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Nullum Crimen Sine Lege and the Role of Foreseeability in the European Human Rights Protection System

A European approach to the problem of judge-made law in Criminal Law

Relatori
Prof. Gabriele Fornasari
Prof. Florian Jeßberger

Dottoranda
Sara Paiusco

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Prof. Gabriele Fornasari, Università di Trento

Prof.ssa Emanuela Fronza, Università di Bologna

Prof. Florian Jeßberger, Universität Hamburg

Prof. Moritz Vormbaum, Westfählische Wilhelms-Universität Münster

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ABSTRACT

The aim of this research is investigating *nullum crimen sine lege* as European principle. Therefore, the analysis focuses on the European Court of Human Rights (ECtHR) interpretation of this principle. The approach of this work is top-down. Since the research question is the role of foreseeability assessment in 'Europeanised' Criminal Law and its possible relevance at the European and national level, when and if necessary, the chosen approach is to look first at the European perspective, in order to analyse it in depth in its own specificities and then try to link it to the national perspective.

With regards to ECHR law, the autonomous definition of law and the application of foreseeability (one of the 'qualities' of the law) as main parameter to assess legality, both in light of retroactivity and legal certainty, are investigated. In particular, special attention is given to the role of judge-made law in the interpretation of Art. 7 ECHR. Hence, the research focuses on the role of foreseeability, milestone of European legality, as a means to find a solution to the legality issues raising from case-law in criminal law. The origin, rationale and application of the concept of foreseeability in ECtHR case-law are scrutinised, trying to extract its main development paths. Subsequently, the current solutions that civil law States adopt to try solving the problem of case-law in criminal law are analysed, with reference to Italy and Germany, also with regards to the traditional rationales of *nullum crimen* and its theoretical foundations. Moreover, the role of foreseeability and legality in the European Union legal order is considered, as an example of an effectiveness-oriented and de-formalised legal order. In the end, future perspectives for the implementation of the principle of foreseeability are analysed, with particular regard to the Italian legal order.

List of Abbreviations

ACHR	American Convention on Human Rights
AG	Amtsgericht
Arch. pen.	Archivio Penale
BGH	Bundesgerichtshof
BVerfG	Bundesverfassungsgericht
Cass. Pen.	Cassazione Penale
CFREU	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
DAR	Zeitschrift für Deutsches Autorecht
Dig. disc. pen.	Digesto discipline penalistiche
Dig. disc. priv.	Digesto discipline privatistiche
Dig. disc. pubbl.	Digesto discipline pubblicistiche
Dir. pen. cont.	Diritto penale contemporaneo (website)
Dir. pen. proc.	Diritto penale e processo
ECHR	European Convention on Human Rights and Fundamental Freedoms
EComHR	European Commission of Human Rights
ECtHR	European Court of Human Rights
GA	Goltdammer's Archiv für Strafrecht
Giur. cost.	Giurisprudenza costituzionale
IACtHR	Inter-American Court of Human Rights

ICCPR	International Covenant on Civil and Political Rights
IMT	International Military Tribunal
Ind. Pen.	Indice Penale
JA	Juristische Arbeitsblätter
JR	Juristische Rundschau
JZ	Juristen Zeitung
MDR	Monatsschrift für Deutsches Recht
NJW	Neue Juristische Wochenschrift
NStZ	Neue Zeitschrift für Strafrecht
OLG	Oberlandesgericht
PCIJ	Permanent Court of International Justice
Riv. it. dir. proc. pen.	Rivista italiana di diritto e procedura penale
Riv. trim. dir. pen. cont.	Rivista trimestrale diritto penale contemporaneo
RUDH	Revue universelle des droits de l'homme
UN	United Nations
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht
ZIS	Zeitschrift für internationale Strafrechtsdogmatik
ZStW	Zeitschrift für die gesamte Strafrechtswissenschaft

INTRODUCTION

The purpose of this thesis is to investigate the European *nullum crimen sine lege* principle, its focus on foreseeability, with special attention to civil law countries and the role of judge-made law. European *nullum crimen*, as understood even at the EU level, is shaped on the interpretation of Art. 7 of the European Convention on Human Rights (ECHR) given by the European Court of Human Rights (ECtHR); as such a comprehensive analysis must focus primarily on its jurisprudence.

The main issue at hand is the definition of *law*/*droit* pursuant to Art. 7 ECHR and thus relevant for criminal law. Law includes statutory as well as judge-made law. Consequently, this definition affects every corollary of the *nullum crimen* principle. Importantly, *nullum crimen sine lege*, as defined in the Strasbourg Court case-law and transposed into EU law, ascribes two main binding features to the *law*: accessibility and foreseeability. As clearly emerged in case-law, the so called 'foreseeability test' is now the heart of the *nullum crimen* scrutiny with regards to criminal law. This feature polarises the *nullum crimen* assessment (in particular *lex certa* and *lex praevia*) on an effectiveness paradigm, rather than a formal examination based on the hierarchy of sources.

This substantial interpretive choice affects in a particularly interesting way countries belonging to civil law legal tradition, which usually lead *nullum crimen* guarantees back only to written law sources. The conflict has been exacerbated by various judgements of the ECtHR that drew scholars' and judges' attention to the apparent inconsistency between the principles enshrined in its case-law and the interpretation of national law. Moreover, the general background of the crisis of legal certainty, involving every branch of the legal order, has intensified the debate. The dispute among scholars has been intense and resulted in substantially contrary opinions as well as cautious favourable assessments towards the new definition of legality.

Firstly, the analysis starts with introductory remarks on the interaction between criminal law and human rights in European perspective. Secondly, the autonomous definition of law in the ECHR and the application of foreseeability (one of the 'qualities' of the law) as the main parameter to assess legality will be investigated. Special attention will be given to the role of case-law and judge-made law in the ECHR interpretation. Thirdly, the focus will be on the possible role of foreseeability as an expression of

European legality in particular as a means to find a solution to the legality issues arising from case-law in criminal law. Fourthly, the current solutions that civil law States adopt to try solving the problems of case-law in criminal law will be analysed, with reference to both Italy and Germany, also with regards to traditional rationales of *nullum crimen* and its theoretical foundations. Moreover, the role of foreseeability and legality in the European Union legal order will be considered as an example of an effectiveness-oriented and de-formalised legal order. In the end, future perspectives on the implementation of the principle of foreseeability will be analysed, in particular with regards to the Italian legal order.

CHAPTER ONE

THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND CRIMINAL LAW

1. A European-oriented approach in Criminal Law.

One of the main issues rising from a European-oriented approach in Criminal Law is methodology. The 'Europeanisation' of fundamental rights protection with regard to criminal law involves a large number of actors at national, European and European Union level.[1] This phenomenon must be read in conjunction with the broader process of 'Europeanisation' of criminal law, which features the expansion of European Union competences in substantive and procedural criminal law, the influence of European Union law on the application of national provisions and the *European* interpretation of fundamental rights, which also includes the European Convention on Human Rights. Out of this broadened context arise three important considerations that affect methodology.

1.1. Methodological challenges.

European Criminal Law, whose definition itself is still debated,[2] and the fertile dialogue between Criminal Law, Human Rights Law and European Law contribute to

[1] The European human rights protection system has been defined as *Mehrebenensystem*, in which the national, conventional and EU level are overlapping. K. AMBOS, *Internationales Strafrecht: Strafanwendungsrecht, Völkerstrafrecht, europäisches Strafrecht, Rechtshilfe*, München, 2018, p. 455.

[2] European Criminal Law is often defined in a broader and stricter sense. Strictly interpreted, European Criminal Law is limited to EU influence on criminal law through harmonisation, assimilation, EU criminal law competences and judicial cooperation. Broadly interpreted, European Criminal Law includes the Council of Europe and its treaties, and especially the European fundamental rights protection in criminal law. Ambos more specifically speaks of *europäisiertes Strafrecht*, because the only proper *europäisches Strafrecht* (in the sense of a supranational criminal law), including a direct and unlimited legislative competence of the European Union, is the protection of the financial interests of the EU (art. 325 TFEU). K. AMBOS, *Internationales Strafrecht*, cit., p. 432-433; B. HECKER, *Europäisches Strafrecht*, Berlin-Heidelberg, 2015, p. 5-7. While denying the existence of a European Criminal Law in the sense of a European Criminal Code, Satzger defines European Criminal Law in a broad sense as the (non-penal) sanctioning powers of the EU. He then includes the above-mentioned integration levels expanding the definition of European Criminal Law to the one of 'Europeanised' criminal law: H. SATZGER, *Internationales und Europäisches Strafrecht: Strafanwendungsrecht, Europäisches Straf- und Strafverfahrensrecht, Völkerstrafrecht*, Baden-Baden, 2018, p. 103. The concept of *Europäisierung* of Criminal Law as an antecedent to the current notion of European Criminal Law can be traced back to H. SATZGER, *Die Europäisierung des Strafrechts*, Köln-Berlin-Bonn- München, 2001, p. 152-156. In the Italian literature see A. BERNARDI, *L'europeizzazione del diritto e della scienza penale*, Torino, 2004. For a broad definition of European Criminal Law, see R. ESSER, *Europäisches und Internationales Strafrecht*, München, 2018, p. 1. Similarly, on European Criminal Law as a comprehensive concept, A. KLIP, *European Criminal Law: an Integrative Approach*, Brussels, 2016, p. 1. Although scholars often use slightly different definitions, the fundamental idea of a European criminal law integration and the difference between 'great' (Council of Europe) and 'small' (European Union) Europe are commonly accepted concepts.

creating a new common legal language for Europe, based on a common heritage and a shared legal tradition.

This new legal language often does not refer to traditional categories. Consequently, its analysis, if not adequately contextualised, is often hampered by misinterpretations. For example, *nullum crimen* as interpreted by the European Courts is shaped as a fundamental right, while in the national legal orders it includes dogmatic contents, which are not always corresponding or equivalent to the ones enshrined in its international version, and vice-versa.

A second consideration stems from the peculiarities of the 'Europeanisation', which mainly happens through judge-made law, which privileges case-law analysis. Thus, relevant case-law is studied both in a synchronic and diachronic perspective, in an attempt to identify its similarities, differences, inconsistencies and future development paths.

Finally, European Criminal law in a broad sense often raises problems related to several branches of law simultaneously: apart from national Criminal Law, also International and European Union Law are crucial, as well as International Human Rights Law and Constitutional Law.[3] Therefore, European Criminal Law in a broad sense can be described as *intradisziplinäre Querschnittmaterie* (that literally means 'interdisciplinary cross-section subject')[4] Due to this peculiar nature, it demands not to be considered as a separate entity, detached from national law: its implications, which ultimately fall on national legal systems, require a legal process to examine the consequences and the background of those national systems. Furthermore, its complexity often suffers from a lack of philosophical and dogmatic background due to the fact that it has been newly established. For this reason, a study on the 'Europeanisation' of law and human rights behoves to consider Mireille Delmas-Marty's contribution to the theoretical framework of the subject.

1.2. The philosophical reach of Mireille Delmas-Marty.

As stated before, in a study about fundamental rights and principles in criminal law in their supranational dimension, Mireille Delmas-Marty's thought must be taken into

[3] K. AMBOS, *Internationales Strafrecht*, cit., p. 432-433; B. HECKER, *Europäisches Strafrecht*, cit., p. 8-13.
[4] K. AMBOS, *Internationales Strafrecht*, cit., p. 433.

consideration.[5] As one of the most important scholars dealing with the philosophical concepts underlying the Europeanisation and internationalisation of law, Delmas-Marty elaborated a complex theoretical structure for a post-modern understanding of law. Her fundamental ideas of law as a *flou* concept and of *pluralisme ordonné* are crucial in order to build a serious scientific framework to studies dedicated to the Europeanisation (as well as internationalisation) of law.

Her articulated thought advances from the 'discovery' of the *flou* nature of the law in the post-modern era. It is almost impossible to translate the French expression *flou*, which could stand for a fuzzy, liquid or vague concept. As a matter of fact, Delmas-Marty describes the law at the end of the 20th century as *flou*, looking at its pluralistic nature in the first place. From a past identification of law only through criminal codes and constitutions, our contemporary legal world faces the challenges of globalisation and universalism. International treaties, European integration, comparative law, international criminal justice, relativism of values are some of the forms in which this phenomenon is expressed. From the immutable and inflexible law of the past, the turn of the millennium is rather dominated by a *flou* logic, which can only be comprehended and dominated by changing old paradigms.[6]

From the description of the *flou* of law, Delmas-Marty elaborates a new methodology to deal with pluralism in law in general, not only in criminal law.[7] First of all, a methodological change in logic and interpretation is required. Instead of focusing on a traditional binary logic, the plurality of normative complexes has to be ordered through the *flou* logic, looking at their degree of belonging to a certain domain, in order to deal with simultaneously applicable norms without suppressing their diversity.[8] Taking European law in a broader sense as a specific example, '*internormativité*'

[5] S. MANACORDA, *Le fonti del diritto penale nella costruzione di un pluralismo ordinato. A proposito dell'opera di Mireille Delmas-Marty*, in M. DELMAS-MARTY, *Studi giuridici comparati e internazionalizzazione del diritto*, Torino, 2004, p. 34.

[6] M. DELMAS-MARTY, *Le flou du droit. Du code pénal au droits de l'homme*, Paris, 1986, p. 10 ff.

[7] On Delmas-Marty's role in the analysis of the new supremacy of hermeneutics and pluralism of legal sources over traditional legal certainty paradigms and the lack of unity in post-modern criminal law, see C.E. PALIERO, *Il diritto liquido. Pensieri post-delmasiani sulla dialettica delle fonti penali*, in *Riv. it. dir. proc. pen.*, 2014, p. 1109 f. and p. 1119.

[8] Binary logic is based on the principle of belonging, according to which the alternative of belonging can be expressed only in these terms: object A belongs to group E, while object B does not. On the contrary, fuzzy logic features just a *degree* of belonging of an object to a certain group or domain (expressed in a numeric value between 0 and 1). For example, object A belongs for 0,9 to group E, while object B for 0,2). M. DELMAS-MARTY, *Le flou du droit*, cit., p. 269. Fuzzy logic developed in the Sixties and was defined for the first time in L. ZADEH, *Fuzzy sets*, in *Information and Control*, 8, 1965, pp. 338-353, as quoted by F. PUPPO, *Logica* fuzzy *e diritto penale nel pensiero di Mireille Delmas-Marty*, in *Criminalia*, 2009, p. 642.

('internormativity') is the key and the crucial problem: as different normative systems are applicable at the same time, previous methods to deal with pluralism and conflicts have become inadequate.[9] As a consequence, fuzzy logic is at core of its understanding.

In the second part of her theory, Delmas-Marty speculates on a possible re-ordering and re-foundation of the legal order. This should happen thanks to the fertile dialogue and cross-fertilisation between the universal and relative forces ruling the post-modern legal phenomenon. First of all, the *flou du droit* apparently causes a diminishing in the formal validity of legal systems, which is conveyed by the entry into positive law of new 'universal' objects: human rights, humanity (crimes against humanity and common heritage of humanity) and markets.[10] Although these three objects are deeply analysed by Delmas-Marty, here it is appropriate to focus just on the first one.

Human rights play a decisive role in the internationalisation of law, as they represent the perfect example for universalism. They are dominated by a fuzzy logic and have a strong harmonisation potential. Moreover, they are able to bring separate legal systems closer together, according to a non-binary logic. Delmas-Marty studies the phenomenon of universal human rights in the interesting laboratory of Europe, as an example of universalisation of legal concepts and pluralism. Human rights are not universal and immutable in their meaning, they are rather '*lignes de fuite qui constituent la cartographie du champ social*'.[11] They are a pertinent example of integration and interaction between universal and relative paradigms. Focusing on the ECHR's system, the Court has long considered the diversity between States undisputed, as well as always yearned towards a unique and uniform understanding of European human rights. Therefore, the European system grants the States a margin of appreciation, taking their diversity into consideration. In the thought of Delmas-Marty, the margin of appreciation is the key to combine

[9] According to Delmas-Marty, '*internormativité, en ce sens que le techniques de mise en relation et d'échange se développent* entre *des norms jusque-là seulement juxtaposées*'. M. DELMAS-MARTY, *Le flou du droit,* cit., p. 268 f. On the relationship between fuzzy logic and criminal law F. PUPPO, *Logica* fuzzy *e diritto penale nel pensiero di Mireille Delmas-Marty*, cit., p. 631 ff., 646: according to Puppo, Delmas-Marty falls in the *impasse* of considering traditional logic as essentially Aristotelean and therefore abandoning the better choice to re-found modern logic instead of shifting towards new 'fuzzy' paradigms; L. PHILIPPS, *Unbestimmte Rechtsbegriffe und Fuzzy Logic*, in F. HAFT (ed.), *Strafgerechtigkeit: Festschrift für Arthur Kaufmann zum 70. Geburtstag*, Heidelberg, 1993, p. 265 ff.

[10] This following step in Delmas-Marty's thought is part of a complex and articulated work, *Les forces imaginantes du droit*, that was published almost twenty years after *Le flou du droit*. M. DELMAS-MARTY, *Les forces imaginantes du droit. I. Le relatif et l'universel*, Paris, 2004, p. 55.

[11] M. DELMAS-MARTY, *Les forces imaginantes du droit. I*, cit., p. 55 f. and 64 f.

universalism of human rights with the relativism of single States' history and legal traditions, in a complementary, rather than opposing relationship to each other.[12]

Universality is not without challenges. It faces the risk of conflicts within each category (human rights, humanity, markets) and between them,[13] as well as ineffectiveness. In particular, ineffectiveness can affect both methods applied to law and the norms themselves. As far as methodological ineffectiveness is concerned, the study of European Criminal Law in broader sense, for example, must address the problem of methodological dispersion. In fact, due to the juxtaposition of different branches of law and legal orders, method becomes a dividing issue.[14] Delmas-Marty's proposal includes the comparative methodology in order to try and compose the fragmentation of autonomous sources.[15]

As far as effectiveness of norms is concerned, this new universal paradigm could result in a mutation in the general coercive force of law. Indeed, a change from effective law as based on its mandatory and binding force, to soft law, whose variable mandatory and binding force is a result of the dispersion of normative sources, is a component of the broader phenomenon.[16]

On the other hand, relativism is a complementary, but not opposing force flanking universalism. Although relativism is a non-legal concept, essentially elaborated in moral philosophy and ethics, it plays a role in its descriptive sense in law, without impeding the development of common principles but rather helping to describe the legal diversity in

[12] Thanks to the underdetermination of the margin of appreciation, the margins can be determined in a variable degree in time and space. Although generally a source of positive effects, vagueness in time and space can undermine their formal validity. M. DELMAS-MARTY, *Les forces imaginantes du droit. I*, cit., p. 64 ff., 68 and 70.

[13] An example of a conflict in the category of human rights is the one arising between different rights in the same legal instrument, that need to be hierarchically ordered to be solved (i.e. absolute and relative rights). An example of a conflict between categories is the European Union and the possible discordance between 'legal' Europeanisation and 'economic' Europeanisation (i.e. the administrative sanctions in competition law and fair trial, terrorist sanctions and fair trial). M. DELMAS-MARTY, *Les forces imaginantes du droit. I*, cit., p. 126-7 and 150-3.

[14] See *above*, Ambos, fn. 4-5.

[15] M. DELMAS-MARTY, *Les forces imaginantes du droit. I*, cit., p. 179 ff.

[16] M. DELMAS-MARTY, *Les forces imaginantes du droit. I*, cit., p. 182 f. The author suggests considering this transformation into soft law as an opportunity to make the law more justiciable at several levels (international, regional, national). Soft law, penetrating the domestic legal order through interpretation, direct and indirect integration, ensures a certain degree of binding force to these atypical sources, which ends up in a *hardened* soft law. A. BERNARDI, *Sui rapporti tra diritto penale e "soft law"*, in M. BERTOLINO, L. EUSEBI, G. FORTI (eds.), *Studi in onore di Mario Romano*, I, Napoli, 2011, p. 3 ff.

national States.[17] Nevertheless, in front of an integrated and pluralistic law, relativism cannot be seen only as a descriptive concept. Instead it should be interpreted in a prescriptive sense: both as co-existence of different overlapping rules in the same legal order as well as the co-existence of different legal orders. In this sense, relativism is an ambiguous concept as it could simply lead to a debate between monist and dualist models in international law. Nevertheless, binary oppositions can only lead to failure before the challenges arising from universality and pluralism.[18]

After having explored the weakness of universalism[19] and the limits of relativism,[20] Delmas-Marty identifies two forms of integration between the universal and relative: the 'universalisation' of relativism[21] and the 'relativisation' of universalism. The example of the relativisation of universality she provides is the ECHR system, where the universal is set in a relationship with a localised reality in time and space. This is possible thanks to the development of 'universal' concepts by the Court, which are then mitigated by a margin of appreciation.[22]

Moreover, moving from *pars destruens* to *pars construens*, Delmas-Marty aims at ordering universalism and relativism and re-found State powers. With the concept of *pluralisme ordonné*, Delmas-Marty intends to create a way out of disorder or hegemonic

[17] In this sense Delmas-Marty refers to the relativism as conceived in comparative law. M. DELMAS-MARTY, *Les forces imaginantes du droit. I*, cit., p. 222-225.
[18] She refers to the misunderstandings of Santi Romano's *Ordinamento giuridico* and his theorisation of plurality of legal orders, in opposition to Kelsen's normativism. M. DELMAS-MARTY, *Les forces imaginantes du droit. I*, cit., p. 226-231.
[19] Ineffectiveness and conflicts between categories, see *above*.
[20] Relativism shows its limits in dealing with the global dimension of crimes (transnational bribery, drug and human trafficking, terrorism), transnational financial and information flows as well as risks coming from biotechnology and the environment. M. DELMAS-MARTY, *Les forces imaginantes du droit. I*, cit., p. 241 ff., 309 ff., 353ff.
[21] Less important for our purposes, the example of the universalisation of a relative system is the American 'colonialism' in law and the will to establish universal jurisdiction, for example with the *Foreign Corrupt Practices Act* of 1977 or *Patriot Act* of 2001 against terrorism. M. DELMAS-MARTY, *Les forces imaginantes du droit. I*, cit., p. 403-404.
[22] M. DELMAS-MARTY, *Les forces imaginantes du droit. I*, cit., p. 406 ff. Another example is the 'functional equivalence' deployed in the field of international corruption, as stated in Commentaries on the OECD Convention: the Covenant does not require uniformity or changes in the fundamental principles of the single legal systems, but rather a functional equivalence among the measures taken by the State Parties. 'This Convention seeks to assure a functional equivalence among the measures taken by the Parties to sanction bribery of foreign public officials, without requiring uniformity or changes in fundamental principles of a Party's legal system', in OECD, *Commentaries on the Convention on Combating Bribery by Foreign Public Officials in International Business Transactions*, adopted by the Negotiating Conference on 21 November 1997, no. 2, available at https://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf, last accessed 13.02.2020.

order that post-modernity could cause.[23] The ordering of multiplicity can take place with techniques that maintain hierarchy and autonomy for States but at the same time favour an evolutive integration. At the crossroads of several legal systems, pluralism can be ordered and pursued through three levels of integration: internormativity as coordination through interweawing;[24] harmonisation, as approximation through common principles under the control of a superior organ (i.e. European Union)[25] and hybridisation, as the construction of a new synthetic system based on comparative law and the fusion of different systems (i.e. International Criminal Law).[26] Furthermore, pluralism is at the same time characterised and challenged at different organisational levels and, most of all, by non-synchronic developments of law in different 'spaces' (or better, legal orders) and by 'polychronic' developments, which see legal dispositions changing differently in the same 'legal space'.[27] The way out is represented by an attempt to order pluralism through regulatory concepts such as subsidiarity or complementarity, through techniques of regulation, such as the above-mentioned margin of appreciation, and through mechanisms enabling superior evaluation and control.[28] The order cannot be described as a hierarchy or a 'net', but rather as an hypercomplex legal pluralistic order, combining horizontal as well as vertical interactions.[29]

[23] Paliero considers the theorisation of *pluralisme ordonné* the most important achievement in Delmas-Marty's work and an attempt to systematise a deeply divided and fragmentary legal world. C.E. PALIERO, *Il diritto liquido. Pensieri post-delmasiani sulla dialettica delle fonti penali*, in *Riv. it. dir. proc. pen.*, 2014, p. 1102-3.

[24] M. DELMAS-MARTY, *Les forces imaginantes du droit. II. Le pluralisme ordonné*, Paris, 2006, p. 40 ff. in particular this is valid for the interaction between national, regional and international jurisdictions and their case-law. Their relationship is based on reciprocal integration, which is easier in national legal systems but becomes more difficult in the international human rights law and international criminal law scenario. See A. BERNARDI, *L'éuropeisation de la science pénale*, in *APC*, 2004, p. 5-36.

[25] M. DELMAS-MARTY, *Les forces imaginantes du droit. II*, cit., p. 69 ff.

[26] M. DELMAS-MARTY, *Les forces imaginantes du droit. II*, cit., p. 103 ff.

[27] M. DELMAS-MARTY, *Les forces imaginantes du droit. II*, cit., p. 220, 227 f. Europe at 'variable geometry' is one of these examples: enhanced cooperation in the European Union and, on the side of synchronic developments, the relationship between human rights law and trade law.

[28] M. DELMAS-MARTY, *Les forces imaginantes du droit. II*, cit., p. 267. The principle of subsidiarity is often regarded as the best possible way to coordinate pluralism. It would enable the closest institution *ratione materiae* to regulate the issue, instead of focusing only on the hierarchy of norms. F. VIOLA, *Il* rule of law *e il pluralismo giuridico contemporaneo*, in ID., Rule of Law. *Il governo della legge ieri e oggi*, Torino, 2011, p. 154. On the principle of subsidiarity in the 'European Commowealth', see also N. MACCORMICK, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth*, Oxford, 1999, p. 137 ff.

[29] The perfect example is the European integration, which is complete in its legal aspects but lacks political integration. In this respect, a complete ordering of pluralism can only happen through a political change and a new vision of powers. M. DELMAS-MARTY, *Les forces imaginantes du droit. II*, cit., p. 279-80. Although the analysis has an empirical and formal validity, it lacks an axiological validity. According to Delmas-Marty, the new system needs principles to be effective: the last part of her research is dedicated to the re-foundation of powers. M. DELMAS-MARTY, *Les forces imaginantes du droit. III. La réfondation des pouvoirs*, Paris, 2007, p. 41 ff.

In the following analysis, a foreword on the interpretation of the Convention is necessary, bearing in mind the peculiarities of the European Convention and the European Court of Human Rights and the fact that its law is essentially case-law. Furthermore, trying to clear the link between Human Rights Law and Criminal Law, an analysis of the growing importance of human rights doctrine in criminal law and the ancipital effect of the role of human rights will be offered. In addition, it is fundamental to clarify the different roles played by the Convention and its interpretation in the Member States and the effects of its judgements. In the end, the crucial role of consistent (or in accordance) interpretation to higher ranking sources is described, both in constitutional, European Union and conventional perspectives. Connecting the actual importance of the consistent interpretation in Criminal Law, it is inevitable to think, as far as the Italian experience is concerned, about the avant-garde work of Franco Bricola.

2. The ECHR system.

2.1. The ECHR: peculiarities and interpretive methods.

Bearing in mind the purpose of this thesis, which is to elaborate a European definition of *foreseeability* in the light of the ECHR jurisprudence, it is crucial to underline the many peculiarities of the European Convention on Human Rights system. In order not to misunderstand European case-law, especially thinking of its constitutional aims, it is fundamental to see which are the characteristics making the Convention so peculiar in the human rights protection scenario.[30]

The European Convention is a multilateral international covenant signed after the end of the Second World War, in the golden age of human rights theories.[31] The first main peculiarity is that the Convention and its organ, the European Court of Human Rights, can be invoked not only by Member States in intergovernmental procedures, but also directly by individuals (Art. 34 ECHR).[32] This procedural aspect is common to some constitutional courts, as the German *Verfassungsbeschwerde* or the Spanish *recurso de*

[30] The significance of the correct framework to an analysis of the European Convention on Human Rights is highlighted by V. ZAGREBELSKY, *La Convenzione europea dei diritti dell'uomo e il principio di legalità nella materia penale*, in V. MANES, V. ZAGREBELSKY (eds.), *La Convenzione europea dei diritti dell'uomo nell'ordinamento penale italiano*, Milano, 2011, p. 69 and F. VIGANÒ, *L'impatto della Cedu e dei suoi protocolli sul sistema penale italiano*, in G. UBERTIS, F. VIGANÒ (eds.), *Corte europea dei diritti dell'uomo e giustizia penale*, Milano, 2016, p. 13.

[31] E. BATES, *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights*, Oxford, 2010, p. 33-35, 40, 58 ff.

[32] V. ZAGREBELSKY, *La Convenzione europea dei diritti dell'uomo*, cit., p. 70.

amparo, giving the individuals direct access to constitutional adjudication. Moreover, this aspect is almost unique among international courts.[33]

Another important feature of the Convention is its link with the Universal Declaration of Human rights proclaimed by the General Assembly of the United Nations in 1949, which is clear in the Preamble to the Convention.[34] In the Preamble, the drafters also made a momentous statement on the scope of the Charter and on its universal aspirations. In fact, the Preamble states that universal and effective recognition of the rights included in the Declaration and reassumed by the Parties is the basis of the new convention. Moreover, the Preamble also underlines the respect of human rights as the basis of the development and functioning of this new European organisation and as the essential mean for peace.[35] More specifically, the Parties recognise 'a common heritage of political traditions, ideals, freedoms and the rule of law'.[36]

Moreover, the already mentioned trend towards universality is proven by the Court's refusal of national categories and concepts, trying to build its own definitions and legal concepts. This particular feature, which will be examined deeper later, has a great influence on legality.[37] In the second place, the treaty is objective in nature. This means that it should be respected by parties even if other members infringe. It is therefore not subject to the ordinary reciprocity principle of ordinary international treaties.[38] Thirdly, the European Convention is not a mere catalogue of fundamental rights; rather it builds an integrated system with its own organ, the European Court of Human Rights.[39] The objective nature of the Convention system also derives from the individual applications,

[33] I.e. the Italian Constitutional Court can be invoked only through a so-called 'conflict of powers' (between State powers, State and Regions, or between Regions (Art. 37-39 ff., L. 11 March 1953, no. 87) or, when questioning the constitutional consistency of a statute, by the judge himself in a legal issue, through the *ricorso incidentale*, (art. 23, L. 11 March 1953, no. 87). Moreover, it does not permit to raise a question on the violation of the constitution in the very situation, but a general doubt of compliance of the piece of legislation with the Constitution. On the other hand, the *Bundesverfassungsgerichtshof* in Germany can be actioned by individuals in the so-called *Verfassungsbeschwerde* (Art. 93 Abs. 1 n. 4a GG).

[34] Preamble to the European Convention on Human Rights, recitals 1,2-5. The reference is present in the International Covenant on Civil and Political Rights (Preamble, recital 4), International Covenant on Economic, Social and Cultural Rights (Preamble, recital 4), American Convention on Human Rights (Preamble, recital 4) and the African Charter on Human and People's Rights (Preamble, recital 3) as well.

[35] Preamble to the European Convention on Human Rights, recitals 2-5. Recital 3 has been seen as the possible legal basis for an *erga omnes* character of the Convention: ECtHR, Fabris v France, 7 February 2013, no. 16574/08, Concurring opinion of Judge Pinto de Albuquerque. W. SCHABAS, *The European Convention on Human Rights. A Commentary*, Oxford, 2015, p. 65.

[36] Preamble to the European Convention on Human Rights, recital 5.

[37] Among others see U. KARPENSTEIN, F. MAYER, *EMRK Kommentar*, München, 2015, p. 12.

[38] A. SACCUCCI, *Corte europea dei diritti dell'uomo*, in S. CASSESE (ed.), *Dizionario di diritto pubblico*, Milano, 2006, p. 1596.

[39] V. ZAGREBELSKY, *La Convenzione europea dei diritti dell'uomo*, cit., p. 69-70.

as long as its aim consists in proclaiming the correct interpretation of the Convention *erga omnes*, and not only *inter partes*.[40]

One of the main pillars of the system is the subsidiarity principle. The European jurisdiction plays a subsidiary role in respect of national adjudications. The principle of subsidiarity as a pillar of the European Convention system has its roots on the requirement of the exhaustion of all domestic remedies pursuant to Art. 35 ECHR. In light of multilevel constitutionalism, Art. 1 and 13 ECHR ensure human rights protection both at national and at international level, with the result that the first judge to be concerned by human rights protection must be the national one.[41] The European system must act only if the national one has failed in providing protection: therefore, this is considered an expression of the so called *résponsabilité partagé* among the national and the European level of protection. However, the European Court has the monopoly over the interpretation of the Convention, according to Art. 19 and 32 ECHR.[42]

The subsidiarity principle has been widely promoted in the 2012 Brighton Conference between Member States of the Council of Europe. The Conference led to the stipulation of the 15th Protocol to the Convention, which introduces a new paragraph to the Preamble to the Convention affirming the subsidiarity principle and the margin of appreciation. In the second place, the new Protocol reduces the period of time to appeal to the Court to four months and modifies Art. 35 in another concern (more specifically related to admissibility).[43]

Interpreting the Convention is not an easy task as one must bear in mind that this international binding instrument has its specific interpretive tools and that the Court aims at following its precedent. As a result of the conciseness of the text of the Convention, the Court tends to recognise a certain degree of stability to its precedent, in order to have

[40] A difference must be highlighted between *erga omnes* effects of the judgement and the *erga omnes* effects of the interpretation given by the Court. Since the *Ireland v United Kingdom* case (Ireland v. the United Kingdom, 18 January 1978, para. 239 'judgements in fact serve […] to elucidate, safeguard and develop the rules instituted by the Convention', and Karner v. Austria, no. 40016/98, para. 26) the Court affirmed the *erga omnes* effect of the interpretation of the Convention given by the Court in its judgements. See also the above-mentioned dissenting opinion of judge Pinto de Albuquerque in *Fabris v. France*. See A. SACCUCCI, *Corte europea dei diritti dell'uomo*, cit., p. 1595.

[41] A. MOWBRAY, *Subsidiarity and the European Convention on Human Rights*, in *Human Rights Law Review*, 15, 2015, p. 319.

[42] W. SCHABAS, *The European Convention*, cit., p. 74, 640.

[43] *15th Protocol amending the Convention on the Protection of Human Rights and Fundamental Freedoms*, available at https://www.echr.coe.int/Documents/Protocol_15_ENG.pdf, last accessed 13.02.2020.

a stable and effective jurisprudence.[44] In this regard, the case-law of the European Court of Human Rights must be considered in light of its similarity more to common law than to civil law style and rules. While examples of the European Court overruling its precedents are numerous, nevertheless the system generally follows the *stare decisis* rule.[45] The Court usually looks for a similar case and tries to apply its *ratio decidendi* to the case in question. If they cannot identify precedent with the case, they will look for another solution, always considering fitting precedents of the Court.[46] In the Court's understanding, obedience to precedent is pursued 'in the interests of legal certainty, foreseeability and equality before the law'.[47]

As far as interpretation is concerned, the Court follows the rules of the Vienna Convention on the Law of Treaties of 1969 (Art. 31-33),[48] but in its own peculiar way. First of all, according to Art. 31 para. 1 of the Vienna Convention, treaties must be interpreted according to good faith and in light of their object and scope.[49] This concept has evolved in teleological interpretation: in the Convention system the Court identifies the object and scope of the treaty with 'the protection of individual human rights'[50] and 'the ideals and values of a democratic society'.[51] This interpretation was initially introduced in *Wemhoff v. Germany* and then confirmed in *Golder v. United Kingdom*, refraining that

[44] Former judges of the Court often underline the above-mentioned idea in their articles: D. POPOVIĆ, *The role of the precedent in the jurisprudence of the European Court of Human Rights*, in D. SPIELMANN, M. TSIRLI, P. VOYATZIS (eds.), *La Convention européenne des droits de l'homme: un instrument vivant. Mélanges en l'honneur de Christos L. Rozakis*, Bruxelles, 2011, p. 467 ff., D. SPIELMANN, *Le fait, le juge, la connaissance: aux confins de la compétence interprétative de la Cour européenne des droits de l'homme*, in P. D'ARGENT, B. BONAFE, J. COMBACAU (eds.), *Les limites du droit international: essais en l'honneur de Joe Verhoeven*, Bruxelles, 2015, p. 519 ff., V. ZAGREBELSKY, *La Convenzione europea dei diritti dell'uomo*, cit., p. 69 ff.

[45] 'The Court is not formally bound to follow any of its previous judgments', ECtHR, Hermann v. Germany, 26 June 2012, 9300/07, para. 78; ECtHR, Scoppola v. Italy, 17 September 2009, no. 10249/03, para. 104.

[46] See D. POPOVIĆ, *The role of the precedent*, cit., p. 477. L. WILDHABER, *Precedent in the European Court of Human Rights*, in P. MAHONEY, F. MATSCHER, M. PETZOLD ET AL. (eds.), *Protection des droits de l'homme: la perspective européenne. Mélanges à la mémoire de Rolv Ryssdal*, Köln, 2000, p. 1529-46.

[47] ECtHR, Sergey Zolotukhin v. Russia, 10 February 2009, no. 14939/03, para. 80.

[48] The Court itself recognises to be guided by the principles established in the Vienna Convention in ECtHR, Golder v. United Kingdom, 21 February 1975, no. 4451/70, para. 29.

[49] W. SCHABAS, *The European Convention*, cit., p. 34 ff., C. GRABENWARTER, K. PABEL, *Europäische Menschenrechtskonvention*, München, 2016, p. 31 ff., G. LETSAS, *A Theory of Interpretation of the European Convention on Human Rights*, Oxford, 2007, p. 58-59.

[50] ECtHR, Soering v. United Kingdom, 7 July 1989, no. 14038/88. See D. HARRIS, M. O'BOYLE, C. WARBRICK, *Law of the European Convention on Human Rights*, Oxford, 2014, p. 7 ff.

[51] ECtHR, Kjeldsen, Busk Madsen and Pedersen v Denmark, 7 December 1976, no. 5095/71, 5920/72, 5926/72, para. 53. D. HARRIS, M. O'BOYLE, C. WARBRICK, *Law of the European Convention on Human Rights*, cit., p. 7.

> 'given that it is a law-making treaty, it is also necessary to seek the interpretation that is most appropriate in order to realize the aim and achieve the object of the treaty, and not that which would restrict to the greatest possible degree the obligations undertaken by the parties'.[52]

Moreover, the ECtHR describes the Convention elsewhere as 'a constitutional instrument of the European public order (*ordre public*)',[53] which means that the Convention must be applied objectively, i.e. imposing objective obligations), and not as a mutual obligation between the contracting parties.[54]

Evolutive interpretation. As a consequence of the relevance of teleological interpretation, the Court developed the *evolutive or dynamic interpretation* doctrine. In *Tyrer v United Kingdom* the Court stated that the ECHR is 'a living instrument which […] must be interpreted in the light of present-day conditions'.[55] Therefore, the Court is not bounded by developments and standards accepted in the States of the Council of Europe.[56] It refers rather to a general standard updated to contemporary social conditions. This reasoning is crucial when the Convention uses vague concepts or general clauses, such as the public order in Art. 8 ECHR.[57] However, the Court tries not to act as a legislator, but to recognise ongoing social changes. In fact, the example of extraterritorial responsibility of the State shows how the evolutive interpretation of the Court can be seen either as a declaration of implicit concepts or as an addition of new ones.

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[52] ECtHR, Wemhoff v. Germany, 27 June 1968, no. 2122/64, para. 8, ECtHR, Golder v. United Kingdom, 21 February 1975, no. 4451/70, para. 34-36. Judge Fitzmaurice strongly opposed this position in his dissenting opinion to the *Golder* judgement. However, the latter interpretation succumbed to the first. D. HARRIS, M. O'BOYLE, C. WARBRICK, *Law of the European Convention on Human Rights*, cit. p. 8.

[53] ECtHR, Loizidou v. Turkey (Preliminary objections), 23 March 1995, no. 15318/89, para. 75.

[54] EComHR, Austria v. Italy, no. 788/60, and ECHR, Ireland v. United Kingdom, 18 January 1978, no. 5310/71, para. 239.

[55] ECtHR, Tyrer v United Kingdom, 25 April 1978, para. 31. S.C. PREBENSEN, *Evolutive Interpretation of the European Convention on Human Rights*, in P. MAHONEY, F. MATSCHER, M. PETZOLD ET AL. (eds.), *Mélanges à la mémoire de Rolv Ryssdal*, Köln, 2000, p. 1123-1137; F. MATSCHER, *Methods of Interpretation of the European Convention*, in R.ST.J. MACDONALD, F. MATSCHER, H. PETZOLD (eds.), *The European System for the Protection of Human Rights*, Dordrecht, 1993, p. 68, J. BADENHOP, *Normtheoretische Grudlagen der Europäischen Menschenrechtskonvention*, Baden-Baden, 2010, p. 67.

[56] ECtHR, Tyrer v. United Kingdom, 25 April 1978, § 31. See A. MOWBRAY, *The Creativity of the European Court of Human Rights*, in *Human Rights Law Review*, 5, 2005, p. 60 ff.

[57] I.e. in the case of *Marckx v Belgium*, the Court interpreted the right to private and family life dynamically to ensure the right of a child born out of wedlock to be treated at the same conditions of a child born in wedlock. The Belgian legislation was constructed in a way that forced a mother to adopt her child born out of wedlock in order to grant his/her inheritance rights. See ECtHR, Marckx v. Belgium, 13 June 1979, no. 6833/74, para. 34 ff. In the case of *Christine Goodwin*, the right to private and family life was interpreted in an evolutive way in order to include the rights of transgender people to have their gender legally modified and to be granted equality, even though there was 'little common ground between contracting states', while there was 'a clear and uncontested evidence of continuing international trend'. See Christine Goodwin v. United Kingdom, 11 July 2002, no. 28957/95, para. 74-75, 92-93.

As far as classical interpretation methods are concerned, the literal and historical interpretations are not the main tools European judges use. However, the literal interpretation is often addressed as 'the limits resulting from the clear meaning of the text', while an occasional use of the *travaux préparatoires* recalls historical interpretation.[58]

Another important interpretative tool is the frequent reminder to the effectiveness (*effet utile*) of the interpretation. According to the Court, the Convention must guarantee 'rights that are not theoretical and illusory but rights that are practical and effective'.[59] Recently, *effet utile* has been considered a general principle ruling the Convention rather than a simple interpretive tool.[60]

Fourth instance doctrine. Although the Strasbourg Court often ends in sanctioning the national system or a certain behaviour of a State power, in its own words it shall not be regarded as a 'fourth instance' remedy by the applicants. This doctrine originally stemmed from Art. 6 ECHR case-law and was then considered as a general doctrine in the interpretation of the Convention. In *Garcia Ruiz v. Spain* the Court states that

> 'according to Article 19 of the Convention, its duty is to ensure the observance of the engagements undertaken by the Contracting Parties to the Convention. In particular, it is not its function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention'.[61]

An application dealing with mistakes in fact or in law by national judges shall therefore be declared inadmissible *ratione materiae*. If this is the case for Art. 6 ECHR, it is obvious that the Strasbourg Court necessarily needs to investigate national law and practice when dealing, for example, with a violation of Art. 7 ECHR. In fact, the very nature of the

[58] D. HARRIS, M. O'BOYLE, C. WARBRICK, *Law of the European Convention on Human Rights*, cit., p. 18-19.
[59] ECtHR, Artico v. Italy, 13 May 1980, no. 6694/74, para. 33. In the case of *Klass v. Germany* the Court recalls the *effet utile* of the Convention regarding the interpretation of former Art. 25. ECtHR, Klass and others v. Germany, 6 September 1978, no. 5029/71, para. 30-38. W. SCHABAS, *The European Convention*, cit., p. 50.
[60] ECtHR, Fabris v France, 7 February 2013, no. 16574/08, Concurring opinion of Judge Pinto de Albuquerque. 'Human rights treaties should be interpreted in a way which is most protective of the rights and freedoms which they foresee. […] Human rights would then be a deceptive mirage in Europe. To ensure that human rights do not become a mere mirage, the most protective interpretation of the Convention's rights and freedoms is required: to guarantee real, not virtual, independence of the judicial power and an *effet utile*, not apparent, of the rights and freedoms of the Convention, it is indispensable that the Court be vested with the implied power to oversee the execution of its judgments, and, if need be, to contradict a decision of the Committee of Ministers in this regard'.
[61] ECtHR, Garcia Ruiz v. Spain, 21 January 1999, no. 30544/96, para. 28.

violation involves an assessment of the national law in question, according to the principle *iura novit curia*.

