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# The *lex certa* principle

# From the Italian Constitution to the European Convention on Human Rights

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anno accademico 2012-2013

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# ABSTRACT

The present research deals with the need for a precise definition in law of criminal offences (*lex certa*), and it analyses the current state of this need in the Italian legal system.

The case law developed by the Italian Constitutional Court suggests that the current understanding of *lex certa* has evolved towards a notion bearing some resemblance with the position adopted on the same topic by the European Court of Human Rights.

The European Court of Human Rights has developed a notion clearly influenced by the Anlgo-American experience, emphasising the need for the criminal law (understood as a concept including written as well as unwritten laws) to be foreseeable.

An hypothetical compatibility of the European position with the Italian system would be full of consequences, because the European Convention on Human Rights (in the interpretation given by the European Court) has recently been acknowledged 'subconstitutional' rank in the Italian hierarchy of the sources of law.

Thus, the Italian law has to comply with the standards of protection enshrined in the European Convention, insofar as this standards do not contradict those enshrined in the Italian Constitution.

Whether the case law developed by the European Court of Human Rights on the foreseeability of the criminal law is compatible with the Italian approach to *lex certa* and with the Italian Constitution is the main question that the present research aims at answering.

In order to do so, the research analyses and compares the case law developed by the Italian Constitutional Court and by the European Court of Human Rights. The European case law is confronted with the Anglo-American experience, so as to unravel its common law inspiration. The research ends with a study of the position attributed to the European Convention on Human Rights in the Italian constitutional system, and with a critical evaluation of its consequences in terms of *lex certa.*

# INTRODUCTION

## 1. Legality and *lex certa*

The principle of legality in criminal law (*nullum crimen, nulla poena sine lege*) states that no person can be held criminally liable, nor convicted for a crime, unless his/her conduct has violated a pre-existent and clearly drafted prohibition constituting criminal law.

The principle expresses four different, but related, needs. The criminal liability has to be grounded on written provisions, which, in the modern democratic state, are enacted by the parliament. These provisions must not be retroactive and they have to be clearly and unambiguously framed. In addition, they must not be interpreted analogically (nor, in some legal systems, extensively) by courts.

The present work originates in thoughts about the need for a precise definition in law of criminal offences. The essence of this need is legal certainty, prerequisite for the existence of a legal order and aim of peculiar importance for the criminal law. The present research wishes to analyse the current state of this need in the Italian legal system, especially focusing on the potential impact of the European Convention on Human Rights on the Italian criminal law.

Before declaring the research questions and describing the structure of the research, it is necessary to highlight a relevant terminological choice.

In the Italian legal system, the need for a precise definition in law of criminal offences is understood as need for the written provision to be precisely and unambiguously framed. The English legal jargon, however, lacks a term clearly referring the need for precision to the written law. When dealing with this feature of legality, reference is made to vague notions, such as ‘legal certainty’, or to long periphrases, such as ‘need for precision in law of criminal offences’, which do not refer, in an unequivocal way, to the written criminal provision.

Thus, a choice has been made by the present research to use the Latin expression ‘*lex certa’* when referring to the Italian understanding of this need, so to underline that, in this view, precision is a quality of the written law (‘*lex*’).

The research includes an analysis of the positions developed on the same topic by the European Court of Human Rights and by the British and North-American experiences: in the context of this analysis, the term *lex certa* is abandoned in favour of the terminology adopted by each experience.

## 2. Research questions

In the Italian legal system, the principle of legality has constitutional nature, being protected by Article 25, paragraph 2 of the 1948 Constitution. The principle is also acknowledged by Article 7 of the European Convention on Human Rights, which is now considered a 'subconstitutional' source of the Italian law. Thus, legality and its features are parameters used by the Italian Constitutional Court and by the European Court of Human Rights to evaluate the legitimacy of the Italian criminal law.

Apparently, the Italian constitutional system has a completely different understanding of the need for precision in law of criminal offences than the one developed by the European Convention system. The European Court of Human Rights refuses any distinction as to the source of precision, requiring written and unwritten laws to be 'reasonably foreseeable'. The Italian constitutional system admits only statutory laws enacted by the parliament as legitimate sources of criminal law: accordingly, precision has been traditionally conceived as a quality attaining to the drafting of criminal statutes.

The first question motivating the present research is whether the distance between the two systems is really as wide as it appears. Indeed, notwithstanding declarations of principle (especially made by the literature), the case law developed by the Italian Constitutional Court suggests that the current understanding of *lex certa* in the Italian legal system has evolved towards a notion bearing some resemblance with the position adopted by the European Court. Accordingly, the main question that the present research wishes to answer is to what extent the position of the Italian Constitutional Court approximates that of the European Court of Human Rights.

The answer to this question is full of consequences, as the European Convention on Human Rights (in the interpretation given by the European Court) has recently been

acknowledged ‘subconstitutional’ rank in the Italian hierarchy of the sources of law. Thus, the Italian law has to comply with the standards of protection enshrined in the European Convention, insofar as this standards do not contradict those enshrined in the Italian Constitution. Whether the case law developed by the European Court on reasonable foreseeability is compatible with the Italian approach to *lex certa* is an open question that the present research aims at answering.

In order to do so, the analysis of the position developed by the European Court of Human Rights plays a central role. As this position focuses on the foreseeability of written and unwritten laws, it bears an interesting resemblance with the Anglo-American perspective on the need for precision in law of criminal offences. Thus, another question motivating the present research is whether, and to what extent, the European Court of Human Rights has been influenced by the common law tradition in its elaboration of the need for precision.

The hypothetical ‘common law nature’ of the position developed by the European Court can help understanding its consequences and implications, as well as its compatibility with the Italian legal system.

An in-depth analysis of the foreseeability requirement has also a significance for the current Italian debate on the crisis of legality, especially focusing on the lack of foreseeability affecting the practice of Italian criminal courts. Thus, another question that the present research wishes to answer is whether the foreseeability requirement developed by the European Court of Human Rights might be a solution to the chaotic state of the Italian case law on criminal matters.

## 3. Structure and methodology of the research

In order to answer the above mentioned questions, the present work is divided into four chapters.

The first chapter analyses how the Italian legal system deals with *lex certa*, retracing the evolution of this principle from the first codification of legality to modern times.

The chapter especially focuses on the evolution of the case law developed by the Italian Constitutional Court. The aim is that of providing an updated construction of

*lex certa*, demonstrating how the Constitutional Court has been paying an increasing attention to the interpretation of the law, promoting an evolution of the traditional understanding of *lex certa* towards a principle granting the intelligibility of the law through statutes and their interpretation.

The second chapter analyses how the European Court of Human Rights, on the basis of Article 7 of the European Convention, has developed its notion of 'reasonable foreseeablity' of the criminal law.

The chapter opens with an introduction on the European Convention system, especially focusing on the central role played in it by the European Court of Human Rights. The interpretative methods and principles developed by the European Court are analyzed, so as to provide the reader with the necessary tools to understand its case law. The chapter then analyses the European case law contributing to shape the legality requirement, on which the European Court has developed its position towards the need for precision of criminal offences.

The chapter closes with a reconstruction of the main features characterizing the perspective of the European Court of Human Rights on reasonable foreseeability, and with a comparison between the case law developed by the Italian Constitutional Court and the case law developed by the European Court of Human Rights.

The third chapter analyses how the legal systems of the United Kingdom and of the United States deal with the need for precision in law of criminal offences.

As for the British legal system, the analysis focuses on the position developed by the literature and by the supreme courts of England and Wales. As for the North-American perspective, the analysis focuses on the void for vagueness and strict construction doctrines elaborated by the U.S. Supreme Court.

The chapter ends with an analysis of the common features underlying the British and the North-American perspectives; a comparison is then made between these common features and the main characteristics of the perspective developed by the European Court of Human Rights on reasonable foreseeability.

The fourth chapter integrates the perspective adopted by the European Court of Human Rights in the current Italian debate on the crisis of legality in criminal law.

The chapter opens with an analysis of the attempts made by the Constitutional Court and of the suggestions proposed by the literature to counterbalance the negative

effects of the crisis of predictability affecting the Italian criminal law. The position of the European Convention on Human Rights in the Italian hierarchy of the sources of law is taken into consideration, in order to understand the extent of the European obligation to reasonable foreseeability. The compatibility of the European perspective with the Italian legal system is then examined, and conclusions are reached as to the admissibility of the reasonable foreseeability requirement in the Italian criminal law.

# CHAPTER ONE

# *LEX CERTA* IN THE ITALIAN LEGAL SYSTEM

## 1. Introduction

In the contemporary Italian legal system, the principle of legality in criminal law has constitutional nature, being composed by four features, or sub-principles.[1]

The absolute statutory reserve (*lex scripta*) requires criminal liability to be grounded on statutory laws enacted by the parliament. Non retroactivity (*lex praevia*) imposes on the legislature the ban for retroactive criminal laws. The void for analogy (*lex stricta*) forbids the judiciary to extend by analogy criminal provisions, and the need for a precise definition in law of criminal offences (*lex certa*) requires the legislature to create precisely drafted and unambiguous criminal statutes.

The present chapter wishes to analyse how the Italian legal system deals with *lex certa*.

The chapter opens with an introduction, retracing the evolution of the legality principle in the Italian legal system, from its first codification to modern times.

The focus, then, moves on *lex certa* and on the evolution of the Italian literature and of the case law developed by the Constitutional Court on this principle.

The final aim is to build a comprehensive theory on the need for precision in law of criminal offences, enhanced by most recent case law of the Constitutional Court.

[1] See, among many others: F BRICOLA, 'Legalità e crisi: l'art. 25, 2° e 3° co., della Costituzione rivisitato alla fine degli anni '70', QC (1980) 184-185; A CADOPPI AND P VENEZIANI, Elementi di diritto penale. Parte generale (Padova, 5th ed, CEDAM 2012) 64-82; G COCCO And E AMBROSETTI, Manuale di diritto penale. Parte generale I,1 (Padova, CEDAM 2013) 48; G FIANDACA And E MUSCO, Diritto penale. Parte generale (Bologna, 6th ed, Zanichelli 2009) 51-85; F MANTOVANI, Diritto penale parte generale (Padova, 7th ed, CEDAM 2011) 39; G MARINUCCI And E DOLCINI, Manuale di diritto penale parte generale (Milano, 4the ed, Giuffré 2012) 36-37; F PALAZZO, Corso di diritto penale. Parte generale (Torino, 5th ed, Giappichelli 2013) 108-110

The chapter ends with an updated construction of this feature of legality, bringing together the results of the positions adopted by the literature and by the Constitutional Court.

## 2. The principle of legality in the Italian legal system

### *2.1 Historical background*

The principle of legality, in its widest meaning, states that no person can be held criminally liable, nor convicted for a crime, unless his/her conduct has violated a pre-existent and clearly drafted prohibition constituting criminal law. This principle is commonly referred to by using the Latin formula *nullum crimen, nulla poena sine (stricta et praevia) lege poenali*, whose origins are attributed to Anselm Feuerbach.[2]
Legality thus conceived is held to be a fundamental principle of any modern and civilized legal system, aiming at protecting two different (but accessory) values: individual freedom, and legal certainty.[3]
The origins of the principle are uncertain. According to some authors, it informed the ancient Attican legal order.[4] Others believe that the principle operated in the II century B.C. Roman legal system, in the context of the criminal proceedings related to the *quaestiones perpetuae*, and that it was dismissed during the Imperial era.[5]
Historically, one of the first written provisions containing guarantees that are now considered part of the legality principle was the due process clause of the 1215

[2] F ANTOLISEI, Manuale di diritto penale. Parte generale (Milano, 15th ed, Giuffré 2000) 68; G BETTIOL, Diritto penale (Padova, 7th ed, CEDAM 1969) 98; A CADOPPI AND P VENEZIANI, Elementi di diritto penale (n 1) 61; G COCCO AND E AMBROSETTI, Manuale di diritto penale (n 1) 46; G FIANDACA AND E MUSCO, Diritto penale (n 1) 48; G MARINUCCI AND E DOLCINI, Manuale di diritto penale (n 1) 36
[3] B PETROCELLI, 'Appunti sul Principio di Legalità nel Diritto Penale', ID, Saggi di Diritto Penale (Padova, CEDAM 1965) 187
[4] C DEDES, 'L'origine del principio nullum crimen nulla poena sine lege', in Studi in memoria di Pietro Nuvolone (Milano, Giuffré 1991) 159 ff. The author recalls other research supporting his thesis: N SARIPOLOS, Systēma tēs en Helladi ischyousēs ponikēs nomothesias (Athēnēsi, 1868); P VIZOUKIDES, Hē dikē tou Sōkratous (Berlin, Heymann 1918)
[5] B PETROCELLI, 'Appunti sul Principio di Legalità' (n 3) 189; G VASSALLI, 'Nullum Crimen Sine Lege', Giur It 91 (1939) 59-62

Magna Carta Libertatum.[6] However, it is disputed whether this clause had, or not, a mere procedural dimension.[7]

Notwithstanding the debates on its far origins, it is generally accepted that the notion of legality prevailing in the modern Western civilization was developed in the historical and cultural background provided by the Enlightenment. [8]

Fundamental contributions to the modern shape of legality were Beccaria's and Montesquieu's books, published around the middle of the eighteenth century.[9] These works expressed an idealistic faith in the law, along with a strong mistrust in the discretion of the judiciary (both common positions in the literature of that time).[10] The authors, in polemic opposition to the past, took extreme stances on the role of the judiciary,[11] reduced to a mere *bouche de la loi* operating mechanical syllogisms.

Thus, the first steps of modern legality into the Western world were strictly related to the need of restraining the discretion of the judiciary, while granting pre-eminence to the law. This need has become a permanent feature of all subsequent theorizations on legality developed in civil law jurisdictions.

[6] Magna Carta (1297) c 29 (reproducing the due process clause of the Magna Carta 1215). The official text of the Magna Carta 1297 as in force today, complete with any amendments, can be found on the UK Statute Law Database (http://www.legislation.gov.uk/)

[7] For a mere procedural dimension of this clause: R MERLE AND A VITU, Traité de droit criminel (Paris, 5th ed, Cujas 2001) 225 n 3, with references to the opposite position held by Jimenez De Asua. Contra, see also: G VASSALLI, 'Nullum Crimen' (n 5) 65-70

[8] On this conclusion, both European and non-European scholars agree. Eg: C DEDES, 'L'origine del principio nullum crimen nulla poena sine lege' (n 4) 158; JC JEFFRIES JR, 'Legality, Vagueness, and the Construction of Penal Statutes', Va L Rev 71 (1985) 190; G VASSALLI, 'Nullum Crimen' (n 5) 70-71

[9] C BECCARIA, De' Delitti e delle Pene (Livorno, 1764); MONTESQUIEU, De L'Esprit des Loix (Genève, 1748)

[10] On this topic, see also G FILANGIERI, La Scienza della Legislazione (Paris, 1853)

[11] PG GRASSO, Il Principio "Nullum Crimen Sine Lege" nella Costituzione Italiana (Milano, Giuffré 1972) 20-21

*2.2 Codification*

During the eighteenth and the nineteenth century, legality became an essential element of every European codification.[12] The first Italian Criminal Code (the so-called 'Zanardelli Code') was no exception to the rule.

The Code was adopted after more than thirty years of struggle to accomplish the legislative unification of the newly born Italian State.[13] It was meant to provide Italy with a unified criminal law, 'dedicated to the principles of science and civilization'.[14] It was a liberal Code, highly regarded as resulting from the fruitful cooperation of the most prominent experts and scholars in the field of criminal law.[15]

The principle of legality was acknowledged by its first two Articles. Article 1, paragraph 1, required criminal liability to be grounded on an express provision of law,[16] thus imposing the 'legislative centralization' of the criminal law.[17] In modern literature, the need for criminal liability to be grounded on parliamentary laws is referred to as 'statutory reserve'.[18]

Article 2 of the Code voided the retroactive application of criminal statutes to the disadvantage of the accused, while disposing for the retroactive application of favourable changes in the law.[19]

Despite being, on the whole, an admirable achievement, the Zanardelli Code was not equipped to face the major changes occurring in the Italian society after the First World War.[20] Under the Fascist regime, a new codification of the criminal law was

[12] G BETTIOL, Diritto penale (n 2) 98; G VASSALLI, 'Nullum Crimen' (n 5) 72

[13] The adoption of the Zanardelli Code was allowed by the Parliament with Law 22 November 1888, n 5801; the Code was then enacted by the King on 1 January 1889

[14] Codice penale per il regno d'Italia: verbali della commissione istituita con regio decreto 13 dicembre 1888, allegati alla relazione con la quale il ministro guardasigilli (Zanardelli) presenta il Codice penale a s.m. il Re nell'udienza del 30 giugno 1889, Verbale n 1: Programma dei lavori della Commissione (Roma, Stamperia Imperiale D Ripamonti 1889) 1 (On Min Zanardelli)

[15] For a comprehensive history of the codification of the criminal law in Italy: G VASSALLI, 'Codice penale', Enciclopedia del Diritto VII (1960) 261-279

[16] 'Nessuna azione od omissione è reato se non per espressa disposizione della legge penale'

[17] G VASSALLI, 'Nullum Crimen' (n 5) 50, nn 1,2,3

[18] F MANTOVANI, Diritto penale (n 1) 4

[19] 'Nessuno può essere punito per un fatto che, al tempo in cui fu commesso, la legge non considerava reato. Nessuno può essere punito per un fatto che una legge posteriore non considera reato; e, se ha avuto luogo la condanna, ne cessano di diritto l'esecuzione e gli effetti penali. Se la legge del tempo nel quale è stato commesso il reato e le posteriori sono diverse, si applica quella che contiene disposizioni più favourevoli al reo'

[20] G VASSALLI, 'Codice penale' (n 15) 269-270

enacted, and in 1930 the Zanardelli Code was replaced by the so-called Rocco Code.[21]

Notwithstanding its 'illiberal' origins, the Rocco Code was in line with the precedent codification as for the liberal principles informing its general part.[22]

This Code has never been repealed nor organically modified, and it is still in force in the current Italian legal system.

Articles 1 and 2 substantially reproduce the provisions of the Zanardelli Code on legality. Article 1 imposes the 'statutory reserve', and it is worded as follows:

> 'Nessuno può essere punito per un fatto che non sia espressamente preveduto come reato dalla legge, ne' con pene che non siano da essa stabilite'.[23]

The use of the adverb 'espressamente' (expressly) motivates the assertion that the Article voids criminal provisions which are 'so vague, generic, indeterminate and substantially unexpressed, that only through analogy it is possible to state their boundaries, or the content of the voided or punished type of offence'.[24] The adverb has also been the basis for the modern recognition of the absolute nature of the statutory reserve, meaning that no source other than parliamentary law can be the ground for criminal liability. [25]

Article 2, paragraph 1, of the Code voids retroactive criminal laws to the disadvantage of the accused, by stating the following:

> 'Nessuno può essere punito per un fatto che, secondo la legge del tempo in cui fu commesso, non costituiva reato'.[26]

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[21] The Rocco Code was enacted by Royal Decree n 1398/ 1930

[22] V SERIANNI, 'Codice penale', Novissimo Digesto Italiano App A-COD (1980) 1287; G VASSALLI, 'Codice penale' (n 15) 275

[23] 'No one can be punished for a fact not expressly contemplated by the law as a criminal offence, nor convicted to a penalty not established by law' (unless otherwise specified, English translations from the Italian language are all made by the Author)

[24] C ESPOSITO, 'L'Articolo 25 della Costituzione e l'Articolo 1 del Codice Penale', Giur Cost (1961) 6 539

[25] F BRICOLA, 'Principio di legalità e potestà normativa delle regioni', Scuola Positiva (1963) 643; M GALLO, La legge penale. Appunti di diritto penale I (Torino, Giappichelli 1999) 13

[26] 'No one can be punished for a fact that did not constitute a criminal offence at the time when it was committed'

Paragraphs 2, 3 and 4 of the same Article regulate changes in the criminal law, being mostly grounded on the *lex mitior* principle (or retroactive application of the most favourable criminal law to the advantage of the accused).

Article 2, paragraph 1 of the Rocco Code is to be read in conjunction with Article 14 of the 'Dispositions on the Law in General', or 'Preliminary Disposition to the Civil Code'.[27] These dispositions, opening the 1942 Civil Code, are also still force in the current Italian legal system.[28]

Article 14 expressly bans the use of analogy in criminal law, by stating the following:

> 'Le leggi penali e quelle che fanno eccezione a regole generali o ad altre leggi non si applicano oltre i casi e i tempi in esse considerati'. [29]

Thus, the notion of legality emerging from the Italian codification entails three express features, or sub-principles: statutory reserve, non-retroactivity, void for analogy. As already mentioned, the literature adds that the statutory reserve should be read as absolute, and that it should be interpreted as voiding vague criminal offences.[30]

Before the adoption of the 1948 Constitution, the legislature was free to derogate or repeal the guarantees of legality, because the dispositions of the Criminal and Civil Codes can be modified or derogated by subsequent laws.

Thus, after the fall of the Fascist regime, legality was deemed to require the protection of a rigid Constitution, which cannot be modified nor derogated by ordinary laws.[31]

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[27] On the void for analogy expressed by a joint interpretation of Article 1 CP and Article 14 disp prel CC, see: M BOSCARELLI, Analogia ed interpretazione estensiva del diritto penale (Palermo, Priulla 1955) 89-90

[28] The Civil Code was enacted by Royal Decree n 262/1942

[29] 'Criminal and exceptional laws must not be applied beyond the circumstances and time provided for'

[30] Text to nn 24 and 25

[31] For a historical and legal account of the period following the fall of the Fascist regime and preceding the approval of the Italian Constitution, see P CALAMANDREI, 'Introduzione Storica sulla Costituente', in P CALAMANDREI AND A LEVI (eds), Commentario Sistematico alla Costituzione Italiana I (Firenze, G Barbera 1950)

### *2.3 Constitutionalisation*

#### *2.3.1 The adoption of the 1948 Constitution*

The current Italian Constitution came into force on the First of January 1948. As a reaction to the past totalitarian experience, it provided for the creation of a Constitutional Court,[32] and it was given 'rigid' character,[33] being thus protected against the whim of contingent political majorities.[34]

The adoption of a rigid Constitution did not entail a gap in the course of the Italian legal tradition:[35] the 1930 Criminal Code, the 1942 Civil Code and many other laws adopted under the Fascist regime were not repelled. However, the introduction of a rigid Constitution assisted by a Constitutional Court implied a radical change in the traditional theory of the sources of law.

All laws enacted by the Parliament, traditionally considered as 'primary sources', must now comply with the constitutional standards to avoid the risk of being voided by the Constitutional Court. The Constitutional Court has clarified that its scrutiny includes also primary sources enacted before the adoption of the 1948 Constitution.[36]

#### *2.3.2 The Constitutional Court*

The Constitutional Court is a non-representative body, composed of fifteen judges, a third nominated by the President of the Republic, a third by the Parliament and a third by the ordinary and administrative supreme courts.[37] It started to operate in

[32] Costituzione della Repubblica Italiana, Artt 134-136. For an English translation of the Italian Constitution, see C CASONATO AND J WOELK (eds) The Constitution of the Italian Republic (Trento, Centro stampa University of Trento 2011)
[33] Art 138 Cost
[34] G DEVERGOTTINI, Diritto costituzionale (Padova, 2nd ed, CEDAM 2000) 189
[35] L PALADIN, Diritto costituzionale (Padova, 3rd ed, CEDAM 1998) 103
[36] C Cost sent 14 giugno n 1/1956, Giur Cost (1956) I1 1210, or on <www.cortecostituzionale.it>
[37] Art 134 Cost

1956, following the entry into force of the laws regulating its functioning and the constitutional proceeding.[38]

Its main tasks are the solution of controversies on the constitutional validity of laws and enactments having the force of law, and the solution of conflicts arising from allocation of powers.[39] In addition, the Constitutional Court (integrated by sixteen members) is the judge in impeachment proceedings involving the President of the Republic.[40]

Claims about the unconstitutionality of a provision of law can be brought under the attention of the Constitutional Court either 'in via principale' or 'in via incidentale'.

In the first case, the claim is presented, under certain conditions, by one of the state powers, while, in the second case, it is a state organ exerting a jurisdictional activity (the so-called '*a quo* judge') who submits the constitutionality doubt to the Court.[41]

Thus, the first proceeding originates in doubts concerning a law *in abstracto*, while, in the second case, the constitutionality issue arises within a concrete judicial proceeding, in strict connection with the application of a law. At least in theory, the two proceedings can be distinguished for their object: the 'law in the books' in the first case, the 'law in action' in the second case.[42] The solution of constitutionality doubts submitted 'in via incidentale' is considered the 'typical' function of the Constitutional Court, being consistently more frequent then the others.[43]

When the Court declares the unconstitutionality of a law, this ceases to have effect from the day following the publication of the decision.[44] As a general rule, the Constitutional Court exerts a considerable self-restraint in striking down provisions of law, fearing the creation of lacunae in the legal system.[45] Thus, ordinary courts are

[38] Legge Costituzionale 1/1948; Legge Costituzionale 1/1953; Legge 87/1953
[39] Art 134 Cost
[40] Artt 134 and 135 Cost
[41] Art 134 Cost; Legge Costituzionale 1/1948, Art 1; Legge 87/1953, Artt 23, 24, 25, 26, 27, 28, 29, 30
[42] F DAL CANTO, 'Corte Costituzionale e attività interpretativa, tra astrattezza e concretezza del sindacato di costituzionalità promosso in via di azione' in A PACE (ed), Corte Costituzionale e Processo Costituzionale nell'esperienza della rivista "Giurisprudenza Costituzionale" nel cinquantesimo anniversario (Milano, Giuffè 2006) 237-238
[43] F MODUGNO, 'La Corte Costituzionale italiana, oggi', Scritti in onore di V. Crisafulli I (Padova, CEDAM 1985) 527, 536
[44] Art 136 Cost
[45] F MODUGNO, 'La funzione legislativa complementare della Corte Costituzionale' (1981) I Giur Cost 1646, 1651

required to search for a 'constitutional interpretation' of the law,[46] because the principle of conservation of legal values prevents the voiding of provisions which can be given a constitutionally compatible meaning.[47]

On the other hand, the need to adapt the laws enacted during the Fascist regime to the values enshrined in the Constitution has motivated a certain activism by part of the Constitutional Court, manifested through the use of judgments not expressly foreseen by the rules governing the constitutional proceeding. All these judgments rely considerably on the interpretation of the law to make the system comply with the constitutional standards. Their legitimacy and actual meaning have been largely debated by the literature.[48] Simplifying the many forms that a constitutional judgement may take, the so-called 'sentenze interpretative di accoglimento' (also, 'sentenze di accoglimento parziale') declare the unconstitutionality of a provision of law insofar as one of its meaning is unconstitutional.[49] The so-called 'manipulative' judgments require the addition, or substitution, of a certain meaning to the provision in order to make it constitutional.[50] The 'sentenze interpretative di rigetto' reject the constitutionality claim while indicating the constitutional interpretation of the provision.[51]

[46] C Cost, ordd 279, 356, 362/1990; sent 559/1990, sent 368/1992, <www.cortecostituzionale.it>

[47] Eg: C Cost, ord 279/1990; C Cost, ord 356/1990; C Cost, ord 62/1990; C Cost, sent 559/1990, <www.cortecostituzionale.it>

[48] On the topic, see for instance : E CHELI AND F DONATI, 'La creazione giudiziale del diritto nelle decisioni dei giudici costituzionali' in La circolazione dei modelli e delle tecniche del giudizio di costituzionalità in Europa : atti del XXI Convegno annuale : Roma, 27-28 ottobre 2006: 50° anniversario della Corte Costituzionale della Repubblica Italiana. Annuario 2006 (Napoli, Jovene 2010); F MODUGNO, 'Corte Costituzionale e potere legislativo', E BARILE and others (eds) Corte costituzionale e sviluppo della forma di governo italiana (Bologna, Il Mulino 1982); (AM SANDULLI, Il giudizio sulle leggi. La cognizione della Corte Costituzionale e i suoi limiti (Milano, Giuffrè 1967) 50 ff; G ZAGREBELKY, 'La Corte costituzionale e il legislatore', E BARILE AND OTHERS (eds) Corte costituzionale e sviluppo della forma di governo italiana (Bologna, Il Mulino 1982); G ZAGREBELSKY, La giustizia costituzionale (Bologna, 2nd ed, Il Mulino 1988) 150 ff and the debate recalled by U RESCIGNO, 'Riflessioni sulle sentenze manipolative da un lato e sulla dimensione della questione di costituzionalità dall'altro, suggerite dalla sentenza n 131 del 1989' (1989) I Giur Cost 654, 654 sub nota 1. On the influence of these judgments on the criminal law, see for instance: M BERTOLINO, 'Dalla mera interpretazione alla "manipolazione": creatività e tecniche decisorie della Corte Costituzionale tra diritto penale vigente e diritto vivente', Studi in onore di Mario Romano I (Napoli, Jovene 2011) 55 ff

[49] G ZAGREBELSKY, La giustizia costituzionale (n 48) 154

[50] G ZAGREBELSKY, Ibid 156

[51] G ZAGREBELSKY, Ibid 186

*2.3.3 The principle of legality*

The 1948 Constitution contains many provisions bearing relevance for the criminal law.[52] Among them, Article 25, paragraph 2 acknowledges the legality principle, reading as follows:

> 'Nessuno può essere punito se non in forza di una legge che sia entrata in vigore prima del fatto commesso'.[53]

The provision voids retroactive criminal statutes to the disadvantage of the accused and imposes the statutory reserve. The rigid character of the Italian Constitution implies that the legislature is now bound to respect the void for retroactive criminal statutes, not being able to derogate or repeal it.

Clearly, the letter of Article 25, paragraph 2, is deficient as for the remaining features of legality: in contrast with Article 1 of the Criminal Code and Article 14 of the Preliminary Dispositions to the Civil Code, it lacks indications as to the kind of statutory reserve, to the need for precision in law of criminal offences, and to the void for analogy. The laconic formulation of the constitutional provision is probably due to many concurring factors, such as the Constituent Assembly being a political organ needing to work on compromises.[54]

In any case, the tendency displayed by the early Italian literature to interpret literally the provision arises serious problems and cannot be accepted.[55] The notion of a democratic Constitution providing an inferior protection to legality than the protection granted by laws enacted under the Fascist regime is a paradox in itself; but the most relevant issue is another. If features such as the void for analogy were

[52] Eg: Article 13, regulating restrictions of personal freedom, Article 27, defining, among other notions, the purpose of punishment, etc. P NUVOLONE, 'Norme Penali e Principi Costituzionali', *Giur Cost* 1 (1956) 1254

[53] 'No one may be punished except on the basis of a law already in force before the offence was committed'

[54] P CALAMANDREI, 'Introduzione Storica sulla Costituente' (n 31) CXXVII-CXXX. On the conservative attitude of the Constituent Assembly towards the principle of legality, see also F PALAZZO, 'Le scelte penali della Costituente', Studi in Ricordo di Giandomenico Pisapia (Milano, Giuffrè 2000) 340 ff

[55] For a literal interpretation of the provision, see: A PAGLIARO, 'Legge penale', Enciclopedia del Diritto XXIII (1973) 1040-1052; M BOSCARELLI, Analogia ed interpretazione estensiva (n 27) 91; C ESPOSITO, 'L'Articolo 25 della Costituzione' (n 24) 537-538.

protected only by primary sources of law, this would imply that only the judiciary is bound to their respect. The legislature, on the contrary, would be allowed to derogate them, for instance by enacting criminal laws formulated in vague terms, or by expressly allowing the use of analogy in the interpretation and application of a criminal provision.[56] The contemporary Italian literature is almost unanimous in denying this paradoxical result, and in assessing that legality as granted by the 1948 Constitution is composed not only by the statutory reserve and by the void for retroactive criminal statutes, but also by the need for a clear definition in law of criminal offences, which implies (or is linked to) the void for analogy.[57]

The early attempts made by the literature to promote a wider meaning for Article 25 of the Constitution referred to the Criminal and Civil Code provisions on legality as part of the 'material Constitution'.[58] Subsequently, the practice of interpreting the Constitution in the light of previous sources of law was criticized.[59] Thus, from the mid-1960s onwards, Italian scholars have been relying on historical, teleological and contextual arguments to demonstrate that legality as emerging from the 1948 Constitution implies all the features, or sub-principles, that are not clearly expressed by the letter of Article 25, paragraph 2: the absolute nature of the statutory reserve, the need for precision in law of criminal statutes, and the void for analogy.[60]

The Constitutional Court shares this view but is quite tolerant towards the loosening of these guarantees, in accordance with its general self-restraint in voiding provisions of law.[61]

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[56] M GALLO, La legge penale (n 25) 29

[57] Eg: F BRICOLA, 'Legalità e crisi' (n 1) 184-185; A CADOPPI AND P VENEZIANI, Elementi di diritto penale (n1 ) 64-82; G COCCO AND E AMBROSETTI, Manuale di diritto penale (n 1) 48; G FIANDACA AND E MUSCO, Diritto penale (n 1) 51-85; F MANTOVANI, Diritto Penale (n 1) 39; G MARINUCCI AND E DOLCINI, Manuale di Diritto Penale (n 1) 36-37; F PALAZZO, Corso di diritto penale (n 1) 108-110

[58] A PAGLIARO, 'Legge penale' (n 55) 1041-1042. The notion of 'material constitution' has been famously developed by C MORTATI, La Costituzione in senso materiale (Milano, Giuffré 1940)

[59] F BRICOLA, 'Legalità e crisi: l'art. 25, 2° e 3° co., della Costituzione rivisitato alla fine degli anni '70', QC (1980) 196, n 27; P NUVOLONE, 'Norme Penali e Principi Costituzionali'(n 52) 1258; F PALAZZO, Il principio di determinatezza nel diritto penale (Padova, CEDAM 1979) 28

[60] B PETROCELLI, 'Appunti sul principio di legalità' (n 3) 192-193. Similarly, with reference to the statutory reserve and to the void for analogy: M GALLO, La legge penale (n 25) 13-24; F BRICOLA, 'La discrezionalità nel diritto penale', ID, Scritti di diritto penale (S CANESTRARI and AL MELCHIONDA eds, first published Milano 1965, Milano, Giuffré 2000) 767-770, 800-802

[61] As for the statutory reserve, the Court admits the contribution of secondary sources to the description of the criminal offence if a primary source identifies the characters, requirements, content and limits of this contribution (C Cost, sent 168/1971, <www.cortecostituzionale.it>). As for *lex certa*, the Court acknowledges a relative dimension to the principle by admitting that the law does not always provide a rigorous description of the criminal offence (C Cost, sent 79/1982; C Cost, ord

*2.4 Crisis*

Fifty years after the enactment of the 1948 Constitution, the principle of legality is facing a state of crisis.[62]

The adoption of rigid constitutions, together with the integration of the national state into wider legal orders, has weakened the ideal of the supremacy of the law.[63] The role of the judiciary has significantly increased, and the phenomenon is referred to as an evolution from the 'rule of law' to the 'rule of judges'.[64]

In the Italian criminal law, the crisis is manifested in various ways. The Criminal Code has lost its centrality, and criminal prohibitions are scattered among 'additional' laws that do not form an organic and coherent body.[65] The parliamentary law is frequently

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169/1983; C Cost, ord 84/84; C Cost, sent 475/88; C Cost, sent 49/1980; C Cost, sent 31/1995, all on <www.cortecostituzionale.it>) Accordingly, the Court is very tolerant towards catch-all provisions allowing the use of analogy (C Cost, sent 27/1961; C Cost, sent 121/1963; C Cost, sent 44/1964; C Cost, sent 133/1973; C Cost, sent 236/1975, on <www.cortecostituzionale.it>). A study of the Court's attitude towards the criminal law may be found in G VASSALLI, 'Giurisprudenza costituzionale e diritto penale. Una rassegna', A PACE (ed), Corte Costituzionale e Processo Costituzionale (n 42) 1021

[62] The debate on the crisis of legality in the contemporary Italian literature is vast. Among many authors, see for instance: A BERNARDI, B PASTORE AND A PUGIOTTO, Legalità penale e crisi del diritto, oggi: un pecorso interdisciplinare (Milano, Giuffrè 2008); BRICOLA F, 'Legalità e crisi'(n 1) 179; G CONTENTO,'L'insostenibile incertezza delle decisioni giudiziarie' (1998) Ind Pen 947; F GIUNTA, 'Il giudice e la legge penale. Valore e crisi della legalità,oggi', Studi in Ricordo di Giandomenico Pisapia (Milano, Giuffrè 2000) 63 ff; F GIUNTA, 'La giustizia penale tra crisi della legalità e supplenza giudiziaria' (1999) St Jur 12; G FIANDACA, 'Concezioni e modelli di diritto penale tra legislazione, prassi giudiziaria e dottrina' (1991) I Quest Giust 34 ff; G FIANDACA, 'Crisi della riserva di legge e disagio della democrazia rappresentativa nell'età del protagonismo giurisdizionale' (2011) Criminalia 79; G INSOLERA, Democrazia, ragione e prevaricazione: dalle vicende del falso in bilancio ad un nuovo riparto costituzionale nella attribuzione dei poteri? (Milano, Giuffrè 1995) 73; S MOCCIA, La perenne emergenza. Tendenze autoritarie nel sistema penale (Napoli, 2nd ed, ESI 1997); F PALAZZO, 'Legalità e determinatezza della legge penale: significato linguistico, interpretazione e conoscibilità della regula iuris', G VASSALLI (ed), Diritto penale e giurisprudenza costituzionale (Napoli, ESI 2006) 49; G ROMEO, 'La nomofilachia, ovvero l'evanescente certezza del diritto' (1997) Cass Pen 1989; F SGUBBI, 'Il diritto penale incerto e inefficace' (2001) Riv It Dir Proc Pen 1193; S PANAGIA, 'Del metodo e della crisi del diritto penale'(1997) Riv It Dir Proc Pen 1124; U SCARPELLI, Il positivismo giuridico rivisitato, in Riv. Fil, 1989; AM STILE (ed), Le discrasie tra dottrina e giurisprudenza in diritto penale (Napoli, 1991)

[63] References to the German, French and Italian literature dealing with the topic can be found in G INSOLERA, Democrazia, ragione e prevaricazione: dalle vicende del falso in bilancio ad un nuovo riparto costituzionale nella attribuzione dei poteri? (Milano, Giuffrè 1995) 73 sub nota 1

[64] G HIRSCH, 'Verso uno Stato dei giudici? A proposito del rapporto tra giudice e legislatore nell'attuale momento storico' (2007) Criminalia 107. On the expansion of the judiciary in contemporary democracies, see also C GUARNIERI AND P PEDERZOLI, 'L'espansione del potere giudiziario nelle democrazie contemporanee' (1996) Riv It Sc Pol 269

[65] M D'AMICO, 'Qualità della legislazione, diritto penale e principi costituzionali' (1996) Riv Dir Cost 3, 9

replaced by secondary sources and by acts enacted by the Government.[66] The enactment of laws is frequently motivated by the will to convey political messages,[67] the criminal law being conceived as a 'symbolic' instrument.[68] The political system has lost its credibility, and it is perceived as scarcely representative of the interests of people.[69] The overall quality of the legislative techniques is low,[70] and the judiciary is somehow forced to compensate for all the inabilities of the legislature through corrective interpretation of the criminal law.[71] However, the chaotic state of the criminal law and the absence of a system binding courts to their previous decisions has led to incoherent and conflicting interpretations of the law.[72] Notwithstanding the presence of the Court of Cassation, whose function should be that of favouring the homogeneous and correct application of the law, the Italian criminal law as applied by courts is extremely chaotic and unpredictable.[73] Conflicting interpretations affect any area of the criminal law, developing between courts of different and same levels. Even the United Sections of the Court of Cassation, in charge of directing the interpretation of the other Sections of the Court, produce conflicting interpretation of the same law over short periods of time.[74]

In such a context, the guarantees enshrined in Article 25, paragraph 2, of the Constitution are defined as *de facto* nullified.[75] The activism of the judiciary calls into question the traditional meaning of legality.[76]

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[66] See the debate recalled by M D'AMICO, 'Qualità della legislazione' (n 65) 4-5

[67] Some authors talk about a 'politically activist notion of the criminal law': G FIANDACA, 'La legalità penale negli equilibri del sistema politico-costituzionale' (2000) Foro It 137, 143

[68] S MOCCIA, La perenne emergenza (n 62); S BONINI, 'Quali spazi per una funzione simbolica del diritto penale' (2003) Ind Pen 491

[69] The phenomenon was already pointed out by P BARCELLONA, 'Brevi note sulla crisi della legge' (1969) 1 Responsabilità e dialogo 98. Recently, a critical analysis of how the political situation influences the crisis of legality in the Italian systems, see: G FIANDACA, 'Legalità penale e democrazia' (2007) Quad Fior, 1247

[70] M D'AMICO, 'Qualità della legislazione' (n 65) 6

[71] M D'AMICO, 'Il principio di determinatezza in materia penale tra teoria e giurisprudenza costituzionale' (1998) Giur Cost 315, 335

[72] See, for instance, the problems raised by new offence of stalking: AM MAUGERI, Lo stalking tra necessità politico criminale e promozione mediatica (Torino, Giappichelli 2010); E LO MONTE, 'Il commiato dalla legalità: dall'anarchia legislativa al 'piroettismo' giurisprudenziale' (2013) <www.dirittopenalecontemporaneo.it >, accessed 26 December 2013

[73] See the study made on the topic by A ESPOSITO AND G ROMEO, I mutamenti nella giurisprudenza penale della Corte di Cassazione (Padova, CEDAM 1995). On the topic, see also the considerations concerning the criminal proceeding by G CONTENTO,'L'insostenibile incertezza' (n 62) 947

[74] On the topic,see: A CADOPPI, Il valore del precedente nel diritto penale (Torino, Giappichelli 1999) 73-80; A ESPOSITO AND G ROMEO, I mutamenti (n 73)

[75] M D'AMICO, 'Qualità della legislazione' (n 65), 7

Notwithstanding the acknowledgment of this state of crisis, a relevant part of the literature still believes in retrieving the traditional guarantees implied by the principle of legality,[77] and hotly criticizes any attempt to weaken them.[78] Others call for a reconsideration of the principle, especially in the light of the influence deriving from the European level.[79]

In any case, there is a huge distance between the theoretical elaborations made on legality by the literature and the concrete 'life' of this principle in courts.[80]

## 3. The need for precision in law of criminal offences (*lex certa*) in the Italian legal system

As previously recalled, the Italian literature unanimously includes *lex certa* among the features of the legality principle, even though referring to it under different names.[81]

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[76] G FIANDACA, 'Considerazioni introduttive' in G FIANDACA (ed), Sistema penale in transizione e ruolo del diritto giurisprudenziale (Padova, CEDAM 1997) 17

[77] M DONINI, Il volto attuale dell'illecito penale. La democrazia penale tra differenziazione e sussidiarietà (Milano, Giuffrè 2004); V VALENTINI, Diritto penale intertemporale: logiche continentali ed ermeneutica europea (Milano, Giuffrè 2012)

[78] R KOERING-JOULIN, 'Pour un retour à une interprétation stricte du principe de la légalité criminelle (a propos de l'article 7, 1 della CEDH)' in Liber Amicorum M.A. Eissen (Bruxelles, Bruylant, 1995) 247, 251; S HUERTA TOCILDO, 'The Weakened Concept of the European Principle of Criminal Legality', J GARCIA ROCA AND P SANTOLAYA (eds), Europe of Rights: a Compendium of the European Convention of Human Rights (Leiden-Boston, 2012) 315, 319

[79] S RIONDATO, 'Retroattività del mutamento giurisprudenziale sfavorevole, tra legalità e ragionevolezza', U VINCENTI (ed), Diritto e clinica - Per l'analisi della decisione del caso (Padova, CEDAM 2000) 239, 255

[80] On the topic, see eg: G FIANDACA, 'Il sistema penale tra utopia e disincanto' and G FLORA, 'Valori costituzionali, "diritto penale dei professori" e "diritto penale dei giudici"', S CANESTRARI (ed) Il diritto penale alla svolta di fine millennio (Torino, Giappichelli 1998) 50 and 325

[81] See supra, text to n 1. As for the terminology, 'determinatezza' and 'tassatività' are often used as interchangeable terms: eg F BRICOLA, 'Legalità e crisi' (n 1) passim . Sometimes, a distinction is drawn between 'determinatezza', as the need for a precise drafting of criminal offences, and 'tassatività', as the void for analogy: F PALAZZO, Il principio di determinatezza (n 59) 3. Someone holds that the two features are so strictly related that it is better to link them also in the terminology, by referring to 'determinatezza/tassatività': S MOCCIA, La promessa non mantenuta: ruolo e prospettive del principio di determinatezza/tassatività nel sistema penale italiano (Napoli, ESI 2001)13. Other authors use the term 'precisione' to indicate the need for a precise drafting of criminal offences by the legislature, whereas 'determinatezza' is held to refer to the need for criminal provisions to be related to facts that can be actually proved in the criminal proceeding, and 'tassatività' to the void for analogy: G MARINUCCI AND E DOLCINI, Manuale di diritto penale (n 1) 37 ff

This position took a certain time to be assessed: until the mid-1960s, the need for precision in law of criminal offences was paid almost no attention by the literature,[82] and the Constitutional Court accepted *lex certa* as a constitutional parameter only in the 1980s.[83]

The following pages retrace the evolution of *lex certa* in the literature and in the case law of the Constitutional Court, from its first recognition to modern times.