The principle of proportionality is a criterion used especially when the Convention foresees restrictions to rights, i.e. Art. 8-11 ECHR.[62]

Autonomous concepts. In the end, another important feature of the Convention is the theory of autonomous concepts. As previously advanced by the Commission, the Court develops autonomous definitions of concepts in order to prevent the States from 'circumventing' the Convention. In the words of the Court a term

> 'cannot be construed as a mere reference to the domestic law of the High Contracting Party concerned but relate to an autonomous concept which must be interpreted independently, even though the general principles of the High Contracting Parties must necessarily be taken into consideration in any such interpretation'.[63]

After the elaboration of the concept of *criminal charge* in *Engel v. the Netherlands*,[64] the Court established a large number of autonomous concepts in its case-law ('civil rights and obligations', 'tribunal', 'witness', 'law', 'victim', 'association').[65] Thus, according to this doctrine the Court ensures effective protection of human rights by using national concepts as 'starting points' in order to elaborate its own understanding.[66] Towards the opposite conclusion, the elaboration of autonomous interpretation has been criticised for two main reasons: first of all, it may lead to judicial activism and, consequently, to a threat to the Court's legitimacy. Secondly, the co-existence of 'European' and national definitions could lead to fragmentation, inequality and legal uncertainty.[67]

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[62] J. BADENHOP, *Normtheoretische Grudlagen der Europäischen Menschenrechtskonvention*, cit., p. 424 f., J. CHRISTOFFERSEN, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights*, Leiden-Boston, 2009, p. 44-66 and S. VAN DROOGHENBROECK, *La proportionalité dans le droit de la Convention Européenne des droits de l'homme*, Bruxelles, 2001.
[63] EComHR, Twenty-one detained persons v. Germany, 6 April 1968, no. 3134/67 et al., para. 4.
[64] ECtHR, Engel and others v. the Netherlands, 8 June 1976, no. 5101-2-3/71, 5354/72, 5370/72, para. 81.
[65] See Artt. 5,6,7,8 ECHR. Fourth instance doctrine must not be seen as a contradiction to the autonomous meaning doctrine, as the first considers the States in principle better placed to judge their legal system and do not act as a last appeal with respect to national adjudication. Differently, autonomous meaning doctrine develops a specific 'conventional' understanding of concepts and definitions in order to provide effective human rights protection.
[66] ECtHR, Chassagnou v. France, 29 April 1999, no. 25088/94, 28331/95, 28443/95, para. 100. G. LETSAS, *A Theory of Interpretation*, cit. p. 43.
[67] J. GERARDS, *Judicial Minimalism and "Dependency". Interpretation of the European Convention in a Pluralist Europe*, in M. VAN ROOSMALEN, B. VERMEULEN ET AL. (eds.), *Fundamental Rights and Principles. Liber Amicorum Pieter van Dijk*, Cambridge-Antwerp-Portland, 2013, p. 78-79 and M. CARTABIA, *Europe and Rights: Taking Dialogue Seriously*, in *European Constitutional Law Review*, 5, 2009, p. 18.

2.2. The ECHR between subsidiarity, margin of appreciation and minimum standard.

Especially after the Brighton Conference of 2012,[68] three main lines of development of the ECHR system can be traced back to subsidiarity, margin of appreciation and the so called 'principle of favourability'.

2.2.1. Subsidiarity and margin of appreciation after the Brighton Conference of 2012.

As stated before, the principle of subsidiarity has become one of the pillars of the Convention system. It is now officially recognised in the Preamble to the Convention, as amended by the 15th Protocol. This means that the responsibility to enforce the Convention and respect human rights resides primarily on State Parties. Nevertheless, the amendment of the Preamble has shown the States' common will for the Court to show deference to national adjudications. The explanatory report to the Protocol states that the new recital is meant to enhance transparency and accessibility to this principle and to follow the Court's doctrine on the margin of appreciation.[69] The principle of subsidiarity derives from Art. 1 and 19 ECHR according to the Court's jurisprudence. In addition, subsidiarity can be also found in Art. 13 ECHR, as far as it obliges States to assure availability of a remedy at national level to enforce the substance of the Convention.[70]

The principle of subsidiarity is a two-sided concept, procedural and substantive. As a consequence, in its procedural aspect it requires that (future) applicants resort to all possible national remedies before appealing to the Court; whereas in its substantive side, the States are considered in principle to be in a better position to verify the necessity and proportionality of measures taken to assure certain rights.[71]

In a constant dialogic perspective between States and the European Court, the margin of appreciation doctrine balances the evolutive interpretation of the Convention in favour of the States, thereby safeguarding their peaceful cooperation.[72] It guarantees a certain degree of national autonomy in the legislative, judiciary and executive as far as certain

[68] See *above*, para. 2.1.
[69] Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms. Explanatory Report (CETS No. 213), p. 2, available at https://www.echr.coe.int/Documents/Protocol_15_explanatory_report_ENG.pdf, last accessed 13.02.2020.
[70] See H. PETZOLD, *The Convention and the Principle of Subsidiarity*, in R.ST.J. MACDONALD, F. MATSCHER, H. PETZOLD (eds.), *The European System*, cit., p. 42-43; J. CHRISTOFFERSEN, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights*, Leiden-Boston, 2009, p. 359, W. SCHABAS, *The European Convention*, cit., p. 75.
[71] W. SCHABAS, *The European Convention*, cit., p. 75. Recently on the procedural aspect see ECtHR, Provenzano v. Italy, 25 October 2018, no. 55080/13.
[72] See *above*, para. 1.2.

Convention rights are concerned. States' decisions are then subject to the scrutiny of the Court.[73] The doctrine can be applied only to some rights guaranteed by the Convention. In particular, it was developed in the context of Art. 15 ECHR[74] and is normally applied to Artt. 8-11 ECHR.[75] The concept of margin of appreciation is used in more than one sense.[76] According to Letsas, the substantive concept of the margin of appreciation is a way to 'address the relationship between individual freedoms and collective goals',[77] while the structural concept is directed towards the Court and its limitations in the review of the State's behaviour. In this regard, the structural margin of appreciation is linked with subsidiarity and State consensus.[78] Bearing in mind Letsas' classification, the case-law which developed on Artt. 8-11 ECHR is an example of the substantive concept of the margin of appreciation. In the *Handyside* case the Court, dealing with an alleged violation of Art. 10 ECHR and the definition of 'morals', stated that 'by reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of

[73] Among others: P. LAMBERT, *Marge nationale d'apprécitation et contrôle de proportionnalité*, in F. SUDRE (ed.), *L'interprétation de la Convention européenne des droits de l'homme*, Bruxelles, 1998, p. 63 ff.; J. CALLEWAERT, *Quel avenir pour la marge d'appréciation?*, in P. MAHONEY, F. MATSCHER, M. PETZOLD ET AL. (eds.), *Mélanges à la mémoire de Rolv Ryssdal*, cit., p. 147 ff.; A. LEGG, *The margin of appreciation in international human rights law: defence and proportionality*, Oxford, 2012; J. GERARDS, *Margin of Appreciation and Incrementalism in the Case Law of the European Court of Human Rights*, in *Human Rights Law Review*, 18, 2018, p. 495-515; C. SOTIS, *Le "regole dell'incoerenza". Pluralismo normativo e crisi postmoderna nel diritto penale*, Roma, 2012, p. 48 ff.

[74] The idea of a certain discretionary power for States first appeared in four cases on the lawfulness of the application of the Art. 15 ECHR derogation clause. The requirements are a public emergency and the absolute necessity of the measures, which must be adequate to the situation. ECtHR, Greece v United Kingdom, 2 July 1956, no. 176/56; Lawless v Ireland, 1 July 1961, no. 332/57; 'Greek case', Reports by the Committee of Ministers Danemark v Greece 3321/67, Norway v Greece 3322/67, Sweden v Greece 3323/67, Netherlands v Greece 3344/67; Ireland v United Kingdom, 18 January 1978, no. 5310/71. See J. ASCHE, *Die Margin of Appreciation*, Berlin, 2018, p. 23 ff.

[75] The case-law on Artt. 8-11 ECHR initially lent the margin of appreciation from Art. 15 ECHR case-law, applying it a as balancing criterion. J. ASCHE, *Die Margin of Appreciation*, cit. p. 27.

[76] G. LETSAS, *A Theory of Interpretation*, cit., p. 80 ff.

[77] G. LETSAS, *A Theory of Interpretation*, cit., p. 80-81.

[78] G. LETSAS, *A Theory of Interpretation*, cit., p. 80-81.

these requirements as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them'.[79] To the contrary, Art. 15 ECHR cases are related to the structural concept.[80]

The margin of appreciation is now explicitly affirmed in the last recital of the Preamble to the Convention and is marking, along with the stress on subsidiarity, a will of the States to take back their national prerogatives, in a new *retour des États* era.[81]

2.2.2. Günstigkeitsprinzip as cornerstone of fundamental rights in Europe.

In the context of a *Mehrebenensystem* of protection of human rights in Europe, the need of coordination between the different levels must be taken into consideration. Both the Convention and the Charter of Fundamental Rights of the European Union have a safeguard provision affirming that the rights affirmed in both legal texts must not be interpreted as a limitation to other rights recognised by the States at national or international levels.[82] Art. 53 of the Convention (Safeguard for existing human rights) states '[n]othing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of every High Contracting Party or under any other agreement to which it is a party', while Art. 53 of the Charter (Level of protection) provides '[n]othing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights

[79] ECtHR, Handyside v United Kingdom, 7 December 1976, no. 5493/72, para. 48 and 49 ff. 'Article 10 para. 2 (art. 10-2) does not give the Contracting States an unlimited power of appreciation. The Court, which, with the Commission, is responsible for ensuring the observance of those States' engagements (Article 19) (art. 19), is empowered to give the final ruling on whether a "restriction" or "penalty" is reconcilable with freedom of expression as protected by Article 10 (art. 10). The domestic margin of appreciation thus goes hand in hand with a European supervision. Such supervision concerns both the aim of the measure challenged and its "necessity"; it covers not only the basic legislation but also the decision applying it, even one given by an independent court. […] The Court's supervisory functions oblige it to pay the utmost attention to the principles characterising a "democratic society". Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man'.

[80] See also B. RAINEY, E. WICKS, C. OVEY, *Jacobs, White, and Ovey: The European Convention on Human Rights*, Oxford, 2014, p. 80. The authors cite *Branningan* case, in which the Court recognises that the State is in a better position to evaluate the presence of an emergency threatening the life of the nation, keeping for itself just the necessity and adequateness assessment. ECtHR, Branningan an McBride v United Kingdom, 26 May 1993, no. 14553/89 and 14554/89.

[81] The expression *retour des États* is Delmas-Marty's. M. DELMAS-MARTY, *L'integration européenne entre pluralisme souveranisme et universalisme*, in *Dir. pen. cont.*, 04.07.2016.

[82] V. MANES, *La lunga marcia della Convenzione europea ed i "nuovi" vincoli per l'ordinamento (e per il giudice) penale interno*, in V. MANES, V. ZAGREBELSKY (eds.), *La Convenzione europea dei diritti dell'uomo nell'ordinamento penale italiano*, cit., p. 11.

and Fundamental Freedoms, and by the Member States' constitutions'. The common interpretation given to these provisions is that States are free to offer a higher protection to human rights, as long as they comply with the minimum level of protection represented either by the Convention or the Charter. In other words, the Convention or the Charter represent a minimum standard and forbid to lower the (possibly) higher protection granted by States through the Convention itself. In this respect, the title of the French version of the article fits best to the clarification of the meaning of the norm. '*Sauvegarde des droits de l'homme reconnus*': limiting or derogating pre-existing rights cannot be carried out interpreting the Convention. This principle is not only part of the EU Charter of Fundamental Rights, but also of federal State constitutions.[83] According to scholars, another possible interpretation is the obligation of States to raise their human rights standards, if they appear to be lower than the international ones.[84] German doctrine often regards these provisions as an application of the principle of 'favourability' (*Günstigkeitsprinzip*).[85] This principle originates, in a different sense, in German labour law, international private law, as well as constitutional law.[86]

The ECHR clause has not been implemented on a large scale, as the State's room to maneuver is limited to a case of conflict between more favourable national law and rights

[83] For example, in the European Union the *Günstigkeitsklausel* is not only referred to the constitutions of the Member States, but also to other international treaties signed by the EU or EU law itself. Curiously, the lack of coordination between both Art. 53 ECHR and CFREU represented one of the main arguments of the CJEU's negative opinion on the accession of the European Union to the ECHR (see CJEU, Opinion, 18 December 2014, C-2/13, para. 186-189). As far as federal states are concerned, Art. 142 GG is similar to Art. 53 ECHR in the approach of the Federal Constitution towards more favourable fundamental rights of the *Länder*. 'Art. 142. *Ungeachtet der Vorschrift des Artikels 31 bleiben Bestimmungen der Landesverfassungen auch insoweit in Kraft, als sie in Übereinstimmung mit den Artikeln 1 bis 18 dieses Grundgesetzes Grundrechte gewährleisten*'. C. GRABENWARTER, K. PABEL, *Europäische Menschenrechtskonvention*, cit., p. 13-14. Similar provisions are included in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 (Art. 1) or the Convention on the Elimination of All Forms of Discrimination Against Women (Art. 23), and most of all in the UN Covenant on Economic, Social and Cultural Rights (Art. 5(2)).

[84] C. GRABENWARTER, *Menschenrechtliche Verschlerterungsverbote als Integrationshindernisse?,* in M. KMENT (ed.), *Das Zusammenwirken von deutschem und europäischem Öffentlichen Recht: Festschrift für Hans D. Jarass zum 70. Geburtstag,* München, 2015, p. 56.

[85] C. GRABENWARTER, K. PABEL, *Europäische Menschenrechtskonvention,* cit., p. 13-14.

[86] In Labour Law the principle of favourability is affirmed in section 4 *Abs*. 3 TVG: D.W. BELLING, *Das Günstigkeitsprinzip im Arbeitsrecht,* Berlin, 1984, K. ADOMEIT, *Das Günstigkeitsprinzip – neu verstanden,* in *NJW*, 1984, p. 26 ff. In international Private Law see J. VON HEIN, *Das Günstigkeitsprinzip im Internationalen Deliktsrecht*, Tübingen, 1999 and C. SCHRÖDER, *Das Günstigkeitsprinzip im Internationalen Privatrecht,* Frankfurt a.M., 1996. In German Constitutional Law the relationship between fundamental rights of the *Grundgesetz* and fundamental rights as enshrined in the Constitutions of *Länder* works with a similar logic. J. PIETZCKER, *Zuständigkeitsordnung und Kollisionsrecht im Bundesstaat*, in J. ISENSEE, P. KIRCHHOF (eds.), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, Heidelberg, 2008, p. 551 ff.

guaranteed at European level.[87] Despite its limited use, the favourability clause can hypothetically operate in two kinds of situations. On the one hand, the above-mentioned statement is fully valid just for conflict cases in which only an individual and a State come into question. On the other, if the conflict arises between the State and the individual but also involves the 'Convention relevant' rights of a third party, the favourability clause cannot work. In these cases, the Convention cannot retreat in favour of nationally recognised rights. Otherwise, the protection of Convention rights would be limited in every case involving another individual as carrier of a different interest.[88]

The interpretation of Art. 53 CFREU is similar to the one of the ECHR but has raised more problematic issues, especially by the Luxembourg Court. The CJEU in the Opinion regarding the accession of the EU to the ECHR has explained its interaction with Art. 53 ECHR considering the latter at the same level of international agreements, arguing that the highest level of protection guaranteed by the CFREU cannot be lowered by an unfavourable overruling of the Strasbourg Court.[89]

Moreover, CFREU also admits the protection of fundamental rights as recognised by the Constitutions of the Member States. Although the Charter limits its argument 'in their respective fields of application', a possible conflict could arise anyway because the scope of application of EU and national law is frequently overlapping. The Charter is therefore a possible source of conflict between different human rights standards: most of all, the current interpretation given by the CJEU seems to limit the scope of national human rights protection if it could result in a violation of the *primauté* of Union law. [90]

3. ECHR as European Magna Carta and Criminal Law.

In the Strasbourg Court's own words, the ECHR has now become a European Constitution and the Court's jurisprudence has contributed to creating a European level

[87] See C. GRABENWARTER, *Menschenrechtliche Verschlerterungsverbote als Integrationshindernisse?,* cit., p. 43; R. STREINZ, *Grundrechtsschutz im europäischen Mehrebenensystem – Die Schutzniveauklausel des Art. 53 EU-Grundrechtecharta in der Rechtsprechung des EuGH*, in M. KMENT (ed.), *Das Zusammenwirken von deutschem und europäischem Öffentlichen Recht: Festschrift für Hans D. Jarass zum 70. Geburtstag*, München, 2015, p. 133-144.

[88] T. THIENEL, *Art. 53*, in U. KARPENSTEIN, F.C. MAYER (eds.), *EMRK. Konvention zum Schutz der Menschenrechte und Grundfreiheiten. Kommentar*, München, 2015, p. 702-706. See G. RESS, *Horizontale Grundrechtskollisionen: Zur Bedeutung von Art. 53 der Europäischen Menschenrechtskonvention*, in E. KLEIN (ed.), *Rechtsstaatliche Ordnung Europas: Gedächtnisschrift für Albert Bleckmann*, Köln, 2007, p. 313-324.

[89] T. THIENEL, *Art. 53*, cit., p. 702. CJEU, Opinion 2/13, 18 December 2014, para. 186-189.

[90] For example, in the case of *Melloni*, the Luxembourg Court interpreted Art. 53 as not leaving the State its margin of appreciation in the assessment of more favourable human rights if it does not comply with the primacy of EU law. CJEU, Stefano Melloni v. Ministerio Fiscal, 26 February 2013, C-399/11, para. 58.

of protection of human rights.[91] Criminal law was one of the first branches in which the Court massively intervened. The new principle-based approach and the case-law of the Court shaped a new approach on criminal law, based on a substantial, rather than formal and legalistic argumentation.[92] Most of all, thanks to the formal (or authoritative) superior value of the Convention and the related case-law in several European States, human rights shape criminal law provisions and influence the interpretation of those provisions, which must be understood in light of a superiorly guaranteed and agreed upon basis.[93]

This phenomenon is part of the wider picture of interaction between human rights and criminal law in the international and national dimension.[94]

3.1. Human Rights: Sword and Shield of Criminal Law.

According to a famous definition given by Judge Christine Van den Wyngaert, human rights are often regarded as 'sword' and 'shield' of criminal law.[95] This effective metaphor represents the double nature of the relationship between human rights and criminal law: they represent both protection *from* criminal law and protection *through* criminal law. As a matter of fact, the traditional point of view sees human rights as shield for the accused against arbitrary punishment, torture, death penalty, unlawful detention.[96]

[91] ECtHR, Loizidou v. Turkey (Preliminary objections), 23 March 1995, no. 15318/89, para. 75, ECtHR, Fabris v France, 7 February 2013, no. 16574/08. L. WILDHABER, *Un avenir constitutionnel pour la Cour européenne des droits de l'homme?*, in *RUDH*, 2002, p. 1.

[92] In general, on the applicability of Ronald Dworkin's principle theory, as well as its elaboration by Robert Alexy see J. BADENHOP, *Normtheoretische Grudlagen der Europäischen Menschenrechtskonvention*, Baden-Baden, 2010, p. 301 ff. and 409 ff.

[93] See *infra*, para. 3.3.

[94] A principle-based approach (in a broader sense) is written in the history of criminal law since the Enlightenment and the era of bills of rights, going forward with codifications and constitutionalism. M. DONINI, *Il volto attuale dell'illecito penale. La democrazia penale tra differenziazione e sussidiarietà*, Giuffrè, Milano, 2004, p. 61-62. Donini quotes principle-based approaches in Italian and German scholarship, i.e. ID. *Teoria del reato. Una introduzione*, Padova, 1996, p. 1 f., F. PALAZZO, *Introduzione ai principi del diritto penale*, Torino, 1999, p. 1 ff., O. LAGODNY, *Strafrecht vor den Schranken der Grundrechte: die Ermächtigung zum strafrechtlichen Vorwurf im Lichte der Grundrechtsdogmatik*, Tübingen, 1996, p. 216 ff.

[95] Judge Van den Wyngaert expressly referred to International Criminal Justice, where human rights became 'offensive' (rather than defensive). The protection and re-establishment of the rights of the victims were the ground to prosecute mass atrocities perpetrators, instead of being a safeguard for the accused. The famous expression was part of a presentation given in 1995 at the *XVe Journées d'études juridiques Jean Dabin*, Louvain and subsequently published in F. TULKENS, H. BOSLY (eds.), *La justice pénale et l'Europe*, Brussels, 1996; see also J.A.E. VERVAELE, *Régulation et repression au sein de l'État providence. La function "bouclier" et la function "épée" du droit penal en déséquilibre*, in *Déviance et société*, 21, 1997, p. 120-22.

[96] This point of view embodies the western tradition on the rule of law and *habeas corpus*, usually considered originating in the *Magna Carta Libertatum* and the French Revolution with the *Déclaration des droits de l'homme et du citoyen* and the work of Cesare Beccaria, *Dei delitti e delle pene*. Similarly M. DELMAS-MARTY, *Le paradoxe pénal*, in M. DELMAS-MARTY, C. LUCAS DE LEYSSAC (eds.), *Libertés et droits fondamentaux*, Paris, 1996, p. 369.

On the contrary, human rights trigger criminal law when their protection embodies a reason to prosecute and punish. In this respect, other individuals than the accused come into consideration as carrying opposing interests.

This relationship has been effectively defined as paradoxical. Reversing the perspective, the *paradoxe pénal* also takes place when 'the criminal law appears to be both a protection and a threat for fundamental rights and freedoms'.[97]

As a 'shield', human rights protect the individual from arbitrariness and abuse of state powers. Bentham asserted that criminal law

> 'throughout the whole course of its operation, can only be a train of evils – evils in the threat and constraint of the law – evils in the pursuit of the accused, before the innocent can be distinguished from the guilty – evils in the infliction of judicial sentences – evils in the inevitable consequences which reverberate upon the innocent'.[98]

Looking at the Convention, the structure of fundamental rights often reflects the idea of State intervention in the rights of the individual as the last possible resort. Absolute rights such as Art. 3 ECHR (prohibition of torture and human and degrading treatment), Art. 7 ECHR (*nulla poena sine lege*) and Art. 4(1) ECHR may be not be derogated (even in times of emergency) and cannot be limited by any other right or interest in the Convention.[99] These are the typical criminal law-related safeguards against State arbitrariness in a criminal proceeding or enforcement. However, the Convention also defends the individual from the risk of arbitrariness in the State's choices of criminalisation or in the application of restrictions to liberty and security or freedom of movement. The violation of these non-absolute rights (Art. 8-11 or Art. 5 ECHR, but also Art. 2 Prot. 4 and Art. 1 Prot. 1) is verified in a two-stage proceeding: scope of application and effective violation. The assessment of the violation is then divided in three stages: its lawfulness of the restriction, its pursuit of a legitimate aim, and its necessity in a democratic society.[100] The necessity requirement is the key of the assessment of the Court, together with legality, and can be generally defined as a proportionality test. The

[97] M. DELMAS-MARTY, *Le paradoxe pénal*, cit., p. 368 ff.
[98] J. BENTHAM, *Discourse on Civil and Penal Legislation*, 1802 quoted by F. TULKENS, *The Paradoxical Relationship between Criminal Law and Human Rights*, in *Journal of International Criminal Justice*, 9, 2011, p. 581. According to Tulkens, the use of the term *evils*, bearing in mind Bentham's utilitarianism, can be easily translated into modern 'infringements of human rights'.
[99] H. SATZGER, *Der Einfluß der EMRK auf das deutsche Straf- und Strafprozessrecht. Grundlagen und wichtige Einzelprobleme*, in *Jura*, 2009, p. 761, 763.
[100] A. GALLUCCIO, *Art. 8*, in G. UBERTIS, F. VIGANÒ (eds.), *Corte di Strasburgo e giustizia penale*, Torino, 2016, p. 257 ff., HARRIS, M. O'BOYLE, C. WARBRICK, *Law of the European Convention on Human Rights*, cit., p. 505 ff.

interference must 'correspond to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued'.[101]

The idea conveyed by the Convention is that of a subsidiary use of criminal law, which shall be considered a last resort.[102] For example, in the case of *Belpietro v. Italy*, the Court found a violation of Art. 10 ECHR (Freedom of expression) against an Italian journalist who had been sentenced to imprisonment for libel pursuant to the Italian Criminal Code. The reasoning of the Court is based on the fact that imprisonment as a penalty (and not the criminal relevance of libel) was not necessary in a democratic society, and therefore disproportionate.[103] In this respect human rights have a restrictive effect on criminal law.

As 'sword', human rights protect individuals *through* criminal law. Criminal law is seen here as an instrument of human right protection: it is a means to strengthen the rights of victims of human rights violations through an expansion of criminal law.[104] This dichotomy can also be described with the German concepts of *Abwehrrecht* and *Schutzpflicht* in fundamental rights theory.[105] The offensive side of human rights is

[101] ECtHR, Olsson v Sweden, 24 March 1988, 10465/83, para. 67.
[102] F. TULKENS, *The Paradoxical Relationship between Criminal Law and Human Rights*, cit., p. 582. Suggesting a comparison between the idea of subsidiarity and the Italian principle of *offensività*, FR. MAZZACUVA, *La legalità come "diritto fondamentale". Ragioni e implicazioni del* nullum crimen *nella giurisprudenza evolutiva della Corte Europea*, Doctoral thesis, Università degli Studi di Parma. Dipartimento di Scienze Penalistiche, 2012, p. 37. In domestic criminal law, the idea of criminal law as last possible response, only determined by necessity is enshrined in the principle of subsidiarity and *extrema ratio*. See in the Italian doctrine historically G.D. ROMAGNOSI, *Genesi del diritto penale*, 1791, ed. Milano, 1996; in the Republican era Franco Bricola's work was, probably, entirely inspired by the *extrema ratio*: F. BRICOLA, *Politica criminale e politica penale dell'ordine pubblico (a proposito della legge 22 maggio 1975 n. 152)*, in *La questione criminale*, 1975, p. 221 ff.; ID., *Carattere 'sussidiario' del diritto penale e oggetto della tutela*, in *Studi in memoria di G. Delitala*, I, Milano, 1984, p. 99, 107 f. See A. BARATTA, *Principi del diritto penale minimo. Per una teoria dei diritti umani come oggetti e limiti della legge penale*, in *Dei delitti e delle pene*, 1985, p. 443 ff. and, differently L. FERRAJOLI, *Diritto penale minimo*, *ibidem*, p. 493 ff. Recently see S. MOCCIA, *La perenne emergenza: tendenze autoritarie nel sistema penale*, Napoli, 1997.
[103] '*61. Il n'en demeure pas moins que, comme rappelé au paragraphe 53 ci-dessus, la nature et la lourdeur des peines infligées sont aussi des éléments à prendre en considération lorsqu'il s'agit de mesurer la proportionnalité de l'ingérence. Or, en l'espèce, outre la réparation des dommages (pour un montant total de 110 000 EUR), le requérant a été condamné à quatre mois d'emprisonnement (paragraphe 18 ci-dessus). Bien qu'il y ait eu sursis à l'exécution de cette sanction, la Cour considère que l'infliction en particulier d'une peine de prison a pu avoir un effet dissuasif significatif. Par ailleurs, le cas d'espèce, portant sur un manque de contrôle dans le cadre d'une diffamation, n'était marqué par aucune circonstance exceptionnelle justifiant le recours à une sanction aussi sévère. […]. 62. La Cour estime que, à cause de la mesure et de la nature de la sanction imposée au requérant, l'ingérence dans le droit à la liberté d'expression de ce dernier n'était pas proportionnée aux buts légitimes poursuivis […]*'. ECtHR, Belpietro v Italy, 24 September 2013, 43612/10, para. 61-62.
[104] F. TULKENS, *The Paradoxical Relationship between Criminal Law and Human Rights*, cit., p. 583 f.
[105] J. DIETLEIN, *Die Lehre von den grundrechtlichen Schutzpflichten*, Berlin, 1992, p. 112 ff., P. UNRUH, *Zur Dogmatik der grundrechtlichen Schutzpflichten*, Berlin, 1996, p. 76 ff. V. EPPING, *Grundrechte*, Heidelberg, 2012, p. 5, 53 f.

pursued mainly through the doctrine of positive obligations and that of *Drittwirkung*.[106] These main issues of International Human Rights Law are here seen in the Convention perspective.

According to an established case-law of the ECtHR, positive obligations can be substantive or procedural. The former create an obligation for States under the Convention to protect individuals from human rights violations and introduce criminal offences in order to deter possible perpetrators (i.e., an obligation to protect and obligation to criminalize), while the latter establish an obligation to effectively prosecute and punish the perpetrators (i.e., a procedural obligation). Only serious violations of core rights give rise to positive obligations in their criminal and therefore most serious declination. As a matter of fact, the Strasbourg Court case-law developed especially in the context of the right to life (Art. 2 ECHR) and the prohibition of torture and other inhuman or degrading treatment (Art. 3 ECHR).[107]

The leading case is *X and Y v. The Netherlands*, where the applicants filed a case regarding the violation of Art. 8 (Right to private and family life) in respect of the lack of criminal proceedings against the perpetrator of a rape against a disabled young girl. The Court, despite acknowledging the State margin of appreciation, affirms for the first time that 'this is a case where fundamental values and essential aspects of private life are at stake. Effective deterrence is indispensable in this area and it can be achieved only by criminal-law provisions; indeed, it is by such provisions that the matter is normally regulated'.[108]

[106] In Italy and Germany, the problem of *Drittwirkung* and positive obligations rising from the constitutional charters is an old problem in Constitutional law as well as Criminal Law. In German law it is appropriate to speak about *Schutzpflichte*. See T. RENSMANN, *Wertordnung und Verfassung*, Tübingen, 2007, p. 215 ff. and H. KRIEGER, *Positive Verpflichtungen unter der EMRK: unentbehrliches Element einer gemeineuropäischen Grundrechtsdogmatik, leeres Versprechen oder Grenze der Justiziabilität?*, in *ZaöRV*, 2014, p. 193. *Drittwirkung* has an indirect relationship with positive obligations. The State must protect the individual, through positive obligations, from human rights violations coming from third parties. The relationship is mediated by the laws of the State as well since the Convention does not recognise a direct 'third-party effect'. C. GRABENWARTER, K. PABEL, *Europäische Menschenrechtskonvention*, cit., p. 159-160.

[107] S. MANACORDA, *"Dovere di punire"? Obblighi di tutela penale nell'era dell'internazionalizzazione del diritto*, in *Riv. it. dir. proc. pen*., 2012, p. 1364-1401. F. VIGANÒ, *Obblighi convenzionali di tutela penale?*, in V. MANES, V. ZAGREBELSKY, *La Convenzione*, cit., p. 253 ff. in the international literature see A. MOWBRAY, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*, Oxford-Portland, 2004, D. XENOS, *The Positive obligations of the State under the European Convention on Human Rights*, London-New York, 2012.

[108] ECtHR, X and Y v The Netherlands, 26 March 1985, 8978/80, para. 27.

Positive obligations also force the State to protect individuals from infringements in their rights coming from State agents or other individuals, through a reading of Art. 1 and 2 (or 3) ECHR.[109]

The obligation to protect has many declinations such as State agents training while using lethal force;[110] the adequate preparation of life-threatening operations; protecting vulnerable persons or persons under the control of the State;[111] supervising dangerous activities;[112] refusing extradition in case of substantial grounds to believe the risk of death penalty or torture in the requesting State.[113] Nevertheless, criminal law properly comes into question when the Court acknowledges that the State has a duty to protect individuals from threats to their rights coming from third parties. In order to avoid murder, domestic violence or other assaults, as well as torture or inhuman or degrading treatment, effective criminal law provisions must be enacted and ought to be enforced.[114] The obligation of the State is to prevent by providing for effective criminal offences. In this regard, positive obligation also entails obligation to criminalize certain offences in order to protect a right enshrined in the Convention. The State must therefore ensure an adequate legal framework. States not only have to enact appropriate bodies of legislation but they also have to guarantee effective criminalization, which shall have a deterrent effect. [115]

[109] Art. 1 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention'. Art. 2 para. 1 'Everybody's right to life shall be protected by law'. F. SUDRE, *Les "obligations positives" dans la jurisprudence européenne des droits de l'homme*, in P. MAHONEY, F. MATSCHER, M. PETZOLD ET AL. (eds.), *Mélanges à la memoire de Rolv Ryssdal*, cit., p. 1359. In the Italian doctrine see F. VIGANÒ, *L'arbitrio del non punire: sugli obblighi di tutela penale dei diritti fondamentali*, in M. BERTOLINO, L. EUSEBI, G. FORTI (eds.), *Studi in onore di Mario Romano*, Napoli, 2011, p. 2645-2704 and ID., *Obblighi convenzionali di tutela penale?*, in V. MANES, V. ZAGREBELSKY (eds.), *La Convenzione*, cit., p. 243 ff.

[110] ECtHR, Şimşek and others v. Turkey, no. 35072/97 and 37194/97, para.104-113.

[111] ECtHR, Perevedentsevy v. Russia, 21 April 2014, 39583/05, para. 90-101.

[112] ECtHR, Öneryildiz v. Turkey, 30 November 2004, no. 48939/99, para. 89-90.

[113] Leading case is ECtHR, Soering v. United Kingdom, 7 July 1989, no. 14038/88.

[114]ECtHR, Osman v United Kingdom, 28 October 1998, 23452/94, para. 115, ECtHR, Paul and Audrey Edwards v. United Kingdom, 14 March 2002, no. 46477/99, para. 54 ECtHR, Railean v. Modavia, 5 January 2010, no. 23401/04, para. 27. J. GERARDS, *Right to life*, in P. VAN DIJK, F. VAN HOOF, A. VAN RIJN, L. ZWAAK (eds.), *Theory and Practice of the European Convention on Human Rights*, Cambridge-Antwerp-Portland, 2018, p. 372-373.

[115] In Italy, the lack of a specific provision on torture in the criminal code and the fact that substitute provisions were inadequate to appropriately and effectively address cases of torture or ill-treatment (i.e. too short statute of limitation), led to the statement of a violation of Art. 3 by the Strasbourg Court. The case concerned the 2001 G8 Summit in Genova, where the police arrested several protesters, that were detained in school facilities and subject to ill-treatment. The alleged violation referred to procedural obligations, as the proceedings against the perpetrators had been ineffective. Nonetheless, the Court identified the real violation behind the procedural setbacks in the lack of an adequate legislative framework, conversely praising the Italian courts' attempt to punish the perpetrators. The Court eventually affirmed that '245. Nevertheless, the Court's jurisdiction is limited to ensuring respect for the obligations deriving from Article 3 of the Convention and, in particular, helping the respondent State to find appropriate solutions to the

Procedural obligations on the other hand include obligations to investigate, obligations to provide an effective remedy and punishment for the perpetrators.[116] Their aim is to effectively enforce national provisions safeguarding the right to life and physical and psychological integrity and to verify individual criminal responsibility of the (public or private) perpetrators.[117]

In fact, there has always been a debate about constitutional positive obligations to protect certain rights through criminal law at domestic level. Italian scholarship generally denies this option, as a result of a debate which took place in the Seventies and Eighties.[118] Similarly, the debate in the Constitutional Court refers to the power of the Court to issue *in malam partem* judgements resulting in an extension of the scope of criminal law, usually refusing to accept this possibility.[119]

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structural problem identified, that is to say the shortcomings in Italian legislation. It is primarily for the State in question to choose the means to be used in its domestic legal system to give effect to its obligation under Article 46 of the Convention (see paragraph 240 above). 246. In this context, the Court considers it necessary to introduce into the Italian legal system legal mechanisms capable of imposing appropriate penalties on those responsible for acts of torture and other types of ill-treatment under Article 3 and of preventing the latter from benefiting from measures incompatible with the case-law of the Court'. ECtHR, Cestaro v. Italy, 7 April 2015, no. 6884/11, para. 245-246. Similarly see ECtHR, Myumyun v. Bulgaria, 3 November 2015, no. 67258/13, para. 77-78.

[116] Among others ECtHR, Nasr and Ghali v. Italy, 23 February 2016, no. 44883/09, para. 262-263, ECtHR, Al Nashiri v. Poland, 24 July 2014, no. 28761/11, para. 485-486, ECtHR, El Masri v. The Former Yugoslav Republic of Macedonia, 13 December 2012, no. 39630/09, para. 182.

[117] ECtHR, Hugh Jordan v. United Kingdom, 4 May 2001, no. 24746/94, para. 105, ECtHR, Nachova and o. v. Bulgaria, 6 July 2005, 43577/98 and 43579/98, para. 110, ECtHR, Al-Skeini and o. v. United Kingdom, 7 July 2011, no. 55721/07, para. 163.

[118] The debate resulted in a general denial of the legitimacy of constitutional obligations to protect through criminal law, apart from the one in art. 13 co. 4 Cost. While the Constitutional Court refused this solution on procedural grounds, scholars tried to ground it on substantial arguments. Pulitanò argued that the protection of constitutionally relevant values justified the creation of new criminal offences by the legislator but was not sufficient to enable the Constitutional Court to do so. His main argument was the principle of legality, which imposes not only statutory law as a source but also the Parliament as the necessary creator of criminal law provisions. This argument is still the most popular among those sceptical on positive obligations and European Union's obligations of criminalisation. D. PULITANÒ, *Obblighi costituzionali di tutela penale?*, in *Riv. it. dir. proc. pen.*, 1983, p. 484 and further in ID., *Orizzonti attuali del controllo di legittimità costituzionale delle norme penali*, in *Criminalia*, 2011, p. 11 ff. Bricola criticised this orientation, especially with regards to *in bonam partem* provisions granting not to be punished on non-constitutionally significant ground (*cause di esclusione della pena*, in general terms). F. BRICOLA, *Tecniche di tutela penale e tecniche alternative di tutela*, in M. DE ACUTIS, G. PALOMBARINI (eds.), *Funzioni e limiti del diritto penale*, Padova, 1984, p. 10. Despite supporting the idea of the subsidiary nature of criminal law and considering that the Constitution defines which legal goods shall be safeguarded, Bricola criticised the above-mentioned orientation and rejected the admission of constitutional obligations of criminalisation in order to protect certain legal goods: too relevant legal goods would forcibly require criminal protection, thus limiting the choice of the legislator on the means to protect them; moreover, the importance of the legal good would justify criminal offences that protect an abstract legal good; moreover, statutory reservation would become void; the role of the Constitutional Court would be altered in the constitutional architecture of checks and balances; in the end, criminalisation would be another service offered by the State and would become a particularly easy path to follow especially in times of crisis.

[119] The Constitutional Court usually refuses to issue judgements that, apart from being based on the principle of equality or discrimination, could result in the new incrimination of categories of individuals

However, the offensive side of human rights is particularly dangerous in criminal law, due to its subsidiary nature. A reasoning based on the protection of victims' rights and the deterring function of a criminal punishment uncovers general-preventive aims, which could not entirely comply with the modern conception of criminal law. This problem rises especially when the State power entitled to the enforcement of positive obligations is also the legislator. Differently, as far as procedural obligations are concerned, the enforcement is rather a duty of judges and State agents. Moreover, this obligation is difficultly coercible for the State: it must be the legislator who decides to introduce or modify criminal offences in the criminal code, as the Constitutional Court cannot comply with European case-law in this sense.[120]

In conclusion, positive obligations show a new proactive way to intend human rights, which give rise to specific problems in the context of criminal law: the principle of legality, separation of powers, criminal law as *extrema ratio*, which rights should be protected by criminal law, the role of the interests of the victims. Moreover, the evaluation of State practice is more and more constructed on an effectiveness paradigm, interpreting human rights in the light of *in concreto* and factual considerations.[121]

3.2. The status of the ECHR in national legal orders.

The peculiar importance of the Convention in shaping the relationship with human rights and criminal law in Europe makes it necessary to specify its status in national legal orders and the definition of consistent interpretation as the main means to disseminate its precedent. The status the European Convention on Human Rights shall occupy in the Member States is not mandatory in the Convention, and, as any other international treaty, depends on the national legal system. The status of the Convention often depends on the

which fell outside the previous scope of application. The Court accepted to rule *in malam partem* in cases strictly linked with individual discrimination. Corte Cost., 9 May 2003, no. 148 and, more recently in the case of statutory limitation, Corte Cost., 23 November 2006, no. 394, with comment by V. MANES, *Illegittime le "norme penali di favore" in materia di falsità nelle competizioni elettorali (nota a Corte cost. n. 394/2006)*, in *Diritto & giustizia*, Milano, 2006, p. 34 ff.

[120] F. VIGANÒ, *Obblighi convenzionali di tutela penale?*, cit., p. 290-293 and O. DI GIOVINE, *Diritti insaziabili e giurisprudenza nel sistema penale*, in *Riv. it. dir. proc. pen*., 2011, p. 1485.

[121] M. CAIANIELLO, *Processo penale e prescrizione nel quadro della giurisprudenza europea. Dialogo tra sistemi o conflitto identitario?*, in *Riv. trim. dir. pen. cont.*, 2, 2017, p. 220 ff. In a study based on the evolution of the French criminal code from the one of 1791 to the one of 1994, Poncela and Lascoumes made some observations that could be valid in a general perspective. According to them, human rights shifted from a political conception, as safeguard for State institutions and the citizens, to a more individualist one: individual rights and their evaluation are oriented on the single person as such and not towards the individual as part of a community. P. PONCELA, P. LASCOUMES, *Réformer le code penal. Où est passé l'architecte?*, Paris, 1998, p. 286-287; F. TULKENS, *The Paradoxical Relationship between Criminal Law and Human Rights*, cit., p. 594.

monist or dualist approach of the State towards international law. The different approaches can be summarised in three groups: States where the Convention has constitutional status,[122] the ones where ECHR has super-legislative rank[123] and the ones where the Convention has ordinary law status.[124]

In Italy the ECHR formally retains the rank of ordinary law, thanks to the ratification process, which happens by ordinary legislative procedure.[125] However, the Constitutional Court in its case-law granted the Convention a specific place: after the entry into force of the new Art. 117 Cost. in 2001, the Constitutional Court accorded the Convention the rank of ordinary law but considered it a *parametro interposto* (interposed parameter) in the relationship between the Constitution and ordinary norms. Therefore, the Convention has been awarded a peculiar position.[126] The so called *sentenze gemelle* (twin judgements) no. 348 and 349/2007 refused to attribute the ECHR either constitutional rank or the effect of European Union Law. Art. 117 of the Constitution subordinated the legislative power

[122] For example, Austria has included the Convention in the Constitution in 1964, therefore raising its rights at constitutional level. C. GRABENWARTER, K. PABEL, *Europäische Menschenrechtskonvention*, cit., p. 15. Similarly, the Netherlands consider the ECHR having constitutional rank, and prevailing over statutory regulations in case of conflict with international law pursuant to Art. 94 of the Dutch Constitution ('Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties or of resolutions by international institutions that are binding on all persons'). G. MARTINICO, *Is the European Convention Going to Be 'Supreme'? A Comparative-Constitutional Overview of ECHR and EU Law before National Courts*, in *European Journal of International Law*, 2012, p. 404.

[123] In most Member States, the ECHR is considered above ordinary statutory law but still in a lower position than the Constitution. In most cases, constitutional case-law ensures the ECHR a status above ordinary statutory law. In France, the ECHR and its interpretation have not been introduced yet in the *bloc de constitutionnalité*. Nevertheless, the *Conseil Constitutionnel* usually interprets statutory provisions in light of the Convention and the *Conseil d'État* considers international law provisions prevailing over ordinary law. O. DUTHEILLET DE LAMOTHE, *La Convention Européenne et le Conseil Constitutionnel*, in *Revue internationale de droit comparé*, 2008, p. 293 ff. and B. STIRN, *La position du Conseil d'État*, *ibidem*, p. 309 ff. In Switzerland national High Courts scrutinise the ECHR together with national human rights because human rights enshrined in the Convention are constitutional in their content and must be compared with fundamental rights enshrined in the Constitution. C. GRABENWARTER, K. PABEL, *Europäische Menschenrechtskonvention*, cit., p. 16.

[124] For example, in Germany and the United Kingdom. As far as Italy is concerned, the Convention has ordinary law status, with the specifications that will be made in the following. In the United Kingdom, the Human Rights Act of 1998 incorporated the ECHR (some specific provisions) into British law. The piece of legislation did not guarantee a certain status but rather imposed to national courts and administration an interpretation of British law consistent with the ECHR. Nevertheless, the Sovereignty of Parliament as the pillar of the relationship between the United Kingdom and the ECHR was preserved. A. ASHWORTH, A. MACDONALD, B. EMMERSON, *Human Rights and Criminal Justice*, London, 2012, p. 151-152, further on the impact of the Human Rights Act, R. CLAYTON, H. TOMLINSON, *The Law of Human Rights*, Oxford, 2000, p. 980.

[125] *Legge* 4 Agosto 1955, no. 848.

[126] It is here impossible to summarise the case-law on the relationship between the ECHR and the Italian Constitution. See D. TEGA, *L'ordinamento costituzionale italiano e il "sistema" CEDU: accordi e disaccordi*, in V. MANES, V. ZAGREBELSKY (eds.), *La Convenzione europea*, cit., p. 216 ff., M. CARTABIA, *La Convenzione europea dei diritti dell'uomo e l'ordinamento italiano*, in A. BALSAMO, R. KOSTORIS (eds.), *Giurisprudenza europea e processo penale italiano*, Torino, 2008, p. 33 ff.

with respect to international obligations and, therefore, their non-compliance (and the ECHR is one of them) in a piece of legislation that could result in the Court declaring its unconstitutionality. However, the judge should try to interpret the law consistently with the ECHR. Only if this is not possible, the ECHR will constitute a *parametro interposto* in order to raise the issue to the Constitutional Court.[127] Moreover, according to Art. 32 ECHR, the State has an obligation to comply with the ECHR in the meaning attributed by the European Court itself.[128] A new judgement issued in 2015 partially specified this relationship. While keeping the ECHR as *parametro interposto*, in a sub-constitutional rank, the Constitutional Court gives a more restrictive interpretation of the obligation of the State to comply with the ECHR as interpreted by its Court. In particular, the Court intends the 'as interpreted' clause in a stricter sense: the judge in its interpretation must comply with 'established European case-law' on the matter in order to 'comply with the substance of that case-law'.[129] According to the Court, 'established case-law' includes, for example, pilot judgements, Grande Chamber judgements, and judgements with no dissenting opinions.[130] The criteria suggested by the Constitutional Court and the judgement itself has been criticised in literature.[131]

In Germany ECHR is an ordinary *Bundesgesetz* (Art. 59 Abs. 2 GG). The ECHR has no constitutional rank, as clearly stated by the *Bundesverfassungsgericht*, and its provisions cannot be used as parameters in the *Verfassungsbeschwerde*.[132] The ECHR provisions can only be referred to through the mentioning of the correspondent fundamental right in the *Grundgesetz*. Although the proposal of a separate

[127] The Constitutional Court frames the problem of the possible inconsistency between the ECHR and the Constitution slightly differently in the two judgements. Both affirm that the Constitutional Court keeps the power to verify the respect of the Constitution by the ECHR. In no. 349, the limit seems to be the protection of fundamental rights and therefore the equivalence of protection, while no. 348 seems to raise the entire Constitution as a limit. Corte Cost., 28 November 2007, no. 348, para. 4.7 and Corte Cost., 28 November 2007, no. 349, para. 6.2. Subsequent judgements seem to have followed this second position: Corte Cost., 19 November 2012, no. 264, para. 4.1.