### *3.1 The early steps of* lex certa *in the Italian constitutional system*

Before the mid-1960s, a few scholars dealt with *lex certa*, and some of them rejected the view that this principle had acquired constitutional status.[84] The opinions in favour of the constitutionalisation underestimated its actual relevance, declaring that vague criminal provisions are a problem that 'for its own nature' can never be brought to the attention of the Constitutional Court.[85] In the early 1960s, ordinary judges started to challenge this view, bringing vague criminal provisions to the attention of the newly formed Constitutional Court and claiming that they should be void.

The reception of these claims by the Constitutional Court was initially very cold. The Court focused on the linguistic meaning of the provisions.[86] Its approach was marked by unwillingness to analyse the quality of the law, [87] and by simplified reasonings, grounded on the pragmatic consideration that the law does not always provide a rigorous description of the criminal offence.[88] On this basis, the Constitutional Court declared the 'physiological nature' of catch-all provisions grounded on the use of analogy, [89] of notions referring to social or moral standards, [90] of ordinary language

[82] F BRICOLA, 'La discrezionalità nel diritto penale'(n 60) 773 n 49-*bis*
[83] G VASSALLI, 'Giurisprudenza costituzionale e diritto penale' (n 61) 1044
[84] M BOSCARELLI, Analogia ed interpretazione estensiva (n 27); C ESPOSITO, 'L'Articolo 25 della Costituzione' (n 24) 539
[85] P NUVOLONE, 'Norme Penali e Principi Costituzionali' (n 52) 1259. Similarly G VASSALLI, 'Nullum Crimen Sine Lege' (n 5) 495
[86] F PALAZZO, 'Legalità e determinatezza della legge penale' (n 62) 64
[87] M D'AMICO, 'Qualità della legislazione' (n 65) 33
[88] C Cost, sent 27/1961, <www.cortecostituzionale.it>
[89] C Cost, sent 27/1961; C Cost, sent 121/1963; C Cost, sent 44/1964; C Cost, sent 133/1973; C Cost, sent 236 del 1975, <www.cortecostituzionale.it>

expressions and of notions whose meaning can be deduced by other fields of the human knowledge.[91] In these early judgments, the Constitutional Court did not even refer to *lex certa*, analysing the claims by generic reference to the principle of legality in criminal law.[92]

By the mid-1960s, an increasing interest for *lex certa* arose in the literature.[93] The turning point for the acceptance of its constitutional nature was the publication of Bricola's 'La discrezionalità nel diritto penale', in 1965.[94] In opposition to the past habit of reading the Constitution in the light of primary sources, Bricola supported the exigency of interpreting the constitutional provisions as a whole, in order to give them their maximum extension.[95] This method allowed him to demonstrate that *lex certa* has an explicit constitutional basis, derived from a joint interpretation of Article 25, paragraph 2, with Articles 3, 13, 24 paragraph 2, and 112 of the Constitution.[96]

His reasoning on the topic developed as follows.

Article 3 of the Constitution protects the right to equality, which would be violated if the citizens were not treated equally under the criminal law because of its vagueness. Article 13 of the Constitution establishes the need for precision in law of preventive measures, and it would be a non-sense to require lighter guarantees for penalties than for preventive measures. Article 24, paragraph 2, protects the procedural right to defence, which would be violated if the accused did not know exactly the grounds for his/her prosecution. Article 112 of the Constitution bans any discretion by part of the public prosecution in the choice of which criminal offences to prosecute, and this provision would be easily violated if the laws were not specific in the definition of what an offence is. [97]

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[90] C Cost, sent 191/1970; C Cost, sent 42/1972, <www.cortecostituzionale.it>

[91] C Cost, sent 125/1971; C Cost, sent 188/175, <www.cortecostituzionale.it>

[92] C Cost, sent 120/1963; C Cost, sent 191/1970; C Cost sent 20/1974; C Cost, sent 188/1975; C Cost sent 49/1980, <www.cortecostituzionale.it>

[93] See the contributions by F BRICOLA, 'La discrezionalità nel diritto penale' (n 60) ; B PETROCELLI, 'Appunti sul Principio di Legalità' (n 3); G VASSALLI, 'Nullum Crimen' (n 5)

[94] F BRICOLA, 'La discrezionalità nel diritto penale' (n 60)

[95] F BRICOLA, 'Legalità e crisi' (n 1) 179

[96] F BRICOLA, 'La discrezionalità nel diritto penale' (n 60) 800-802; F BRICOLA, 'Teoria generale del reato' (1973) *Nov.mo Dig It*, 38 ff; F BRICOLA, 'Legalità e crisi' (n 60) 209-210

[97] F BRICOLA, 'La discrezionalità nel diritto penale' (n 60)

In a subsequent work, Bricola underlined also the link connecting *lex certa* to Article 27 of the Constitution.[98] According to an interpretation elaborated by the literature (and subsequently endorsed by the Constitutional Court), this Article requires criminal liability to be grounded on acts or omissions performed with mens rea, thus prohibiting strict liability in criminal law. [99] Obviously, mens rea presupposes the possibility of knowing the law: therefore, criminal prohibitions must be precisely and unambiguously framed.[100]

Bricola's persuasive theorizations on *lex certa* were followed by an increasing favour, displayed by the literature, for the constitutional nature of this principle. [101]

During the 1970s, the attention paid by the literature for *lex certa* led to the first treatise entirely dedicated to this principle.[102] The Constitutional Court, on the opposite, persisted in its refusal to explicitly acknowledge *lex certa* as an autonomous feature of legality.[103]

### *3.2 The acceptance of* lex certa *by the Constitutional Court*

During the 1980s, the approach of the Constitutional Court towards *lex certa* radically evolved. On the one side, the Court expressly acknowledged *lex certa* as a feature of the legality principle, starting to declare vague criminal laws unconstitutional and void; on the other side, the Court started to focus more and more on the interpretation of the law to assess its compatibility with the need for precision.[104]

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[98] F BRICOLA, 'Teoria generale del reato' (n 96) 54-55

[99] D PULITANO', 'Ignoranza (dir pen)' (1970) XX Enciclopedia del Diritto 36. This position was famously endorsed by the Constitutional Court, with judgment n 364 of 1988 (see infra, text to n 114)

[100] F BRICOLA, 'Teoria generale del reato'(n 96) 54-55

[101] Eg: M SINISCALCO, Giustizia penale e Costituzione (Torino, ERI 1968); M SPASARI, 'Appunti sulla discrezionalità del giudice penale' (1976) Riv It Dir Proc Pen 50

[102] F PALAZZO, Il principio di determinatezza (n 59)

[103] C Cost, sent no 191/1970; C Cost, sent no 188/1975; C Cost, sent no 71/1978, <www.cortecostituzionale.it>

[104] On this evolution during the 1980s, see: S MOCCIA, La promessa non mantenuta (n 81) 65; F PALAZZO, 'Legalità e determinatezza' (n 62) 65 ff

In 1981, the Court released its first judgment voiding a criminal offence for its lack of compliance with *lex certa*.[105] The criminal provision under review was Article 603 of the Criminal Code, incriminating '[c]hiunque sottopone una persona al proprio potere, in modo da ridurla in totale stato di soggezione'.[106] According to the *a quo* judge, the provision violated Article 25, paragraph 2, of the Constitution, by allowing courts total discretion in the choice of the parameters needed to assess the 'state of total subjection'. As the reasoning of the Court demonstrated, the problem with Article 603 C.P. was mainly the inability of the 'total subjection' requirement to reflect reality. Thus, *lex certa* was taken into consideration not as a parameter imposing precision, but as a principle requiring the legislature to forbid behaviors that can actually be observed in nature.[107] However, the judgment was also the first occasion in which the Constitutional Court expressly took a stance on *lex certa* as an autonomous principle of the criminal law, deriving it from the absolute statutory reserve enshrined in Article 25, paragraph 2, of the Constitution.

The Court declared that the rationale of the statutory reserve is the need to avoid the arbitrary application of measures restricting personal freedom. In order to fulfill this aim, criminal laws must be framed in a precise, clear and intelligible way, not leaving space for discretion. The Court observed that clear and univocal parameters for assessing the 'state of total subjection' had never been developed by the literature, nor by courts: this proved the impossibility of giving an univocal meaning to the 'state of total subjection'. The Court concluded that Article 603 of the Criminal Code had been applied analogically by courts so far and voided the provision by declaring the following:

> 'L'art. 603 del c.p., in quanto contrasta con il principio di tassatività della fattispecie contenuto nella riserva assoluta di legge in materia penale,

[105] C Cost, sent no 96/1981, <www.cortecostituzionale.it>. The Court had already voided a provision for its lack of compliance with *lex certa*, but the judgment had involved preventive measures and not the definition of the criminal offence: C Cost, sent no 177/1980, <www.cortecostituzionale.it>

[106] 'Whoever dominates another person, so to put her in a state of total subjection'

[107] See also C Cost, sent no 370/1996, <www.cortecostituzionale.it>

> consacrato nell'art. 25 della Costituzione, deve pertanto ritenersi costituzionalmente illegittimo'.[108]

With this judgment, the Constitutional Court explicitly acknowledged *lex certa* as an autonomous principle of the criminal law, while grounding its *ratio* on the need to avoid arbitrary applications of measures restricting personal freedom. The judgment relied consistently on the practice of ordinary courts to assess the violation of *lex certa*, thus demonstrating the growing interest of the Constitutional Court in the interpretation of the law.

In 1989, the Court released its first judgment grounded on a mature elaboration of *lex certa* and dealing solely with the need for a precise definition in law of the criminal offence.[109] The provision under review criminalized 'relevant' misrepresentations in the income declaration for tax purposes, without specifying the amount making a misrepresentation relevant. The Constitutional Court rejected the vagueness claim on the basis of a well-developed and acute reasoning, acknowledging the relevant role played by interpretation. The Court stated the following:

> '[L]a determinatezza [è] una qualità delle norme (e dei suoi elementi essenziali) come risultano dagli enunciati legislativi, dall'interpretazione dei medesimi e dal loro precisarsi (o confondersi) attraverso l'applicazione'. [110]

Then, the Court assessed that the evaluation of the compliance with *lex certa* must always consider the ambiguous or vague provision in its context, thus promoting a return to the origins of *lex certa* as a quality referring to a coherent body of laws.[111]

Lastly, the Court clarified its view by stating the following:

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[108] 'Considering that Article 603 of the Criminal Code violates the principle of the need for precision in law of criminal offences, which is included in the absolute statutory nature, enshrined in Article 25 of the Constitution, it must be held as constitutionally void.'

[109] C Cost, sent 247/1989. For a commentary of the decision, see: F PALAZZO, 'Elementi quantitativi indeterminati e loro ruolo nella struttura della fattispecie (a proposito della frode fiscale)' (1989) Riv It Dir Proc Pen 1194

[110] '[P]recision is a quality of the law (…) resulting from the statutory provisions, from their interpretation, and from their application'

[111] M D'AMICO, 'Qualità della legislazione' (n 65) 15 and 44

> ‘[I]l principio di determinatezza è violato non tanto allorché è lasciato ampio margine alla discrezionalità dell'interprete (…) bensì quando il legislatore, consapevolmente o meno, s'astiene dall'operare "la scelta" relativa a tutto od a gran parte del tipo di disvalore d'un illecito, rimettendo tale scelta al giudice, che diviene, in tal modo, libero di "scegliere" significati tipici.’[112]

In the judgment, the Court made also a subtle distinction between the need for precision of ‘essential elements’ of the offence, and the need for precision of ‘non-essential’ elements. The Court held that, in the first case, precision aims at granting the exercise of free will; whereas, in the second case, precision aims at granting an equal treatment before the law.[113]

The notion of *lex certa* as a prerequisite for the exercise of free will was fully developed by the Constitutional Court in 1998, in the famous judgment assessing the partial unconstitutionality of Article 5 of the Criminal Code.[114] The judgment represented a true revolution in the constitutionalisation of the Italian criminal law, primarily because it defined the extent of the culpability principle, protected under Article 27 of the Constitution.[115] In addition, it had a crucial relevance for the understanding of *lex certa*, demonstrating the close connection between legality and culpability.

The problem brought to the attention of the Court was that of criminal behaviors committed by mistake of law, or in a state of ignorance of the criminal law. Coherently with its totalitarian origins, Article 5 of the Rocco Code declares that the ignorance of the law never exempts the wrongdoer from his/her criminal liability (*ignorantia legis non excusat*), the rule being applicable also to the mistake of law.[116]

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[112] With this assertion, the Court clarified that *lex certa* is violated when the legislature leaves mostly or entirely undefined the meaning of an essential element of the offence, thus allowing the judge to freely evaluate the criminal significance of certain behaviors

[113] C Cost, sent 247/1989, <www.cortecostituzionale.it>

[114] C Cost, sent 364/1988, <www.cortecostituzionale.it>

[115] Among the many commentaries on the decision, eg: G FIANDACA, ‘Principio di colpevolezza ed ignoranza scusabile della legge penale: prima lettura della sentenza’ Foro It I (1988) 1386; T PADOVANI, ‘L'ignoranza inevitabile sulla legge penale e la declaratoria di incostituzionalità parziale dell'art. 5 c.p.’ Legisl Pen (1988) 449; L STORTONI, ‘L'introduzione nel sistema penale dell'errore scusabile di diritto: significato e prospettive’ Riv It Dir Proc Pen (1988) 1313

[116] Codice Penale, Art 5

Thus, the matter was regulated without making a distinction between guilty and guiltless mistake or ignorance.

Two *a quo* judges had alleged the unconstitutionality of such a maxim. Among other constitutional provisions, they relied on Article 27, paragraph 1, of the Constitution**,** stating that the '[c]riminal liability is personal'. In its basic meaning, the provision voids criminal liability grounded on the behavior of another person. The *a quo* judges supported a wider interpretation, according to which the provision bans strict liability in criminal law.[117] Thus, they alleged that Article 5 of the Criminal Code was unconstitutional, insofar as it did not allow wrongdoers to invoke a state of 'unavoidable' ignorance of the law to their defense.

The Constitutional Court supported this view, relying on a contextual interpretation of the constitutional provision. The Court underlined that paragraph 3 of Article 27 Const requires the punishment to aim at the reeducation of the person convicted, and it wisely stated the following:

> 'Non avrebbe senso la "rieducazione" di chi, non essendo almeno "in colpa" (rispetto al fatto) non ha, certo, "bisogno" di essere "rieducato".'[118]

Therefore, the Court concluded that Article 27 of the Italian Constitution expresses the culpability principle, thus requiring all essential elements of the offence to be covered by mens rea. A clear line was then drawn between culpability and legality.

According to the reasoning made by the Court, if all the essential elements of the offence must be covered by mens rea, the citizen is to be put in the conditions to know the law. Whether the wrongdoer actually took care of knowing the law might be neglected by the legal system: however, the state cannot require its citizens to abide by the law, without giving them at least the opportunity of freely decide whether to disregard or abide it. This free decision presupposes, among other conditions, clear and unambiguous criminal laws.

Thus, the Court clarified the following:

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[117] Text to n 99

[118] 'There is no meaning in the reeducation of a person who, not being at least negligent towards its conduct, does not need to be reeducated'

> 'Nelle prescrizioni tassative del codice il soggetto deve poter trovare, in ogni momento, cosa gli è lecito e cosa gli è vietato: ed a questo fine sono necessarie leggi precise, chiare, contenenti riconoscibili direttive di comportamento'.[119]

On this basis, the Court acknowledged the strict relation between culpability and legality, and it stated as follows:

> 'I principi di tassatività e d'irretroattività delle norme penali incriminatrici (…) evidenziano che il legislatore costituzionale intende garantire i cittadini, attraverso la "possibilità" di conoscenza delle stesse norme, la sicurezza giuridica delle consentite, libere scelte d'azione'.[120]

The judgment ended with the recognition that Article 5 of the Criminal Code was void, insofar as it did not allow for exceptional circumstances to overcome the maxim *ignorantia legis non excusat.*

Even if its core was not the need for precision in law of criminal offence, the decision represented a relevant evolution in the position of the Constitutional Court towards *lex certa*: it promoted the notion that legal certainty is not a value *per se*, but a value instrumental to the foreseeability of the law.[121] From that moment on, the Constitutional Court has reiterated more than once its view that the criminal law must put its subjects in the conditions to understand the difference between lawful and unlawful conducts, and that in order to do so its provision must be formulated with a certain degree of precision.[122] At the same time, the Court has never abandoned its early position, according to which *lex certa* serves the purpose of granting the separation of powers, thus avoiding abuses and discriminations by the

[119] 'In every moment, the individual should be able to derive from the precise provisions of the Criminal Code what is lawful and what is not; for this purpose, the law must be precise, clear and must express identifiable guidelines for the individual's behavior'

[120] 'The principles of precision and non-retroactivity of the criminal law (…) highlight the constitutional exigency of providing the citizens with certainty about the lawful and free display of their will, through the possibility of knowing the law'

[121] L PEGORARO, Linguaggio e certezza della legge nella giurisprudenza della Corte Costituzionale (Milano, Giuffrè 1988) 44

[122] C Cost, sent 282/1990; C Cost, sent 185/1992, <www.cortecostituzionale.it>

judiciary.[123] Thus, the position of the Constitutional Court on the aim of *lex certa* is assessed as follows:

> 'L'inclusione nella formula descrittiva dell'illecito penale di espressioni sommarie, di vocaboli polisensi, ovvero (…) di clausole generali o concetti "elastici", non comporta un *vulnus* del parametro costituzionale evocato, quando la descrizione complessiva del fatto incriminato consenta comunque al giudice — avuto riguardo alle finalità perseguite dall'incriminazione ed al più ampio contesto ordinamentale in cui essa si colloca — di stabilire il significato di tale elemento, mediante un'operazione interpretativa non esorbitante dall'ordinario compito a lui affidato: quando cioè quella descrizione consenta di esprimere un giudizio di corrispondenza della fattispecie concreta alla fattispecie astratta, sorretto da un fondamento ermeneutico controllabile; e, correlativamente, permetta al destinatario della norma di avere una percezione sufficientemente chiara ed immediata del relativo valore precettivo'. [124]

Thus, according to the Court, the core of *lex certa* is the ability of the law to restrict the judicial role into the boundaries of an ordinary interpretation, while laying the grounds for a clear understanding of the law. The two perspectives are clearly related: in one occasion, the Court clarified that when judges are free to evaluate the criminal nature of certain behaviors, the results of this evaluation are unforeseeable to the individual.[125]

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[123] C Cost, sent 34/1995; C Cost, sent 327/2008; C Cost, sent 21/2009, <www.cortecostituzionale.it>

[124] 'The inclusion of concise expressions, polysemous words, general clauses or "elastic" notions in the description of the criminal offence constitutes no violation of the constitutional parameter when the overall description of the criminal conduct allows the judge – having regard to the aim pursued by the provision and to the wider context in which the provision is set – to declare the meaning through an interpretation that does not go beyond the limits of the ordinary: thus, when the description allows [the judge] to release a judgment grounded on a verifiable basis, and at the same time allows the subject to have a sufficiently clear and immediate perception of its legal significance'. C Cost, sent 5/2004; C Cost, sent 327/2008. Similarly: C Cost, sent 34/1995, C Cost, sent 122/1993, <www.cortecostituzionale.it>

[125] C Cost, sent 447/1998, <www.cortecostituzionale.it>

### *3.3 The central role of interpretation and the crisis of* lex certa

From the 1980s onwards, the full recognition of the constitutional nature of *lex certa* went together with the new interest paid by the Constitutional Court and by the literature for interpretation as a source of precision. Studies concerning interpretation (a topic usually neglected by Italian criminal law scholars)[126] are now flourishing among the Italian literature.[127] The Constitutional Court, on its part, holds *lex certa* as a result granted by statutory provisions and by their interpretation and application.[128]

Especially in the past, the Constitutional Court focused on the abstract interpretative process, acknowledging the constitutionality of an imprecise or vague provision if its meaning could be construed through the 'ordinary' methods of interpretation (mainly, the teleological and/or the contextual method).[129] Nowadays, the Court has ceased to focus on the abstract interpretative process, taking into consideration the concrete interpretation of criminal laws.[130] Two kinds of constitutional judgments can be identified: those taking into consideration the interpretation itself as a source of precision, and those taking into consideration the uniform application of a certain interpretation as a source of precision.

Judgments of the first kind are those in which the Court rejects the vagueness claim because an interpretation giving precision to the law exists, irrespective of the fact that this interpretation was the one concretely applied by courts. [131] The interpretation

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[126] With a few remarkable exceptions: see, eg M BOSCARELLI, Analogia ed interpretazione estensiva (n 27)

[127] G CONTENTO, 'Clausole generali e regole di interpretazione', Valori e principi della codificazione penale : le esperienze italiana, spagnola e francese a confronto : atti del Convegno organizzato dalla Facoltà di Giurisprudenza e dal Dipartimento di diritto comparato e penale dell'Università di Firenze : 19-20 novembre 1993 (Padova, CEDAM 1995) 109; DI GIOVINE O, L'interpretazione del diritto penale, tra creatività e vincolo della legge (Milano, Giuffré 2006); A PALAZZO (ed) L'interpretazione della legge alle soglie del XXI secolo (Napoli, 2001) 299; A PAGLIARO, 'Testo e interpretazione nel diritto penale' (2000) Riv It Dir Proc Pen 2; D PULITANO', 'Sull'interpretazione e gli interpreti della legge penale', Studi in onore di Giorgio Marinucci (Milano, Giuffré 2006) 657; M RONCO, 'Precomprensione ermeneutica del tipo legale e divieto di analogia', E DOLCINI AND CE PALIERO (eds) Studi in onore di Giorgio Marinucci (Milano, Giuffrè 2006) 693

[128] C Cost, sent 247/1989, <www.cortecostituzionale.it>

[129] Text to nn 88-92

[130] On this evolution, see F PALAZZO, 'Legalità e determinatezza' (n 62) 69 ff

[131] These are often called 'rejections due to an insufficient interpretative effort', see: C Cost, ord 360/1997; C Cost, sent 69/1999; C Cost, ord 39/2001; C Cost, sent 295/2002, <www.cortecostituzionale.it>. Examples of a constitutional interpretation concretely applied by courts

may be suggested by the same Constitutional Court, especially on the basis of theological considerations. [132] In this case, the judgment is usually a 'sentenza interpretativa di rigetto', lacking an *erga omnes* binding force.[133] Therefore, ordinary courts may not conform to the correct interpretation of the provision, and the Constitutional Court may uphold a previously rejected vagueness claim on this basis.[134]

Turning to judgments of the second kind, the Court has been rejecting vagueness claims because of the presence of a steady judicial interpretation of the provision, [135] especially if developed by the Court of Cassation.[136] On the other hand, the presence of 'conflicting interpretations' of a criminal offence has occasionally been part of the justification for its void.[137] These judgments are motivated by the argument of the 'living law', which is to say, the existence of a body of meanings acknowledged by the community of interpreters as the most 'authoritative'.[138] When a consensus is reached on the meaning of a certain provision, doubts concerning the prohibited conduct disappear: thus, the Constitutional Court declares the vagueness claim irrelevant.[139]

Clearly, all judgments considering the concrete interpretation of a provision as a source of precision imply a shift from *lex certa* as a quality of the 'law in the books' to *lex certa* as a quality of the 'law in action'. Following the developments of the constitutional case law, studies dealing with *lex certa* now focus on the gap between

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can be found in C Cost, ord 360/1997; C Cost, sent 69/1999. A case in which the constitutional interpretation was disregarded by the practice is C Cost, sent 295/2002, <www.cortecostituzionale.it>

[132] C cost, sent 71 /1978 ; C Cost, ord 11/1989; C Cost, sent 69/1999; C Cost, sent 247/1989; C Cost, sent 312/1996; C Cost, sent 293/2000; C Cost, sent 510/2000; C Cost, sent 519 del 2000; C Cost, ord 39/2001, <www.cortecostituzionale.it>

[133] G ZAGREBELSKY, La giustizia costituzionale (n 48) 186-190

[134] This is what happened with the 'relevant' misrepresentations in the income declaration for tax purposes, first considered constitutional (C Cost, sent 247/1989) and subsequently voided (C Cost, sent 35/1991)

[135] C Cost, ord 983/1988; C Cost, sent 31/1995; C Cost, sent 247/1997; C Cost sent 327/2008, <www.cortecostituzionale.it>

[136] C Cost, ord 11/1989, <www.cortecostituzionale.it>

[137] C Cost, sent 96/1981; C Cost, sent 35/1991, <www.cortecostituzionale.it>

[138] R BIN, 'La Corte Costituzionale tra potere e retorica: spunti per la costruzione di un modello ermeneutico dei rapporti tra corte e giudici di merito', AA VV, La Corte Costituzionale e gli altri Poteri dello Stato (Torino, Giappichelli 1993) 8, 9. On the living law doctrine, see: A ANZON, 'La Costituzione e il diritto vivente' (1984) I Giur Cost 300; T ASCARELLI, 'Giurisprudenza costituzionale e teoria dell'interpretazione giuridica' (1957) Riv Dir Proc 351; A PUGIOTTO, Sindacato di costituzionalità e diritto vivente (Milano, Giuffré 1994)

[139] C Cost, ord 11/1989, <www.cortecostituzionale.it>

*lex certa* 'in the books' and lex certa 'in action',[140] and incorporate the position of the Constitutional Court.[141] The constitutional case law is often criticized, *in primis* because of its excessive self-restraint.[142] In addition, the excessive focus on the concrete interpretation of laws is sometimes accused of obliterating the 'separation of powers' rationale of *lex certa*, [143] thus leading to potential violations of the principle according to which judges are subjected only to the written law (Article 101, paragraph 2, Constitution).[144]

The use of the living law doctrine is especially disapproved, first of all because it carries the risks that all new provisions should wait for the creation of a stable interpretation before being declared constitutional or unconstitutional by the Court.[145] In addition, the living law allegedly favours the notion that a widespread and well-assessed interpretation compensates the deficiencies of a vague provision: thus, it might turn the problem of precision in a 'quantitative' issue, involving the number of decisions conforming to the same interpretation.[146] The main criticism, however, is the lack of consistency displayed by the Constitutional Court on this topic, which is, indeed, significantly affecting the concrete functioning of the living law doctrine. The Court keeps on using the early argument of the literal precision in some judgments,[147] while others are entirely grounded on the doctrine of the living

[140] A CADOPPI, 'Riflessioni sul valore del precedente nel diritto penale italiano', G COCCO (a cura di), Interpretazione e precedente giudiziale nel diritto penale (Padova, CEDAM 2005) 123, 137 ff; M D'AMICO, 'Il principio di determinatezza' (n 71) 315; M D'AMICO, 'Qualità della legislazione' (n 65) 3; F PALAZZO, 'Orientamenti dottrinali ed effettività giurisprudenziale del principio di determinatezza-tassatività in materia penale'(1991) RIDPP 327; F PALAZZO, 'Legalità e determinatezza della legge penale: significato linguistico, interpretazione e conoscibilità della regula iuris' in G VASSALLI (ed), Diritto penale e giurisprudenza costituzionale (n 62) 49

[141]M D'AMICO, 'Il principio di determinatezza' (n 71) 315; ID, 'Qualità della legislazione, diritto penale e principi costituzionali' (2000) Riv Dir Cost 3; G LICCI, Ragionevolezza e significatività come parametri di determinatezza della norma penale (Milano, Giuffrè 1989); F PALAZZO, 'Orientamenti dottrinali ed effettività giurisprudenziale' (n 140) 327; ID, 'Legalità e determinatezza della legge penale' (n 62) 49; D PULITANO', 'Sull'interpretazione e gli interpreti' (n 127) 657

[142] Eg: M D'AMICO, 'Qualità della legislazione, diritto penale e principi costituzionali' (2000) Riv Dir Cost 3; S MOCCIA, La promessa non mantenuta (n 81) 66

[143] F PALAZZO, 'Legalità e determinatezza della legge penale' (n 62) 70

[144] M D'AMICO, 'Qualità della legislazione, diritto penale e principi costituzionali' (2000) Riv Dir Cost 3, 49

[145] This happened, for instance, in C Cost, ord 983/1988. Underlying this risk: F PALAZZO, 'Orientamenti dottrinali ed effettività giurisprudenziale' (n 140) 352

[146]In this sense, F PALAZZO, 'Orientamenti dottrinali ed effettività giurisprudenziale' (n 140) 350

[147] Eg: C Cost, sent 34/1995; C Cost, sent 327/2008; C Cost, sent 21/2009, <www.cortecostituzionale.it>

law.[148] In addition, the constitutionality of vague criminal provisions has been assessed on the basis of *one of the many* interpretations given by ordinary courts, even when the interpretation was not the dominant one.[149] Furthermore, the Court admits that the living law can contribute to *lex certa*, but seldom voids a provision because the living law has produced the opposite effect.[150] Thus, the Constitutional Court often contradicts itself by rejecting claims even though there are conflicting interpretations of the same provisions.[151]

To conclude, the Italian literature is generally disapproving of the constitutional case law and, even if it shares the interest of the Constitutional Court for the concrete life of *lex certa*, its almost unanimous conclusion is that the Italian criminal law does not comply with this principle.[152] The topic is examined in details by the fourth chapter of the present research: for the purpose of the present chapter, it is enough to anticipate that *lex certa* is defined by the contemporary Italian literature as a 'non-honoured promise'.[153]

## 4. Conclusion. Considerations on the current understanding of *lex certa* in the Italian legal system

The following considerations are grounded on the above analysis, and they willingly focus on the position adopted by the Constitutional Court on *lex certa*, for two main reasons.

First of all, the constitutionalisation of *lex certa* has clearly been the factor determining the acceptance of its essential nature: the Italian literature has started to be truly concerned with this principle only during the 1960s, in connection with the first vagueness claims raised by *a quo* judges to the Constitutional Court. Indeed, *lex*

[148] Eg: C Cost, ord 938/1988; C Cost, ord 81/1989; C Cost, sent 247/1997; C Cost, sent 295/2002, <www.cortecostituzionale.it>

[149] See eg: C Cost, sent 11/1989 and the commentary by M PAPA, la questione di costituzionalità relativa alle armi giocattolo: il "diritto vivente" tra riserva di legge e determinatezza della fattispecie' (1989) I Giur Cost 29

[150] S RIONDATO, 'Retroattività del mutamento giurisprudenziale (n 79) 247

[151] C Cost, sent 472/1989; C Cost, ord 507/1989, <www.cortecostituzionale.it>

[152] On the topic: M D'AMICO, 'Il principio di determinatezza' (n 71) 315; G LICCI, Ragionevolezza e significatività (n 141); F PALAZZO, 'Legalità e determinatezza della legge penale' (n 62) 49

[153] S MOCCIA, La promessa non mantenuta (n 81)

*certa* as a binding obligation for the legislature was born with the adoption of the 1948 Constitution: before that time, *lex certa* tended to be conceived as a mere drafting quality of criminal statutes, which the legislature was allowed to derogate. It was the introduction of a rigid Constitution that led Italian courts and literature to think of *lex certa* as an essential element of the criminal law.

In addition, the role played by international obligations in the Italian constitutional system has been assessed through the constitutional case law, as the fourth chapter of the present study further explains. The present research wishes to examine the potential influences of the obligations deriving from the European Convention on Human Rights on *lex certa*: thus, it is convenient to focus on the main features attributed by the Constitutional Court to this principle, as this Court is the main responsible for the approximation of the Italian constitutional law to the European Convention obligations.

Accordingly, the following considerations on the current understanding of *lex certa* in the Italian legal system originate in the constitutional case law.

The Constitutional Court has been considerably careful in voiding provisions of law for their vagueness, and its case law on *lex certa* is frequently affected by a strong inconsistency. However, the theoretical position which has been developed by the Court on *lex certa* is to be appreciated for many reasons.

As demonstrated above, the Court works on the assumption that *lex certa* is not always enforced in the criminal law by providing a rigorous description of the fact.[154] This assertion is coherent with the general abandonment of the ideals promoted by the Enlightenment, according to which it is actually possible to draft completely precise laws applied by courts through a mechanical syllogism. Once accepted that precision of the human language is mostly an ideal, taking into consideration the interpretation of the law is a quite natural consequence: hence, the Constitutional Court admits that precision is a quality of the law resulting not only from the drafting of statutes, but also from their interpretation and application.[155] This position logically implies a modification of the previous assertion, according to which the

[154] C Cost, sent 23/1961; C Cost, sent 79/1982; C Cost, ord 169/983; C Cost, sent 188/1975; C Cost, sent 49/1980; C Cost, ord 84/1984; C Cost, sent 475/1988; C Cost, sent 5/2004, <www.cortecostituzionale.it>

[155] C Cost, sent 247/1989, <www.cortecostituzionale.it>

*ratio* of *lex* certa is coincident with that of the absolute statutory reserve. If interpretation is required to grant precision, than a certain amount of creativity in the judicial practice must be admitted. Accordingly, the aim of *lex certa* is not excluding any creative power by the judiciary, but restricting the creative power into the limits of an 'ordinary and verifiable' interpretation, so to give individuals the opportunity of knowing the law in advance.[156]

This position implies two different perspectives: *lex certa* as a rule governing the relationship between state powers (i.e., lex certa addressing the judge) and *lex certa* as a rule aiming at the intelligibility of the law (i.e., lex certa addressing the citizen).[157] Thus, there is still a double *ratio* in *lex certa*, including an 'institutional' and an 'individualistic' perspective. However, the position of the Constitutional Court has transformed the institutional ratio: *lex certa* does not grant the separation of powers by excluding interpretation, but by providing limits to that interpretation. The separation of powers rationale already implied the notion that *lex certa* is instrumental to limit judicial discretion, thus avoiding discrimination and abuses by part of the judiciary. However, it also implied the idealistic belief that *lex certa* could restrain discretion by preventing the exercise of a creative role by the judiciary. The current understanding of *lex certa* promoted by the Constitutional Court refuses this idealistic belief, focusing only on the *essence* of the separation of powers rationale, which is that of protecting citizens from potential abuses and discrimination perpetrated by the judiciary.

On this basis, there has been a further step. In recent years, the Constitutional Court has frequently turned its attention from the theoretical possibility of an 'ordinary and verifiable' interpretation of the law, to the concrete existence of such an 'ordinary and verifiable' interpretation. Thus, the Constitutional Court has 'translated' the institutional *ratio* of *lex certa* in practical terms: from the 'need to restrain courts into the limits of an ordinary and verifiable interpretation', to the 'need for a constitutional or steady interpretation of vague provisions'. This shift, in itself, should not be blamed. First of all, it is a logical consequence of the focus on the interpretation of the law: if the Court conceives *lex certa* as the ability of the law to

[156] C Cost, sent 34/1995; C Cost, sent 327/2008; C Cost, sent 21/2009, <www.cortecostituzionale.it>
[157] G LICCI, Ragionevolezza e significatività (n 141) 101 ff

conduct an ordinary (and thus uniform) interpretation, its evaluation of constitutionality might be easily influenced by the concrete 'life' of the vague criminal provision.[158] It is natural for the Court to focus on the concrete interpretation as a factor contributing to the final result of producing a *lex* which is *certa*. Secondly, this shift allows to draw a line connecting the two *rationes* underlying *lex certa*. As the same Constitutional Court acknowledged, when judges are free to evaluate the criminal nature of certain behaviors, the results of this evaluation are unforeseeable to the individual.[159] Accordingly, whenever the law provides no limits to judicial discretion (for instance, by using vague notions to define the criminal offence), the ability of individuals to understand the law and to foresee its consequences is excluded. This conclusion proves wrong only in one, particular, case: when courts spontaneously and unanimously adopt a well-assessed and widespread interpretation of an otherwise vague provision of law. In this case, individuals are actually put in the position to understand the law and foresee its consequences, even if the law itself does not provide sufficient indications. At the same time, courts applying the law have a clear indication as to the limits allowed to their interpretation, and, even though this indication is not provided by the legislature, this does not mean that it cannot work properly thanks to the peer-pressure. This situation is the only one in which the living law doctrine should properly be used to 'save' a vague criminal provision from being void.

On the basis of this panorama, some criticisms moved to the constitutional case law appear too much conditioned by an old-fashioned view of the relationship between state powers. When the literature criticizes the constitutional case law on *lex certa* because, through its focus on interpretation, it allegedly obscures the 'separation of powers' rationale of *lex certa,* its position loses sight of the unavoidable changes occurred in the Italian legal system during the past decades.A system equipped with a rigid Constitution, deprived of a systematic and coherent criminal law, and in which the traditional allocation of powers is blurred and still in evolution because of international influences simply cannot be grounded on the same notion of separation of powers underlying the birth of the modern democratic state. The

[158] M D'AMICO, 'Qualità della legislazione' (n 65) 45; S MOCCIA, La promessa non mantenuta (n 81) 64; F PALAZZO, 'Legalità e determinatezza della legge penale' (n 62) 69 ff

[159] C Cost, sent 447/1998, <www.cortecostituzionale.it>

constitutionalisation of the democratic state has carried a relevant modification of the balance between state powers. The rule according to which the judiciary is subjected only to parliamentary law (Article 101, paragraph 2, of the Constitution) is actually a *fictio iuris* insofar as it excludes any kind of evaluation of the law by courts. Indeed, in the Italian legal system, judges are attributed the task of raising constitutionality doubts, and the Constitutional Court requires them to look for the constitutional interpretation of the law. Thus, even if the Constitution requires judges to be subjected only to the law enacted by the Parliament, the same existence of a rigid Constitution implies that the judiciary is subjected to the law only insofar as the law complies with the constitutional standards.[160]

In such a context, *lex certa* as a principle granting the separation of powers by assessing the supremacy of the law has lost its significance. *Lex certa* as a principle preventing discriminations and abuses, by requiring an ordinary and verifiable interpretation of the law keeps, instead, all its validity.

Of course, some of the criticisms made by the literature to the constitutional case law are valid, and even more so if we are to accept the theoretical background for *lex certa* described above. Thus, for instance, the lack of consistency of the constitutional case law applying the living law doctrine is an unacceptable tendency, together with the reject of vagueness claims grounded on the abstract existence of an interpretation giving precision to the law, irrespective of the fact that this interpretation is concretely applied by courts. Both positions disregard the aim of *lex certa* as a principle limiting the discretion of the judiciary into the boundaries of an ordinary and verifiable interpretation, while allowing citizens to understand and know the law. However, it should be considered that the ductility with which the living law doctrine has been used finds its roots in the theory of the sources of law underlying the Italian legal system: if the decisions of courts keep on being denied the status of law, it will always be possible for the Constitutional Court to ignore them in the evaluation of constitutionality, relying only on the letter of the provision whenever this is more convenient.[161] In addition, the Italian legal system lacks

[160] R TONIATTI, 'Deontologia giudiziaria tra principio di indipendenza e responsabilità. Una prospettiva teorica' in L ASCHETTINO and others (eds), Deontologia giudiziaria. Il codice etico alla prova dei primi dieci anni (Napoli, Jovene 2006) 82

[161] S RIONDATO, 'Retroattività del mutamento giurisprudenziale' (n 79) 247

formal mechanisms to bind lower courts to the living law as acknowledged by the Constitutional Court.[162] Thus, one of the reasons why the doctrine does not solve the uncertainties of the Italian criminal law is the fact that it has been introduced in a system lacking any formal recognition of the value of judicial decisions in the law-creating process. This is why today some Italian authors look at the common law experience to find the means of granting a better certainty in criminal law.[163] The debate on the possible solutions to the systematic lack of compliance of the Italian criminal law with *lex certa* is analysed in the fourth chapter of the present work. For the purpose of the present chapter, it is enough to conclude with the following considerations.

The theoretical framework elaborated by the Constitutional Court for *lex certa* and described above is in line with the exigencies emerging from the constitutionalisation of the modern democratic state. The focus on the interpretation of the law does not obliterate the institutional *ratio* of *lex certa*, as a principle operating not only to allow individual to understand and know the law, but also to restrain the judicial activity. It merely translate the institutional *ratio* in concrete terms, expressing the need of a joint effort between the legislature and the judiciary in the final aim of protecting individual freedom. Thus, the change of perspective proposed by the Constitutional Court does not imply the abandonment of the separation of powers rationale, but its evolution according to the new asset of the state powers in the contemporary constitutional state. Surely, the constitutional case law is deficient as to its consistency in applying this theoretical framework. However, a modern reconstruction of *lex certa* in the Italian legal system should work on the basis of this framework, instead of blindly rejecting it by virtue of a conservative attitude.

[162] A CADOPPI, Il valore del precedente (n 74) 157-158

[163] Eg: E GRANDE, 'Principio di legalità e diritto giurisprudenziale' (n 76) 129-146; G FIANDACA, 'Ermeneutica e applicazione giudiziale' (n 127) 327; A CADOPPI, Il valore del precedente (n 74)

# CHAPTER TWO

# THE NEED FOR PRECISION IN LAW OF CRIMINAL OFFENCES IN THE EUROPEAN CONVENTION ON HUMAN RIGHTS

## 1. Introduction

The present chapter analyses how the need for precision in law of criminal offences is dealt with in the European Convention on Human Rights (ECHR) system. The chapter opens with a description of the historical background in which the European Convention was signed and the European Court of Human Rights (ECtHR) was created. The role of the European Court in the overall evolution of the system is analysed, as well as its development of peculiar methods and principles of interpretation.

The chapter then focuses on the case law developed by the European Court of Human Rights around the notion of 'reasonable foreseeability' of the criminal law. The analysis opens with a reconstruction of the autonomous notion of 'criminal law' adopted by the ECtHR and applied to Article 7 ECHR, demonstrating how the Court has been shaping a substantial notion characterized by qualitative requirements. On this basis, the need for precision in law of criminal offences is identified as *ius certum*. The meaning of *ius certum* is then extracted from the case law developed around the notion of 'reasonable foreseeability'. The case law analysis is conducted in a chronological order, allowing the research to follow the progressive developments of the European case law. Then, the analysis moves to the main features of *ius certum* as reasonable foreseeability (i.e. its subjective, relative and chronological dimensions, strictly related to the central role played by interpretation). The chapter ends with a critical evaluation of these features. In addition, a comparison is made with the results of the first chapter, so as to highlight differences and similarities between the approach to *lex certa* promoted by the Italian

Constitutional Court and the position adopted on *ius certum* by the European Court of Human Rights.

## 2. The European Convention on Human Rights and Fundamental Freedoms

### *2.1 Historical background*

Until the second half of the twentieth century, international treaties took little notice of the individual human being, governing only the relationships between states on state level.[164] They were mainly conceived as means of favouring the peaceful cooperation between international actors, and it was a common assumption that only states and international organisations were subjects of the international law.[165] The growth of positivistic theories (as well as the birth of the national state) had obscured the real essence of the international public law, whose ultimate concern was historically for the human being.[166] A few international agreements showed a mild interest into the individual well-being.[167] However, only occasionally individuals were granted protection against the states.[168] Imposing duties on the states towards their citizens was considered a major and (at that time) unacceptable intrusion into the national state sovereignty.