[128] Corte Cost., 28 November 2007, no. 349, para. 6.2.

[129] Already affirmed in Corte Cost., 22 July 2011, no. 236 and 26 November 2009, no. 311.

[130] Corte Cost., 26 March 2015, no. 49, para. 7.

[131] A. RUGGERI, *Fissati nuovi paletti alla Consulta a riguardo del rilievo della CEDU in ambito interno*, in *Riv. trim. dir. pen. cont*., 2, 2015, p. 325 ff.; V. ZAGREBELSKY, *Corte Cost. n. 49/2015, giurisprudenza della Corte europea dei diritti umani, art. 117 Cost., obblighi derivanti dalla ratifica della Convenzione*, in *Osservatorio AIC*, 2, 2015, p. 5.

[132] BVerfG 26.02.2008 – 1 BvR 1602/07, 1 BvR 1606/07, 1 BvR 1626/07, in *ZUM*, 2008, p. 420 ff.; BVerfG, 4.5.2011 − 2 BvR 2365/09, 740/10, 2333/08, 1152/10, 571/10 in *NJW*, 2011, p. 1931 ff. In the most recent case-law the *Bundesverfassungsgericht* accepts that, in the argumentation of the violation of a fundamental right enshrined in the *Grundgesetz*, the applicant invokes the non-enforcement or violation of an ECtHR judgement. BVerfG, 14.10.2004 - 2 BvR 1481/04, in *NJW*, 2004, p. 3407 ff. J. GRIEBEL, *Europäische Menschenrechte als Prüfungsmaßstab der Verfassungsbeschwerde*, in *DVBl*, 2014, p. 206-207.

Grundrechtverfassung was not accepted,[133] the *Bundesverfassungsgericht* usually applies the Convention as an interpretive aid and thus introduces *de facto* an obligation to interpret and apply national laws consistently with the European Human Rights case-law.[134] The Convention must be introduced in the national legal system[135] but must not be considered a *schematische Parallelisierung* with the *Grundgesetz*,[136] and thus cannot conflict with the Constitution. The ECHR and its interpretation by the Strasbourg Court cannot directly affect German Constitutional Law, but have rather a strong indirect effectiveness.[137]

3.3. Consistent interpretation, Criminal Law and the ECHR.

The progressive development of the role of dogmatic and the radical changes in the role of the judge, together with the European integration (both at European Union level and at Council of Europe level), have opened a new era of criminal law, which has been defined as *europeismo giudiziario* (judicial Europeanism).[138] Its features include principle-norms and argumentation through principles, the re-interpretation of national principles according to supranational sources, relevance of transnational courts case-law, the expansion of consistent interpretation in every branch of law.[139]

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[133] The proposal suggested to attribute constitutional rank to the ECHR through Art. 1 *Abs*. 2 GG and the so-called 'international law friendliness' F. HOFFMEISTER, *Völkerrechtlicher Vertrag oder europäische Grundrechtsverfassung*, in *Der Staat*, 2001, p. 349 ff., as quoted by C. GRABENWARTER, K. PABEL, *Europäische Menschenrechtskonvention*, cit., p. 19.

[134] BVerfG, 26.03.1987 - 2 BvR 589/79, in *NJW*, 1987, p. 2427 ff. See BVerfG, 14.10.2004 - 2 BvR 1481/04, in *NJW*, 2004, p. 3407 ff.: German judges must take European case-law into sufficient consideration and study it in detail. W. SCHALLER, *Das Verhältnis von EMRK und deutscher Rechtsordnung vor und nach dem Betritt der EU zur EMRK*, in *EuR*, 2006, p. 657 f.

[135] BVerfG, 4.5.2011 − 2 BvR 2365/09, and o., in *NJW*, 2011, p. 1931 ff.

[136] BVerfG, 17.12.2013 – 1 BvR 3139/08, 1 BvR 3386/08, in *NVwZ*, 2014, p. 211, 225, para. 267. See H. JARASS, B. PIEROTH, *GG Kommentar*, München, 2018, p. 51.

[137] See J. MAYER, *Grundrechtsvielfalt und Grundrechtskonflikte im europäischen Mehrebenensystem*, in *EuGRZ*, 2011, p. 234 ff.

[138] M. DONINI, *Europeismo giudiziario e scienza penale. Dalla dogmatica classica alla giurisprudenza-fonte*, Milano, 2011, p. 47.

[139] '[…] *dall'altro questa influenza è sempre più mediata dal grande spazio ermeneutico offerto dalla realtà istituzionale di un* europeismo giudiziario*: a) norme-principio e argomentazioni per principi; b) declinazione delle norme-principio 'interne' alla luce di fonti sovranazionali: UE, Cedu, trattati internazionali (per es. Statuto di Roma); c) grande rilevanza assunta dalle Corti sovranazionali che interpretano quei principi secondo logiche di comparazione costituzionale; d) espansione ormai a ogni livello dell'interpretazione conforme, quale obbligo del giudice ordinario, prima di ogni remissione alle Corti costituzionali e sovranazionali di questioni di legittimità*' M. DONINI, *Europeismo giudiziario e scienza penale*, cit., p. 47-48. A growing number of scholars deal with this phenomenon with different approaches: A. BERNARDI, *L'europeizzazione del diritto e della scienza penale*, cit., G. PANEBIANCO, *Delitti e pene nella giurisprudenza delle Corti europee*, Torino, 2007; V. MANES, *Il giudice nel labirinto: profili delle intersezioni tra diritto penale e fonti sovranazionali*, Roma, 2012; M. DONINI, *Il volto attuale dell'illecito penale. La democrazia penale tra differenziazione e sussidiarietà*, Milano, 2004; C. GRANDI, *Riserva di legge e legalità penale europea*, Milano, 2010.

Consistent (or *in accordance*) interpretation to hierarchically superior norms has always been hard to define. It is at the crossroads between the identification of the applicable *norm* and the criteria governing the composition of *sources* in a legal system.[140] In the first sense, consistent interpretation is fully classifiable within the methods of interpretation, due to the fact that it is interpreting the normative content of law.[141] In the second sense, it is a criterion to solve antinomies, which presumes that legal provisions come from different sources.[142] Therefore, it is split between theory of interpretation and theory of sources. Even though the theoretical distinction may be complicated, it is fictitious to separate both processes in the application of law. In other words, it is impossible to distinguish under a logical perspective the substantive level of the source from the theoretical level of norms.[143]

The question of consistent interpretation has often been confused with the problem of antinomies. The problem of antinomies is indeed crucial in consistent interpretation, although the two concepts are not necessarily connected. Antinomies are contrasts between norms but not precisely contrasts between sources.[144] Therefore, the contrast cannot be solved with the criteria ruling sources (i.e., hierarchical, chronological, separation of competences).[145] As a consequence, scholars believe that a comprehensive and more correct definition of consistent interpretation is not based on hierarchy, but that it can be summarised as the obligation to deduce interpretations from the norms entailed in a source, which must be consistent (i.e., harmonic) with the interpretations of another source. The latter exercises the power to influence the former.[146]

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[140] With reference to consistent interpretation with the Constitution, M. LUCIANI, *Interpretazione conforme a Costituzione*, in *Enc. Dir*., Milano, 2016, p. 444.
[141] G. TARELLO, *Gerarchie normative e interpretazione dei documenti normativi*, in *Pol. Dir*., 1977, p. 508 f.; G. SORRENTI, *L'interpretazione conforme a Costituzione*, Milano, 2006, p. 12. Luciani quotes H. BOGS, *Die verfassungskonforme Auslegung von Gesetzen – unter besonderer Berücksichtigung der Rechtsprechung des Bundesverfassungsgerichts*, Stuttgart-Berlin-Köln-Mainz, 1966, p. 5 as well. It should be classified as a *species* of systematic interpretation.
[142] A. LONGO, *Alcune riflessioni su tempo, co-testualità ed ermeneutica costituzionale, tra posizioni teoriche e itinerari giurisprudenziali*, in *GiustAmm.it*, 2014, p. 16, and, among criminal lawyers, V. MANES, *Il giudice nel labirinto*, cit., p. 48. The presumption of the validity of laws is a frequently adopted argument.
[143] M. LUCIANI, *Interpretazione conforme*, cit. p. 444. The reference to hierarchy of sources as explanation and method is criticised by A. RUGGERI, *Alla ricerca del fondamento dell'interpretazione conforme,* in ID., *"Itinerari" di una ricerca sul sistema delle fonti*, *XII, Studi dell'anno 2008*, Torino, p. 180 ff.
[144] For a definition of antinomy, see N. BOBBIO, *Il positivismo giuridico*. *Lezioni di filosofia del diritto*, Torino, 1997, p. 210.
[145] M. LUCIANI, *Interpretazione conforme*, cit., p. 442.
[146] M. LUCIANI, *Interpretazione conforme*, cit., p. 445. The ongoing process between the conditioning and the conditioned source is bilateral when the sources belong to the same legal order (Constitution-ordinary law), while in separate legal orders the conditioned source can influence the conditioning source only if the latter expressly admits it (as the common constitutional traditions in European Union Law). See A. LONGO,

In addition, consistent interpretation is often unclear in its actual meaning due to its bi-polar nature. At one end, consistent interpretation is an interpretive standard at the same level as other standards (be they historical, systematic, literal, teleological).[147] At the other end, consistent interpretation may be a rule, and therefore an obligation for the interpreter. Consistent interpretation is usually an optional interpretive method, which *can* be perceived as a *must* by jurists only for the sake of coherence.[148] Nevertheless, consistent interpretation may be an obligation, i.e. a rule, if the sources in question are ordered, in the legal system, in a hierarchy.[149] This solution takes on the risk of juxtaposition between sources and norms.

In the actual scenario, consistent interpretation is declined in several forms: constitutional interpretation and the consistent interpretation with European Union Law and international law. Consistent interpretation is a rule when governing the relationship between national and European Union Law. The European Court of Justice justifies the obligation of the States to interpret their national law in accordance with EU Law referring to its *primauté*. The argument is not based on hierarchy, as it may seem, but rather on the separation of competences. Historically the Court of Justice invoked the principles of *fidelité communautaire* and *loyal cooperation* to ground the duty of consistent interpretation.[150] In this chapter it is impossible to summarise the debate on consistent interpretation, European Union Law, and constitutional *controlimiti* (or *Schranken Schranken*),[151] which will be properly referred to when necessary.

Alcune riflessioni su tempo, co-testualità ed ermeneutica costituzionale, cit. p. 35, E. CANIZZARO, *Interpretazione conforme fra tecniche ermeneutiche ed effetti normativi*, in A. BERNARDI (eds.), *L'interpretazione conforme al diritto dell'Unione Europea. Profili e limiti di un vincolo proble*matico, Napoli, 2011, p. 6-7. On German doctrine of consistent interpretation with the Constitution R. ZIPPELIUS, *Verfassungskonforme Auslegung von Gesetzen, in Bundesverfassungsgericht und Grundgesetz*, 2, Tübingen, 1976, p. 108 ff. and the collective volume by B. RANDAZZO, M. D'AMICO (eds.), *Interpretazione conforme e tecniche argomentative*, Torino, 2009.

[147] According to Alexy, interpretative standards are 'argumentation forms', which are not binding but persuasive, depending on their premises. R. ALEXY, *Theorie der juristischen Argumentation: die Theorie des rationalen Diskurses als Theorie der juristischen Begründung*, Frankfurt a.M., 1996, p. 245.

[148] See R. BIN, *L'interpretazione conforme. Due o tre cose che so di lei*, in *Studi in onore di Maurizio Pedrazza Gorlero*, II, Napoli, 2014, p. 20-22, available online in *Rivista AIC*, 1, 2015.

[149] R. BIN, *L'interpretazione conforme*, cit., p. 22. Bin underlines the overlapping territories of the hierarchy of sources and competence as criteria to solve a conflict and to look at consistent interpretation.

[150] CJEU, Von Kolson and Kamann, 10 April 1984, C-14/83, para. 26 f. R. BIN, *Gli effetti del diritto dell'Unione nell'ordinamento italiano e il principio di entropia*, in *Studi in onore di Franco Modugno*, I, Napoli, 2011, p. 363 ff.; V. MANES, *Il giudice nel labirinto*, cit., p. 49. Lately the judgement C. Cost., 18 July 2014, no. 216 opens for a previous European scrutiny on the consistency of national laws with EU law, which must then be followed by a Constitutional judgement.

[151] See A. BERNARDI, *Nei meandri dell'interpretazione conforme al diritto dell'Unione Europea*, in ID. (ed.), *L'interpretazione conforme al diritto dell'Unione Europea. Profili e limiti di un vincolo proble*matico, Napoli, 2011, p. VII ff.; E. LAMARQUE, *L'interpretazione conforme al diritto dell'Unione*

International Law also poses a basis for consistent interpretation, with a difference between general International Law and International Treaty Law.[152] The consistent interpretation with International Treaty Law plays a key role in Europe, with regard to the European Convention on Human Rights. The peculiarities of this international treaty place it in a privileged position in a great number of European States. Although often regarded as ordinary law, without supremacy over the constitution, its interpretation influences the understanding of national law.[153]

Consistent interpretation with the Convention is influenced by the adoption of a dualist or a monist approach. The Italian Constitutional Court is clearly oriented towards dualism, considering the European Convention and its interpretation by the Strasbourg Court at the same level as ordinary law (in fact, they are introduced in national law through the legislative ratification process) but acting as a *parametro interposto* (interposed parameter) between national laws and the Constitution.[154]

Nonetheless, the superior value of the ECHR (as well as EU law) accorded by States has different justifications. In Italy and Germany, it is justified by constitutional courts case law, whereas, for example, in Spain and Romania there are specific constitutional provisions granting its interpretive function, while in other legal orders (such as the United Kingdom) statutory provisions affirm the obligation to consistent interpretation.[155]

These new obligations to interpret in accordance with other (European) sources play a role in criminal law as well. As a consequence of their affirmation, constitutionalism in criminal law has entered a new phase.[156]

Europea secondo la Corte Costituzionale italiana, *ivi*, p. 91 ff.; C. SOTIS, *Le "regole dell'incoerenza". Pluralismo normativo e crisi postmoderna nel diritto penale*, Roma, 2012, p. 43 ff.

[152] Italian legal order automatically adapts to general international law principles thanks to Art. 10 Cost., while international treaty law need ratification by Parliament.

[153] P. GAETA, *Dell'interpretazione conforme alla C.E.D.U.: ovvero la ricombinazione genica del processo penale*, in *Arch. Pen*., 2012, p. 73 ff.

[154] See *above*, previous paragraph. The preference of the Italian Constitutional Court for dualism is clear considering its case-law on the relationship with the European Union: Corte Cost., 7 March 1964, no. 14, Corte Cost., 27 December 1973, no. 183, Corte Cost., 8 June 1984, no. 170 (Granital), Corte Cost., 10 November 1994, no. 384, Corte Cost., 17 March 2010, no. 103.

[155] See Art. 10 para. 2 of the Spanish Constitution. G. MARTINICO, *Is the European Convention Going to Be 'Supreme'?*, cit., p. 407. See A. ASHWORTH, B. EMMERSON, A. MACDONALD, *Human Rights and Criminal Justice*, cit., p. 180 ff.

[156] Nevertheless, criminal law scholars often point out the specificity of the interpretation in criminal law (prohibition of analogy) even if influenced by consistent interpretation: F. PALAZZO, *Testo contesto e sistema nell'interpretazione penalistica*, in E. DOLCINI, C.E. PALIERO (eds.), *Studi in onore di Giorgio Marinucci*, I, Milano, 2011, p. 520-25; M. DONINI, *Europeismo giudiziario e scienza penale*, cit., p. 64 ff.

3.4. The avant-garde criminal constitutionalism of Franco Bricola.

As far as Italy is concerned, European Courts case-law and the relevance of European Human Rights protection has gained a crucial role in the criminal law practice and theory. European and Constitutional protection of human rights in criminal law is recently one of the most studied fields and there are countless scientific contributions to it. Despite criticism, the European approach has been largely accepted and integrated as a method, independent of the merits. In comparison with other European experiences, the Italian one has been particularly fruitful and open towards this movement thanks to an already established tradition.[157]

After its entry into force in 1948, the Constitution has been re-shaping Italian law and adapting it to the vision enshrined in the Charter. In criminal law, the Seventies saw one of the most avant-garde theories regarding a constitutional-oriented approach not only in the interpretation but also on the foundation of national criminal law. Franco Bricola's *Teoria generale del reato* (general theory of the criminal offence) in the *Novissimo Digesto Italiano* was published in 1973, marking a great development in the Italian 20th Century Criminal Law scholarship.[158] Here the analysis of Bricola's theories is limited to the purpose of showing its effects on the Italian approach to the interpretation of criminal law in light of hierarchically superior sources and in particular of a charter of fundamental rights, which saw its blooming in the following decades.[159]

[157] A mere sample listing: M. CHIAVARIO, *La Convenzione europea dei diritti dell'uomo nel sistema delle fonti normative in materia penale*, Milano, 1969, A. BERNARDI, *L'europeizzazione del diritto e della scienza penale*, cit.; G. PANEBIANCO, *Delitti e pene nella giurisprudenza delle Corti europee*, Torino, 2007; V. MANES, *Il giudice nel labirinto: profili delle intersezioni tra diritto penale e fonti sovranazionali*, Roma, 2012; V. VALENTINI, *Diritto penale intertemporale. Logiche continentali ed ermeneutica europea*, Milano, 2012; C. SOTIS, *Il diritto senza codice. Uno studio sul sistema penale europeo*, Milano, 2007.

[158] F. BRICOLA, *Teoria generale del reato*, in *Novissimo Digesto Italiano*, XIV, Torino, 1974. Other authors were oriented towards an idea of the Constitution as a 'limit', in a debate about 'static' and 'dynamic' constitutionalism in criminal law: G. VASSALLI, *Corruzione propria e corruzione impropria*, in *Giustizia penale*, p. 326 f. quoted by Bricola himself in his work on Art. 25 Cost. See also P. NUVOLONE, *Norme penali e principi costituzionali*, in *Giurisprudenza costituzionale*, 1956, p. 1253 ff., ID., *La problematica penale della Costituzione*, in G. AMATO (ed.), *Scritti in onore di Costantino Mortati*, Milano, 1977, p. 494 ff.

[159] The Italian context has been therefore particularly successful for a constitutional model of criminal offence: for example G. MARINUCCI, E. DOLCINI, *Costituzione e politica dei beni giuridici*, in *Riv. it. dir. proc. pen.*, 1994, p. 333-373; F. PALAZZO, *Introduzione ai principi del diritto penale*, Torino, 1999, p. 142 ff.; E. MUSCO, *L'illusione penalistica*, Milano, 2004, p. 55 ff. Luigi Ferrajoli, Italian philosopher of law, is often considered the father of *criminal law constitutionalism*. His work was published in 1989 and anchored *criminal law constitutionalism* on a strong philosophical basis. Nevertheless, its antecedent was undoubtedly Bricola with his *teoria generale*. L. FERRAJOLI, *Diritto e ragione. Teoria del garantismo penale*, Bari, 1989. See also Donini's opinion in M. DONINI, *L'eredità di Bricola e il costituzionalismo penale come metodo, Radici nazionali e sviluppi sovranazionali*, in *Riv. trim. dir. pen. cont.*, 2, 2012, p. 54.

The revolutionary reach of Bricola's thought is the re-founding of criminal law and of the *teoria del reato* on a constitutional basis. As mentioned above, Bricola looks at the Constitution not only as a *Magna Carta* limiting State powers in their criminal declination or as a bill of rights defining the boundaries of the State's interference in the individual's autonomy. He also sees the Constitution as the foundation of criminal law and believes it shapes the understanding of the structure of offence and penalty.[160] He does not limit his analysis to a dogmatic construction and synthesis of the components of the criminal offence, but rather he tries to describe, also through constitutional norms, the '*volto attuale dell'illecito penale*' (the actual aspect (lit. face) of the criminal offence), defining its peculiarities with regards to unlawful acts in other areas of law. His work reveals a strong positivist approach, treating the Constitution as a binding legal text whose interpretation must influence the attitude towards criminal law, thanks to its superiority in the hierarchy of sources. His theory must not be read as a natural law approach, since Bricola sees the picture of the criminal offence drawn in the Constitution as a binding instrument, not an abstract philosophical framework.[161]

The *Teoria generale del reato* focuses on the description of the different possible conceptions of general theory in the first place. Bricola describes the German version as based on a natural law approach and a tendency to create an abstract system, whose validity is conditional on aprioristic and non-legal postulates.[162] On the contrary, the Italian version features a systemic and *in concreto* approach, influenced by the legalistic approach of the Constitution.[163] Furthermore, the Author constructs his personal findings by analysing the objectives and methods generally assigned to the *teoria generale del*

[160] Bricola himself in a later work commenting Art. 25 co. 2 and 3 of the Italian Constitution fights the idea of the Constitution as mere limitation to criminal law. To him, constitutional norms relating to criminal law are not just ruling the structure of the criminal offence and the aims of penalties but ground criminal policy and at the same time bound it, identifying the values to be protected. F. BRICOLA, *Legalità e crisi: l'art. 25, commi 2° e 3°, della Costituzione rivisitato alla fine degli anni '70*, in *La Questione Criminale*, 1981, p. 180 f.

[161] The *Teoria generale* is immersed in a positivistic attitude towards constitutional principles. The author criticises a naturalist vision of criminal law, opting for a theory rooted in a concrete legal system. See F. BRICOLA, *Teoria generale del reato*, p. 8-9. See the evaluation of Bricola's legacy recently made by Massimo Donini, M. DONINI, *L'eredità di Bricola e il costituzionalismo penale come metodo*, cit., p. 51 ff., 53-54. Other authors at the time were critical about the positivist nature of theories based on a general reference to 'law', 'norm' or a 'normative system'. See Marinucci in his work *Il reato come azione: critica di un dogma*, who uses very similar words to the ones used by Bricola, in the context of a critique to the unitarian conception of *azione (actus reus)* and methodological premise to his thesis. G. MARINUCCI, *Il reato come 'azione': critica di un dogma*, Milano, 1971, p. 31-32.

[162] The Author himself sees this trend as a result of the less codified general part in the German Criminal Code. F. BRICOLA, *Teoria generale del reato*, cit., p. 9.

[163] According to Bricola, judges, more than scholars, often recur to meta-positivistic elements in order to re-interpret the norms, F. BRICOLA, *Teoria generale del reato*, cit., p. 9.

reato, and eventually affirming his personal opinion on the contents of a new *teoria generale.*[164] According to Bricola, the *teoria generale* has the additional purpose of defining the formal and substantial features of the offence enshrined in the Constitution. The definition of offence is merely formal in the Italian criminal code: the criminal nature of a provision is assessed only through its statutory definition and the kind of penalties imposed. Nevertheless, such an analysis could reveal discrepancies between the formal classification as criminal offences, and the impossibility to do the same under the constitutional point of view.[165]

The crucial points of his work cover the criminal offence as a harm in a constitutionally relevant value[166] and describe the *teoria generale* as strongly bound to the purposes of penalties, reciprocally influencing each other.[167]

Analysing Art. 25 of the Italian Constitution, Bricola defines the criminal offence according to its necessarily statutory source. Therefore, the definition of offence depends on two factors. The first one relates to the identification of the legal sources, which can introduce a criminal offence, while the second assesses whether subordinate enactments could be comprehended in them. As a consequence, the delimitation of the definition of criminal offence, with respect to other unlawful acts, is also made by the necessarily strict construction of the norm and must not be interpreted by analogy.[168]

Furthermore, the criminal offence is also identified thanks to its anchoring to Art. 27 co. 1 Cost., which links it with individual criminal responsibility. Always bearing in mind

[164] The historical evolution of the different ways to approach general theory is divided into a 'classical', a 'neoclassical', and a 'finalistic' period. Moreover, Bricola analyses the comparison between the Nazi *Tätertyp* theory (trying to overcome the dogmatic construction on the conception of criminal offence, rather than the author) and socialist material conception of the criminal offence. F. BRICOLA, *Teoria generale del reato*, cit., p. 26-36.

[165] These remarks are particularly modern, thinking of the redefinition of the substantial notion of 'criminal offence' and 'penalty' promoted by the ECHR, causing several contrasts in national legal orders. Let's just think about the Italian cases on confiscation and the German cases on *Sicherungsverwahrung*. F. BRICOLA, *Teoria generale del reato*, cit., p. 36-37. ECtHR, Sud Fondi and others v. Italy, 20 January 2009, no. 75909/01, ECtHR, Varvara v. Italy, 29 October 2013, no. 17475/09, ECtHR, G.I.E.M. s.r.l. and others v. Italy, 28 June 2018, no. 1828/06, 34163/07 and 19029/11, ECtHR, M. v. Germany, 17 December 2009, no. 19359/04 and ECtHR, Ilnseher v. Germany, 4 December 2018, no. 10211/12 and 27505/14. FR. MAZZACUVA, *Le pene nascoste*, Giappichelli, Torino, 2017, *passim.*

[166] Traditionally, Italian doctrine adopts a realistic notion of criminal offence, i.e. necessarily causing harm. On the contrary, German doctrine has a subjective notion of the criminal offence. See F. BRICOLA, *Teoria generale del reato*, cit., p. 37-38. The 'hard' model of *offensività* (harmfulness) and *concezione critica del bene giuridico* (critical conception of the legal good) suggested by Bricola was then opposed by other scholars i.e. D. PULITANÒ, *Obblighi costituzionali di tutela penale?*, in *Riv. it. dir. proc. pen*., 1983, p. 484.

[167] F. BRICOLA, *Teoria generale del reato*, cit., p. 38.

[168] F. BRICOLA, *Teoria generale del reato*, cit., p. 39 ff.

the delimitation of criminal unlawfulness in contrast with other branches of law, Bricola considers the above-mentioned provision as shaping not only the necessary individual responsibility, but also adopting the *nulla poena sine culpa* principle at the constitutional level, especially reading it in conjunction with Art. 27 co. 2 and 3.[169]

In the remainder Bricola builds his conception of criminal offence as an individual offence *necessariamente lesivo* (necessarily harmful). Focusing on the realistic conception of the criminal offence, he develops his idea on the basis of the theory that constructed the realistic concept of criminal offence on the interpretation of Art. 49 co. 2 c.p..[170] Upgrading the latter theory, Bricola affirms his personal view on a possible formal concept of a *necessariamente lesivo* offence, based on *offensività* (harmfulness). According to him, the concept of a *reato necessariamente lesivo/offensivo* (*necessarily offensive/harmful criminal offence*)[171] is enshrined in the Constitution. As a matter of fact, it can be deducted through a systematic interpretation of the Constitution and especially of Art. 27. In particular, the latter must be interpreted making the retributive purpose of penalties dialogue with the re-educational purpose pursuant to Art. 27 co. 3 Cost..[172] The new method of interpretation and foundation of criminal law on constitutional basis comes to a climax when Bricola supports his argument non only invoking this single constitutional provision but offering a comprehensive and systematic look on other rights enshrined in the Charter. Bricola's innovative approach makes him add rationales based on Art. 25 co. 2 of the Constitution, the (implicit) right to 'moral freedom', the spirit of opposition of the whole text to the typical Nazi conception of the criminal offence as mere

[169] F. BRICOLA, *Teoria generale del reato*, cit., p. 51 ff. Bricola also clearly distinguishes the individual conception of the criminal offence as enshrined in the Constitution and the German theory of *personales Unrecht*, which gives criminal law a moral connotation. He also criticises Italian Giuseppe Bettiol as embracing *Gesinnungsstrafrecht*, grounding it on Art. 27 co. 1 Cost. and overlooking, according to Bricola, to read it in conjunction with other norms (especially Art. 27 co. 3 Cost.). G. BETTIOL, *Sul diritto penale dell'atteggiamento interiore*, in *Riv. it. dir. proc. pen*., 1971, p. 3 ff.

[170] G. NEPPI MODONA, *Reato impossibile*, in *Dig. disc. pen*., XI, Torino, 1996, p. 260 ff., 267-271, M. GALLO, *Dolo*, in *Enc. Dir*., XIII, Milano, 1964, p. 786 ff. Bricola adopted the same point of view of the previous authors but upgraded its rationale in order to consider it constitutionally protected. On the opposite side see F. STELLA, *La teoria del bene giuridico e i c.d. fatti inoffensivi conformi al tipo*, in *Riv. it. dir. proc. pen*., 1973, p. 3 ff. and p. 35.

[171] The principle of *offensività* is not translated in order to avoid confusion with the apparently similar but rather different harm principle in common law. J. FEINBERG, *Offense to Others*, New York, 1987. See recently G. FORNASARI, *Offensività e postmodernità: un binomio inconciliabile?*, in *Riv. it. dir. proc. pen*., 2018, p. 1519 ff.

[172] Bricola compares his thesis to Marcello Gallo's. The latter based the idea of a necessarily harmful criminal offence on the conjunction between Art. 25 and 27 Cost. but only focused on paragraph 1 and the retributive idea of penalty. In addition, Bricola criticises the lack of a systematic interpretation of the Constitution as test bench for such results. F. BRICOLA, *Teoria generale del reato*, cit. p. 81 ff. and M. GALLO, *I reati di pericolo*, in *Foro pen*., 1969, p. 8 f.

disobeying, the prohibition to instrumentalise individuals to the purposes of criminal policy (Art. 27 co. 1 Cost.), as well as constitutionally protected tolerance, minority protection and individual's protection.[173]

Finally, Bricola draws a portrait of the criminal offence in the Constitution as a method of interpreting ordinary law in force and as a mission statement *de lege ferenda*. His work, in his own words, outlines an historical moment of antinomy between the wording of the Constitution and the criminal code and criminal legislation.[174]

[173] F. BRICOLA, *Teoria generale del reato*, cit. p. 82-83. In the end, Bricola supports the constitutionalisation of the principle of *offensività*, already supported by the interpretation of Art. 49 co. 2 c.p. Moreover, in a *de jure condendo* perspective, he suggests the introduction of a principle of formal *tipicità*. He completes his analysis examining the problems in the relationship between the above-mentioned principle and some 'border-line' criminal offences.

[174] F. BRICOLA, *Teoria generale del reato*, cit. p. 92-93. '*Scopo di questa voce era soltanto quello di registrare, stimolandone l'eliminazione, un particolare momento transitoriamente antinomico del nostro sistema penale positivo: fedeli all'assunto di partenza in forza del quale la teoria generale del reato, anziché disperdersi sui sentieri del diritto naturale alla ricerca di connotati ontologici, deve rimanere saldamente ancorata al diritto positivo, anche nei momenti di crisi*'.

4. Conclusions of Chapter One.

The 'Europeanisation' of Criminal Law is a complex phenomenon that involves multiple legal orders and multiple factors. This phenomenon requires to find new methods to interconnect different normative levels, as highlighted by Mireille Delmas-Marty in her studies on the interaction between universalism and relativism in the new fuzzy dimension of law.

Therefore, in order to elaborate a European definition of *foreseeability* in the light of the ECHR jurisprudence, it is crucial to consider following peculiarities in the interpretation of the ECHR: evolutive interpretation, the elaboration of autonomous concepts by the ECtHR, the margin of appreciation and the principle of favourability and of the minimum standard of protection.

With regards to the relationship between the ECHR as standard of human rights protection at European level and Criminal Law, human rights have been used both as a sword and shield towards criminal law, thus as a means respectively to enhance criminalisation and to protect the individual from State arbitrariness. In this perspective the ECHR has played a crucial role, which has different reaches depending on the status of the Convention in the sources of law of the Member States.

Moreover, the instrument of consistent interpretation has played a great harmonising role in contemporary criminal law with regards to ECHR law, but also to EU law. It must however be underlined that the method of interpreting and adapting criminal law according to a constitutional charter is a component of national constitutional traditions. In particular, a constitutional oriented method in criminal law, especially in Franco Bricola's work, has shaped the Italian criminal law in the post-war era.

CHAPTER TWO

ART. 7 ECHR AS A EUROPEAN DEFINITION OF *NULLUM CRIMEN*

1. Origin and rationale of Art. 7 ECHR.

The history of the *nullum crimen nulla poena sine lege* as a codified principle in international law is concentrated in the 20th Century and is focused on its nature as a human right. The first traces of a written recognition of the principle at the international level date back to the Paris Peace Conference in 1919, at the end of the First World War. Within the Conference, a Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties discussed the possibility to try the perpetrators of grave crimes against the laws and customs of war and, in particular, which authority (and under which law) could prosecute the crimes that could thereby be adjudicated in more than one country. In those cases, the Allies Commission intended to apply punishment as a sentence both for the violation of 'the laws and customs of war' and 'the laws of humanity'.[1] The applicable law was thus composed by 'the principles of the laws of nations as they result from the usages established among civilized peoples, from the laws of humanity and from the dictates of public conscience' and the appropriate applicable punishments were those 'imposed for such an offence or offences by any court of any country represented on the tribunal or in the country of the convicted person'.[2] In this respect, the United States delegates expressed concern about the respect of the *nullum crimen* in a memorandum. The delegates were critical about the possibility to establish an international court and, most of all, had doubts about the applicable law before this kind of judicial institution. In their view, such a prosecution would have resulted in the

[1] Upon mandate by the Preliminary Peace Conference on 25th January 1919, the Allies Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties had to inquire the responsibilities related to the war. It was composed by two members from each Great Power. They had to draft a report about specific points defined by the Peace Conference, among which there were, in particular, 'the facts as to breaches to the laws and customs of war committed by the forces of the German Empire and their Allies […]' and 'the degree of responsibility for these offences attaching to particular members of the enemy forces, including members of the General Staffs, and other individuals, however highly placed'. The Allies Commission was favourable to the prosecution of individuals and the idea was to sentence for the violation of the laws and customs of war and the laws of humanity at an international level. These expressions seem to recall the future creation of the crimes against humanity and war crimes. The report of the works of the Commission was published shortly after in the American Journal of International Law. M. ADATCI, *Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties*. *Report presented to the Preliminary Peace Conference*, in *American Journal of International Law*, 14, 1920, p. 95, p. 116 and p. 121 ff.

[2] M. ADATCI, *Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties*, cit., p. 122.

creation of crimes punished according to new law and new penalties, which would be inevitably applied *ex post facto*.[3] The memorandum stated that the delegates 'were of the opinion that an act could not be a crime in the legal sense of the word, unless it were made so by law, and that the commission of an act declared to be a crime by law could not be punished unless the law prescribed the penalty to be inflicted'.[4] The U.S. representatives drew a parallel with the problem of the legislative authority of the American Union composed of States in criminal law, in respect of the Federal States. Referring to the U.S. Supreme Court in the case of the *United States v. Hudson* (1812), the delegates affirmed the following principle: as a crime and a penalty have to be previously established by law in the American federation, the same principle is forcibly applicable within the Society of Nations, which was similar to the American Union.[5] Even if the tribunal was never created, these concerns prove the international relevance of the principle of legality.[6]

The Permanent Court of International Justice's advisory opinion of 1935 on the consistency with the Danzig Constitution of Legislative Decrees of August 29th 1935, as introduced by the Danzig Senate under Nazi majority, contains the first relevant statement of the principle in public international law.[7] The National Socialist legislation provided the possibility for the judge to create law (*Rechtsschöpfung*) to fill up gaps in criminal legislation pursuant to two requirements. The new offence or extension of an existing offence had to be worth punishing according to both the 'sound popular feeling'

[3] M. ADATCI, *Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties*, cit., p. 127 ff. On the point see also K. GALLANT, *The Principle of Legality in International and Comparative Criminal Law*, Cambridge, 2009, p. 57.
[4] M. ADATCI, *Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties*, cit., p. 145-146.
[5] M. ADATCI, *Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties*, cit., p. 146.
[6] Although the Treaty of Versailles (Treaty of Peace with Germany) foresaw the possibility to try Emperor Wilhelm II at national level, the Netherlands, where the former Emperor had sought refuge, refused his extradition on the ground of a violation of the *nullum crimen* principle. Further on the Versailles Settlement, K. GALLANT, *The Principle of Legality in International and Comparative Criminal Law*, cit., p. 56 ff.
[7] PCIJ, *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City, XXXV Session, Advisory Opinion of December 4th 1935*, Series A/B, Fasc. 65, p. 51-53, available at https://www.icj-cij.org/files/permanent-court-of-international-justice/serie_AB/AB_65/01_Decrets-lois_dantzikois_Avis_consultatif.pdf, last accessed 13.02.2020. The disputed legislative decree, introduced by the National Socialist majority in Danzig, modified the Criminal Code of the Free City of Danzig adding a second paragraph to the article referring to the principle *nullum crimen nulla poena sine lege*, affirming that 'Any person who commits an act which the law declares to be punishable or which is deserving penalty according to the fundamental conceptions of a penal law and sound popular feeling, shall be punished. If there is no particular penal law directly covering an act, it shall be punished under the law of which the fundamental conception applies most nearly to the said act'. The Free City of Danzig was created by Art. 103 of the Treaty of Versailles, as an entity under the protection of the League of Nations in order to settle the disputes between Germany and Poland.

(*gesundes Volksempfinden*) and the 'fundamental idea of a penal law' (*Grundgedanke eines Strafgesetzes*). This reform was the result of the National Socialist politics in criminal law and of the enforcement of the *Führerprinzip*, in accordance with the reform of the Criminal Code of 1871 introduced in Germany on 28 June 1935.[8] Since Nazi criminal law legitimated analogy according to the 'fundamental idea of penal law' and the 'sound popular feeling', the Permanent Court affirmed the inconsistency of the Decrees with the Constitution of the Free City of Danzig, as

> 'there is the possibility under the new decrees that a man may find himself placed on trial and punished for an act which the law did not enable him to know was an offence, because its criminality depends entirely upon the appreciation of the situation by the Public Prosecutor and by the judge'.[9]

According to the constitutional principle shaping the Free City of Danzig as a *Rechtsstaaat*, governed by the rule of law, the Permanent Court affirmed that the discretionary power of judges to determine punishable acts was too wide and went beyond the limits of the concept of 'law'. In particular:

> 'It is true that a criminal law does not always regulate all details. By employing a system of general definition, it sometimes leaves the judge not only to interpret it, but also to determine how to apply it. The question as to the point beyond which this method comes in conflict with the principle that fundamental rights may not be restricted except by law may not be easy to solve. But there are some cases in which the discretionary power left to the judge is too wide to allow any doubt that it exceeds these limits. It is such a case which confronts the Court in the present proceedings.
>
> The problem of the repression of crime may be approached from two different standpoints, that of the individual and that of the community. From the former standpoint, the object is to protect the individual against the State: this object finds its expression in the maxim *Nulla pœna sine lege*. From the second standpoint, the object is to protect the

[8] The amendment of § 2 of the German Criminal Code of 1871 was almost identical. Following Carl Schmitt's idea of the people (*Volk*) as a community (*Gemeinschaft*), the idea of community was hierarchically superior to the idea of State in the 1930s Germany. The new formulation of § 2 was inspired by the *Führerprinzip*, which played a major role in the National Socialist *Weltanschauung*. The Führer's will, as convergence between People as Community and State, was equivalent to Law, because the *Führer*'s and the People's spirit were correspondent. On this basis, analogy was admissible as the law, a concretisation of the Führer's will, was a guideline that had to be extended and completed in order to be consistent with the People's spirit. The background was the idea of the pre-eminence of substantive justice (*materielle Gerechtigkeit*). For example, in Mezger's thought, there could be *Unrecht* even if there was no violation of the law, but only inconsistency with the '*gesundes Volksanschauung*'. See the reconstruction of the debate in Germany by P. NUVOLONE, *La riforma del § 2 del codice penale germanico*, in *Riv. it. dir. pen*., 1938, p. 535 ff. E. MEZGER, *Die materielle Rechtswidrigkeit im kommenden Strafrecht*, in *ZStW*, 1935, p. 4.

[9] PCIJ, *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City. XXXV Session, Advisory Opinion of December 4th 1935*, Series A/B, Fasc. 65, p. 53. Another point underlined by the Court was the need for defining the limits between morals and law.

community against the criminal, the basic principle being the notion *Nullum crimen sine pœna*'.[10]

The main feature of the principle in this first affirmation is the express link to the rule of law, while its fundamental right dimension remains in the background.[11] Furthermore, the PCIJ seems to make a first stance on the role of judicial interpretation as an inevitable element.[12] As the Permanent Court states, the obligation of all State powers to be subject to the law is to be safeguarded in criminal law as well, in order not to jeopardise individual liberty through arbitrariness of the authorities of the State.[13]

Despite these hints on an international recognition of the *nullum crimen*, the following decade witnessed mass violations of human rights during the Second World War and a general setback of the principle in totalitarian States.[14] As a reaction, on the one side the human rights movement born of the ashes of the war saw the blooming of the international definition of *nullum crimen nulla poena sine lege*, which resulted in its codification in the United Nations Declaration on Human Rights of 1948.[15] On the other hand, the prohibition of retrospectivity of crimes and penalties as a principle recognised by the majority of countries increased doubts on the possibility to punish the perpetrators of the atrocious acts committed during the war. The alleged perpetrators had to be prosecuted for acts that, although considered illegal, were not criminalised at the time they were committed.

Therefore, the question whether to punish the perpetrators of core crimes under retroactive criminal law was raised for the first time at the London Conference for the

[10] PCIJ, *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City.XXXV Session, Advisory Opinion of December 4th 1935*, Series A/B, Fasc. 65, p. 56-57.
[11] Moreover, according to Gallant, in this case, the statements of the Court were influenced by the idea of protecting the Danzig Constitution through the League of Nations, whose role could be compared to the one of an international organisation interpreting domestic law. K. GALLANT, *The Principle of Legality in International and Comparative Criminal Law*, cit., p. 63.
[12] Gallant considers the conflict between the necessary interpretive role of the judge and the prohibition of fundamental rights restrictions which are not provided by law as an antecedent of the modern theories on foreseeability. K. GALLANT, *The Principle of Legality in International and Comparative Criminal Law*, cit., p. 64.
[13] PCIJ, *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City. XXXV Session, Advisory Opinion of December 4th 1935*, Series A/B, Fasc. 65, p. 56.
[14] As mentioned above, the amendment of the Criminal Code in the Free City of Danzig reported above reflected the new section 2 of the German *Strafgesetzbuch*, allowing analogy in criminal law and its fusion with morals. In the URSS, the Soviet Penal Codes of 1922 and 1926 endorsed analogy in criminal law, allowing 'socially dangerous acts' to be punished. C. KREß, *Nulla poena nullum crimen sine lege*, in *Max Planck Encyclopedia of Public International Law*, Oxford, 2012, p. 892; G. FORNASARI, A. MENGHINI, *Percorsi europei di diritto penale*, Torino, 2012, p. 9.
[15] See *infra*, para. 1.1.

Charter of the International Military Tribunal.[16] The *nullum crimen sine lege*, and especially the prohibition of punishment according to an *ex-post facto* law, was then jeopardised in the proceedings before the International Military Tribunal established at Nuremberg by the Allies. The defence counsels of the accused submitted that their clients were tried for crimes against peace, described in the London Agreement, which was being applied retroactively.[17] Despite these problematic aspects, the Tribunal admitted the retroactive application of crimes against peace according to international law, as it considered that:

> 'In the first place, it is to be observed that the maxim *nullum crimen sine lege* is not a limitation of sovereignty, but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighboring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished'.[18]

The relationship between the principle of legality and its exceptions in cases of serious international law violations was crucial in the codification process of the principle at international level. The possibility of discrepancies between law and morals at the one end and law and justice at the other in relation to *nullum crimen* was in fact vividly disputed in the post-war context. Several prominent jurists dealt with the question of the punishment of the perpetrators of inhuman and atrocious acts that were not criminally sanctioned at the time they were committed, but whose impunity could conflict with the idea of justice itself.[19]

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[16] At the London Conference for the Charter of the IMT, the *ex post facto* issues were abandoned as the crimes were considered such under national and international law, thanks to the practice of national courts applying them according to the 1907 Hague Conventions and the Geneva Conventions. The Soviet Union and the United States were, for different reasons, positive on the problem of legality. Conversely, the French delegation raised serious concerns about it, although generally admitting the prosecution of war criminals according to international law. The French delegation underlined the risk of *ex post facto* application of international crimes, as they could be considered crimes only when a sanction for an individual is prescribed. Otherwise, those accounts remained only connected to State responsibility, even if at the end of the war the international community started to think about the recognition of individual criminal responsibility. The British delegation had the role to bridge differences among the parties. The final text of Article 6 was ambiguous, leaving to the Tribunal the task to define the crimes and their sources and therefore leaving space to possible defences based on the principle of legality. K. GALLANT, *The Principle of Legality in International and Comparative Criminal Law*, cit., p. 82-84, p. 89-90.

[17] All defence counsels presented an identical motion, 19 November 1945, (1948) 1 IMT, p. 168-70. The London Agreement, which included the Charter of the International Military Tribunal, was signed in 1945, after the commission of the aforementioned acts.

[18] IMT, Trial of German Major War Criminals (Judgement), The United States et al. v. Göring et al., 30 September and 1 October 1946, in *American Journal of International Law*, 41, 1947, p. 172 ff.

[19] H. KELSEN, *Will the Judgement in the Nuremberg Trial Constitute a Precedent in International Law?*, in *International Law Quarterly*, 1, 1947, p. 153-171, G. RADBRUCH, *Gesetzliches Unrecht und übergesetzliches Recht*, in *Süddeutsche Juristen-Zeitung*, 1946, p. 105-108. Hart and Fuller later continued the debate on the relationship between law and morals in the *Harvard Law Review*: H.L.A. HART,

1.1. The travaux préparatoires of Art. 11(2) of the Universal Declaration of Human Rights.

The international recognition of the principle of legality was reached with its provision in Art. 11(2) of the 1948 Universal Declaration of Human Rights. As a result of the international movement for the protection of human rights, the newly established United Nations (specifically its Economic and Social Council) established a Human Rights Commission in charge of drafting an international bill of rights to be later adopted by the General Assembly.[20]

The analysis of the *travaux préparatoires* to the Universal Declaration is meaningful in order to fully appreciate the elaboration of the principle at European level for two offsetting reasons. On the one side, the wording of Art. 11(2) of the Universal Declaration was never questioned as a suitable definition of the principle. On the other, the debate during the drafting of the European Convention on Human Rights was lacking on all aspects of legality, except for the possible relationship with the validity of the Nuremberg trials.

With regards to the wording of the principle in the Declaration, it is the result of a complex process which led to the final drafting of the provision by the Human Rights Commission. The first draft of the actual wording can be traced back to a British proposal to the Secretary General of the United Nations in 1947 and reads as follows: 'Art. 12. No person shall be held guilty of any offence on account of acts or omissions which did not constitute such an offence at the time when they were committed'.[21] The formulation proposed by the United Kingdom replaced the original wording of the Draft Outline by the Division of Human Rights: 'Art. 26. Nor shall anyone be convicted of crime unless he has violated some law in effect at the time of the act charged as an offence, nor be

Positivism and The Separation of Law and Morals, in *Harvard Law Review*, 71, 1957, p. 593-629, L.L. FULLER, *Positivism and the Fidelity to Law – A Reply to Professor Hart*, in *Harvard Law Review*, 71, 1957, p. 630-672.

[20] Art. 68 of the Charter of the United Nations wished the establishment of a Human Rights Commission within the Economic and Social Council. The first drafting meetings started in 1946. The most updated edition of the preparatory works to the Universal Declaration is edited by Schabas: W. SCHABAS (ed.), *The Universal Declaration of Human Rights. The* travaux préparatoires, Vol. I (October 1946 to November 1947), Cambridge, 2013, see p. lxxi for the historical introduction. On the general debate on the Universal Declaration in historical perspective see C.N.J. ROBERTS, *The Contentious History of the International Bill of Human Rights*, Cambridge, 2015, p. 72 ff. and G. BROWN (ed.), *The Universal Declaration of Human Rights in the 21st Century: a living document in a changing world*, Cambridge, 2016, p. 19-21.

[21] E/CN.4/AC.1/4, 5 June 1947, Text of Letter from Lord Dukeston, the United Kingdom Representative on the Human Rights Commission, to the Secretary-General of the United Nations, now published in W. SCHABAS (ed.), *The Universal Declaration of Human Rights. The* travaux préparatoires, Vol. I, cit., p. 295.

subjected to a penalty greater than that applicable to at the time of the commission of the offence'.[22] At this early stage, there was a comparative study on the different constitutional provisions safeguarding the *nullum crimen* principle.[23] Although the report simply listed the relevant provisions, the comparison between the different formulations of the principle at national level was meaningful, especially because it was not going to be addressed within the Council of Europe. Despite the comparative study, the formulation of the relevant paragraph of the Declaration did not take into account any of the national versions.

With regards to the debate at UN level on the appropriateness of the reference to the Nuremberg Trials, the discussion was particularly articulated and the will not to question the validity of prosecution and punishment of crimes according to the 'general principles of law recognised by civilised nations' was crucial. Again, the main issue at international level was the debate on the possible questioning on the Nuremberg Trials, but no particular attention was given to an exception to the principle of non-retroactivity. The focus was instead on the possible political and legal obstacles militating against the creation of the International Military Tribunal at Nuremberg. The Draft International Declaration at the end of the Second Session of the Commission on Human Rights included a first version of the article, which did not include the obligation for the crimes to be previously established in 'national or international law'. On the contrary, it encompassed a paragraph which prevented *nullum crimen* to prejudice the trial and punishment of persons having committed criminal acts according to the 'general principles of law'.[24] While the majority of States agreed on the provision, some States

[22] E/CN.4/AC.1/3, 4 June 1947, Draft Outline of International Bill of Rights (prepared by the Division on Human Rights), now published in W. SCHABAS (ed.), *The Universal Declaration of Human Rights. The* travaux préparatoires, Vol. I, cit., p. 285. The Secretariat's Division of Human Rights had the task to submit a draft to the Human Rights Commission. The reference to the law applicable at the time the offence was committed showed a civil-law oriented approach.

[23] The Draft Outline commented on the original provision of Art. 26 drafted by the Division of Human Rights, and therefore not in the British proposal version. The same report was made for all the articles of the Draft International Bill of Rights. The Drafting Committee was composed by the Chairman, the Vice-Chairman and the Rapporteur of the Commission, in order to propose a Draft Declaration. E/CN.4/AC.1/3/Add.1, 11 June 1947, Drafting Committee of an International Bill of Human Rights International Bill of Rights Documented Outline, in W. SCHABAS (ed.), *The Universal Declaration of Human Rights. The* travaux préparatoires, Vol. I, cit., p. 533-546.

[24] Art. 10 of the Draft International Declaration on Human Rights, E/CN.4/77/Annex A, 16 December 1947, Draft International Declaration on Human Rights, in W. SCHABAS (ed.), *The Universal Declaration of Human Rights. The* travaux préparatoires, Vol. II (December 1947 to August 1948), Cambridge, 2013, p. 1326 f.

proposed its deletion, opposing legal arguments such as the 'unacceptable derogation of the traditional precept *nullum crimen sine lege*'.[25]

The debate continued in the Third Session of the Human Rights Commission, when, in a Sub-committee formed by the Representatives of China, France, India, the United Kingdom and Yugoslavia, appointed to write a new draft of the provision, the paragraph justifying the Nuremberg trials disappeared. Quite the reverse, the new draft of the main paragraph included the reference to *national and international law* as legitimate sources of criminal offences and penalties.[26] As a consequence, the following discussion focused on the definition of international law in the sense of the provision. The potential incorporation of unwritten international law (general principles of international law and customary law) in the concept of international law was crucial both in the Third Session and later in the last debate within the Third Committee of the General Assembly.

The last part of the debate during the Third Committee of the General Assembly, which anticipated the final approval of the text, dealt with the possibility to include international law under the relevant sources of incrimination and saw two opposing fronts among the delegations. Venezuela and Cuba opted for the incorporation solely of positive international law, while France, URSS and Belgium preferred to include both positive and customary international law.[27] The main point at stake was then the re-affirmation of the principles governing the Nuremberg Trials and the idea of the international rejection of atrocities committed during the Second World War. The Yugoslavian delegation was the only one that underlined the contrast between the conception of the non-retroactivity principle in criminal and in international law. The delegation considered it inappropriate

[25] E/CN.4/82/Add.2, 22 April 1948, Comments from Governments on the Draft International Declaration on Human Rights, Draft International Covenant on Human Rights and the Question of Implementation, Comments and Observations of the Brazilian Government on the Draft 'Bill of Rights', in W. SCHABAS (ed.), *The Universal Declaration of Human Rights. The* travaux préparatoires, Vol. II, cit., p. 1426.

[26] E/CN.4/109, 2 June 1948, First Report of the Sub-Committee Consisting of the Representatives of China, France, India, United Kingdom and Yugoslavia on Article 8 of the Draft Declaration on Human Rights, in W. SCHABAS (ed.), *The Universal Declaration of Human Rights. The* travaux préparatoires, Vol. II, cit., p. 1710. As the United States delegation pointed out in the Third Session that day, the explicit inclusion of a 'Nuremberg safeguard' clause in the Article could have had the opposite effect of undermining the validity of the Trials, highlighting, instead of mitigating, a possible contrast with the *nullum crimen* principle. Later, during the Session of the Third Committee, the Greek and Cuban delegations expressed similar concerns on the possible raising of doubts on the Nuremberg Trials due to the international affirmation of the non-retroactivity principle in criminal law.

[27] A/C.3/SR.116, 29 October 1948, Summary Record of the Hundred and Sixteenth Meeting [of the Third Committee], in W. SCHABAS (ed.), *The Universal Declaration of Human Rights. The* travaux préparatoires, Vol. III (September to December 1948), Cambridge, 2013, p. 2382-2388. The Third Committee was established within the General Assembly and represents the last stage of debate before the adoption of the Declaration.

to indiscriminately apply the principle *nulla poena sine lege* in domestic criminal law and in international law. In their understanding, the non-retroactivity of penal laws in domestic law was almost universally applied, while the principles of international responsibility were different. It was therefore 'inadvisable to propose identical solutions for the same problems in those two fields of law'. [28] This remark remained isolated and the provision was approved in its current version.

Finally, the explicit reference to the prohibition of a heavier penalty was another relevant addition within the debate in the Committee of the General Assembly ('Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed'). This amendment was introduced thanks to the proposals of Central and Southern American States (Panama and Uruguay).[29] The final draft approved by the Third Committee of the General Assembly reflected the Panamanian amendment. In addition, the majority of States accepted the principle of non-retroactivity of a heavier penalty as part of the principle of legality, thus the debate about it was scarce.[30]

1.2. The travaux préparatoires *of Art. 7 ECHR.*

The Consultative Assembly of the Council of Europe proposed the drafting of the European Convention on Human Rights in August 1949, a few months after the establishment of the Council through the Treaty of London.[31] The process encompassed three phases: the Committee on Legal and Administrative Questions at the Consultative Assembly discussed a first draft upon proposal by the International Council of the European Movement. The Committee of Experts within the Committee of Ministers drafted a second version, coming up with two proposals (Alternative A and B) for the

[28] A/C.3/SR.116, 29 October 1948, Summary Record of the Hundred and Sixteenth Meeting [of the Third Committee], in W. SCHABAS (ed.), *The Universal Declaration of Human Rights. The* travaux préparatoires, Vol. III, cit., p. 2385 f.

[29] A/C.3/220, 4 October 1948 for the Panamanian amendment ([…] Neither can anyone be imposed a heavier penalty than the one that was applicable at the time the offence was committed) and A/C.3/268, 12 October 1948 for the Uruguayan amendment (Laws which increase penalties or diminish means or of guarantees of defence may not be applied retroactively), both in W. SCHABAS (ed.), *The Universal Declaration of Human Rights. The* travaux préparatoires, Vol. III, cit., p. 2084 and 2212 respectively.

[30] A/C.3/SR.116, 29 October 1948, Summary Record of the Hundred and Sixteenth Meeting [of the Third Committee] in W. SCHABAS (ed.), *The Universal Declaration of Human Rights. The* travaux préparatoires, Vol. III, cit., p. 2386.

[31] Human rights were already on the agenda of the Council of Europe, although not expressly included in its Statute. The Preparatory Commission considered it necessary to mention them. See W. SCHABAS, *The European Convention on Human Rights. A Commentary*, Oxford, 2015, p. 3.

text. As a last step before the adoption by the Committee of Ministers, the Conference of Senior Officials, established by the Committee of Ministers, finalised the draft.[32]

As it clearly emerges from the reading of the *travaux préparatoires* to the Convention, the main issues at stake concerned the implementation mechanism and the possible interaction between the Court and the Commission, as well as the role of the Court and the convenience of its existence. The definition and selection of the rights and freedoms to be safeguarded in the Convention was mainly based on the results of the discussions that took place within the United Nations Commission on Human Rights during the drafting of the Universal Declaration of Human Rights.[33]

As this is valid also for the principle of legality, Art. 7 ECHR owes its origins to the Universal Declaration of Human Rights. The principle *nullum crimen nulla poena sine lege* enshrined in the Convention is rooted in International Law, being independent, at least at the beginning, from definitions provided by national criminal codes and Constitutions. The drafting of Art. 7 ECHR was directly related to the drafting of Art. 11(2) UN Declaration and that of Art. 15 of the International Covenant on Civil and Political Rights (ICCPR), as it will be demonstrated in the following.

1.2.1. The first phase of negotiations.

The first draft of the provision was proposed by the International Committee for the European Unity to the Committee on Legal and Administrative Questions at the Consultative Assembly, which was in charge of the first draft in August 1949.[34] The idea

[32] E. BATES, *The Evolution of the European Convention on Human Rights*, Oxford, 2010, p. 77-87. W. SCHABAS, *The European Convention*, cit., p. 6. The Consultative Assembly is now known as the Parliamentary Assembly and is composed by delegates elected from Parliaments of the Member States, while the Committee of Ministers is composed by the Ministers of Foreign Affairs of each Member State. In the context of the drafting of the Convention, each of these institutions established a body of legal experts to negotiate it, respectively the Committee on Legal and Administrative Questions and the Committee of Experts. With regards to the *travaux préparatoires* of Art. 7 ECHR, they can be found in Document DH(57) 6 of 21 May 1957 of the European Commission of Human Rights, Preparatory work on art. 7 of the European Convention of Human Rights. This information document was prepared by the Secretariat of the Commission putting the classified stenotype versions of the *travaux* together in 1957. The draft discussion within the Committee on Legal and Administrative Questions at the Consultative Assembly is to be found in Document DH(57) 6, p. 2 ff. and refers to the session of August-September 1949. The following draft by the Committee of Experts is reported at p. 4 ff. of the same document, referring to the meeting of the Committee between the 2 and 8 February 1950, while the meeting of 6-10 March 1950 is reported at p. 8 ff. The draft finalisation by the Conference of Senior Officials on 8-17 June 1950 is reported at p. 10 ff. Finally, the reports on the Committee of Ministers session of 7 August 1950 is reported at p. 12 f., followed by the first Session of the Consultative Assembly report at p. 13 f. Document DH(57) 6 is available online at https://www.echr.coe.int/Documents/Library_TravPrep_Table_ENG.pdf, last accessed 13.02.2020.

[33] E. BATES, *The Evolution of the European Convention on Human Rights*, Oxford, 2010, p. 82-83.

[34] 'Immunity from all arrest, detention or arbitrary exile, in accordance with Articles 9, 10 and 11 of the Declaration of the United Nations', EUROPEAN COMMISSION OF HUMAN RIGHTS, *Preparatory Work on Art.*

was to reproduce the text of the Universal Declaration, which at the time had already been signed. The draft was a very concise text, only referring to the relevant articles of the Declaration. The Committee adopted a slightly different version of the article, which was then approved by the Consultative Assembly in Art. 2 para. 3 of the draft:

> '[…] Freedom from arbitrary arrest, detention, exile, and other measures, in accordance with Articles 9, 10 and 11 of the United Nations Declaration […]'.[35]

The provisions on the prohibition of arbitrary arrest and detention, fair trial, presumption of innocence and *nullum crimen*, showed the intention not to expand the debate and to avoid drafting detailed provisions. The core idea was to limit the Convention to a Bill of Rights providing a list of relevant internationally recognised human rights standards. This approach was the most popular at the time since the States tried not to hinder further developments of the rights by too strict definitions.[36]

From February 1950 the Committee of Experts appointed by the Committee of Ministers analysed the first draft and adopted a new draft in preparation for the third and final step.[37] The Committee of Ministers recommended high consideration for the Universal Declaration and the draft of the International Covenant on Civil and Political Rights.[38] As a result, the preparatory works included the text of the provisional draft for the ICCPR relevant provision on *nullum crimen*. At that stage, the ICCPR draft was explicitly recalling the text of Art. 11(2) of the Universal Declaration as well.[39]

The general problem the Committee of Experts had to face at this stage was the approach to be followed towards the UN initiative in the Universal Declaration of Human Rights. This issue also played a major role in the discussion on Art. 7 ECHR. The

7 of the European Convention on Human Rights, 21 May 1957, Doc. DH (57).6, p. 2 referring to Doc. A16 p. 1. Preparatory works to the Convention are available in full text access on the website of the Court, both in English and French version, https://www.echr.coe.int/Documents/Library_TravPrep_Table_ENG.pdf, last accessed 13.02.2020.

[35] EUROPEAN COMMISSION OF HUMAN RIGHTS, *Preparatory Work on Art. 7 of the European Convention on Human Rights*, 21 May 1957, Doc. DH (57).6, p. 3, referring to Doc. No. 77, p. 209 and Doc. A 290, p. 10.

[36] W. SCHABAS, *The European Convention*, cit., p. 5-6.

[37] E. BATES, *The Evolution of the European Convention on Human Rights*, cit., p. 80-84.

[38] The Committee of Ministers of the Council of Europe invited the Committee of Experts to pay due attention 'to the progress which has been achieved in this matter by the competent organs of the United Nations', Doc. No. 116, 1949, para. 6, p. 288-289. The drafting of the International Covenant on Civil and Political Rights was still in its early stages at the UN level.

[39] EUROPEAN COMMISSION OF HUMAN RIGHTS, *Preparatory Work on Art. 7 of the European Convention on Human Rights*, 21 May 1957, Doc. DH (57) 6, p. 3, referring to Doc. E/1371, p. 20. It is the draft of the 'International Covenant on Human Rights' submitted by the Commission on Human Rights to the United Nations Economic and Social Council, regarding its fifth session (May-June 1949).

Committee had two alternatives: either supporting the Consultative Assembly's proposal and subscribing a Bill of Rights, which referred in its entirety to the Universal Declaration, or opting for a more 'detailed' approach, focusing rather on the drafts of the International Convention on Human Rights under negotiation at UN level (the future International Covenant on Civil and Political Rights).[40]

The debate in the first and second session of the Committee of Experts was significantly concentrated on the 'too absolute' prohibition of *ex post facto* penal laws and the possibility to use it to impugn the validity of the Nuremberg Trials.[41] The Committee did not question the definition of the principle of legality by the Universal Declaration nor raise issues concerning domestic legislation. The official documents suggest that the delegations focused on the international law version of the principle, which at the time was to be found in the Universal Declaration. Moreover, the drafters of the European Convention were debating on the implementation and enforcement mechanisms but could not imagine the considerable success of individual applications

[40] On the one hand, the British delegation demanded a definition of rights at the UN level, which had to be as detailed as possible. The idea was to protect the States from subscribing a Convention establishing institutions of control without being able to assess whether it was consistent with their domestic system. On the other hand, other delegations (especially the Belgian, French and Italian) deemed the detailed definition of rights to be too ambitious and held a simple listing of the rights and freedoms as sufficient requirement for the States to regulate their conduct. E. BATES, *The Evolution of the European Convention on Human Rights*, cit., p. 82-83. On the British role in the drafting of the Convention see G. MARSTON, *The United Kingdom's Part in the Preparation of the ECHR, 1950*, in *International and Comparative Law Quarterly*, 42, 1993, p. 796-826 and E. WICKS, *The United Kingdom Government's Perceptions of ECHR at the time of entry*, in *Public Law*, 2000, p. 438-455.

[41] The British delegation was the first to raise the issue of the validity of the Nuremberg trials, which reflects the British role in the IMT Statute negotiations as well. From the beginning, they suggested the inclusion of a second paragraph in the text, which is very similar to the actual second paragraph of Art. 7: 'Nothing in this Article shall prejudice the trial and punishment of any person for the commission of any act which, at the time it was committed, was criminal according to the general principles of law recognised by civilised nations'. EUROPEAN COMMISSION OF HUMAN RIGHTS, *Preparatory Work on Art. 7 of the European Convention on Human Rights*, 21 May 1957, Doc. DH (57) 6, p. 4, Doc. A. 770, p. 5. The remarks made by the Swiss delegation underlined the possible 'too absolute' prohibition enshrined in the article, that combined the non-retrospectivity of penal laws and the legality of punishment. The idea was not only that international law did not foresee such a principle but also that many international and national provisions had refused the *nulla poena sine lege* and even *nullum crimen* principle after the Second World War. Although admitting the general acceptance of the principle in 'all civilised nations', the Swiss delegation deemed that it was not universally accepted that the principle had no exceptions. Their proposal was amending the text including the legality of the act according to the 'general principles of law as recognised by the civilised nations' in the first paragraph. EUROPEAN COMMISSION OF HUMAN RIGHTS, *Preparatory Work on Art. 7 of the European Convention on Human Rights*, 21 May 1957, Doc. DH (57) 6, p. 5-6, Doc. A.784, p. 1-2.
Furthermore, Sweden was the only delegation concerned with the possibility to see the new safeguard as a means to apply international law in the domestic criminal system. They proposed an amendment which limited the wide wording of Art. 11(2) with a reservation for Member States to apply only the law in force in the State's territory at the time the act was committed. EUROPEAN COMMISSION OF HUMAN RIGHTS, *Preparatory Work on Art. 7 of the European Convention on Human Rights*, 21 May 1957, Doc. DH (57) 6, p. 4, Doc. A.777.

and the future coordination problems between domestic Constitutions and the European Convention. The Universal Declaration, the only example at the time, was a non-enforceable act, although the project was in the act of completing it with an International Convention on Human Rights (the future ICCPR) that could be implemented.

1.2.2. The finalisation of the text of Art. 7 ECHR.

The first session of the Committee of Experts ended up with a draft text for the future Art. 7 ECHR, which was identical to art. 11(2) of the Universal Declaration and based on the work of the Consultative Assembly and on the preliminary draft for the (future) ICCPR.[42] The report accompanying the draft already highlighted the remarks made by the delegations of the UK and Luxembourg, specifying that the prohibition of *ex post facto* laws could not affect the prosecution of war crimes, treason and collaboration with the enemies through laws introduced after the Second World War and was neither condemning them legally nor morally.[43]

These remarks were crucial in the second session of the Committee of Experts, where two proposals were drafted. The so-called 'Alternative A' was based on the approach followed by the Consultative Assembly's proposal, i.e. listing the rights and freedoms to be safeguarded. This proposal did not amend the original text and was identical to Art. 11(2) of the Universal Declaration.[44] On the contrary, 'Alternative B' was based on the method of precisely defining the rights and freedoms and included the British amendments to the text. The draft Article was twofold.[45] The first paragraph was identical to 'Alternative A' and therefore to Art. 11(2) of the Universal Declaration. Paragraph two, as a result of the discussion within the Committee, stated: 'Nothing in this Article shall prejudice the trial and punishment of any person for any act or omission which, at

[42] EUROPEAN COMMISSION OF HUMAN RIGHTS, *Preparatory Work on Art. 7 of the European Convention on Human Rights*, 21 May 1957, Doc. DH (57) 6, p. 7, referring to Doc. A.809.
[43] EUROPEAN COMMISSION OF HUMAN RIGHTS, *Preparatory Work on Art. 7 of the European Convention on Human Rights*, 21 May 1957, Doc. DH (57) 6, p. 7, referring to Doc. CM/WP I (50) 1, p. 11.
[44] 'Alternative A' corresponded to the above-mentioned draft of Art. 2, para. 3 (d). It was originally named Alt. B2 in the preliminary draft Convention. 'Alternative A', reflecting the approach listing rights and freedoms, was then disassembled in Alt. A and A2, identical with regards to this provision. The two alternatives reflected the two possibilities to discipline the enforcement mechanism: either through Commission and Court (Alt. A) or just through the Commission (Alt. A2). The same is valid for Alt. B and B2. Two comments accompanied Alt. A, reporting the results of the discussion on the need to assure the validity of the exceptional laws passed after the Second World War and the Swedish concern for a 'margin of appreciation' *ante litteram.* EUROPEAN COMMISSION OF HUMAN RIGHTS, *Preparatory Work on Art. 7 of the European Convention on Human Rights*, 21 May 1957, Doc. DH (57) 6, p. 5.
[45] In Alternative B, the draft article had become Art. 8.

the time it was committed, was criminal according to the general principles of law recognised by civilised nations'.[46]

In June 1950, the Conference of Senior Officials, established by the Committee of Ministers and representing the last step before the final adoption of the draft within the Committee of Ministers, adopted and finalised Alternative B.[47] The proposal made to the Committee of Ministers essentially reflected the text of Alternative B, with two minor amendments in its wording (the substitution of the term 'criminal' to 'penal' and, in the French version '*une action ou omission*' instead of '*des actions ou omissions*'). Moreover, the Conference of Senior Officials proposed to place it at Art. 7. Thus, the draft version of Art. 7 provided:

> '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. Nothing in this Article shall prejudice the trial and punishment of any person for any act or omission which, at the time it was committed, was criminal according to the general principles of law recognised by the civilised nations'.[48]

In its fifth session in August 1950, the Committee of Ministers of the Council of Europe adopted the final version of Article 7, with two minor linguistic amendments, building the actual text of Art. 7 ECHR:

> '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 when the criminal offence was committed.

[46] In this phase, the Article had again changed its position in the draft, becoming Art. 9. EUROPEAN COMMISSION OF HUMAN RIGHTS, *Preparatory Work on Art. 7 of the European Convention on Human Rights*, 21 May 1957, Doc. DH (57) 6, p. 8, referring to Doc. CM/WP I (50), 2, p. 4. The British delegation's view on the explicit justification of the Nuremberg trials, considering the inclusion of international crimes in 'international law' insufficient, was to prevail in the negotiations for the International Covenant on Civil and Political Rights as well. Several doubts were raised with regards to the superfluous provision of the second paragraph and the vagueness of the general principles to justify a criminal conviction. In the end, the paragraph passed as justifying Nuremberg Trials and confirming and strengthening the principles thereof. M.J. BOSSUY, *Guide to the* "travaux préparatoires" *of the International Covenant on Civil and Political Rights*, Dordrecht, 1987, p. 331-332.

[47] EUROPEAN COMMISSION OF HUMAN RIGHTS, *Preparatory Work on Art. 7 of the European Convention on Human Rights*, 21 May 1957, Doc. DH (57) 6, p. 10-11.

[48] EUROPEAN COMMISSION OF HUMAN RIGHTS, *Preparatory Work on Art. 7 of the European Convention on Human Rights*, 21 May 1957, Doc. DH (57) 6, p. 11, Doc. CM/WP IV (50) 16, Appendix, p. 5.

> 2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time it was committed, was criminal according to the general principles of law recognised by the civilised nations'. [49]

In conclusion, four main points emerge from the analysis of the preparatory works to the Convention. Firstly, the domestic provisions regarding the principle 'no punishment without law' were not taken into consideration. The historic and legal origin of the principle is rooted in international law and in the development of International Human Rights Law after the Second World War. Before the adoption of the Universal Declaration of Human Rights, the principle can be found in international customary law and in some Treaties (such as the Geneva Conventions).[50] For this reason, the wording of Art. 7 ECHR is almost identical to the wording of Art. 11(2) of the Universal Declaration.

Secondly, the discussion amongst the delegations of the Member States and within the Committee of Experts, did not challenge the general principle 'no punishment without law'. The main concern was the possible threat to the legitimation of the prosecution of war criminals after 1945. Except for the critical remarks by the Swiss delegation on a possible 'too absolute' non-retroactivity,[51] the British mainstream proposal had a political intent, rather than the purpose of creating a general exception to the non-retroactivity of criminal laws. The 'Nuremberg clause' was indeed included in a new separate paragraph and did not add in the first paragraph the 'general principles of law recognised by the civilised nations' among the potential sources of incrimination or punishment, as the Swiss delegation had suggested.

Thirdly, the discussion only concentrated on the essence of the provision as granting non-retrospectivity of criminal laws, and therefore legality of incrimination, and legality of punishment. There were no references to the principle of legal certainty, nor to the prohibition of analogy, which were already part of national criminal law tradition in many

[49] EUROPEAN COMMISSION OF HUMAN RIGHTS, *Preparatory Work on Art. 7 of the European Convention on Human Rights*, 21 May 1957, Doc. DH (57) 6, p. 12-13, Doc. CM (50) 52, p. 5.
[50] Art. 99 of the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949 (the so-called Third Geneva Convention) prescribes that 'No prisoner of war may be tried or sentenced for an act which is not forbidden by the law of the Detaining Power or by international law, in force at the time the said act was committed'. Art. 65 of the Geneva Convention relative to Protection of Civilian Persons in time of War of 12 August 1949 (the so-called Fourth Geneva Convention) states that 'The penal provisions enacted by the Occupying Power shall not come into force before they have been published and brought to the knowledge of the inhabitants in their own language. The effect of these penal provisions shall not be retroactive'. Moreover, Art. 67 of the same Convention is relevant: 'The courts shall apply only those provisions of law which were applicable prior to the offence, and which are in accordance with general principles of law, in particular the principle that the penalty shall be proportionate to the offence. They shall take into consideration the fact that the accused is not a national of the Occupying Power'.
[51] See *above*, para. 1.2.1.

Member States. Moreover, there was no actual debate on the possible sources allowed to establish crime and punishment. In particular, the inclusion of international law amongst the possible 'laws' to define crime and penalty was not put into question. This could be partially explained when looking at the political composition of the various committees, which did not usually include national law experts or academics.[52] Another relevant factor was the exclusively international origin of the codification, which at the time was in no way connected to Constitutions or Criminal Codes. In addition, the complete constitutionalisation of the principle was to be achieved only in the following decades, especially considering the Italian and German systems, whose Constitutions date back respectively to 1948 and 1949.

Lastly, the relationship with the UN Declaration focused on non-retrospectivity and the international origin of the principle. The only problematic points were the acceptance of the principle of non-retroactivity of heavier penalties and the legitimacy of the Nuremberg Trials. With regards to the sources of the criminal law, the discussion focused only on the definition of international law and the inclusion of customary international law and the general principles among the sources. Nevertheless, the drafting already conveyed the idea of the recessive nature of *nullum crimen*, which would take a step down in relation to higher values, such as the human dignity of the victims. The following development of the principle by the European Court proved to be, with the passing of time, stricter than the initial vision.

2. The international normative context surrounding the European nullum crimen.

In addition to its connection to Art. 11(2) of the Universal Declaration of Human Rights, Art. 7 ECHR is part of a broader international legal framework safeguarding *nullum crimen sine lege*. The current most important international provisions on *nullum crimen* are Art. 15 of the International Covenant on Civil and Political Rights (ICCPR), Art. 9 of the American Convention on Human Rights (ACHR) and Art. 49 of the Charter of Fundamental Rights of the European Union (CFREU). The development of the right at international level has boosted its 'universal' side, disregarding national specificities. Its universal component consists in the fundamental right to be aware of the definition of

[52] W. SCHABAS, *The European Convention*, cit., p. 5.

the criminal offence and to be able to foresee the consequences of a violation thereof, which is in the end an ultimate expression of the right of self-determination.[53]

The wording of these provisions is very alike. As discussed above, the drafting of the ECHR, ICCPR and Universal Declaration are strictly bound to each other. Moreover, the rights enshrined in the EU Charter of Fundamental Rights are tailored to the guarantees of the European Convention, for reasons that will be explained later.

Following the model of art. 11(2) of the Universal Declaration of Human Rights, which provides 'No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal 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 penal offence was committed', the International Covenant on Civil and Political Rights of 1966 uses the same wording. Along with the legality principle and the non-retroactivity, the necessity to apply the *lex mitior* retroactively begins to manifest: '…[i]f, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby'. In addition, the provision includes the 'Nuremberg clause'.[54]

The American Convention on Human Rights is almost identical to the ICCPR in its Art. 9 (Freedom from *ex-post facto* laws), except for the reference to 'applicable law' instead of specifying 'national or international law' under the sources. The title in the Spanish version of the ACHR is more explicit, as it refers both to the principle of legality and to the principle of retroactivity.[55] Despite similar wording, the case-law of the Inter-

[53] F. PALAZZO, *Legalità*, in S. CASSESE (ed.), *Dizionario di diritto pubblico*, Milano, 2006, p. 3373 and more recently F. PALAZZO, *La legalità fra* law in the books *e* law in action, in *Riv. trim. dir. pen. cont.*, 3, 2016, p. 7.

[54] The scope of Art. 15 ICCPR is generally interpreted in a narrow sense, not including procedural alterations operating to the accused's detriment, as in Nicholas v. Australia (HRC, 1080/02), and prohibiting punishment under extremely vague laws, such as in the 2004 Human Rights Committee's Report on Belgium (2004) UN doc CCPR/CO/81/BEL. S. JOSEPH, M. CASTAN, *The International Covenant on Civil and Political Rights*, Oxford, 2013, p. 521-522. However, the Human Rights Committee is very careful in the assessment of foreseeability of national law (which is supposed to include judge-made law), although in some recent developments the Committee went much deeper into national law issues in Baumgarten v. Germany (HRC, 960/2000). F. TULKENS, S. VAN DROOGHENBROECK, *Article 15*, in E. DECAUX (ed.), *Le pact international relative aux droits civils et politiques*, Paris, 2011, p. 365.

[55] It is widely accepted that the expression 'applicable law' of Art. 9 ACHR refers both to national and international law, because of the analysis of the preparatory works to the American Convention. J.L. GUZMÁN DALBORA, *El principio de la legalidad penal en la jurisprudencia de la Corte Interamericana de Derechos Humanos*, in K. AMBOS, E. MALARINO, G. ELSNER (eds.), *Sistema interamericano de protección de los derechos humanos y derecho penal internacional*, Montevideo, 2010, p. 175, G.E. COTE BARCO, *Rückwirkung und die Entwicklung der internationalen Verbrechen*, Berlin, 2018, p. 328.

American Court of Human Rights has shown a stricter conception of legality than that of the European Court.[56]

At the European level, the CFREU entered into force in 2000 as soft law. It was then raised to 'the same legal value as the Treaties' by the Treaty of Lisbon (Art. 6(1) TEU). The wording of Art. 49 CFREU, entitled 'Principle of legality and proportionality of criminal offences and penalties', follows Art. 15 ICCPR as far as legality, non-retroactivity and *lex mitior* are concerned. With regard to the exception to non-retroactivity, Art. 49 CFREU has the same content as Art. 15 ICCPR and Art. 7 ECHR, although referring to 'the principles recognised by the community of nations', instead of the 'civilised nations'. The great innovation of Art. 49 CFREU is the recognition of the proportionality principle: 'The severity of penalties must not be disproportionate to the criminal offence'.[57] However, the *nullum crimen* was already a non-written principle in EU law even before its inclusion in the CFREU.

3. The comprehensive reach of the ECHR definition of the European Principle of Legality.

At the European level, the reason to analyse in depth the European Principle of Legality in its 'Strasbourg' version is that the definition given by the European Court of Human Rights has reached a comprehensive scope both for European Union law and its interpretation by the Court of Justice of the European Union. The importance of the European Court of Human Rights definition of the principle is crucial for EU law for normative and interpretive reasons, especially considering that it has not always shared the status of the Treaties by virtue of the CFREU. On the one hand, *nullum crimen* is a non-written principle in EU law as it is part of the general principles. On the other, it has become a written principle thanks to its inclusion in the CFREU. Moreover, in both cases, its interpretation depends on the Strasbourg definition.

[56] The case-law of the Inter-American Court of Human Rights mainly focuses on the principle of *lex certa* and *stricta*, which is very severe on judicial interpretation and gives great importance to the precision of the written law. IACtHR, Castillo Peruzzi and others v. Peru, 30 May 1999, para. 21; IACtHR, De la Cruz-Flores v. Peru, 18 November 2004, para. 79; IACtHR, Kimel v. Argentina, 2 May 2008, para. 63; IACtHR, Usón Ramirez v. Venezuela, 20 November 2009, para. 55; on judicial interpretation see IACtHR, Pollo Rivera and o. v. Peru, 21 October 2016, para. 224. J.L. GUZMÁN DALBORA, *El principio de la legalidad penal*, cit., p. 179 ff, G.E. COTE BARCO, *Rückwirkung und die Entwicklung der internationalen Verbrechen*, cit., p. 330.

[57] R. SICURELLA, *Art. 49*, in R. MASTROIANNI, O. POLLICINO, S. ALLEGREZZA ET AL. (eds.), *Carta dei Diritti Fondamentali dell'Unione Europea*, Milano, 2017, p. 976-978, S. PEERS, *The EU Charter of Fundamental Rights: a commentary*, Oxford, 2014, p. 1358 f.

3.1. The Principle of Legality as a non-written principle in EU Law.

As stated above, the principle of legality is a non-written principle of EU law, as it is considered part of its general principles on two different levels.

On the first level, fundamental rights are part of EU law as general principles.[58] The Court of Justice of the European Union steadily affirms that fundamental rights are based on common constitutional traditions of Member States and on the most important international human rights treaties among which the ECHR has a peculiar meaning.[59] In addition, Art. 6(3) TEU (like Art. 6(2) of the TEU in its pre-Lisbon version) expressly recognises that '[f]undamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law'.[60] For these two interpretive and normative reasons, *nullum crimen* as enshrined in Art. 7 ECHR and as interpreted by the European Court of Human Rights falls clearly within primary EU law as a general principle.[61]

[58] General principles of law are a source of primary EU law. The Court of Justice can derive these principles of law in case the EU legal order, seen as an incomplete legal order, has some gaps to be filled, especially in EU powers. M. HERDEGEN, *Europarecht*, München, 2016, p. 170-171.

[59] CJEU, Internationale Handelsgesellschaft, 17 December 1970, C-11/70, para. 4 (the law).

[60] The CJEU has stated that Art. 6 (3) TEU does not discipline a hierarchical relationship between the ECHR and the legal systems of the Member States, or potentially impose to disapply national provisions. CJEU, Kamberaj, 24 April 2012, C-571/10, para. 62 f., S. PEERS, *The EU Charter of Fundamental Rights*, cit., p. 1490.

[61] Among others CJEU, Criminal proceedings against X, 12 December 1996, C-74/95 and C-129/95, para. 25; CJEU, Dansk Rørindustri, 28 June 2005, joined cases C-189/02 P, C-202/02 P, C-205/02 P to 208/02 P and C-213/02 P, para. 215-217, CJEU, Advocaten voor de Wereld, 3 May 2007, C-303/05, para. 49 f. C. GRANDI, *Riserva di legge e legalità penale europea*, Milano, 2010, p. 83, M. SCOLETTA, *La legalità penale nel sistema europeo dei diritti fondamentali*, in C.E. PALIERO, F. VIGANÒ (eds.), *Europa e diritto penale*, Milano, 2013, p. 199, A.M. MAUGERI, *I principi fondamentali del sistema punitivo comunitario: la giurisprudenza della Corte di Giustizia e della Corte Europea di Diritti dell'Uomo*, in G. GRASSO, R. SICURELLA (eds.), *Per un rilancio del progetto europeo. Esigenze di tutela degli interessi comunitari e nuove strategie di integrazione penale*, Milano, 2008, p. 119. The CJEU makes reference to the principle of legality in criminal law as part of the common constitutional traditions and specifically recalling the ECHR as a particularly important source, quoting its judgements as precedents: 'More specifically, in a case such as that in the main proceedings, which concerns the extent of liability in criminal law arising under legislation adopted for the specific purpose of implementing a directive, the principle that a provision of the criminal law may not be applied extensively to the detriment of the defendant, which is the corollary of the principle of legality in relation to crime and punishment and more generally of the principle of legal certainty, precludes bringing criminal proceedings in respect of conduct not clearly defined as culpable by law. That principle, *which is one of the general legal principles underlying the constitutional traditions common to the Member States, has also been enshrined in various international treaties, in particular in Article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms* (see, inter alia, the judgements of the European Court of Human Rights in *Kokkinakis v Greece*, 25 May 1993, Series A, No 260_A, paragraph 52, and in *S.W. v United Kingdom* and *C. R. v United Kingdom*, 22 November 1995, Series A, No 335-B, paragraph 35, and No 335-C, paragraph 33)' CJEU, Criminal proceedings against X, 12 December 1996, C-74/95 and C-129/95, para. 25 (emphasis added).

Secondly, the principle of legality has been autonomously elaborated as a general principle of law on the basis of common constitutional traditions of Member States. In general terms, the principle of legality elaborated by the CJEU is a principle, originating from the rule of law, governing the action of the European institutions,.[62] Nonetheless, in the specific field of criminal law, the CJEU considers the principle of legality as part of the principle of legal certainty and therefore part of common constitutional traditions of EU Member States.[63] In this regard, this common understanding of the principle of legality in the European States, which is also the interpretation of Art. 7 ECHR, contributes to advancing 'common constitutional traditions'. Thus, Art. 7 ECHR and its interpretation by the Strasbourg Court have in this strictly interpretive sense an indirect and continuing effect on the development of the principle at EU level.

3.2. The Principle of Legality as a written principle in EU Law.

Since the drafting of Art. 49 CFREU, the principle of legality has also become a written principle in European Union Law. As stated above, as part of the CFREU it now has the status of primary EU law at the same level of the Treaties. As any other provision of the Charter, Art. 49 CFREU must therefore be interpreted, pursuant to Art. 6 (1.3) TEU, 'in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions'. Title VII of the Charter, Art. 52 (3) establishes that the scope of the guaranteed rights must reflect the meaning and scope of the rights enshrined in the ECHR, in so far as they correspond.[64] Thus, the meaning of

[62] T. KOSTADINIDES, *The Rule of Law in the European Union. The Internal Dimension*, Oxford-Portland, 2017, p. 91 f. and 95 ff.

[63] Among others see CJEU, Deutsche Milchkontor, 21 September 1983, C-205/82 and C-215/82, § 30; CJEU, Regina v. Kirk, 10 July 1984, C-63/83, para. 22; CJEU, Groupe Danone v. Commisson, 8 February 2007, C-3/06, para. 87, CJEU, Intertanko and others v. the Secretary of State for Transport, 3 June 2008, C-308/06, para. 70. M. SCOLETTA, *La legalità penale nel sistema europeo dei diritti fondamentali*, cit., p. 198, A. BERNARDI, *All'indomani di Lisbona: note sul principio europeo di legalità penale*, in *Quaderni costituzionali*, 2009, p. 47-49.

[64] According to the CJEU, the ECHR is not a *formally incorporated legal instrument of EU law*, as long as the EU does not accede to the Convention: 'As regards, first, the conclusions to be drawn by a national court from a conflict between national law and the ECHR, it is to be remembered that whilst, as Article 6(3) TEU confirms, fundamental rights recognised by the ECHR constitute general principles of the European Union's law and whilst Article 52(3) of the Charter requires rights contained in the Charter which correspond to rights guaranteed by the ECHR to be given the same meaning and scope as those laid down by the ECHR, the latter does not constitute, as long as the European Union has not acceded to it, a legal instrument which has been formally incorporated into European Union law. Consequently, European Union law does not govern the relations between the ECHR and the legal systems of the Member States, nor does it determine the conclusions to be drawn by a national court in the event of conflict between the rights guaranteed by that convention and a rule of national law', CJEU, Åkerberg Fransson, 26 February 2013, C-617/10, para. 44.

Art. 49 CFREU depends on the interpretation of Art. 7 ECHR for these normative reasons. As far as Art. 49(1) CFREU is concerned, its correspondence with Art. 7 ECHR has been stated since the Opinion of Advocate General Sharpston in the *Giovanardi* preliminary ruling in 2012.[65] As a consequence, the meaning and scope of Art. 49(1) is the same as the one of the correspondent right in the Convention, which is also expressly quoted in the Explanations to the Charter.[66] The principles enshrined in the Strasbourg jurisprudence are constantly applied by the European Court of Justice in its case-law and therefore highlight the crucial and pervasive role of the Strasbourg definition of legality.[67] For these reasons, the definition of *nullum crimen* at European level must focus on its interpretation by the European Court of Human Rights.

4. Introductory remarks on Art. 7 ECHR.

Art. 7 ECHR ensures the *nullum crimen nulla poena sine lege* principle. Its literal formulation safeguards the legality of offences and penalties and the non-retroactivity of criminal law and punishment. Its second paragraph includes the exception of the admissibility of prosecution and punishment for acts or omissions that were criminal according to the general principles of law recognised by civilised nations.