Unfortunately, the traditional perspective on international law made the commitments to the maintenance of peaceful relationships inadequate to prevent two global conflicts. In a world deeply shocked by the tragic events of the Second World War and by the horrors of the Holocaust, the perspective on international law radically changed. Social interdependence and the predominance of the general

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[164] Exceptions were the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Force in the Field (First Geneva Convention) 1864, 75 UNTS 31 and all the Minority Treaties signed after the First World War within the Paris Peace Conference 1919: S GREER, The European Convention on Human Rights (New York, CUP 2006) 7

[165] L OPPENHEIM, International Law: a Treatise, I (London - New York, 8th ed, Longmans Green and Co 1955) passim

[166] MN SHAW, International law (Cambridge, 6th ed, CUP 2008) 258

[167] n 164

[168] An early example of protection of individuals against their own State is the German-Polish Convention on Upper Slesia (1922): AH ROBERTSON AND JG MERRILLS, Human Rights in the World (Manchester and New York, 3rd ed, MUP 1989) chaptt 2 and 3

interest were considered good reasons for binding states by rules not ordered by their will.[169] Moreover, the international community begun to conceive treaties as means of protecting human rights and freedoms.[170]

In Europe, movements for the international protection of human rights arose in connection with the struggle for European Unity. Between 1948 and 1949, the Congress of Europe and the International Council of the European Movement declared their wish of a United Europe grounded on a Charter of Human Rights.[171] These movements favoured the adoption, in 1949, of the Treaty of London, establishing the first official organism with a European dimension: the Council of Europe. According to its Statute, the Council of Europe had the double aim of achieving 'a greater unity among the European Countries', and of promoting 'individual freedom, political liberty and the rule of law'.[172] Every member of the Council had to 'accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms'.[173] Failures to comply with the commitment to human rights and to the rule of law could be sanctioned, eventually with the expulsion of the state from the Council.[174] This choice was unique in the panorama of the 1950s human rights treaties: for the first time, the respect for human rights was not only an objective, but also a condition for membership.[175]

However, the path of human rights soon diverged from that of European Unity. The Council of Europe successfully achieved only one tangible result, the adoption of the European Convention of Human Rights and Fundamental Freedoms, whereas the building of a 'united Europe' followed a slow and different path, mainly grounded on

[169] Corfu Channel Case (UK v Albania) [1949] ICJ Rep 4 (Judge Alvarez)
[170] L HENKIN, The Age of Rights, I (New York, CUP 1990) 1 ff; AH ROBERTSON AND JG MERRILLS, Human Rights in Europe. A study of the European Convention on Human Rights (Manchester and New York, 3rd ed, MUP 1993) 2. The Preamble to the Charter of the United Nations of 1945 is almost the first reference to human rights in an international treaty. The Brussels Treaty 1948 and the North Atlantic Treaty 1949 incorporated the same ideas about the states' will to safeguard fundamental human rights and the dignity of all men and women.
[171] S GREER, The European Convention (n 164)14
[172] Statute of the Council of Europe (Treaty of London), Preamble and Art 1
[173] Treaty of London, Art 3
[174] Treaty of London, Art 8
[175] AH ROBERTSON AND JG MERRILLS, Human Rights in Europe (n 170) 3

economic interests.[176] The pre-eminent attention of the Council of Europe for human rights did not depend on the wills of the Ministers for foreign affairs composing the Committee of Ministers. On the contrary, the interest for the creation of a European 'Charter of Human Rights' (as it was then called) was a popular movement, led by the Consultative Assembly of the Council. The Assembly, composed of representatives drawn from national parliaments, reacted vigorously to the decision of the Committee of Minister not to include an item relating to human rights in the draft agenda for its first session. The representatives of the European peoples insisted on the need of giving shape to those 'individual freedom and political liberty' mentioned in the preamble of the Treaty of London.[177] They wanted to lay down the moral conditions of Europe,[178] strengthening the resistance against any possible attempts (reviving from the past, as well as coming from the East) to undermine its political stability.[179] In other words, European peoples felt the need of a 'constitution' for Europe, in accordance with the more profound and ancient meaning of this term. Their aim was that of '*constitŭere*' in the Latin sense, by not only shaping but also fixing once and forever the moral conditions of the new Europe; by not only establishing, but also giving stability to common principles of *ius naturale* that a purely majoritarian system had proved unable to protect.

Of course, the choice of binding future parliaments by assessing supreme values at the international level was hotly debated, as it intrinsically contradicted the well-established Western notion of democracy, where the maximum power lies in the will of people, a force potentially and practically above the law.[180] However, during the Second World War, the limits of democracy had become self-evident: whenever the people's will has no limitation at all, the majority is free to pursue its own interests in the name of the *cratos* (power) of the *démos* (people), and the majority is an easy

[176] It is common knowledge that the EU has its origins in the agreeements, signed between the 50s and the 60s, aiming at the creation of a common market between European States: B BEUTLER AND R BIEBER, L'Unione Europea: Istituzioni, Ordinamento, Politiche (Bologna, 2nd ed, Il Mulino 2001)

[177] AH ROBERTSON, 'Introduction' in COUNCIL OF EUROPE, Collected Edition of the Travaux Préparatoire to the European Convention on Human Rights, I (The Hague, Martinus Nijhoff 1975) XXIV

[178] COUNCIL OF EUROPE, Collected Edition of the Travaux Préparatoire to the European Convention on Human Rights, I (The Hague, Martinus Nijhoff 1975) 16 (M. Molet)

[179] COUNCIL OF EUROPE, Collected Edition of the Travaux Préparatoire to the European Convention on Human Rights, I (The Hague, Martinus Nijhoff 1975) 28 (Lord Layton)

[180] This ideal is not a product of the Enlightenment, dating back to the ancient Greek democracies: see L CANFORA, Critica della retorica democratica (Bari, Laterza 2002) 40-41

prey for the persuasion of a single man (Hitler, Mussolini) or of an ideological movement (National-Socialism, Fascism, Socialism). In the post-war Europe, the adoption of written constitutions at the national level was motivated by the same need pushing the European states to limit their sovereignty at the international level: the need to create a bulwark against future tyranny.[181] The European peoples seemed to be aware of this need, and they successfully persuaded their governments to engage into the drafting of a European Convention on Human Rights.

### *2.2 Birth of the European Convention on Human Rights*

On the basis of a continuous exchange of opinions with the Consultative Assembly, in 1950 the Committee of Ministers reached an agreement on a draft European Convention on Human Rights and Fundamental Freedoms.[182] The Convention was opened to signature in Rome on 4 November 1950 and entered into force on 3 September 1953.

The conflict between states where the distortion of democracy had not been experienced, and states heavily committed to the foundation of constitutional democracies ended in an agreement which could have been dismissed as a poor result. It covered only a minimum core of rights and freedoms, carefully chosen among the very essential human rights, 'defined and accepted after long usage by the democratic regimes'.[183] These were the most ancient and stabilized human rights, whose protection dates back to the French *Déclaration des Droits de l'Homme et du Citoyen*

[181] For the 'Republican Liberalist' theory on the negotiations of the European Convention: A MORAVCSIK, 'The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe' (2000) 54 IO, 217-252

[182] The new technique of treaty-making due to the 'dual nature' of the Council of Europe is reputed one the great success of this institution , resulting in the conclusion of many conventions and agreements: AH ROBERTSON AND JG MERRILLS, Human Rights in Europe (n 170) 12

[183] COUNCIL OF EUROPE, Collected Edition of the Travaux Préparaatoire to the European Convention on Human Rights vol I (The Hague, Martinus Nijhoff 1975), 218. These are the right to life (Art 2 ECHR), the prohibition of torture (Art 3 ECHR), the prohibition of slavery and forced labour (Art 4 ECHR), the right to liberty and security (Art 5 ECHR), the right to a fair trial (Art 6 ECHR), the nullum crimen sine lege principle (Art 7 ECHR), the right to respect for private and family life (Art 8 ECHR), the freedom of thought, conscience and religion (Art 9 ECHR), the freedom of expression (Art 10 ECHR), the freedom of assembly and association (Art 11 ECHR), the right to marry (Art 12 ECHR), the right to an effective remedy (Art 13 ECHR) and prohibition of discrimination (Art 14 ECHR)

1789. The mere text of the European Convention, therefore, was not revolutionary at all.

The breaking force of the European Convention, however, lied in its nature of law-making treaty, creating 'a network of mutual, bilateral undertakings, objective obligations' and binding the actions of all state powers to the respect for human rights.[184] Another relevant aspect of this peculiar treaty was the introduction of an independent judicial review, verifying the compliance of state actions with the international obligations. The creation of a European Court of Human Rights, ensuring the respect of the European Convention by its member states, was supported by the Consultative Assembly. However, powerful negotiators (such as the United Kingdom) strongly opposed the idea, and in the end the Council had to reach a compromise: the creation of a European Court was included in the Convention, but its jurisdiction and the right of individual petition became an optional choice for the member states, so that they could choose the actual extent of its influence on their sovereignty.

### *2.3 Establishment of the European Court of Human Rights*

The European Court of Human Rights was established in 1959.

For the reasons mentioned above, at the beginning of its life the jurisdiction of the Court was not compulsory for the member states of the Convention. The right of individual petition was available for citizens of states specifically agreeing to it; in all other cases, only inter-states complaints were admissible. The Court initially worked on a part-time basis, together with the European Commission of Human Rights and the Committee of Ministers. The proceeding was 'contaminated' by its political dimension, given the important role played by both the European Commission and the Committee of Ministers. However, the potential of the 'old' European Court must not be underestimated. The creation of an independent, non-majoritarian and supranational organ such as the Court was, in itself, revolutionary. The additional possibility of allowing citizens (for the first time, actors of the international scene) to seek redress for

[184] A ASHWORTH, B EMMERSON AND A MACDONALD, Human rights and criminal justice (London, Thomson Sweet & Maxwell 2007) 5

violations of human rights contradicted all the classical views on the national state and on its international relations.

Surprisingly, in a short time all member states 'bowed' to the jurisdiction of the Court, so that in 1990 every party to the European Convention had spontaneously accepted it, being ready to reconcile itself with the destabilizing potential of a supranational court.

Given that the annual rate of provisional applications had risen considerably during the 1980s, [185] in 1998 the Council of Europe declared the 'urgent need to restructure the control machinery established by the Convention, in order to maintain and improve the efficiency of its protection of human rights and fundamental freedoms'.[186] Protocol 11 of 1998 introduced a new enforcement mechanism, based on a full-time European Court.

The 'new' Court works alone and on a full-time basis.[187] It is composed by a number of judges equal to that of the contracting parties.[188] Judges are elected, for a period of nine years, by the parliaments of each state, and they have to be of high moral character, either possessing the qualifications required for appointment to high judicial office or being jurisconsults of recognised competence.[189]

The jurisdiction of the new Court covers 'all matters concerning the interpretation and application of the Convention and the Protocols', and it is compulsory for all parties to the European Convention.[190] The Court may receive applications from any contracting party, and from 'any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols'.[191]

[185] For the three phases of the activity of the Court (dormancy, activation, case overload), and for possible explanations of the dramatic rise in individual applications during the 1980s: H BOYLE AND M THOMPSON 'National politics and resort to the European Commission on Human Rights'(2001) 35 LS Rev, 337-341; S GREER, The European Convention (n 164) 36-38; R RYSSDAL, 'The Coming of Age of the European Convention on Human Rights' (1996) EHRLR 22

[186] ECHR, Protocol 11/1998, Preamble

[187] ECHR (as amended), Art 19

[188] ECHR (as amended), Art 20

[189] ECHR (as amended), Artt 21, 22, 23

[190] ECHR (as amended), Art 32

[191] ECHR (as amended), Artt 33, 34

*2.4 The peculiar nature of the ECHR system*

The analysis of the historical background provides the necessary tools to understand the peculiar (and almost unique) nature of the ECHR system. As already stated above, the European Convention bears strong similarities to national written constitutions. The aim pursued is exactly the same: the European Convention and national written constitutions are instruments assessing supreme values of 'natural law', thus creating a bulwark against the misuse of the democratic institutions.[192] At the ECHR level, the aim is only more ambitious, implying a commitment not only towards individuals, but also towards other institutional actors of the international scene. As for their content, the European Convention is more limited than a national constitution, setting out principles rather than regulating the relationships and attributions of the state powers (although the European Convention regulates the relationship between the Convention organs and the member states). This is due to the different context in which the two instruments operate: a constitution establishes and works at the national level, while the European Convention presupposes an existing and well-structured national level over which the Convention organs operate.

However, it must be clear that the Convention is not a traditional international instrument. The European Convention is a mix of constitutional and international elements of law, and the European Court is often considered to be a quasi-national, quasi-international court, because the subject matter of the ECHR is one traditionally left to national law.[193] The same European Court stated, more than once, that the European Convention is a 'constitutional instrument of European public order',[194] and the way in which the Convention law has been developed singles the Convention

[192] F PALAZZO AND A BERNARDI, 'Italy', M DELMAS-MARTY (ed), The European Convention for the Protection of Human Rights. International Protection versus National Restrictions (Dordrecht-Boston-London, Martinus Nijhoff 1992) 195-207

[193] R BERNHARDT, 'Human Rights and Judicial review: the European Court of Human Rights' in DM BEATTY (ed), Human Rights and judicial review. A comparative perspective (Leiden, Martinus Nijhoff 1994) 304; J CHRISTOFFERSEN, Fair balance: proportionality, subsidiarity and primarity in the European Convention on Human Rights (Leiden, Martinus Nijhoff 2009) 22-24

[194] Loizidou v Turkey (1995) Series A n 310; Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v Ireland ECHR 2005-VI

out of any other international instrument.[195] Indeed, the Court is constitutional in the sense that it addresses issues that are often subjected to regulation in national constitutions,[196] and this is the reason why the Court is sometimes referred to as the Constitutional Court of Europe.[197] This conclusion has relevant consequences in relation to the interpretation and application of the European Convention, as it will be further analysed in the section devoted to this topic.

### *2.5 Current state of the ECHR system. The activism of the European Court of Human Rights*

Notwithstanding its uncertain first steps, the European Convention system has now grown to mature adulthood, being considered the most successful and advanced system of human rights protection in the world.[198] The main responsible for this much praised effectiveness is the European Court of Human Rights. Since its origins (but especially since the reform of 1998), the European Court has proved to be a very active judge. Its case law applies extensively the rights and freedoms guaranteed by the European Convention, following a dynamic approach which extends the obligations upon the states beyond their original meaning.[199]

The activism of the European Court is rooted in the structural vagueness of the Convention provisions, and in the absence of a standing organ or method to effect

[195] See, for instance, the creation of 'positive obligation' upon member states. It has been said that 'in many respect positive obligations are the hallmark of the European Convention on Human Rights, and mark it out from other human rights instruments; particularly those drafted before the Second World War' (K STARMER, 'Positive obligations under the Convention', J JOWELL AND J COOPER (eds), Understanding human rights principles (Oxford, Hart Publishing 2001) 159

[196] J CHRISTOFFERSEN, Fair balance (n 193) 24

[197] L WILDHABER, 'A constitutional future for the European Court of Human Rights' (2002) 23 HLR, 161-165. In favour of the European Court's resemblance to a constitutional court, see also: R BERNHARDT, 'The Convention and Domestic Law', R MACDONALD, F MATSCHER, H PETZOLD (eds), The European System for the Protection of Human Rights (Dordrecht, Martinus Nijhoff 1993) 25; DJ HARRIS, M O'BOYLE, EP BATES, CM BUCLEY, Law of the European Convention on Human Rights (New York, 2nd ed, OUP 2009) 2

[198] S GREER, The European Convention (n 164) 1; DJ HARRIS, M O'BOYLE, EP BATES, CM BUCLEY, Law of the European Convention (n 197) 30; MW JANIS, RS KAY AND AW BRADLEY, European Human Rights Law (New York, 3rd ed, OUP 2008) 3; AH ROBERTSON AND JG MERRILS, Human Rights in Europe (n 170)

[199] LG LOUCAIDES, The European Convention on Human Rights. Collected Essays (Leiden, Martinus Nijhoff Publishers 2007) 13; A MOWBRAY, 'The Creativity of the European Court of Human Rights' (2005) HRLR 58

quick amendments to the Convention.[200] The Convention ambiguous provisions need to be interpreted in accordance with the constant changes affecting human rights, otherwise the Convention would lose its effectiveness. Waiting for the member states to add new Protocols to the Convention is not really an option. The 'legislative' path, respectful of the state sovereignty as it might be, is too slow and does not really solve the problem of ambiguous provisions. Involving the official decision-making body of the Council of Europe implies the need to reach a political agreement between states (whose number, by the way, is constantly increasing). As the history of the European Convention demonstrates, political wills require a long time to be settled when limitation to the state sovereignty are at stake, and the unavoidable compromises cause vagueness and ambiguities. The meaning of expressions which are vague and lacking in precision cannot be determined abstractly, but only in the light of the particular circumstance of each case.[201]

This is why most relevant and necessary developments were brought into the Convention system by the case law of the European Court. Nowadays, a human right may not literally fit in the Convention (nor in its additional Protocols) but still be protected under the case law of the European Court, as it is the case for the right to a lenient penalty.[202] The activism of the European Court has been harshly criticized, sometime by its own judges.[203] However, the European Court has developed an original judicial reasoning aiming (successfully) at persuading states of the validity of its judgments, and constantly bringing relevant developments into the Convention.

[200] LG LOUCAIDES, The European Convention (n 199) 1-2
[201] Wemhoff v Germany (1968) Series A n 7
[202] Scoppola v Italy (no 2) App n 10249/03 (ECtHR, 17 September 2009)
[203] Golder v UK (1975) Series A n 18 (Judge Sir Gerald Fitzmaurice)

## 3. The interpretation of the Convention by the European Court, and its role in the evolution of the European Convention system

### *3.1 Preliminary remarks*

Being expression of sovereign wills, international treaties can deal with their own interpretation, choosing the methods and principles that their interpreters will have to use. The European Convention on Human Rights, however, does not express any choice in this regard. The contracting parties gave to the European Court jurisdiction on 'all matters concerning the interpretation and application of the Convention and the Protocols'.[204] They did not give, however, clear indications as to the instruments of that interpretation. Therefore, the task of solving the problems arising from the need to interpret and apply the Convention has been left to the Convention organs.

A methodological study of the ECHR interpretation is a powerful tool for analysing the case law of the European Court.[205] The huge amount of judgments and the tendency of the Court to express its methodological choices make it easier to identify common standards and rules of interpretation. The topic, of course, is vast and cannot be fully examined by the present study. However, a brief survey is essential in order to understand how the need for precision in law of criminal offences was developed by the Court on the basis of Article 7 ECHR.

The survey is divided into three main parts. The first section highlights some important terminological choices made by the present study. Being the European case law vast and sometimes confusing, it is important to choose in advance the terminology to be used. Only a clear distinction between the different interpretative aids can lead to a useful analysis of this case law. The second section describes the interpretative tools provided by the Vienna Convention on the Law of Treaties 1969, and it classify them according to the terminology chosen in the first section. The third and last section demonstrates how the European Court of Human Rights, using

[204] ECHR (as amended), Art 32 [former Article 45]

[205] F OST, 'The Original Canons of Interpretation of the European Court of Human Rights', M DELMAS-MARTY (ed), The European Convention for the Protection of Human Rights. International Protection versus National Restrictions (Dordrecht-Boston-London,Martinus Nijhoff 1992) 283

the methods and principle of the Vienna Convention as a starting point, developed its own theory of interpretation of the Convention. The subject matter is commonly approached by reference to a few landmark cases: in the present study, these cases are taken into consideration in their chronological order, so to highlight the *fil rouge* which led from a mere application of the Vienna Convention interpretative tools to the present stage of the European case law.

### *3.2 Interpretative methods and principles*

Studies dealing with the interpretation of the ECHR do not have a common approach as to the terminology used.[206] The same Vienna Convention on the Law of Treaties 1969, when dealing with the interpretation of international agreements, speaks about 'rules' and 'means' of interpretation without making a clear distinction between them.

Feeling the need for more clarity, a recent proposal provides a useful distinction between 'interpretative methods' and 'interpretative principles'.[207] Interpretative methods are techniques used to justify a particular line of reasoning or a particular outcome, on the basis of substantive arguments. For instance, textual interpretation is an interpretative method, because it is grounded on a substantive argument: the ordinary meaning of words. On the contrary, a principle of interpretation is an aim, an objective helping to determine the meaning of a provision. Principles alone are not sufficient to justify a certain interpretation; they can only help to make a choice between diverging outcomes resulting from different methods of interpretation. For instance, evolutive interpretation is a principle, because it only provides a general

[206] Some scholars refer to the Court's 'interpretative techniques' : A ASHWORTH, B EMMERSON AND A MACDONALD, Human rights and criminal justice (n 184) or to the Court's 'canons of interpretation': F OST, 'The Original Canons of Interpretation' (n 205). Other authors refer to the 'principles of interpretation' of the European Convention: P LEACH, Taking a case to the European Court of Human Rights (Oxford, 3rd ed., OUP 2012), to the 'methods of interpretation' used by the Court: JG MERRILLS, The Development of International Law by the European Court of Human Rights (Manchester, 2nd ed, MUP, 1993) or to the 'rules of interpretation' : LG LOUCAIDES, The European Convention (n 199)

[207] The reference is to the work by H SENDEN, Interpretation of Fundamental Rights in a Multilevel Legal System. An analysis of the European Court of Human Rights and The Court of Justice of the European Union (Cambridge, Intersentia 2011)

objective for the interpretation: namely, that it should be in line with the evolution of the society.

Of course, the distinction is not always crystal clear. Some interpretative principles have a more natural link with certain interpretative methods, and this can generate confusion.[208] However, the distinction is useful and will be used by the present study.

### *3.3 The interpretation of international treaties. The Vienna Convention on the Law of Treaties (VCLT) 1969 and its applicability to the interpretation of the European Convention*

Being the ECHR an international agreement, it should be interpreted in accordance with Articles 31 to 33 of the Vienna Convention on the Law of Treaties 1969. These provisions, as the same European Court recognizes, provide interpretative tools which are 'generally accepted principles of international law', thus applying to the interpretation of every international agreement.[209]

Article 31 states the 'general rule of interpretation', namely that 'a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.[210] Following the classification chosen above, the provision lists three different interpretative methods: the textual (or literal) interpretation, relying on the substantive argument of the 'ordinary meaning to be given to the terms of the treaty'; the systemic (or contextual) interpretation, relying on the substantive argument of the 'context' of the terms to be interpreted; the purposive (or teleological) interpretation, relying on the 'object and purpose' of the international agreement.

The 'contractual' nature of international law implies that the utmost respect should be paid to the will of the contracting parties. Accordingly, even if the Vienna Convention does not give a hierarchical order to the methods listed by Article 31, the

[208] H SENDEN, ibid 46

[209] Golder v UK (1975) Series A n 18 para 34

[210] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT), Art 31

supremacy of the literal interpretation can be theorized,[211] because the text is the 'least contestable manifestation of the common intention of the parties'.[212]

Article 32 VCLT allows the use of 'supplementary means of interpretation' (including the *travaux préparatoires* to the treaty and the circumstances of its conclusion) whenever the interpretation grounded on Article 31 leaves the meaning ambiguous or obscure, leads to a result which is manifestly absurd or unreasonable, or simply needs to be confirmed.[213] This Article mixes interpretative methods and principles. The reference to the *travaux préparatoires* recalls the interpretative method of the subjective (or historical) interpretation, grounded on the original intention of the contracting parties. However, considerations of principle are implied when Article 31 refers to the problem of an ambiguous or absurd meaning. In this case, it is the need for a reasonable interpretation (i.e., an interpretative principle) that legitimates the recourse to additional interpretative methods.

Article 33 regulates the 'interpretation of treaties authenticated in two or more languages', stating that the text is equally authoritative in all the languages in which the treaty was authenticated.[214] This is clearly an interpretative method, relying on the substantive argument of the authentic text. The Article adds that the terms are presumed to have the same meaning in each text (unless the treaty expresses its choice for a different solution) and that, if a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 cannot remove, preference should be given to 'the meaning which best reconciles the texts, having regard to the object and purpose of the treaty'.[215] This is clearly an interpretative principle, imposing an aim (the meaning which best reconciles the texts) and the means of pursuing it (having regard to the object and purpose).

[211] See H SENDEN, Interpretation, (n 207) 47-48
[212] F OST, The Original Canons of Interpretations (n 205) 288
[213] VCLT 1969, Art 32
[214] VCLT 1969, Art 33 para 1
[215] VCLT 1969, Art 33 paras 3, 4

*3.4 The European case law on the interpretation of the European Convention*

In its first judgment (relinquished under the 'old' system of protection),[216] the European Court of Human Rights displayed a quite traditional approach towards the interpretation of the Convention.[217] The interpretative question brought to its attention was solved through the use of the literal and contextual methods: according to the Court, the meaning thus derived was 'fully in harmony with the purpose of the Convention'.[218] Because of this conclusion, the Court declared that it could not resort to the *travaux préparatoires*. Thus, the methods applied were the same that the Vienna Convention would have listed in its Article 31 some years later, and they were applied in exactly the same order.

In 1968, the Court started to depart from the traditional interpretative methods previously used. In the famous *Wemhoff* case, the Court called for an interpretation of the Convention favouring the purposive rather than the restrictive method, and assessed the following principle:

> '[G]iven that it is [the European Convention] a law-making treaty, it is (...) necessary to seek the interpretation that is most appropriate in order to realise the aim and achieve the object of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the Parties'.[219]

That same year, the Court relinquished judgment in the so-called *Belgian Linguistic* case.[220] This was the first decision dealing with the topic of positive obligations implied by the Convention rights.[221] The main argument raised by the applicants was that the right to education (Article 2 of Protocol 1) gave rise to 'obligations to take actions' by the respondent state. Allegedly, the provision did not limit its scope to a

[216] Chapt 2, sect 1.3
[217] Lawless v Ireland (No 3) (1961) Series A n 3
[218] Ibidem
[219] Wemhoff v Germany (1968) Series A n 7
[220] Case 'Relating to certain aspects of the laws on the use of languages in education in Belgium' v Belgium (1968) Series A no 6 (also known as Belgian Linguistic Case)
[221] For the subsequent case law on positive obligations, see: Airey v Ireland (1979) series A n 32; X and Y v the Netherlands (1985) Series A n 91; McCann and Others v UK (1995) Series A n 324; LCB v UK, ECHR 1998-III; Hatton and Others v UK, ECHR 2003-VIII

negative perspective, but implied the need of positive actions by the state. The respondent state claimed that the 'negative character' of the right to education was confirmed by a literal interpretation and by the *travaux préparatoires.* The European Court concluded that, under Article 1 of the Convention, member states have the duty to positively secure the enjoyment of the Convention right to everyone. In order to determine the scope of the right to education, the Court added that the general aim of the Convention had to be considered, which was to be identified in the 'effective protection of fundamental human rights'.[222] The judgment ended with the inclusion of a positive dimension in the right to education, being one of the first expressions of the need to give 'effectiveness' to the protection of human rights.

In 1975, the European Court relinquished its first judgment expressly taking into consideration the provisions of the Vienna Convention on the Law of Treaties 1969.[223] The case involved the question of 'unenumerated' (or implied) rights: rights that are not expressly mentioned in the text, but it is proposed that they should be 'read into' it.[224] The applicant was a British prisoner who had tried to contact a solicitor in order to sue its warder for defamation, but had been prevented to do so by the competent authorities. His complaint focused on the denial of his 'right to access to the Court', allegedly protected by Article 6 par 1 ECHR. The provision grants the right to a 'fair and public hearing within a reasonable time by an independent and impartial tribunal established by law' and does not expressly recognize the right to access a Court.

The European Court of Human Rights declared that its reasoning 'should be guided by Articles 31 to 33 of the Vienna Convention', even if that Convention had not yet entered into force, because those Articles 'enunciate in essence generally accepted principles of international law'. [225] However, that formal declaration was followed by a reasoning focusing on the relevance of the preamble to the Convention 'for the determination of the object and purpose' of the provision.[226]

[222] Belgian Linguistic case, The law, sect I A, paras 3-5
[223] Golder v UK (1975) Series A n 18
[224] This dworkinian category is applied to the Golder case by G LETSAS, A Theory of Interpretation of the European Convention on Human Rights (Oxford, OUP 2007) 61-62
[225] Golder v UK (1975) Series A n 18
[226] Golder v UK, para 34

The preamble, read in combination with the Statute of the Council of Europe, expresses the importance of the rule of law, and the Court considered that 'in civil matters one can scarcely conceive the rule of law without there being a possibility of having access to the courts'.[227] The Court added that, were Article 6, paragraph 1 ECHR to be understood as concerning exclusively an existing proceeding, a contracting state 'could, without acting in breach of that text, do away with its courts, or take away their jurisdiction'. Such assumption 'would have serious consequences which are repugnant (...) and which the Court cannot overlook'.[228] As a consequence, the Court concluded that 'the right of access constitutes an element which is inherent in the right stated by Article 6 par 1'.[229] As the harsh dissenting opinion of Judge Fitzmaurice promptly noticed, the Court had admitted that 'the only provision that could have any relevance' did not 'directly or in terms give expression to such a right'.[230] The judgment was the first concrete step by which the Court attributed to the scope of the Convention a crucial role in the interpretation of its provisions. It is also a good example of the strict relationship that the Court often finds between the purposive interpretation of the Convention and the argument of the absurd (or the 'choice of a not unreasonable interpretation'). [231]

In 1975, the Court carried to its full extent a tendency shown by the Convention organs since the earliest stages of their activity: that of giving to the Convention terms an autonomous meaning, independent from the one in use among States.[232] The applicants were Netherlands nationals serving in the Army, who had been subjected to various penalties for offences against military discipline.[233] Among other violations of the Convention, they alleged a breach of Article 6 ECHR, providing procedural guarantees for 'everyone charged with a criminal offence'.

[227] Ibidem
[228] Ibidem
[229] Golder v the UK, para 36
[230] Golder v UK (1975) Series A n 18 (Judge Sir Gerald Fitzmaurice) para 18
[231] This label is used by F OST, The Original Canons of Interpretation (n 205) 304. The author stresses, also, the link with the teleological (purposive) interpretation, p 294. For another concrete example of this link, see Airey v Ireland (1979) series A n 32
[232] See, for instance, the Court's struggle to create an autonomous notion of 'court' for the purpose of applying the guarantees enshrined in Article 5 ECHR, in: Neumeister v Austria (1968) Series A n 8, paras 18-24; De Wilde, Ooms And Versyp v Belgium (1971) Series A n 12, paras 77-80. See, also, the autonomous notion of 'charge' in Neumeister v Austria (1968) Series A n 8, para 18; Wemhoff v Germany (1968) Series A n 7, para 19; Ringeisen v Austria (1971) Series A n 13, para 110
[233] Engel and Others v the Netherlands (1976) Series A n 22

Both the respondent government and the Commission for Human Rights denied that the proceedings against the applicants had been connected with a 'criminal charge', being, instead, of a disciplinary nature. Thus, the question brought to the attention of the Court was whether the domestic distinction between disciplinary and criminal proceedings was 'decisive from the standpoint of the Convention'.

The European Court stated that the choice of incriminating an act or omission constituting the normal exercise of one of the Convention rights should be subjected to its scrutiny. If the contracting states 'were able at their discretion to classify an offence as disciplinary instead of criminal (...) the operation of the fundamental clauses of Articles 6 and 7 would be subordinated to their sovereign will' and this 'might lead to results incompatible with the purpose and object of the Convention'.[234] Therefore, the Court elaborated criteria to 'determine whether a given "charge" vested by the State in question - as in the present case - with a disciplinary character nonetheless counts as "criminal" within the meaning of Article 6'.[235] This was one of the first express stances against a passive subordination to the will of the member states, with the final aim of avoiding an 'illusory' supervision by the European Court.[236] The Court justified its choice with the need to avoid a 'misuse of labels', and a consequent 'fraud to the Convention', by the states.[237]

Two years later, the Court addressed again problems of interpretation. Mr. Tyrer, a British citizen living in the Isle of Man, had been convicted for a minor crime committed when he was still under age and subsequently subjected to corporal punishment in accordance to the law of that state.[238] The legal question was whether he had been subjected to a 'degrading punishment', in breach of Article 3 ECHR. Of

[234] Engel And Others v The Netherlands (1976) Series A n 22, para 81
[235] Ibidem
[236] Subsequently, the Court used autonomous concepts also in relation to the notion of 'law' (The Sunday Times v UK (1979) Series A n 30), of 'family life' (Marckx v Belgium (1979) Series A n 31), of 'civil rights and obligations' (X v Germany (1972) Collection 40, 11-14). On the topic of autonomous concepts, see: G LETSAS, 'The Truth in Autonomous Concepts: how to interpret the ECHR' (2004) 15 EJIL 279
[237] The problem of national legislators misusing labels and creating a distance between the formal classification and reality has been famously discussed by E KOHLRAUSCH, 'Sicherungshaft. Eine Besinnung auf den Streitsand' (1924) ZStW, 21. This problem is very well known to the Italian legal system, and Italian scholars use to name it as 'misuse of labels' or 'fraud of labels', following the idiomatic expression firstly used by Kohlrausch. See, eg: E NICOSIA, Convenzione Europea dei Diritti dell'Uomo e Diritto penale (Torino, Giappichelli 2006) 42 sub nota 11. The notion of 'fraud to the Convention' is used by F OST, 'The original canons' (n 205) 306
[238] Tyrer v UK (1978) Series A n 26

course, the assessment of what is 'degrading' largely depends on the current social perspective. For this reason, the Court stated that it could not avoid being influenced by the developments and common accepted standards in the penal policy of the states, because 'the Convention is a living instrument which (...) must be interpreted in the light of present-day conditions'.[239] Not surprisingly, the Court concluded that the whipping on the bare posterior of a juvenile offender implied a sufficient humiliation or debasement to be considered 'degrading' punishment within the ambit of Article 3 ECHR, considering that all parties to the Convention had withdrawn corporal punishment from their criminal system. The judgement therefore relied on the presence of a common practice among member states in order to interpret a Convention provision.

One year later the Court faced a more complicated case. Ms. Marckx was a single mother who had had to adopt her own baby in order to give her the status of 'legitimate' child under Belgian law. At that time in Belgium, no legal bond between an unmarried mother and her child resulted from the mere fact of birth, and, even after the adoption, the child of an unmarried mother suffered from certain legal discriminations. Ms. Marckx applied the Commission for Human Rights, complaining about the alleged breach of Articles 3, 8, 12, 14 ECHR.[240]

The case was an interesting first application by the Court of the autonomous notion of 'family'. Even if the Belgian legislation did not consider the natural bond between an unmarried mother and her illegitimate child as creating a new 'family', the Court assessed that 'Article 8 makes no distinction between the legitimate and the illegitimate family', and therefore it could be applied to the case under examination. During the course of the following years, the notion of 'family life' under Article 8 ECHR would have become a prime example of the 'autonomous notion' principle of interpretation.

The most interesting part of the *Marckx* judgment is the analysis of the alleged violation of the non-discrimination principle (Art. 14 ECHR), read in conjunction with the protection of family life. The Court recalled the *Tyrer* case, stating that 'this Convention must be interpreted in the light of present-day conditions'. As regard to

[239] Tyrer v UK, para 31
[240] Marckx v Belgium (1979) Series A n 31

the legal status of legitimate and illegitimate children, the situation in Europe, however, was quite different from that of corporal punishment. At the time when the Convention was drafted, it was regarded as permissible and normal in many European Countries to draw a distinction between legitimate and illegitimate children. And, even if 'the domestic law of the great majority of the States of the Council of Europe [had] evolved and [was] continuing to evolve', in 1978 there was not (yet) a well-established European consensus in relation to their equality. However, the Court was satisfied by the existence of an 'evolution' in this area of the law, and declared that the distinction made by the Belgian State was lacking 'objective and reasonable justification' and violated Article 14 taken in conjunction with Article 8 ECHR. Thus, the *Marckx* case was the first departure from the idea that 'present-day conditions' are necessarily coincident with a full consensus among member states.

In a series of subsequent judgments, the Court further increased the distance, showing a prime interest in the evolution towards 'the moral truth of the ECHR rights, not in evolution towards some commonly accepted standards, regardless of its content'.[241] In 1981, the Court released a judgment concerning the protection of a 'negative right', which is to say, the protection of the 'negative dimension' (in that case, right *not* to join an association) of a right protected by the Convention only in its positive form (right to associate, Art. 11 ECHR).[242] The *travaux préparatoires* to the Convention clearly demonstrated that the contracting parties wanted to exclude the 'right not to be compelled to belong to an association' from the protection afforded by Article 11 ECHR. Nonetheless, the Court decided that the compulsion to join an association 'strikes at the very substance of the freedom guaranteed by Article 11', being blatantly contrary to the Article's *ratio.*[243] The judgment was accompanied by a dissenting opinion pointing out that 'no canon of interpretation can be adduced in support of extending the scope of the Article to a matter which deliberately has been

[241] G LETSAS, A Theory of Interpretation (n 223) 79
[242] Young, James and Webster v UK (1981), Series A n 44
[243] Young, James and Webster v UK (1981), Series A n 44, para 55

left out and reserved for regulation according to national law and traditions of each State Party to the Convention'.[244]

### *3.5 Interpretative methods and principles in the European case law*

The early case law analysed above closely reflects the overall attitude currently displayed the European Court of Human Rights towards the interpretation of the European Convention. Express references to the interpretative tools of the Vienna Convention on the Law of Treaties are frequent: however, the Court pays only 'lip-service' to them.[245] The peculiar nature of the Convention (a 'law-making treaty', having the purpose of achieving the aims and ideals of the Council of Europe)[246] justifies a liberal interpretation of the obligations imposed on the states.[247] Therefore, as in the *Wemhoff* and *Tyrer* cases, the literal interpretation is frequently overcome by other interpretative methods and/or principles, and, as in the *Belgian Linguistic* case, the historical interpretation is avoided, because it would limit the meaning of the provisions to the original (and historically determined) will of the contracting parties. On the opposite, the Court attaches the greatest importance to the interpretation 'according to the object and purpose' of the Convention, which allows both an extensive and evolutive interpretation of the ECHR provisions. In the name of purposive considerations, the European Court feels entitled to promote interpretative results which can even contradict the letter of the Convention (not to say the original intentions of the contracting parties).[248] The attention for the purpose of the Convention is often accompanied by references to the need of examining, interpreting and applying the provisions of the Convention and its Protocols 'as a whole'[249]. This is because the Convention articles are linked according to a logical structure expressing the purpose and object of the Convention.[250]

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[244] Young, James and Webster v UK (1981), Series A n 44 (Judge Sørensen, Judge Thór Vilhjálmsson and Judge Lagergren)
[245] I SINCLAIR, The Vienna Convention on the Law of Treaties (Manchester, 2nd ed, MUP 1984) 140
[246] Austria v Italy, 4 YB ECHR (1961) 140
[247] LG LOUCAIDES, The European Convention (n 199) 10
[248] Eg: Young, James and Webster v UK (1981), Series A n 44
[249] Belgian Linguistic, para 1; Leander v Sweden (1987) Series A n 116; Schalk and Kopf v Austria App n 30141/04 (ECtHr, 24 June 2010)

To conclude, the interpretation of the European Convention is mainly conducted on the basis of the teleological and contextual methods, while the historical and the literal interpretation are usually avoided by the European Court. The purposive and contextual methods, alone, do not provide an answer to a substantial question that is a matter of some controversy in international law[251]: which aim and purpose should be followed in the interpretation of a treaty? The historical aim and purpose pursued by the contracting parties, or their abstract intention as expressed by the treaty provisions and subject to the developments of society?

This question can be answered only by referring to interpretative principles, because interpretative methods can naturally lead to diverging outcomes, among which a choice of principle is to be made. As demonstrated by the previous analysis, the European Court makes frequent use of three interpretative principles: the 'living instrument' principle (or principle of evolutive interpretation); the 'autonomous notion' principle (or principle of autonomous interpretation); the 'practical and effective rights' principle. These are the most important and frequently assessed principles of interpretation in the huge body of case law developed by the Strasbourg Court.

According to the 'living instrument' principle, 'the Convention is a living instrument which (...) must be interpreted in the light of present-day conditions'[252]. For this reason, 'the Court cannot overlook the marked changes [occurring] in the domestic law of the States' [253], and may accordingly vary its evaluation as to the infringement of 'new' human rights. This principle is perfectly in line with the tendency to avoid any historical interpretation of the Convention, so as to grant the maximum possible protection to human rights and freedoms. Of course, the evolutive interpretation of the Convention might be wrongly used by the Court to anticipate, encourage or promote tendencies which have not been firmly established yet. At the same time, this interpretative principle might be the only way to determine the meaning of

(ECtHR, 24 June 2010)
[250] F OST, The Original Canons of Interpretation (n 205) 290
[251] JG MERRILLS, The Development of International Law (n 206) 76-77
[252] Tyrer v UK (1978) Series A n 26, para 31; Marckx v Belgium (1979) Series A n 31, para 41
[253] Dudgeon v UK (1981) Series A n 45, para 23

excessively vague notion, which can only be understood in their own social context.[254]

According to the 'autonomous notion' principle, the Court gives the Convention notions an autonomous meaning, independent from that in use among the member states. The use of autonomous notions is meant to avoid that states 'were able at their discretion' to subordinate the application of the Convention provision to their 'sovereign will'.[255] Thus, the final aim is, again, that of granting the maximum possible protection to human rights and freedoms.

According to the 'practical and effective rights' principle, 'the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective'.[256] This is because 'the general aim set for themselves by the Contracting Parties through the medium of the European Convention on Human Rights, was to provide effective protection of fundamental human rights'.[257]

Clearly, all these principles share the same *ratio* and express the same need: the need for the Convention to be interpreted and applied effectively. The exigency to grant human rights effective protection is the reason why the literal interpretation plays only a secondary role in the reasoning of the European Court; the reason why the Court tends to consider the process of interpretation as 'a unity, a single combined operation'; [258] and the reason why the Court developed positive obligations across a number of substantive Articles of the Convention.[259] In the end, the need for effectiveness is the reason why the Court favours the purposive interpretation, and it is also the origins of all the interpretative principles applied to the European Convention.[260]

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[254] JG MERRILLS, The Development of International Law (n 206) 79 ff

[255] Engel And Others v The Netherlands (1976) Series A n 22, para 81

[256] Airey v Ireland (1979) series A n 32, para 24

[257] Case 'Relating to certain aspects of the laws on the use of languages in education in Belgium' v Belgium (1968) Series A n 6

[258] Golder v UK (1975) Series A no 18

[259] A MOWBRAY, The Development of Positive Obligations under the European Convention on Human Rights (Oxford, Hart Publishing 2004) 221

[260] For this reason, I respectfully disagree with who argues that the 'practical and effective' rights principle derives from the 'living instrument' principle (M FITZMAURICE, 'Dynamic (Evolutive) Interpretation of Treaties' (2008) 21 Hague YB Intl L 132)

Clearly, the activism thus displayed by the European Court may raise objections, and the Strasbourg judges must be exceptionally careful in motivating their choices.[261] However, the position developed by the Court is justified by the peculiar nature of the European Convention. The international law of human rights is substantively an autonomous branch of the international law, which is not (or should not) be subject to ordinary principles of interpretation.[262] The ECHR is a 'law-making treaty', which does not create subjective and reciprocal rights between states, but objective obligations of states towards individuals.[263] The purpose of the states negotiating the Convention was not to concede each other reciprocal rights and obligations in pursuance of their individual national interests, but to realise the 'maintenance and further realisation of human rights and fundamental freedoms'. [264] Accordingly, the European Convention should not be interpreted with the traditional tools of the international law, which are mainly borrowed by the private law of contracts. [265]
As the Advocate General Jacobs wisely stated:

> 'It cannot be objected that this approach to interpretation extends the obligations of the Contracting States beyond their intended undertakings. On the contrary, this approach is necessary if effect is to be given to their intention, in a general sense. They did not intend solely to protect the individual against the threats to human rights which were then prevalent, with the result that, as the nature of the threats changes, the protection gradually fell away. Their intention was to protect the individual against the threat of the future, as well as the threats of the past'.[266]

Moreover, since the European Convention sets out principles rather than rules, it is almost impossible to find an univocal meaning for its provisions. The peculiar nature

[261] JG MERRILLS, The Development of International Law (n 206) 34
[262] LG LOUCAIDES, The European Convention (n 199) 10
[263] Wemhoff v Germany (1968) Series A n 7
[264] Preamble to the European Convention of Human Rights and Fundamental Freedoms
[265] LG LOUCAIDES, The European Convention (n 199) 10
[266] F JACOBS, The European Convention on Human Rights (Oxford, OUP 1975) 18

of the Convention requires the European Court to exercise a wide measure of discretion in order to select an interpretation among many.[267]

### *3.6 Conclusion. The principle of effectiveness and the activism of the European Court of Human Rights*

All the interpretative tools developed by the European Court of Human Rights are inspired by the principle of effectiveness, 'a means of giving the provisions of a treaty the fullest weight and effect consistent with the language used and with the rest of the text and in such a way that every part of it can be given meaning'.[268] The principle of effectiveness is thus the 'bedrock' of evolutive interpretation, *and* of all the interpretative choices made by the European Court. [269]

When applied to a law-making treaty concerning human rights, effectiveness requires that the interpretation and application of the international instrument aims at protecting human rights to their maximum possible extent. This implies that the historical and literal interpretation are less important than an evolutive and dynamic approach, which can even stretch and push the evolution of the consensus reached by the member states on a certain topic.[270]

Effectiveness has played a central role in the interpretation and application of the Convention, exercising a major influence also on the idea that the European Court has of its own role in the Strasbourg system[271]. The Court appears, indeed, a very active judge, conceiving its own role as naturally leading to the evolution and extension of the Convention provisions. This attitude might be seen as an exercise of unlimited (and illegitimate) judicial discretion[272], and, at the very beginning of the Convention life, it was harshly criticized by some of the Strasbourg judges. In 1979, Judge Sir Gerald Fitzmaurice described the extension of a Convention provision

[267] JG MERRILLS, The Development of International Law (n 206) 34-35
[268] JG MERRILLS, ibid 98
[269] See C OVEY AND RCA WHITE, The European Convention on Human Rights (New York, 5th ed, OUP 2010) 73, where the principle of effectiveness is defined as 'the bedrock of evolutive interpretation'
[270] As in Marckx v Belgium (1979) Series A n 31
[271] JG MERRILLS, The Development of International Law (n 206) 113
[272] JG MERRILLS, The Development of International Law (n 206) 119

(grounded on a purposive approach to the Convention) as 'virtually an abuse of the powers given to the Court'.[273] In 1981, Judges Sørensen, Thór Vilhjálmsson and Lagergren pointed out that 'no canon of interpretation can be adduced in support of extending the scope of the Article to a matter which deliberately has been left out' by the Convention.[274]

Surely, the undeveloped state of the European case law and the dominium of a traditional perspective on the role of international jurisdictions played a role in those harsh criticisms. Today, the dissenting opinions attached to dubious cases have significantly changed their tone, so that in 1990 Judge Martens complained about the excessive self-restraint displayed by the majority toward the rights of transsexuals people, stating that the Court had 'sadly failed its vocation of being the last-resort protector of oppressed individuals'.[275] Nowadays, the same Strasbourg judges expressly recognize that the 'supervisory function' of the European Court has an inevitable 'creative, legislative element comparable to that of the judiciary in common law countries'.[276] Its tendency to create law has become, matter-of-factly, something not only normal, but even *expected* by the most interventionist among the judges.