Acknowledging the principle of legality in the criminal field among fundamental rights and freedoms is a common feature to Constitutions and International Human Rights Charters.[68] The importance of the principle 'no punishment without law' is crucial in the Convention system, and, as such, is enumerated in Art. 15 ECHR as one of the rights which cannot be subject to derogation, even in times of emergency.[69] *Nullum crimen* is

[65] Opinion of AG Sharpston, Procura della Repubblica v. Maurizio Giovanardi and o., 15 May 2012, C-79/11, para. 68.
[66] The Explanations to the Charter of Fundamental Rights directly refer to Art. 52(3), see *Explanations relating to the Charter of Fundamental Rights*, (2007/C 303/02). S. PEERS, *The EU Charter of Fundamental Rights*, cit., p. 1359.
[67] Before the Treaty of Lisbon see CJEU, Dansk Rørindustri, 28 June 2005, joined cases C-189/02 P, C-202/02 P, C-205/02 P to 208/02 P and C-213/02 P, para. 216-219 and CJEU, Spektor Photo Group NV, 23 December 2009, C-45/08, para. 42. After the entry into force of the Treaty of Lisbon see, among others, CJEU, Taricco and o., 8 September 2015, C-105/14, para. 57 and the Opinion of AG Kokott, 30 April 2015, C-105/14, para. 113. See also R. SICURELLA, *Art. 49*, cit., p. 982 ff.
[68] On the evolution of the principle at the international and national level after the setbacks of totalitarian regimes after the Second World War: C. KREß, *Nulla poena nullum crimen sine lege*, in *Max Planck Encyclopedia of Public International Law*, Oxford, 2012, p. 893, G. VASSALLI, *Nullum crimen nulla poena sine lege*, in *Dig. disc. pen*., VIII, Torino, 1994, p. 294 f. and 296 ff.
[69] According to Art. 15 ECHR, derogations from the rights enshrined in Art. 2 (right to life), except for deaths resulting from lawful acts of war, Art. 3 (Prohibition of torture), Art. 4 para.1 (Prohibition of slavery and forced labour) and Art. 7 are not permitted in time of war or other public emergencies which would otherwise justify the derogation from the Convention. U. KARPENSTEIN, F.C. MAYER, *Konvention zum Schutz der Menschenrechte und Grundfreiheiten*, München, 2015, p. 242.

considered an expression of the more general principle of the rule of law, enshrined in the Preamble to the Convention.[70] Moreover, like all other rights in the Convention, its application has ensure its effectiveness:

> 'The guarantee enshrined in Article 7, which is an essential element of the rule of law, occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is permissible under Article 15 of the Convention in time of war or other public emergency. 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'.[71]

The wording of Art. 7 ECHR further establishes the principle that only the law can define a crime or penalty and prohibits the retrospective application of criminal law to an accused disadvantage. In the words of the European Court: 'Article 7 para. 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)'.[72]

Thanks to the evolutive interpretation of the provision by the Strasbourg Court, *nullum crimen* has been completed with the following other complementary safeguards. i) The prohibition of extensive interpretation in criminal law reads that: 'the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy; it follows from this that an offence must be clearly defined in law'. Although the ECHR prohibition of extensive interpretation seems wider than the national prohibition of analogy, it almost remained a dead letter.[73] Moreover, ii) the law must be sufficiently accessible and foreseeable in order to be a sufficient legal basis for the definition of the criminal offence or penalty: 'when speaking of 'law' Article 7 alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which […] implies qualitative requirements, notably those of accessibility

[70] ECHR, Preamble, Recital no. 5.
[71] ECtHR, Kafkaris v. Cyprus, 12 February 2008, no. 21906/04, para. 137; ECtHR, S.W. v. the United Kingdom, 22 November 1995, no. 20166/92, para. 34.
[72] ECtHR, Kokkinakis v. Greece, 25 May 1993, no. 14307/88, para. 52; ECtHR, S.W. v. the United Kingdom, 22 November 1995, no. 20166/92, para. 35.
[73] ECtHR, Kokkinakis v. Greece, 25 May 1993, no. 14307/88, para. 52; ECtHR, S.W. v. the United Kingdom, 22 November 1995, no. 20166/92, para. 35; ECtHR, Veeber v. Estonia (no.2), 22 January 2003, no. 45771/99, para 31; ECtHR, Coëme and Others v. Belgium, 22 June 2000, nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, § 145

and foreseeability'.[74] In recent years the Court interpreted the Convention dynamically in order to add iii) the principle of retrospective application of the more lenient criminal law, 'Article 7 § 1 of the Convention guarantees […] implicitly, the principle of retrospectiveness of the more lenient criminal law'.[75]

The majority of cases concerning Art. 7 ECHR took place in the last three decades. Although Art. 7 ECHR has not the same case-law amount as other rights in the Convention, such as Art. 6 ECHR, the Court developed an articulated definition. At the beginning, Art. 7 ECHR was often regarded as superfluous, since the autonomous notions of 'law' and 'criminal charge' (or penalty, *matière pénale*) had already been elaborated in case-law regarding different provisions of the Convention (Art. 8-10 and 6 ECHR).[76] Nowadays the autonomous definitions of 'law' and 'penalty' are crucial in order to assess the 'lawfulness' of the legal basis and the scope of application of Art. 7 ECHR.[77]

4.1. The autonomous definition of law in Art. 7 ECHR.

The key concept in Art. 7 ECHR is the autonomous definition of *law*.[78] This autonomous concept builds the basis of all other principles enshrined in Art. 7 ECHR (*lex praevia, lex certa, lex stricta*). In addition, the definition of *law* also sets the limits of the Court's scrutiny into domestic Criminal Law.

As stated before, Art. 7 ECHR prohibits convicting someone for an act or omission that did not constitute a criminal offence at the time it was committed, under national or international law. Accordingly, a heavier penalty shall not be imposed than the one applicable at the time the offence was committed. The definition of *law* (whether national or international), or *droit* in the French version, defines the legitimate legal basis for

[74] ECtHR, K.-H. W. v. Germany, 22 March 2001, no.37201/97, para. 45, quoting ECtHR, Tolstoy Miloslavsky v. the United Kingdom, 13 July 1995, no. 18139/91, para. 37, ECtHR, Del Río Prada v. Spain, 21 October 2013, no. 42750/09, para. 91-93.

[75] ECtHR, Scoppola v. Italy (no. 2), 17 September 2009, no. 10249/03, para. 104-106, 109; ECtHR, Gouarré Patte v. Andorra, 12 January 2016, no. 33427/10, para. 29; ECtHR, Ruban v. Ukraine, 12 July 2016, no. 8927/11, para. 38-39.

[76] According to Soyer, Art. 7 ECHR did not have autonomous 'conceptual' substance, as it was at the crossroads of other notions developed elsewhere in the Convention, or even outside the Convention. Regarding the fact that the Court used the autonomous definitions of 'law' and 'criminal charge' elaborated for other provisions, Soyer defines Art. 7 an 'importer' article, only providing for the non-retroactivity of criminal law. J.C. SOYER, *L'article 7 de la Convention existe-t-il?,* in P. MAHONEY, F. MATSCHER, M. PETZOLD, L. WILDHABER (eds.), *Protection des droits de l'homme: la perspective européenne. Mélanges à la mémoire de Rolv Ryssdal*, Köln-Berlin-Bonn-München, 2000, p. 1337 ff., in the same direction P. ROLLAND, *Article 7*, in L.E. PETTITI, E. DECAUX, P.H. IMBERT (eds.), *La Convention Européenne des Droits de l'Homme*, Paris, 1995, p. 293.

[77] See *infra*, para. 4.

[78] For a definition of autonomous concepts in the Convention, see *above* Chapter 1, para. 2.1.

incrimination and punishment. Since the first judgements when it was applied, it became clear that such a definition could not be dependent on any national understanding and therefore should be conceived independently from national sources of law.

The autonomous notion of 'criminal' or 'penalty' for its part sets out the scope of application of Art. 7 ECHR. Although the concept is crucial, especially in that it introduces a substantive definition of what can be considered *criminal*, nonetheless its development is beyond the scope of the present analysis.

4.2. The intersecting scope of the principle of legality in the ECHR.

The autonomous definition of law and the requirements of the legal basis together refer to a broader concept of the principle of legality and thus require a comprehensive approach.

First of all, the principle of legality, as a component of the rule of law, is not just a criminal law prerogative, but is also part of other guarantees enshrined in the Convention. In general, it can be described as the request for a valid legal basis (lawfulness) in order to justify any infringement in a fundamental right. The principle of legality pervades the Convention and differs slightly from time to time.[79] Nevertheless, the autonomous meaning of *law* is common to all provisions in the Convention referring to 'law' or 'prescribed by law'.[80] In most of the cases, the requirement 'prescribed by law' is applicable for non-absolute rights, whose violations can be tolerated if they satisfy a three-step test: sufficient legal basis, legitimate aim and proportionality. The existence of a legal basis is pivotal in the assessment of legality. The legal basis must be found in written or unwritten law, and such law must have the necessary features of accessibility

[79] V. ZAGREBELSKY, R. CHENAL, L. TOMASI, *Manuale dei diritti fondamentali in Europa*, Bologna, 2016, p. 125. F. SUDRE, *Le principe de la légalité et la jurisprudence de la Cour européenne des Droits de l'Homme*, in *Revue pénitentiaire et de droit pénal*, 2001, p. 335.

[80] ECtHR, Perinçek v. Switzerland, 15 October 2015, no.27510/08, para. 134-135. The Court refers to the definition of law both in Art. 7 ECHR and Art. 8-11 ECHR while assessing the lawfulness of a violation of Art. 10 ECHR, affirming that it is the same in all parts of the Convention. According to Matscher, the references to 'law' in the Convention can be divided into three groups. i) The necessity of a legal basis for State measures limiting a fundamental right (such as Art. 8-11 ECHR, Art. 1 Prot. 1 ECHR, Art. 7 ECHR), ii) consistency with the law of the procedure followed to adopt such measures (such as Art. 5 ECHR) and, in the light of the rule of law, iii) the general obligation for every State action to have a legal basis. F. MATSCHER, *Il concetto di legge secondo la recente giurisprudenza della Corte di Strasburgo*, in *Scritti in onore di Guido Gerin*, Padova, 1996, p. 267 ff.

and foreseeability. With regards to relative (non-absolute) rights safeguarded in the Convention, their restriction needs a valid legal basis in order to be legitimate.[81]

Art. 7 ECHR is peculiar because it does not include any justifiable limitation. For this reason, it is one of the few absolute rights enshrined in the Convention, i.e. the principle of legality in criminal law cannot be balanced with other rights.[82] As opposed to non-absolute rights, where legality is required for them to be legitimately restricted, Art. 7 ECHR protects the principle of legality in the criminal field *as such*. Hence, the principle of legality is not a safeguard against unlawful restrictions of *other rights*, but it *is* the right. At best, as criminal law limits individual liberty, the principle of legality may be considered the means for avoiding unlawful restrictions to individual liberty. The existence of an accessible, foreseeable and non-retroactive law prescribing crime and penalty is the core of the safeguard. Thus, Art. 7 ECHR not only refers to the common definition and the quality of law, but it also entails the prohibition of retroactivity and the *lex mitior* principle.[83]

There is also another reason supporting a comprehensive approach to the principle of legality. As far as domestic law is concerned, legality is a foundational principle in different areas of law, although in different orders of magnitude. It is regarded as an inherent principle in the legal order. In its criminal law declination, it is considered a stricter version of the general principle.[84] In the Convention, the principle cannot be

[81] D. HARRIS, M. O'BOYLE, C. WARBRICK, *Law of the European Convention on Human Rights*, Oxford, 2014, p. 506 f.

[82] U. KARPENSTEIN, F.C. MAYER, *Konvention zum Schutz der Menschenrechte und Grundfreiheiten*, cit., p. 242.

[83] In 2001, Fréderic Sudre dealt with the question of the possible peculiar understanding of the principle of legality in criminal law in the Convention. He referred to the opinion of the European Commission of Human Rights, that at the time had opted for a stricter and more rigid assessment of legality in Art. 7 ECHR than the approach adopted for other rights. See the report on the case of X. Ltd. and Y v. the United Kingdom, 7 May 1982, no. 8710/79 and Cantoni v. France, 12 April 1995, no. 17862/91. The jurisprudence of the Court was already going in the opposite direction at the time, transposing the criteria applied elsewhere in the Convention. F. SUDRE, *Le principe de la légalité et la jurisprudence de la Cour européenne des Droits de l'Homme*, cit., p. 337 f., P. ROLLAND, *Art. 7*, cit., p. 294.

[84] The principle of legality encompasses three rules: (a) the pre-eminence of the law on the other state powers (judiciary and executive) and the consequent necessity for them not to act in contrast with it, (b) the prohibition for State powers to act without lawful authorisation (formal principle of legality) and (c) it is constitutionally illegitimate every provision that confers a power without defining it properly (substantive principle of legality). R. GUASTINI, *Legalità (principio di)*, in *Dig. disc. pubbl.*, Torino, 1994, p. 87. According to Norberto Bobbio's well-known definition of legality, the principle of legality includes the obligation for all state powers (constituted by law) to act consistently with the law, apart from exceptional cases. The principle operates on three levels: (i) the relationship between law and the *princeps*, which is always bound by law and cannot be *legibus solutus*; (ii) the relationship between the *princeps* and the citizens, which is ruled and carried out only by statute law; (iii) the application of law to particular cases, which must be pursued by judges in accordance with written law (and not with equity). According to Bobbio, the principle *nullum crimen sine lege* is a component of this latter aspect of the general principle

applied differently within different areas of law. The approach of the Convention is substantive, as it is also the case in the autonomous definition of penalty or criminal charge. For example, an administrative sanction in domestic law is subject to the principle of legality according to the requirements of administrative law, if the legislator formally classifies it as administrative. Conversely, in the logic of the Convention, the lawfulness assessment of potential infringements in individual rights has to be carried out according to the standard of the allegedly violated right, and not according to the area of law the measure belongs to. For example, the right to property enshrined in Art. 1 Prot. 1 ECHR can be violated equally through an expropriation order, as well as through a criminal confiscation measure, which in domestic legal systems belong to different legal areas.[85] On the other hand, in the Convention both violations shall be assessed under the standard of Art. 1 Prot. 1. Henceforth, the principle of legality shall be approached in a substantive way, abandoning the formalistic logic of domestic legal orders.[86] As a consequence, the analysis of the principle of legality under Art. 7 ECHR must also consider its application elsewhere in the Convention.[87]

This comprehensive approach is rooted in the rationale of the principle of legality, which is ultimately 'to provide effective safeguards against arbitrary prosecution, conviction or punishment'.[88] Thus, the definition of the scope of the principle of legality is independent of the right or the area of law, although different rights often give rise to some minor peculiarities.

of legality. N. BOBBIO, *Legalità*, in N. BOBBIO, N. MATTEUCCI (eds.), *Dizionario di politica*, Torino, 1976, p. 518-520.

[85] R. CHENAL, *Il principio di legalità e la centralità dei diritti fondamentali*, in *Fattore tempo e diritti fondamentali. Cassazione e CEDU a confronto* (Studi e Pubblicazioni della Corte di Cassazione), Roma, 2017, p. 57.

[86] It has been pointed out that this approach is the result of the U-turn represented by the Convention system in Europe, putting fundamental rights at the centre of the legal order and abandoning the traditional attention for State powers. R. CHENAL, *Il principio di legalità e la centralità dei diritti fondamentali*, cit., p. 57-58.

[87] The European Court highlights the importance of referring to the principle of legality as developed in different provisions in the Convention. The Court asserts that the principle of foreseeability as enshrined in Art. 1 Prot. 1 must be applied '*a fortiori* in the context of Article 7'. ECtHR, Žaja v. Croatia, 4 October 2016, no. 37462/09, para. 103-105.

[88] ECtHR, Kononov v. Latvia, 17 May 2010, no. 36376/04, para. 185, ECtHR, Vasiliauskas v. Lithuania, 20 May 2015, no. 35343705, para. 153, ECtHR, Del Río Prada v. Spain, 21 October 2013, no. 42750/09, para. 77, ECtHR, Žaja v. Croatia, 4 October 2016, no. 37462/09, para. 105

5. The definition of law.

5.1. The definition of law outside Art. 7: Art. 8-11 ECHR and other provisions.

The definition of *law* in the context of Art. 7 ECHR corresponds to the autonomous definition of law in other Articles, and places written and unwritten law, statutory and judge-made law on the same level. The origin of this autonomous concept[89] is to trace back to the interpretation of Art. 10 ECHR (Freedom of expression).[90]

The leading case is *Sunday Times v. United Kingdom* of 1979, concerning a violation of the freedom of expression raised by the Sunday Times newspaper.[91] British courts convicted the Sunday Times for the offence of 'contempt of court', which was ruled by the common law. The accusation was having published an article on the lawsuits concerning the effect of thalidomide despite a judicial prohibition to do so. Owing to the fact that the Court had to assess whether the limitation to the freedom of expression was, *inter alia*, '*prescribed by law / prevue par la loi*', according to the wording of Art. 10 ECHR, the Strasbourg judges found it appropriate to provide a first definition of the concept of *law*. In this regard the Court stated:

> 'the word «law» in the expression «prescribed by law» covers not only statute but also unwritten law. Accordingly, the Court does not attach importance here to the fact that contempt of court is a creature of the common law and not of legislation. It would clearly be contrary to the intention of the drafters of the Convention to hold that a restriction imposed by virtue of the common law is not «prescribed by law» on the sole ground that it is not enunciated in legislation: this would deprive a common-law State which is Party to the Convention of the protection of Article 10 (2) (art. 10-2) and strike at the very roots of that State's legal system'.[92]

The autonomous concept of law also includes various forms of delegated legislation as well as unwritten law, developed through the interpretive activity of the courts, since it was originally created in view of the effectiveness of human rights protection. In addition, as common law States are Parties to the Convention, it is reasonable to include

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[89] See *above*, Chapter 1, para. 2.1.

[90] F. MATSCHER, *Il concetto di legge secondo la recente giurisprudenza della Corte di Strasburgo*, in *Scritti in onore di Guido Gerin*, Padova, 1996, p. 265 ff., especially 267 ff., J.J. CREMONA, *The Interpretation of the Word „Law" in the Jurisprudence of the European Court of Human Rights*, in ID., *Selected Papers 1946-1989*, Malta, 1990, p. 189-190; M. DELMAS-MARTY, *Légalité pénale et prééminence du droit selon la Convention européenne de sauvegarde des droits de l'homme et de libertés fondamentales*, in *Droit pénal Contemporain. Mélanges en l'honneur d'André Vitu*, Paris, 1989, p. 153.

[91] ECtHR, the Sunday Times v. the United Kingdom, 26 April 1979, no. 6538/74. W.M. WONG, *Sunday Times Case: Freedom of Expression versus English Contempt-of-Court Law in the European Court of Human Rights*, in *New York University Journal of International Law and Politics*, 1984, p. 35-77.

[92] ECtHR, the Sunday Times v. the United Kingdom, 26 April 1979, no. 6538/74, para. 47. The contempt of court was recently the object of a judgment, where its common law nature did not represent an obstacle for the assessment of legality. The foreseeability test was based on the merits. See ECtHR, Dallas v. the United Kingdom, 11 February 2016, no. 38395/12, para. 72.

unwritten law and judicial interpretation, considering the judge-made nature of law in those countries. The original purpose of the Court was to offer a comprehensive definition of law that could enable every State subject to the Convention to take advantage of the Convention's guarantees. The inclusion of unwritten law in the notion of 'law' was extended very soon to other rights related to Art. 10 ECHR: the right to respect for private and family life (Art. 8 ECHR), the freedom of thought, conscience and religion (Art. 9 ECHR) and the freedom of assembly and association (Art. 11 ECHR). Moreover, the Court introduced the 'quality' of law as a supplementary requirement to the legal basis, in order to justify a State's restriction to an individual's right. Hence, the steady interpretation of the word *law* also prescribes the accessibility and foreseeability (i.e. the 'qualities') of the law.[93]

Following the jurisprudence of the *Sunday Times* case, the Court began then to apply the same definition of law to other cases concerning common law States, that involved similarly-structured articles in the Convention (in particular Art. 8 ECHR). According to the reasoning of the Court in the case of *Silver v. the United Kingdom*, the freedom of expression and the respect for private and family life had overlapping scope of application when dealing with correspondence. Furthermore, the expression 'prescribed by law' and 'in accordance with the law' were considered equivalent, especially because of the identical wording of the French version of the Convention (*prévue par la loi*).[94] However, a previous case against the United Kingdom had already referred both to statute law and common law in relation to a violation of Art. 8 ECHR.[95]

[93] See *infra*, para. 8.
[94] ECtHR, Silver and others v. the United Kingdom, 25 March 1983, no. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75, para. 85-86. The Court further compares and juxtaposes the other principles related with the expression 'prescribed by law' in the case of *Sunday Times*: accessibility and the sufficient precision of the law.
[95] ECtHR, Dudgeon v. the United Kingdom, 22 October 1981, no. 7525/76, para. 44. According to the Court, the 'prescription by law' of the provision in question was undisputed between the parties, because it was foreseen in statutes and in the common law.

After having applied the new definition of law to cases concerning common law States,[96] the Court took the following step, which consisted of applying the same definition when dealing with civil law countries.[97]

In the case of *Kruslin v. France*, the Court affirmed that 'law' in the sense of Art. 8(2) ECHR is in general terms, the result of 'the law in force in a given legal system, in this instance a combination of the written law […] and the case-law interpreting it'.[98] The Court classified a consistent case-law of the highest French Court (*Cour de Cassation*) as 'law':

> '[…] In relation to paragraph 2 of Article 8 (art. 8-2) of the Convention and other similar clauses, the Court has always understood the term "law" in its "substantive" sense, not its "formal" one; it has included both enactments of lower rank than statutes (see, in particular, the De Wilde, Ooms and Versyp judgment of 18 June 1971, Series A no. 12, p. 45, § 93) and unwritten law. The Sunday Times, Dudgeon and Chappell judgments admittedly concerned the United Kingdom, but it would be wrong to exaggerate the distinction between common-law countries and Continental countries, as the Government rightly pointed out. Statute law is, of course, also of importance in common-law countries. Conversely, case-law has traditionally played a major role in Continental countries, to such an extent that whole branches of positive law are largely the outcome of decisions by the courts. The Court has indeed taken account of case-law in such countries on more than one occasion (see, in particular, the Müller and Others judgment of 24 May 1988, Series A no. 133, p. 20, § 29, the Salabiaku judgment of 7 October 1988, Series A no. 141, pp. 16-17, § 29, and the Markt Intern Verlag GmbH and Klaus Beermann judgment of 20 November 1989, Series A no. 165, pp. 18-19, § 30). Were it to overlook case-law, the Court would undermine the legal system of the Continental States almost as much as the Sunday Times judgment of 26 April 1979 would have "struck at the very roots" of the United Kingdom's legal system if it had excluded the common law from the concept of "law" (Series A no. 30, p. 30, § 47). In a sphere covered by the written law, the "law" is the enactment in force

[96] ECtHR, Malone v. the United Kingdom, 2 August 1984, no. 8691/79, para. 66; ECtHR, Chappell v. the United Kingdom, 30 March 1989, no. 10461/83, para. 52. In the *Chappell* case, the Court had to assess the legal basis of a restriction against Art. 8 ECHR (the so-called *Antony Piller orders*). Although the government and the applicant disagreed whether the restriction was provided only in statutes or both in statutes and common law, the Court stated that a sufficient legal basis was present indifferently in statutes or common law, thanks to the interpretation of the word law by the Court, which included both written and unwritten law.

[97] Even without explicitly applying the substantive definition of law to civil law States, the Court was already judging the quality of the legal basis considering relevant case-law as well, as in ECtHR, Müller and others v. Switzerland, 24 May 1988, no. 10737/84, para. 29 and ECtHR, Markt Intern Verlag Gmbh and Klaus Beerman v. Germany, 20 November 1989, 10572/83, para. 30 or considering case-law when assessing the meaning of a presumption according to national law, ECtHR, Salabiaku v. France, 7 October 1988, no. 10519/83, para. 29.

[98] ECtHR, Kruslin v. France, 24 April 1990, no. 11801/85, para. 28. The applicant claimed telephone tapping by senior police officers was carried out in the absence of a proper legal basis. In particular, the Court identified the legal basis in a consistent case-law by the *Cour de Cassation*. This case-law admitted the telephone tapping ordered by investigating judges on the basis of an interpretation of three different provisions of the French Code of Criminal Procedure (art. 81, 151 and 152). The Commission was contrary to this interpretation, as in a civil law state a 'substantive enactment of general application- whether or not passed by Parliament' was a primary source of law, while case-law could only be regarded as primary in common law States, quoting the cases of *Dungeon*, *Sunday Times* and *Malone* (all against the United Kingdom) to substantiate its argument.

as the competent courts have interpreted it in the light, if necessary, of any new practical developments'.[99]

At this point in the development of the Court's case law, the definition of law could be regarded as an autonomous concept, independent from domestic understandings. Consequently, the concept of law was and still is substantive. Pursuant to Art. 8-11 ECHR, law is the provision in force as the courts have interpreted it.[100] Therefore, the ECHR definition of law is different from a constitutional provision that establishes the legitimate formal sources of law in a given legal order.

The Court adopted the same attention to the interpretation of law by domestic courts, the equivalent value of case-law and statutes, as well as the requirements of accessibility and foreseeability for other rights that demanded a restriction to be 'prescribed by law' or 'in accordance with the law'.[101]

In the case-law on Art. 5 ECHR (Right to liberty and security), following a procedure prescribed by law is one of the conditions justifying a lawful deprivation of liberty. In this regard, the Court often focuses on procedural aspects, but also explicitly requires the respect of the Convention's 'standard of lawfulness'. That is to say, the law, irrespective whether written or not, must be accessible and foreseeable in order for the citizen to be able to foresee, to a reasonable degree under the circumstances of the case, the consequences of his or her actions.[102] Especially in the most recent case-law, the Court makes explicit reference to the autonomous definition of law in other provisions within the Convention, thus revealing its comprehensive approach. Hence, *law* as a substantive

[99] ECtHR, Kruslin v. France, 24 April 1990, no. 11801/85, para. 29.

[100] ECtHR, Leyla Şahin v. Turkey, 10 November 2005, no. 44774/98, para. 88 (in the context of Art. 9 ECHR); ECtHR, Sanoma Uitgevers B.V. v. The Netherlands, 14 September 2010, no. 38224/03, para. 83 (in the context of Art. 10 ECHR). See, in context of Art. 10 ECHR, ECtHR, Casado Coca v. Spain, 24 February 1994, no. 15450/89, para. 41-43 and, in the context of Art. 11 ECHR, ECtHR, Vyerentsov v. Ukraine, 11 April 2013, no. 20372/11, para. 63.

[101] According to Delmas Marty, the addition of the 'quality' of the law as a requirement builds a narrow 'democratic legality', as in *Malone v. the United Kingdom*. M. DELMAS MARTY, *The Richness of Underlying Legal Reasoning*, in M. DELMAS MARTY (ed.), *The European Convention for the Protection of Human Rights: International Protection versus National Restrictions*, Dordrecht-Boston-London, 1992, p. 324

[102] ECtHR, Steel and Others v. the United Kingdom, 23 September 1998, no. 24838/94, para. 51-57 in particular 54: 'the Court first recalls that it is essential that the applicable national law meet the standard of 'lawfulness' set by the Convention, which requires that all law, whether written or unwritten, be sufficiently precise to allow the citizen – 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'. Other cases referring to 'written or unwritten law' as equivalent legal basis: ECtHR, Laumont v. France,8 November 2001, no. 43626/98, para. 45, ECtHR, Del Río Prada v. Spain, 21 October 2013, no. 42750/09, para. 123; considering the common law doctrine of necessity as legal basis see ECtHR, H.L. v. the United Kingdom, 5 October 2004, no. 45508/99, para. 114 and 116. Restating the general principle: ECtHR, Oravec v. Croatia, 11 July 2017, no. 51249/11, para. 47 and 53 and ECtHR, A.S. v. Poland, 20 June 2006, no. 39510/98, para. 53.

concept, i.e. legal provisions in force as interpreted by national courts, is indifferently applicable to all Convention rights.[103]

Similarly, the autonomous definition of law is relevant in Art. 1 Prot. 1 ECHR (Protection of property), where respect for 'conditions provided for by law' is a requirement for a lawful deprivation of property. The Court interprets this clause as a reference to the quality of the law according to the consistent case-law of the Court.[104]

Likewise, the freedom of movement pursuant to Art. 2 Prot. 4 ECHR requires restrictions to be 'in accordance with the law'. As in the case-law on the right to property,[105] the Court demands not only a legal basis, but also accessibility and foreseeability as qualities of the law.[106] Moreover, the legal basis does not have to be an 'enactment' in the countries of civil law: a well-established case-law is sufficient, according to a substantive argumentation and to the interpretation of the word 'law' elsewhere in the Convention.[107] Nonetheless, in such cases the Court rather focuses on the foreseeability of the restriction by the individual, rather than on the restriction being 'prescribed by law'.[108]

5.2. Art. 7 ECHR and the autonomous concept of 'law'.

The above-mentioned interpretation applies to the definition of *law* in the context of Art. 7 ECHR. Although the heading of the article corresponds to the translation of the Latin expression '*Nulla poena sine lege*', the English version refers to the general concept of *law*, while the French version translates it as *loi*. The wording of the provision refers to *law* or *droit*, both in the English and French versions.

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[103] 'When speaking of "law" the Convention alludes to the concept which comprises statute as well as case-law. In this connection, the Court has always understood the term "law" in its "substantive" sense, not its "formal" one. It has thus included both enactments of lower rank than statutes and unwritten law. In sum, the "law" is the provision in force as the competent courts have interpreted it', ECtHR, Porowski v. Poland, 21 March 2017, no. 34458/03, para. 112. In *S. V. and A. v. Danemark* the Court underlines the purpose of protecting the individual from arbitrariness, see ECtHR, S. V. and A. v. Danemark, 22 October 2018, no. 35553/12, 36678/12, 36711/12, para. 73.

[104] ECtHR, James and others v. the United Kingdom, 21 February 1986, no. 8793/79, para. 67.

[105] The Court reiterates that, according to its settled case-law, the expression 'in accordance with the law' not only requires that the impugned measure should have some basis in domestic law but also refers to the quality of the law, requiring that it should be accessible to the person concerned and foreseeable as to its effects. ECtHR, Landvreugd v. the Netherlands, 4 June 2002, no. 37331/97, para. 54.

[106] ECtHR, Oliveira v. the Netherlands, 4 June 2002, no. 33129/96, para. 47-52; ECtHR, Landvreugd v. the Netherlands, 4 June 2002, no. 37331/97, para. 47 and 54 ff.; ECtHR, Khlyustov v. Russia, 11 July 2013, no. 28975/05, para. 68

[107] ECtHR, Landvreugd v. the Netherlands, 4 June 2002, no. 37331/97, para. 47 and 54 ff.

[108] ECtHR, Dzhaksybergenov (Aka Jaxybergenov) v. Ukraine, 10 February 2011, 12343/10, para. 59-60; ECtHR, De Tommaso v. Italy, 23 February 2017, no. 43395/09, para. 106-109.

As the Court has stated on several occasions, the meaning of the word *law* is autonomous, like in other provisions in the Convention, and does not depend on the domestic formal concepts of criminal law as 'enactment'. The autonomous meaning of law places on an equal rank the statutory and judge-made sources of the criminal law, as well as delegated legislation. As a consequence, the legal basis on which legality can be assessed includes all the sources of law, without distinguishing among specific legislative mechanisms to issue criminal statutes.[109] The formal definition of law and the attention to legislative procedures does not belong to the rationale of the principle of legality at European level. The Court is not in the position to assess the legality of a criminal provision according to national parameters. More importantly, Art. 7 ECHR is not related to the so-called 'democratic' or 'historical' component of legality, which in some civil law countries establishes that criminal law provisions can only be included in parliamentary enactments, in order to ensure a democratic debate.[110]

The substantive definition of law and the absence of the democratic rationale of legality affect the interpretation of the other principles included in Art. 7 ECHR: accessibility, foreseeability and non-retroactivity.[111] The national principles of *lex certa*, *lex praevia* and *lex stricta* are shaped on the statutory source of criminal law and on the statutory reservation (*riserva di legge*/*Gesetzesvorbehalt)*, insofar as written Parliamentary law is the parameter to measure retroactivity, precision and legitimacy. Therefore, the comprehensive substantive definition of law in the Convention could give

[109] M. SCOLETTA, *La legalità penale nel sistema europeo dei diritti fondamentali*, cit., p. 219. On the role of statutory reservation in the sources of criminal law see G. VASSALLI, *Nullum crimen nulla poena sine lege*, cit., p. 309 ff., F. PALAZZO, *Legalità*, cit., p. 3379; V. KREY, *Studien zum Gesetzesvorbehalt im Strafrecht*, Berlin, 1977, *passim*, C. ROXIN, *Strafrecht: Allgemeiner Teil*, I, München, 2006, p. 139.

[110] Among others A. BERNARDI, *Art. 7*, in S. BARTOLE, B. CONFORTI, G. RAIMONDI (eds.), *Commentario alla Convenzione europea per la tutela dei diritti dell'uomo e delle libertà fondamentali*, Padova, 2001, p. 252; O. DI GIOVINE, *Il principio di legalità tra diritto nazionale e diritto convenzionale*, in *Studi in onore di Mario Romano*, IV, Napoli, 2011, p. 2249; V. ZAGREBELSKY, *La Convenzione europea dei diritti dell'uomo e il principio di legalità nella materia penale*, in V. MANES, V. ZAGREBELSKY (eds.), *La Convenzione europea dei diritti dell'uomo nell'ordinamento penale italiano*, Milano, 2011, p. 75; E. NICOSIA, *Convenzione europea dei diritti dell'uomo e diritto penale*, Torino, 2010, p. 56, even if considering the European version of legality as a 'weak' form of legality; Palazzo sees in the effectiveness-oriented approach to legality a sign of the more general evolution from the democratic era, dominated by parliaments and the idea of participation, to the fundamental rights era, where individuals, betrayed by the parliamentary democracies, demand for a direct and more effective protection of human rights, without the mediation of Parliament. F. PALAZZO, *Legalità fra* law in the books *e* law in action, in *Riv. trim. dir. pen. cont*., 3, 2016, p. 7.

[111] Chiavario already underlined that Art. 7 was unsuitable to provide statutory reservation. M. CHIAVARIO, *La Convenzione europea dei diritti dell'uomo nel sistema delle fonti normative in materia penale*, Milano, 1969, p. 8 f. Likewise, Bricola stressed the absence of references to the statutory reservation in Art. 7, because of its relative importance in the various political-institutional background of the Member States. F. BRICOLA, *La discrezionalità nel diritto penale*, Milano, 1965, p. 290.

rise to potential conflicts between European and domestic law. In particular, this emerges when the concept of law 'ignores' the statutory reservation; it considers case-law among the sources of incrimination and punishment; and, by extension, it refers the retroactivity or foreseeability assessment to judge-made law.[112]

Since the effective safeguard against arbitrary prosecution and punishment is the core of the principle, any legal basis has to ensure legal certainty.[113] Therefore, the judges in Strasbourg rather focus on the principle of effectiveness and interpret the Convention accordingly, neglecting national differences on the legitimate sources of the criminal law and the separation of powers.[114]

The first possible contrast with the national statutory reservation is the possibility to include delegated legislation or regulations within the legitimate sources. According to the jurisprudence of the Court, written law must not necessarily be issued by Parliament, as lower enactments are also accepted.[115] In the criminal matter, the Court considered executive orders as part of the legitimate legal basis for incrimination in the case of *Custers Deveaux and Turk v. Danemark*.[116] The Court once again disregards the 'democratic' component of legality: the absolute or relative statutory reservation, as well

[112] Before the development of relevant Art. 7 ECHR case-law, some scholars in Germany interpreted Art. 7 ECHR as only encompassing written law (*geschriebener Rechtssatz*) and excluding unwritten law. According to them, the status of written law, whether a formal statute or a regulation, was irrelevant. This strict interpretation was due both to the misuse of legality during the National Socialist regime and to the wide interpretation of Art. 103 II GG. H. SCHORN, *Die Europäische Konvention zum Schutze der Menschenrechte und Grudfreiheiten*, Frankfurt a.M., 1965, p. 237. Even if considering this approach comprehensible under the historical point of view, Chiavario held the methodology beneath these opinions for incorrect. The historical background and the rationale of the Convention were completely different from the correspondent provisions regulating criminal law sources in continental legal orders. Consequently, the inclusion of unwritten law in the interpretation of Art. 7 ECHR was acceptable. M. CHIAVARIO, *La Convenzione europea dei diritti dell'uomo nel sistema delle fonti normative in materia penale*, cit., p. 90-92. Appel highlighted the general reach of Art. 7 ECHR, E. APPEL, *Die Europäische Konvention zum Schutze der Menschenrechte und Grundfreiheiten in ihrer Bedeutung für das deutsche Strafrecht und Strafverfahrensrecht*, Marburg, 1961, p. 95-96.

[113] Similarly, Esposito affirms that the main issue in European legality is the possibility to recognise the law and the consequences of one's actions. A. ESPOSITO, *Il diritto penale "flessibile". Quando i diritti umani incontrano i sistemi penali*, Torino, 2008, p. 303-305.

[114] R. CHENAL, *Il principio di legalità e la centralità dei diritti fondamentali*, cit., p. 66.

[115] ECtHR, Barthold v. Germany, 25 March 1985, no. 8734/79, para. 46 (on art. 10 ECHR).

[116] In the present case, the applicants were Greenpeace activists who claimed the violation of Art. 7 ECHR because the prohibition of trespassing in the military zone and the exact definition of the military zone in the part of Greenland they were protesting in was established by 'executive orders' of an administrative authority. In their understanding, these executive orders were not a proper 'law' in the sense of the Convention. On the contrary, the Court considered executive orders a legitimate legal basis. ECtHR, Custers, Deveaux and Turk v. Danemark, 3 May 2007, no. 11843/03, 11847/03 and 11849/03, para. 83.

as the problem of 'blank criminal norms' are not part of the scope of application of the Convention.[117]

The second relevant point is the inclusion of case-law in the relevant definition of law. In a first phase, the Court quoted its precedent, referring to the autonomous concept of law in Art. 8-11 ECHR, and stated that law is also what judges recognise as such. In the Court's understanding, the law as it lives in courts ensures the possibility to be aware of criminal offences and penalties, rather than the wording of written provisions. In this phase, represented by the case of *Kokkinakis v. Greece*, the Court moves from the interpretation of the word *law* used at Art. 9 ECHR, which was one of the violations claimed by the applicant, and transposes it in the assessment of the alleged violation of Art. 7 ECHR. With regards to a civil law country, the Strasbourg judges consider case-law concerning a written provision to be part of the Court's scrutiny, as

> 'the wording of many statutes is not absolutely precise. The need to avoid excessive rigidity and to keep pace with changing circumstances means that many laws are inevitably couched in terms which, to a greater or lesser extent, are vague […]. The interpretation and application of such enactments depend on practice. In this instance there existed a body of settled national case-law […]. This case-law, which had been published and was accessible, supplemented the letter of section 4 and was such as to enable Mr Kokkinakis to regulate his conduct in the matter'.[118]

Recalling the principles enshrined in Art. 9 ECHR, the Court then measures the clarity of the criminal provision, which must results 'from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him liable'.[119] It is reasonable to conclude that, in this first approach, the Court was cautiously using national case-law as a complementary, but necessary

[117] The possible tensions between statutory reservation and the European *nullum crimen* have been thoroughly debated in literature. With regard to European legislation C. GRANDI, *Riserva di legge e legalità penale europea*, cit., p. 84 and more specifically on the possible contrasts with EU legislation at p. 131, C. CUPELLI, *La legalità delegata. Crisi e attualità della riserva di legge in materia penale*, Napoli, 2012, p. 171 ff. and 281 f. See also A. BERNARDI, *All'indomani di Lisbona*, cit., p. 60-61, who suggests a formal recognition of the statutory reservation at EU level through the combination of the maximum standard, better law and prevailing orientation criteria, referring to the validity of the principle in the common constitutional tradition of the Member States. He argues that the statutory reservation is the most advanced level of protection among European States in this regard (maximum standard), that the necessity of an enactment by Parliament for the criminal law is widespread among Member States (prevailing orientation) and that the inclusion of the principle at EU level would be more convenient because it would prevent the States to object to EU penal legislation in this regard (better law).

[118] ECtHR, Kokkinakis v. Greece, 25 May 1993, 14307/88, para. 40.

[119] ECtHR, Kokkinakis v. Greece, 25 May 1993, 14307/88, para. 51-53.

source to assess the legal basis. Nevertheless, the legal basis in *Kokkinakis v. Greece* is still the written law.[120]

Later on, the cases of *S.W. v. the United Kingdom* and C.*R. v. the United Kingdom* affirmed the equivalence between written and unwritten law. The situation was identical to the case *Sunday Times*. The Court had to face the problem of a mere common law precedent as legal basis, with no chances to refer to written legislation. At the time, the Court dealt with two applications complaining about the violation of Art. 7 ECHR. In both cases, the retrospective application of an overruling allegedly violated the principle of non-retroactivity. Leaving the question of non-retroactivity aside, the legal basis which the Court had to deal with was not statutory law. The subject matter of the case was the marital rape exemption, foreseen in a precedent reported by Sir Matthew Hale in his 1736 *History of the Pleas of the Crown*, and its judicial applications after 1888, then overruled by the English courts at the beginning of the 1990s. Like in the case of *Sunday Times*, the judges affirmed that, as long as Art. 7 ECHR provided for criminal offences to have a legal basis prior to their commission, the individual must know, from the wording of the provision and, if necessary, from the interpretation of the courts, which acts could imply his criminal responsibility.

> 'The Court thus indicated that when speaking of "law" Article 7 (art. 7) alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises written as well as unwritten law and implies qualitative requirements, notably those of accessibility and foreseeability […]'.[121]

According to the Court, even in criminal law judicial interpretation is an inevitable component of the legal process, in order to clarify unclear concepts and adapt the law to the evolution of the context.[122] The crucial point is the inherence of judge-made law to the legal tradition of the Convention States (including, but not limited to the United Kingdom) as 'the progressive development of the criminal law through judicial law-making is a well-entrenched and necessary part of legal tradition'.[123] Therefore, the definition of the sufficient legal basis must not outlaw the 'gradual clarification of the rules of criminal liability through judicial interpretation from case to case', as long as the

[120] See A. ESPOSITO, *Il diritto penale "flessibile",* cit., p. 303-304.
[121] ECtHR, S.W. v. the United Kingdom, 22 November 1995, no. 20166/92, para. 35 and ECtHR, C.R. v. the United Kingdom, 22 November 1995, no. 20190/92, para. 33.
[122] ECtHR, S.W. v. the United Kingdom, 22 November 1995, no. 20166/92, para. 36 and ECtHR, C.R. v. the United Kingdom, 22 November 1995, no. 20190/92, para. 34.
[123] ECtHR, S.W. v. the United Kingdom, 22 November 1995, no. 20166/92, para. 36 and ECtHR, C.R. v. the United Kingdom, 22 November 1995, no. 20190/92, para. 34.

consequent development is consistent with the essence of the offence and could be reasonably foreseen.[124] Again, a very broad notion of law is required in order to enhance effectiveness, which is the ultimate objective of the State in all its manifestations (judiciary, legislative, executive).

Considering case-law and judicial interpretation in the assessment of the legal basis and in the evaluation of its compliance with the quality of the law has been a consistent feature in the Court's interpretation since then.[125] On the contrary, critical commentators claimed that the substantive definition of law should only concern common law countries because of their specificities, while continental States maintain written law as only legitimate source.[126]

Regardless of criticism, a predictable development of this jurisprudence was the inclusion of case-law into the assessment of the legal basis even in cases concerning continental State. In the case of *Pessino v. France*, the Court considered a judge-made legal basis in order to assess the violation of Art. 7 ECHR, moving forward from the idea that case-law is complementary to written law.[127] The retroactivity of the law could in

[124] ECtHR, S.W. v. the United Kingdom, 22 November 1995, no. 20166/92, para. 36 and ECtHR, C.R. v. the United Kingdom, 22 November 1995, no. 20190/92, para. 34.

[125] ECtHR, Cantoni v. France, 11 November 1996, no. 17862/91, para. 32 'When the legislative technique of categorisation is used, there will often be grey areas at the fringes of the definition. This penumbra of doubt in relation to borderline facts does not in itself make a provision incompatible with Article 7 (art. 7), provided that it proves to be sufficiently clear in the large majority of cases. The role of adjudication vested in the courts is precisely to dissipate such interpretational doubts as remain, taking into account the changes in everyday practice. The Court must accordingly ascertain whether in the present case the text of the statutory rule read in the light of the accompanying interpretive case-law satisfied this test at the relevant time'. ECtHR, Başkaya and Okçuoğlu v Turkey, 8 July 1999, no. 23536/94, 24408/94, para. 36; ECtHR, Veeber v. Estonia (no. 2), 22 January 2003, no. 45771/99, para. 31-37; ECtHR, Coëme and others v Belgium, 22 June 2000, no. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, para. 145; ECtHR, Achour v. France, 29 March 2006, no. 67335/01, para. 55, where the Court, a few months before the case of *Pessino v. France*, considers the foreseeability of the law both according to the relevant statutes and to the case-law, recalling the *Cantoni* case definition of law.

[126] Koering Joulin criticises the extension of the broad definition of law to civil law countries and sees a paradox in the 'double role' assigned by the Court to judge-made law: both prohibiting excesses in judicial interpretation and considering it an essential element to clarify the wording of written provisions. R. KOERING-JOULIN, *Pour un retour à un'interprétation stricte…du principe de la légalité criminelle (À propos de l'article 7, 1° de la Convention européenne des droits de l'homme)*, in *Liber Amicorum Marc-André Eissen*, Bruxelles-Paris, 1995, p. 247 and 252.

[127] ECtHR, Pessino v. France, 10 October 2006, no. 40403/02, para. 32-34. The Court considered existing case-law by French courts, which qualified 'continuing building' despite a suspension order by an administrative judge as a criminal offence, before the judgment given in the case of the applicant. It looked for a judge-made legal basis for a criminal offence. On the acknowledgement of the normative power of the judge, O. BACHELET, *Les revirements de jurisprudence, problèmes d'application dans le temps (arrêt Pessino du 10 octobre 2006)*, in P. TAVERNIER (ed.), *La France et la Cour européenne des droits de l'homme: la jurisprudence en 2006*, Bruxelles, 2007, p. 166; K. LUCAS, *Revirements de jurisprudence et non-rétroactivité de la "loi" : la Cour européenne des droits de l'homme face au sempiternel problème de la rétroactivité naturelle des changements de cap jurisprudentiels*, in *Revue trimestrielle des droits de l'homme*, 2012, p. 750.

fact only be considered through an analysis of the French courts' jurisprudence. The same pattern repeated in two following cases concerning civil law countries, namely the cases of *Del Río Prada v. Spain*[128] and *Contrada v. Italy*.[129] In both alternatives, case-law of domestic courts was the legal basis to assess the foreseeability of the law.[130] The judicial orientations were considered the only relevant law and were treated as common-law precedents, in order to assess their succession in time. In addition, in the case of *Contrada v. Italy*, the Court considered the retroactive application of a criminal offence unforeseeable according to its classification as a judge-made criminal offence (*infraction d'origine jurisprudentielle*) and evaluated the precedents of the *Corte di Cassazione* as formulations of the offence. Apparently, the Court further developed this jurisprudence, considering the possibility of admitting a sort of common-law originated criminal offence in a civil law State. Although the latter statement in the *Contrada* case remained exceptional, the Court had no intention to affirm the prevalence of the common-law model of the sources of law in a civil law State. The intention was rather considering the multifaceted picture of the law in force in its effective reach. The Convention and the Court do not opt for a certain paradigm in the sources' system but rather follow a different point of view in the assessment of legality, simply focused on effectiveness.

5.3. International law as a legal basis and the 'scandalous' Art.7(2) ECHR.

Art. 7(1) ECHR provides that international law can prescribe criminal offences and penalties, as in Art. 11(2) UN Declaration. The definition of which sources of

[128] In the case of *Del Río Prada*, the legal basis on which the court was assessing foreseeability was the case-law of the *Tribunal Supremo* on the methods of calculation of the penalty, in order to apply an anticipated release of the detainee, in specific cases related to terrorism in the Basque region. ECtHR, Del Río Prada v. Spain, 21 October 2013, no. 42750/09, para. 112, E. MACULAN, *Il volto garantista di un principio di legalità flessibile. Considerazioni sulla sentenza «Del Río Prada c. Spagna» della Corte di Strasburgo*, in *Diritto penale XXI secolo*, 2013, p. 94 ff.

[129] In the case *Contrada*, the Court assessed the foreseeability of a so-called 'judge-made criminal offence' looking at the most important cases by the Italian *Corte di Cassazione* on the subject matter. Moreover, it considered the judgement of the *Corte di Cassazione* in its highest composition (*Sezioni Unite*) as a precedent declaring a new criminal offence ('external' participation in the offence/*concorso esterno*). Although the doctrine of the 'external' participation in the offence was based on two dispositions of the national criminal code (Art. 110 and 416 *bis* c.p.), the Court considered the evolution of case-law by domestic courts on the admissibility of the *concorso esterno* in criminal association offence as the legal basis. ECtHR, Contrada v. Italy (no. 3), 14 April 2015, no. 66655/13, para. 67 ff. For the debate on the legal basis for the aforementioned criminal offence see F. PALAZZO, *La sentenza* Contrada *e i cortocircuiti della legalità*, in *Dir. pen. proc*., 2015, p. 1062 and G. FORNASARI, *Un altro passo nella «riscrittura» della legalità? Appunti sulla sentenza Contrada*, in A. CAVALIERE, C. LONGOBARDO, V. MASARONE ET AL. (eds.), *Politica criminale e cultura giuspenalistica. Scritti in onore di Sergio Moccia*, Napoli, 2017, p. 449 f.

[130] ECtHR, Pessino v. France, 10 October 2006, no. 40403/02, para. 31. ECtHR, Del Río Prada v. Spain, 21 October 2013, no. 42750/09, para. 79 and 92. ECtHR, Contrada v. Italy (no. 3), 14 April 2015, no. 66655/13, para. 60.

international law can define crimes, as well as which crimes can be considered 'provided for by international law' is debated. Moreover, Art. 7(2) ECHR specifies that Art. 7 ECHR '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*'. It is therefore crucial to establish the definition of a legal basis in international law, and to distinguish it from the crimes recognised by *general principles of law*, as the latter are subject to the exceptional regime of Art. 7(2) ECHR.[131]

The general understanding is to link the reference to international law in Art. 7(1) ECHR to the so-called international crimes provided by the sources listed in Art. 38 of the Statute of the International Court of Justice (ICJ St.). The most relevant sources include, in particular, international conventions and international custom, as well as the general principles of law recognised by civilized nations.[132] With regards to Art. 7(2) ECHR, some scholars consider the 'general principles of law' in Art. 7(2) ECHR having the same meaning as the identical expression used in Art. 38 ICJ St.[133]

Another interpretation of 'international law' in Art. 7(1) ECHR is limiting it to international instruments which have been transposed into national legal orders. Thus, the States could be confronted only with international sources implemented in their national system. Nonetheless, the wording of Art. 7(1) ECHR seems to contradict this interpretation, as the Convention appears to be satisfied with a mere provision at international level.[134]

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[131] V. MANES, *Art. 7*, in S. BARTOLE, P. DE SENA, V. ZAGREBELSKY (eds.), *Commentario breve alla Convenzione europea per la salvaguardia dei diritti dell'uomo e delle libertà fondamentali,* Padova, 2012, p. 277.

[132] Art. 38(1) ICJ St. reads '1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; international custom, as evidence of a general practice accepted as law; the general principles of law recognized by civilized nations; subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law'.

[133] A. BERNARDI, *Art. 7*, cit., p. 268. The reference to the 'general principles of law' in para. 2 is considered the same as in Art. 38 of ICJ St. by D. HARRIS, M. O'BOYLE, C. WARBRICK, *Law of the European Convention on Human Rights*, cit., p. 501.

[134] P. VAN DIJK, F. VAN HOOF, A. VAN RIJN, L. ZWAAK (eds.), *Theory and Practice of the European Convention on Human Rights*, Cambridge – Antwerp – Portland, 2018, p. 664. A. BERNARDI, *Art. 7*, cit., p. 269. See also the Swedish delegation's remark in the *travaux préparatoires*, EUROPEAN COMMISSION OF HUMAN RIGHTS, *Preparatory Work on Art. 7 of the European Convention on Human Rights,* 21 May 1957, Doc. DH (57) 6, p. 4, Doc. A.777, see *above*, para. 1.2.1. On the opposite, international law is considered as a valid legal basis even if it is not part of national law, according to the German Border Guard cases,

With regards to which crimes can be considered 'provided for by international law', the common opinion is to refer to international crimes *stricto sensu* (i.e. genocide, crimes against humanity, war crimes, crime of aggression). The question of their legal basis is controversial both *per se* and in the application of Art. 7 ECHR. International crimes are now defined in many treaties, although they are not yet unanimously part of international customary law, such as the Convention on the Prevention and Punishment of the Crime of Genocide or the Geneva Conventions. Moreover, in 2002 the founding treaty of the International Criminal Court includes a definition of, genocide, crimes against humanity, war crimes, and now crime of aggression), defining the jurisdiction *ratione materiae* of the Court. The actual legal basis of international crimes in conventional sources could solve the questions arising from the application of Art. 7(1) ECHR in respect of international law. Nonetheless, the cases involving international crimes and international law often concern crimes committed during the Second World War or immediately after, and therefore when international crimes were not codified. Moreover, their scope of application and the definition of their constitutive elements were still uncertain or there were discrepancies between national law interpretation and international development of international crimes. [135] In addition, the reference to international law was usually made

although the precedent was not considered fully convincing. D. HARRIS, M. O'BOYLE, C. WARBRICK, *Law of the European Convention on Human Rights*, cit., p. 498.

[135] The case of *Kolk and Kislyiy v. Estonia* was about a conviction for crimes against humanity for the deportation of Estonian civilian population by soviet officers in 1949. The Court's reasoning focused on the provision of crimes against humanity in the 1946 Charter of the IMT, on the prohibition of statutory limitation for those crimes according to the respective Convention, signed by Estonia in 1991 and on the universal validity of the IMT Charter, disregarding the conflicting provisions of Soviet law at the time. The legal basis was identified in the 1994 Estonian criminal code article. Moreover, the Court does not distinguish between the provision in international law in Art. 7(1) ECHR and the general principles of Art. 7(2) ECHR, which are recalled in the reasoning. ECtHR, Kolk and Kislyiy v. Estonia, 17 January 2006, no. 23052/04, 24018/04, (the law). Renzikowski and Cassese substantially agree with the Court's assessment, although they deem that the indissoluble link between crimes against humanity and armed conflict in 1949 was still required (to be committed *in connection with* or *in execution of* war crimes or crimes against peace) and ignored by the Court in its reasoning. Nevertheless, they both deemed it applicable. Another controversial point was the reference to Art. 7(2) ECHR, as Cassese considered that the Nuremberg principles were international law according to Art. 7(1) ECHR and that in 1949 the prohibition of crimes against humanity was not a general principle. See J. RENZIKOWSKI, *Coming to Terms with One's Past: the Strasbourg Court's Recent Case-Law on Article 7 ECHR and Retroactive Criminal Liability*, in *European Yearbook on Human Rights*, 2010, p. 260 f. and A. CASSESE, *Balancing the Prosecution of Crimes Against Humanity and the Non-Retroactivity of Criminal Law*, in *Journal of International Criminal Justice*, 2006, p. 413 ff. See also ECtHR, Penart v. Estonia, 24 January 2006, no. 14685/04, (the law). In the case of *Kononov v. Latvia*, a Soviet partisan was convicted for war crimes committed in 1944 against Latvian civilians who had collaborated with the German occupant. The Court found war crimes to have a legal basis in international customary law in 1944, listing a series of sources that built an international law definition of the crimes at the time. Therefore, the Court considered the application of Art. 7(2) ECHR unnecessary. Scholars have been very critical towards the identification of a sufficient legal basis mostly in *ius in bello*. Moreover, the crucial point that made the Grand Chamber reverse the judgement of the Chamber was the classification of the victims as civilians who take part in the conflict, but *hors de combat* at the time of the offence, making war crimes applicable. ECtHR, Kononov v. Latvia, 17 May 2010, no. 36376/04, para. 196

for prosecuting crimes which were not disciplined by national law at the time the acts were committed, thus enabling the States to circumvent non-retroactivity of criminal law through the reference to international law.[136] Consequently, the identification of a correct legal basis and the definition of 'international law' pursuant to Art. 7(1) ECHR is decisive when dealing with international crimes.

The definition of 'international law' according to Art. 7(1) ECHR leads to the debate on Art. 7(2) ECHR. The provision of Art. 7(2) ECHR is linked to the inclusion of international law in Art. 7(1) ECHR, as the two provisions 'are interlinked and are to be interpreted in a concordant manner'.[137] The exception of Art. 7(2) ECHR is often criticised by scholarship, as it is considered a threat to absolute legality, at the point of defining it 'scandalous'.[138] Although the scope of application of this provision is debated, the *travaux préparatoires* are quite unambiguous. The application of Art. 7(2) ECHR is limited in time and space, since its purpose is specifying that Art. 7 ECHR does not affect the laws that were passed after the Second World War in order to punish war crimes.[139]

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ff., E. FRONZA, M. SCOLETTA, *Corti regionali, crimini internazionali e legalità penale: spunti (e problemi) a partire dal caso* Kononov, in *ius17@unibo.it*, 2012, p. 87.

[136] In the case of *Korbely v. Hungary* the Court, finding a violation of Art. 7, considered that the acts committed by the applicant (multiple killings during the 1956 Hungarian revolution) did not amount to crimes against humanity as they were understood in 1956, since the elements of war and discrimination or persecution of an identifiable group were considered necessary requirements for the existence of the crime. ECtHR, Korbely v. Hungary, 19 September 2008, no. 9174/02, para. 78 ff. See also W. SCHABAS, *Synergy or Fragmentation: International Criminal Law and the European Convention on Human Rights*, in *Journal of International Criminal Justice*, 9, 2011, p. 617. According to Mariniello, the *Kononov* and *Korbely* cases were a turning point in the ECtHR jurisprudence, which became stricter asking for a clear legal basis even in international criminal law. T. MARINIELLO, *The Nuremberg Clause and beyond: Legality Principle and Sources of International Criminal Law in the European Court's Jurisprudence*, in *Nordic Journal of International Law*, 82, 2013, p. 234 f. Similarly, in *Jorgic v. Germany* the broad concept of genocide applied by the German courts to convict the applicant for his acts in the former Yugoslavia was considered inconsistent with the interpretation of the ICTY and ICJ at the time of the offence but still foreseeable according to several authorities going in the opposite direction. The debate concerned the interpretation of the 'intent to destroy', which was broadly interpreted by German Courts in order to include the intent to destroy the group as a social unit, not necessarily in a physical or mental sense. ECtHR, Jorgic v. Germany, 12 July 2007, no. 74613/01, para. 103 ff. In the case of *Vasiliauskas v. Lithuania*, the Court examined both international treaty law and international customary law in order to assess a legal basis for a broader definition of genocide in 1953 than the one of Article II of the 1948 Genocide Convention, encompassing political groups as well. ECtHR, Vasiliauskas v. Lithuania, 20 May 2015, no. 35343705, para. 169-178. See K. AMBOS, *The Crime of Genocide and The Principle of Legality Under Art. 7 of the European Convention on Human Rights*, in *Human Rights Law Review*, 17, 2017, p. 175 ff. and H. VEST, *Völkermord durch Tötung zweier litauischer Partisanen*, in *ZIS*, 2016, p. 487 ff. With an overruling the Court considered the legal basis existent for a case of 1956, that will be discussed in the following. ECtHR, Drėlingas v. Lithuania, 12 March 2019, no. 28859/16, para. 16 ff.

[137] ECtHR, Kononov v. Latvia, 17 May 2010, no. 36376/04, para. 186. ECtHR, Tess v. Latvia, 3 December 2002, no. 34854/02, (en droit).

[138] M. GALLO, *Le fonti rivisitate. Appunti di diritto penale*, Torino, 2017, p. 84 f.

[139] The judgement *Kononov v. Latvia* highlights the understanding in the *travaux préparatoires*: 'Having regard to the subject matter of the case and the reliance on the laws and customs of war as applied before and during the Second World War, the Court considers it relevant to observe that the *travaux préparatoires*

According to Jescheck, this provision is a *Zweckformel* (functional formula) to legitimate the legal assumptions of the IMT, dealing with crimes against peace, war crimes and crimes against humanity, which had no legal basis in written law at the time they were committed but were part of the general principles of law recognised by civilised nations.[140] Conversely, Mariniello points out that the majority of scholarship opts for a broader scope of Art. 7(2) ECHR to international crimes in general.[141]

In this respect, the Court applied the exception of Art. 7(2) ECHR only in relation to crimes committed during the Second World War and to war-related crimes, in order not to impede the retroactive application of criminal law in those cases (*De Becker v. Belgium*, *Trouvier v. France*, *Papon v. France*).[142] As mentioned above, if a case now deals with international crimes, the Court usually resorts to the reference to 'international law' in Art. 7(1) ECHR. Therefore, Art. 7(2) ECHR is often disregarded, although its abstract scope of application could theoretically go beyond the crimes committed during the Second World War.[143]

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to the Convention indicate that the purpose of the second paragraph of Article 7 was to specify that Article 7 did not affect laws which, in the wholly exceptional circumstances at the end of the Second World War, were passed in order to punish, inter alia, war crimes so that Article 7 does not in any way aim to pass legal or moral judgment on those laws (see X. v. Belgium, no. 268/57, Commission decision of 20 July 1957, Yearbook 1, p. 241). In any event, the Court further notes that the definition of war crimes included in Article 6 (b) of the Charter of the IMT Nuremberg was found to be declaratory of international laws and customs of war as understood in 1939' ECtHR, Kononov v. Latvia, 17 May 2010, no. 36376/04, para. 186.

[140] H.H. JESCHECK, *Die europäische Konvention zum Schutze der Menschenrechte und Grundfreiheiten*, in *NJW*, 1954, p. 783-786, in particular p. 785.

[141] T. MARINIELLO, *The Nuremberg Clause and beyond*, cit., p. 230.

[142] The European Commission of Human Rights declared the inadmissibility of cases concerning war crimes, treason and collaboration with the enemy, punished after the end of the war pursuant to (retroactive) national provisions: EComHR, De Becker v. Belgium, 9 June 1958, (the case of a journalist convicted for collaboration with the enemy and to whom retroactive accessory penalties were applied, which were considered lawful by the Commission), and similarly EComHR, X. v. Norway, 30 May 1961, EComHR, X. v. Belgium, 18 September 1961. Later, Art. 7(2) ECHR was ambiguously used to legitimate the prosecution of people collaborating with Nazi occupants for crimes against humanity: in *Touvier v. France*, the prohibition of time-barring crimes against humanity was applied retroactively to the acts of the applicant and the scope of application of Art. 7(2) ECHR was extended to crimes against humanity. The case regarded the killings of French civilians by a French officer during the German occupation. EComHR, Touvier v. France, 13 January 1997, no. 29420/95, para. 2 (the law). In the case of *Papon v. France*, on the aiding and abetting murder and abuse of power of a secretary-general of the prefecture in the deportation of Jews to Auschwitz, the Court concluded similarly, affirming that crimes against humanity were included in the scope of Art. 7(2) ECHR and that they could not be time-barred. ECtHR, decision, Papon v. France, 15 November 2001, no. 54210/00, (the law).

[143] In the case of *Kolk and Kislyiy v. Estonia*, there was still reference to the exception of Art. 7(2) ECHR, considering the crimes against humanity part of the general principles of law. Nevertheless, the Court considered crimes against humanity having a legal basis in international law and applied Art. 7(1) ECHR instead. In the following judgements (i.e. *Kononov v. Latvia*), the reference to Art. 7(2) ECHR was disregarded in favour of Art. 7(1) ECHR, even if the crime did not have any legal basis in national and international law (*Korbely v. Hungary*). D. HARRIS, M. O'BOYLE, C. WARBRICK, *Law of the European Convention on Human Rights*, cit., p. 502. Some scholars were critical, as they considered it more honest

With regard to the recent non-application of Art. 7(2) in favour of Art. 7(1) ECHR, some scholars have attributed a complementary character to Art. 7(2) ECHR. Thus, Art. 7(2) ECHR is not an autonomous provision, since it only clarifies Art. 7(1) ECHR, when international crimes are provided for by international law. Emmerson and Ashworth confine the rationale of Art. 7(2) ECHR in specifying that the sources of international law, pursuant to Art. 7(1) ECHR, also include the general principles of law. Consequently, they diminish the ground-breaking role of the exception to *nullum crimen*.[144]

Although this exceptional provision was applied very rarely and mainly in the first years after the war, it has often been considered a breakthrough in *nullum crimen*, as it placed written law and general principles of law on the same level.[145] Some scholars pointed out that Art. 7(2) ECHR, if interpreted differently than in the intention of the drafters, could open to the possibility of broader and worrying exceptions to the principle of legality.[146] Although crimes under general principles of law recognised by all civilised nations are usually identified with international crimes, some scholars suggest including transnational crimes or crimes violating fundamental rights such as torture as well.[147]

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to simply apply Art. 7(2) ECHR in the case of *Kononov v. Latvia*. E. FRONZA, M. SCOLETTA, *Corti regionali, crimini internazionali e legalità penale*, cit. p. 87.

[144] A. ASHWORTH, A. MACDONALD, B. EMMERSON, *Human Rights and Criminal Justice*, London, 2001, p. 292. Esposito expresses a similar view and motivates her statement by reference to the case-law of the Court on the inadmissibility of the cases involving Art. 7(2) ECHR. A. ESPOSITO, *Il diritto penale "flessibile"*, cit., p. 319 f.

[145] H. SCHORN, *Die Europäische Konvention zum Schutze der Menschenrechte und Grudfreiheiten*, Frankfurt a.M., 1965, p. 241 f. Besides, Germany ratified the Convention with the reservation that Art.7(2) ECHR could be adopted only in compliance with Art. 103 *Abs.* 2 GG, reaffirming the absolute validity of the latter. According to Jescheck, even in absence of the reservation, Art. 7(2) ECHR would give pace to the higher standard of protection guaranteed by the German *Grundgesetz*, that should be accorded primacy under the *Günstigkeitsprinzip* in the Convention. H.H. JESCHECK, *Die europäische Konvention zum Schutze der Menschenrechte und Grundfreiheiten*, in *NJW*, 1954, p. 785.

[146] Gallo sees Art. 7(2) ECHR as a risk for constitutional legality, especially because motivated by the reasons of the victors of the war. The non-application of this exception is due to the fact that the scope of application of Art. 7(1) ECHR is limited to objective and subjective elements of the offence and penalty. In opposition, other important elements of the offence are considered procedural law and therefore excluded from the substantive criminal law safeguard. Furthermore, Gallo warns against the risk of manipulation of Art. 7(2) ECHR by national courts, that could extend the meaning of crimes pursuant to the 'general principles of law' with worrying results, as in the example of the 'crimes protecting transnational interests' by the Italian *Corte di Cassazione* (Cass. pen., II, 11 February 2016 (12 April 2016), no. 15107). M. GALLO, *Le fonti rivisitate*, cit., p. 87 ff. Although very concerned by the threats to legality represented by the interpretation of Art. 7 ECHR, Valentini identifies its weakness in the too broad concept of foreseeability, which is the real reason why the exception of Art. 7 (2) ECHR has been disregarded. V. VALENTINI, *Diritto penale intertemporale. Logiche continentali ed ermeneutica europea*, Milano, 2012, p. 143 f.

[147] According to Schabas, international law recognises several offences with transnational elements, such as drug trafficking, terrorism, piracy. However, he does not further develop the issue. W. SCHABAS, *The European Convention*, cit., p. 343 f. A logical consequence would be to include the fundamental principles in human rights law, such as the prohibition of torture and racial discrimination, according to P. VAN DIJK,

Furthermore, Art. 7(2) ECHR and its reference to the general principles of law seems to highlight a link between the principle of legality and morals. In this respect, the substantive conception of legality also requires the legal basis not only to be lawful, but also legitimate. *Ergo*, Art. 7(2) ECHR has been considered a non-exception to *nullum crimen*. In this understanding, when exceptionally serious crimes have been committed, Art. 7(2) ECHR shall ensure the prevalence of the law of nature above positive law.[148]

With regards to the link between legality and morality, the hard cases of *S.W. v. the United Kingdom* or the *Mauerschützenfälle* have also shown that there is a very strict relationship between the rule of law and morals in the conception of Art. 7 ECHR. The 'quality' of the law is not enough if the very essence of the legal basis is contrary to the object and scope of the Convention, which is the 'respect for human dignity and human freedom'.[149] Moreover, Art. 7(1) ECHR cannot justify state practice violating human rights, among which the right to life plays a prominent role. As a consequence, an inconsistent state practice on that note cannot be considered 'law' in the sense of the Convention.[150] Looking at the cases of *Streletz, Kessler and Krenz v. Germany* and *K.-H. W. v. Germany*, it seems possible to infer that a crime shall be defined as such by international human rights law, or that a legitimate legal basis is such only when compliant with international human rights.[151] These observations must be limited to

F. VAN HOOF, A. VAN RIJN, L. ZWAAK (eds.), *Theory and Practice of the European Convention on Human Rights*, cit., p. 666.

[148] In Soyer's opinion, one of the reasons to share this view on the nature of Art. 7 (2) ECHR is the case-law of the European Commission of Human Rights rejecting the applications of those accused of collaboration with the enemy or war crimes immediately after the war and according to statutes adopted subsequently. J.C. SOYER, *L'article 7 de la Convention existe-t-il?*, cit., p. 1345.

[149] An additional argument in the case of the marital rape exception was the impossibility to apply the safeguard of Art. 7 ECHR in a way that would result in legitimating a legal framework inconsistent with the essential values protected by the Convention, such as freedom and human dignity. *De facto*, the Court legitimated the retrospective overruling by the English courts. ECtHR, S.W. v. the United Kingdom, 22 November 1995, no. 20166/92, para. 44.

[150] In the cases related to the killings at the German border, the Court estimated that, although the state practice of the GDR substantially legitimated those killings, the examination of the international law instruments in force (ratified and part of GDR law) and of national law, together with subjective foreseeability, led to a different conclusion, especially looking at the primary role of the right to life in the Convention. ECtHR, K.-H. W. v. Germany, 22 March 2001, no.37201/97, para. 87 ff. and in particular para. 90. The arguments of the Court seem to recall the considerations of Robert Alexy in his *Begriff und Geltung des Rechts*, where he states that law amounts to non-law if motivated by extreme injustice. R. ALEXY, *Begriff und Geltung des Rechts*, Freiburg i.B., 1992, p. 83.

[151] Although the case in question was unusual, because the former GDR code provided that those who violated the Democratic Republic's international obligation were criminally responsible, the first view is shared by D. HARRIS, M. O'BOYLE, C. WARBRICK, *Law of the European Convention on Human Rights*, cit., p. 498. For the second interpretation, see E. NICOSIA, *Convenzione europea dei diritti dell'uomo e diritto penale*, Torino, 2010, p. 69.

exceptional cases, where the violation of fundamental rights is objective and particularly serious.[152]

While this concept may work in some legal models, it seems entirely unacceptable for the strong positivist model of civil law. Conversely, the relationship between law and morality is explicit in common law and the debate on the role of justice in respect of criminal law guarantees has been very lively.[153]

6. Antinomies between national principles and the European definition of law.

Apparently, the substantive definition of law and the role of unwritten law in the Convention leave no common ground for dialogue, especially with civil law States. The Court seems to have made a different choice in the legitimate sources of criminal law, militating against the national statutory reservation.[154] Although this criticism seems to be acceptable, a more thorough analysis and understanding of the ECtHR's jurisprudence could lead to different results, and could make the two legality paradigms dialogue.

First of all, it is necessary to define the role of case-law and judicial interpretation in the definition of law, in order to try and explain the choice of the Court. Secondly, the traditional explanation of the 'compromise between common-law and civil law' will be discussed, as well as the explanation looking at the inclusion of case-law in the definition of law as a final recognition of the difference between 'disposition' and 'norm' in the General Theory of Law. In the end, a new rationale that will be suggested, pursuant to a proper European definition of legality, based on the foreseeability of the 'norm'. Having thoroughly examined the historical development of the definition of law in the Convention through an in-depth analysis of its case-law, the conclusions will concern the role of case-law and judicial interpretation.

[152] M. SCOLETTA, *La legalità penale nel sistema europeo dei diritti fondamentali*, cit., p. 227-231. According to Scoletta, the only way to apply the requirement of the substantive legitimacy of the legal basis is through a more precise definition of Art. 7(2) ECHR, which is at the moment not sufficiently foreseeable to determine when *nullum crimen* can recess in favour of other fundamental rights.
[153] A. ESPOSITO, *Il diritto penale "flessibile"*, cit., p. 379 f. R. ALEXY, *Mauerschützen. Zum Verhältnis von Recht, Moral und Strafbarkeit*, Hamburg, 1993, p. 22 ff. and his main contribution ID., *Begriff und Geltung des Rechts*, cit., p. 75 ff., aimed at defending the Radbruch formula in its legal sense, opposing the criticism (especially by Hart) that warned against a dangerous fusion between law and morals. G. VASSALLI, *Formula di Radbruch e diritto penale*, Milano, 2001, in the context of a debate with the work of Vassalli see G.A. DE FRANCESCO, *Crimini di Stato, filosofia politica, diritto penale*, in *Quaderni fiorentini per la storia del pensiero giuridico moderno*, XXX, 2001, p. 787 ff. On the debate between law and morality see *infra*, Chapter 3, para. 4.7.3.
[154] See *above*, para. 5.2.

On the one side, case-law is accessory to the legal basis, meaning that judicial interpretation represents one of the components of the legal basis considered by the Court in order to assess its compliance with the Convention. In this respect, case-law has a descriptive value. Judicial interpretation clarifies the content of a written provision. Its task is to dissipate doubts that could remain in legislation. Therefore, they are complementary to written provisions.[155] Judicial interpretation is a necessary element of the legal phenomenon, regardless of the precision of the written text. Especially when thinking of general clauses and formulation in legislation, case-law is inevitable in order to adapt the provision to the changing circumstances and an inevitably necessary element in the complex relationship with the legal basis.[156] Another point is the acknowledgement of case-law as a relevant part of the legal tradition, as a contribution to the gradual development of the criminal law.[157]

On the other hand, case-law can be the actual (and only) legal basis for incrimination and punishment. It must be consistent with the requirements of accessibility and foreseeability, in order to protect the need for clarity, safeguarded by Art. 7 ECHR.[158] As case-law can be a legal basis itself, and not only a complementary, clarifying element, a lack of accessibility and foreseeability in judicial interpretation may lead to a violation of Art. 7 ECHR, regardless of the continental or common law origin of the law.[159] Judicial

[155] 'There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances […]. The role of adjudication vested in the courts is precisely to dissipate such interpretational doubts as remain […]' ECtHR, Scoppola v. Italy (no. 2), 17 September 2009, no. 10249/03, para. 100-101; ECtHR, Kafkaris v. Cyprus, 10 February 2008, no. 21906/04, para. 141, ECtHR, S.W. v. the United Kingdom, 22 November 1995, no. 20166/92, para. 36. The clarity of the norm must result 'from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him liable' ECtHR, Kokkinakis v. Greece, 25 May 1993, 14307/88, para. 51-53. Moreover, case-law supplements (in the words of the Court) the letter of a statute and make the individual able to foresee the consequences of his/her actions. ECtHR, Kokkinakis v. Greece, 25 May 1993, 14307/88, para. 40.

[156] Inevitable element: ECtHR, Cantoni v. France, 11 November 1996, no. 17862/91, para. 31 (the wording of statues is not always precise and the interpretation depends on practice), ECtHR, Del Río Prada v. Spain, 21 October 2013, no. 42750/09, para. 92, ECtHR, Kafkaris v. Cyprus, 10 February 2008, no. 21906/04, para. 141, ECtHR, Dragotoniu et Militaru Pidhorni v. Romania, 24 May 2007, no. 77193/01 and 77196/01, para. 36.

[157] 'It is a firmly established part of the legal tradition of the States party to the Convention that case-law, as one of the sources of the law, necessarily contributes to the gradual development of the criminal law' ECtHR, Camilleri v. Malta, 22 January 2013, no. 42931/10, para. 37, ECtHR, Scoppola v. Italy (no. 2), 17 September 2009, no. 10249/03, para. 101, recalling the precedent in ECtHR, Kruslin v. France, 24 April 1990, no. 11801/85, para. 29.

[158] The law in force in a legal system is a combination of statute and case-law. ECtHR, Kruslin v. France, 24 April 1990, no. 11801/85, para. 28.

[159] ECtHR, Pessino v. France, 10 October 2006, no. 40403/02, para. 35-36, ECtHR, Dragotoniu et Militaru Pidhorni v. Romania, 24 May 2007, no. 77193/01 and 77196/01, para. 43-44, ECtHR, Alimuçaj v. Albania, 7 February 2012, no. 20134/05, para. 156 ff., ECtHR, Contrada v. Italy (no. 3), 14 April 2015, no. 66655/13, para. 67-74.

interpretation is consequently the very object of adjudication, and is regarded as a source of law.[160]

The nature of the subjects addressed by the obligation to comply with the Convention could explain the comprehensive approach described in the previous paragraph. Differently from national States, where the assessment of legality by a Constitutional Court addresses the formulation of statutory law and it is essentially a judgement on the statute (and not on the individual right), in the Convention the obligation falls over all State components; i.e. legislative, judiciary, executive. The Convention is not directed at limiting a specific State power, as it is not interested in the rationale of separation of powers. It rather assesses whether a fundamental right has been violated and whether the State was responsible. While looking at State responsibility, it evaluates which State power has caused the violation and therefore can be held responsible thereof. The Court assesses the concrete application of the law, regardless of the judicial, legislative or executive nature of the State power involved. Therefore, the object of the Court's scrutiny is the law *in concreto*.[161]

6.1. The traditional reading: compromise between common law and civil law.

Traditionally, both the Court and scholars believe that the substantive definition of law in the Convention is a compromise between civil law and common law systems, for the Court has to judge applications coming from 47 States with as many legal orders. The same leading cases *Sunday Times* and *S.W. v. the United Kingdom* highlighted the necessity not to undermine at their roots the common law legal orders with a too-strict definition of law, thereby depriving common law States of the protection of the Convention.[162] The Court also explicitly affirmed that it was not its duty to decide on the nature of a judge-made rule in a continental state, and on its equivalence with a statute.[163]

[160] Here 'source of law' is used in a descriptive meaning, not in the sense of the architecture of legal sources in a given legal order.

[161] 'The principle of lawfulness also presupposes that the applicable provisions of domestic law are sufficiently accessible, precise and foreseeable in their application' ECtHR, Broniowski v. Poland, 22 June 2004, no. 21443/96, para. 147, ECtHR, Elberte v. Latvia, 13 January 2015, no. 64243/08, para. 114, quoted by R. CHENAL, *Il principio di legalità e la centralità dei diritti fondamentali*, cit., p. 58; V. ZAGREBELSKY, *La Convenzione europea*, cit., p. 71.

[162] ECtHR, the Sunday Times v. the United Kingdom, 26 April 1979, no. 6538/74, para. 47. ECtHR, S.W. v. the United Kingdom, 22 November 1995, no. 20166/92, para. 35. V. ZAGREBELSKY, *La Convenzione europea*, cit., p. 77.

[163] In the case of *Belvedere Alberghiera s.r.l. v. Italy*, the Court had to decide whether the Italian judge-made rule on constructive-expropriation was an accessible and foreseeable legal basis for the asserted infringement in Art. 1 Prot. 1 ECHR. The Court then solved the problem referring to accessibility and

Moreover, scholarship often criticised the introduction of case-law into the notion of law with respect to continental States. According to this scholarship, it was advisable to differentiate common law and civil law States in the assessment of what is law and in the evaluation of a possible violation, because including case-law was reasonable only for common law systems.[164] Furthermore, the influence of the looser version of the principle of legality in the United Kingdom would have represented a step backwards.[165] In particular, it would be inappropriate to accept a correspondence between written and unwritten law, although some scholars saw this evolution of the interpretation of the law as an inevitable consequence of the importance of judicial interpretation in the Court's assessment.[166]

Another possible remark is the actual convergence of civil law and common law systems in relation to criminal law sources. While in civil law States the courts gain more and more importance, in common law countries statutory law tends to regulate more and more areas of the criminal law.[167] The diffuse understanding and stereotype is that in the common law the judge is the main creator of law, while in continental States Constitutions assign this power to the legislator. Therefore, the role of the civil law judge is interpreting the law, within the limits of the written provision.[168]

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foreseeability of the law in general, without any further inquiry on the role of rules established by courts. ECtHR, Belvedere Alberghiera s.r.l. v. Italy, 30 May 2000, no. 31524/96, para. 57.

[164] Scholars were often sceptical after the controversial judgement in the case of the marital rape exemption, claiming for the application of the principle only to common law countries, without betraying the continental version of legality. R. KOERING-JOULIN, *Pour un retour à un'interprétation stricte…du principe de la légalité criminelle (À propos de l'article 7, 1° de la Convention européenne des droits de l'homme)*, in *Liber Amicorum Marc-André Eissen*, Bruxelles-Paris, 1995, p. 247; see also J.C. SOYER, *L'article 7 de la Convention existe-t-il?*, cit., p. 1337.

[165] Delmas-Marty criticises this objection, highlighting that the only reason for the inclusion of case-law in the notion of law is the transition from a formal version of legality to the 'quality of the law' paradigm. M. DELMAS-MARTY, *Légalité pénale et prééminence du droit selon la Convention européenne de sauvegarde des droits de l'homme et de libertés fondamentales*, in *Droit pénal Contemporain. Mélanges en l'honneur d'André Vitu*, Paris, 1989, p. 153-154.

[166] S. VAN DROOGHENBROECK, *Interprétation jurisprudentielle et non-rétroactivité de la loi pénale*, in *Revue trimestrielle des droits de l'homme*, 1996, p. 463 f.

[167] S. VINCIGUERRA, *Introduzione allo studio del diritto penale inglese: i principi*, Torino, 1992, p. 55 ff. Calamandrei observed the non-absolute distinction between the two systems, which combined their mutual characteristics. P. CALAMANDREI, *Appunti sul concetto di legalità*, in ID., *Opere giuridiche*, III, Napoli, 1967, p. 68.

[168] A. CADOPPI, *Il valore del precedente nel diritto penale. Uno studio sulla dimensione* in action *della legalità*, Torino, 2014, p. 77. The principle of legality is not expressly acknowledged in the British system, which has a non-written Constitution. In addition, courts do not assess it strictly. The current increasing attention towards it has taken place after the introduction of the Human Rights Act in 1998 and the growing importance of the European Convention. S. VINCIGUERRA, *Introduzione allo studio del diritto penale inglese: I principi*, Torino, 1992, p. 59 f. A. ASHWORTH, *Principles of Criminal Law*, Oxford, 2009, p. 58 ff. In the past, the principle was considered disregarded in practice. A.T.H. SMITH, *Judicial Law Making in the Criminal Law*, in *Law Quarterly Review*, 100, 1984, p. 75 f. On the other hand, the U.S. Constitution

Going beyond stereotypes, even at common law level, statutory law is gaining more and more importance in the criminal law since several decades.[169] As a matter of fact, the House of Lords gave up its declaratory power in the 1972 case of *Knuller v. DPP*.[170] In addition to that, the largest number of criminal offences is now ruled by statutes in England. Thus, even if the continental and common law legal systems show different features, there seems to be a finer line drawn between them.[171] Nevertheless, some voices in scholarship highlight the substantial difference of the systems as an intrinsic feature, which survives the current developments that seem to bring them together.[172]

It is now necessary to discuss whether these opinions can be shared. First of all, although the constitutional and comparative criticism are justified in the present case, the traditional explanation seems not to be fitting with the real question hiding behind the definition of law in the Convention. The rationale of the broad definition of law is not only inspired by a comparative approach, but rather by a substantive approach in the interpretation of the Convention, inspired by the principle of effectiveness and the object of the Convention, which is, ultimately, the protection of human rights. Therefore, the

affirms the principle of legality in Art. 1 para. 9 and 10, but its application is nevertheless dubious because of the existence of common law offences. S. ATRILL, *Nulla Poena Sine Lege in Comparative Perspective*, in *Public Law*, 2005, p. 110.

[169] S. VINCIGUERRA, *Introduzione allo studio del diritto penale inglese*, cit., 1992, p. 55-59, for the US system M.C. BASSIOUNI, *Diritto penale degli Stati Uniti d'America*, Milano, 1985, p. 24 ff.

[170] In the case of *Knuller v. DPP*, the House of Lords denied its power to declare the common law and to create or widen criminal offences (Knuller v. DPP, 1973, A.C. 435). It overruled its assessment in the case of *Shaw v. DPP*, where judge-made law was still considered declaratory, in order to avoid the problems of a creation of a new offence or of a retrospective overruling (Shaw v. DPP, 1962, A.C.220). On the contrary, the High Court of Justiciary in Scotland still declares the common law and is the most prominent example of an authentic judge-made criminal law. A. CADOPPI, *Il valore del precedente nel diritto penale*, cit., p. 80-81. A. CADOPPI, A. MCCALL SMITH, *Introduzione allo studio del diritto penale scozzese*, Padova, 1995, p. 81 ff., S. MANTOVANI, *Il carattere indipendente del diritto penale scozzese: dalla* common law *alla codificazione*, in *Indice Penale*, 2009, p. 795 ff., G. FORNASARI, A. MENGHINI, *Percorsi europei di diritto penale*, cit., p. 13. On the discussion about creativity in judicial law-making in respect of creation of new offences, defences and retroactivity, see A.T.H. SMITH, *Judicial Law Making in the Criminal Law*, in *Law Quarterly Review*, 100, 1984, p. 46 ff., 54 ff.

[171] Donini focuses on the growing importance of statutory law in common law systems and on the restrictive interpretive methods in criminal law. Nevertheless, Donini warns against too easy juxtapositions of the two systems and the too superficial statement on the import of the Anglo-Saxon 'culture of precedent' into continental law. The growing importance of judicial interpretation in the absence of good legislation must not be confused with a proper precedent rule in the higher courts. M. DONINI, An impossible exchange? *Prove di dialogo tra* civil e common lawyers *su legalità, morale e teoria del reato*, in *Riv. it. dir. proc. pen.*, 2017, p. 19.

[172] According to Valentini, common law States still show substantial differences: the loose version of retroactivity, the construction of the criminal law through courts (instead of its 'continental' interpretation), the intrinsic analogy in the distinguishing and the great uncertainty of the criminal law. For these reasons, the author considers continental legality a higher safeguard for the individual. V. VALENTINI, *Diritto penale intertemporale*, cit., p. 165 f. The still great law-making power of the House of Lords (today UK Supreme Court) is widely recognised and is due to the fact that the general principles of criminal law are still provided by the common law. A. CADOPPI, *Il valore del precedente nel diritto penale*, cit., p. 80.

inclusion of case-law in the assessment of the Court is due to the necessity not to give an easy excuse for the States to escape the jurisdiction of the Court. Moreover, the States themselves often quote case law in order to substantiate their argument and motivate the 'prescribed by law' clause.[173]

Secondly, the common constitutional traditions of Member States only correspond in the very core guarantees of legality and their essential features. Conversely, the specific contents of the principle are heterogeneous in Member States, and within continental States as well.[174] Therefore the effort to build a European definition of the principle cannot depend on national specificities, or on the national procedures governing the law-making process.[175] This is a typical case of European harmonisation of standards aimed at improving national guarantees, but not eroding the national 'margin of appreciation' and giving space to a higher protection by means of the statutory reservation.[176] In the end, the rationale is to affirm the pre-eminence of law on statutes, following the lesson of the Second World War.[177]

6.2. Another interpretation: the acknowledgement of the difference between 'disposition' and 'norm'.

Another common interpretation of the definition of law in the Convention is the acknowledgement of the distinction between 'disposition' and 'norm' according to the General Theory of Law. Since these terms are typical of continental law countries, a correspondence in the English language is hard to find and it is necessary to use the terms in a different meaning than ordinary. The terms 'disposition' (i.e. *Rechtssatz*, *disposizione*) and 'norm' (i.e. *Norm*, *norma*) are used indistinctly only in the common

[173] R. CHENAL, *Il principio di legalità e la centralità dei diritti fondamentali*, cit., p. 51 f.
[174] For example, while the Italian criminal system assigns great importance to the statutory reservation and thus the role of lower sources is highly problematic in criminal law, in the French legal system the creation of criminal offences through regulation is a commonly accepted principle (Art. 111-2 *code pénal*). X. PIN, *Droit pénal general*, Paris, 2018, para. 64 ff.
[175] M. SCOLETTA, *La legalità penale nel sistema europeo dei diritti fondamentali*, cit., p. 203. Sudre is favourable to the substantive definition of law, as it shows a certain realism of the Court. He also considers it motivated by the necessity of uniform interpretation of the Convention and a common heritage of principles. F. SUDRE, *Le principe de la légalité et la jurisprudence de la Cour européenne des Droits de l'Homme*, cit., p. 346.
[176] M. DELMAS-MARTY, *Les forces imaginantes du droit. I. Le relatif et l'universel*, cit., p. 64 ff. According to Sudre, the substantive definition of law is necessary to fulfil its original purpose: evaluating the lawfulness of possible restrictions to Art. 8-11 ECHR in all Member States. F. SUDRE, *Le principe de la légalité et la jurisprudence de la Cour européenne des Droits de l'Homme*, cit., p. 346.
[177] M. DELMAS-MARTY, *Légalité pénale et prééminence du droit selon la Convention européenne de sauvegarde des droits de l'homme et de libertés fondamentales*, in *Droit pénal Contemporain. Mélanges en l'honneur d'André Vitu*, Paris, 1989, p. 154.

language to indicate the wording of a statute. On the contrary, the theoretical distinction in the General Theory of Law is important as the disposition[178] refers to the voluntary act that disposes for a certain domain and that can be traced back to an authority. A 'disposition' is a formulation which is institutionally deputed to reveal and establish the so-called 'norm'. Conversely, the norm is placed at the level of the objectivity of law. The norm is focused on the consequences of the act and builds the objective law of the community.[179] In sum, the 'disposition' is the wording of the statutory provision, while the 'norm' is its concrete applied dimension.[180]

In light of this distinction, the European Court applies the principle of legality to the 'norm' in its entirety, i.e. to the provision as applied in practice, and does not limit its protection to statutes. This extension is particularly meaningful in the domain of retroactivity, given that in the national systems the judicial interpretations often remain detached from the guarantees of non-retroactivity. As a matter of fact, only statutes undergo the prohibition of retroactivity and must not be ultra-actively applied if they have been abolished.

Similarly, some scholars also observe that the European legality employs a more attentive approach towards the law in action, rather than the law in the books.[181] This

[178] The 'disposition' is the precept or imperative in the act (source). For example: the title of the statute is not part of it.

[179] V. CRISAFULLI, *Disposizione (e norma)*, in *Enc. Dir*., XIII, Milano, 1964, p. 195 ff., partially dissenting, R. GUASTINI, *Teoria e dogmatica delle fonti*, Milano, 1998, p. 136 ff. G. TARELLO, *L'interpretazione della legge*, Milano, 1980, p. 10 ff., F. MODUGNO, *Norma giuridica*, in *Enc. Dir*., XXVIII, Milano, 1978, p. 358 ff.

[180] Among criminal law scholars, the use of the opposition between 'disposition' and 'norm' is very important in Donini's scientific production: above all M. DONINI, *Il volto attuale dell'illecito penale*, Milano, 2004, p. 161 ff., and also ID., *Metodo democratico e metodo scientifico nel rapporto fra diritto penale e politica*, in *Riv. it. dir. proc. pen*., 2001, p. 27 ff., and, recently, ID. *Il diritto giurisprudenziale penale*, in *Riv. trim. dir. pen. cont*., 3, 2016, p. 17 f.

[181] In one of the most valuable studies on the importance of judicial law-making in the criminal law in the Italian legal system, Alberto Cadoppi uses the concept of 'law in the books' to describe the principle of legality in its theoretical and constitutional framework and the one of 'law in action' to describe the growing importance of judicial law-making in the 'real' legal world, in order to suggest a (partial) adoption of the rule of precedent. His analysis, in the new edition of the study of 2014, makes extensive reference to the concept of law in the ECHR and the paradigm of foreseeability to support his thesis on the convergence of common law and civil law States on legality. A. CADOPPI, *Il valore del precedente nel diritto penale*, cit., p. 195-198 and 202. The first scholar to use the well-known expression of the 'law in the books' in opposition to the 'law in action' was Roscoe Pound in 1910 in the *American Law Journal*. His article aimed at a wide and open analysis of American law in order to underline the development lines in the courts which went beyond the established common law. Pound's analysis was directed towards the common law and its almost sacred value in the American legal environment. His aim was opposite to the purpose of civil law scholars using the same concept: Pound's goal was an appeal not to stick to the ancient common law as an authority and refuse legal development in particular through statutory law, which, according to him expressed 'the spirit of the time'. R. POUND, *Law in the books and law in action*, in *Am. Law Review*, 44, 1910, p. 12 ff., 35-36.

interpretation is however a descriptive one. The concept of 'law in the books' and 'law in action' is used to describe the contrast (or equivalence) between the law in force and the law in its evolutive and practical reach in a certain legal system in a given period.[182] In this regard, the emphasis on the ECHR attention for the law in action is rather an acknowledgement of the actual meaning of the European legality rather than a way of justifying it or solving the possible antinomies with national law.