It is true that, sometimes, this attitude is restrained by the need to respect the developments of 'common grounds' among the member states.[277] However, the sensation is that in most cases the Court makes a display of restrained attitude with the perfect consciousness that it will not last long. For instance, the review of the European Court over the British legislation on the rights of transsexuals has been narrowed, initially, by considerations relating to the non-existence of a common attitude among the member states. However, the evolution subsequently demonstrated in the famous *Goodwin* case did not rely on the fact that a clear and uncontested common position had been finally reached, but on the existence of a 'continuing international trend' and on a judgment of 'no-longer-sustainability' of

[273] Marckx v Belgium (1979) Series A n 31 (Judge Sir Gerald Fitzmaurice)
[274] Young, James and Webster v UK (1981), Series A n 44 (Judge Sørensen, Joined By Judges Thór Vilhjálmsson and Lagergren)
[275] Cossey v UK (1990) Series A n 184 (Judge Martens)
[276] H WALDOCK, 'The Effectiveness of the System set up by the European Convention on Human Rights' (1980) I HRLJ 9
[277] For instance, see the conclusions reached by the European Court in the delicate field of euthanasia (Pretty v UK, ECHR 2002-III)

the situation.[278] Shortly, the European Court of Human Rights conceives its own activism as the necessary tool to promote the evolution toward a better and wider protection of human rights, in accordance with the 'object and purpose' of the European Convention.

Of course, this attitude raises many problems. First, the European Court is a body of foreign judges entrusted with the task of scrutinizing the internal law and practice of sovereign states.[279] Its role is delicate, because its powers rely on the acceptance of its case law by the member states of the European Convention. Second, in the attitude of the European Court there is a tendency to consider the process of interpretation as 'a unity, a single combined operation'[280]. In addition, being primarily focused on the concrete violation of human rights, the approach of the European Court is highly casuistic, and the case law never follows a single, well-defined path. As a result, it is difficult (if not impossible) to predict the order in which the Court will use its interpretative tools (not to say the outcome of its decisions). For this lack of clarity and foreseeability, the Court has been more than once criticized.

However, taking a position on these problems would fall outside the scope of the present analysis. The main aim, here, is to underline the importance of the conclusions drown above, when it comes to understand the attitude of the European Court towards *lex certa*. First, among the Vienna Convention interpretative tools, the Court clearly favours the teleological or purposive method, often coupled with the contextual method and sometimes leading to results contradicting the letter of the Convention. Second, in order to determine the aim to pursue, the Court follows a dynamic, non-historical and autonomous approach, which can be considered as an application of the more general principle of effectiveness to a law-making treaty dealing with human rights. Third, these interpretative choices do not necessarily contradict the will of the member states, given that the contracting parties aimed at protecting their citizens from all future attacks which could have endangered their human rights and freedoms. Fourth, the activism displayed by the European Court is justified by the peculiar nature of the European Convention, a 'constitutional

[278] Goodwin v UK ECHR 2002-VI, paras 84 and 90
[279] JG MERRILLS, The Development of International Law (n 206) 34
[280] Golder v UK (1975) Series A n 18 para 30

instrument of European public order in the field of human rights'.[281] Every constitutional court faces the dilemma of passively respecting the will of the legislature, making the constitution ineffective, or making the protection of rights its priority. Even if it operates at the international level, the European Court is substantially a 'constitutional' court protecting a bill of right, a non-majoritarian organ entrusted with the protection of supreme values, whose developments should be as much independent as possible from the unstable wills of political majorities. Thus, its activist approach and its dynamic interpretation of the European Convention appears perfectly justified.

## 4. The need for precision in law of criminal offences in the European Convention system

### *4.1 Article 7 ECHR*

Article 7 ECHR, protecting the *nullum crimen sine lege* principle, reads as follows:

> '1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
> 2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.'

The first limb of Article 7 ECHR prohibits the retroactive application of criminal offences so as to penalise conducts which were not criminal at the time when the acts (or omissions) occurred.[282] As most formulations of the *nullum crimen sine lege*

[281] See supra, sub n 194
[282] A ASHWORTH, B EMMERSON AND A MACDONALD, Human rights and criminal justice (n 184) 281

principle, it expresses, also, the void for heavier penalties; but, interestingly, it allows criminal liability grounded on the international law.[283]

The second limb of Article 7 allows an exception to the first paragraph, intended to permit the prosecution of individuals responsible for 'war crimes, collaboration with the enemy and treason'[284] on the basis of the national and international law enacted during and after the Second World War.[285] This exception was a codification of the principles laid down by the Nuremberg and Tokyo tribunals.[286] It clarified that the trial of war criminals for acts which were not criminal according to the national law, but criminal for the international community, would not be contrary to the principle of non retroactivity of criminal law.[287] However, the wording of the paragraph bears a much more general meaning, not merely related to war crimes: it refers to all acts and omissions which are 'criminal according to the general principles of law recognised by civilised nations'.[288]

According to Article 15 ECHR, the guarantees enshrined in Article 7, paragraph 1, cannot be derogated even in case of 'war or other public emergency threatening the life of the nation'. Thus, the European Court holds that Article 7, paragraph 1, ECHR protects an 'inviolable core right'.[289] This right occupies a 'prominent place in the Convention system of protection', and it 'should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment'.[290]

Therefore, the Court conceives the *nullum crimen sine lege* principle as a human right, and as 'an essential element of the rule of law', whose *ratio* is the protection of

[283] For this reason, it has been criticized. See, for instance, S HUERTA TOCILDO, 'The Weakened Concept of the European Principle of Criminal Legality', J GARCIA ROCA AND P SANTOLAYA (eds), Europe of Rights: a Compendium of the European Convention of Human Rights (Leiden-Boston, Martinus Nijhoff 2012) 315 ff

[284] Kononov v Latvia [GC], App n 36376/04 (ECtHR, 17 May 2010)

[285] A ASHWORTH, B EMMERSON AND A MACDONALD, Human rights and criminal justice (n 184) 292; C OVEY AND RCA WHITE, The European Convention (n 268) 298

[286] P VAN DIJK AND GJH VAN HOOF, Theory and Practice of the European Convention on Human Rights (Deventer-Boston, 2nd ed, Kluwer 1984) 365

[287] AH ROBERTSON AND JG MERRILLS, Human Rights in Europe (n 170) 125

[288] The wording of this paragraph thus reproduces Article 38 of the Statute of the International Court of Justice

[289] Liivik v Estonia, App n 12157/05 (ECtHR, 25 June 2009), para 92. On Article 7 and its nature of 'core right': V MANES, 'Introduzione' in V MANES AND V ZAGREBELSKY (eds), La Convenzione Europea dei Diritti dell'Uomo nell'Ordinamento Penale Italiano (Milano, Giuffré 2011) 28

[290] CR v UK (1995) Series A n 335-C, para 34; Ecer and Zeyrek v Turkey, ECHR 2001-II, para 29

the individual against the state.[291] The actual extent of this right has been progressively clarified by the European Court's case law. The following pages are dedicated to describe the ambit of application of Article 7 ECHR, as well as the meaning attributed by the Court to Article 7, paragraph 1, ECHR. On this basis, the case law dealing with the need for precision in law of criminal offences is analysed.

### *4.2 Ambit of application. The autonomous notion of 'criminal law'*

The significant impact of Article 7 ECHR on domestic legal systems is mostly due to its huge ambit of application, identified by the Court into an autonomously developed notion of 'criminal law'. The creation of autonomous notions is justified by the need to grant effective protection to the Convention rights: only using autonomous definitions of legal concepts can the Court avoid that the protection of human rights is subordinated to the sovereign will of the member states.[292] Thus, the creation of an autonomous notion of 'criminal law' is the means by which the Court assesses, with a high degree of effectiveness, whether member states comply with Article 7 ECHR.

The autonomous notion of criminal law was not created by the Court as such. The European Court applies to Article 7 ECHR two autonomous definition: that of 'criminal charge' (originally created for assessing the ambit of application of Article 6 ECHR), and that of 'law' (originally created for verifying the respect of the legality requirement incorporated in Articles 8-11 ECHR).

In order to understand the ambit of application of Article 7 ECHR, and the actual extent of the inviolable core right that it protects, the autonomous notions of 'criminal' and of 'law' must be analysed.

[291] Ibidem
[292] Engel And Others v The Netherlands (1976) Series A n 22, para 81

*4.2.1 The autonomous notion of 'criminal' (charge/liability/proceeding/law)*

Since 1961, the European Court has been facing complaints about the alleged misrepresentation of afflictive measures: while applicants claimed that those measures fell within the ambit of application of Articles 6 and 7 ECHR, the domestic law of the respondent states did not qualify them as criminal sanctions.[293]

Initially, the Court adopted a cautious attitude and respected the choice made by the respondent state, denying the criminal nature of the afflictive measures whenever the domestic law attributed them a different one (e.g., administrative, disciplinary). In 1976, with the famous *Engel* judgment, the attitude of the Court radically changed.[294] The Court relied on the peculiar 'purpose and object' of the Convention to assess that the procedural guarantees enshrined in Article 6 ECHR needed to be applied effectively.[295] This consideration justified the choice of reviewing the substantial nature of the proceeding under its scrutiny, qualified by the respondent state as having disciplinary nature. The Court declared that the qualification chosen by the state had 'only a formal and relative value', constituting 'no more than a starting point'. Thus, the Court clarified that 'the very nature of the offence is a factor of greater import' and that its supervision would be illusory if it did not 'also take into consideration 'the degree of severity of the penalty that the person concerned risks incurring'. In addition, the Court relied on teleological arguments ('the importance attached by the Convention to the respect for the physical liberty of the person') to assess that 'deprivations of liberty liable to be imposed as a punishment' arguably belong to the criminal sphere. The conclusion was that the disciplinary proceeding brought under its attention had criminal nature, thus falling within the ambit of application of Article 6 ECHR.

After 1976, the so called 'Engel criteria' have been constantly used by the European Court, either for assessing the ambit of application of the procedural guarantees

[293] Lawless v Ireland (no 3) (1961) Series A n 3; De Wilde, Ooms and Versyp ('Vagrancy') v Belgium (1971) Series A n 12

[294] JG MERRILLS, The Development of International Law (n 206) 100

[295] Engel and Others v the Netherlands (1976) Series A n 22

enshrined in Article 6 ECHR, or for verifying the respect of the *nullum crimen sine lege* principle protected by Article 7 ECHR. On the basis of the Engel criteria, the Court has assessed the criminal nature of confiscation orders, of customs fines, of the 'placement at the Government's disposal' of recidivists and habitual offender, of certain forms of preventive detention, of the annulment of a driving licence, of the expulsion of aliens in substitution of their imprisonment for criminal offences.[296] On the contrary, all measures concerning the execution or enforcement of a penalty (such as the modification of the limitation period) cannot be considered as part of the criminal law according to the Engel criteria. [297] The distinction is not always clear, as recognized by the same European Court.[298] Thus, measures with a considerable degree of severity (such as the remission of a sentence, a change in a regime for early release, the 'special police supervision' of Mafia suspects, and the registration of the offender's name in the national register of sexual criminal offenders) has been kept outside the autonomous notion of criminal law. [299]

In all these judgments, the Court has constantly referred to the principle of effectiveness. The need for an autonomous interpretation of the adjective 'criminal' is meant to allow judgements not limited by appearances, in order to provide effectiveness to the review exerted by the European Court. Frequently, the Court has also referred to the aim of the Convention (as that of 'protecting rights that are practical and effective'), thus showing the link between the practical and effective rights principle and the purposive method of interpretation.[300]

[296] Welch v UK (1995) Series A n 307-A; Sud Fondi Srl et Autres c Italie, Appl n 75909/01 (ECtHR, 20 January 2009); Jamil v France (1995) Series A n 317-B; Van Droogenbroeck v Belgium (1982) Series A n 50; M v Germany, App n 19359/04 (ECtHR, 17 December 2009); Mautes v Germany, App n 2008/07 (ECtHR, 13 January 2011); Kallweit v Germany, App n 17792/07 (ECtHR, 13 January 2011); Schmitz v Germany, App n 30493/04 (ECtHR, 9 June 2011); OH v Germany, App n 464/08 (ECtHR, 24 November 2011); Maszni v Romania, App n 59892/00 (ECtHR, 21 September 2006); Mihai Toma v Romania App n 1051/06 (ECtHR, 24 January 2012); Gurguchiani c Espagne, Appl n 16012/06 (ECtHR, 15 December 2009)

[297] Cöeme and Others v Belgium [GC], ECHR 2000-VII

[298] Kafkaris v Cyprus, App n 21906/04 (ECtHR [GC] 12 February 2008)

[299] Hogben v UK (1986) DR 46, 231; Grava c Italie App n 43522/98 (ECtHR, 10 July 2003); Kafkaris v Cyprus, App n 21906/04 (ECtHR [GC] 12 February 2008); Raimondo v Italy (1994) Series A n 281-A; Bouchacourt c France, App n 5335/05 (ECtHR, 17 December 2009)

[300] Eg: Cöeme and Others v Belgium [GC], ECHR 2000-VII

*4.2.2 The autonomous notion of 'law'*

Many Convention provisions expressly refer to the domestic law of the member states. Some of them contain a 'limitation clause', allowing the national authorities to interfere, under certain conditions, with the right or freedom protected.[301] Others identify and list lawful exceptions to the respect for the right protected.[302] In all these cases, the exception or the limitation to the human right or freedom protected must comply with and be prescribed by the domestic law. In order to operate an effective review over the compliance with this legality requirement, the Court has developed a unitary and autonomous notion of 'law'.

The notion of law elaborated by the European Court is unitary, because it has always the same meaning. According to the European Court, 'the Convention must be read as a whole, and interpreted in such a way as to promote internal consistency and harmony between its various provisions'.[303]Thus, in the case law relating to Article 7 ECHR, the Court frequently holds that 'when speaking of law, Article 7 alludes to the very same concept as that to which the Convention refers elsewhere when using that term'.[304] Similar statements can be found in other judgements concerning different Convention provisions.[305] In addition, the unitary character of the notion of law implies that the notion is applied both to civil law and to common law jurisdictions, independently from the theory of the sources of law adopted by each legal system.[306]

[301] See ECHR (as amended), Art 8, Art 9, Art 10, Art 11; Protocol no 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) Art 1 and Art 2; Protocol no 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) Art 2 and Art 3. These rights or freedoms can be limited, under conditions such as: that their limitation is 'prescribed by law', that the limitation is 'necessary in a democratic society', or that it pursues one of the legitimate aims indicated (for instance, public safety, national security). They are often identified as 'qualified' rights and freedoms. Qualified rights and freedom have been quite important in the history of the European Court's case law because they need, more than other provisions, the Court's interpretation in order to be applied (given that the conditions for interferences by the state are often formulated in ambiguous terms)

[302] ECHR (as amended), Art 2 and Art 5

[303] Stec and Others v UK [GC] ECHR 2005-X

[304] CR v UK (1995) Series A n 335-C

[305] Eg: Malone v UK (1984) Series A n 82

[306] Among the first judgments applying the autonomous notion of criminal law: Jamil v France (1995) Series A n 317-B; G v France (1995) Series A n 325-B; Cantoni v France, ECHR 1996-V

The notion of law is autonomous, because the Court gives the term a meaning which is independent from that in use among member states.[307] As already stated, the development of autonomous notions is justified by the need to grant effective protection to the Convention rights.[308] Thus, the creation of an autonomous notion of 'law' is the means by which the Court reviews the domestic law independently from national authorities.

The term is autonomous in a double sense. First of all, when the Court verifies the existence of a domestic legal basis, it is satisfied by a 'substantial notion' of law, which does not refer to strict formal criteria with respect to its institutional origins.[309] This choice was first expressed in 1979, when the Court had to apply Article 10 ECHR (protecting the freedom of expression) to a common law jurisdiction.[310] The following question arose: can an interference with the freedom of expression be 'prescribed by law' (and thus legitimate under Article 10, paragraph 2 ECHR) even if it is not regulated by a written provision? The European Court observed that interpreting 'law' only as 'statutory law' would imply the exclusion of every common law jurisdiction from the ambit of application of the European Convention. Hence, the Court admitted that legitimate restrictions to the freedom of expression may derive from unwritten law.

In addition to the existence of a domestic legal basis, the Court requires the domestic law to comply with qualitative standards: the law must be both 'adequately accessible' and 'formulated with sufficient precision to enable the citizen to regulate his conduct'.[311] The citizen 'must be able to have an indication (....) of the legal rules applicable to a given case' and 'must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail'.[312]

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[307] Many authors point out that 'law' is a 'semi-autonomous' notion, because it gives normative weight to national law (whereas, normally, international courts see the national law as a fact). Eg: G LAUTENBACH, The Rule of Law Concept in the Case Law of the European Court of Human Rights (Oxford, OUP 2013) 162-163

[308] Engel and Others v the Netherlands (1976) Series A no 22

[309] G LAUTENBACH, The Rule of Law Concept (n 306) 112

[310] The Sunday Times v UK (no 1) (1979) Series A no 30

[311] Sunday Times v the UK (No 1), para 49

[312] Silver and Others v UK (1978) Series A no 61, paras 87-88. Sometimes, the Court adds other standards, in order to meet the specificities of a peculiar provision. See, eg, the 'non-arbitrariness' requirement recurring in the case law on Art 5: ECtHR, case of X v UK, 5 November 1981, para 43

Today, according to the well-established case law of the European Court of Human Rights, the national law of the member states is 'a concept which comprises written as well as unwritten law and implies qualitative requirements, notably those of accessibility and foreseeability'.[313] It must be stressed, again, that this notion of law is unitary, and thus applicable also to the delicate field of criminal law. Consequently, the case law can legitimately be the ground for the criminal liability of the culprit, provided that its developments are 'consistent with the essence of the offence' and 'reasonably foreseeable'.[314]

The combination of the autonomous notions of 'criminal' and of the autonomous notion of 'law' makes it possible to conclude that, under the Strasbourg system, 'criminal law' is a concept which refers to any accessible and foreseeable norm, prescribing, for a certain act or omission, consequences that have criminal nature according to the Engel criteria. This is the ambit of application of the guarantees enshrined in both Article 6 and Article 7 ECHR.

### *4.3 The guarantees embodied in Article 7, paragraph 1 ECHR*

At first sight, Article 7, paragraph 1 of the European Convention encompasses only the non retroactivity principle, prohibiting the retrospective application of the criminal law, and of heavier penalties, to the detriment of the accused. The European Court, however, ascribes a wider dimension to the provision, by interpreting it as follows:

> 'Article 7 par 1 (art. 7-1) of the Convention 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

[313] CR v UK (1995) Series A n 335-C, para 33
[314] G v France (1995) Series A n 325-B, para 34

> accused's detriment, for instance by analogy; it follows from this that an offence must be clearly defined in law'.[315]

Thus, the provision grants the need for a clear definition in law of criminal offences and the void for an extensive construction of the criminal law to the detriment of the accused. In 2009, through an evolutive interpretation of the provision, the Court added the right to the retrospective application of the more lenient penalty (or *lex mitior* principle) and the right to be held criminally liable only for acts committed with mens rea (or culpability principle). [316]

On the whole, Article 7, paragraph 1 ECHR does not protect the principle of legality as conceived by continental legal systems.[317] According to the European case law, the provision voids any extensive construction unfavourable to the accused, and not only the use of analogy. Moreover, the European case law does not include in the provision the statutory nature of criminal offences, referring the *nullum crimen* principle to the autonomous and deformalized notion of 'law' analysed by the previous paragraph. Thus, it has been (correctly) pointed out that Article 7 par 1 ECHR does not entail the *nullum crimen sine lege*, but the *nullum crimen sine iure* principle.[318] This approach has been harshly criticized by continental scholars, fearing that such a deformalized notion will undermine the formal guarantees enshrined in the legality principle.[319] Sometimes, the same Strasbourg judges have been casting doubts upon the legitimacy of using the *nullum crimen sine iure* in the context of civil law

[315] Kokkinakis v Grece (1993) Series A n 260-A, para 52. Among the many studies dealing with this provision, see: A BERNARDI, 'Commento sub Art. 7 CEDU' in S BARTOLE, B CONFORTI AND G RAIMONDI (Eds), Commentario alla Convenzione Europea per la tutela dei diritti dell'uomo e delle libertà fondamentali (Padova, CEDAM 2001); M DE SALVIA, La Convenzione Europea dei diritti dell'uomo (Napoli, ESI 2001) 190 ff; V MANES AND V ZAGREBELSKY, La Convenzione europea (n 288) 27 ff; A ESPOSITO, Il diritto penale 'flessibile' (Torino, Giappichelli 2008) 307 ff; E NICOSIA, Convenzione Europea dei diritti dell'uomo e diritto penale (Torino, Giappichelli 2006) 56 ff; LE PETTITI, E DECAUX AND PH IMBERT (Eds), La Convention Européenne des Droit de l'Homme: Commentaire Article par Article (Paris, 2nd ed, Economica 1999); C RUSSO AND P QUAINI, La Convenzione Europea dei Diritti dell'Uomo e la Giurisprudenza della Corte di Strasburgo (Milano, Giuffré 2006) 125; L PETTOELLO MANTOVANI, 'Convenzione Europea e Principio di Legalità, in Studi in memeoria di Pietro Nuvolone, I (n 4)

[316] Scoppola v Italy (no 2) App n 10249/03 (ECtHR, 17 September 2009); Sud Fondi Srl et Autres c Italie, Appl n 75909/01 (ECtHR, 20 January 2009)

[317] E NICOSIA, Convenzione Europea (n 236) 57

[318] R KOERING-JOULIN, 'Pour un retour' (n 78) 247 ff

[319] S HUERTA TOCILDO, 'The Weakened Concept' (n 78); R KOERING-JOULIN, ''Pour un retour' (n 78) 247 ff

jurisdictions. [320] This possibility is analysed by the conclusion of the present chapter, after having taken into consideration the European case law on reasonable foreseeability.

### *4.4 Ius certum as reasonable foreseeability of the criminal law*

Among the guarantees embodied in Article 7, paragraph 1 ECHR, the European Court lists the need for a clear definition in law of criminal offences. As already stated, the notion that the law must be 'formulated with sufficient precision to enable the citizen to regulate his conduct' has been created by the Court as an essential requirement of the autonomous notion of law, thus applicable to all fields of the law.[321] Its *ratio* has been identified in the right of individuals to be able to foresee the consequences that their actions entail.[322] Of course, an absolute foreseeability is impossible to reach: thus, the Court is satisfied by a less strong parameter, identified as 'reasonable foreseeability'.[323]

In the field of the criminal law, the reasonable foreseeability requirement developed by the Court bears a double meaning. On one hand, it is the ground for assessing the presence of a valid 'criminal law', in accordance with the autonomous notions of 'criminal' and of 'law' elaborated by the European Court. On the other hand, it is the ground for verifying whether the domestic law satisfies the need for a clear definition in law of criminal offences.[324]

In the following pages, an analysis of the case law on reasonable foreseeability is provided, with the aim of deriving the position of the European Court of Human Rights on the need for precision in law of criminal offences. Before starting the analysis, however, two clarifications are needed. Firstly, as the European Court conceives the *nullum crimen sine lege* as *nullum crimen sine iure*, the need for precision in law of criminal offences is not equivalent to the need for precision of criminal statutes. Thus, in the following pages reference will be made to the *ius certum*

[320] Larissis and Others v Greece, ECHR 1998-I (Judge Repik)
[321] Sunday Times v UK (No 1) Series A n 30, para 49
[322] Silver and Others v UK (1978) Series A n 61, paras 87-88
[323] The Sunday Times v UK (No 1) (1979) Series A n 30
[324] Kokkinakis v Grece (1993) Series A n 260-A

principle, as a concept under which all the exigencies connected to the certainty of the *ius* ('law', in the autonomous notion provided by the Court) can be brought. Secondly, as reasonable foreseeability is first and foremost a requirement of the autonomous notion of law, it is important to remember that the Court makes use of this notion frequently, and not only when dealing with the need for precision in law of criminal offences. The Court speaks of reasonable foreseeability when assessing the need for a strict interpretation of criminal offences, when checking the non retroactivity of a new interpretation, when dealing with lacunae in the domestic law of the member states, when confronted with the retroactive application of a criminal statute.[325] Briefly, reasonable foreseeability is now the central element of the protection afforded by Article 7, paragraph 1 ECHR, and the judicial review over the compliance with this provision is frequently focused on reasonable foreseeability, even when the guarantees dealt with by the Court do not relate to the *ius certum* principle.

This *reductio ad unum* of the guarantees embodied in Article 7, paragraph 1 ECHR is not shared by the following analysis, which focuses only on the position of the European Court towards the need for precision in law of criminal offences. Thus, even if the Court makes frequent use of the notion of 'reasonable foreseeability', it is necessary to extract from the huge amount of case law on this topic only those conclusions which are valid for assessing the position on 'reasonable foreseeability' as *ius certum*.

[325] On the reasonable foreseeability of the domestic court's interpretation: Radio France and Others v France, ECHR 2004-II; Alimuçaj v Albania, App n 20134/05 (ECtHR, 7 February 2012); SW and CR v UK (1995) Series A nn 335-B and 335-C; Pessino v France, App n 40403/02 (ECtHR, 10 October 2006); Huhtamäki v Finland, App n 54468/09 (ECtHR, 6 March 2012). Specifically relating to Article 7, para 1 ECHR: Vyerentsov v Ukraine, App n 20372/11 (ECtHR, 11 April 2013). Mutatis mutandis, see also: Baranowski v Poland, ECHR 2000-III; Kawka v Poland, App n 25874/94 (ECtHR, 9 January 2001); ECtHR, case of Yeloyev v Ukraine, App n 17283/02 (ECtHR, 6 November 2008); Farhad Aliyev v Azerbaijan, App n 37138/06 (ECtHR, 9 November 2010); Tymoshenko v Ukraine, App n 49872/11 (ECtHR, 30 April 2013). On the retroactive application of a new criminal statute: Achour v France [GC], ECHR 2006-IV

### *4.5 The developments of the European case law on* ius certum

As already mentioned in the previous paragraphs, the notion of foreseeability was introduced in the European case law as a qualitative requirement contributing to shape the autonomous notion of 'law' under the Convention system, thus being applicable to any reference the Convention makes to the domestic law of the member states.

The first and leading judgment on the autonomous notion of law was released by the Court in 1979, in the case of *Sunday Times v the UK*.[326] The publisher, the editor and a group of journalists of the British weekly newspaper had applied the Convention organs, alleging a violation of Article 10 ECHR. They claimed that the British authorities had unlawfully restrained their freedom of expression, by applying to their publications the restrictions of the common law-based 'law of contempt'. The applicants maintained that the judge-made law could not be the ground for a legitimate interference with Article 10 ECHR, which allows restriction to the freedom of expression only if (among other requirements) the interference is 'prescribed by law'.[327]

The European Court dismissed the applicants' claim, stating that the expression 'prescribed by law' might be satisfied either by statutory or by judge-made law (hence the famous statement that 'the word "law" in the expression "prescribed by law" covers not only statute but also unwritten law'). The Court clarified that the requirements flowing from that expression are the 'accessibility' and 'foreseeability' of the interferences with one's freedom, meaning that, on the one hand, 'the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case' and, on the other hand, that 'he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail'.

The Court wisely added that the consequences which a given action may entail 'need not be foreseeable with absolute certainty', because this is an impossible result and

[326] The Sunday Times v UK (No 1) (1979) Series A n 30
[327] Ibidem

'whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances'. Accordingly, the Court recognized the need for interpretation of laws (which might be 'inevitably couched in vague terms'), and reached the conclusion that in the concrete case under review the common law discipline had been sufficiently specified by the English courts, so that the applicants had been 'able to foresee, to a degree that was reasonable in the circumstances' the consequences of their conduct. The Court thus recognized no violation of Article 10 ECHR.

In the Kokkinakis judgment of 1993, the Court extended the autonomous notion of law elaborated in *Sunday Times* to the *nullum crimen* principle, opening the door to the subsequent statement that 'when speaking of law, Article 7 alludes to the very same concept as that to which the Convention refers elsewhere when using that term'.[328]

The Kokkinakis judgment involved the vague offence of 'proselytism' provided by the Greek criminal law.[329] The compliance of this offence with the Convention standards was firstly analysed from the standpoint of Article 9 ECHR, protecting the freedom of religion. The Court recognized that 'there existed a body of settled national case law (...) which had been published and was accessible (...) and was such as to enable Mr Kokkinakis to regulate his conduct on the matter'. Accordingly, the interference with the applicant's freedom of religion was deemed to be 'prescribed by law' by the European Court, and no violation of Article 9 ECHR was found.

This review was followed by an analysis of the legitimacy of the offence under Article 7 ECHR. The European Court held, for the first time, that the *nullum crimen* principle involves a 'clear definition in law of criminal offences', adding that the requirement 'is satisfied when the individual can know from the wording of the relevant provision and, if need be, with the assistance of the court's interpretation of it, what acts and omissions will make him liable'. The Court thus demonstrated the close connection between the *nullum crimen* principle and the autonomous notion of 'law' elaborated in *Sunday Times*, by referring back to the conclusions reached under Article 9 ECHR and finding no violation of Article 7 ECHR.

[328] SW and CR v UK (1995) Series A nn 335-B and 335-C
[329] Kokkinakis v Grece (1993) Series A n 260-A

The interest of the European Court for the foreseeability of the criminal law surfaced in subsequent judgments,[330] finally reaching its climax with the famous 'marital rape' cases (*C.R.* and *S.W. v the UK*).[331]

It must be underlined that in those two well-known and hotly debated judgements, the notion of foreseeability was mainly used by the Court in its chronological dimension: it was the parameter used by the Court to verify the legitimacy of an evolution of the English criminal law at the detriment of the accused. Thus, foreseeability was used to evaluate the alleged retroactivity of a criminal law provision, and not for assessing its degree of precision. However, the reasoning of those judgments bears a considerable importance for all the subsequent case law on *ius certum*. In *C.R.* and *S.W.*, for the first time, the Strasbourg Court referred to the rule of law as the context in which to place the guarantees enshrined in Article 7, paragraph 1 ECHR. Underlying the 'prominent place' of these guarantees in the Convention system, the Court assessed that the purpose of the *nullum crimen sine iure* is that of providing 'effective safeguards against arbitrary prosecution, conviction and punishment'. This statement would lately be present in many judgments concerning Article 7 ECHR.[332] As in the earlier *Kokkinakis* case, the Court recognized that, even in the delicate field of criminal liability, laws might be couched in vague terms and thus need interpretation to produce foreseeable results. The Court identified the requirements of a legitimate 'gradual clarification' of the criminal law: namely, consistency with the essence of the offence, and reasonable foreseeability. Thus, in its third relevant application of the foreseeability requirement to the criminal law, the Court introduced the parameters for assessing the legitimacy of the developments occurring into the jugde-made law on criminal matters.

[330] Eg: G v France (1995) Series A n 325-B, in which the Court referred ex officio to the foreseeability of a criminal provision

[331] SW and CR v UK (1995) Series A nn 335-B and 335-C

[332] In the case law referring to Article 7 ECHR and foreseeability, it is possible to find many other judgments assessing, word to word, the same: Ecer and Zeyrek v Turkey, ECHR 2001-II; Veeber v Estonia (No 2), ECHR 2003-I; Gabarri Moreno v Spain, App n 68066/01 (ECtHR, 22 July 2003); Puhk v Estonia, App n 55103/00 (ECtHR, 10 February 2004); Kafkaris v Cyprus App n 21906/04 (ECtHR [GC] 12 February 2008); Kononov v Latvia, App n 36376/04 (ECtHR [GC] 17 May 2010); Korbely v Hungary, App n 9174/02 (ECtHR [GC]19 September 2008); Liivik v Estonia App n 12157/05 (ECtHR, 25 June 2009); Scoppola v Italy (No 2) App n 10249/03 (ECtHR, 17 September 2009); Gurguchiani c Espagne, Appl no 16012/06 (ECtHR, 15 December 2009); Alimuçaj v Albania, App n 20134/05 (ECtHR, 7 February 2012); Camilleri v Malta, App n 42931/10 (ECtHR, 22 January 2013)

*C.R.* and *S.W.* were also the cases in which the Court introduced the adjective 'reasonable' to the foreseeability requirement. The Court motivated this choice by declaring that the wording of most statutes bears an inevitable element of imprecision, due to the fact that laws must be of general application. In addition, it acknowledged that a certain imprecision might be useful to avoid excessive rigidity, so that the law can keep pace with the developments of society.[333]

The recognition of the relative nature of foreseeability, not conceived as an absolute requirement, but as a reasonable standard to be aimed to, cleared the ground for the subsequent creation of parameters used for assessing whether a reasonable foreseeability is achieved. These parameters were elaborated in the following *Groppera* case, in which the Court was asked to assess whether an international law-based provision limiting the applicants' freedom of expression had been reasonably foreseeable to them.[334] On that occasion, the Court assessed the following:

> '[T]he scope of the concepts of foreseeability and accessibility depends to a considerable degree on the content of the instrument in issue, the field it is designed to cover and the number and status of those to whom it is addressed'[335]

The three parameters thus identified (content of the instrument, field the instrument is designed to cover, number and statutes of those to whom the instrument is addressed) were first used to evaluate the foreseeability of the criminal law in the *Cantoni* judgment. [336] On that occasion, the European Court warned all the 'persons carrying on a professional activity' of the need to 'proceed with a high degree of caution', being 'expected to take special care in assessing the risks that such activity entails'. From that moment on, the Court made frequent use of the 'content', 'field' and 'subjects' of the criminal provision to assess its compliance with the reasonable foreseeability requirement.[337]

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[333] See also Cantoni v France, ECHR 1996-V
[334] Groppera Radio AG and Others v Switzerland (1990) Series A n 173
[335] Ibidem
[336] Cantoni v France, ECHR 1996-V
[337] Eg: Başkaya and Okçuoğlu v Turkey [GC], ECHR 1999-IV; KA and AD v Belgium, App no 42758/98; 45558/99 (ECtHR, 17 February 2005); Flinkkilä and Others v Finland, App n 25576/04

By the end of the 1990s, the applications concerning vague criminal laws increased.

In the *Grigoriades* case, the applicant expressly contested that the criminal offence of 'desertion and insult to the army' was too loosely defined to satisfy the *ius certum* principle under Article 7, paragraph1 of the Convention. [338] However, since he also alleged a violation of Article 10 ECHR (freedom of expression), the Court mainly concentrated on this second claim. The Court held that the ordinary meaning of the word 'insult' was sufficiently clear to enable the applicant to foresee the risk of a criminal sanction for his actions. Thus, the Court found that the interference with the applicant's freedom of expression had been 'prescribed by law', and no violation of the Convention was found.

In the *Larissis* case, the applicants complained about the vague offence of 'proselytism' already examined by the Court in the *Kokkinakis* case, introducing the new argument of the lack of consistency of the domestic case law. The Court analysed the situation only from the standpoint of Article 7 ECHR; however, relying on its previous findings in the *Kokkinakis* judgment, it denied that a violation of the Convention had occurred.

In the *Başkaya and Okçuoğlu* case, the applicants relied on Article 7, paragraph 1 ECHR to challenge the compatibility with the Convention of the offence of 'propaganda against the state's indivisibility'. The Court applied the parameters of the content and field of the law, holding that the security of the state may require certain discretion by domestic judges. Having thus evaluated the quality of the national case law, the Court concluded that the offence was reasonably foreseeable.[339]

The *Grigoriades, Larissis and Başkaya* judgments demonstrate a growing attention by the applicants and by the Court to the protection of *ius certum* under Article 7, pargraph 1 ECHR; at the same time, they show a certain resistance, by part of the Court, to assess a violation of the Convention in this regard. In the early 2000s, the attention for *ius certum* was temporarily abandoned, and the European Court of Human Rights took into consideration reasonable foreseeability only as a parameter to verify if a new 'criminal law' had been applied retrospectively to the detriment of the

(ECtHR, 6 April 2010); Kononov v Latvia [GC], n 36376/04, ECHR 2010; Michaud v France, App n 12323/11 (ECtHR, 6 December 2012)

[338] Grigoriades v Greece, ECHR 1997-VII

[339] Başkaya and Okçuoğlu v Turkey [GC], ECHR 1999-IV

accused.[340] By the mid-2000s, the notion of reasonable foreseeability as a guarantee for *ius certum* permeated again the Strasbourg case law.[341] However, the attitude of the Court was still quite rigid, denying any violation of the Convention.

In the *Moiseyev* case, the applicant complained of his conviction for 'high treason in the form of espionage' (i.e., 'communication of state secrets'), committed at a time when there was no law specifying the notion of state secrets.[342] The Court held that the interpretation given by the domestic courts to the criminal provision for which the applicant had been convicted had been 'consistent with the essence of the offence'. Thus, recalling its previous findings in the *Jorgic* case, the Court stated that 'an interpretation (...) which was – as in the present case – consistent with the essence of that offence, must, as a rule, be considered foreseeable'.[343] By relying on this assumption, the Court found no violation of Article 7 ECHR.

In the *K.A. and A.D.* case of 2005, the applicants relied on the absence of an established case law to complain about the lack of foreseeability of their conviction for sadomasochist acts, punished by the domestic court under the offence of 'actual bodily harm'.[344] The Court denied that the total lack of case law could amount to a violation of Article 7 ECHR, relying on two considerations: firstly, the sadomasochist acts committed by the applicants were so extreme that they could not be expected to be frequent, thus giving birth to an established case law on the topic; secondly, the applicants were a judge and a medical doctor, so they could not claim to be unaware of the serious legal and medical consequences of their actions. On this basis, the Court denied that there had been a violation of the reasonable foreseeability requirement. In this case, the Court relied substantially on the parameter of the 'status of those to whom the law is addressed' in order to reach this conclusion.

[340] Eg: Veeber v Estonia (No 2), ECHR 2003-I; Gabarri Moreno v Spain, App n 68066/01 (ECtHR, 22 July 2003); Grava c Italie, App n 43522/98 (ECtHR, 10 July 2003)**;** Puhk v Estonia, App n 55103/00 (ECtHR, 10 February 2004); Achour v France [GC], App n 67335/01, ECHR 2006-IV; Pessino v France, App n 40403/02 (ECtHR, 10 October 2006); Kafkaris v Cyprus, App n 21906/04 (ECtHR [GC] 12 February 2008)

[341] Eg : KA and AD v Belgium, App n 42758/98; 45558/99 (ECtHR, 17 February 2005); Kafkaris v Cyprus, App n 21906/04 (ECtHR [GC] 12 February 2008)

[342] Moiseyev v Russia, App n 62936/00 (ECtHR, 9 October 2008)

[343] Jorgic v Germany, App n 74613/01 (ECtHR, 12 July 2007)

[344] KA and AD v Belgium, App nn 42758/98 and 45558/99 (ECtHR, 17 February 2005)

Subsequent judgments also rely, almost exclusively, on this subjective parameter in order to deny the lack of foreseeability of the criminal law.[345]

Finally, by the end of the 2000s, the Court started to assess violations of Article 7, paragraph 1 ECHR due to an infringement of the *ius certum* principle. The first case was that of Mr. Kafkaris, a Cypriotic applicant who had been sentenced to life imprisonment for murder. According to the Prison Regulations applicable in Cyprus at the time of Mr. Kafkaris' conviction, 'life imprisonment' was tantamount to imprisonment for a period of twenty years. However, while the applicant was serving his sentence, the Prison Regulations had been repealed by the domestic Supreme Court, and a new statutory law, denying the reduction, had entered into force. Mr. Kafkaris applied the European Court and alleged an infringement of Article 7, paragraph 1 EHCR, due to the retroactive application of a heavier penalty. The Strasbourg Court, however, was not satisfied by the qualification of the phenomenon as a retrospective application of the criminal law, and decided to autonomously qualify the case as a question involving the 'quality of the law'.

The Court thus verified that, when the applicant had committed the offence, all domestic authorities were working on the premise that life imprisonment was tantamount to an imprisonment of twenty years. The Prison Regulations concerned the execution of the penalty, and not the penalty itself, but the distinction was basically unknown to the same domestic authorities (the first clarification being given only after the commission of the offence by the applicant). On this basis, the Court concluded that, at the time when the applicant had committed the offence, the relevant domestic law 'taken as a whole was not formulated with sufficient precision as to enable the applicant to discern, even with appropriate advice, to a degree that was reasonable in the circumstances, the scope of the penalty'. Accordingly, the Court assessed that a violation of Article 7, paragraph 1 ECHR had occurred. Interestingly, a partly dissenting opinion criticized the choice made by the majority to use the 'quality of the law' requirement in relation to Article 7 ECHR, assuming that it belonged only to the Convention provisions referring to interferences 'prescribed by law'.[346]

[345] Eg: Kuolelis and Others v Lithuania, App nn 74357/01, 26764/02 and 27434/02 (ECtHR, 19 February 2008)

[346] Kafkaris v Cyprus App no 21906/04 (ECtHR [GC] 12 February 2008) (Judge Loucaides, joined by Judge Jočienė)

The reasoning of the *Kafkaris* case was undoubtedly incoherent where the Court first applied the reasonable foreseeability requirement, and then refused to recognize that a retrospective application of a heavier penalty had occurred. As another dissenting opinion pointed out, this was a 'superb contradiction' in the reasoning.[347] However, with specific regard to the findings on *ius certum*, it must be stressed that the Court might have never been referring to the 'quality of law' requirement in relation to Article 7, paragraph 1 ECHR, but this does not imply that the requirement had never been applied, before, to the criminal law. As demonstrated by the above analysis, the quality of the law has always been the prime concern of the Court when speaking of criminal offences. The *Kafkaris* judgment was perfectly in line with the previous judgments, applying to the criminal law the qualitative requirements of accessibility and foreseeability. In addition, as already explained, the need for a coherent interpretation of the Convention requires that the same term be given the same meaning: thus, if the provisions referring to interferences 'prescribed by law' imply qualitative requirements, all other provisions referring to the notion of 'law' should comply with the same standards.

The following *Liivik* judgment confirmed the conclusion that the 'quality of law' test must be applied also to the criminal law. The case originated in an application concerning the Estonian offence of 'misuse of official position', criminalizing the 'intentional misuse by an official of his or her official position with the intention to cause significant damage, or if thereby significant damage is caused, to the legally protected rights or interests of another person or to public interests'.[348] The offence had been inherited from the former Sovietic legal system: thus, the domestic case law giving shape to the vague notions composing the offence (such as 'significant damage', or 'public interest') had been developed under the influence of a totally different economic system. After the fall of the Sovietic Union, the Estonian Supreme Court had given an interpretation to the 'significant damage' which did not, however, call for specific criteria on which the damage could be assessed. Therefore, when the applicant was tried, domestic courts were relying on vague notions (such as the incompatibility with a 'general sense of justice') in order to determine if a significant

[347] Kafkaris v Cyprus, App n 21906/04 (ECtHR [GC] 12 February 2008) (Judge Borrego Borrego)
[348] Liivik v Estonia, App n 12157/05 (ECtHR, 25 June 2009)

damage had occurred. The applicant thus applied the European Court of Human Rights, alleging that his sentence had been based on an 'unclear and incomprehensible (...) law' and thus had violated Article 7, paragraph 1 ECHR. The European Court, having analysed the background in which the offence had been developed, concluded as follows:

> '[O]n the whole (...) the interpretation and application of Article 161 in the present case involved the use of such broad notions and such vague criteria that the criminal provision in question was not of the quality required under the Convention in terms of its clarity and the foreseeability of its effects'.