The supporters of an anti-formalistic approach to criminal law have also interpreted European legality through the lenses of hermeneutics.[183] In this light, European legality could represent the tension between the legal syllogism and the hermeneutic spiral as models not only for legal reasoning but also for criminal law in particular.[184] In hermeneutics[185] and legal pragmatism (in a more moderate sense), interpretation is the result of the interaction between text and context. Therefore, interpretation (which includes legal interpretation) has a constitutive value.[186] Strasbourg case-law in particular,

[182] As Pound clearly states, the nature of the law as a 'process of becoming' naturally causes differences between the law in the books and the law in action. Such divergences can be more relevant in certain historical periods (periods of growth) where the law is developing through the activity of the courts, as opposed to the periods of stability. R. POUND, *Law in the books and law in action*, in *Am. Law Review*, 44, 1910, p. 22. In the Italian criminal law scholarship, Francesco Palazzo underlines the divergence in the concrete expression of the principle of legality between the law in the books and the law in action. According to him, the Strasbourg Court, as well as the Italian Constitutional Court for some part, has stressed the importance of the safeguard of legality in the law in action, rather than in the books. As a result, the guarantees of legality are directed towards the practical application of the law rather than its legislative formulation. F. PALAZZO, *La legalità fra* law in the books *e* law in action, cit., p. 5-7.

[183] The terms formalism and anti-formalism are used to describe the opposite legal philosophical theories also known as cognitivism and anti-cognitivism. Formalist theories believe in the inherent meaning of the text and the 'discovery' role of judges, as well as the independence of the law from the context. In opposition, anti-formalist theories opt for a creative role of interpretation, meant in a descriptive sense, and a complete interdependent relationship between text and context. As Di Giovine reports in her work, the use of these terms is due to Vittorio Villa in V. VILLA, *Una teoria pragmaticamente orientate dell'interpretazione giuridica*, Torino, 2012, p. 76 s. ad 82. O. DI GIOVINE, *Antiformalismo interpretativo: il pollo di Russell e la stabilizzazione del precedente giurisprudenziale*, in *Riv. trim. dir. pen. cont*., 2, 2015, p. 12. A preference for the definition as cognitivism and anticognitivism can be found in R. GUASTINI, *Le fonti del diritto e l'interpretazion*e, Milano, 1993, p. 335 ff. There are also 'mixted theories', including both characteristics of formalism and antiformalism and based on Hart's theory of the 'open texture' of legal rules. V. VILLA, *La teoria dell'interpretazione giuridica tra formalismo e antiformalismo*, in *Etica e Politica*, 2006, p. 5 ff., H.L. HART, *The Concept of Law*, Oxford, 1961.

[184] O. DI GIOVINE, *Dal costruttivismo al naturalismo interpretativo? Spunti di riflessione in materia penale*, in *Criminalia*, 2012, p. 268 ff. Similarly, Donini affirms the essential nature of case-law as a source (in a descriptive sense) but limits his affirmation to hard cases. According to him, judges exercise a real creative power only in hard cases, that can be divided into problems of interpretation and problems of the application of the law. M. DONINI, *Il volto attuale dell'illecito penale*, cit., p. 159 ff. and ID., *Europeismo giudiziario e scienza penale*, Milano, 2011, p. 72 ff. Di Giovine responds to his remarks at p. 271.

[185] The use of the term 'hermeneutics' is limited to 'ontological hermeneutics' in philosophy and in particular the influence of Gadamer in the legal doctrine. H.G. GADAMER, *Wahrheit und Methode: Grundzüge einer philosophischen Hermeneutik*, Tübingen, 1960, *passim*.

[186] The text is created in its context and their relationship is circular. This common ground between hermeneutics and pragmatism is then followed by the specificity of hermeneutics, which theorises the subjective nature of interpretation and unveils the pre-comprehension behind the interpretation mechanism.

but also constitutionalism in criminal law, have shown the constitutive feature of interpretation in the criminal law as well.[187] Moreover, anti-formalism also seems to be the paradigm of the interpretation of law in the Convention as well because the normative system is a simple factual element in the ECtHR interpretation, which, together with other elements, can amount to a violation in a fundamental right.[188]

Therefore, the attention of the Court for the law in its concrete manifestation and the assessment of legality *in concreto* has been interpreted as an acknowledgement of the legal hermeneutics and a more effective protection of legality. Although these remarks can be acceptable, they require to sharing theories of hermeneutics and applying an anti-formalist approach in criminal law.[189] This seems not to be an ideal justification and explanation of the European legality. Moreover, while these remarks have the purpose of motivating the adoption of an anti-formalist approach in the criminal law, their perspective is not explaining the extensive meaning of the word law in the Convention.

6.3. Substantive legality as a right to justification and a descriptive definition of law.

Apart from the previous remarks, the definition of law can raise other questions on the nature of the European legality, leading to slightly different but significant conclusions.

According to the Court, the definition of law is not a prescriptive concept in a formal theory of sources. Nevertheless, the most common criticism with regards to the definition of law is the unconstitutionality of European legality due to the inclusion of case-law among the legal sources in the theory of sources of law. Consequently, case-law is considered a source of law in a prescriptive sense. According to this criticism, although

It is very important to point out that anti-formalists affirm that their theories are not prescriptive, but rather descriptive of the interpretation process. Therefore, it is incorrect to consider them prescriptive theories. Moreover, antiformalism does not deny the importance of the written law. Di Giovine endorses such approaches as they are open to the legal order in its concrete dimension, they recognise (in a descriptive sense) the creative role of interpretation and the contradiction of blindly continuing to affirm principles that are distant from reality. O. DI GIOVINE, *L'interpretazione nel diritto penale tra creatività e vincolo alla legge*, Milano, 2006, p. 163 f.

[187] O. DI GIOVINE, *Il principio di legalità tra diritto nazionale e diritto convenzionale*, cit., p. 2243 and ID., *Antiformalismo interpretativo*, cit., p. 13.

[188] O. DI GIOVINE, *Antiformalismo interpretativo*, cit., p. 13. Di Giovine is critical towards the use of antiformalism as a dogma, which could lead to paradoxical results such in the case of *Contrada v. Italy*. She further expresses her concerns on the potential creation of inter-right and intra-rights conflicts within the Strasbourg case-law as a result of the adoption of an anti-formalist approach. Similarly in O. DI GIOVINE, *Il principio di legalità tra diritto nazionale e diritto convenzionale*, cit., p. 2278.

[189] On the opposite, for example, scholars believe in a core literal meaning of the legislative text, which exists before the interpretation and is the very heart of the 'criminal *typus*', even if acknowledging the decisive importance of judicial interpretation in the process. F. PALAZZO, *Legalità penale: considerazioni su trasformazioni e complessità di un principio "fondamentale"*, in *Quaderni Fiorentini*, XXXVI, 2007, p. 1309.

judicial interpretation plays a great role in practice, it cannot alter the architecture of the sources as prescribed by the Constitution.[190] Even though a formalist legal reasoning is acceptable with reference to the national legal order, it cannot lead to satisfying conclusions when interpreting the Convention. A formalist reasoning, based on the theory of sources, would have its first setback in the contrast between monist and dualist approaches, which would interpret the prescriptions of the Court in two opposite, incompatible ways.[191] In addition, the role of the Convention is not establishing the sources of law in a certain legal order, since this is not a constitutional charter and the Court does not deal with the separation of powers or with legislative procedures.[192] Consequently, the definition of law cannot be regarded as coercive or prescriptive, but rather as a descriptive concept that focuses on the evaluation *in concreto* of the legal framework.[193] In this sense, the role of interpretation in the ECHR is really close to its

[190] According to Pulitanò, the essence of the legal order (he is speaking about the Italian one) is the statutory reservation. As a consequence, case-law cannot be included in the sources with regards to the theory of sources. In this respect, the European legality 'abolishes' the classical continental legality. D. PULITANÒ, *Paradossi della legalità. Fra Strasburgo, ermeneutica e riserva di legge*, in *Riv. trim. dir. pen. cont*., 2, 2015, p. 49 ff.

[191] O. DI GIOVINE, *Antiformalismo interpretativo*, cit., p. 14. According to this interpretation, statutory reservation cannot solve this problem. According to this scholarship, the task of antiformalism is to unveil the pre-comprehension, but not to apply these principles in a coercive way. This last option would, in fact, create new problems. The ineffective and inappropriate role of hermeneutics to draw a theory of sources is criticised by Pulitanò in his article. D. PULITANÒ, *Paradossi della legalità*, cit., p. 48. Although his criticism is commendable in its content, it does not really fit the debate with Di Giovine, as her point was the necessity not to let the anti-formalist vision of the Strasbourg Court become coercive.

[192] The safeguard of the separation of powers is not part of the duties of the Court as expressed in *Kleyn v. the Netherlands*: 'Although the notion of the separation of powers between the political organs of government and the judiciary has assumed growing importance in the Court's case-law (see Stafford v. the United Kingdom [GC], no. 46295/99, § 78, ECHR 2002-IV), neither Article 6 nor any other provision of the Convention requires States to comply with any theoretical constitutional concepts regarding the permissible limits of the powers' interaction. The question is always whether, in a given case, the requirements of the Convention are met'. ECtHR, Kleyn v. the Netherlands, 6 May 2003, no. 39343/98, 39651/98, 43147/98 and 46664/99, para. 193. According to Chenal, the disregard for the separation of powers is not due to the subsidiarity principle and the margin of appreciation, nor to the necessity of applying the definition to 47 different Member States but it is rather the consequence of the adoption of an alternative idea of legality in the Convention. This new idea is based on a different (and primary) position of fundamental rights in the legal reasoning of the Court and the effectiveness of their protection. Moreover, the principle of legality is an aspect of the more general meta-right to justification of State behaviour which limits individual rights. In this sense, legality should be read as part of the right to foresee not only the consequences of one's conduct but also when the public authority will be allowed to limit fundamental rights, as expressed in *De Tommaso v. Italy*. R. CHENAL, *Il principio di legalità e la centralità dei diritti fondamentali*, cit., p. 52 f. The idea of the primary role of fundamental rights in the Convention system faces a counterargument: the rule of law is, according to the Preamble to the Convention, one of the pillars of its functioning. Therefore, attributing a primary role only to fundamental rights can be too narrow, as it would exclude the balance among all the components of the rule of law (including democracy and state sovereignty). Regardless of the legal counterargument, this idea can be accepted if properly introduced as a political or philosophical choice.

[193] Scholars have further defined the role of case-law as a legal source in the Convention in a 'non-institutional' sense, because considering case-law as an institutional source would be unconstitutional and therefore conflict with the principle enshrined in art. 53 CFREU. The acknowledgement of the crisis of the statutory reservation is a question of the institutional reorganisation of powers, rather than a debate on the

role in antiformalist theories of interpretation. If interpretation and application of law depend on practice, the Court creates an autonomous concept that aims at including and describing the situation *in concreto* and at looking at case-law as a 'cognition source' rather than as a 'production source'.[194]

Hence, the descriptive concept of law is crucial in order to look at 'domestic' and 'European legality' in the right perspective and avoid antinomies.[195] Scholarship has distinguished between the two 'legalities' on the basis of their function. The inclusion of case-law in the sources of law and the relationship with statutory reservation shall not lead to compare European and domestic legality 'quantitively' (i.e. lower-higher protection).[196] Substantive and formal legality differ on a qualitative level instead. The formal version of legality determines which subject is entitled to both define what is punishable under criminal law and formulate criminal provisions. On the other hand, substantive European legality works with an *ex post* logic. It controls *ex post* the effects of national legal orders on the fundamental rights enshrined in the Convention.[197] Therefore, effectiveness is the paradigm to interpret the definition of law.

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constitutionally admitted sources of (criminal) law. A. DI MARTINO, *Una legalità per due? Riserva di legge, legalità CEDU e giudice-fonte*, in *Criminalia*, 2014, p. 119. Some commentators see the notion of legal source in the Convention as descriptive, coming from the idea of effectiveness in the protection of fundamental rights, rather than from the theory of legal sources. R. CHENAL, *Il principio di legalità e la centralità dei diritti fondamentali*, cit., p. 66 f.

[194] This effort would be vain if the law was just considered *in abstracto*, leaving room for possible violations of fundamental rights. R. CHENAL, *Il principio di legalità e la centralità dei diritti fondamentali*, cit., p. 67.

[195] Otherwise, the risk would be the general denial of the European legality. One of the most difficult consequences of the European evolution of criminal law is the sacrifice of national dogmatic specificities in the name of the 'conceptual syncretism'. One of the obstacles is theoretical: giving up national dogmatic categories. The possible way out is only to keep an open mind in view of the methods. Another obstacle is cultural in nature: the different legal traditions claim their autonomy. Although scholarship has raised these issues in the framework of EU Criminal law, it can also be valid for the general process of Europeanisation of criminal law. A. BERNARDI, *Europeizzazione del diritto e della scienza penale*, Torino, 2004, p. 98 ff. In the German scholarship on the openness of methods see J. VOGEL, *Europäische Kriminalpolitik – europäische Strafrechtsdogmatik*, in *GA*, 2002, p. 524.

[196] A. DI MARTINO, *Una legalità per due? Riserva di legge, legalità CEDU e giudice-fonte*, in *Criminalia*, 2014, p. 115.

[197] A. DI MARTINO, *Una legalità per due?*, cit., p. 117 and 124. See also ID., *Das Gesetzlichkeitsprinzip zwischen zwei Welten*, in *ZStW*, 2016, p. 281-282. From a more general point of view, the pluralist nature of legality can be also seen as an expression of its nature as a principle. According to the very similar approaches of Dworkin and Alexy, a principle is relatively general, as it encompasses norms that have not been defined yet by the factual and legal features of the normative world. As they become concrete, in the limitation of the legal and factual context of the normative world, they gain concrete and definitive character and become a 'differentiated rule system'. Although finding the generality criterion useful, Alexy does not believe in it as a distinctive criterion for rules and principles. According to Alexy, Art. 103 II GG is a general norm, but not a principle. R. ALEXY, *Theorie der Grundrechte*, Frankfurt a.M., 1985 (new edition of 1994), p. 92 f., in English translation ID., *A Theory of Constitutional Rights*, Oxford, 1986 (new edition 2002), p. 60 f. R. DWORKIN, *Taking Rights Seriously*, London 1977, p. 22-24. According to Dworkin, who generally opposes positivism, a principle is a 'standard to be observed' because it is a requirement of justice or fairness or some other dimension of morality.

The idea behind legality in the Convention is the *rule of law*, and, therefore, the protection against arbitrary exercise of power by the State. Conversely, Di Martino sees the 'national' legality, if referred to statutory reservation, as a *rule by law*, used by judges when applying the law.[198]

7. The influence of the concept of law on non-retroactivity and the role of foreseeability.

After having analysed the rationale of the definition of law in the Convention, it is now necessary to address the way its substantive character affects all other principles enshrined in Art. 7 ECHR. Due to the fact that the law is a substantive concept, the investigation of its principles will focus on the role played by case-law and will demonstrate how the definition of foreseeability is so strictly tied with non-retroactivity, especially when referred to judicial interpretation. The relationship between foreseeability, the autonomous definition of law and non-retroactivity will be studied as the core of European legality. In the following, foreseeability will be analysed in depth, in order to define its characteristics and its future development.

Art. 7 ECHR prohibits the retroactive application of criminal law to an accused's disadvantage,[199] as well as the extensive construction of criminal law, for example by analogy, and prescribes that an offence must be clearly defined by law.[200] Art. 7 ECHR also requires the law to be precise and the consequences of any criminal behaviour to be foreseeable under the law in force and its interpretation. Both the law and its interpretation must be accessible.

With regards to non-retroactivity of offences and penalties, the Court does not make any relevant distinction between them. Therefore, they will be considered jointly. The principle of non-retroactivity of crimes and penalties refers both to national and international law. Taking into account the definition of law, the addition of international law to the relevant sources does not represent a particular issue in the Court's assessment.

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[198] A. DI MARTINO, *Una legalità per due?*, cit., p. 124 f. The rule of law is a very elaborated and fuzzy concept, which has different declinations in common law and civil law countries. While in civil law countries it is more related to the idea of positive law and formal requirements, in common law countries it is much more related to the idea of law as social practice. F. VIOLA, Rule of Law. *Il governo della legge ieri e oggi*, Torino, 2011, p. 5. G. COGLIANDRO, *Rule of Law*, in *Dig. disc. pubb.*, Torino, 2015, p. 435 ff.

[199] ECtHR, Kokkinakis v. Greece, 25 May 1993, no. 14307/88, para. 51; ECtHR, Kononov v. Latvia, 17 May 2010, no. 36376/04, para. 185; ECtHR, Del Río Prada v. Spain, 21 October 2013, no. 42750/09, para. 78.

[200] ECtHR, Kokkinakis v. Greece, 25 May 1993, no. 14307/88, para. 52; ECtHR, Coëme and Others v. Belgium, 22 June 2000, nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, para. 145.

If the law is defined substantively, it is clear that relevant international law will be part of the assessment.

The substantive definition of law not only includes the prohibition of retroactivity of statutory law but it also prohibits the retroactive application of judicial interpretation to the accused's detriment. In the logic of the Convention, there is no point in distinguishing between the retroactivity of written or unwritten law, because their mutual consideration is the consequence of the *in concreto* reasoning adopted by the Court. In a national-oriented approach, the Convention precludes both direct (or explicit) retroactivity, i.e. the retroactive application of a statute which entered into force after the commission of the offence,[201] and indirect (or hidden) retroactivity, i.e. the retroactive application of a *contra reum* overruling in case-law.[202]

With regards to direct retroactivity, the Court has rarely had relevant cases, as national legal orders usually deal with the most important issues. Apart from the exceptional case of an explicitly retroactive criminal statute, the most common issues will concern the extent of the prohibition of non-retroactivity and which elements of the criminal offence it encompasses[203]. For example, the Court had to assess the alleged retroactivity of new statutory provisions in detriment of the accused, which were introduced during the commission of a 'continuing offence' and subsequently applied to the offender. The position of the Court on the subject matter is inconsistent.[204]

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[201] A. BERNARDI, *Art. 7,* cit., p. 180. D. HARRIS, M. O'BOYLE, C. WARBRICK, *Law of the European Convention on Human Rights*, cit., p. 495.

[202] The retroactive application of judicial interpretation can be regarded as a natural consequence of the declaratory nature of the interpretation. It bears particularly serious consequences in criminal law if the result is to include previously excluded acts or omissions in the scope of application of a criminal provision. S. VAN DROOGHENBROECK, *Interprétation jurisprudentielle et non-rétroactivité de la loi pénale*, cit., p. 470 f. For the distinction between direct and indirect (or hidden) retroactivity see A. ESPOSITO, *Il diritto penale "flessibile",* cit., p. 336; M. SCOLETTA, *La legalità penale nel sistema europeo dei diritti fondamentali*, cit., p. 248. The terms direct-indirect retroactivity are used by P. ROLLAND, *Art. 7*, cit., p. 293, while Cadoppi refers to 'hidden' retroactivity in A. CADOPPI, *Il valore del precedente nel diritto penale*, cit., p. 113.

[203] Art. 7 ECHR is usually considered applicable to all the provisions disciplining *mens rea*, defences, modes of liability, excuses, justifications etc. W. SCHABAS, *The European Convention*, cit., p. 341. See M. CHIAVARIO, *La Convenzione europea dei diritti dell'uomo nel sistema delle fonti normative in materia penale*, cit., p. 121.

[204] The Court defines continuing offence as a 'type of crime committed over a period of time': it encompasses offences that could be defined as *reati a struttura permanente* or sometimes *reati abituali* or even *reato continuato* in the Italian legal order. In its assessment the Court required the law, whether written or unwritten, to be foreseeable during the whole period of time the act was committed, although a better distinction is made in the French version between *infraction continue* and *continuée*. ECtHR, Ecer and Zeyrek v Turkey, 27 February 2001, no. 29295/95 and 29363/95, para. 33; ECtHR, Veeber v. Estonia (no.2), 22 January 2003, no. 45771/99, para. 35 f. and similarly ECtHR, Puhk v. Estonia, 10 February 2004, no. 55103/00, para. 30 f. ECtHR, Rohlena v. Czech Republic, 27 January 2015, no. 59552/08, para. 57 ff., see also the concurring opinion of Judge Pinto de Albuquerque, para. 2 ff.

As far as indirect retroactivity is concerned, the Court had the chance to extend the principle to unwritten law in the cases mentioned above to describe the development of the concept of law. Therefore, the prohibition of non-retroactivity covers an unfavourable overruling and even a 'new' interpretation, if applied to non-previously included cases.[205] The Court also states that judicial interpretation is an inevitable element of the criminal law. Some commentators consider this affirmation at odds with the prohibition of retroactive application of the criminal law, since interpretation is *per se* retroactive.[206]

Initially, the European Commission of Human Rights affirmed that the elements of an offence could not be substantially modified to the accused's detriment, although extensive interpretation was generally accepted in order to clarify them. In this regard, the Commission excluded that the courts could declare an act criminal, if it was not punishable up to then; it further excluded that courts could extend the definition of an existing criminal offence in order to include facts that were not qualified as criminal until

[205] V. MANES, *Art. 7*, cit., p. 274. The latter is the case of the creation of '*sottofattispecie*': the innovative objectivation of new cases which the courts can subsume under the provision. M. DONINI, *Il diritto penale giurisprudenziale*, in *Riv. trim. dir. pen. cont.*, 3, 2016, p. 19; A. CADOPPI, *Il valore del precedente nel diritto penale*, cit., p. 165 ff. The term is used by these authors with reference to judicial interpretation, but it is important to anticipate that it was originally introduced by Tullio Padovani alluding to the succession of statutes, in the case of their substitution and the problematic approach to cases which 'survived' the reformulation of the offence. T. PADOVANI, *Tipicità e successione di leggi penali*, in *Riv.it. dir. proc. pen*., 1982, p. 1375. See *infra*, Chapter 4, section II, para. 3.2.

[206] ECtHR, Del Río Prada v. Spain, 21 October 2013, no. 42750/09, para. 92, ECtHR, Kafkaris v. Cyprus, 10 February 2008, no. 21906/04, para. 141; S. VAN DROOGHENBROECK, *Interprétation jurisprudentielle et non-rétroactivité de la loi pénale*, cit., p. 472.

that point.[207] The interpretation amounts to a retroactive application of criminal law when it is creative and thereby not in continuity with previously established case-law.[208]

The leading cases of the Court are *S.W. v. the United Kingdom* and *C. R. v. the United Kingdom*, affirming the same principles in two very similar contexts. Taking the case of *S.W.* into consideration, the Court was asked to assess the illegitimate retroactive application of the overruling in *R.v.R.* to facts committed by the applicant in September 1990. The British courts had extended the cases of exception to the marital rape immunity, which was a common law defence. It granted immunity for the husband raping his wife, due to the wife's allegedly implicit consent to sexual intercourse. In the case of *S.W.*, the courts refused to apply the marital rape exemption to a *de facto* separation between husband and wife, applying the precedent of *R. v. R* because of the obsolete and unacceptable nature of the principle.[209] In the present case, although the Court did not

[207] In the case of *Enkelmann v. Switzerland*, the applicant claimed the retroactive application of case-law established in 1982 to his conduct, which had been carried out in 1981. According to him, the *Cour de Cassation* of the Federal Tribunal had modified its established case-law that required full intent to fulfil the requirements of the offence of *émeute* (riot, *Landfriedensbruch*), considering a lower degree of the mental element sufficient in order to convict the applicant (the awareness of the potential danger to public order of the demonstration). The overruling of the Swiss court had, therefore, the effect of a retroactive application of written law, extending the boundaries of what was punishable in the specific case. The European Commission of Human Rights estimated the case to be only a clarification of the constitutive elements of the offence. EComHR, Enkelmann v. Switzerland, 4 March 1985, no. 10505/83, p. 179-180 and 183, in particular 185. In the same sense also the case of *X Ltd. and Y. v. the United Kingdom* (on a violation of Art. 10 ECHR but recalling the principles of Art. 7 ECHR), where the Commission affirmed the same principle, prohibiting to modify the essential elements of the criminal offence, but deeming a clarification by case-law acceptable. It was the case of the conviction for the common law offence of 'blasphemous libel' with the mental element of 'intention to publish' instead of the 'intention to blaspheme' required by the respective precedent. EComHR, X. Ltd. and Y. v. the United Kingdom, 7 May 1982, no. 8710/79, p. 81, para. 9 'any acts not previously punishable should be held by the courts to entail criminal liability, or that existing offences should be extended to cover facts which previously clearly did not constitute a criminal offence. This implies that constituent elements of an offence such as e.g. the particular form of culpability required for its completion may not be essentially changed, at least not to the detriment of the accused, by the case law of the courts'.

[208] Van Drooghenbroeck defines it a false interpretation (*fausse interprétation*). S. VAN DROOGHENBROECK, *Interprétation jurisprudentielle et non-rétroactivité de la loi pénale*, cit., p. 472.

[209] The marital rape exemption was a defence of the common law dating back to Sir Matthew Hale's *History of the Pleas of the Crown* of 1736 and the precedent *R. v. Clarence* of 1888. The development of the social and legal conception of marriage in the 1970s and 1980s led to several adjustments in the application of this precedent, which was often considered unacceptable. In the late 1980s, several cases enumerated the exception of separation agreements or orders as grounds for excluding the immunity. In the case of *S.W.* the judge applied the precedent of Justice Owen (Crown Court) in the case of *R.v.R.* (issued in July 1990, confirmed in appeal in March 1991 and later that year by the House of Lords), which considered three possible categories of revocation of the wife's consent: withdrawal from cohabitation, the statement of a judge, an agreement between husband and wife. This same reasoning of *S.W.* was then extended in *R.v.C.* in October 1990 to every case where the wife had revoked her consent to intercourse, regardless of the couple leaving together or apart. In the same period, the Law Commission was studying the debated topic and collecting relevant precedents in its working paper of September 1990 'Rape within Marriage'. The Commission considered the ruling in *R.v.R.* as an innovation in respect of the past authorities and recommended that the immunity was abolished by statute law as well. ECtHR, S.W. v. the United Kingdom, 22 November 1995, no. 20166/92, para. 10 ff. and 22 ff. C. OSBORNE, *Does the End Justify the Means?*

find a violation of Art. 7 ECHR, the reasoning of the judgement was clearly based on precedent and not on statute law.[210] In particular, the legitimate development of law through judicial interpretation has to be consistent with the essence of the offence and reasonably foreseeable, otherwise it becomes an overruling.[211] The Court assessed the non-violation of Art. 7 ECHR on the basis of a foreseeability assessment: the ongoing evolution trend of English case-law made the judicial recognition of the absence of the immunity a *foreseeable development*.[212] Even from this leading case, the impossibility to separate the assessment of the retroactivity of the overruling and the foreseeability test is self-evident. Leaving aside the merits of the Court's judgement, the real essence of the reasoning was the classification of the problem under the foreseeability standard, hence under the quality of the law. Following a common law approach instead, the real problem in the case was the retrospective overruling.[213]

With regards to the autonomous concept of law elaborated for Art. 8 and 10 ECHR, the acknowledgement of the crucial role played by case-law in Art. 7 ECHR in *Kokkinakis v. Greece* and the cases of *S.W.* and *C.R. v. the United Kingdom*, scholarship foretell the eventual extension of non-retroactivity of *contra reum* overrulings to civil law countries.[214] In *Veeber v. Estonia* and *Puhk v. Estonia*, the absence of case-law already contributed to substantiate the reasoning of the Court in order to acknowledge the retroactive application of an amendment to a statute. Case-law was therefore an argument to prove a violation.[215] *A contrario*, case-law could also contribute to making an amendment in statute law (and its retroactive application) foreseeable. Although this

Retrospectivity, Article 7, and the Marital Rape Exception, in *European Human Rights Law Review*, 1996, p. 409 ff.

[210] For the reasoning see *above*, para. 5.2.

[211] ECtHR, S.W. v. the United Kingdom, 22 November 1995, no. 20166/92, para. 36.

[212] ECtHR, S.W. v. the United Kingdom, 22 November 1995, no. 20166/92, para. 43.

[213] Although in the United States retrospective overruling is forbidden, as U.S. courts follow the rule of prospective overruling, in the United Kingdom the situation is more dubious and the retrospective application of an overruling is a minor problem. A. ASHWORTH, *Principles of Criminal Law*, cit., p. 58 ff., G. FORNASARI, A. MENGHINI, *Percorsi europei di diritto penale*, cit., p. 28 f., S. ATRILL, Nulla poena sine lege *in comparative perspective: retrospectivity under the ECHR and the US Constitution*, in *Public Law*, 2005, p. 107 ss., C. MURPHY, *The principle of legality in criminal law under the European Convention on Human Rights*, in *European Human Rights Law Review*, 2010, p. 192 ff. The Strasbourg Court was criticised for not having taken a stance with regards to prospective overruling, S. VAN DROOGHENBROECK, *Interprétation jurisprudentielle et non-rétroactivité de la loi pénale*, cit., p. 462 ff.

[214] S. VAN DROOGHENBROECK, *Interprétation jurisprudentielle et non-rétroactivité de la loi pénale*, cit., p. 463.

[215] In both cases, the problem was the retrospective application of an amendment to a statute, which intervened during the commission of a so-called 'continuing offence'. Case-law is here an argument to reinforce the affirmation of the non-foreseeability of the amendment when the offence was committed. ECtHR, Veeber v. Estonia (no. 2), 22 January 2003, no. 45771/99, para. 37, ECtHR, Puhk v. Estonia, 10 February 2004, no. 55103/00, para. 40 f.

would be a rather unacceptable result for a civil law country, it sheds light on the reasoning of the Court, which is based on foreseeability *in concreto*, rather than on a strict assessment of retrospectivity.[216]

A turning point was the above-mentioned case of *Pessino v. France*, where judicial law-making was the real issue at stake and case-law was not employed only as an argument in a case concerning an amendment in statute law.[217] In the case of *Pessino v. France* the same reasoning of *S.W. v. the United Kingdom* was applied to a civil law country. The retrospective application of criminal law to the accused's disadvantage was due to a new (retrospective) interpretation of a statute, which extended the scope of application of the offence to a new category of cases. The applicant claimed the illegitimate retrospective overruling of the French courts, which convicted him for the offence of having continued building despite a court judgement ordering to interrupt the construction (Art. L-480-3 *Code de l'urbanisme*). The French judges could convict the offender thanks to an equivalence between the '*sursis à exécution du permis*' (a suspension order by an administrative tribunal) and the '*decision judiciaire ou arrêté ordonnant l'interruption des travaux*' provided by the statute, which had never been made before.[218] The Court judged the case only by looking at the evolution of case-law on this specific issue, that caused the extension of the offence to cases which were not included before. However, looking at the terminology of the judgement, the Court applied the foreseeability criterion, in light of the relevant case-law of the French courts. The lack of foreseeability and the absence of precedents made the *revirement* unexpected and consequently calculating the consequences of the applicant's act or omission was unattainable.[219] Moreover, the Court, reasoning the distinguishing from the British case

[216] In the case of *Achour v. France*, case-law is used again as an argument to affirm the non-retrospective application of a provision regulating recidivism in France. ECtHR, Achour v. France, 29 March 2006, no. 67335/01, para. 52.

[217] D. ROETS, *La non-rétroactivité de la jurisprudence pénale in malam partem consacrée par la CEDH: Cour européenne des droits de l'homme, 10 oct. 2006*, in *Recueil Dalloz*, 2007, p. 124, K. LUCAS, *Revirements de jurisprudence et non-rétroactivité de la "loi"*, cit., p. 749, O. BACHELET, *Les revirements de jurisprudence, problèmes d'application dans le temps*, cit., p. 166, P. DOURNEAU-JOSETTE, *CEDH: Jurisprudence de la Cour européenne des droits de l'homme en matière pénale*, in *Encyclopédie juridique Dalloz: répertoire de droit pénal*, Paris, 2013, p. 63.

[218] ECtHR, Pessino v. France, 10 October 2006, no. 40403/02, para. 4 and 34 ff.

[219] '*Or le manque de jurisprudence préalable en ce qui concerne l'assimilation entre sursis à exécution du permis et interdiction de construire résulte en l'espèce de l'absence de précédents topiques fournis par le Gouvernement en ce sens. 36. Il résulte ainsi de tout ce qui précède que, même en tant que professionnel qui pouvait s'entourer de conseils de juristes, il était difficile, voire impossible pour le requérant de prévoir le revirement de jurisprudence de la Cour de cassation et donc de savoir qu'au moment où il les a commis, ses actes pouvaient entraîner une sanction pénale (a contrario Cantoni c. France, précité, § 35 et Coëme*

of the marital rape exemption, made clear that the key idea was essentially the same.[220] Like in the case of *S.W.*, scholars interpreted the *Pessino* case through the lenses of retroactivity, looking at it as a judicial retrospective overruling. Even though this conclusion is undoubtedly correct, this line of case-law must also be read in light of foreseeability, if we want to remain faithful to the initial intention of reading European legality in its proper and peculiar framework.[221]

The same method, which is the plain application of the 'prescribed by law' test developed elsewhere in the Convention, became in a growing number of cases more and more detached from domestic law understandings of the principle of legality. It focused on the foreseeability criterion as a general test both for analogy and overruling. Narrowing down the focus on the reasoning of these judgements, without anticipating the analysis of the following chapter on foreseeability criteria, it becomes clear that the main issue at stake while evaluating the retroactivity of judicial interpretation is the foreseeability assessment, which has consolidated over the years.[222] The Court prohibits the retroactive application of a judicial interpretation that was not reasonably foreseeable at the time the offence was committed to an accused's detriment. The parameter to assess retroactivity is not the entry into force of the relevant statute but the point when case-law was consistent enough in order to let the individual foresee the consequences of his act or

et autres c. Belgique, précité, § 150). […]' ECtHR, Pessino v. France, 10 October 2006, no. 40403/02, para. 35-36

[220] ECtHR, Pessino v. France, 10 October 2006, no. 40403/02, para. 36.

[221] D. ROETS, *La non-rétroactivité de la jurisprudence pénale in malam partem consacrée par la CEDH : Cour européenne des droits de l'homme, 10 oct. 2006*, in *Recueil Dalloz*, 2007, p. 124. It was already clear that the Strasbourg Court was combining not only normative sources but also principles: according to French commentators, the issue should have been rather the principle of strict interpretation in criminal law. O. BACHELET, *Les revirements de jurisprudence, problèmes d'application dans le temps*, cit., p. 168. The overlapping territories between retrospective overruling and sudden extension of the norm by analogy to new cases are clear when thinking of the case of *Dragotoniu and Militaru Pidhorni v. Romania* of the following year. In a very similar situation, a sudden overruling had extended the application of the provision on bribery to new cases, including bank accountants in the notion of public officials. The Court applied the foreseeability test but referred to analogy instead of retroactivity. ECtHR, Dragotoniu et Militaru Pidhorni v. Romania, 24 May 2007, no. 77193/01 and 77196/01, para. 44-47.

[222] In the case of *Del Río Prada*, Spanish courts had retroactively applied a sudden overruling to the case of the applicant. The *Tribunal Supremo* established *ex novo* the so-called *doctrina Parot*, interpreting the existing law on *redención de penas por trabajo* in an unfavourable sense for persons convicted for terrorism. The assessment of the ECtHR is nevertheless *in concreto* foreseeability, referred both to written and unwritten law. ECtHR, Del Río Prada v. Spain, 21 October 2013, no. 42750/09, para. 112 ff. In the case of *Contrada v. Italy*, the applicant claimed the retroactive application of a 'judge-made' criminal offence which was established by the case-law of the Italian *Corte di Cassazione* after the commission of the acts. Again, the assessment of the Court is not the retroactivity of the overruling, but rather the foreseeability of the legal characterisation of the acts by the applicant at the time of the offence, according to relevant case-law and statutes. ECtHR, Contrada v. Italy (no. 3), 14 April 2015, no. 66655/13, para. 66 ff. and 75.

omission. In this respect, the evaluation of the retroactivity of a new offence[223] or a non-foreseeable overruling overlaps with the assessment of the reasonable foreseeability of judicial interpretation, which is part of the assessment of the quality of the norm.[224] At the margins of the respective definitions, a retrospective overruling and the lack of *in concreto* foreseeability of the judicial interpretation, as well as inconsistent case-law, have the same effects.[225]

The key role of the foreseeability test *in concreto*,[226] instead of a time-based assessment of retrospectivity becomes even more clear in those hard cases, where the Court decided for the non-violation of Art. 7 ECHR with a reasoning that combined the foreseeability test with 'legitimacy' or 'moral' elements. This was the case for the above-mentioned *S. W. v. the United Kingdom* as well as the assessment of the legal basis in the so-called *Mauerschützenfälle* (*Streletz, Kessler, Krenz v. Germany* and *K.-H.W. v. Germany*). In these cases, a simple assessment of retrospectivity would probably have led to opposite results. On the contrary, the Court considered the law to be foreseeable because of the 'essentially debasing character of rape' and because the abandonment of the marital rape immunity was in conformity with 'the fundamental objectives of the Convention, the very essence of which is respect for human dignity and human freedom'.[227] Furthermore, it noted 'the very principles on which the system of protection put in place by the Convention is built' and 'the pre-eminence of the right to life in all

[223] The retroactivity of a new offence is equivalent to the extensive application of an existing offence in non-reasonably foreseeable cases.
[224] The case of *Prigală v. Moldova* regarded the sudden new interpretation of the word '*honoraires*' in the law regulating social insurances. The court focused again on the reasonable foreseeability of the interpretation, which had always been debated but had remained favourable to the citizen until the case of the applicant, where the court overruled its (until then) consistent interpretation. ECtHR, dec., Prigală v. Moldova, 13 February 2018, no. 36763/06, para. 37-39. In the case of *Arrozpide, Sarasola et al. v Spain* the applicant's claim of retrospectivity of a *Tribunal Supremo* overruling (no. 874/2014) on the possibility to cumulatively count penalties served outside Spain was rejected by the Court. The retrospective overruling was again assessed as a matter of reasonable foreseeability, admitting a tolerable period of uncertainty in the elaboration of a precedent, which is acceptable if the system has the capacity to reabsorb it. ECtHR, Arrozpide, Sarasola et al. v. Spain, 23 October 2018, no. 65101/16, 73789/16 and 73902/16, para. 121-128.
[225] M. SCOLETTA, *La legalità penale nel sistema europeo dei diritti fondamentali*, cit., p. 250; A. BERNARDI, *Art. 7*, cit., p. 284.
[226] On foreseeability as a crucial principle to understand European legality see O. DI GIOVINE, *Come la legalità europea sta riscrivendo quella nazionale. Dal primate delle leggi a quello dell'interpretazione*, in *Riv. Trim. dir. pen. cont*., 1, 2013, p. 164; R. CHENAL, *Il principio di legalità e la centralità dei diritti fondamentali*, cit., p. 64, FR. MAZZACUVA, *Art. 7*, in G. UBERTIS, F. VIGANÒ (eds.), *Corte di Strasburgo e giustizia penale*, Milano, 2017, p. 237 ff.
[227] ECtHR, S.W. v. the United Kingdom, 22 November 1995, no. 20166/92, para. 44.

international instrument on the protection of human rights' were grounds to acknowledge the existence of the legal basis.[228]

8. Foreseeability and accessibility as the 'qualities' of the law.

The Court defines the so-called 'qualities' of the law in order to consider it a sufficient legal basis. Thus, the law must be *accessible* and *foreseeable*. In the case law on Art. 8-11 ECHR the Court developed the autonomous concept of law together with its qualitative requirements of accessibility and foreseeability, which constitute a second stage in the assessment of the legal basis. The affirmation of the quality of the law is included in the Court's jurisprudence and a well-established principle which permeates the Convention.[229] Especially in Art. 7 ECHR, foreseeability is very close to the principle of *determinatezza/tassatività* or *Bestimmtheit* in the Italian and German criminal systems, and often recalls the prohibition of extensive construction of the criminal law, for instance by analogy.[230] Nonetheless, the major peculiarity is that the assessment of foreseeability is rigorously *in concreto*.[231] Foreseeability looks at the results of the interpretation, while analogy in national criminal law concentrates on interpretive methods.

[228] ECtHR, Streletz, Kessler and Krenz v. Germany, 22 March 2001, no. 34044/96, 35532/97 and 44801/98, para. 83 and 85, ECtHR, K.-H.W. v. Germany, 22 March 2001, no. 37201/97, para. 86 and 88.

[229] 'In the Court's opinion, the following are two of the requirements that flow from the expression "prescribed by law". Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: 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. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, 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, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice' ECtHR, the Sunday Times v. the United Kingdom, 26 April 1979, no. 6538/74, para. 49. ECtHR, Silver and others v. the United Kingdom, 25 March 1983, no. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75, para. 87-88. On the importance of case-law in the assessment of foreseeability see ECtHR, Müller and others v. Switzerland, 24 May 1988, no. 10737/84, para. 29. Accessibility and foreseeability are assessed separately as 'quality of the law' in ECtHR, Kruslin v. France, 24 April 1990, no. 11801/85, para. 30. See also ECtHR, Leyla Şahin v. Turkey, 10 November 2005, no. 44774/98, para. 91. See, for the use of the quality of the law in Art. 7 case-law, ECtHR, S.W. v. the United Kingdom, 22 November 1995, no. 20166/92, para. 35.

[230] M. SCOLETTA, *La legalità penale nel sistema europeo dei diritti fondamentali*, cit., p. 232.

[231] The Italian Constitutional Court has developed the concept of *determinatezza* in relation to *tassatività* and looking at the so-called *living law* (*diritto vivente*) when assessing the compliance of a statute with the principle of *lex certa*. The clarity of the statute is considered not just in relation to its wording but in the normative context where it operates (which includes case-law). Corte Cost., 8 June 1981, no. 96, para. 10 and Corte Cost., 16 May 1989, no. 247, para. 2 ff. See *infra*, Chapter 4, section II, para. 2.

Accessibility, often a minor requirement, demands that the citizen has adequate indication, according to the circumstances, of the legal rules applicable to a given case.[232] In Art. 7 ECHR, its assessment is often a unique assessment with foreseeability.[233]

Foreseeability is a more complex element, that builds the essence of European legality. Its objective is the assessment of the predictability of the *regula juris* as a whole, from an *ex post facto* perspective. The legal basis must be formulated with sufficient precision in order to let the individual regulate his or her conduct.[234] Moreover, the Court requires the precision of the legal provisions but admits that the terms are inevitably vague and are defined by case-law, since the interpretation also depends on practice.[235]

> 'As the Court has already had occasion to note, it is a logical consequence of the principle that laws must be of general application that the wording of statutes is not always precise. One of the standard techniques of regulation by rules is to use general categorisations as opposed to exhaustive lists. The need to avoid excessive rigidity and to keep pace with changing circumstances means that many laws are inevitably couched in terms which, to a greater or lesser extent, are vague. The interpretation and application of such enactments depend on practice'[236]

The Court here admits that citizens must resort to 'adequate legal advice' in order to be able to foresee,[237] to a degree which is reasonable in respect of the circumstances of the concrete case, the consequences that a certain act may entail. At the same time, that 'legal advice' must also keep pace with practice to stay relevant.[238]

Hence, foreseeability depends on the interaction between all the sources of law, as the quality of the law is satisfied only if the interpretation of the law by the courts is reasonably foreseeable by the individual. As the precedent states,

> 'Article 7 para. 1 […] of the Convention […] 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

[232] ECtHR, the Sunday Times v. the United Kingdom, 26 April 1979, no. 6538/74, para. 49. ECtHR, Silver and others v. the United Kingdom, 25 March 1983, no. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75, para. 87.
[233] The issues properly regarding accessibility concerned the publication of statutes, or their partial publication. ECtHR, Groppera Radio AG and others v. Switzerland, 28 March 1990, no. 10890/84, para. 67, ECtHR, Chappell v. the United Kingdom, 30 March 1989, no. 10461/83, para. 56.
[234] ECtHR, Müller and others v. Switzerland, 24 May 1988, no. 10737/84, para. 29, ECtHR, Radio France v. France, 30 March 2004, no. 53984/00, para. 19.
[235] See also ECtHR, Kafkaris v. Cyprus, 10 February 2008, no. 21906/04, para. 140.
[236] ECtHR, Cantoni v. France, 11 November 1996, no. 17862/91, para. 31.
[237] On the admissibility of the need to take appropriate legal advice in order to be able to foresee the consequences. ECtHR, Pessino v. France, 10 October 2006, no. 40403/02, para. 33; ECtHR, Soros v. France, 6 October 2011, no. 50424/06, para. 53, quoting the precedent in ECtHR, Tolstoy Miloslavsky v. the United Kingdom, 13 July 1995, no. 18139/91, para. 37.
[238] ECtHR, De Tommaso v. Italy, 23 February 2017, no. 43395/09, para. 107-108; ECtHR, Kafkaris v. Cyprus, 10 February 2008, no. 21906/04, para. 141.

> to an accused's detriment, for instance by analogy; it follows from this that an offence must be clearly defined in law. This condition is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him liable'[239].

The determination of foreseeability is based on a case-by-case evaluation. Article 7 ECHR cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen.[240] The role of the adjudications vested in courts is precisely to dissipate such interpretational doubts that remain.[241] The lack of an accessible and reasonably foreseeable judicial interpretation can lead to a finding of a violation of Art. 7 ECHR, in order not to defeat its object and purpose, i.e. not to see the individual subject to arbitrary prosecution, conviction or punishment.[242] The Court has constantly modified the criteria to assess foreseeability, although the core idea remained the same. The following chapter will analyse the meaning of foreseeability in Art. 7 ECHR.

As a result of this analysis, it emerges that the European version of legality is essentially based on an *in concreto* foreseeability test, that creates a contingence between non-retroactivity and foreseeability, especially when dealing with case-law. Foreseeability also becomes the key to understand this new definition of *nullum crimen*. The following chapter will investigate the role of foreseeability and the criteria and content of this new parameter.

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[239] ECtHR, Kokkinakis v. Greece, 25 May 1993, 14307/88, para. 52; ECtHR, Cantoni v. France, 11 November 1996, no. 17862/91, para. 29; ECtHR, Streletz, Kessler and Krenz v. Germany, 22 March 2001, no. 34044/96, 35532/97 and 44801/98, para. 50.