Another judgement followed in 2012, concerning the application of Mr. Alimuçaj, an Albanian citizen who had been sentenced to twenty years' imprisonment for deception, on the basis of a new calculation system elaborated by the domestic courts after the commission of the offence, and on the ground of a new law attaching criminal consequences to the process of loan-taking.[349] Mr. Alimuçaj had applied the European Court complaining of the retrospective application of a heavier penalty, and of the lack of a legal basis for his conviction. The Court dismissed the second claim, and checked only whether, at the time when the offence was committed, there was 'interpretive case law which would satisfy the foreseeability test' with regard to the final amount of twenty years' imprisonment. The Court concluded that, at the time the applicant had committed the offence, he could not have reasonably foreseen such a heavy penalty: thus, a violation of Article 7, paragraph 1 ECHR was declared.
Even though the judgment focused on the retrospective imposition of a heavier penalty, a dissenting opinion wisely pointed out that in the case of Mr. Alimuçaj the actual issue to be taken into consideration was the lack of foreseeability of the unlawfulness of the loan-taking, because, at the time when the applicant was engaged in the relevant behaviours, there was 'absolutely nothing to indicate or suggest that the applicant's actions would be considered unlawful'.[350]

[349]Alimuçaj v Albania, App n 20134/05 (ECtHR, 7 February 2012)
[350]Alimuçaj v Albania, App n 20134/05 (ECtHR, 7 February 2012) (Judges Šikuta and De Gaetano) par 4

In 2013, in the case of *Camilleri v Malta*, the Court found again a violation of Article 7, paragraph 1 ECHR due to an infringement of *the ius certum* principle.[351] The case originated in an application by Mr Camilleri, a Maltese citizen sentenced to fifteen years' imprisonment for possession of illegal drugs. Under the Maltese law, the Attorney General choses whether such offences are to be tried by the Criminal Court, or by the Magistrates' Court, with relevant consequences as to the penalty applicable for a verdict of guilty. Mr Camilleri complained that the Maltese law gives the Attorney General total discretion in deciding which of the two punishment brackets is to be applied in the concrete case, thus causing an infringement of Articles 6 and 7 ECHR.

As for the alleged violation of the *nullum crimen* principle, the Court acknowledged that the relevant provision was not ambiguous or unclear in respect of what actions were criminal: however, the Maltese law did not determine with any degree of precision the circumstances in which a particular punishment bracket was to be applied, because the criteria followed by the Attorney General were not published, neither made the subject of a judicial clarification over the years. The domestic case law demonstrated that the choice of the punishment bracket was unpredictable: thus, the applicant could not have foreseen the penalty to which he had been sentenced. The Court held that 'the relevant legal provision failed to satisfy the foreseeability requirement and provide effective safeguards against arbitrary punishment', thus causing an infringement of Article 7, paragraph 1 ECHR.

For the time being, these remain the only judgments in which the European Court found a violation of Article 7, paragraph 1 ECHR due to the an infringement of *ius certum*.[352] On the whole, the topic of reasonable foreseeability as a guarantee for *ius certum* has been developed by the Court in tight connection with the other aspects of reasonable foreseeability, having scarcely received autonomous attention. However, some conclusions can be drawn as to the position of the European Court of Human Rights towards the need for precision in law of criminal offences.

[351] Camilleri v Malta, App no 42931/10 (ECtHR, 22 January 2013)
[352] The conclusions of the present research are updated to December 2013

### *4.6 The main features of* ius certum *as reasonable foreseeability*

#### *4.6.1 The subjective dimension*

The notion of 'foreseeability' can have an objective or a subjective dimension. Objective foreseeability is a concept referring to the law as a means to regulate the relationship between state powers and private citizens. It is a requirement working at the level of the state responsibility, serving the purpose of providing 'effective safeguards against arbitrary prosecution, conviction and punishment'. [353] Subjective foreseeability is a prerequisite for the existence of mens rea, allowing the citizens to know in advance which conducts will make them criminally liable. It is a requirement working at the level of the citizens responsibility, allowing them to predict the consequences of their actions and to act accordingly. In the case law dealing with the need for precision, the Strasbourg Court mainly focuses on this second perspective, defining foreseeability as the situation in which 'the individual can know (...) what acts and omissions will make him liable',[354] and holding the 'number and status' of those to whom the law is addressed as a central element of this evaluation.[355]

Such a subjective perspective on the foreseeability of the law is not surprising. On the one side, the Court is committed to the protection of human rights: thus, it approaches both the principle of legality and the need for a clear definition in law of criminal offences as human rights. On the other side, the subjective perspective is strictly related to the relative dimension of *ius certum.*

[353] In the case law referring to Article 7 ECHR and foreseeability, it is possible to find many other judgments assessing, word to word, the same: Ecer and Zeyrek v Turkey, App nn 29295/95 and 29363/95, ECHR 2001-II; Veeber v Estonia (No 2) App n 45771/99, ECHR 2003-I; Gabarri Moreno v Spain, App n 68066/01, 22 July 2003 (unreported); Puhk v Estonia, App n 55103/00, 10 February 2004 (unreported); Kafkaris v Cyprus, App n 21906/04 (ECtHR [GC] 12 February 2008); Kononov v Latvia [GC], App n 36376/04, ECHR 2010; Korbely v Hungary [GC], App n 9174/02, 19 September 2008 (unreported ); Liivik v Estonia, App n 12157/05 (ECtHR, 25 June 2009); Scoppola v Italy (No 2) App n 10249/03 (ECtHR, 17 September 2009); Gurguchiani c Espagne, App n 16012/06 (ECtHR, 15 December 2009); Alimuçaj v Albania, App n 20134/05 (ECtHR, 7 February 2012)

[354] Kokkinakis v Grece (1993) Series A n 260-A

[355] Groppera Radio AG and Others v Switzerland (1990) Series A n 173

### *4.6.2 The relative dimension*

In the European case law, *ius certum* is acknowledged a relative dimension. Being committed to an evolutive interpretation of the Convention, the Court conceives the use of broad terms as a necessary tool to allow the law to adjust to social developments. Thus, the existence of a 'penumbra of doubt' in relation to borderline facts does not in itself make a provision incompatible with Article 7, provided that it proves to be sufficiently clear in the large majority of cases.[356] Thus, the consequences which a given action may entail 'need not be foreseeable with absolute certainty',[357] because 'whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances'.[358] The Court is satisfied by a 'reasonable' foreseeability of the law,[359] depending 'to a considerable degree on the content of the instrument in issue, the field it is designed to cover and the number and status of those to whom it is addressed'.[360] The status of the addressee of the criminal provision has often been taken into consideration by the Court to evaluate the foreseeability of the law.

### *4.6.3 The focus on the interpretation of the law*

Connected to the subjective and relative dimension of *ius certum* is the relevance attributed by the European Court to the interpretation of the law. If the absolute precision of a written provision is held as something impossible to reach and not convenient, then the European notion of *ius certum* imposes a certain degree of judicial activism by domestic courts.

Indeed, according to the European Court, the role of the judiciary is that of dissipating the interpretative doubts that the wording of criminal statutes might leave, taking into

[356] Cantoni v France, ECHR 1996-V
[357] The Sunday Times v UK (No 1) (1979) Series A n 30
[358] Cantoni v France, ECHR 1996-V
[359] SW and CR v UK (1995) Series A nn 335-B and 335-C; Cantoni v France, ECHR 1996-V; Soros v France, App n 50425/06 (ECtHR, 6/10/2011)
[360] Groppera Radio AG and Others v Switzerland (1990) Series A n 173

account the unavoidable changes of the human society.[361] Thus, the Court approves and encourages judicial activism at the national level, because the interpretation of the law is the only tool by which reasonable foreseeability of the (inherently) uncertain statutory provisions can be granted.

### *4.6.4 The chronological dimension*

The focus on the interpretation of the law inevitably attributes to the need for precision a chronological dimension, because the interpretation develops over period of times.[362] Thus, not only there must be a body of national case law, published, accessible, and such as to enable the individual to regulate his/her conduct on the matter.[363] It is also necessary that the activity of the judiciary respects the requirements of a legitimate 'gradual clarification' of the criminal law: namely, consistency with the essence of the offence, and reasonable foreseeability.

Clearly, the 'consistence with the essence of the offence' requirement makes foreseeability easily dependent on the nature of the offence under review. Indeed, when the offence consists in behaviours which are naturally conceived as criminal (e.g., rape , murder), the Court is more prone to assess the foreseeability of changes in the law, even though unfavourable to the accused.[364]

As for the foreseeability of judge-made law, it is never in doubt whenever there is a 'long-established case law', having taken a 'clear and consistent position' towards the interpretation and application of the written provision.[365] However, if that case law has been developed under a different legal system, that is reputed by the Court as tantanamount to its absence.[366] A newly developed interpretation is presumed to be foreseeable when it is consistent with the essence of the offence. [367]

[361] Cantoni v France, ECHR 1996-V
[362] SW and CV v UK (1995) Series A nn 335-B and 335-C
[363] Kokkinakis v Grece (1993) Series A n 260-A
[364] SW and CR v UK (1995) Series A nn 335-B and 335-C, Streletz, Kessler and Krenz v Germany, ECHR 2001-II
[365] Achour v France [GC], App n 67335/01, ECHR 2006-IV
[366] Alimuçaj v Albania, App n 20134/05 (ECtHR, 7 February 2012
[367] Jorgic v Germany, Aopp n 74613/01, 12 July 2007, ECHR 2007 (extracts)

The lack of a long-established case law might be of no importance when the applicants are professionals or persons otherwise expected to know the regulation on a certain issue.[368] This highlights, again, the relative nature of *ius certum*, and its tendency to be a notion with a subjective dimension.

## 5. Conclusion

### *5.1 Critical evaluation of the European case law on* ius certum

As clarified in the above analysis, the European Court of Human Rights develops autonomous definitions for the legal concepts to which the European Convention on Human Rights refers. 'Law' is thus a concept which 'comprises written as well as unwritten law and implies qualitative requirements, notably those of accessibility and foreseeability'.[369] The origins of this definition lie in the need for the Court to provide an effective review over the laws developed in common law jurisdictions. According to this notion of law, the *nullum crimen sine lege* principle is conceived by the European Court as *nullum crimen sine iure*, and the precise definition in law of criminal offences is conceived as reasonable foreseeability of written and unwritten laws (*ius certum*).

The approach of the European Court to the *nullum crimen* principle has been harshly criticized by continental scholars, fearing that such a deformalized notion of law will undermine the formal guarantees enshrined in the principle of legality.[370] Sometimes, the same Strasbourg judges have been casting doubts upon the legitimacy of using the *nullum crimen sine iure* in the context of civil law jurisdictions.[371] Leaving aside the other features of the *nullum crimen* principle, some criticisms can indeed be moved to the European notion of *ius certum*.

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[368] KA and AD v Belgium, App n 42758/98; 45558/99 (ECtHR, 17 February 2005), para 55. See also Custers, Deveaux And Turk v Denmark, App n 11843/03; 11847/03; 11849/03 (ECtHR, 3 May 2007) para 81

[369] ECtHR, case of CR v UK, 22 November 1995, para 33

[370] S HUERTA TOCILDO, 'The Weakened Concept' (n 78); R KOERING-JOULIN, 'Pour un retour' (n 78) 247 ff; V VALENTINI, Diritto penale intertemporale : logiche continentali ed ermeneutica europea (Milano, Giuffrè 2012)

[371] Larissis and Others v Greece, ECHR 1998-I (Judge Repik)

As demonstrated above, conceiving the need for precision as reasonable foreseeability of the law means that this notion is given a subjective and relative dimension. The relative dimension allows the existence of vague laws and makes the requirement dependent on elements such as the content of the instrument in issue, the field it is designed to cover and the number and status of those to whom it is addressed. This carries the risk of unduly bad legislation and of discriminations. The subjective dimension is even more dangerous. If *ius certum* is conceived as a human right, this means that it can be balanced with other rights of equivalent (or even superior) value, such as the right to life.[372] In addition, as wisely underlined by Judge Zupančič, if the powerful objective guarantees entrenched in the legality principle are reduced to a 'subjective right to advance notice of what is punishable under positive law', the risk is that the criminal actor is made a 'legislator in casu proprio.'[373]

It could be objected that the European Court of Human Rights does not entirely refuses the notion that *ius certum* has also an 'institutional' dimension, i.e. a dimension addressing the state powers and not only citizens. Indeed, if *ius certum*, by reason of its subjective and relative dimension, requires an active role of the judiciary, it also serves the purpose of limiting the activism of domestic courts. When courts participate to the creation of a valid domestic law under the Convention system, they have to comply with the same standards of quality that the written law must fulfil: namely, accessibility and foreseeability. These requirements are essential to the autonomous notion of law developed by the European Court: what is not accessible and reasonably foreseeable cannot even be considered as law.[374] Thus, *ius certum* requires the domestic case law to develop in a 'reasonably foreseeable' way, restraining the discretion of the judiciary.

However, the objection must be rejected. The European Court of Human Rights is not really interested in what is outside the limits of its role: and its role is working with human rights, not with rules and principles regulating the activity of the state powers. Thus, its practice clearly demonstrates that the focus is on *ius certum* as a requirement laying the necessary grounds for the existence of mens rea. Accordingly, the restraints

[372] This is what the Court did in the famous 'Berlin Wall' cases : K-H W v Germany, ECHR 2001-II; Streletz, Kessler and Krenz v Germany, ECHR 2001-II

[373] Streletz, Kessler and Krenz v Germany, ECHR 2001-II (Judge Zupančič)

[374] The Sunday Times v UK (No 1) (1979) Series A n 30

placed on the judicial activity by the European Court of Human Rights are not grounded on objective parameters, but on the same subjective notion of 'foreseeability' which is the ground for mens rea. Thus, the only limitations to the discretion of courts seem to depend on the ability of the concrete individual to foresee their decisions. As a consequence, if the addressee of the criminal prohibition, by reason of its status or by reason of the field and object of the criminal law, could foresee the possibility of his/her criminal liability, no restraints are placed on the state powers: not even the non-retroactivity of unfavourable changes in the law to the disadvantage of the accused.
For this reason, the European notion of *ius certum* as subjective foreseeability should be 'handled with care' when transposed into domestic legal systems, where the need for precision in law of criminal offences is not (only) a human right.

### *5.2 Comparison between the European case law on* ius certum *and the Italian constitutional case law on* lex certa

As demonstrated in the first chapter, *lex certa* is a constitutional principle of the Italian criminal law. According to the Italian Constitutional Court, *lex certa* is not always enforced in the criminal law by providing a rigorous description of the fact.[375] Hence, the Constitutional Court admits that precision is a quality of the law resulting not only from the drafting of statutes, but also from their interpretation and application.[376] Accordingly, the aim of *lex certa* is that of restricting the creative power of judges into the limits of an 'ordinary and verifiable' interpretation, so to give individuals the opportunity of knowing the law in advance.[377] Recently, the constitutional case law has been translating the need to restrain courts into the limits of an ordinary and verifiable interpretation into need for a constitutional or steady interpretation of vague provisions. This position resembles the European *ius certum* insofar as it attributes to interpretation a relevant role in granting precision.

[375] C Cost, sent 23/1961; C Cost, sent 79/1982; C Cost, ord 169/983; C Cost, sent 188/1975; C Cost, sent 49/1980; C Cost, ord 84/1984; C Cost, sent 475/1988; C Cost, sent 5/2004, <www.cortecostituzionale.it>
[376] C Cost, sent 247/1989, <www.cortecostituzionale.it>
[377] C Cost, sent 34/1995; C Cost, sent 327/2008; C Cost, sent 21/2009, <www.cortecostituzionale.it>

On these grounds, it must be acknowledged that the main difference theoretically separating the position of the Italian Constitutional Court and of the European Court of Human Rights (i.e., the object of the certainty requirement) is not actually so profound. The Italian constitutional system does not recognize the role of judicial decisions in the law-creating process and, accordingly, the need for precision in law of criminal offences is referred to the statutory law. However, as demonstrated in the first chapter, the case law developed by the Italian Constitutional Court acknowledges a relevant role to the decisions of courts in the process or granting precision: it is for this reason that *lex certa* is deemed to require a constitutional or steady interpretation of vague provision. Thus, the recent developments of the Italian constitutional case law show an interesting convergence towards the results of the European case law on *ius certum*, by taking into account the judicial practice as a source of precision and by acknowledging the role of *lex certa* in providing the essential conditions for the existence of a *mens rea*.

However, at least two important differences remain between the positions elaborated by the Italian Constitutional Court and by the European Court of Human Rights. The European Court of Human Rights forgets the 'institutional' aim of the need for precision, focusing almost exclusively on *ius certum* as a quality granting the subjective foreseeability of the criminal law, i.e. the preconditions for mens rea. In addition, the European Court tends to overlap non-retroactivity with *ius certum*, reducing both guarantees to foreseeability of the criminal law. As foreseeability is a subjective parameter, individuals are not even protected from the retrospective application of the criminal law to their disadvantage.

In the Italian constitutional case law, instead, the institutional aim of *lex certa* as a principle limiting judicial discretion on the basis of objective parameters remains. The separation of powers rationale, although evolved towards its 'essential' dimension (prevention of abuses and discriminations by part of the judiciary) is still preserved. In addition, non-retroactivity of the criminal law is an independent principle, not overlapped with *lex certa* and that cannot be derogated on the basis of the foreseeability of the change in the law. Thus, the two positions sensibly differ.

As the fourth chapter of the present work demonstrates, these differences determine the conditions on the basis of which the European *ius certum* can penetrate the Italian criminal law.

# CHAPTER THREE

# THE BRITISH AND NORTH-AMERICAN PERSPECTIVES ON THE NEED FOR PRECISION IN LAW OF CRIMINAL OFFENCES

## 1. Introduction

### *1.1 Choice of jurisdictions*

The present chapter is dedicated to analyse the need for precision in law of criminal offences in the legal systems of the United Kingdom and of the United States. The choice of a comparative analysis focusing on these jurisdictions is motivated by the following considerations. As demonstrated by the previous chapter, the European Court of Human Rights conceives the need for precision in law of criminal offences as a quality pertaining to written and unwritten laws (*ius certum*) and identified as 'reasonable foreseeability'. The notion that the need for precision refers both to written and unwritten laws has been developed by the European Court to include in its review the law produced by common law jurisdictions.

The United Kingdom and the United States are common law jurisdictions, and both of them emphasise the connection between a precise definition in law of criminal offences and the ability of individuals to foresee the consequences of their actions. The focus of the European Court on foreseeability evokes the possibility that not only the object, but also the content of the European *ius certum* might be influenced by a common law perspective on the need for precision in law of criminal offences. Thus, the purpose of the following analysis is to ascertain whether (and to what extent) this is true.

The United Kingdom is taken into account as the only pure common law jurisdiction adhering to the European Convention on Human Rights, thus able to convey hypothetical 'common law influences' to the European Court's perspective. The United States are taken into consideration for two reasons. On the one side, a comparative

analysis focusing only on the British perspective might be biased, because the United Kingdom is part of the European Convention, and British courts might be affected by the Strasbourg case law on the topic. On the other side, the need for precision in law of criminal offences is a constitutional parameter in the North-American legal system, whereas it is not in the United Kingdom. For this reason, the North-American experience can provide useful suggestions for the constitutional courts of those civil law jurisdictions that are now part of the European Convention on Human Rights and hold it as a source of constitutional law. By looking at the North-American experience, it is possible to understand how the need for precision in law of criminal offences may be used as a constitutional parameter in relation to both written and unwritten law.

### *1.2 Structure*

The chapter is divided into three main parts, the first focusing on the British perspective. The case law is taken into consideration before the literature, because of the scarce relevance played by the latter in the British system. An important caveat is needed here. For the sake of brevity, the present research makes frequent use of the adjective 'British'. However, within the United Kingdom there exist three different legal systems, each one with its own courts.[378] An analysis of the perspective adopted by each legal system towards *lex certa* would be too complicated: thus, the present research is limited to the most densely populated one, that of England and Wales.[379]

The second part of the chapter focuses on the North-American perspective. As this perspective has been shaped around the void for vagueness and strict construction doctrines developed by the U.S. Supreme Court, the analysis of its case law precedes that of the literature.

The third part of the chapter provides conclusions as to the common features underlying the British and the North-American perspectives, analysing the theoretical background in which they were shaped. A comparison is then made between the Anglo-American

[378] L PRAKKE, 'The United Kingdom of Great Britain and Northern Ireland', L PRAKKE AND C KORTMAN (eds), Constitutional Law of 15 EU Member States (Deventer, Kluwer 2004) 912

[379] A ASHWORTH, 'United Kingdom' in KJ HELLER AND MD DUBBER (eds), The Handbook of Comparative Criminal Law (Stanford, SUP 2011) 532

and the Strasbourg perspectives, especially focusing on the 'predictability' (or 'foreseeability') requirement.

## 2. The British perspective on the need for precision in law of criminal offences

### *2.1 Introductive remarks*

Ever since the Norman conquest, the British legal system has been committed to the respect of the rule of law.[380] With the enactment of the Constitutional Act 2005, this principle has been expressly recognized in legislation.[381] The rule of law is a complex notion, with many possible definitions.[382] For the purpose of the present research, it is enough to recall the Diceyan notion, according to which 'Englishmen are ruled by the law, and by the law alone'.[383] Even though merely formal, this definition is the key for understanding why one of the legal values embodied in the rule of law is the need for precision in law of criminal offences.[384] If men are to be ruled by law, the law must be able to be obeyed.[385] Thus, the rule of law requires 'fixed, knowable and certain' rules.[386] In criminal law, this means that people should not be punished for something that was not clearly marked as illegal when they did it.[387] Accordingly, the rule of law

[380] AV DICEY, Introduction to the Study of the Law of the Constitution, (London, 10th ed, first edited 1885, MacMillan Press Ltd 1959) 183-184
[381] D FELDMAN (ed), English Public Law (Oxford, 2nd ed, OUP 2009) 7
[382] Eg, the two diverging visions on the rule of law expressed by FA VON HAYEK, The Constitution of Liberty (Chicago, UCP 1960) and by J RAZ, The Authority of the Law: Essays on Law and Morality (Oxford, Clarendon Press 1979)
[383] AV DICEY, Introduction (n 379) 202
[384] I LOVELAND, Constitutional Law, Administrative Law and Human Rights. A Critical Introduction (Oxford, 6th ed, OUP 2012) 74
[385] D FELDMAN (ed), English Public Law (n 380) 601; N PARPWORTH, Constitutional and Administrative Law (Oxford, OUP 2010) 41; J RAZ, The Rule of Law and its Virtue [1977] 93 LQR 195-202
[386] J RAZ, The Authority of the Law (n 381) 214-215
[387] D HOFFMAN J ROWE QC, Human Rights in the UK. An introduction to the Human Rights Act 1998 (Harlow, 3rd ed., Pearson Education Limited 2010) 19

requires non-retroactive and clearly defined criminal rules, [388] the last requirement being commonly referred to as 'legal certainty'.[389]

Considering the ancient origins of the rule of law, it might be surprising to discover that legal certainty made its debut in the British literature only by the middle of the twentieth century. The first mention of this need (at that time defined as 'certainty in draftmanship') dates back to 1953,[390] and its general recognition as a principle of the criminal law is still uncertain. Even more appalling is the panorama offered by the British case law. None of the features composing the *nullum crimen sine lege* principle has ever been pursued consistently by British courts, and the interest of practitioners for the value of legal certainty has been virtually inexistent before the beginning of the twenty-first century. [391]

This unsatisfactory situation finds its roots in the peculiarities of the British legal system. As well known, this system is not provided with a codified constitution,[392] neither with a constitutional review of legislation by courts.[393] In addition, for a very long time, the system has been based only on decisions of courts and opinions of legal practitioners.[394] Not surprisingly, neither courts nor scholars found fertile grounds for speculations on the general principles of the law. Things started to change when the United Kingdom opened to limitations of sovereignty deriving from international legal systems. The recognition of higher-orders rights promoted a new perspective on British public law.[395] On the one side, it encouraged the development of doctrinal analyses of the criminal law organized around a set of principles.[396] On the other side, it challenged

[388] Eg: A ASHWORTH, Principles of Criminal Law (Oxford, OUP 2009) 58; AP SIMESTER and GR SULLIVAN, Criminal Law, Theory and Doctrine (Oxford – Portland Oregon, 2nd ed, Hart Publishing 2003) 37

[389] AP SIMESTER and GR SULLIVAN, ibidem; A ASHWORTH, ibidem; I LOVELAND, Constitutional Law (n 383) 74

[390] G WILLIAMS, Criminal Law: the General Part (first edited 1953, London, Stevens & Sons Ltd 1961) 578

[391] A ASHWORTH, Human Rigths and Criminal Justice (London, 3rd ed, Sweet & Maxwell, 2012) 703

[392] A KING, The British Constitution (Oxford, OUP 2007) 5

[393] D FELDMAN (ed), English Public Law (n 380) 5

[394] A ASHWORTH, Principles (n 388) 8

[395] T HICKMAN, Public Law after the Human Rights Act (Oxford and Portland Oregon, Hart Publishing 2010) 13-19

[396] N LACEY, 'Principles, Policies and Politics of Criminal Law' in L ZEDNER AND J V ROBERTS (eds) *Principles and Values in Criminal Law and Criminal Justice: Essays in honour of Andrew Ashworth* (Oxford, OUP 2012) 23

the principle of parliamentary supremacy, according to which the will of the British Parliament is supreme and unrestrained.[397]

Theorizations on the need for precision in law of criminal offences have been particularly stimulated by the adoption of the Human Rights Act 1998.[398] The Act incorporates in the British law the rights and freedoms protected by the European Convention on Human Rights and places on public authorities (including courts) the duty to act in conformity with the Convention provisions. [399] Thus, both Parliament and courts are now bound to the respect of the *nullum crimen* principle enshrined in Article 7 of the European Convention, and courts are bound by the interpretation given to it by the European Court of Human Rights.[400]

Admittedly, British courts have no power to declare a statute unlawful because of its non-compliance with the Convention rights: they can only draw the alleged incompatibility to the attention of the Parliament.[401] Thus, the status and actual relevance of the Human Rights Act are still debated.[402] However, a remarkable evolution can be traced in the British literature and case law subsequent to the enactment of the Human Rights Act 1998. The following pages are dedicated to its analysis.

[397] D HOFFMAN J ROWE QC, Human Rights (n 386) 40; J ALDER, *Constitutional and Administrative Law* (Basingstoke, 8th ed, Palgrave Macmillan 2011)117
[398] D HOFFMAN J ROWE QC, Ibid 33-35
[399] Human Rights Act 1998, sect 6
[400] Human Rights Act 1998, sect 2
[401] Human Rights Act 1998, sect 4
[402] G PHILLIPSON, The Human Rights Act, Dialogue and Constitutional Principles in R MASTERMAN & I LEIGH (eds), The United Kingdom's Statutory Bill of Rights. Constitutional and Comparative Perspectives (Oxford, OUP 2013) 28; D HOFFMAN J ROWE QC, Human Rights (n 386) 24. In favour of the Bill of Rights nature, see A KAVANAGH, Constitutional Review under the UK Human Rights Act (Cambridge, CUP 2009) ch 10. See also Laws LJ, in Thoburn v Sunderland City Council [2002] 3 WLR 247 [62]

## *2.2 British case law on legal certainty*

### *2.2.1 Introduction*

The analysis of the British case law on legal certainty requires an introductive *caveat*. The criminal law of England and Wales is mostly statutory, but a few relevant crimes and the general part of the criminal law are entirely regulated by the common law.[403] Statutory and common law crimes are classified as either indictable, summary, or 'triable either way' offences. Summary offences are tried by the Magistrates' Courts. Appeals against convictions or sentences by the Magistrates' Courts lie to the Crown Court; but if appeals concern a point of law, they lie to the Queen's Bench Division of the High Court of Justice. In both cases, further appeal may lie to the House of Lords (after 2009, Supreme Court). As for 'triable either way' offences, the Magistrates' Courts can retain or reject the proceeding in favour of the Crown Court.[404]

The case law produced by the Magistrates' Courts is rarely reported,[405] but over 95 percent of the criminal cases are dealt with by the Magistrates' Courts from the beginning to the end, without reaching further stages of the criminal proceeding.[406] Thus, an analysis of the British case law on legal certainty can give only a partial insight of the attitude of British courts towards the topic, being able to rely only on the case law produced by higher courts: namely, the Queen's Bench Division of the High Court of Justice, the Criminal Division of the Court of Appeal, and the House of Lords (after 2009, Supreme Court).

These case law of the the High Court of Justice, of the Court of Appeal, and of the House of Lords binds lower courts. However, since the greatest part of the British criminal cases are tried only by courts whose decisions are not reported, it is almost impossible to state if and how the lower courts actually conform to the case law developed by higher courts.

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[403] G WILLIAMS, Criminal Law (n 389) 578; KJ HELLER AND MD DUBBER (eds), The Handbook (n 378) 532-534

[404] D OMEROD, Smiths and Hogan's Criminal Law (Oxford, 13th ed, OUP 2011) 32-36; J LOVELESS, Criminal Law (Oxford, 3rd ed, OUP 2012) 15-23; R CARD, Card, Cross & Jones Criminal law (Oxford, 20th ed, OUP 2012) 4-6

[405] M JEFFERSON, Criminal Law (10th ed, Longman 2011) 20

[406] J LOVELESS, Criminal Law (n 405) 15; R CARD, Card, Cross & Jones (n 405) 4

*2.2.2 Case law*

The Court of Appeal has recently declared that there is 'nothing novel' in the claim that a criminal provision should not be vaguely framed.[407] Indeed, as early as 1887, the principle that there cannot be criminal liability 'unless the language of the clause (...) is so clear that the case must necessarily be within it' was held to be a 'well-settled rule' of criminal law.[408] However, before the adoption of the Human Rights Act 1998, legal certainty was mainly an issue concerning the validity of byelaws enforceable by criminal prosecution.[409] Bylaws are a form of subordinate legislation, enacted by local authorities on the basis of a delegation of powers conferred by or under an Act of Parliament.[410] One of the conditions of validity of a byelaw is that it is 'certain, that is, it must contain adequate information as to the duties of those who are to obey'.[411] Thus, when byelaws do not comply with the certainty condition, they are invalid as acting *ultra vires*.[412] In the practice, uncertainty is rarely sufficient to render a byelaw void and unenforceable. [413] However, any challenge to the validity of bylaws may be mounted by way of defence in criminal proceedings.[414]

Between 2001 and 2002, legal certainty started to make its appearance in challenges to primary legislation and to common law offences. In *Tagg*, the Court of Appeal analysed the alleged uncertainty of the notion of 'drunkness', main element of the charge with being drunk on an aircraft contrary to article 57 of the Air Navigation Order 1995 and section 61 of the Civil Aviation Act 1982.[415] According to the applicant, this was 'a vague concept, much too vague to comply with the requirements of precision in relation to criminal conduct of the European Convention on Human Rights'. The Court of

[407] R v Misra (Amit), 2004 WL 2270263, para 32
[408] Tuck & Sons v Priester, (1887) LR 19 QBD 629 (Lindley LJ)
[409] A ASHWORTH, B EMMERSON AND A MACDONALD, Human rights and criminal justice (n 184) 381
[410] H BARNET, Constitutional and Administrative Law (Oxon/NY, 8th ed, Routledge 2011) 399; L PRAKKE, 'The United Kingdom' (n 377) 871
[411] Kruse v Johnson [1898] 2 Q.B. 91 per A ASHWORTH, Human Rigths and Criminal Justice (n 392) 703 at 14
[412] Bugg v DPP [1993] QB 473
[413] R v Secretary of State for Trade and Industry ex parte Ford [1984] 4 Tr L 150
[414] Boddington v British Transport Police [1998] 2 All ER 203
[415] R v Tagg (Heather Susan), [2002] 1 Cr App R 2

Appeal, having recalled a previous decision giving shape to the notion of 'drunkness', concluded that:

> '[it] affords a sufficiently clear indication of the English domestic law, for the courts in Strasbourg, were they called upon to adjudicate upon the matter, to conclude that the concept of drunkenness has been sufficiently precisely defined in English domestic law for the purposes of the European Convention'.[416]

In *Muhamad*, the Court of Appeal took into consideration section 362(1)(a) of the Insolvency Act 1986, according to which '[t]he bankrupt is guilty of an offence if he has—(a) in the two years before petition, materially contributed to, or increased the extent of, his insolvency by gambling'. The applicant claimed that the presentation of a petition of bankruptcy within two years of the act of gambling 'is outside the gambler's control and therefore unforeseeable' and that the offence was thus in breach of Article 7 ECHR. The Court quickly dismissed the claim by pointing out that the applicant had confused 'factual uncertainty with legal uncertainty'.[417]

In *Perrin*, the applicant had been convicted for 'publishing an obscene article' contrary to section 2(1) of the Obscene Publications Act 1959. He had challenged his conviction on the ground that the necessary degree of certainty 'lacks where the critical decision as to whether an article is to be regarded as obscene is habitually left to a jury'.[418] The Court of Appeal dismissed the claim, recalling a previous decision of the European Court of Human Rights which had declared the provision compatible with Article 7 ECHR.[419]

In *Cotter, Clair and Wynn*, the appellants had lamented the uncertain ambit of application of the common law offence of 'perverting the course of justice'. [420] The English case law had been striving for a long time around the question of whether this offence requires an allegation capable of identifying individuals, and the applicants had alleged that this uncertainty amounted to a violation of Article 7 ECHR. The Court of Appeal quickly dismissed the applicants' claim, on the ground that the process of

[416] Ibidem
[417] R v Muhamad (Mithum) [2003] QB 1031
[418] R v Perrin (Stephane Laurent) [2002] WL 347127
[419] Hoare v UK, App no 31211/96 (Comm, 2 July 1997)
[420] R v Cotter, R v Clair, R v Wynn, [2002] 2 Cr App R 29

elucidation undergone by the offence in the British case law had been 'consistent' with the European requirements.

In *Misra*, the Court of Appeal analysed the common law crime of 'manslaughter by gross negligence'. According to the *Adomako* test (laid down by the House of Lords in 1995), the offence requires the wrongdoer to have acted with 'gross negligence which the jury consider justifies a criminal conviction'.[421] The appellant in *Misra* had alleged that the offence was uncertain because of the circularity affecting this test, and to support his argument he had relied on Article 7 of the European Convention on Human Rights. The Court of Appeal declared that there was 'nothing novel' in the claim that a criminal provision should not be vaguely framed, and that 'the incorporation of the Convention, while providing a salutary reminder, has not effected any significant extension of or change to the "certainty" principle as long understood at common law'. The Court then added that:

> '[I]t is not to be supposed that prior to the implementation of the Human Rights Act 1998 , either this Court, or the House of Lords, would have been indifferent to or unaware of the need for the criminal law in particular to be predictable and certain. Vague laws which purport to create criminal liability are undesirable, and in extreme cases, where it occurs, their very vagueness may make it impossible to identify the conduct which is prohibited by a criminal sanction. If the court is forced to guess at the ingredients of a purported crime any conviction for it would be unsafe. That said, however, the requirement is for sufficient rather than absolute certainty'.[422]

Thus, the Court concluded as follows:

> 'In our judgment the law is clear. The ingredients of the offence have been clearly defined, and the principles decided in the House of Lords in *Adomako*. They involve no uncertainty. The hypothetical citizen, seeking to know his position, would be advised that, assuming he owed a duty of care to the

[421] R v Adomako (John Asare), [1995] 1 AC 171
[422] R v Misra (Amit), [2005] 1 Cr App R 21

> deceased which he had negligently broken, and that death resulted, he would be liable to conviction for manslaughter if, on the available evidence, the jury was satisfied that his negligence was gross. A doctor would be told that grossly negligent treatment of a patient which exposed him or her to the risk of death, and caused it, would constitute manslaughter'.[423]

In the subsequent case of *Rimmington and Goldstein*, the House of Lords took into consideration the common law offence of 'causing a public nuisance'.[424] The appellants had submitted that the crime 'as currently interpreted and applied, lacks the precision and clarity of definition, the certainty and the predictability necessary to meet the requirements of either the common law itself or article 7 of the European Convention'.
The House of Lords declared that the common law acknowledges the principle that 'no one should be punished under a law unless it is sufficiently clear and certain to enable him to know what conduct is forbidden before he does it'. Accordingly, ' [i]f the ambit of a common law offence is to be enlarged, it must be done step by step on a case by case basis and not with one large leap'. After a detailed survey of the pertinent case law, the Court concluded that the offence of public nuisance, as interpreted and applied, lacked the clarity and precision 'which both the law and the Convention require'. Thus, the House of Lords concluded for the use of a restrictive interpretation in favour of the accused and quashed his conviction, even though recognizing that it had been based on 'a small and foreseeable development' in the case law.
In *Regina v K,* the Court of Appeal took into consideration Sections 58 of the Terrorism Act 2000, incriminating the possession of record of information 'of a kind likely to be useful to a person committing or preparing an act of terrorism'. The applicant had submitted that the term 'likely to be of use to' was so broad and so undefined in common law or statute, as to result 'insufficiently certain to comply with the common law or with Art.7 of the European Convention on Human Rights'. The Court of Appeal stated that the meaning of the term could be identified in 'information that calls for an explanation', because 'of such a nature as to raise a reasonable suspicion that it is intended to be used to assist in the preparation or commission of an act of terrorism'.

[423] R v Misra (Amit), [2005] 1 Cr App R 21
[424] R v Rimmington [2005] UKHL 63. For a critical commentary of the decision, see A ASHWORTH, [2006] Crim L R 153 (case)

Having thus elaborated the correct interpretation of the provision, the Court held that 'if [the offence] is interpreted in accordance with this judgment, its effect will not be so uncertain as to offend against the doctrine of legality'.[425]

### *2.2.3 Conclusion*

The case law developed on legal certainty is not vast, and the overall attitude of the higher courts has not been particularly radical.[426] As demonstrated by the above analysis, the requirement to be respected is that of 'sufficient rather than absolute certainty'.[427] The parameter to assess whether a 'sufficient' degree of certainty is reached it the 'test of notional legal advice', implying that 'the rules by which the citizen is to be bound should be ascertainable by him (or, more realistically, by a competent lawyer advising him) by reference to identifiable sources that are publicly accessible'.[428] The consequences of uncertainty are dealt with at an interpretative level, in accordance with the principle that 'if a statutory provision is ambiguous, the court should adopt any reasonable interpretation which should avoid the penalty'.[429]
Admittedly, 'in extreme cases (…) vagueness may make it impossible to identify the conduct which is prohibited by a criminal sanction'. [430] In this case, as courts have no power to create nor to abolish existing offences,[431] they will only have the chance of considering the legislation as unenforceable.[432] However, this possibility presupposes a situation in which 'it is impossible to resolve the ambiguity',[433] and it rarely occurs outside the field of byelaws. The only offence that has been declared to infringe the requirement of legal certainty so far ('manslaughter by gross negligence') has been

[425] R v K [2008] 2 Cr App R 7
[426] B FITZPATRICK, 'Gross negligence manslaughter: compatibility with European Convention on Human Rights, Article 7', J Crim L (2005) 69(2) 126, 128
[427] R v Misra (Amit), [2005] 1 Cr App R 21
[428] Fothergill v Monarch Airlines Ltd [1981] AC 251 (Lord Diplock). See also: Harvey Phillips v The Director of Public Prosecutions [2002] EWHC 2093 Admin
[429] Fawcett Properties Ltd v Buckingham County Council [1961] AC 636 at 662 (Lord Cohen)
[430] R v Misra (Amit), [2005] 1 Cr App R 21
[431] R v Rimmington [2005] UKHL 63
[432] Mixnam's Properties Ltd v Chertsey Urban District Council [1964] 1 QB 214 at 238 (Lord Diplock)
[433] Fawcett Properties Ltd v Buckingham County Council [1961] AC 636 at 662 (Lord Cohen)

'corrected' through a decision restricting its ambit of application.[434] On this basis, a few considerations can be developed.

First of all, British courts seem eager to underline the 'common law nature' of legal certainty. Initially, challenges to primary legislation were grounded by the applicants on the lack of compliance with Article 7 of the European Convention.[435] However, both the Court of Appeal and the House of Lords have clarified to the applicants that the principle according to which 'no one should be punished under a law unless it is sufficiently clear and certain to enable him to know what conduct is forbidden before he does it' is also part of the common law. Accordingly, after the statement by the Court of Appeal in *Misra* and by the House of Lords in *Rimmington*, challenges to substantive laws are now based on their failure 'to comply with the common law or with Art.7 of the European Convention on Human Rights'.[436]

Second of all, British courts adopt a test which relies on the citizens' ability to understand the law with the aid of a lawyer. Somehow, this test reminds of the European foreseeability as the ability to foresee, 'if need be with appropriate advice', the consequences which a given action may entail.[437] The criticisms moved by the literature to this test are similar to those that can be moved to the Strasbourg position: namely, that the possibility to have access to a lawyer's advice should not be so easily presumed, and that such a test legitimizes the existence of laws of 'an unhealthily vague quality'. [438]

Thirdly, the attitude displayed by British courts has been dependent on the origins of the crime under review, being more incisive when dealing with common law crimes rather than when dealing with statutory offences, motivating their conclusions at length in the first case and quickly rebutting the challenge in the second case. Resistance has been shown towards assessing the uncertainty of Acts of Parliament: at the moment, the only criminal offence that has been declared to lack the necessary clarity and precision is the

[434] R v Rimmington [2005] UKHL 63. For a critical commentary of the decision, see A ASHWORTH, [2006] Crim L R 153 (case)
[435] Eg: R v Tagg (Heather Susan) [2001] EWCA Crim 1230 ; R v Muhamad (Mithum) [2003] QB 1031; R v Perrin (Stephane Laurent) [2002] EWCA Crim 747; R v Cotter, R v Clair, R v Wynn [2002] 2 Cr App R 29
[436] R v K [2008] EWCA Crim 185; [2008] 2 Cr App R 7. See also: R v Rimmington, R v Goldstein [2005] UKHL 63; [2006] 1 AC 459
[437] B FITZPATRICK, 'Gross negligence manslaughter' (n 427) 131
[438] Sunday Times v UK (No 1) Series A no 30

common law offence of public nuisance.[439] Thus, it is the case law dealing with common law offences that has shaped the British position on legal certainty. Multiple reasons can explain this attitude. On the one side, the principle of parliamentary supremacy is a well-entrenched part of British constitutionalism, and courts are unwilling to pronounce on such a delicate and debated topic as the existence of limitations for Acts of Parliaments. On the other side, common law offences are naturally prone to create issues of uncertainty, in consideration of their development through judicial interpretation.

This leads to a fourth, connected, consideration: namely, the tendency of British courts to absorb non-retroactivity into legal certainty. Indeed, the problem of common law offences developed through judicial interpretation is double fold. When the case law evolves, there might be an overlapping of diverging instances. On the one side, the courts' intervention blurs the ambit of application of the offence, removing the expectation that the criminal defendant might have had towards it. On the other side, when the intervention is to the disadvantage of the accused, it amounts to a retroactive application of the criminal law. Judicial interpretation is always 'to some extent an exercise of creativity' and '[w]here an interpretation is creative, it is by definition new'.[440] This is especially true when common law offences are at stake, their elements being formed by the case law.[441] Thus, even if the case law evolution might, in the long run, contribute to clarify the actual extent of the criminal provision, for the concrete criminal defendant to whom the evolution applies it represents a double violation of the guarantees enshrined in the *nullum crimen* principle.

According to the House of Lords, the principles governing the enlargement of common law offences are 'entirely consistent' with Article 7 of the European Convention, because they require the enlargement to 'be done step by step on a case by case basis and not with one large leap'.[442] Indeed, when the House of Lords removed the common law-based marital exemption for rape,[443] the European Court of Human Rights agreed that the 'gradual clarification' of the criminal law had been foreseeable: the changes

[439] R v Rimmington [2005] UKHL 63
[440] B FITZPATRICK, 'Rape: retrospectivity of abolition of marital immunity' [2004] 68(5) J Crim L 375, 378
[441] A ASHWORTH, B EMMERSON AND A MACDONALD, Human rights and criminal justice (n 184) 395
[442] R v Rimmington [2005] UKHL 63; R v Clark (Mark) [2003] 2 Cr App R 363
[443] R v R [1992] AC 599

occurred in society made it almost impossible to continue presuming that a man could not be criminally liable for raping his own wife.[444] However, it is highly debatable whether the concrete defendant could have foreseen the evolution of the law in his own case. At a more general level, it is debatable whether 'signals' deriving from the society might render predictable an evolution in the law. The doctrinal debate arisen from the decisions of the House of Lords, and the amount of criticisms surrounding the Strasbourg judgments, prove how sensible this topic is.[445]

### *2.3 The position of the British literature*

The first principled analysis of the criminal law, expressly dealing with the need for precision in law of criminal offences, was Glenville Williams' *Criminal Law: the General Part,* edited in 1953.[446] The book dedicated an entire chapter to the 'Principle of Legality' and defined the need for a precise definition in law of criminal offences as 'certainty in draftmanship'. Its meaning was briefly identified as 'an injunction to the legislature not to draw its statutes in such broad general terms that almost anybody can be brought within them at the whim of the prosecuting authority and the judge'.[447] No further explanation of the *ratio* of this principle was attempted, and the author declared that in the English legal system 'the most that can be done' with statutes offending this maxim was to interpret them restrictively.

Nowadays, the attention of the literature for the rule of law and the principles limiting the criminal law has slightly increased. The need for precision in law of criminal offences is referred to as 'legal certainty' and it is related to the duties imposed on public authorities by the Human Rights Act 1998.[448] The principle is frequently paired

[444] SW and CR v UK (1995) Series A nos 335-B and 335-C

[445] See, for example: M GILES, 'Judicial Law-Making in the Criminal Courts: the Case of Marital Rape' [1992] Crim LR, 407; C OSBORNE, 'Does the End Justify the Means? Retrospectivity, Article 7 and the Marital Rape Exemption' [1996] EHRLR 406

[446] 1st ed 1953; 2nd ed 1961

[447] G WILLIAMS, Criminal Law (n 389)578

[448] A ASHWORTH, B EMMERSON AND A MACDONALD, Human Rigths and Criminal Justice (n 184); A P SIMESTER AND G R SULLIVAN, Criminal Law, Theory and Doctrine (Oxford – Portland Oregon, 2nd ed, Hart Publishing 2003); LORD JUSTICE BINGHAM OF CORNHILL, 'A Criminal Code: Must we wait forever?' (1998) Crim L R 694, 695

with the non-retroactivity of the criminal law, [449] its *ratio* being identified in the need for the citizens to be put in the conditions to know in advance their position before the law.[450] A vague law amounts to a violation of non-retroactivity, because, until the moment in which the court pronounces, 'no one is quite sure whether given conduct is within or outside the rule'.[451] Being the essential precondition for speaking of the individual's mens rea, legal certainty is also related to the culpability doctrines.[452] In addition, since an ambiguous provision of law violates the wrongdoer's procedural rights, legal certainty is put in relation to the exigencies underlying the due process of law. [453] Finally, British scholars also refer legal certainty to the need of restraining the public authorities' discretion. [454]

Notwithstanding the major steps undertaken by the British literature to promote a stronger interest for issues of principles, there are still textbooks of criminal law that do not even dedicate a paragraph to legality.[455] In the eyes of a continental criminal lawyer, this might be an oddity: however, it is also a proof of the British literature's closeness to a practical perspective on the law. It is undeniable that none of the features composing the *nullum crimen sine lege* principle has ever been pursued consistently by the British courts.[456] The same Law Commission remains doubtful as to the compatibility of the British criminal system with the parameters laid down by the European Convention in this regard.[457] A relevant part of the British criminal system is still grounded on vague notions deriving from the common law.[458] Thus, the British literature cannot but admit that fundamental principles of the criminal law, such as legal certainty, have no real impact onto the British legal system.[459]

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[449] G WILLIAMS, Criminal Law (n 389) 578; A ASHWORTH, Principles (n 388) 64; B FITZPATRICK, 'Gross negligence manslaughter' (n 427) 127

[450] G WILLIAMS, Criminal Law (n 389) 575. See, also R BUXTON, 'The Human Rights Act and the Substantive Criminal Law' (2000) Crim LR 331, 332; CMW CLARCKSON, Understanding Criminal Law (London, 4th ed, Sweet and Maxwell 2005) 10

[451] A ASHWORTH, Principles (n 388) 64

[452] A ASHWORTH, ibid 57-58

[453] CMW CLARCKSON, Understanding (n 450) 10

[454] G WILLIAMS, Criminal Law (n 389)575; A ASHWORTH, Principles (n 388) 65-66; R BUXTON, 'The Human Rights Act' (n 451) 332

[455] Eg: J LOVELESS, Criminal Law (Oxford, 3rd ed, OUP 2012); D OMEROD, Smiths and Hogan's (n 405)

[456] A ASHWORTH, Human Rigths and Criminal Justice (n 392) 703

[457] Law Commission Consultation Paper no 155, Fraud and Deception (1999), para 1.23

[458] G WILLIAMS, Criminal Law (n 389)578

[459] G WILLIAMS, Criminal Law (n 389) 575; J HERRING, Criminal Law: Text, Cases and Materials (Oxford, 5th ed, OUP 2012) 9; A ASHWORTH, Principles (n 388) 65; M JEFFERSON, Criminal Law (406) 5

However, this does not imply that the system cannot evolve: indeed, there are many claims that it is time for the 'inherently uncertain' common law [460] to leave space for a codification, held as a necessary precondition for a better certainty in criminal law.[461]

[460] TH JONES, 'Common Law and Criminal Law: the Scottish Example' (1990) Crim LR 292, 300
[461] M ARDEN, 'Criminal Law at the Crossroads: the Impact of Human Rights from the Law Commission's Perspective and the Need for a Code' (1999) Crim LR 439; LORD JUSTICE BINGHAM OF CORNHILL, 'A Criminal Code' (n 449) 694; R BUXTON, 'The Human Rights Act' (n 451) 331

## 3. The North-American perspective on the need for precision in law of criminal offences

### *3.1 Introductive remarks*

The United States of America is a federal republic composed by fifty-one different governments, each one provided with its own legal system.[462] The criminal law operates both at the federal and at the state level and it has its origins in the common law of England.[463] Nowadays, neither federal nor state statutes allow the creation of criminal offences by courts: however, some criminal codes incorporate common law offences, and common law cases are frequently used by courts to clarify the meaning of statutory provisions. [464]

Unlike the United Kingdom, the United States are provided with a written Constitution and a Bill of Rights, dating back to the end of the eighteenth century.[465] All courts are bound by 'the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void'.[466] The U.S. Supreme Court has final authority over the constitutionality of federal laws[467] and over federal and state courts decisions.[468] Therefore, in the U.S. legal system the need for precision in law of criminal offences is a parameter of the judicial review of legislation. On the basis of the Due Process clause of the Fifth Amendment to the U.S. Constitution, the Supreme Court has elaborated a 'void for vagueness' doctrine, directed toward voiding those statutes that do not provide an adequate definition of what behavior is criminal and to whom it applies.[469] In addition, the Supreme Court acknowledges the common law rule

[462] W BURNHAM, Introduction to the Law and Legal system of the United States (St Paul, 2nd ed, West Group 1999) 1
[463] PH ROBINSON, Criminal Law (New York, Aspen Law & Business 1997) 66-69
[464] PH ROBINSON, ibid
[465] E CHEMERINKSY, Constitutional Law. Principles and Policies (NY, 4th ed, Wolters Kluwer 2011) 9 ff
[466] Marbury v Madison, 5 US 137, 180, 2 L Ed 60 (1803)
[467] Marbury v Madison, 5 US 137, 180, 2 L Ed 60 (1803)
[468] Martin v Hunter's Lessee, 14 US 304, 4 L Ed 97 (1816); Cohens v State of Virginia, 19 US 264, 5 L Ed 257 (1821)
[469] Infa, text to n 475

of strict construction of penal statutes (in the U.S. legal system, often referred to as 'rule of lenity'), which requires any ambiguity to be solved in favour of the accused.[470]

The void for vagueness doctrine and the strict interpretation of criminal statutes are at the basis of all the North-American theorizations on the need for a clear definition in law of criminal offences.[471] For this reason, the following analysis opens with a survey of the Supreme Court case law dealing with the void for vagueness, and differentiating vagueness from ambiguity. The decision to provide a mere survey, rather than a detailed analysis, is motivated by the massive amount of judgments released by the U.S. Supreme Court on this topic. An in-depth study of all these judgments (if possible) would be way too long for the purposes of the present research. Being the case law so developed, it is possible to infer from it general principles governing in an almost undisputable way the position of the Supreme Court towards the need for precision in law of criminal offences.

### *3.2 The case law of the U.S. Supreme Court*

As early as 1875, the Supreme Court assessed that '[l]aws which prohibit the doing of things, and provide a punishment for their violation, should have no double meaning' and that the definition of criminal offences should be expressed 'in language that need not deceive the common mind'.[472] In the first decades of the twentieth century, the Supreme Court linked this requirement to the Due Process clause included in the Fifth Amendment to the U.S. Constitution.

[470] Infra, text to n 511

[471] Two classic treatments of these subjects are those by A AMSTERDAM, 'The Void-for-Vagueness Doctrine in the Supreme Court' (1960) 109 U Pa L Rev 67 (note) and JC JEFFRIES JR, 'Legality, Vagueness, and the Construction of Penal Statutes', Va L Rev 71 (1985). See also: R BATEY, 'Vagueness and the Construction of Penal Statutes: Balancing Acts' (1997) 5 Va J Soc Pol'y & L, 1; M DAN-COHEN, 'Decision Rules and Conduct Rules: on Acoustic Separation in Criminal Law' (1984) 97 Harvard Law Review 625; JF DECKER, 'Addressing Vagueness, Ambiguity, and Other Uncertainty in American Criminal Laws' (2002) 80 Denv U L Rev 241; L HALL, 'Strict or Liberal Construction of Penal Statutes'(1935) 48 Harv L Rev 748, 762; S LEVMORE, 'Ambiguous Statutes' (2010) 77 U Chi L Rev 1073; P WESTEN, 'Two Rules of Legality in Criminal Law' (2007) 26 Law and Philosophy 229

[472] United States v Reese, 92 US 214, 219-220, 23 L Ed 563 (1875)

The clause states that '[n]o person shall be (…) deprived of life, liberty, or property, without due process of law'.[473] Between the 1910s and the 1920s, the Supreme Court came to conclusion that 'a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law'.[474] The doctrine thus elaborated allows the Supreme Court to declare vague provisions of law void because of their non compliance with the Fifth Amendment. The doctrine does not apply only to criminal statutes: however, the vagueness analysis required for criminal provisions is stricter, especially if they involve expression protected by the First Amendment, or any other constitutional of fundamental right.[475] Thus, a criminal statute is void for vagueness either if it fails to give adequate notice to people of ordinary intelligence concerning the conduct it proscribes,[476] or if it invites arbitrary and discriminatory enforcement.[477]

Interestingly, this second condition was developed by the Supreme Court only during the 1970s, and it is now playing a leading role in the Court's evaluations of vagueness. A chronological analysis of the Supreme Court case law has recently underlined how its early judgments focused more on the 'fair warning' and 'separation of powers' rationales of the void for vagueness, whereas recent judgments tend to focus on how vagueness allows arbitrary enforcement of the law.[478] With due respect to the mentioned study, the 'separation of powers' rationale does not seems to have ever played a crucial role in the Supreme Court case law. The notion that vague laws allow the judiciary to substitute for the legislature has never been the sole ground for invalidating a criminal provision. [479] True, instead, is the consideration that the 'fair warning' has been playing a leading role, at least until the 1970s.

[473] USCA CONST Amend V

[474] Harvester Co v Kentucky, 234 US 216, 58 L ed 1284, 34 Sup Ct Rep 853; Collins v Commonwealth of Kentucky, 234 US 634, 638, 34 S Ct 924, 58 L Ed 1510 (1914); Connally v General Constr Co, 269 US 385, 391 (1926)

[475] AE GOLDSMITH, 'The Void-for-Vagueness Doctrine in the Supreme Court, Revisited' (2003) 30 Am J Crim L 279, 281

[476] Coates v City of Cincinnati, 402 US 611, 614, 91 S Ct 1686, 1688, 29 L Ed 2d 214 (1971) (Coates )

[477] Papachristou v City of Jacksonville, 405 US 156, 162, 92 S Ct 839, 843, 31 L Ed 2d 110 (1972). See also Jordan v De George, 341 US 223, 231–32, 71 S Ct 703, 707–08, 95 L Ed 886 (1951)

[478] AE GOLDSMITH, 'The Void-for-Vagueness' (n 476) 286-291

[479] United States v Reese, 92 US 214, 219, 221, 23 L Ed 563 (1875)

The 'fair warning' rationale rests on the notion that '[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids'.[480] This is because it would be an 'essential injustice' to place the accused 'in trial for an offense, the nature of which the statute does not define and hence of which it gives no warning'.[481] Thus, in 1951 the essential purpose of the void for vagueness doctrine was defined by the Court as 'to warn individuals of the criminal consequences of their conduct'.[482]

The 'arbitrary and discriminatory enforcement' rationale rests on the notion that vague criminal provisions 'encourages arbitrary and erratic arrests and convictions', because '[w]here (…) there are no standards governing the exercise of the discretion (…) the scheme permits and encourages an arbitrary and discriminatory enforcement of the law'.[483] Thus, a vague law 'impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application'.[484] As previously mentioned, the Supreme Court started to rely on this rationale during the 1970s, and today the new prong has assumed greater importance than the others.[485] Nowadays, the position of the Supreme Court seems to be assessed as follows:

> '[I]n a noncommercial context behavior (...) the most meaningful aspect of the vagueness doctrine is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement'.[486]

The test used by the Supreme Court to assess whether a criminal provision is void for vagueness varies according to the rationale attributed to the doctrine. When the focus is on the fair warning, '[t]he test is whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and

[480] Lanzetta v State of NJ, 306 US 451, 452, 59 S Ct 618, 83 L Ed 888 (1939)
[481] Screws v United States, 325 US 91, 101-02, 65 S Ct 1031, 89 L Ed 1495 (1945)
[482] Jordan v De George, 341 US 223, 71 S Ct 703, 707 95 L Ed 886 (1951)
[483] Papachristou v City of Jacksonville, 405 US 156, 161, 92 S Ct 839, 842, 31 L Ed 2d 110 (1972)
[484] Grayned v City of Rockford, 408 US 104, 108-09, 92 S Ct 2294, 2298-2299 33 L Ed 2d 222 (1972)
[485] AE GOLDSMITH, 'The Void-for-Vagueness' (n 476) 289
[486] Smith v Goguen, 415 US 566, 94 S Ct 1242, 1248, 39 L Ed 2d 605 (1974); Kolender v Lawson, 461 US 352, 103 S Ct 1855, 1858-59, 75 L Ed 2d 903 (1983)

practices'.[487] When the focus is on 'arbitrary and discriminatory enforcement' rationale, the test is whether the legislature has established 'minimal guidelines to govern law enforcement'.[488] In both hypothesis, the Supreme Court is careful in assessing that 'the Constitution does not require impossible standards',[489] because 'we can never expect mathematical certainty from our language'.[490] Thus, '[a]ll the Due Process Clause requires is that the law give *(sic)* sufficient warning that men may conduct themselves so as to avoid that which is forbidden',[491] or that there are 'minimal guidelines' for law enforcement.[492]

The stress on the inherent uncertainty of the human language and on the impossibility to grant perfect precision is strictly related to how the Supreme Court concretely deals with challenges grounded on vagueness of the law. First of all, the Supreme Court rarely voids a statute for its vagueness: in most cases, a 'cure' is found. The Supreme Court has upheld criminal statutes against vagueness challenges either by deriving from legislative history more precise meaning,[493] or by looking to the meaning of language in technical and professional fields, [494] or by referring to 'words of common understanding."[495] In addition, the Supreme Court has more than once held that 'a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed.'[496] Second of all, the Supreme Court pays a lot of attention to the judicial interpretation of criminal statutes: even when the statute is challenged for vagueness 'on its face' (i.e., not for its

[487] Connally v General Construction Co, 1926, 269 US 385, 46 S Ct 126, 70 L Ed 322
[488] Smith v Goguen, 415 US 566, 94 S Ct 1242, 1248, 39 L Ed 2d 605 (1974)
[489] United States v Petrillo, 332 US 1, 7-8, 67 S Ct 1538, 1542, 91 L Ed 1877 (1947); Jordan v De George, 341 US 223, 71 S Ct 703, 708, 95 L Ed 886 (1951)
[490] Grayned v City of Rockford, 408 US 104, 108-09, 92 S Ct 2294, 2300, 33 L Ed 2d 222 (1972)
[491] Rose v Locke, 423 US 48, 96 S Ct 243, 46 L Ed 2d 185 (1975)
[492] Smith v Goguen, 415 US 566, 94 S Ct 1242, 1248, 39 L Ed 2d 605 (1974)
[493] US Civil Serv Comm'n v Nat'l Ass'n of Letter Carriers, AFL-CIO, 413 US 548, 570-75, 93 S Ct 2880, 37 L Ed 2d 796 (1973); United States v Nat'l Dairy Products Corp, 372 US 29, 33-34, 83 S Ct 594, 9 L Ed 2d 561 (1963); United States v Bramblett, 384 US 503, 509 (1955); United States v Harriss, 347 US 612, 621-23, 74 S Ct 808, 98 L Ed 989 (1954); Boyce Motor Lines v United States, 342 US 337, 72 S Ct 329, 342, 96 L Ed 367 (1952)
[494] McGowan v Maryland, 366 US 420, 428 (1961); Lanzetta v State of NJ, 306 US 451, 454, 59 S Ct 618, 83 L Ed 888 (1939); Champlin Refining Co v Corp Comm'n of Okla., 286 US 210, 242-43 (1932)
[495] Boos v Barry, 485 US 312, 332, 108 S Ct 1157, 99 L Ed 2d 333 (1988)
[496] Vill of Hoffman Estates v Flipside, Hoffman Estates, Inc, 455 US 489, 499, 102 S Ct 1186, 71 L Ed 2d 362 (1982) See also, eg, Posters 'N' Things, Ltd v United States, 511 US 513, 526, 114 S Ct 1747, 128 L Ed 2d 539 (1994); Boyce Motor Lines v United States, 342 US 337, 72 S Ct 329, 342, 96 L Ed 367 (1952); Screws v United States, 325 US 91, 102, 65 S Ct 1031, 89 L Ed 1495 (1945)

application in a concrete case, but in all its potential applications) a crucial role is attributed to its interpretation and application by courts. In general, when the Supreme Court is evaluating a facial challenge, 'any limiting construction that a state court or enforcement agency has proffered' must be taken into consideration. [497] The statute must be taken 'as the highest court of the State has interpreted it.'[498] In addition, courts 'have the duty to avoid constitutional difficulties': thus, whenever a certain construction can prevent the void for vagueness, courts have the duty to adopt it.[499]

Of course, judicial interpretation can contribute to the precision of the criminal statute, and the Supreme Court accepts that a 'clarifying gloss' might contribute to define the meaning of a statute.[500] On the other side, judicial interpretation can also remove the precision that a statute already had: thus, the Supreme Court acknowledges that a deprivation of the right of fair warning 'can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language'.[501] When the Supreme Court faces this aspect of fair warning, reference is made to the 'foreseeability' of the judicial expansion, which is not violated by 'a routine exercise of common law decisionmaking in which the court brought the law into conformity with reason and common sense'. [502] Instead, a judicial alteration of a common law doctrine of criminal law 'violates the principle of fair warning, and hence must not be given retroactive effect, only where it is unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue'.[503] Interestingly, the Supreme Court expressly points out that the judicial enlargement of a criminal offence does not violate the constitutional void for retroactive criminal statutes, but the Due Process clause, because the first rule addresses only the legislature.[504]

Judicial interpretation plays a role in determining the extent of the Supreme Court's intervention: if a statute is vague but 'not incapable of constitutional applications', the

[497] Kolender v Lawson, 461 US 352, 355 (1983) quoting Hoffman Estates v Flipside, Hoffman Estates, Inc, 455 US 489, 494 n 5 (1982)
[498] Minnesota ex rel. Pearson v Probate Court, 309 US 270, 514, 68 S Ct 665, 669, 92 L Ed 744 (1940)
[499] Boos v Barry, 485 US 312, 330-31, 108 S Ct 1157, 99 L Ed 2d 333 (1988)
[500] Hamling v United States, 418 US 87, 115-16, 94 S Ct 2887, 2907, 41 L Ed 2d 590 (1974)
[501] Bouie v City of Columbia, 378 US 347, 350, 84 S Ct 1697, 1702, 12 L Ed 2d 894 (USSC 1964)
[502] Eg: Rogers v Tennessee, 532 US 451, 453, 121 S Ct 1693, 1698, 149 L Ed 2d 697 (2001)
[503] Rogers v Tennessee, 532 US 451, 453, 121 S Ct 1693, 1700 149 L Ed 2d 697 (2001)
[504] Bouie v City of Columbia, 378 US 347, 350, 84 S Ct 1697, 1702, 12 L Ed 2d 894 (USSC 1964); Rogers v Tennessee, 532 US 451, 453, 121 S Ct 1693, 1699, 149 L Ed 2d 697 (2001)

Supreme Court will not declare it void but will overturn particular (unconstitutional) applications of the statute.[505] When the interpretation of a criminal statute is not well-settled and there are disagreements as to its correct meaning, the Supreme Court does not void the statute if the 'vast majority of cases' is still undisputed.[506] This position has been harshly criticized by Justice Scalia.[507]

The void for vagueness doctrine presupposes a distinction between 'vagueness' and 'ambiguity'. According to the Supreme Court, a provision is vague when 'no standard of conduct is specified at all', as opposing the situation in which a provision lies down 'an imprecise but comprehensible normative standard'.[508] Ambiguity, instead, affects those statutes which ' by their terms or as authoritatively construed apply without question to certain activities, but whose application to other behavior is uncertain'.[509] Only if the provision is vague, then it is unconstitutional and void: on the opposite, if the provision is only ambiguous, then the rule of lenity (or strict interpretation) applies.[510]

The doctrine according to which penal statutes are to be strictly interpreted was developed by English Courts during the seventeenth century, with the aim of restraining the excessive severity of the criminal system of that time.[511] Thus, originally, it was not a rule specifically addressing problems of ambiguity, being simply meant to favour the adoption of the narrowest possible interpretation of criminal statutes. Being conceived as a means of solving ambiguities in the language of penal statutes, it has undergone an interesting evolution. Especially in the past, the rule was interpreted as requiring that 'in the construction of a penal statute, all reasonable doubts concerning its meaning must operate in favour of the defendant'.[512] In this form, the rule has been repeated in 'perhaps thousands of judicial opinions in the Anglo-American legal world during the

[505] Steffel v Thompson, 415 US 452, 469-71, 94 S Ct 1209, 1221, 39 L Ed 2d 505 (1974)
[506] Skilling v United States, 561 US 358, 130 S Ct 2896, 2905, 177 L Ed 2d 619 (2010)
[507] Sorich v United States, 555 US 1204, 129 S Ct 1308, 173 L Ed 2d 645 (2009) (Justice Scalia, dissenting)
[508] Coates v City of Cincinnati, 402 US 611, 614, 91 S Ct 1686, 1688, 29 L Ed 2d 214 (1971)
[509] Smith v Goguen, 415 US 566, 94 S. Ct. 1242, 1249, 39 L. Ed. 2d 605 (1974); Parker v Levy, 417 US 733, 756, 94 S Ct 2547, 2561, 41 L Ed 2d 439 (1974)
[510] See, eg, McBoyle v United States, 283 US 25, 27, 51 S Ct 340, 341, 75 L Ed 816 (1931); Liparota v United States, 471 US 419, 427, 105 S Ct 2084, 2089, 85 L Ed 2d 434 (1985); United States v Bass, 404 US 336, 347–348, 92 S Ct 515, 522–523, 30 L Ed 2d 488 (1971); United States v Lanier, 520 US 259, 261, 266, 117 S Ct 1219, 1222, 137 L Ed 2d 432 (1997)
[511] L HALL,'Strict or Liberal Construction (n 472) 749-751
[512] North American Van Lines v United States, 243 F 2d 693, 696 (6th Cir 1957)

last two and one-half centuries'.[513] Nowadays, strict construction is conceived by the Supreme Court as a 'doctrine of last resort'.[514] This means that lenity is reserved to 'those situations in which a reasonable doubt persists about a statute's intended scope even after resort to "the language and structure, legislative history, and motivating policies" of the statute'.[515]

### *3.3 The position of the North-American literature*

Unlike their English counterparts, American textbooks of criminal law always dedicate an introductory chapter to the 'principle of legality'. [516] The interest paid by the American scholarship to principled analyses of the law finds its roots in the early nineteenth century emergence of an indigenous legal literature, willing to distance itself from the common law of England.[517] Legality is theoretically conceived as a principle limiting the exercise of powers by the state and equivalent to the rule of law.[518] It requires criminal liability and punishment to be grounded on a prior legislative enactment, stating what is proscribed as an offense in a precise and clear manner.[519] Legality is not a rule expressly declared by the American Constitution, but a notion derived by the literature from constitutional rules and doctrines.[520] One of the major experts in the field once noticed that '[a]cademic celebration of the legality ideal seems to have flowered after, not before, judicial crafting of the modern vagueness doctrine'.[521]

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[513] FA ALLEN, 'The Erosion of Legality in American Criminal Justice: some Latter-Day Adventures of the Nulla Poena Principle' (1987) 29 Ariz L Rev 385, 397

[514] SH KADISH, SJ SCHULHOFER, CS STEIKER, RE BARKOW, Criminal Law and its Processes : Cases and Materials, (New York , 9th ed, Wolters Kluwer Law and Business, 2012) 159-160

[515] Moskal v United States, 498 US 103, 108 (1990)

[516] Eg: J HALL, General Principles of Criminal Law (Indianapolis, 2nd ed, 1960 Bobbs-Merrill) chapt 2; SH KADISH, SJ SCHULHOFER, CS STEIKER, RE BARKOW Criminal Law (n 515) chapt 3; J DRESSLER AND SP GARVEY, Cases and Materials on Criminal Law (St Paul MN, 6th ed, 2012 West) chapt 3

[517] AWB SIMPSON, 'The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature' (1981) 48 U Chic L Rev 632, 670-673

[518] J HALL, General Principles (n 517) 27-28; DH HUSAK AND CA CALLENDER, 'Wilful Ignorance, Knowledge, and the "Equal Culpability" Thesis: a Study of the Deeper Significance of the Principle of Legality' [1994] 1 W L Rev 29, 30

[519] PH ROBINSON, Criminal Law (n 464) 74-75

[520] JF DECKER, 'Addressing Vagueness' (n 472) 244; J C JEFFRIES JR, 'Legality' (n 472), 195; PH ROBINSON, 'United States' in KJ HELLER AND MD DUBBER (eds), The Handbook (n 378) 566

[521] JC JEFFRIES JR, 'Legality' (n 472) 195

Thus, it is not surprising that the American literature dealing with the need for precision in law of criminal offences mostly focuses on the void for vagueness doctrine and on the interpretation of criminal statutes.[522] The void for vagueness and the strict construction of criminal statutes are defined as 'devices worked out by the courts to keep the principle of legality in good repair'.[523] The rule of lenity is conceived as the 'junior version of the vagueness doctrine'.[524]

The *ratio* most commonly attributed to the void for vagueness and to the rule of lenity is the need to grant 'fair warning' to citizens, by setting the conditions of criminal liability in advance and in a language understandable by a man of common intelligence.[525] For this reason, the literature criticizes the tendency of the U.S. Supreme Court to use strict construction only as a 'doctrine of last resort'. This tendency deprives the rule of lenity of its main purpose: namely, that of ensuring fair warning.[526] At the same time, part of the American literature underlines the 'abstracted and artificial character of the rhetoric of fair warning' in a legal system that still adopts the *ignorantia legis non excusat* rule.[527] Thus, according to some author, the solution to difficult cases does not lie in the use of strict interpretation but in 'more generously defined defenses of mistake or ignorance of law than we have thus far been willing to accept'.[528]

On the whole, the current American debate on legal certainty seems to be striving between two opposites. On the one side, 'realist' (as opposing 'formalist') views seems to have shaped the contemporary American scholarship, [529] favouring the consciousness that absolute certainty in language is unattainable.[530] Thus, an entire body of literature

[522] n 471
[523] HL PACKER, The Limits of the Criminal Sanction (Stanford, SUP 1968) 93
[524] HL PACKER, Ibid 95
[525] SH KADISH, SJ SCHULHOFER, CS STEIKER, RE BARKOW Criminal Law (n 515) 152; J C JEFFRIES JR, 'Legality' (n 472) 201; FA ALLEN, 'A Crisis of Legality in the Criminal Law? Reflections on the Rule of Law' (1990-1991) 42 Mercer L Rev 811, 816; PH ROBINSON, 'United States' (n 521) 567
[526] SH KADISH, SJ SCHULHOFER, CS STEIKER, RE BARKOW Criminal Law (n 515) 160
[527] J C JEFFRIES JR, 'Legality' (n 472), 210
[528] F A ALLEN, 'The Erosion of Legality' (n 513) 404. Similarly, see M DAN-COHEN, 'Decision Rules and Conduct Rules' (n 472) 662-664
[529] JR MAXEINER, 'Some Realism about Legal Certainty in the Globalization of the Rule of Law', M SELLERS AND T TOMASZEWSKI (eds), The Rule of Law in Comparative Perspective (Dordrecht Heidelberg London New York, Springer 2010) 45-47
[530] For references, see: FA ALLEN, 'The Erosion of Legality' (n 513) 389; K KRESS, 'Legal Indeterminacy' (1989) 77 Cal L Rev 283, 286

has been dedicated to the notion of 'legal indeterminacy'.[531] In addition, modern criminal law textbooks tend to present legality as a potentially dangerous 'loophole' through which clever criminals manage to escape.[532] Thus, the literature underlines how the principle of legality is presently undergoing a major crisis in the American legal theory,[533] and advocates of legal certainty are indeed rare.[534]

On the other side, the few authors dealing with legality are trying to remind courts and legal practitioners that 'there is a core concept of notice as a requirement of fairness to individuals that is, and should be, taken very seriously'[535] and that rules failing to guide citizens endanger the same existence of a social order.[536] The 'European model' for ensuring legal certainty is presented as the ideal solution for a system too much influenced by realist and pragmatical views.[537]

Because of this tension, many attempts to provide new insights on legal certainty are arising, claiming that a legal system so complicated and stratified and addressing such a varied society should give more weight to *mens rea* in order to serve the interests of fair warning.[538]

[531] See, for instance, K KRESS, 'Legal Indeterminacy' (1989) 77 Cal L Rev 283 (promoting a moderate position on the topic)
[532] DH HUSAK and CA CALLENDER, 'Wilful Ignorance, Knowledge, And The "Equal Culpability" Thesis: A Study Of The Deeper Significance of the Principle of Legality' [1994] 1 W L Rev 29, 31-32
[533] F ALLEN 'The Erosion of Legality' (n 513) 385; FA ALLEN, 'A Crisis of Legality' (n 525) 811
[534] JR MAXEINER, 'Legal Certainty: A European Alternative to American Legal Indeterminacy?' (2006-2007) 15 Tul J Int'l & Comp L, 541, 546; JR MAXEINER, 'Some Realism' (n 530) 43;
[535] JC JEFFRIES JR, 'Legality' (n 472) 211
[536] JR MAXEINER, 'Legal Indeterminacy made in America: U.S. Legal Methods and the Rule of Law', (2006-2007) 41 al U L Re 517, 523-525
[537] JR MAXEINER, 'Legal Certainty' (n 535) 541
[538] Text to n 529

## 4. Conclusions

### *4.1 Comparative analysis. The main features of a common law perspective on the need for precision in law of criminal offences*

As demonstrated by the previous paragraphs, the British and the North-American perspectives on the need for precision in law of criminal offences sensibly differ as to a number of elements. The constitutional review of legislation forms an integral part of the U.S. system, while being repugnant to the British notion of Parliamentary Supremacy. Partly for this reason, the North-American perspective on legal certainty is ancient and elaborated, while the British perspective has gained consistency only after the incorporation of the European Convention rights. The different times at which the two perspectives were shaped is probably at the roots of the different test used by courts to assess whether the required degree of certainty is reached. The British perspective has been elaborated in a contemporary legal system, complicated by factors such as the increasing amount of legislation and case law, often conflicting and not easily understandable, and addressing a non-homogeneous society. Consequently, British courts make use of the so called 'test of notional legal advice', presupposing the aid of a lawyer in the process of understanding the law. On the opposite, the void for vagueness doctrine has been shaped at the end of the nineteenth century, and when the Supreme Court applied the fair warning rationale, the test referred to the understanding of a 'man of common/ordinary intelligence'. However, the fair warning has now been abandoned (at least, by the Supreme Court) in favour of the 'arbitrary and discriminatory enforcement' rationale, better reflecting the exigencies of a heterogeneous society.
Notwithstanding these differences, the British and North-American perspectives the fundamental view that legal certainty secures the subjects of the law by granting them the ability to foresee/predict the application of state powers.[539] In the North-American experience, the 'fair warning' rationale connects precision with the right of individuals

[539] A ASHWORTH, Principles (n 388) 66; JR MAXEINER, 'Legal Certainty' (n 535) 546; JR MAXEINER, 'Legal Indeterminacy' (n 537) 522

to 'be informed' as to their position towards the state.[540] The 'arbitrary and discriminatory enforcement' rationale rests on the need to avoid arbitrary and erratic (i.e., unforeseeable) arrests and convictions.[541] In the British experience, courts expressly relate precision to the need for the law to be 'certain and predictable'[542] and scholars identify the rationale of precision in the need for the citizens to be put in the conditions to know in advance their position before the law.[543] Even before the adoption of the Human Rights Act 1998, one of the conditions of validity of a byelaw was to be 'certain, that is, it must contain adequate information as to the duties of those who are to obey'.[544]

The notion that legal certainty secures the subjects of the law by granting them the ability to foresee/predict the application of state powers is an individual-centred perspective on the need for precision. The focus is not on whether the law is certain, but whether the individual, faced with the state powers, can be protected against unforeseeable results. In the North-American experience, this is proved by the multiple references to the 'right' to fair warning. Such a practical and individual-centred perspective is connected to the common law nature of these systems. The British and the North-American criminal law are mostly statutory-based, and in both systems courts do not have the power to create new criminal offences anymore. However, both systems find their roots in the common law tradition. This means that the case law has historically been a legitimate source of law and also that the basic guarantees for criminal defendants have been shaped around a totally different understanding of the role of courts than the one adopted by civil law jurisdictions. Specifically, the British and the North-American perspectives on legal certainty have been heavily influenced by the rule of law.

As previously recalled, the English 'rule of law' is a notion dating back to centuries before the development of the modern state,[545] largely developed around the idea that

[540] Lanzetta v State of NJ, 306 US 451, 452, 59 S Ct 618, 83 L Ed 888 (1939)
[541] Papachristou v City of Jacksonville, 405 US 156, 161, 92 S Ct 839, 842, 31 L Ed 2d 110 (1972)
[542] R v Misra (Amit), [2005] 1 Cr App R 21; R v Rimmington [2005] UKHL 63; R v R [1992] AC 599
[543] G WILLIAMS, Criminal Law (n 389) 575. See, also CMW CLARCKSON, Understanding (n 451) 10; R BUXTON, 'The Human Rights Act' (n 451) 332
[544] Kruse v Johnson [1898] 2 QB 91 per A ASHWORTH, Human Rigths and Criminal Justice (n 392) 703 at 14
[545] D ZOLO, 'The Rule of Law: a critical Appraisal', P COSTA AND D ZOLO (eds) The Rule of Law: History, Theory and Criticism (Dordrecht, Springer 2007) 9

courts can counteract the absolutist demands of the monarch.[546] The rule of law does not share the origins of the legality principle, developed in the historical and cultural background provided by the Enlightenment.[547] When the Enlightenment spread across Europe, the English rule of law was already a well-settled notion regarding the judiciary not as an obstacle but as one of the means of protecting individual liberties: the Glorious Revolution of 1688 had settled the independency of the judiciary from the Crown[548] and English courts were perceived as guardians of the rule of law, as protectors of civil liberties.[549] Legality, instead, was primarily meant to arrest the unfettered discretion of courts, going hand in hand with the belief that the law can be applied through a syllogistic reasoning leaving no space for any measure of interpretation or discretion.[550] Admittedly, the North-American legal system has been influenced by the European notion of legality, also because of the willingness to distance itself from the constitutional tradition of the former 'motherland'.[551] Thus, 'legality' and 'rule of law' are often used as interchangeable terms in North-American criminal law.[552] However, the English rule of law has left significant traces upon the constitutional structure of the United States of America,[553] and the different background in which legality and the rule of law were shaped should not be underestimated. The rule of law presupposes an individual who is to be protected, through judicial recognition of his rights, against all state powers. Legality presupposes an individual who is to be protected against all state powers, but especially against the judiciary.

For this reason, legality relies heavily on the *form* of the law, whereas the rule of law 'encompasses more than the form and accessibility of laws' being necessarily concerned

[546] D ZOLO, Ibid 8

[547] On this conclusion, both European and non-European scholars agree. E.g.: C DEDES, 'L'origine del principio (n 4) 158; JC JEFFRIES JR, 'Legality' (n 472) 190; G VASSALLI, 'Nullum Crimen' (n 5) 70-71

[548] M SELLERS, 'An Introduction to the Rule of Law in Comparative Perspective', M SELLERS AND T TOMASZEWSKI (Eds), The Rule of Law in Comparative Perspective (Dordrecht-Heidelberg-London-N.Y., Springer 2010) 5

[549] A BABINGTON, The Rule of Law in Britain (Chichester, Barry Rose 1995) 201; M SELLERS, An Introduction' (n 549) 5

[550] G TARELLO, Storia della Cultura Giuridica Moderna (Bologna, Il Mulino 1976) 69

[551] B CASALINI, 'Popular Sovereignty, the Rule of Law, and the "Rule of Judges" in The United States' in P COSTA AND D ZOLO (eds) The Rule of Law: History, Theory and Criticism (Dordrecht, Springer 2007) 205

[552] P WESTEN, 'Two Rules of Legality' (n 472) 231

[553] D ZOLO, 'The Rule of Law' (n 546) 3

with their interpretation and application.[554] Thus, the rule of law encourages an individual-centred perspective on the need for a clear definition in law of criminal offences, in which what is important is not the theoretical precision of the law but the ability of the individual to foresee the use of state powers.

### *4.2 Comparative analysis. The Anglo-American perspective and ius certum*

As demonstrated by the previous chapter, the European Court of human rights mainly focuses on the perspective of the individual when dealing with the need for precision in law of criminal offences. Similarly, the Anglo-American experience conceives the need for precision mostly in terms of an 'individual right'. The individual-centred perspective on the need for precision is the main feature shared by the Anglo-American and Strasbourg perspectives, and it is strictly related to its 'relative dimension'.

The European Court of Human Rights, conscious that an absolute foreseeability is impossible to reach, is satisfied by a 'reasonable' foreseeability.[555] Accordingly, the existence of a 'penumbra of doubt' in relation to borderline facts does not in itself make a provision incompatible with Article 7, provided that it proves to be sufficiently clear in the large majority of cases.[556] Similarly, the British case law requires 'sufficient rather than absolute certainty'.[557] The US Supreme Court is satisfied by a 'sufficient warning that men may conduct themselves so as to avoid that which is forbidden',[558] or by 'minimal guidelines' for law enforcement.[559] Thus, the statute is not void if the 'vast majority of cases' is still undisputed.[560]

The 'reasonableness' or the 'sufficiency' of precision is measured, both in the European Court of Human Rights' and in the British perspective, on the citizen's ability to foresee, with the aid of a lawyer, the consequences of his/her actions. In the North-American experience, it is interesting to notice how the Supreme Court case law evolved, leaving behind the 'man of common/ordinary intelligence' test. The new test, grounded on the

[554] FA ALLEN, 'A Crisis of Legality' (n 526) 815
[555] Sunday Times v UK (No 1) (1979) Series A no 30
[556] Cantoni v France, ECHR 1996-V
[557] R v Misra (Amit), [2005] 1 Cr App R 21
[558] Rose v Locke, 423 US 48, 96 S Ct 243, 46 L Ed 2d 185 (1975)
[559] Smith v Goguen, 415 US 566, 94 S Ct 1242, 1248, 39 L Ed 2d 605 (1974)
[560] Skilling v United States, 561 US 358, 130 S Ct 2896, 2905, 177 L Ed 2d 619 (2010)

existence of 'minimal guidelines for law enforcement', seems to refer more to the lawyers and courts' perspective, rather than to citizens'. Indeed, the 'arbitrary and discriminatory enforcement' rationale rests on the need to avoid arbitrary and erratic (i.e., unforeseeable) arrests and convictions;[561] but it is debatable whether the arbitrariness of an arrest or convictions could actually be measured by an ordinary citizen. The European Court of Human Rights also refers the need for precision to the purpose of providing 'effective safeguards against arbitrary prosecution, conviction and punishment'.[562] Interestingly, the case law mentioning this rationale is the same in which the Court mentions the rule of law as the as the context in which to place the guarantees enshrined in Article 7 par. 1 ECHR.

Clearly, there is some sort of contradiction between an individual-centred perspective and a test measured not on the average citizen, but on the citizen who is recurring to a lawyer's advice. On the opposite, the individual-centred perspective explains coherently the focus on the subjective dimension of foreseeability, thus connecting precision with *mens rea*. The U.S. Supreme Court holds the presence of a scienter requirement as one of the elements contributing to lessen the impact of ambiguities, and among scholars new insights on legal certainty are arising, claiming that the legal system should give more weight to *mens rea* in order to serve the interests of fair warning.[563] In the British experience, criminal defendants tend to challenge uncertain provisions on the ground that the criminal consequences of their behaviours are beyond their control (either because of the structure of the criminal offence,[564] or because of the fact that the evaluation is left to a jury).[565]

Because of the relative dimension attributed to the need for precision, the three perspectives acknowledge the central role played by interpretation. The European Court

[561] Papachristou v City of Jacksonville, 405 US 156, 161, 92 S Ct 839, 842, 31 L Ed 2d 110 (1972)

[562] Eg: Ecer and Zeyrek v Turkey, ECHR 2001-II; Veeber v Estonia (No 2), ECHR 2003-I; Gabarri Moreno v Spain, App n 68066/01 (ECtHR, 22 July 2003); Puhk v Estonia, App n 55103/00 (ECtHR, 10 February 2004); Kafkaris v Cyprus, App n 21906/04 (ECtHR [GC] 12 February 2008); Kononov v Latvia, App n 36376/04 (ECtHR [GC] 17 May 2010); Korbely v Hungary, App n 9174/02 (ECtHR [GC]19 September 2008); Liivik v Estonia, App n 12157/05 (ECtHR, 25 June 2009); Scoppola v Italy (No 2) App n 10249/03 (ECtHR, 17 September 2009); Gurguchiani c Espagne, App n 16012/06 (ECtHR, 15 December 2009); Alimuçaj v Albania, App n 20134/05 (ECtHR, 7 February 2012); Camilleri v Malta, App n 42931/10 (ECtHR, 22 January 2013)

[563] Text to n 527

[564] R v Muhamad (Mithum) [2003] QB 1031

[565] R v Perrin (Stephane Laurent) [2002] WL 347127; R v Misra (Amit), [2005] 1 Cr App R 21

of Human Rights attributes to the judiciary the fundamental role of contributing to the foreseeability of the law by dissipating the interpretative doubts that the wording of criminal statutes might leave.[566] The US Supreme Court takes into consideration the law 'as interpreted and applied'. [567] In both the British and the North-American system, the consequences of uncertainty are dealt with at an interpretative level through a restrictive interpretation of the criminal provision.[568]

Because of the central role played by interpretation, the three perspectives attribute to the need for precision a chronological dimension. In the Strasbourg case law, the retroactivity of judicial enlargements of the criminal offence is usually examined under the foreseeability requirement. In the British experience, case law developments to the disadvantage of the accused are challenged on the basis of their lack of certainty, and the literature expressly equate vague with retroactive laws.[569] In the North-American experience, retroactive judicial expansions of the law is held not to violate the void for retroactive criminal liability, but the right to fair warning under the due process clause.[570]

For this reason, the three perspectives lie down the requirements of a legitimate case law development. According to the European Court of Human Rights, a 'gradual clarification' of the criminal law does not violate *ius certum* when it is consistent with the essence of the offence, and reasonably foreseeable.[571] The U.S Supreme Court also refers to the 'foreseeability' of the judicial expansion, which is violated by an 'unexpected and indefensible' interpretation of the law.[572] In the British experience, courts refer to the need for the case law to develop 'step by step on a case by case basis and not with one large leap',[573] but the concrete respect of this principle is debatable.

To conclude, the Strasbourg and Anglo-American perspectives on the need for precision in law of criminal offences share many relevant features, chiefly deriving from the focus on the individual. Thus, the European *ius certum* might be defined as a common law notion.

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[566] Cantoni v France, ECHR 1996-V

[567] R v Rimmington [2005] UKHL 63; Kolender v Lawson, 461 US 352, 355 (1983) quoting Hoffman Estates v Flipside, Hoffman Estates, Inc, 455 US 489, 494 n 5 (1982)

[568] R v Misra (Amit), [2005] 1 Cr App R 21; R v Rimmington [2005] UKHL 63

[569] G WILLIAMS, Criminal Law (n 389) 578; A ASHWORTH, Principles (n 388) 64; B FITZPATRICK, 'Gross negligence manslaughter' (n 427) 127

[570] Bouie v City of Columbia, 378 US 347, 350, 84 S Ct 1697, 1702, 12 L Ed 2d 894 (USSC 1964)

[571] SW and CR v UK (1995) Series A nn 335-B and 335-C

[572] Rogers v Tennessee, 532 US 451, 453, 121 S Ct 1693, 1700 149 L Ed 2d 697 (2001)

[573] R v Rimmington [2005] UKHL 63; R v Clark (Mark) [2003] 2 Cr App R 363

# CHAPTER FOUR

# THE EUROPEAN *IUS CERTUM* AND THE ITALIAN CRIMINAL LAW

## 1. Introduction. *Lex certa* in crisis

*Lex certa* as originally conceived by the continental legal tradition has a meaning when referred to a coherent body of laws, i.e. the criminal code.[574] As mentioned in the first chapter, the evolution from the Fascist to the democratic state has not deprived the Italian system of a code. The code, however, has lost its previous centrality and the legislature has never intervened significantly to adapt it to the new Constitution. The task of making the system comply with the democratic values has been thrust on the judiciary, which is facing an increasing amount of old and new criminal laws, scattered around the legal system and characterized by a bad drafting quality.[575]

The Constitutional Court has operated with a considerable self-restraint in voiding provisions of law, to the point that its position has been frequently criticized by the literature. By contrast, the constitutional judge has been particularly active in promoting the constitutionalisation of the system via corrective interpretation. Its practice of focusing on the interpretation of the criminal law as a means of solving constitutionality doubts attaining to its clarity has moved the focus from the literal precision of the criminal prohibition to its interpretation.[576]

As a consequence of all these phenomena, the distinction between what is legal and what is not cannot be found in the mere letter of the criminal code and of the (many) criminal laws enacted outside the code, but in the criminal law as interpreted and applied by judges.[577] However, the practice of Italian courts is characterized by a state of confusion, which has been defined as 'anarchy' in the law interpretation and

[574] M D'AMICO, 'Il principio di determinatezza' (n 71) 824
[575] See supra, Chapt 1, 2.4 and 3.4
[576] See supra, Chapt 1, 3.3
[577] M D'AMICO, 'Il principio di determinatezza' (n 71) 338; FC PALAZZO, 'Orientamenti dottrinali ed effettività giurisprudenziale' (n 140) 327-328

application.[578] Conflicting interpretations of the same provision develop between courts of different and of same level, and even the United Sections of the Court of Cassation produce conflicting interpretation of the same law over short periods of time.[579]

Clearly, conflicting interpretation of the law coexisting at the same time undermine *lex certa*. Thus, the literature correctly points out that even the most basic dimension of *lex certa* as a principle allowing individuals to understand and know the law is today in crisis, and that the loss of the traditional notion of *lex certa* in not balanced by adequate instruments providing legal certainty.[580]

The present chapter is dedicated to analyse the possible solutions to such a crisis, verifying how the Italian literature and higher courts are trying to make the criminal law predictable and certain. In this analysis, a relevant role is attributed to the case law developed by the European Court of Human Rights on *ius certum*. This case law is relevant for two reasons. On the one side, the Italian legal system must comply with the obligations descending from the European Convention on Human Rights, and the current state of uncertainty of the criminal law allows to cast doubts as to its compliance with the European *ius certum*. On the other side, some Italian authors have been suggesting that the adoption of the European *ius certum* could be the key for solving the uncertainty of the Italian criminal law. Thus, the present chapter analyses if and how the European Convention and the case law of the European Court should be taken into consideration by studies dealing with *lex certa* in the Italian legal system.

[578] A CADOPPI, Il valore del precedente (n 74) 21
[579] On the topic,see: A CADOPPI, Il valore del precedente (n 74)73-80; A ESPOSITO AND G ROMEO, I mutamenti nella giurisprudenza penale (n 73)
[580] A CADOPPI, Il valore del precedente (n 74) 118

## 2. Lack of predictability of the Italian case law on criminal matters: the debate on the possible solutions

### *2.1 The value of legal certainty in a civil law jurisdiction*

The subjection of the judiciary to the law is the way by which civil law jurisdictions grants legal certainty, as opposing the subjection to the binding authority of precedents in common law jurisdictions.[581] Binding courts to the written law should grant its uniform interpretation and application, thus making the system predictable in the eyes of individuals. However, legal certainty by subjection to the law may be granted only in a coherent system, composed by precisely defined laws. Furthermore, even in a system where these conditions were respected, uniformity would be satisfied either through a mechanical and syllogistic interpretation of the law, either through a certain persuasive force of the interpretation produced by superior courts.

The first hypothesis is held as little more than an ideal by the contemporary literature, because of the natural uncertainties affecting the human language.[582] The notion that judges can actually be reduced to '*bouches de la loi*' has not even survived the first ages of the modern state: the substantial failure of the *référé legislatif* in the post-Revolution France has motivated the acknowledgement that the interpretation of the law is a task to be left to the judiciary, and whose uniformity is to be granted by a 'third-level' court.[583] Thus, the creation of Courts of Cassations, in charge of providing the 'final' interpretation of the law, is the proof that civil law jurisdictions are well conscious that the interpretative process is not a mathematical result whose uniformity might be granted by the simple subjection of courts to well-drafted and coherent laws.

In the Italian legal system, the judiciary is subjected 'only to the law', according to Article 101, paragraph 2 of the 1948 Constitution.[584] The provision expresses the centrality of the ideal of legality, and it is meant to grant the independency of the

[581] F PALAZZO, Il principio di determinatezza nel diritto penale (n 59) 57 ff
[582] HLA HART, The concept of law (Oxford, Clarendon Press 1961) 121 ff
[583] P CALAMANDREI, La cassazione civile, vol I (Napoli, ed M CAPPELLETTI, Morano 1976) 464-466 *per* A CADOPPI, Il valore del precedente (n 74) 221-222
[584] Article 102, par 2 Cost

judiciary from any power of the state.[585] By subjecting judges 'only to the law', Article 101, paragraph 2 of the Constitution expresses the exigency that judges are bound only by the law, and by no other authority: thus, the Italian legal system formally refuses the notion that courts might be subjected to the binding authority of precedents.[586]

The task of securing the 'exact' and 'uniform' interpretation of the law, as well as its 'unity', is attributed to the Court of Cassation.[587] On the basis of Article 111 of the 1948 Constitution, appeals to the Court of Cassation in cases of violation of the law are always allowed against sentences and measures restricting personal freedom.[588]Today, the nomophylactic role of the Court of Cassation, born in connection to the ideal that there can be 'a' correct interpretation of the law, [589] has gone through a considerable state of crisis,[590] to the point that even its ability of granting a certain uniformity among the decisions of lower courts is now doubted.[591] As previously recalled, the whole Italian legal system is facing a state of considerable confusion as for the practice of courts and interpretation of the law.

The debate on the possible solutions to such a crisis, including the debate on the nomophylactic role exerted by the Court of Cassation, is examined below. Before analysing the proposals made by the literature, however, it is worth taking into consideration the attempts made by the Constitutional Court to balance the uncertainty affecting criminal law. These efforts might be considered as 'spontaneous attempts', expressing the quest for a non-codified solution to the problem of uncertainty. As the present work deals solely with *lex certa*, only the spontaneous attempts to make the system comply with the need for precision in law of criminal offences are taken into consideration. The attempts to acknowledge overruling as sources of law are not taken

[585] M PISANI, 'Il giudice, la legge e l'art. 101 comma 2 Cost.' (2013) 56 Riv It Dir Proc Pen 558, 562-563
[586] C Cost, sent 40/1964, <www.cortecostituzionale.it>
[587] Regio Decreto 30 gennaio 1941, n 12, Art 65
[588] Art 111, par 7, Cost
[589] See the literature recalled by M TARUFFO, Il vertice ambiguo. Saggi sulla Cassazione civile (Bologna, Il Mulino 1991) 59 ff
[590] A CADOPPI, 'Riflessioni sul valore del precedente' (n 140) 147. On the origins of this crisis, see A CADOPPI, Il valore del precedente (n 74) 235 ff
[591] On the topic, the literature is vast. See, eg the debate in For It (1988) V, 442 ff

into consideration, even though they are equally relevant proofs of how the system is struggling to comply with legal certainty.[592]

### *2.2 The attempts of the Constitutional Court to grant legal certainty*

#### *2.2.1 The living law doctrine*

The use made by the Constitutional Court of the living law doctrine can be considered as one of the spontaneous attempts made by the system to promote a better legal certainty. As explained in the first chapter, during the 1980s the Constitutional Court started to reject vagueness claims because of the presence of a steady judicial interpretation of the provision, [593] especially if developed by the Court of Cassation.[594] However, the notion of 'living law' started to emerge in the constitutional case law already during the 1950s. In one of its first judgments, the Constitutional Court assessed the following:

> '[L]a Corte (…) non può non tenere il debito conto di una costante interpretazione giurisprudenziale che conferisca al precetto legislativo il suo effettivo valore nella vita giuridica, se è vero, come è vero, che le norme non sono quali appaiono in astratto, ma quali sono applicate nella quotidiana opera del giudice, intesa a renderle concrete ed efficaci'.[595]

During the 1950s and 1960s, the Court has been focusing its review over the law as interpreted by courts, making use of notions such as 'steady interpretation', 'current meaning of the provision', laws 'living in the interpretation given by the Court of

[592] On this topic, see the interesting analysis made by A CADOPPI, Il valore del precedente (n 74), including these attempts into a general tendency of the Italian legal system to acknowledge binding force to precedents

[593] C Cost, ord 983/1988 ; C Cost, sent 31/1995; C Cost, sent 247/1997; C Cost sent 327/2008, <www.cortecostituzionale.it>

[594] C Cost, ord 11/1989, <www.cortecostituzionale.it>

[595] 'The [Constitutional] Court cannot ignore the steady interpretation given to the legislative provision by courts and assessing its real dimension, if, as it is, norms are not the abstract provisions but the provisions as applied daily by courts and as concretely working': C Cost, sent 3/1956, <www.cortecostituzionale.it>

Cassation'.[596] These early judgments were at the basis of the theorizations made by the literature about the existence of a 'living law',[597] i.e. the body of meanings acknowledged by the community of interpreters as the most "authoritative" for a certain provision.[598]

The use of the term 'living law' appeared in the constitutional case law by the mid-1970s,[599] and subsequently increased.[600] On the basis of the living law doctrine, the Constitutional Court leaves to judges the task of interpreting the law. The constitutional review is then exerted on the legislative provision as interpreted and applied, according to the following principle:

> 'Spetta al giudice ordinario l'interpretazione della norma, mentre questa Corte ha la funzione di porre a confronto la norma nel significato ad essa comunemente attribuito o assegnatole dall'interprete con i precetti costituzionali invocati, per rilevare gli eventuali contrasti'.[601]

The interpretation endorsed by the Court of Cassation is held by the Constitutional Court as having a particular relevance, either to confirm whether a living law has indeed formed, or to determine the actual content of the living law.[602] The living law doctrine has been the means by which the Constitutional Court has defined its tasks in relation to ordinary courts,[603] and especially in relation to the other 'superior' court of the Italian legal system, the Court of Cassation.[604]

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[596] C Cost, sent 3/1956; C Cost, sent 8/1956; C Cost, sent 11/1965; C Cost, sent 52/1965; C Cost, sent 134/1968; C Cost, sent 32/1971, <www.cortecostituzionale.it>

[597] The first theorization of the living law doctrine is commonly reputed to be the one by T ASCARELLI, 'Giurisprudenza costituzionale' (n 138) 351. On the topic, see also: A ANZON, 'La Costituzione e il diritto vivente' (n 138) 300; A PUGIOTTO, Sindacato di costituzionalità e diritto vivente (n 138)

[598] R BIN, 'La Corte Costituzionale tra potere e retorica (n 138) 9

[599] C Cost, sent 276/1974; C Cost, sent 286/1974, <www.cortecostituzionale.it>

[600] Starting with C Cost, sent 143/1980, references to the living law are present in about a hundred decisions released during the 1980s: see A PUGIOTTO, Sindacato di costituzionalità e diritto vivente (n 138) 354

[601] 'It is the ordinary judge's task to interpret the law, while this Court has the task of verifying the compliance of the provision, as commonly interpreted or as interpreted by the judge, with the constitutional parameters, in order to assess possible violations': C Cost, sent 280/1992

[602] See the analysis over the Constitutional Court's case law taking into consideration the Court of Cassation as main producer of the living law in A PUGIOTTO, Sindacato di costituzionalità e diritto vivente (n 138) 368 ff

[603] R BIN, 'La Corte Costituzionale tra potere e retorica (n 138) 14; A ANZON, 'La Costituzione e il diritto vivente' (n 138) 301

[604] A PUGIOTTO, Sindacato di costituzionalità (n 138) 351

At the same time, this doctrine could also have relevant consequences in terms of legal certainty: by acknowledging the decisions of the Court of Cassation as the main source of living law, the Constitutional Court reinforces its 'nomophylactic' role, thus promoting more 'unity' of interpretation. However, as pointed out in the first chapter, the Constitutional Court does not use consistently the living law doctrine, and this affects the relevance attributed to the case law of the Court of Cassations.[605] Indeed, notwithstanding declarations of principle, the Constitutional Court has been focusing more on the repeated application of a certain interpretation over the time (quantitative evaluation), rather than on the source of that interpretation (qualitative evaluation).[606]

As previously noticed, the ductility with which the living law doctrine has been used finds its roots in the theory of the sources of law underlying the Italian legal system: if the decisions of courts keep on being denied the status of law, it will always be possible for the Constitutional Court to ignore them in the evaluation of constitutionality, relying only on the letter of the provision whenever this is more convenient.[607] In addition, the system lacks formal mechanisms to bind lower courts to the living law as acknowledged by the Constitutional Court. [608] Thus, one of the reasons why the doctrine does not solve the uncertainties of the criminal system is not the doctrine itself, but the fact that this doctrine has been introduced in a system lacking any formal recognition of the value of case law in the law-creating process.

In any case, the doctrine represents an interesting tendency towards the recognition that the decisions of courts are sources of law. By assessing its review over the law as 'steadily' or 'commonly' interpreted, the Constitutional Court promotes the notion that interpretation is a source of law. This notion, if formalized, would imply the need to subject this source to the same guarantees enshrined in the legality principle for written laws, including *lex certa*.

[605] A PUGIOTTO, ibid 492
[606] A PUGIOTTO, ibid 492
[607] S RIONDATO, 'Retroattività del mutamento giurisprudenziale' (n 79) 247
[608] A CADOPPI, Il valore del precedente (n 74) 157-158

### *2.2.2 The unavoidable error iuris due to interpretative chaos*

The introduction of hypotheses in which individuals are 'excused' for their mistake of law can be considered as another attempt made by the Constitutional Court to face the problematic uncertainty of the Italian criminal law. Unlike the use of the living law doctrine, this attempt constitutes a 'normative' solution to the problem of uncertainty, being expressed through an unconstitutionality judgment. As previously recalled, in 1998 the Constitutional Court assessed the partial unconstitutionality of Article 5 of the Criminal Code, expressing the *ignorantia legis non excusat* rule.[609] As a consequence of that judgment, a state of guiltless mistake (or ignorance) of law can exempt the wrongdoer from his/her criminal liability.[610]

The judgment demonstrated the close connection between legality and culpability, as well as the existence of corresponding duties on citizens and on state powers. As the Constitutional Court declared, 'prima del rapporto tra soggetto e "singola" legge penale, esiste un ben definito rapporto tra ordinamento e soggetto "obbligato" a non violare le norme'.[611] Thus, the state has the duty to create the necessary preconditions for individuals to comply with *their* duties (i.e., to know the criminal law).

On that occasion, the Constitutional Court wisely acknowledged the following problem:

> 'L'assoluta, "illuministica" certezza della legge sempre più si dimostra assai vicina al mito: la più certa delle leggi ha bisogno di "letture" ed interpretazioni sistematiche che (…) rinviano, attraverso la mediazione dei c.d. destinatari della legge, ad ulteriori "seconde" mediazioni. (…) quelle ad es. di tecnici, quanto più possibile qualificati, di organi dello Stato'.[612]

[609] C Cost, sent 364/1988 (text to n 114)
[610] Among the many commentaries on the decision, see *supra*, n 115
[611] 'Before the relationship between the subject and the criminal law, there is the relationship between the legal system and the subject bound to respect the rules'
[612] 'The absolute, illuministc, certainty of the law is proving to be close to a myth: the more certain among laws needs to be 'read' through systemic interpretations, referring, through the mediation of the law's subjects, to additional 'secondary' mediations (…) For instance, those operated by qualified experts belonging to the state organs'

Thus, the Court acknowledged that even a perfectly clear drafting of the criminal provision might not be enough to render the law 'knowledgeable' for individuals. Accordingly, the parameters identified by the Court to assess whether the *error iuris* is, or not, avoidable and thus guiltless do not merely attain to the precise drafting of the criminal provision. The Constitutional Court identified as 'objective' parameters those cases in which an *error iuris* would affect any subject, and then stated the following:

> 'Tali casi attengono, per lo più, alla (oggettiva) mancanza di riconoscibilità della disposizione normativa (ad es. assoluta oscurità del testo legislativo) oppure ad un gravemente caotico (la misura di tale gravità va apprezzata anche in relazione ai diversi tipi di reato) atteggiamento interpretativo degli organi giudiziari ecc.'.[613]

Thus, the Court exemplified as a typical situation causing unavoidable *errores iuris* the interpretative chaos which is, indeed, common in the Italian criminal law. In addition, the Court referred to other situations, attaining to the 'erroneous assurance' received from those in charge of judging the facts: for instance, the existence of 'precedent, numerous discharges for the same fact'. However, the Court clarified that the specific abilities of the concrete subjects (such as their knowledge of the field) might obliterate the effect of objective situations otherwise capable of misleading indications.

The attention displayed by the Constitutional Court for situations in which the overall lack of quality of the system affects the individual ability to perceive the criminal nature of certain conducts had been preceded by the tendency to acknowledge *bona fide* mistakes of law, due to erroneous indications by public authorities.[614] The judgment released in 1988 by the Constitutional Court, thus, expressed an already perceived exigency emerging spontaneously from the legal system: the abandonment of the 'presumption of knowledge-ability' of the law, motivated by the realistic consideration that the criminal law 'in action' is often unclear and unpredictable.

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[613] 'These cases mostly concern the objective impossibility of understanding the provision (for instance, because of an absolute lack of clarity in the drafting) or the seriously chaotic position displayed towards interpretation by courts, that is to be measured also in accordance to the specific kind of criminal offence'

[614] Eg the numerous judgments cited by D PULITANO', 'Ignoranza (dir pen)' (n 99) 23, 33 sub notae 38-41

The attempt made by the Constitutional Court to solve the problematic uncertainty of the Italian criminal law through the recognition of excusable mistakes of law has, however, been criticized by the literature.

From a dogmatic point of view, the judgment has been criticized for equating the ignorance of the law (by definition, grounded on the absence of a relevant state of mind) with the mistake of law (which might indeed be guilty or guiltless).[615] The equation was probably motivated by the fact that, in the Italian criminal law, the two states are usually considered as equivalents:[616] however, it is true that this equivalence has a meaning only if the consequences for both states are the same (i.e., the criminal liability of the subject). Now that a distinction is introduced between the consequences implied by a guilty or by a guiltless state of mind, it is improper to perpetuate the equation between mistake and ignorance of the law.

From a practical point of view, the judgment has been criticized for including in the state of unavoidable *error iuris* situations in which the criminal provision is radically void, e.g. for its vagueness.[617] Thus, the Constitutional Court has been accused of consciously misusing the unavoidable *error iuris* as a means of masking the deficiencies of the legal system.[618] This strong assertion is grounded on the notion that the Constitutional Court could (and therefore should) intervene with a declaration of unconstitutionality whenever the criminal law does not comply with the constitutional values. However, as underlined in the first chapter of the present work, the problem here is that the Constitutional Court does not have an officially acknowledged power to declare unlawful a provision because of its conflicting interpretations.

Of course, this does not exclude criticisms to the judgment. The judgment demonstrates the potential consequences of moving the focus of *lex certa* from the institutional to the individual perspective: the risk is that of burdening the citizens with the failures of the system,[619] in line with the current 'subjectivism' affecting the criminal law.[620]

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[615] L STORTONI,'L'introduzione nel sistema' (n 115) 1329

[616] FIANDACA G MUSCO E, Diritto penale (n 1) 335. Critcizing the equivalence: D PULITANO', 'Ignoranza (dir pen)' (n 99) 24 ff

[617] L STORTONI,'L'introduzione nel sistema' (n 115) 1313

[618] L STORTONI, ibid 1348

[619] See the debate recalled by M DONINI, 'Serendipità e disillusioni della giurisprudenza. che cosa è rimasto della sentenza C. Cost. n. 364/1988 sull ignorantia legis', Studi in memoria di Pietro Nuvolone (n 4) 173, 185

Furthermore, in the Italian criminal law there is a difference between an acquittal due to lack of mens rea (e.g., on the basis of an unavoidable state of ignorance) and an acquittal due to the lawfulness of the conduct (e.g., following the declaration that a criminal prohibition is unconstitutional and thus void). This difference, attaining to the consequences of the criminal proceeding, has been underlined by some authors to demonstrate that the unavoidable *error iuris* should not be the physiologic solution for the unintelligibility of the provision assisted by conflicting interpretations.[621] On the opposite, it should operate only in extreme situations, being a solution for pathological conditions where the legal system has failed its duty to offer individuals a clear indication of the prohibited conducts.[622] Lastly, the unavoidable *error iuris* is an instrument which can be used with much discretion by courts, leading to unpredictable results and to violations of the equality principle.[623] Indeed, after the constitutional judgment of 1988, the use of this instrument has been the exception rather than the rule in courts.[624]

### *2.3 The suggestions proposed by the literature*

#### *2.3.1 Drafting and interpretative techniques*

Historically, in civil law jurisdiction the problem of uncertainty has been studied in the perspective of the legislature: thus, focusing on the legislative techniques and on how the legislature should formulate criminal offences in order to grant their intelligibility.[625] Italian authors still debate on this topic,[626] and in 1986 criteria for the formulation of criminal offences were elaborated by the Italian premiership.[627]

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[620] On the tendency of the system to focus on the subjective moment of the criminal offence, see: N MAZZACUVA, 'Il "soggettivismo nel diritto penale: tendenze attuali ed osservazioni critiche' (1983) V For It 45

[621] A CADOPPI, Il valore del precedente (n 74) 322; MANTOVANI F, 'Ignorantia legis scusabile ed inescusabile', Studi in memoria di Pietro Nuovolone, vol I (Milano, Giuffré 1991) 307, 328; L STORTONI,'L'introduzione nel sistema' (n 115) 1325

[622] A CADOPPI, Il valore del precedente (n 74) 266

[623] A CADOPPI, Il valore del precedente (n 74) 322; L STORTONI,'L'introduzione nel sistema' (n 115) 1325

[624] For the general failure of the judgment 364/88 to make the difference in the Italian legal system, see: M DONINI, 'Serendipità e disillusioni' (n 620) 187 ff

[625] References to classic studies on the topic can be found in A CADOPPI (ed), Il problema delle definizioni nel diritto penale. Omnis definitio in iure pericolosa? (Padova, CEDAM 1996) 13 ff

The legislature has not proved to be particularly concerned with the respect of such criteria and, in any case, there are entire areas of the criminal law (such as sexual offences) which are 'genetically' in contrast with lex certa, because a precise legislative definition of the offence is almost impossible to reach.[628] In addition, the complexity and number of sources of criminal law is such that even the boundaries of a precisely defined provision can be in doubt.[629] *Lex certa* is at stake anytime the (otherwise precise) provision is collocated in a context lacking systematic coordination.[630]

Thus, reducing the number of criminal offences and tightly connecting them to the violation of values perceived as essential for the human society has been envisaged as a solution to grant the intelligibility of the criminal law.[631] The same Constitutional Court, in the above mentioned judgment of 1988, has acknowledged that the intelligibility of criminal offences requires them to be few, and grounded on the violation of clearly perceived social values.[632] The notion that the criminal law should be reduced to the essential, so to comply with its nature of *extrema ratio*, has been the ground for proposals of a 'minimal' criminal law.[633] These proposals have been criticized for the risk of carrying with them the decriminalization of relevant 'modern' criminal offences, such as those protecting the environment.[634]

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[626] Eg, among many others: A CADOPPI (ed), Il problema delle definizioni (n 625); D CASTRONUOVO, 'Clausole generali e diritto penale' (2012) <www.dirittopenalecontemporaneo.it >, accessed 26 December 2013; G MARINUCCI AND E DOLCINI, Manuale di diritto penale (n 1) 60 ff; F PALAZZO, 'Tecnica legislativa e formulazione della fattispecie penale in una recente circolare della Presidenza del Consiglio dei Ministri' (1987) Cass Pen 230

[627] Circolare 5 febbraio 1986, n 1.1.2/17611/4.6, Gazzetta Ufficiale Serie Generale, 18 marzo 1986, n 64

[628] On this topic, see: F MACRI', 'La giurisprudenza di legittimità sugli atti sessuali tra interpretazione estensiva ed analogia in *malam partem*' (2007) I Dir Pen Proc 109

[629] A CADOPPI, Il valore del precedente (n 74) 143; N MAZZACUVA, 'A proposito della "interpretazione creativa" in materia penale: nuova "garanzia" o rinnovata violazione dei diritti fondamentali?', E DOLCINI AND CE PALIERO (eds) Studi in onore di Giorgio Marinucci (Milano, Giuffrè 2006) 437, 445

[630] AL MELCHIONDA, 'Definizioni normative e riforma del codice penale (spunti per una riflessione sul tema)', A CADOPPI (ed), Il problema delle definizioni (n 625) 402

[631] F BRICOLA, 'Legalità e crisi' (n 1) 211

[632] 'Il principio di "riconoscibilità" dei contenuti delle norme penali, implicato dagli artt. 73, terzo comma e 25, secondo comma, Cost., rinvia, ad es., alla necessità che il diritto penale costituisca davvero la extrema ratio di tutela della società, sia costituito da norme non numerose, eccessive rispetto ai fini di tutela, chiaramente formulate, dirette alla tutela di valori almeno di "rilievo costituzionale" e tali da esser percepite anche in funzione di norme "extrapenali", di civiltà, effettivamente vigenti nell'ambiente sociale nel quale le norme penali sono destinate ad operare.': C Cost, sent 364/1988, <www.cortecostituzionale.it>

[633] L FERRAJOLI, 'Il diritto penale minimo', A BARATTA (ed), Il diritto penale minimo: la questione penale tra riduzionismo e abolizionismo (Napoli, ESI 1985); ID, Diritto e ragione. Teoria del garantismo penale (Roma, Laterza 1989)

[634] G MARINUCCI AND E DOLCINI, 'Diritto penale "minimo" e nuove forme di criminalità', Studi in Ricordo di Giandomenico Pisapia (Milano, Giuffrè 2000) 211

The proposals to decrease the criminal law by sanctioning only the violation of certain values (e.g., those expressed in the 1948 Constitution) has moved in a similar direction.[635] However, these suggestions are clearly disregarded by the legislature and maybe even impossible to respect in a complex and heterogeneous society such as the current Italian one.[636]

As most Italian literature now adheres to the notion that *lex certa* is a quality to be granted by the law and by its interpretation, [637] the focus has now moved on the interpretation of the criminal law [638] and on a re-evaluation of *lex certa* (not as a drafting principle but) as an interpretative principle. [639] Since the use of *lex ce*rta as an interpretative principle is often disregarded by courts, proposals have been made for the introduction of a judicial review, allowing citizens to appeal against interpretative violations of *lex certa*.[640] Whether this appeal should be examined by the Constitutional Court[641] or by the Court of Cassation[642] is an open question.

The focus on interpretation has carried also other proposals: the legislative regulation of interpretative methods, [643] the void for extensive interpretations, [644] the use of the *favor rei* principle as an interpretative parameter comparable to the rule of leniency in

[635] The notion that criminal offences should be grounded on the violation of constitutional values was famously developed by Franco Bricola: F BRICOLA, 'Teoria generale del reato'(n 96) 14; F BRICOLA, 'Legalità e crisi' (n 1) 226. On the path traced by this author, see also: T PADOVANI, 'Spunti polemici e digressioni sparse sulla codificazione penale', S CANESTRARI (ed) Il diritto penale alla svolta di fine millennio (Torino, Giappichelli 1998) 95 ff

[636] A CADOPPI, Il valore del precedente (n 74) 135; F GIUNTA, 'Il giudice e la legge penale. Valore e crisi della legalità,oggi', Studi in Ricordo di Giandomenico Pisapia (Milano, Giuffrè 2000) 63, 78

[637] Eg: G CONTENTO, 'Clausole generali' (n 127) 109; F PALAZZO, 'Orientamenti dottrinali ed effettività giurisprudenziale' (n 140) 327; A PAGLIARO, 'Testo e interpretazione' (n 127) 2

[638] G CONTENTO, 'Clausole generali' (n 127) 109; O DI GIOVINE, L'interpretazione' (n 127); G FIANDACA, 'Ermeneutica e applicazione giudiziale del diritto penale', A PALAZZO (ed) L'interpretazione della legge (n 127) 299; N MAZZACUVA, 'A proposito della "interpretazione creativa" in materia penale: nuova "garanzia" o rinnovata violazione dei diritti fondamentali?', E DOLCINI AND CE PALIERO (eds) Studi in onore di Giorgio Marinucci (Milano, Giuffrè 2006) 437; A PAGLIARO, 'Testo e interpretazione nel diritto penale' (n 127) 2; D PULITANO', 'Sull'interpretazione e gli interpreti' (n 127) 657; M RONCO, 'Precomprensione ermeneutica del tipo legale e divieto di analogia' (n 127) 693

[639] AL MELCHIONDA, 'Definizioni normative' (n 630) 401-402; F PALAZZO, 'Orientamenti dottrinali ed effettività giurisprudenziale' (n 140) 332

[640] F BRICOLA, 'Le definizioni normative nell'esperienza dei codici penali contemporanei e nel progetto di legge delega italiano', A CADOPPI (ed), Il problema delle definizioni nel diritto penale. Omnis definitio in iure pericolosa? (Padova, CEDAM 1996) 175, 189; G CONTENTO, 'Principio di legalità e diritto penale giurisprudenziale', La Cassazione penale: problemi di funzionamento e ruolo (1988) For It 484, 489; AL MELCHIONDA, 'Definizioni normative' (n 630) 401-402

[641] In this direction, with references to similar institutes in other civil law jurisdictions: AL MELCHIONDA, 'Definizioni normative' (n 630) 21 ff

[642] G CONTENTO, 'Principio di legalità' (n 640) 489

[643] G CONTENTO,'L'insostenibile incertezza' (n 62) 967

[644] *Ibid*

common law jurisdictions. [645] Of course, in criminal law there is a high tension between legality and interpretation, and this is why there is much interest in finding interpretative tools to grant legality.[646] However, as professor Hart wisely acknowledged,

> 'Canons of 'interpretation' cannot eliminate, though they can diminish, these uncertainties; for these canons are themselves general rules for the use of language, and make use of general terms which themselves require interpretation'.[647]

Indeed, canons of interpretation are remedies which cannot solve the problems deriving from the essential uncertainty of the human language.[648] A comparative analysis demonstrates that legal systems historically concerned with canons of interpretation (such as the North-American one) do not grant a better legal certainty just for this reason.[649] Furthermore, the enactment of rules governing interpretation in civil law jurisdictions has not solved the problem of creative interpretation by courts.[650]

### *2.3.2 The nomophylactic role of the Court of Cassation*

As one of the problems affecting Italian criminal law is the lack of uniformity in the practice of courts, many authors have been suggesting a re-evaluation of the nomophylactic role of the Court of Cassation.[651] The rules governing the Italian judicial system attribute to the Court of Cassation the task of securing the 'exact' and 'uniform' interpretation of the law.[652] Thus, the Court is meant to exert a nomophylactic function,

[645] In favour of the codification of the *favour rei*: G CONTENTO,'L'insostenibile incertezza' (n 62) 968
[646] F PALAZZO, 'Legge Penale', Dig Disc Pen VII (1993) 360
[647] HLA HART, The concept of law (n 585) 123
[648] Demonstrating this inability in details: O DI GIOVINE, L'interpretazione' (n 127) 11 ff
[649] JR MAXEINER, 'Legal Certainty' (n 535) 572
[650] In this direction, with references to the French experience, see: A CADOPPI, Il valore del precedente (n 74) 153, sub nota 60
[651] Eg, among many others (cited in the following pages): A CADOPPI, Il valore del precedente (n 74); G FIANDACA, 'Diritto penale giurisprudenziale e ruolo della Cassazione' (2005) Cass Pen1722; N MAZZACUVA, 'Diritto penale giurisprudenziale e ruolo della Cassazione: spunti problematici', La Cassazione penale: problemi di funzionamento e ruolo (1988) For It 491
[652] Regio Decreto 30 gennaio 1941, n 12, Art 65

by providing the correct (or, at least, the most authoritative) interpretation of the law and by promoting uniformity in the courts' practice. [653]

In the Italian legal system, the subjection of the judiciary 'only to the law' is commonly reputed to exclude a formal binding force of precedents: thus, the compliance with the judgments released by the Court of Cassation depends on their persuasive force. [654] From the 1950s onwards, such persuasive force has lowered considerably. Concurring factors, such as the presence of a Constitutional Court, and the reform of the criteria for appointing the judges of the Court of Cassation, have diminished the authoritativeness of the decisions of the Court of Cassation. [655] In addition, this Court frequently releases contradicting interpretations of the same provision, and the preeminent role theoretically attributed to the United Sections of the Court is progressively losing its significance.[656]

The United Sections should be in charge of solving particularly important or dubious interpretative issues: Article 610 of the 1988 Code of Criminal Procedure states that appeals to the Court can be attributed to the United Sections when the issue under review is of particular importance, or when it is necessary to settle a contrast between decisions released by different sections of the Court.[657] The following Article 618 states the same with regard to the hypothesis in which the issue under review has been, or is likely to be in the future, ground for interpretative contrasts between lower courts.[658] Article 172 of the rules governing the entry into force of the 1988 Code of Criminal Procedure envisages the possibility that the United Sections give back the appeal to one

[653] See the report accompanying Article 65 Regio Decreto 30 gennaio 1941, n 12 in ACH MELCHIONDA, 'La crisi della funzione nomofilattica della Corte di cassazione penale' (1987) Crit Pen 40, 46 sub nota 14

[654] M TARUFFO, Il vertice ambiguo. Saggi sulla Cassazione civile (Bologna, Il Mulino 1991) 98; A VELA, 'La Corte suprema di cassazione, oggi', 'Per la Corte di Cassazione' 1989 For It 215, 219.Critizing this position: G PIOLETTI, 'Sul ruolo delle sezioni unite penali della Corte di Cassazione', La Cassazione penale: problemi di funzionamento e ruolo (1988) For It 461, 463 ff

[655] A CADOPPI, 'Riflessioni sul valore del precedente' G COCCO (n 140) 147; S SENESE, 'Funzioni di legittimità e ruolo di nomofilachia', 'Per la Corte di Cassazione' 1989 For It 256, 263. On the origins of this crisis, see A CADOPPI, Il valore del precedente (n 74) 235 ff; S CIANCI, 'Problemi di funzionamento della Cassazione penale', La Cassazione penale: problemi di funzionamento e ruolo (1988) For It 446, 448 ff;

[656] On the United Sections of the Court, see: P TONINI, Manuale di procedura penale (Milano, Giuffrè 2012) 880

[657] 'Il presidente, su richiesta del procuratore generale, dei difensori delle parti, o anche d'ufficio, assegna il ricorso alle sezioni unite quando le questioni proposte sono di particolare imporantza o quando occorre dirimere contrasti insorti tra le decisioni delle singole sezioni'(Article 610, paragraph 2, CPP)

[658] 'Se una sezione della corte rileva che la questione di diritto sottoposta al suo esame ha dato luogo, o può dar luogo, a un contrasto giurisprudenziale, su richiesta della parti o d'ufficio può con ordinanza rimettere il ricorso alle sezioni unite (Article 618 CPP)

of the regular sections when 'the contrast between courts is settled'.[659] However, the unifying influence theorized by these dispositions is mostly contradicted by the practice: interpretative contrasts arise frequently within the Court of Cassation, and the same United Sections happen to contradict themselves over short periods of time.[660] The situation is so confusing that someone has been wondering what purpose the United Sections serve.[661]

The literature, for a long time indifferent to the crisis undergone by the Court of Cassation, resumed the debate around its nomophylactic function during the 1980s.[662]

At that time, the problematic state of the Court of Cassation started to be taken into consideration as a non-physiologic phenomenon,[663] especially when concerning the simple sections of the Court not complying with the interpretation elaborated by the United Sections.[664]

The amount of appeals filed before the Court of Cassation was pointed out as one of the causes of its dysfunctions.[665] The literature underlined how a crisis of the nomophylactic function was liable to affect constitutional values such as equality and the subjection of judges 'only to the law' (both instrumental to the concrete respect of legality).[666] The reform of the Code of Criminal Procedure, finalized in 1988,[667] raised the expectation of a reinforced nomophylactic role of the Court.[668] However, the proposal of compelling the simple sections of the Court to adhere to the interpretation

[659] Article 172, Norme di attuazione, di coordinamento e transitorie del codice di procedura penale, DLgs 28 luglio 1989, n 127 (published on: Gazzetta Ufficiale 182, 5 agosto 1989)

[660] See the research made on the topic by: A ESPOSITO AND G ROMEO, I mutamenti nella giurisprudenza penale (n 73)

[661] V ZAGREBELSKY, 'La continuazione senza pace e le Sezioni Unite senza ruolo' (1987) Cass Pen 927, 932

[662] On this evolution, see S CIANCI, 'Problemi di funzionamento' (n 655) 446 ff

[663] See the studies published under the title 'Per la Corte di Cassazione', For It 1989, as well as those published under the title 'La Cassazione penale: problemi di funzionamento e ruolo', For It 1988, all focused on the crisis of the Court's role and on its possible solutions

[664] On this phenomenon, see the considerations by G PIOLETTI, 'Sul ruolo delle sezioni unite penali della Corte di Cassazione', La Cassazione penale: problemi di funzionamento e ruolo (1988) For It 461

[665] S CIANCI, 'Problemi di funzionamento' (n 655) 446 ff

[666] S CIANCI, 'Problemi di funzionamento' (n 655) 448; G FIANDACA, 'Nota introduttiva', La Cassazione penale: problemi di funzionamento e ruolo (1988) For It 442; G LATTANZI, 'La Corte di Cassazione tra vecchio e nuovo processo penale', La Cassazione penale: problemi di funzionamento e ruolo (1988) For It 453, 454; G PIOLETTI, 'Sul ruolo delle sezioni unite penali della Corte di Cassazione', La Cassazione penale: problemi di funzionamento e ruolo (1988) 462

[667] The new Code of Criminal Procedure was enacted with DPR 22 settembre 1988, n 447 (published on Gazzetta Ufficiale n 250 del 24 ottobre 1988)

[668] G LATTANZI, 'La Corte di Cassazione' (n 667) 460 ff; F ZUCCONI GALLI FONSECA, 'Le nuove norme sul giudizio penale di cassazione e la crisi della corte suprema' (1990) Cass Pen 524, 524-525

given by the United Sections,[669] was not included in the final project, probably by fear of introducing a form of binding precedent in the system.[670] The belief that Article 610 of the Code of Criminal Procedure would have been enough to avoid conflicting interpretations soon proved to be wrong, and part of the literature now laments the cautious attitude displayed at that time by the legislature.[671]

Recently, the legislature seems to have grown a certain awareness of the problematic situation affecting the Court of Cassation: Article 374 of the Code of Civil Procedure has been modified, so to require simple sections of the Court of Cassation to appeal to the United Sections when they wish to detach from their interpretation.[672] However, the provision concerns only the civil procedure and has no influence in the field of criminal law.

The current doctrinal debate on the nomophylactic role of the Court of Cassation is more and more aware of the creative role played by courts, and scholars focus especially on the means to grant some sort of binding force to the judgments of the Court of Cassation. As the interpretation given by this Court usually intervenes at the end of the criminal proceeding (when the possibly erroneous interpretation of the law has already formed), [673] a suggestion has been the creation of a preventive control over the interpretation of the law, implying also an evaluation of the interpretation's compliance with the values enshrined in the legality principle.[674] On the other hand, some authors suggest that the persuasive force of the decisions of the Court of Cassation should be considered as a form of precedent, *de facto* (although not formally) binding lower courts.[675] On these grounds, many call for an improvement of the service in

[669] Specifically, the proposal was that of compelling the simple sections of the Court to the respect of the interpretation released by the United Sections to solve an interpretative contrast. The choice appeared too radical and was subsequently not accepted: see P DUBOLINO AND OTHERS (ed), Il Nuovo Codice di Procedura Penale, illustrato articolo per articolo, con il commento, la relazione ministeriale e la giurisprudenza,vigente nel nuovo, del vecchio rito (Piacenza, La Tribuna 1989) 1157. On this topic, see also: G LATTANZI, 'La Corte di Cassazione' (n 667) 460

[670] F ZUCCONI GALLI FONSECA, 'Le nuove norme sul giudizio penale' (n 669) 527

[671] A CADOPPI, Il valore del precedente (n 74) 311

[672] Article 374, paragraph 3, CPC, as amended by D. Lgs 40/2006. On the topic, see: E LO MONTE, 'Il commiato dalla legalità: dall'anarchia legislativa al 'piroettismo' giurisprudenziale' (2013) <www.dirittopenalecontemporaneo.it >, accessed 26 December 2013, 22

[673] N MAZZACUVA, 'Diritto penale giurisprudenziale e ruolo della Cassazione: spunti problematici', La Cassazione penale: problemi di funzionamento e ruolo (1988) For It 491, 493

[674] G CONTENTO, 'Principio di legalità' (n 643) 489; G CONTENTO,'L'insostenibile incertezza' (n 62)

[675] See the debate recalled by A ANZON, Il valore del precedente nel giudizio sulle leggi (Milano, Giuffrè 1995) 82 ff. See also: M BIN, 'Funzione uniformatrice della Cassazione e valore del precedente giudizario' (1988) Contr e Impr 545

charge of extracting and publishing the *ratio decidendi* of the Court judgments,[676] and for a bigger attention, by part of the Court, to the elaboration of 'general principles' applying to 'typical cases'.[677]

Recently, a proposal has been made for the introduction of a formally binding precedent, through which the Court of Cassation might bind lower courts.[678] The proposal has been criticized because, in the Italian tradition, the force of the judgments released by the Court of Cassation is left to their ability of persuading lower courts, in a dialectic dynamic that would not tolerate the authoritative imposition of a binding precedent.[679] However, the attention paid by the literature for the way common law experiences deal with legal certainty has generally increased. [680]

[676] S EVANGELISTA AND G CANZIO, 'Corte di Cassazione e diritto vivente' (2005) V For It 82; G FIANDACA, 'Diritto penale giurisprudenziale e ruolo della Cassazione' (2005) Cass Pen1722, 1735. This need was already perceived during the 1980s: F ZUCCONI GALLI FONSECA, 'Le nuove norme sul giudizio penale' (n 669) 530

[677] G FIANDACA, 'Diritto penale giurisprudenziale e ruolo della Cassazione' (2005) Cass Pen1722, 1734

[678] A CADOPPI, Il valore del precedente (n 74) 301 ff

[679] G FIANDACA, 'Diritto penale giurisprudenziale' (n 678) 1737

[680] Eg: E GRANDE, 'Principio di legalità e diritto giurisprudenziale' (n 163) 129-146; A CADOPPI, Il valore del precedente (n 74)

## 3. The European 'reasonable foreseeability' and the Italian criminal law

Italy is one of the founding members of the Council of Europe, and it ratified the European Convention on Human Rights in 1955.[681] Until 2001, the European Convention on Human Rights was considered a primary source of law, thus equivalent to any law enacted by the Parliament.[682] Because of its position in the hierarchy of sources, the European Convention was scarcely taken into consideration by the literature as a factor of potential impact on the domestic criminal law.[683] Today, the European Convention is held to be a 'subconstitutional' source of law.[684] Thus, all domestic laws must comply with the standards of protection afforded to human rights by the European Convention, and the Constitutional Court has the power to declare void and unconstitutional the laws not complying with such standards. Accordingly, a new interested by the literature has arose, as to the effects of the European Convention on the Italian criminal law.[685]

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[681] Legge 848/1955

[682] See *infra*, text to n 698

[683] A few authors mentioned Article 7 ECHR when dealing with the legality principle: however, these references were more theoretical than practical. See eg: F BRICOLA, 'La discrezionalità nel diritto penale'(n 60) 811; F PALAZZO, Il principio di determinatezza (n 59) 26

[684] See *infra*, text to n 782

[685] A BALSAMO, 'La dimensione garantistica del principio di irretroattività e la nuova interpretazione giurisprudenziale "imprevedibile": una nuova frontiera del processo in "europeizzazzione" del diritto penale' (2007) Cass Pen 2200; N CIRILLO, 'L'efficacia della giurisprudenza della Corte Europea dei Diritti dell'Uomo, in diritto interno, in materia penale, alla luce delle sentenze 348 e 349/2007 della Corte Costituzionale' (2009) Rass Dir Pubb Europ 7; M D'AMICO, 'Il principio di legalità in materia penale fra Corte Costituzionale e Corti europee', N ZANON (ed), Le Corti dell'integrazione europea e la Corte Costituzionale italiana (Napoli, ESI 2006); DEL TUFO, 'Il diritto penale italiano al vaglio della giurisprudenza della Corte europea dei diritti dell'uomo: attuazione dei principi della Convenzione e ruolo del giudice interno' (2000) Crit Dir 457; O DI GIOVINE, 'Il principio di legalità tra diritto nazionale e convenzionale', Studi in onore di Mario Romano IV (Napoli, Jovene 2011) 2197; O DI GIOVINE, 'Ancora sui rapporti tra legalità europea e legalità nazionale: primato del legislatore o del giudice?' (2012) <www.penalecontemporaneo.it> accessed 26 December 2013; A ESPOSITO, Il diritto penale 'flessibile' (n 316); F IACOVIELLO, 'Il quarto grado di giurisdizione: la Corte europea dei diritti dell'uomo' (2011) Cass Pen 794; V MANES, 'La lunga marcia della Convenzione Europea ed i "nuovi" vincoli per l'ordinamento (e per il giudice) penale interno', Studi in onore di Mario Romano IV (Napoli, Jovene 2011) 2413; V MANES AND V ZAGREBELSKY, La Convenzione europea (n 288); E NICOSIA, Convenzione Europea dei Diritti dell'Uomo e Diritto penale (Torino, Giappichelli 2006); L PETTOELLO MANTOVANI, 'Convenzione Europea e Principio di Legalità', in Studi in memeoria di Pietro Nuvolone, I (n 4); V VALENTINI, Diritto penale intertemporale : logiche continentali ed ermeneutica europea (Milano, Giuffrè 2012); F VIGANO', 'Il diritto penale sostanziale italiano davanti ai giudici della CEDU' (2008) suppl n 12 Giur Mer 81; F VIGANO', 'Diritto penale sostanziale e Convenzione europea dei diritti dell'uomo' (2007) Riv It Dir Proc Pen 46; V ZAGREBELSKY, 'La convenzione europea dei diritti dell'uomo e il principio di legalità nella materia penale' (2009) Ius17@unibo.it 57

Among studies dealing with this topic, someone suggests that Article 7 ECHR, in the interpretation given to it by the Strasbourg Court, might solve the problems affecting the Italian criminal law, for instance by imposing the non-retroactivity of a new interpretation *in malam partem.*[686] Indeed, one might wonder whether the international obligations deriving from the European Convention on Human Rights could represent a solution for the problematic state of the Italian case law on criminal matters, by limiting its developments into the boundaries of a 'reasonably foreseeable' interpretation. In order to answer this question, it is necessary to analyse how the European Convention and the case law of the European Court of Human Rights penetrate the Italian legal system.

### *3.1 The European Convention and the Italian hierarchy of the sources of law*

On the basis of a traditional approach to the relationship between international law and domestic legal orders, the role played by international norms in the Italian legal system depends on the solution of two questions. First, it has to be established how these norms 'enter' the system; second, it has to be established their position in the hierarchy of the sources of law and, consequently, their resistance towards subsequent changes in the law.

According to some authors, the current debate on the role played by international treaties should not be conducted at the formalistic level of the 'theory of sources', but at the level of the 'dialogue between courts'.[687] However, the analysis in terms of multilevel constitutionalism[688] might, in the peculiar context of human rights, cause unacceptable discrepancies as to the level of protection.[689] For this reason, and for the

[686] S RIONDATO, 'Retroattività del mutamento giurisprudenziale' (n 79) 255

[687] D TEGA, 'Le carte dei diritti nella giurisprudenza della Corte Costituzionale (e oltre)', A PACE (ed), Corte Costituzionale e Processo Costituzionale (n 42) 953, 978-979; A ESPOSITO, Il diritto penale 'flessibile' (n 316) 27 ff

[688] On the topic, see S GAMBINO, 'Multilevel constitutionalism e diritti fondamentali' (2008) III Dir Pubbl Comp Eur 1149

[689] See the debate recalled by C NAPOLI, 'Le sentenze della C. Costituzionale nn. 348 e 349 del 2007: la nuova collocazione della CEDU e le conseguenti prospettive di dialogo tra le Corti' (2008) Quad Cost 137

sake of clarity, the present research wishes to establish the position of the European Convention of Human Rights in the 'traditional' hierarchy of the sources of law.

### *3.1.1 International norms in the Italian legal system: general rules and the example of EU laws*

Italy is classified as a 'dualistic' state: a formal act of incorporation is needed for international norms to produce their effects into the system.[690] As a consequence, international norms automatically acquire the rank of the act of incorporation, their resistance to subsequent changes in the law depending on their position in the hierarchy of sources.

Before 2001, the Italian Constitution dealt only with customary international law, acknowledging the subjection of Italian laws to the 'generally recognized norms' of international law.[691] However, already during the 1970s, the Constitutional Court had acknowledged the subconstitutional status of European Union (then, European Community) laws. The Court had declared that the laws deriving from the European Community fell within Article 11 of the Constitution, which allows limitations to the sovereignty of the state when 'necessary to create an order that ensures peace and justice among Nations'.[692] On the basis of such 'constitutional coverage', the Court had admitted their direct applicability into the legal system, [693] and its own jurisdiction in evaluating the conformity of domestic laws to the European Community norms, considered as constitutional parameters under Article 11 of the Constitution .[694]

Subsequently, the position of the Constitutional Court on this second point evolved, reaching the conclusion that directly applicable EU laws automatically 'prevail' over domestic laws. Thus, judges must 'disapply' the incompatible norm,[695] while the Constitutional Court retains jurisdiction only on the compatibility of EU laws with the fundamental principles of the Italian constitutional system or with inalienable human

[690] B CONFORTI, Diritto internazionale (Napoli, ESI 1992) 284 ff; L PALADIN, Le fonti del diritto italiano (Bologna, Il Mulino 1996) 413 ff
[691] Art 10 Cost
[692] Art 11 Cost
[693] C Cost, sent n 183/1973 <www.cortecostituzionale.it>
[694] C Cost, sent n 232/1975 <www.cortecostituzionale.it>
[695] C Cost, sent 170/1984 <www.cortecostituzionale.it>

rights.[696] Thus, the position of EU laws in the hierarchy of the sources had been established as 'subconstitutional' by the end of the 1980s. On the opposite, the complete solution of how the European Convention on Human Rights enters the Italian legal system needed both a constitutional reform and the subsequent intervention of the Constitutional Court.

### *3.1.2 International norms in the Italian legal system: the ECHR as a primary source of law*

In 1955, Italy ratified and incorporated into its legal system the European Convention on Human Rights.[697] As the act providing for the incorporation was an ordinary law enacted by the Parliament, the Constitutional Court initially held that the European Convention was a primary source, potentially affected by subsequent changes in the law.[698]

Between the 1970s and the 1980s, attempts were made by the literature to promote a higher rank for the European Convention in the hierarchy of sources of law. Some authors suggested that the European Convention might be 'constitutionalised' under Article 2 of the 1948 Constitution, because, according to that provision, the Italian Republic 'recognizes and guarantees inviolable rights of man'.[699] Others suggested that Article 11 of the Constitution could be the ground for the constitutionalisation, as it had already been for EU laws.[700] Lastly, someone suggested that the guarantees enshrined in the European Convention could be considered as 'generally recognized norms of international law' under Article 10 of the Constitution.[701]

[696] C Cost, sent 183/1973; C Cost, sent 170/1984 <www.cortecostituzionale.it>
[697] Legge 848/1955
[698] Eg: C Cost, sent n 188/1980; C Cost, sent n 17/1981 ; C Cost, sent n 15/1982; C Cost, sent n 388/1999 <www.cortecostituzionale.it>
[699] For this position, see A BARBERA, 'Articolo 2 Cost', G BRANCA (ed) Commentario della Costituzione (Bologna-Roma, Soc Ed For It 1975) 4
[700] P MORI, 'Convenzione Europea dei Diritti dell'uomo, Patto delle Nazioni Unite e Costituzione italiana' (1983) Riv Dir Int 307
[701] G BERTI, Interpretazione costituzionale (Padova, CEDAM 1987) 166; R QUADRI, Diritto internazionale pubblico (Napoli, Liguori 1989)

Notwithstanding the attempts made by *a quo* judges,[702] none of these position was accepted by the Constitutional Court, whose gradual opening towards the European Convention was manifested without taking a clear stance on the status of the European Convention. Thus, by the late 1980s, the Constitutional Court started to refer to international treaties when dealing with the 'inviolable rights of man' protected under Article 2 of the Constitution.[703] In 1993, an *obiter dictum* declared that the Convention could not be repealed or modified by subsequent laws, being an 'atypical' source of law.[704] However, this decision remained quite isolated in the subsequent constitutional case law.[705] In 1999, the Constitutional Court assessed the use of Convention rights as interpretative aids,[706] thus acknowledging their role as provisions integrating the constitutional parameters.[707] This solution has been used by other 'dualistic' legal systems,[708] but it has been criticized by the literature for lacking a clear justification,[709] and, in any case, it has not been pursued consistently by the subsequent constitutional case law.[710]

The Court of Cassation, instead, demonstrated a more progressive attitude towards the role of the European Convention on Human Rights: between the 1980s and the 1990s, it acknowledged its immediately preceptive role.[711] On one occasion, the first section of the Court declared the constitutional status of the European Convention under Article 2 of the Constitution,[712] and the United Sections once assessed that domestic laws not complying with the Convention could be disapplied by ordinary judges.[713] Nonetheless, the Constitutional Court kept on denying the constitutional status of the Convention,[714] and the overall situation in the Italian system was getting quite confusing when the

[702] D PICCIONE, ' I trattati internazionali come parametro e come criterio di interpretazione nel giudizio di legittimità costituzionale', A PACE (ed), Corte Costituzionale e Processo Costituzionale (n 42) 818, 821
[703] Eg: C Cost, sent n 408/1988; C Cost, sent n 125/1992, <www.cortecostituzionale.it>
[704] C Cost, sent n 10/1993, <www.cortecostituzionale.it>
[705] D TEGA, 'Le carte dei diritti' (n 688) 965 ff
[706] C Cost, sent n 388/1999. See also C Cost, ord n 305/2001, <www.cortecostituzionale.it>
[707] For a commentary of the decision, see: D TEGA, 'La CEDU nella giurisprudenza della Corte costituzionale' (2007) Quad Cost 2
[708] See the German case, recalled by D TEGA, 'Le carte dei diritti' (n 688) 968-969
[709] D TEGA, 'Le sentenze della Corte Costituzionale nn. 348 e 349 del 2007: la CEDU da fonte ordinaria a fonte "subcostituzionale" del diritto' (2008) Quad Cost 133
[710] D PICCIONE, ' I trattati internazionali' (n 703) 828 ff
[711] Corte di Cassazione (SS UU), sent 23 novembre 1988 (1988) Riv Pen 207
[712] Corte di Cassazione (Sezione I), sent 12 maggio 1993 (1994) Cass Pen 439
[713] Corte di Cassazione (Sezione I), sent 6672 del 1998; Corte di Cassazione (SS UU), sent 28507 del 2005
[714] Eg: C Cost, sent 388/1999; C Cost, sent 315/1990; C Cost, sent 188/1980; C Cost, ord 464/2005, <www.cortecostituzionale.it>

constitutional reform of 2001 took place, laying the grounds for a settlement of the debate.

### *3.1.3 International norms in the Italian legal system: the ECHR as a subconstitutional source of law*

In 2001, the Italian Parliament reformed the provisions of the 1948 Constitution dealing with local authorities (regions, provinces and municipalities).[715] On that occasion, Article 117 of the Constitution was rewrote, so to provide a new allocation of legislative powers between state and regions. As a consequence of the reform, its first paragraph now reads as follows:

> 'La potestà legislativa è esercitata dallo Stato e dalle Regioni nel rispetto della Costituzione, nonché dei vincoli derivanti dall'ordinamento comunitario e dagli obblighi internazionali'.[716]

Thus, the provision explicitly subjects primary sources to the respect of the Constitution, of EU laws and of other, non specified, 'international duties'. With regard to EU law, the debate was open on whether the provision simply confirmed the constitutional case law, or whether it reinforced the position of EU laws by equating them to the Constitution,[717] thus imposing a judicial review by the Constitutional Court over potential violations.[718] With regard to other 'international duties', the literature underlined that this is the first explicit constitutional reference to international treaties.[719] However, the effects of this reference were initially debated.[720] Someone

[715] Legge Costituzionale 18 ottobre 2001, n 3 - Modifiche al titolo V della parte seconda della Costituzione (published on GU 24 ottobre 2001, n 248)
[716] 'Legislative powers shall be vested in the State and the Regions in compliance with the constraints deriving from the European Union law and international obligations' (Art 117 Cost)
[717] See the debate recalled by S CATALANO, 'L'incidenza del nuovo articolo 117, comma 1, Cost. sui rapporti tra norme interne e norme comunitarie', N ZANON AND V ONIDA (eds), Le Corti dell'integrazione europea e la Corte Costituzionale italiana (Napoli, ESI 2006) 129, 133 ff
[718] For this position, see eg: S CATALANO, ibid 146
[719] Eg: R BIN, G BRUNELLI, A PUGIOTTO AND P VERONESI (eds), All'incrocio tra Costituzione e CEDU, Il rango delle norme della convenzione e l'efficacia interna delle sentenze di Strasburgo (Giappichelli, Torino 2007); A CASSESE, Il diritto internazionale (Bologna, Il Mulino 2003) 278; A D'ATENA, 'La nuova

held that the provision opens to a 'monist' model, in which international treaties enter the system without a formal act of incorporation.[721] Others held that the rank attributed to international treaties by the provision was not constitutional, although certainly higher than ordinary laws.[722]

In 2007, the Constitutional Court solved those claims with two highly relevant judgments,[723] welcomed by the literature as finally enlightening the position of the European Convention of Human Rights in the Italian legal system.[724]

The two judgments were partially different as for their object and reasoning: however, their analysis highlights common *principia iuris*, defining the status of the European Convention and its implications for the Italian law.[725] First of all, the Court clarified the difference between EU laws and the European Convention on Human Rights, by providing, in the first judgment, the following description:

> 'La Convenzione EDU (…) non crea un ordinamento giuridico sopranazionale e non produce quindi norme direttamente applicabili negli Stati contraenti. Essa è configurabile come un trattato internazionale multilaterale – pur con le caratteristiche peculiari che saranno esaminate più avanti – da cui derivano "obblighi" per gli Stati contraenti, ma non l'incorporazione dell'ordinamento giuridico italiano in un sistema più vasto, dai cui organi deliberativi possano

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disciplina costituzionale dei rapporti internazionali e con l'Unione europea', S MANCINI (ed), Il nuovo titolo V della Parte II della Costituzione (Milano, Giuffrè 2002) 133; F GHERA, 'I vincoli derivanti dall'ordinamento comunitario e dagli obblighi internazionali nei confronti della potestà legislativa dello Stato e delle Regioni', F MODUGNO AND P CARNEVALE (eds), Trasformazioni della funzione legislativa (Milano, Giuffrè 2003) 68 ff; E LUPO, 'La vincolatività delle sentenze della Corte Europea dei Diritti dell'Uomo per il giudice interno e la svolta recente della Cassazione civile e penale' (2007) <http://appinter.csm.it/incontri/relaz/14032.pdf> , accessed 26 December 2013

[720] Vast references to this debate can be found in D TEGA, 'Le carte dei diritti' (n 688) 956 sub nota 10

[721] A D'ATENA, 'La nuova disciplina costituzionale' (n 720) 133; R CALVANO, 'La Corte costituzionale "fa i conti" per la prima volta con il nuovo art. 117 comma 1 Cost' (2005) Giur Cost 4417

[722] R BIN, G BRUNELLI, A PUGIOTTO AND P VERONESI (eds), All'incrocio tra Costituzione e CEDU (n 722); F SORRENTINO, 'Nuovi profili costituzionali dei rapporti tra diritto interno e diritto internazionale e comunitario' (2002) Dir Pubb Comp Eur 1355 ff; D PICCIONE, ' I trattati internazionali' (n 703) 831

[723] The so called 'sentenze gemelle' ('twin judgments'): C Cost, sent 348/2007 and C Cost, sent 349/2007

[724] Among the many commentaries to these decisions: M CARTABIA, 'Le sentenze «gemelle»: diritti fondamentali, fonti, giudici' (2007) Giur Cost 3564; F DONATI, 'La CEDU nel sistema italiano delle fonti del diritto alla luce delle sentenze della Corte costituzionale del 24 ottobre 2007' <www.osservatoriosullefonti.it> accessed 26 December 2013; C NAPOLI, 'Le sentenze della C. Costituzionale nn. 348 e 349' (n 690) 133

[725] M CARTABIA, 'Le sentenze «gemelle»' (n 724) 3564

> promanare norme vincolanti, *omisso medio*, per tutte le autorità interne degli Stati membri'.[726]

On the basis of this distinction, the Court denied that ordinary judges can disapply domestic laws violating the European Convention, and the same conclusion was confirmed in the second judgment.[727]

In both decisions, the Court clarified that a constitutional recognition of the European Convention could not be found in Articles 10 or 11 of the Constitution, but in the new Article 117 paragraph 1,[728] defined as a norm introduced by the parliament to fill a previously existent gap.[729] Thus, the Court described the new provision as follows:

> 'La struttura della norma costituzionale (…) si presenta simile a quella di altre norme costituzionali, che sviluppano la loro concreta operatività solo se poste in stretto collegamento con altre norme, di rango sub-costituzionale, destinate a dare contenuti ad un parametro che si limita ad enunciare in via generale una qualità che le leggi in esso richiamate devono possedere. (…) [I]l parametro costituito dall'art. 117, primo comma, Cost. diventa concretamente operativo solo se vengono determinati quali siano gli "obblighi internazionali" che vincolano la potestà legislativa dello Stato e delle Regioni. Nel caso specifico sottoposto alla valutazione di questa Corte, il parametro viene integrato e reso operativo dalle norme della CEDU, la cui funzione è quindi di concretizzare nella fattispecie la consistenza degli obblighi internazionali dello Stato.[730]

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[726] 'The ECHR (..) does not create a supranational legal order and thus does not produce legal norms directly applicable in its member states. It is a multilateral international treaty, even though with peculiar features, creating duties for its member states but not making the Italian legal system part of a wider legal order, in which law-making organs may produce legal norms binding directly the domestic authorities of the member states': Cost, sent 348/2007, par 3.3. Critizing this distinction: A RUGGERI, 'La CEDU alla ricerca di una nuova identità, tra prospettiva formale-astratta e prospettiva assiologico-sostanziale di un inquadramento sistematico (a prima lettura di Corte Cost nn 348 e 348 del 2007)' (2007) <www.forumcostituzionale.it> accessed 26 December 2013

[727] C Cost, sent 349/2007, para 6.2, <www.cortecostituzionale.it>

[728] C Cost, sent 348/2007, para 4.3 and para 4.4.; C Cost, sent 349/2007, paras 6.1 and 6.2, <www.cortecostituzionale.it>

[729] C Cost, sent 349/2007, para 6.2, <www.cortecostituzionale.it>

[730] 'The structure is similar to that of other constitutional norms, operating in connection with norms having 'subconstitutional' rank, which give shape to the constitutional parameter (…) The constitutional parameter of Article 117, paragraph 1 of the Constitution is operative only when the 'international duties' limiting the authority of the legislature are identified. In the specific case under review, the parameter is shaped by the norms of the European Convention on Human Rights, whose function is that of specifying

Then, the Court described the position of the European Convention as 'subordinate to the Constitution, but halfway between the Constitution and ordinary laws'.[731] On this basis, the Court assessed the following:

> '[L]a norma nazionale incompatibile con la norma della CEDU e dunque con gli "obblighi internazionali" di cui all'art. 117, primo comma, viola per ciò stesso tale parametro costituzionale. Con l'art. 117, primo comma, si è realizzato, in definitiva, un rinvio mobile alla norma convenzionale di volta in volta conferente, la quale dà vita e contenuto a quegli obblighi internazionali genericamente evocati e, con essi, al parametro, tanto da essere comunemente qualificata "norma interposta"; e che è soggetta a sua volta, come si dirà in seguito, ad una verifica di compatibilità con le norme della Costituzione'.[732]

Therefore, the Court acknowledged that the non compliance with the European Convention makes ordinary laws unconstitutional by violation of Article 117, first paragraph, of the Constitution. However, the Court clarified that this assertion does not imply that the European Convention provisions are above the Italian Constitution. On the opposite:

> 'Proprio perché si tratta di norme che integrano il parametro costituzionale, ma rimangono pur sempre ad un livello sub-costituzionale, è necessario che esse siano conformi a Costituzione. (…) L'esigenza che le norme che integrano il parametro di costituzionalità siano esse stesse conformi alla Costituzione è assoluta e inderogabile (…)Nell'ipotesi di una norma interposta che risulti in contrasto con una norma costituzionale, questa Corte ha il dovere di dichiarare

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the extent of the international obligation of the Italian State': C Cost, sent n 348/2007, para 4.5, <www.cortecostituzionale.it>

[731] C Cost, sent 348/2007, par .5, <www.cortecostituzionale.it>

[732] 'The national law which is not compatible with the ECHR, and thus with the international obligations to which Article 117, paragraph 1 of the Constitution refers, infringes this last provision. Article 117, paragraph 1 of the Constitution refers every time to the relevant conventional norm, giving shape to the generic 'international duties' recalled by the provision and, thus, to the constitutional parameter (…)': C Cost, sent 349/2007, para 6.2, <www.cortecostituzionale.it>

> l'inidoneità della stessa ad integrare il parametro, provvedendo, nei modi rituali, ad espungerla dall'ordinamento giuridico italiano.'[733]

This way, the Court clarified the existence of constitutional limits for the same European Convention, as well as its own jurisdiction in evaluating the respect of those limits.

In both judgments, the Court pointed out that the peculiar nature of the European Convention on Human Rights implies the central relevance of the case law developed by the European Court. Thus, the Constitutional Court assessed the following, relevant principle:

> 'Poiché le norme giuridiche vivono nell'interpretazione che ne danno gli operatori del diritto, i giudici in primo luogo, la naturale conseguenza che deriva dall'art. 32, paragrafo 1, della Convenzione è che tra gli obblighi internazionali assunti dall'Italia con la sottoscrizione e la ratifica della CEDU vi è quello di adeguare la propria legislazione alle norme di tale trattato, nel significato attribuito dalla Corte specificamente istituita per dare ad esse interpretazione ed applicazione.'[734]

As for the implications of the subconstitutional nature of the European Convention, the Court adopted the following position:

> [A]l giudice comune spetta interpretare la norma interna in modo conforme alla disposizione internazionale, entro i limiti nei quali ciò sia permesso dai testi delle norme. Qualora ciò non sia possibile, ovvero dubiti della compatibilità

[733] 'As these norms [the ECHR] concur to define the constitutional parameter, they live at a 'subconstitutional' rank, thus needing to comply with the values of the Constitution (…) The need for these norms to comply with the Constitution is absolute and cannot be derogated. (…) If one of these norms infringes the Constitution, this Court has the duty to declare it inadmissible as a source integrating the constitutional parameter, and thus to void it from the Italian legal order': C Cost, sent 348/2007, para 4.7, <www.cortecostituzionale.it>

[734] 'As the norms live in the interpretation given by their interpreters, and expecially by judges, the natural consequence deriving from Article 32, paragraph 1 ECHR is that, among the international duties accepted by Italy with the signature and ratification of the European Convention, there is the duty to adjust its legislation to the Convention norms, in the meaning identified by the court in charge of interpreting and applying them': C Cost, sent 348/2007, para 4.6 (similarly, C Cost, sent 349/2007, para 6.2) , <www.cortecostituzionale.it>

> della norma interna con la disposizione convenzionale 'interposta', egli deve investire questa Corte della relativa questione di legittimità costituzionale rispetto al parametro dell'art. 117, primo comma, come correttamente è stato fatto dai rimettenti in questa occasione.'[735]

Thus, the Court demonstrated the different impact of the European Convention provisions and EU laws: whereas the second automatically prevail over incompatible provisions, the first need a declaration of unconstitutionality by the Constitutional Court (provided that the ordinary source cannot be rendered 'constitutionally compatible' via interpretation). Considering the relevance of the Strasbourg case law in the ECHR system, the Constitutional Court clarified that the duty for ordinary judges to look for the 'Convention-compatible' interpretation of the domestic law must take into consideration the Convention as interpreted by the Strasbourg Court.

The relevance of the Strasbourg case law in the interpretation of the European Convention had already been assessed many times by ordinary judges (including the Court of Cassation),[736] but with these judgments the Constitutional Court promotes the respect of the European interpretation as a duty for domestic judges.[737] Apparently, the Constitutional Court was also willing to bind its own scrutiny (over the European Convention compliance with the Italian Constitution) to the 'norm as resulting from its interpretation', and not to the mere letter of the Convention provision.[738] However, it left open the possibility that a 'reasonable balance' between international duties and constitutional values imposes the need to detach from the interpretation given by the European Court of Human Rights.[739]

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[735] 'The domestic judge must interpret the domestic law in order to render it compatible with the international provisions, as far as this is possible according to the text. Whenever this is not possible, or whenever the judge doubts of the compatibility of the domestic law with the convention provision, its duty is to apply this Court with a constitutionality claim': C Cost, sent n 349/2007, para 6.2, <www.cortecostituzionale.it>

[736] Eg: Cass Civ, SS UU, 26 gennaio 2004

[737] I CARLOTTO, 'I giudici comuni e gli obblighi internazionali dopo le sentenze 348 e 349 del 2007: un'analisi sul seguito giurisprudenziale' (2008) <www.associazionedeicostituzionalisti.it> accessed 26 December 2006, 12

[738] C Cost, sent n 348/2007, para 4.7 (similarly, C Cost, sent n 349/2007, para 6.2), <www.cortecostituzionale.it>

[739] C Cost, sent n 348/2007, para 4.7, <www.cortecostituzionale.it>

*3.2 Current status of the European Convention in the Italian legal system*

With the 2007 judgments, the Constitutional Court draw a clear line, separating the status and effects of the European Convention of Human Rights from those of EU laws. Not only the Court denied the possibility of disapplying ordinary laws in favour of the European Convention provisions: it also assessed that the Convention provisions are subjected to a full constitutional scrutiny, more extended than the one applying to EU laws.[740] In 2009, the Constitutional Court clarified the following:

> 'Con riferimento ad un diritto fondamentale, il rispetto degli obblighi internazionali non può mai essere causa di una diminuzione di tutela rispetto a quelle già predisposte dall'ordinamento interno, ma può e deve, viceversa, costituire strumento efficace di ampliamento della tutela stessa'.[741]

Thus, the ECHR provisions are allowed to enter the system as subconstitutional sources of law only if they provide a protection to human rights which is at least equivalent to the one provided by the Italian Constitution.[742]

According to the literature, the two decisions left open many questions. For instance, what is the relevance of the case law developed by the European Court of Human Rights when it is not the product of judgments involving Italy?[743] The European Court releases very concrete judgments, depending on the specificities of the legal system to which they are referred: thus, caution should be paid in the extension of the ratio decidendi to different cases.[744]

Italian judges have demonstrated to be aware of this problem, frequently taking into consideration the specificities of the Strasbourg case law before concluding for its

[740] M CARTABIA, 'Le sentenze «gemelle»' (n 724) 3570; A RUGGERI, 'La CEDU alla ricerca di una nuova identità' (n 727)

[741] 'When a fundamental right is at stake, the need to comply with international obligations can never be the reason for a lessening of the guarantees enshrined in the domestic legal system: it should, instead, be the instrument for their extension': C Cost, sent n 317/2009, <www.cortecostituzionale.it>

[742] C NAPOLI, 'Le sentenze della C. Costituzionale nn. 348 e 349' (n 690) 140

[743] F DONATI, 'La CEDU nel sistema italiano' (n 725) 8 ff

[744] M CARTABIA, 'Le sentenze «gemelle»' (n 724) 3573. Simlarly, D TEGA, 'Le sentenze della Corte Costituzionale nn. 348 e 349' (n 710) 135-136

application (or non application) to the case under review.[745] However, situations in which the Strasbourg case law not involving Italy has been taken into consideration have been frequent, and even the Constitutional Court, in two recent judgments, has done so.[746]

Again, what should an ordinary court do when a provision might be given either a constitutionally compatible or a Convention-compatible meaning, but the two meaning diverge?[747] The practice developed by ordinary courts in the years following the constitutional judgments has been favourable to operate a 'reasonable balance' between constitutionally protected interests and international obligations, with final prevalence of the constitutional over the Convention-compatible meaning.[748] However, there have been also contradicting judgments, and the judicial practice has sometimes even disregarded the indications given by the Constitutional Court as to the non-disapplicability of domestic laws for their contrast with the Convention.[749]

According to the literature, these difficulties derive from the unclear distinction between Convention-compatible interpretations and disapplication of the domestic law.[750] The final effect of the two constitutional judgments is that Italian courts are now entrusted with a delicate task, requiring them a good knowledge of the Strasbourg case law, as well as the ability to operate the necessary distinguishing between different cases (a modus operandi that continental judges are not generally used to).[751] This is why, according to part of the literature, Article 101 paragraph 2 of the 1948 Constitution should now be read as subjecting the judiciary to the law *insofar as it complies* with the constitutional standards *and* with the standards imposed by (the EU law and) the European Convention on Human Rights.[752]

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[745] See the analysis on the case law following the two constitutional judgements made by I CARLOTTO, 'I giudici comuni' (n 738)

[746] C Cost, sent n 49/2008; C Cost, sent n 97/2009, <www.cortecostituzionale.it>

[747] V SCIARABBA, 'Nuovi punti fermi (e questioni aperte) nel rapporto tra fonti e corti nazionali ed internazionali' (2007) Giur Cost 3579, 3586

[748] See the analysis on the case law made by I CARLOTTO, 'I giudici comuni' (n 738) 24 ff

[749] I CARLOTTO, Ibid 24

[750] I CARLOTTO, Ibid 65 ff

[751] I CARLOTTO, Ibid 70

[752] R TONIATTI, 'Deontologia giudiziaria' (n 160) 82. On this path, see also D BIFULCO, Il giudice è soggetto soltanto al "diritto": contributo allo studio dell'articolo 101, comma 2 della Costituzione italiana (Napoli, Jovene 2008)

### *3.3 Effects of the judgments released by the European Court of Human Rights in the Italian legal system*

According to the European Court of Human Rights, once a violation of the Convention is assessed, it is primarily for the state concerned to choose the means to abide by the Strasbourg judgment under Article 46 of the Convention.[753] Recently, the European Court has clarified that a 'just compensation' to the victim(s) is not sufficient: the state is also expected to 'put an end to the breach and to make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach'.[754]
This result is particularly problematic in criminal law, because appeals to the European Court of Human Right are admissible only when all domestic remedies have been exhausted,[755] which usually means that the conviction is final. The Committe of Ministers of the Council of Europe has thus recommended the member states to grant the 'restitutio in integrum' of the violated human right or freedom by introducing in their legal systems remedies allowing to re-open the criminal proceeding. [756]
For a long time, the Italian legal system has been lacking such a remedy. Until 2011, Article 630 of the Code of Criminal Procedure allowed the re-opening of the criminal proceeding only in four cases, not including a judgment by the European Court of Human Rights.[757] In the absence of any action by the legislature, the Court of Cassation had tried to solve the problem by applying analogically to the cases under its review other procedural remedies.[758] Such approach, however, lacked general application,[759]

[753] Assanidze v Georgia, ECHR 2004-II. Article 46, paragraph 1, ECHR states that '[t]he High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties'.
[754] Scoppola v Italy (No 2) App n 10249/03 (ECtHR, 17 September 2009); Assanidze v Georgia, ECHR 2004-II
[755] Article 35, paragraph 1, ECHR
[756] Recommendation No R (2000) 2 of the Committee of Ministers to member states on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights
[757] Codice di Procedura Penale, Artt 629-647
[758] Eg: Cass sez I, 1 dicembre 2006, Dorigo (2007) Cass Pen 1447; Cass sez VI, 12 novembre 2008, Drassich (2009) Cass Pen 1457
[759] On the various attempts made by the Italian judiciary to give effects to the Strasbourg judgments, see: MG AIMONETTO, 'Condanna "europea" e soluzioni interne al sistema processuale penale: alcune riflessioni e spunti de iure condendo' (2009) Riv It Dir Proc Pen 1510; E APRILE, 'I "meccanismi di adeguamento alle sentenze della Corte Europea dei Diritti dell'Uomo nella giurisprudenza penale di legittimità' (2011) Cass Pen 3216; M GIALUZ, 'Il riesame del processo a seguito di condanna della Corte di Strasburgo'(2009) Riv It Dir Proc Pen 1845; D NEGRI, 'Corte europea e iniquità del giudicato penale' (2007) Dir Pen Proc 1229; A TAMIETTI, 'Un ulteriore passo verso una piena esecuzione delle sentenze

and on many occasions the Committee of Ministers had stigmatized the legislative lacuna of the Italian system.[760]

In 2006, a constitutional claim focusing on Article 630 C.P.P. was addressed to the Italian Constitutional Court. The case under review originated in a violation of Article 6 ECHR, protecting the procedural guarantees of the criminal defendant.[761] The Strasbourg Court had acknowledged that a violation had occurred, and the successful applicant had asked the domestic courts to review his final conviction on this basis. As Article 630 C.P.P. did not include Strasbourg judgments in the cases allowing a re-opening of the criminal proceeding, the domestic court had referred to the Constitutional Court a claim involving the constitutionality provision. The Court, however, rejected the constitutionality claim, motivating its denial with the speficic constitutional parameters invoked by the *a quo* judge (namely, Articles 3, 10 and 27 of the Constitution).[762]

Promptly, the same *a quo* judge applied again the Constitutional Court, alleging that Article 630 C.P.P. caused a violation of the international obligations undertaken by the Italian State under Article 117, paragraph 1, of the Constitution. This time, the Constitutional Court acknowledged the violation of the constitutional provision, and declared the unconstitutionality of Article 630 C.P.P.[763] The decision, a typical case of 'manipulative judgment',[764] voids the provision *insofar as it does not include* Strasbourg judgments assessing the violation of a human right in the exceptional circumstances allowing the review of a final conviction. It is, at the moment, unclear how this remedy will concretly work in the Italian legal system, [765] expecially when

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della Corte europea dei diritti dell'uomo in tema di equo processo: il giudicato nazionale non è di ostacolo alla riapertura dei processi' (2007) Cass Pen 1015

[760] ResDH (2005) 82; CM/ResDH (2007) 83

[761] Dorigo v Italy, App n 33286/96 (ECtHR, 20 May 1998)

[762] C Cost, sent n 129/2008 (2008) Giur Cost 1506. See : M CHIAVARIO, 'Giudicato e processo «iniquo»: la Corte si pronuncia (ma non è la parola definitiva)' (2008) Giur Cost 1524

[763] C Cost, sent n 113/2011 (2011) Giur Cost 1523. Commentaries to the decision: L PARLATO, 'Revisione del processo iniquo: la Corte Costituzionale "getta il cuore oltre l'ostacolo"' (2011) Dir Pen Proc 833; G UBERTIS, 'La revisione successiva a condanne della Corte di Strasburgo' (2011) Giur Cost 1542; G REPETTO, 'Corte Costituzionale e CEDU al tempo dei conflitti sistemic' (2011) Giur Cost 1548; S LONATI, 'La Corte Costituzionale individua lo strumento per adempiere all'obbligo di conformarsi alle condanne europee: l'inserimento delle sentenze della Corte Europea tra i casi di revisione' (2011) Giur Cost 1557

[764] Text to n 50

[765] On this point, see also the considerations by S QUATTROCOLO, 'La vicenda Drassich si ripropone come crocevia di questioni irrisolte' (2013), <www.penalecontemporaneo.it> accessed 12 December 2013

considering that a judgment of the European Court assessing the violation of a Convention rights can actually cover a number of very different situations.[766]

## 4. The role of the European *ius certum* in the Italian criminal law

On the basis of the analysis conducted thus far, it is possible to establish the role of the European *ius certum* in the Italian criminal law.

As acknowledged by the Constitutional Court, the European Convention on Human Rights is a 'subconstitutional' source of the Italian law. Thus, the legislature must comply with the Convention standards of protection, unless these standards are inferior to the ones established by the Italian Constitution. The judiciary, on its part, must interpret the domestic laws with the aim of making them compatible with the ECHR system and with the Constitution. In case of contrast between possible interpretations, the constitutional one should prevail; or, whenever there is no constitutional interpretation, the law should be subjected to the scrutiny of the Constitutional Court. According to this frame, the case law developed by the European Court of Human Rights on *ius certum* introduces duties both for the Italian legislature and for the Italian judiciary. Both must contribute to the accessibility and reasonable foreseeability of the criminal law. Clearly, the extent of this proposition depends on an evaluation of the level of protection for human rights implied by the European *ius certum*: if the level is inferior to the one provided by the Italian Constitution, then it is the duty of the legislature and of the judiciary not to apply the Convention standards.

Many authors, in Italy and abroad, hold that the European *ius certum* provides less protection than continental legality, refusing *in toto* its application in civil law jurisdictions.[767] However, the present research demonstrates that the main difference theoretically separating the position of the Italian Constitutional Court and of the European Court of Human Rights (i.e., the object of the certainty requirement) is not actually so profound. As demonstrated by the first chapter, the Italian constitutional case law on *lex certa* shows an interesting convergence towards the results of the

[766] G UBERTIS, 'La revisione successiva a condanne della Corte di Strasburgo' (2011) Giur Cost 1542, 1546

[767] Eg: S HUERTA TOCILDO, 'The Weakened Concept' (n 78); R KOERING-JOULIN, 'Pour un retour' (n 78); V VALENTINI, Diritto penale intertemporale: logiche continentali ed ermeneutica europea (Milano, Giuffrè 2012)

European case law on *ius certum*, by taking into account the judicial practice as a source of precision and by acknowledging the role of *lex certa* in providing the essential conditions for the existence of mens rea.

However, as recalled by the second chapter, at least two important differences remain between the positions elaborated by the Italian Constitutional Court and by the European Court of Human Rights. The European Court of Human Rights forgets the 'institutional' aim of the need for precision, focusing almost exclusively on *ius certum* as a quality granting the subjective foreseeability of the criminal law, i.e. the preconditions for mens rea. In addition, the European Court tends to overlap non-retroactivity with *ius certum*, reducing both guarantees to 'foreseeability' of the criminal law. As foreseeability is a subjective parameter, individuals are not even protected from the retrospective application of the criminal law to their disadvantage.

In the Italian constitutional case law, instead, the institutional aim of *lex certa* remains. The separation of powers rationale, although evolved towards its 'essential' dimension (prevention of abuses and discriminations by part of the judiciary) is preserved. In addition, the void for retroactive criminal laws is an independent principle, not overlapped with *lex certa*, and which can never be derogated. Thus, the notion that changes in the law to the detriment of the accused might be justified by their foreseeability cannot be accepted by the Italian legal system.

However, this does not imply that the European *ius certum* cannot enter the system, insofar as it provides better protection to human rights and it does not contradict the Italian Constitution. [768] This happens when *ius certum* requires courts to clarify the meaning of a criminal provision within the limits of what is reasonably foreseeable. The case law developed by the Constitutional Court has never pursued consistently this position, by assessing a parameter to which the interpretation should conform. In addition, it reacts to the lack of predictability of the criminal law through the unavoidable *error iuris*, thus burdening the citizens (and not the institutions) with the failures of the system. The European reasonable foreseeability, instead, can operate as a parameter imposing limits to the judicial interpretation of the criminal provisions, requiring courts not to apply to the concrete case under review unreasonably unforeseeable interpretations of the law to the detriment of the accused. This parameter

[768] C Cost, sent n 317/2009, <www.cortecostituzionale.it>

is imposed on Italian courts by Article 117, parargraph 1, of the Constitution (recalling Article 7, paragraph 1, ECHR).

Admittedly, the solution is not the best one to grant legal certainty, first of all because it is difficult to establish whether a certain interpretation clarifies the meaning of a provision or enlarges its boundaries. Thus, reasonable foreseeability grants less protection than an hypothetical ban on retroactive interpretations *in malam partem*, because the parameters of reasonable foreseeability are subjective and not completely clear in the case law of the European Court of Human Rights. In addition, being reasonable foreseeability a subjective and relative requirement, it carries the risk of diverging applications by courts, exactly as the *unavoidable error iuris* due to interpretative chaos. Lastly, it is difficult to understand how the citizen can react to a violation of his/her right to *ius certum*, whenever courts do not spontaneously comply with the international obligations descending from the European notion of legality. The most appropriate solution would be a claim to the Constitutional Court, which is the final authority in charge of verifying the compliance of the domestic law with the Convention provision. However, the Constitutional Court has no official power to review the interpretation of the law, and the citizen cannot apply it directly. Thus, when domestic courts do not comply spontaneously with the European *ius certum*, the only available solution for the citizen would be a review of the final conviction released on the basis of an unforeseeable interpretation.

This solution can be theorized on the basis of the constitutional judgment of 2011. Indeed, even though the judgment originated in a violation of Article 6 ECHR, the literature underlines that the solution proposed by the Constitutional Court can be referred to any other human right violations.[769] Thus, the individual affected by an unforeseeable interpretation could apply the European Court of Human Rights, and then ask for the domestic criminal proceeding to be re-opened. The feasibility of such a solution can only be established by the judicial practice. In any case, the need for Italian courts to comply with the European *ius certum* is an international obligation accepted

[769] S LONATI, 'La Corte Costituzionale individua lo strumento per adempiere all'obbligo di conformarsi alle condanne europee: l'inserimento delle sentenze della Corte Europea tra i casi di revisione' (2011) Giur Cost 1557, 1565; G UBERTIS, 'La revisione successiva a condanne della Corte di Strasburgo' (2011) Giur Cost 1542, 1546

by the Italian State, which, at the moment, is not paid by literature, courts (nor by the legislature) the attention that it deserves.

# CONCLUSION

In the Italian legal system, *lex certa* is one of the features of the principle of legality in criminal law, requiring the legislature to provide clearly drafted and unambiguous criminal statutes. With the adoption of the 1948 Constitution, legality has been acknowledged constitutional status. Hence, from the 1980s onwards, the Italian Constitutional Court has been using *lex certa* as a parameter for evaluating the constitutionality of statutory laws enacted by the Parliament.

According to the Constitutional Court, *lex certa* is not always enforced in the criminal law by providing a rigorous description of the fact. Thus, precision is defined as a quality of the law resulting not only from the drafting of statutes, but also from their interpretation and application. Accordingly, the aim of *lex certa* is identified in the restriction of the judicial activity into the limits of an 'ordinary and verifiable' interpretation, and in the creation of the necessary preconditions for the existence of mens rea.

Recently, the Constitutional Court has been interpreting the need to restrain courts into the limits of an ordinary and verifiable interpretation as need for a constitutional or steady interpretation of vague provisions. By taking into account the judicial practice as a source of precision and by acknowledging the role of *lex certa* in providing the essential conditions for the existence of a mens rea, the recent developments of the Italian constitutional case law show an interesting convergence towards the results reached by the European Court of Human Rights on *ius certum*.

The European Court conceives the *nullum crimen sine lege* principle as *nullum crimen sine iure*, and the precise definition in law of criminal offences as reasonable foreseeability of written and unwritten laws (*ius certum*). Thus, the legislature and the judiciary are required to cooperate in the final result of granting 'reasonable foreseeability' to the criminal law. The notion that legal certainty secures the subjects of the law by granting them the ability to foresee the application of state powers is an individual-centred perspective on the need for precision. The focus is not on whether the

law is certain, but whether the individual, faced with the state's powers, can be protected against unforeseeable results.

The notion of reasonable foreseeability used by the European Court of Human Rights is clearly borrowed from the Anlgo-American experience. The Strasbourg perspective on the need for precision in law of criminal offences shares with the North-American experience many relevant features, first of all a strong focus on the individual. This is the main difference separating the perspective on *ius certum* adopted by the European Court of Human Rights from the Italian notion of *lex certa.*

In the Italian experience, the focus on the interpretation of the law and the recognition that *lex certa* aims at allowing individuals to understand and know the law does not obliterate the 'institutional' rationale of *lex certa*, according to which this principle aims at limiting the discretion of the judiciary. On the opposite, the Strasbourg notion of *ius certum* is almost exclusively centered on the subjective foreseeability of the law. Thus, even if the judiciary is required to operate within the limits of an 'accessible and reasonably foreseeable' interpretation, the parameters applied to this notion by the European Court of Human Rights are merely subjective.

The clear differences between the European notion of *ius certum* and the Italian *lex certa* do not create an insoluble contrast, because the guarantees enshrined in the European Convention enter the Italian system only as long as they provide a better protection for human rights than the one afforded by the Italian Constitution. Thus, the foreseeability requirement legitimately enters the Italian system only insofar as it provides a better protection for the accused. Accordingly, the European reasonable foreseeability cannot be the ground for a retroactive application of the criminal law to the disadvantage of the accused. Vice versa, it can operate as a parameter requiring courts not to apply to the concrete case under review new interpretations of the law to the detriment of the accused.

Admittedly, it is difficult to understand how the citizen can react to a violation of his/her right to *ius certum*, whenever domestic courts do not spontaneously comply with the international obligations descending from the European notion of legality. A solution might be the review of the final conviction on the basis of the Strasbourg judgment assessing the unforeseeability of the interpretation. This possibility has

recently been acknowledged by the Constitutional Court, but its feasibility with reference to violations of Article 7 ECHR has yet to be established.

At a more general level, reasonable foreseeability is not the ideal solution for granting legal certainty, because it grants less protection than an hypothetical ban on retroactive interpretations *in malam partem*. In addition, being reasonable foreseeability a subjective and relative requirement, it carries the risk of diverging applications by courts. However, this is the solution implied by the international obligations accepted by the Italian State, and, at the moment, it is not paid by the literature and by courts the attention that it deserves.

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