[240] S.W. v. the United Kingdom, 22 November 1995, no. 20166/92, para. 36 and ECtHR, C.R. v. the United Kingdom, 22 November 1995, no. 20190/92, para. 34; ECtHR, Streletz, Kessler and Krenz, cited above, § 50 and ECtHR, K.-H.W. v. Germany, 22 March 2001, no. 37201/97, para. 85; ECtHR, Korbely v. Hungary 10 September 2008, no. 9174/02, para. 71; ECtHR, Kononov v. Latvia, 17 May 2010, no. 36376/04, para. 185; ECtHR, Del Río Prada v. Spain, 21 October 2013, no. 42750/09, para. 93.

[241] ECtHR, Kafkaris v. Cyprus, 10 February 2008, no. 21906/04, para. 141.

[242] ECtHR, Del Río Prada v. Spain, 21 October 2013, no. 42750/09, para. 93, quoting the precedents in *Pessino v. France*, *Dragotoniu et Militaru-Pidhorni v. Romania* and *Alimucaj v. Albania*.

9. Conclusions of Chapter Two.

The origin of *nullum crimen* as a human right at the international level is concentrated in the 20th Century and is primarily due to the development of charters safeguarding human rights at the international and regional level. Art. 11(2) UN Declaration inspired and influenced the drafting of Art. 7 ECHR. The analysis of the *travaux préparatoires* shows that the major point at stake was the legitimation of the prosecution of war criminals after 1945. Therefore, the drafters disregarded the domestic understanding of *nullum crimen* and the question of the legitimate sources of the criminal law.

Art. 7 ECHR is part of a broader international legal framework safeguarding the same principle and has a comprehensive reach as European definition of legality, since the 'Strasbourg' legality plays a crucial role for the European Union as well, for normative and interpretative reasons. Art. 7 ECHR in the Convention is a component of the rule of law and safeguards, implicitly or explicitly, legality of offences and penalties.

Art. 7 ECHR features an autonomous definition of *law*, that encompasses both statutory and judge-made law, that applies both to civil law and common law countries. This autonomous concept must be interpreted considering that it is common to several other rights in the ECHR and not an exclusively prerogative of the criminal limb. The equation between statutory and judge-made sources of the criminal law raises antinomies in civil law legal orders. In order to overcome these obstacles, *law* has to be conceived as a descriptive concept and as a substantive means to assess *in concreto* the State's conduct towards individual rights, without regulating the hierarchy of sources.

Art. 7 further admits international law as a source of incrimination and provides for an exception to non-retroactivity in the so-called 'Nuremberg clause' at Art. 7(2) ECHR.

The substantive definition of law further determines the application of the subprinciples of non-retroactivity and the qualities of the law (accessibility and foreseeability) to judge-made law as well. The assessment of legality of judicial interpretation is now focused on a foreseeability test, both under the perspective of retroactive interpretations and *lex certa*.

CHAPTER THREE

FORESEEABILITY IN ART. 7 ECHR: ORIGIN AND NEW PERSPECTIVES THROUGH CASE-LAW ANALYSIS

1. Origin and rationale of foreseeability.

The elaboration of foreseeability as standard for the assessment of the quality of the law *in concreto* dates back to the first judgements of the Court on the definition of law.[1] As mentioned in the previous chapter, the law requires the qualities of accessibility and foreseeability in order to comply with the ECHR. What is not clear, however, is the precise origin of the concept of foreseeability in relation to legality.

Two alternatives can be made in this respect. On the one hand, foreseeability is a concept linked to legal certainty in general theory of law and philosophy of law. Rather than a concept elaborated in a specific legal area, it is the result of a specific philosophic definition of certainty as foreseeability. On the other hand, foreseeability could derive from, or simply recall, the principle of fair warning in American Criminal Law, and in part the principle of maximum certainty in British Criminal Law.

1.1. Foreseeability as legal certainty in General Theory of Law and Legal Philosophy.

Legal certainty has been defined as an *idée directrice* of law.[2] In its national meanings of *certezza del diritto, securité juridique, seguridad juridica* and *Rechtssicherheit*, it is a common characteristic of legal systems in Europe and beyond and it is linked with the idea of law itself.[3] Despite its widespread application, legal certainty is a very uncertain concept to define. There are many possible definitions of this concept and, although descending from the Roman law idea of *ius certum*, it has slightly different developments

[1] See *above*, Chapter 2, para. 8.

[2] Bertea distinguished the general philosophical concept of legal certainty from the technical concept as developed in philosophy and general theory of law. The first one corresponds to the foreseeability, security and stability that law must assure, as its intrinsic feature and the essence of its existence. The second has a legal meaning that cannot be univocally defined. It involves different components of law, as it will be explained in the following paragraph. S. BERTEA, *Certezza del diritto e argomentazione giuridica*, Catanzaro, 2002, p. 49 ff. Although only the second definition is considered in this work, it is preferable just to refer at legal certainty as an *idée directrice* of law, taking Andreas von Arnauld's definition. A. VON ARNAULD, *Rechtssicherheit*, Tübingen, 2006, p. 103 ff.

[3] For an historical and philosophical analysis of legal certainty see A. VON ARNAULD, *Rechtssicherheit*, cit., p. 568 ff., G. GOMETZ, *La certezza giuridica come prevedibilità*, Torino, 2005, p. 7 ff. According to von Arnauld, the contemporary concept of *Rechtssicherheit* was developed during the 19th Century.

in European States.[4] Even if the implementation and concrete role of legal certainty in positive law partially differs from State to State, the philosophic concept grounding it has important common features in the Western Legal Tradition which shall be highlighted.[5] Scholars have long debated whether to classify legal certainty as a 'fact' or as a 'value' (for some, as a 'principle'). This is not the right place for an in-depth analysis of this debate, but it is sufficient to point out that if legal certainty is considered a 'fact', it will then represent the possibility for the individuals to foresee the consequences of their actions in a given and concrete legal order. On the contrary, if legal certainty is considered a 'value' or a 'principle', it must be treated as a duty for the judge to enhance legal certainty or as an ideal to pursue.[6]

1.1.1. Foreseeability as a definition of legal certainty.

A truly broad and general concept to define legal certainty, which can represent a common characteristic among many definitions, is the 'foreseeability of the legal

[4] While analysing the nature and history of *Rechtssicherheit* in Germany, von Arnauld defines it generally as *Erkennbarkeit* (recognisability), *Verlässlichkeit* (reliability) and *Berechenbarkeit* (predictability). Foreseeability/Predictability is the core definition. See A. VON ARNAULD, *Rechtssicherheit*, cit., p. 107-109 and 626 ff., G. GOMETZ, *La certezza giuridica come prevedibilità*, cit., p. 10.

[5] It is useful to refer to the concept in philosophy and general theory of law, although in positive law, and especially in Constitutional and Supreme Courts' case-law, legal certainty has become a *topos.* In France, *sécurité juridique* is not a right nor a value explicitly safeguarded in the *bloc de constitutionnalité* or the law. However, especially when referring to the principle of the legitimate expectations, the *Conseil Constitutionnel* and the *Cour de Cassation* tend to recognise the need for legal certainty. In Spain, the principle of *seguridad juridica* is explicitly mentioned in the Constitution (Art. 9 para. 3) and there are no doubts about its constitutionalisation. In the Italian legal order, it is not possible to define it as a constitutional principle, although the Constitutional Court often uses it as a value to substantiate its arguments. In Germany, *Rechtssicherheit* derives from Art. 103 Abs. 2 GG and Art. 20 GG and is expressly recognised as a constitutional principle by the *Bundesverfassungsgericht*. i.e. BVerfG, 03.11.1965, 1 BvR 62/61, in *NJW*, 1966, p. 196 ff. See i.e. See A. VON ARNAULD, *Rechtssicherheit*, cit., p. 543 ff.

[6] G. GOMETZ, *La certezza giuridica come prevedibilità*, Torino, 2005, p. 25 ff. and 35 ff., L. GIANFORMAGGIO, *Certezza del diritto*, in *Dig. disc. priv. (sez. civ.*), II, Torino, 1988, p. 276.

consequences of acts or facts.[7] This concept is therefore directly related to the individual's autonomy.[8]

It is now useful to identify an acceptable precise definition of legal certainty in order to later take up the debate on foreseeability. Letizia Gianformaggio in the Italian *Digesto* defines it in a very general way, thus her analysis represents a good starting point. According to her definition legal certainty is i) foreseeability of the intervention of state organs with decision-making power, ii) foreseeability of legal decisions taken by decision-making organs and iii) security in legal relations, through consistency and coherence of law both in (respectively) vertical hierarchical relationship and in horizontal relationship.[9]

[7] L. GIANFORMAGGIO, *Certezza del diritto*, in *Dig. disc. priv. (sez. civ*.), II, Torino, 1988, p. 275. It is the possibility for the individual to foresee the consequences of his/her actions in G. GOMETZ, *La certezza giuridica come prevedibilità*, cit., p. 10. S. BERTEA, *Certezza del diritto e argomentazione giuridica*, cit., p. 61. Von Arnauld underlines the absence of a precise definition of legal certainty (*Rechtssicherheit*) but quotes two possible definitions by two different authors '*Beständigkeit der für ein Verhalten eintretenden Rechtsfolgen*' (reliability/consistency of the consequences of a behaviour) and '*Berechenbarkeit staatlichen Handelns*' (predictability of state practice), respectively G. KÖBLER, *Juristisches Wörterbuch. Für Studium und Ausbildung*, München, 2001, p. 398 and E. BENDA, *Der soziale Rechtsstaat*, in E. BENDA, W. MAIHOFER, H.-J. VOGEL, *Handbuch des Verfassungsrechts der Bundesrepublik Deutschland*, Berlin-New York, 1994, para. 17. Nonetheless, von Arnauld considers that predictability and coherence create legal certainty but cannot represent its definitions. After having comparatively analysed several European legal orders, he concludes that a common background for the definition of legal certainty can be found in i) the stability of legal rules and ii) the foreseeability of judicial decisions and foreseeability of the possible changes in the law. A. VON ARNAULD, *Rechtssicherheit*, cit., p. 102 f. and 626. On the different meaning of legal certainty in the Italian scholarship see M. CORSALE, *Certezza del diritto e crisi di legittimità*, Milano, 1979, p. 30 ff.; R. GUASTINI, *La certezza del diritto come principio di diritto positivo?*, in *Le regioni*, XIV, 1986, p. 1094-1096; M. LONGO, *Certezza del diritto*, in *Nov. Dig. it*., III, Torino, 1974, p. 124-129; C. LUZZATTI, *L'interprete e il legislatore. Saggio sulla certezza del diritto*, 1999, *passim*; L. FERRAJOLI, *Diritto e Ragione. Teoria del garantismo penale*, Roma-Bari, 1989, p. 94-190.

[8] G. GOMETZ, *La certezza giuridica come prevedibilità*, cit., p. 1 ff.

[9] L. GIANFORMAGGIO, *Certezza del diritto*, cit., p. 275. It is impossible to quote all definitions of legal certainty. Another useful distinction could be the one between legal certainty of statutes, coming from the Enlightenment and the need for written precise provisions, and legal certainty of the law in its concrete application, which is another common understanding of legal certainty. S. PRADUROUX, *Certezza del diritto, I agg*., in *Dig. disc. priv. (sez. civ.)*, Torino, 2014, para. 1. Luigi Lombardi distinguished the possible definitions of legal certainty in four categories in order to identify the role of judge-made law: 1) legal certainty as security. Due to the ethical and utilitarian dimension of legal certainty, law must correspond to certainty; 2) non-violation of previously acquired subjective rights/subjective situations from the State, as a concept linked to the rule of law, non-retroactivity, the principle *nullum crimen sine lege* in criminal law, prohibition of analogy. Lombardi refers to Rümelin in the German scholarship, who speaks of *Freiheitsinteresse* and in particular of positive *Rechtsbewährungsinteresse* as sources for the interest to legal certainty (*Rechtssicherheitsinteresse*). M. RÜMELIN, *Rechtssicherheit*, Tübingen, 1924, p. 11 f.; 3) knowability of the individual legal situation and therefore foreseeability of the law applied to the individual by courts, thanks to the general norm; 4) diachronic legal certainty as consistency, coherence and gradualness of the law, especially through judge-made law. L. LOMBARDI, *Diritto giurisprudenziale*, Milano, 1967, p. 569-587. See also G. GOMETZ, *La certezza giuridica come prevedibilità*, cit., p. 8 f. Another classical concept of legal certainty is Flavio Lopez de Oñate's, which is also considered in the first point of Lombardi's analysis. Lopez de Oñate's legal certainty is ethicality/morality in a universal dimension. He draws a link between justice, seen as equality, legal certainty and legality. Legality and equity are not opposed concepts. Justice can only be achieved through abstract and fixed legal provisions. Thanks to its abstract nature, the legal practice can be concretely precise and in this dimension of legal

The most known Italian handbook on the theory of law defines legal certainty as 'the possibility for the citizen to know what attribute the law will assign to his/her actions and to foresee the courts' reactions to his/her conduct' and links foreseeability and legal certainty directly to individual freedom.[10] This definition of legal certainty can also include accessibility of the law, unambiguous legal characterisations, steadiness in precedents, protection from State's arbitrariness, clarity of statutes etc.[11]

What emerges from these definitions is that the concepts of foreseeability and predictability are the core component of most definitions of legal certainty in philosophy of law and theory of law.[12] Authoritative scholars indeed depict foreseeability and legal certainty *in abstracto* as intertwined concepts at the core of the modern age: the foreseeability of the law was a core value in the Age of the Enlightenment and was put into question by the complexity of the facts between the 19th and 20th Century.[13]

The following paragraphs offer a brief overview of foreseeability according to different philosophical conceptions. First of all, legal certainty as foreseeability is a typical understanding of legal positivism.[14] Although positivism is accused of being sceptical towards legal certainty, it is more correct to state that legal positivists do not believe it is possible to reach absolute legal certainty, but rather admit relative legal certainty and pursue it in its relative dimension as a value and an ideal.[15] Secondly, the concept of foreseeability can be also found in realism and in anti-formalism.

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certainty, justice can be achieved. F. LOPEZ DE OÑATE, *La certezza come specifica eticità del diritto*, in ID., *La certezza del diritto. Nuova edizione riveduta con saggi di G. Capograssi, P. Calamandrei, F. Carnelutti, P. Fedele* (ed. G. ASTUTI), Milano, 1968, p. 157 ff., in particular p. 161.

[10] M. JORI, A. PINTORE, *Manuale di teoria generale del diritto*, Torino, 1995, p. 194-195. The authors further underline the importance of foreseeability in criminal law, where it is a multi-faceted principle composed by several sub-principles (*lex stricta, lex praevia, lex certa* etc.).

[11] G. GOMETZ, *La certezza giuridica come prevedibilità*, cit., p. 7 f. and S. BERTEA, *Certezza del diritto e argomentazione giuridica*, cit., p. 53 f.

[12] In this respect, Gianmarco Gometz has dedicated a volume to the reconstruction of legal certainty in light of foreseeability. According to him, several definitions of legal certainty can be included in the wide concept of foreseeability, such as circumstances, requirements or means to achieve foreseeability, which he uses as a synonym for legal certainty in this context. For example, accessibility and stability in law are requirements, rather than a definition of legal certainty, to ensure foreseeability of legal consequences; certainty in *res iudicata* is a means to ensure foreseeability, otherwise, it would be impossible to foresee legal consequences from final judgements. G. GOMETZ, *La certezza giuridica come prevedibilità*, cit., p. 23.

[13] Paolo Grossi considers the modern idea of abstract foreseeability and legal certainty inevitably in decline, due to his conception of *post-modern law* (*diritto pos-moderno*) that puts the facts at the centre of the legal discourse. In Grossi's view, facts are connected to the idea of history and therefore the development and changing of the law become an ordinary phenomenon. P. GROSSI, *Storicità* versus *prevedibilità: sui caratteri di un diritto* pos-moderno, in *Questione Giustizia*, 4, 2018, p. 17 ff.

[14] S. BERTEA, *Certezza del diritto e argomentazione giuridica*, cit., p. 61.

[15] S. BERTEA, *Certezza del diritto e argomentazione giuridica*, cit., p. 64. Hans Kelsen refused the idea of an absolute certainty in law, as a fixed legal order, where courts apply already existing norms. In this

1.1.2. Foreseeability as a relative gradual ideal for Hans Kelsen.

Hans Kelsen considered legal certainty as foreseeability in the second edition of his *Reine Rechtslehre* (Pure Theory of Law) in 1960, but it was the result of an articulated elaboration starting from the first edition of his work in 1934.[16]

Kelsen rejected the concept of absolute foreseeability in law, namely the possibility to be aware of the exact interpretation. Therefore, his scepticism was directed towards interpretive formalism. Given the fact that Kelsen considered that the judges actually created law, in his opinion it made no sense to consider the absolute predictability of the content of law before its application. However, it is not possible to previously know what the judges will decide in equity and according to their own beliefs through sciences such as the Pure Theory. This knowledge is possible only through empirical sciences such as legal sociology, since foreseeability is something that belongs to *Sein* rather than to *Sollen*.[17]

In the later elaboration of his doctrine, Kelsen was influenced by American realists and the Sociology of Law and softened his beliefs on the nature of the Sociology of Law as an empirical science. The later acknowledgement of the reciprocity between Sociology of Law and normative Jurisprudence leads to the elaboration, later on, of legal certainty as foreseeability of the judicial function. [18]

perspective, he defines legal certainty as an illusion but limits his statement to traditional legal theories and *concepts jurisprudence.* On another perspective, he elaborates on the concept of legal certainty as relative and gradual foreseeability, as it will be explained in the following. H. KELSEN, *Lineamenti di dottrina pura del diritto*, Torino, 1952, p. 124. (It is the 1934 edition).

[16] Both Gometz and Bertea agree on a) the fact that Kelsen was not opposing the idea of legal certainty. Kelsen was critical about the idea of an absolute legal certainty, as the one of the *concepts jurisprudence*, but he was supporting the idea of legal certainty as (relative) foreseeability. b) his understanding of legal certainty was foreseeability. S. BERTEA, *Certezza del diritto e argomentazione giuridica*, cit., p. 61. G. GOMETZ, *La certezza giuridica come prevedibilità*, cit., p. 119 ff.

[17] H. KELSEN, *Lineamenti di dottrina pura del diritto*, Torino, 1952, p. 53 ff., 75, 123-124.

[18] H. KELSEN, *The Pure Theory of Law and Analytical Jurisprudence*, in *Harvard Law Review*, 55, 1941, p. 50-54, later published in Italian together with the 1934 Pure Theory of Law, H. KELSEN, *La dottrina pura e la giurisprudenza analitica*, in ID., *Lineamenti di dottrina pura del diritto*, cit., p. 180-185. Jurisprudence describes its object (law) in ought-propositions, while natural science uses is-propositions. Normative jurisprudence is different from sociological jurisprudence. Even if Kelsen previously refused the scientific nature of sociological jurisprudence, here he describes its object as '[t]hus sociological jurisprudence is not legal norms in their specific meaning of " ought-statements," but the legal (or illegal) behaviour of men'. (p. 52) He does not deny its validity but refuses to consider it as the only science. On the contrary, 'sociological jurisprudence stands by side with normative jurisprudence'. However, sociological and normative jurisprudence have different objects and the first one deals with the efficacy of the law, while the second with its validity. But, although validity and efficacy must be distinguished, they 'stand in a definite relation to each other', so sociological and normative jurisprudence have a 'considerable connection'.

In the *Reine Rechtslehre*/Pure Theory of Law of 1960 Kelsen deals again with legal certainty, but in a different way than in the 1934 edition. Kelsen discusses this point in the chapter entitled *Rechtsdynamik*, and specifically with regards to the definition of the *Stufenbau*. According to some scholars, Kelsen changes his approach towards legal certainty and comes closer to traditional positivist views on legal certainty as foreseeability.[19] Others believe that Kelsen only specifies and develops his vision of legal certainty. If the first edition was simply concentrated on the argumentation against the illusory character of absolute foreseeability, this second edition developed a different idea of legal certainty as an ideal which can be pursued only relatively.[20]

According to Kelsen, legal certainty is the foreseeability of judicial decisions. Foreseeability is a relative concept and comes to existence when courts and inferior organs apply law in a consistent way with hierarchically superior norms, in the light of the *Stufenbau*. Therefore, certainty means that individuals must be able to foresee the normative content of administrative and judicial acts in order to plan their actions being aware of the possible consequences.[21] Following the positivist approach, Kelsen looks at legal certainty in the perspective of the dynamic dimension of the legal order, i.e. the law in action. Therefore, he studies the application of the legal phenomenon in a diachronic perspective. Kelsen specifies the aspect of legal certainty (*Rechtssicherheit*) in the context of judge-made law while analysing the components of the legal order. Legal certainty is detached from the abstract dimension of law, and it is considered in its relationship with respect of all components of the legal order (*Stufen*).[22] Kelsen distinguishes between legal orders with centralised law-making power and the legal orders where the law-making process is de-centralised.

In the first case, courts simply apply general norms to concrete cases and create 'individual norms' in concrete cases. Although this legal order lacks flexibility, its main advantage is legal certainty.[23] Legal certainty consists of 'the courts' decision to be foreseeable to a certain degree and therefore it is predictable that the subjects will direct

[19] M. CORSALE, *Certezza del diritto e crisi di legittimità*, cit., p. 26. Although Corsale, bearing in mind the results of anti-formalist theories, does not approve the equation written law-legal certainty and unwritten law-uncertainty, he substantially approves Kelsen's approach to legal certainty.
[20] G. GOMETZ, *La certezza giuridica come prevedibilità*, cit., p. 79; C. LUZZATTI, *L'interprete e il legislatore*, cit., p. 244 ff.
[21] G. GOMETZ, *La certezza giuridica come prevedibilità*, cit., p. 80.
[22] H. KELSEN, *Reine Rechtslehre*, Wien, 1960, p. 198 ff. and 228 ff. See S. BERTEA, *Certezza del diritto e argomentazione giuridica*, cit., p. 62.
[23] H. KELSEN, *Reine Rechtslehre*, cit., p. 256 f.

their behaviour according to the foreseeable judicial decisions'.[24] As a consequence, legal certainty is related to the function of administrative organs. According to Kelsen, this representation of the rule of law corresponds to legal certainty.[25]

In the second case, i.e. in de-centralised legal orders, courts and administrative organs have full discretionary power in their decisions and adapt to the circumstances of the case as much as possible. De-centralised legal orders represent an ideal state model with opposing characteristics to the centralised legal order: maximum flexibility and absence of legal certainty, where foreseeability is absolutely impossible for individuals. Individuals will be aware of the consequences of their actions only when a decision is issued.[26]

Although these two models are philosophical ideals, Kelsen recognises the existence of hybrid models in the real world, where the degree of realisation of flexibility and legal certainty is inversely proportional.[27] Hence, foreseeability (i.e. legal certainty) is an ideal that can be pursued to a relative and graded level in real legal orders. In particular, the foreseeability of the judicial function (i.e. the decisions of the judges) is possible only in those legal orders where the law-making power is at least partially centralised. In a standard case, individuals are only able to foresee the authority adjudicating the case and applicable procedural law, even if the decision-making power is always exercised according to a superior formal norm. In a centralised law-making system, it is possible to foresee the actual content of the law in the decisions of the courts. Therefore, centralised legal orders are more effective in safeguarding legal certainty.[28]

1.1.3. The role of prediction in Hart.

Herbert Hart attributes a crucial role to predictions of judicial decisions, with particular regard to two cases. Firstly, in case of the open texture of law, answering to the question 'what the law is' would be 'a guarded prediction of what the courts will do'.[29] Secondly, even if it is clear what the law is, a prediction of the courts' decisions will often be the means to state what the law is. In both cases, but mostly in the latter, 'the basis of such prediction is the knowledge that the courts regard legal rules not as predictions, but as

[24] Literal translation from German, H. KELSEN, *Reine Rechtslehre*, cit., p. 257.
[25] H. KELSEN, *Reine Rechtslehre*, cit., p. 257.
[26] This is the model of *freie Rechtsfindung* (free search for law), about which Kelsen is not persuaded, criticising the fallacy of this model. H. KELSEN, *Reine Rechtslehre*, cit., p. 257 f.
[27] H. KELSEN, *Reine Rechtslehre*, cit., p. 257.
[28] G. GOMETZ, *La certezza giuridica come prevedibilità*, cit., p. 83.
[29] H.L.A. HART, *The Concept of Law*, Oxford, 1961, p. 143.

standards to be followed in decision, determinate enough, in spite of their open texture, to limit, though not to exclude, their discretion'.[30] Nevertheless, Hart affirms that 'the existence of rules in any social group renders predictions possible and often reliable, it cannot be identified with them'.[31] Hart is in fact dismantling rule-scepticism and the claim that law is only what courts say it is and its prediction. Hart does not even believe in absolute certainty but opens the door to a possible relative certainty.[32]

1.1.4. Rule of law as a matter of degree in Raz.

A gradual idea of the rule of law can be also found in Joseph Raz's thought. According to Raz, the basic idea of the rule of law consists in the attitude of the law being respected and therefore in its capacity of ruling people.[33] All other principles connected with the rule of law derive from this basic idea, including the principle that *laws should be relatively stable*. Only a relatively stable law enables the individuals to take short and long-term decision on the basis of their knowledge of the law. Nevertheless, the conformity to the rule of law 'is often a matter of degree': apart from explicit retroactivity, the law can be clear or stable at a variable degree.[34] With regards to the rule of law, one of its main advantages is the protection of individual freedom, which can only be pursued though predictability of the consequences of one's actions.[35] Therefore, the rule of law can be violated either by uncertain law or by frustrated expectations due, for example, to retroactive law-making. The frustration or the absence of foreseeability of future developments ground both kinds of violations. Violations, as well as conformity to the rule of law, are not absolute judgments. It is instead a matter of degree of the violation. Complete consistency in law is impossible, as Raz admits an inevitable element of vagueness.[36]

[30] H.L.A. HART, *The Concept of Law*, cit., p. 143.
[31] H.L.A. HART, *The Concept of Law*, cit., p. 144.
[32] S. BERTEA, *Certezza del diritto e argomentazione giuridica*, cit., p. 67.
[33] J. RAZ, *The Authority of Law: Essays on Law and Morality*, Oxford, 2011 (reprint of the 1979 first edition), p. 213-214. Raz discusses the idea of the rule of law starting from the absolute definition given by Hayez, according to whom predictability is an absolute characteristic of the rule of law, which means 'that government in all its actions is bound by rules fixed and announced beforehand – rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge'. F.A. HAYEK, *The Road to Serfdom*, London, 1944, p. 54, quoted by Raz at p. 210.
[34] J. RAZ, *The Authority of Law: Essays on Law and Morality*, cit., p. 215.
[35] J. RAZ, *The Authority of Law: Essays on Law and Morality*, cit., p. 220 f.
[36] J. RAZ, *The Authority of Law: Essays on Law and Morality*, cit. p. 222.

1.1.5. Predictability as essence of the rule of law in Waldron.

In the framework of normative (or ethical) positivism, Jeremy Waldron in his paper *The Rule of Law in Contemporary Liberal Theory* defines the rule of law as social predictability. Although the rule of law is a very broad concept in an historical perspective,[37] Waldron holds that nowadays the rule of law is concentrated on the qualities that rules should have in order to foster ideals such as liberty or justice. Law is therefore universal, both in its form and in its application (consistency) and well-known to citizens, who can rely on it as they make future plans. Leaving aside universality and non-arbitrariness, predictability expresses the 'demand for official action to be governed by rules which are general, clear, well-known, relatively constant through time, prospective, non-contradictory, and possible to comply with'.[38] Thus, the rationale behind predictability is individual autonomy, in so far as it is necessary to safeguard the individuals' free decision-making. This connection between predictability and autonomy is the outcome of liberalism, as it does not limit the importance of predictability to the general interest, but instead considers it affecting each citizen in its individuality.[39]

One of the main features of the rule of law defined as predictability is that citizens should have access to the knowledge of the law. It is then a matter of degree of accessibility if the law should be available to everybody or with legal advice.[40] Waldron distinguishes between certainty obtained with or without legal advice, since this distinction affects the consequent idea of the rule of law, which can have different degrees of autonomy. If individuals are granted only few free choices, the knowledge of the law has to be assessed according to the results of legal advice. On the contrary, if autonomy attributes a large number of life choices to the individuals, the knowledge of the law

[37] Waldron refers to Dicey's three folded definition of the rule of law: a) 'no man is punishable or can lawfully be made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land'; b) 'every man, whatever his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals; c) the general principles of the constitution […] are […] the result of judicial decisions determining the rights of private persons in particular cases brought before the courts'. (A.V. DICEY, *Introduction to the Study of the Law of the Constitution*, London, 1959 (1885), p. 188-193-195). According to Waldron, contemporary rule of law is concentrated on the first meaning. J. WALDRON, *The Rule of Law in Contemporary Liberal Theory*, in *Ratio Juris*, 1989, p. 79 and 81.

[38] J. WALDRON, *The Rule of Law in Contemporary Liberal Theory*, cit., p. 84.

[39] J. WALDRON, *The Rule of Law in Contemporary Liberal Theory*, cit., p. 84. Waldron seems to accept Raz's definition of autonomy, that is moderate and does not stand in the way of state powers.

[40] In the extreme cases of complete obscurity and complete clarity legal experts would be useless but most cases will be in the nuances between these two opposites. J. WALDRON, *The Rule of Law in Contemporary Liberal Theory*, cit., p. 91.

should be available without the necessity of legal advice.[41] To sum up, the citizen should be in the place to establish whether he or she can rely on his knowledge and whether he or she has to resort to appropriate legal advice. As a result of the importance of predictability in law, the requirements of the law are: familiarity, simplicity, reasonable constancy over time, reliability of reforms.[42] Another possible consequence could be, in Waldron's view, that the law should not be 'morally counter-intuitive'. Since citizens will never carry out the duty to know exactly what the law prescribes, it is the law that should refrain from going beyond what would be ordinarily thought. Waldron himself avoids equating between morality and the rule of law, or natural law and the rule of law. He does so by highlighting that his purpose is not giving objective validity to morality, but to show that morality and law reciprocally influence each other. Thus, the question is only a matter of what law should achieve, not an assessment of its essence.[43]

Predictability plays also a crucial role in judicial interpretation. According to Waldron, the rule of law as predictability imposes the judges an interpretive approach, as certainty does not necessarily mean strict literal interpretation. On the contrary, judges should interpret systematically, considering the rationale of the provision they are interpreting with regards to other principles on which the law is based.[44] Under this perspective, judicial interpretation should, again, be closer to the social understanding and predictability rather than to technical interpretation. In the end, Waldron sees the rule of law as social predictability, thanks to the connection liberal theories make between the predictability and individual autonomy. This is particularly important when dealing with legal certainty and judicial construction and the role of social understanding.

1.1.6. Realists and foreseeability.

Although for realists legal certainty is more a myth than an ideal, they nevertheless identify it with foreseeability. For example, Jerome Frank affirmed the impossibility to pursue legal certainty. But he admits that, since law consists in judicial decisions, legal certainty means the possibility to foresee these decisions. Judge-made law is however unforeseeable as it does not employ pre-established rules. The denial of legal certainty induces Frank to affirm that maximum flexibility is to be pursued, in order for law to adapt to unforeseeable changing social circumstances. It is clear that, although Frank

[41] J. WALDRON, *The Rule of Law in Contemporary Liberal Theory*, cit., p. 91.
[42] J. WALDRON, *The Rule of Law in Contemporary Liberal Theory*, cit., p. 91.
[43] J. WALDRON, *The Rule of Law in Contemporary Liberal Theory*, cit., p. 92.
[44] J. WALDRON, *The Rule of Law in Contemporary Liberal Theory*, cit., p. 93.

denies legal certainty because law is unforeseeable, *a contrario* he would identify legal certainty with foreseeability.[45]

Similarly, Alf Ross discusses the validity of law and affirms that the only valid law is the effective one. Valid law consists in the 'correspondence between the system of norms […] and […] the application of law by the courts'.[46] Given the fact that the system of norms is a scheme of interpretation, it is possible to predict the action of the courts as 'meaningful responses to given conditions'.[47] First of all, valid law refers to 'hypothetical future decisions under certain conditions'.[48] Secondly, valid law is a prediction. Consequently, if an action is brought before the courts of a state, it means that the facts that condition the application of the law have happened. If in the meantime there have been no alterations in the circumstances that form the basis of the fact, the directive to the judge contained in the law will form an integral part of the reasoning underlying the judgement.[49] Following Ross' theory, validity is related, in the end, to probability. As absolute certainty cannot be claimed, it can only be achieved with gradual probability and therefore includes relativity into law. 'It can also be said that a rule can be valid law to a greater or lesser degree varying with the degree of probability with which it can be predicted that the rule will be applied'.[50] Moreover, probability and its degree depend on the sources of law, which represent the 'experience material' on which predictability is built.[51]

Therefore, in Ross' view predictability and probability are related to the validity of law, which depends on its judicial application, rather than on certainty itself. More importantly, probability is gradual and relative, as in positivists. It is important to highlight that, given the realists' identification of law with its application, they apply predictability as a concept which indicates *what* is applicable law and *what* law is valid.

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[45] J. FRANK, *Law and the Modern Mind*, New York, 1930, p. 14 ff.
[46] A. ROSS, *On Law and Justice*, London, 1958, p. 39 and p. 34 f. The content of doctrinal proposition is the action of the courts under certain conditions. Therefore, the validity of the law depends on its concrete application by judges. Two aspects need to be specified: i) if this application refers to present, past or future and ii) what does 'applied' mean.
[47] The theory of Alf Ross is that doctrine of law is an empirical social science subject to the theory of verification. A. ROSS, *On Law and Justice*, cit., p. 35 and 39.
[48] A. ROSS, *On Law and Justice*, cit., p. 41.
[49] A. ROSS, *On Law and Justice*, cit., p. 42.
[50] A. ROSS, *On Law and Justice*, cit., p. 45.
[51] A. ROSS, *ibidem.* and p. 49. Further, Ross affirms the impossibility to separate the cognitive study of law from legal politics, as every prediction is not only a description but can influence future interpretations of the law, and therefore also a political act.

1.1.7. Legal certainty and foreseeability in Italian positivists and anti-formalists.

Although a complete analysis of the Italian philosophical tradition is beyond the present scope, it is interesting to report on the concepts of legal certainty according to three scholars. The positivist Luigi Ferrajoli refers to foreseeability in the specific context of constitutionalism and criminal law, while the anti-formalists Massimo Corsale and Bruno Leoni ground their definition of legal certainty as foreseeability on the idea that law does not include only written law but is a broader concept.

Luigi Ferrajoli in his *Diritto e Ragione* deals with philosophical concepts and criminal law. Although he opts for a Minimal criminal law, in a State governed by the rule of law, in opposition to a 'maximum criminal law model', typical of a totalitarian State,[52] Ferrajoli affirms that an authentically limited criminal law must pursue legal certainty and rationality. These two principles are strictly linked to each other in the following way. In order to convict the accused, a criminal court must verify the clarity and precision of the requirements of criminal liability. Otherwise, it would be impossible to issue a guilty verdict, at least for a criminal system based on the rule of law. The relationship between a human rights-oriented criminal law and rationalism is the following: in order to realise a rational and certainty-oriented criminal law system, criminal law's interventions must be predictable. Foreseeability is therefore the content and aim of legal certainty and rationalism in an ideal model of criminal law. Moreover, foreseeability is related to the concrete enforcement of the criminal law and the probability of the intervention of the State: in this respect, it could be understood to mean the foreseeability of the application of criminal law.

More specifically, the application of criminal law is foreseeable if it is rationally supported by cognitive arguments that enable the courts to establish the truth. Therefore, foreseeability in criminal law is the need for a rationally controlled argumentation by the courts with rationally verifiable criteria.[53] According to Ferrajoli, certainty in rule of law system (Minimal criminal law) consists in never convicting an innocent party and

[52] After having analysed the two opposite models of minimal and maximal criminal law (*diritto penale minimo* e *diritto penale massimo*), Ferrajoli underlines that real models have perhaps mixed features and can be described only as tendentially leaning towards minimal or maximal models. As far as minimal criminal law is concerned, it presents human rights and liberal safeguards to the highest level. On the contrary, maximal criminal law is typical of totalitarian States, where there are no limits to the criminal intervention of state powers, which happen in the absence of limitations and pre-determination. L. FERRAJOLI, *Diritto e ragione. Teoria del garantismo penale*, Bari, 1989, p. 5 ff., 67 ff., 74 ff.

[53] L. FERRAJOLI, *Diritto e ragione*, cit., p. 81-82. In opposition, 'maximum criminal law' is uncertain and unforeseeable in relation to convictions and penalties.

therefore in the application of the principle *in dubio pro reo* and, consequently, of the principle of *favor rei*. However, it is relevant to note that Ferrajoli defines certainty, with different goals in different systems, as a relative and subjective concept.[54] In the end, *favor rei* is the criterion to solve possible uncertainties in case-law.[55] Moreover, certainty is relative because it cannot be realised completely, but is always a gradual concept.[56] Even more importantly, he distinguishes between 'certainty-uncertainty of law' and 'certainty-uncertainty of fact'. While 'uncertainty of fact' concerns ambiguous evidence and the determination of the facts, 'uncertainty of law' concerns the ambiguous legal characterisation and definition of already proven facts. What Ferrajoli identifies as 'uncertainty of law' is the very subject matter of the problematic notion of foreseeability in criminal law and corresponds to the problem raised by the Strasbourg Court's jurisprudence.[57]

An important contribution to the non-positivist scenario can be found in the definition of legal certainty given by Massimo Corsale.[58] In his *Certezza del diritto e crisi di legittimità*, a classic work on legal certainty under the Italian philosophy of law, Corsale analyses the history of legal certainty and provides his own definition. After having analysed the nature of legal certainty as objective or as intrinsic element of law, Corsale focuses on the relationship between legal certainty and the concept of law.[59] He therefore elaborates a two-sided definition of legal certainty: security and foreseeability. Legal certainty is first of all security. Security (*Rechtssicherheit*) can be defined as security in mutual legal relationships, and therefore consistency in the qualifications of legal situations.[60] Secondly and more importantly, Corsale considers foreseeability as the most

[54] Certainty in a minimal model is based on the principle *in dubio pro reo*, while in a maximum model on the principle *in dubio contra reum*. L. FERRAJOLI, *Diritto e ragione*, cit., p. 83.
[55] L. FERRAJOLI, *Diritto e ragione*, cit., p. 83-84.
[56] The similarities with Kelsen's though are self-evident, even if Ferrajoli did explicitly refer to Kelsen. Certainty is linked with truth in a trial, and therefore the impossibility to ensure the finding of truth in every case causes its relative character.
[57] L. FERRAJOLI, *Diritto e ragione*, cit., p. 86. Uncertainty of law is a problem of legality.
[58] In the same vein, see G. GOMETZ, *La certezza giuridica come prevedibilità*, cit., p. 102 ff.
[59] M. CORSALE, *Certezza del diritto e crisi di legittimità*, Milano, 1979, p. 15 ff. Corsale opposes the identification between legal certainty with a value. According to him, legal certainty is an element of law which is preordained to the pursuit of justice. As a consequence, he interrupts the debate on the relationship between legal certainty and justice. On the possible contrasts between justice (*Gerechtigkeit*) and legal certainty (*Rechtssicherheit*). See G. RADBRUCH, *Gesetzliches Unrecht und übergesetzliches Recht*, in *Süddeutsche Juristen-Zeitung*, 1946, p. 107.
[60] Corsale refers to the definition of *Rechtssicherheit* given by Schulz and tries to find a common ground between its two elements: *Rechtssicherheit* as the prevalence of law over wrongdoing and legal certainty as knowability of the legal order. M. CORSALE, *Certezza del diritto e crisi di legittimità*, cit., p. 31-33. F. SCHULZ, *Prinzipien des römischen Rechts*, München-Leipzig, 1934, Corsale refers to the Italian translation ID., *I principi del diritto romano*, Firenze, 1946, p. 206.

widespread definition of legal certainty. It is directly related to *Rechtssicherheit* (as consistent legal characterisation), as the latter is required for its existence.[61] Legal certainty is hence foreseeability of the legal consequences of the action and demands three requirements: i) codification, as the possibility to know written norms in force. According to him, this tool is not adequate to realise legal certainty, as knowability cannot be reduced to codification;[62] ii) the individual's expectation that his interpretation of the law will coincide with the one given by other individuals. This second requirement includes and absorbs the first one. As Corsale moves from anti-formalist positions, he believes that the impossibility to know written law, the risks connected to its excessive proliferation and the unfair exclusion of common law legal orders from legal certainty as a result thereof, impose to consider consistent and unique interpretation as a more fitting requirement;[63] iii) lastly, effectiveness of the legal order. According to Corsale, effectiveness is a comprehensive concept summarising the whole concept of legal certainty as foreseeability.[64] Effectiveness, both an essential characteristic of the legal order and a constitutional principle, consists in the objective to order society through organisation, and more specifically in the creation of foreseeability and security through consistent legal characterisations.[65]

Therefore, Corsale considers more specific principles usually associated with legal certainty only historical manifestations of legal certainty but does not identify them with the essence of the concept. For example, Corsale refers to the principle of legality and the separation of powers as a consequence to the fact that legal certainty also includes a 'political component': individual autonomy and non-arbitrariness of State powers created the need for the principle of legality. To him, the principle of legality is part of legal certainty but it is not autonomous, as it cannot be convincingly based on the separation of powers.[66] His definition of the principle of legality is not the same offered by constitutionalism, therefore it would be unfair to equate these two notions of the same principle.

[61] M. CORSALE, *Certezza del diritto e crisi di legittimità*, cit., p. 32.
[62] M. CORSALE, *Certezza del diritto e crisi di legittimità*, cit., p. 34-36.
[63] M. CORSALE, *Certezza del diritto e crisi di legittimità*, cit., p. 35-36.
[64] M. CORSALE, *Certezza del diritto e crisi di legittimità*, cit., p. 37 ff.
[65] Corsale elaborates this definition of effectiveness quoting Kelsen and the reference to an effective legal order in times of crisis in the safeguard of the duration of the legal order. M. CORSALE, *Certezza del diritto e crisi di legittimità*, cit., p. 37 f.
[66] M. CORSALE, *Certezza del diritto e crisi di legittimità*, cit., p. 41 ff., in particular p. 44 and 49.

What is important here is focusing on the results of such an antiformalist analysis, which turns around the concept of effectiveness. In particular, legal certainty is identified with foreseeability and subsequently is linked with effectiveness. Corsale allows to focus on the relationship between foreseeability, legal certainty and effectiveness, starting from a broad definition of law. Therefore, it should not be surprising that the analysis of the ECtHR case-law and, under this point of view, of the European Court of Justice's, will show that the stress on effectiveness plays such a great role. The link foreseeability-legal certainty-effectiveness is therefore crucial in anti-formalist legal orders, which are not bound by the national organisation of the sources of law.

As Gometz explains in his work,[67] Bruno Leoni in his book *Freedom and the Law* (1961) defines legal certainty as foreseeability, while refusing to identify law just with written law.[68] Leoni defines legal certainty as foreseeability by stating that foreseeability is one essential component of human decisions. He therefore relies on general rules to allow human actions, or at least legal actions, to be foreseeable.[69] He distinguishes between long-term certainty and short-term certainty, which both contribute to individual freedom. Long-term certainty is based on customs and non-written law and is defined as the possibility for individuals to make long-term plans on the basis of spontaneously and usually adopted rules, which are acquired by judges in the passing of time.[70] On the other hand, short-term certainty is based on written law. It is defined as foreseeability with regards to written law, which is valid as long as statutes stay in force. Consequently, this certainty requires precision of the written law.[71]

In conclusion, the idea of legal certainty as foreseeability is common both to positivist and to realists, as well as to anti-formalist theories. The recognition of foreseeability as the core of the rule of law in general, and legal certainty in particular, explains the ECtHR's focus on this concept. The development of the foreseeability standard is therefore, apparently, a concretisation of a philosophical ideal, or directive, quite widespread among the recent Western legal tradition.

[67] The addition of Bruno Leoni's thought is due to the analysis made by Gometz in his book on legal certainty, see G. GOMETZ, *La certezza giuridica come prevedibilità*, cit., p. 138 ff.
[68] Here the reference is the Italian translation of 1995. B. LEONI, *Freedom and the Law*, Princeton, 1961, translated into Italian B. LEONI, *La libertà e la legge*, Macerata, 1995.
[69] B. LEONI, *La libertà e la legge*, cit., p. 84.
[70] B. LEONI, *La libertà e la legge*, cit., p. 106.
[71] *Ibidem*. G. GOMETZ, *La certezza giuridica come prevedibilità*, cit., p. 141 ff.

1.2. Fair warning and maximum certainty.

A second explanation of the notion of foreseeability in the Strasbourg case-law is its similarity with the principles of fair warning and maximum certainty, respectively in the U.S. and United Kingdom. Some scholars believe that the influence of common law systems into the Strasbourg approach is not limited to the inclusion of unwritten law, but it also entails the reference to the foreseeability *in concreto* of the legal consequences of the individuals' actions.[72] Both principles, as more broadly the rule of law in common law, are rooted in the idea of the individual's autonomy.[73]

Fair warning or fair notice is a rationale governing legality in U.S. law, which supports different legality doctrines, as non-retroactivity (both *ex post facto* prohibition and bar to retroactive application of judicial interpretations) and vagueness prohibition (in the void-for-vagueness doctrine of the U.S. Supreme Court), as well as the rules (such as strict construction) governing the construction of penal statutes. In broad sense, fair warning is deemed to be the rationale of legality, prohibiting judicial creation and supporting legislative creation in criminal law. In *Bynum v. State* the U.S. Supreme Court held:

> 'The concept that prior notice of criminal offenses is essential to fundamental fairness in a democracy is somewhat surprisingly, not of ancient vintage. The principle of "legality," or nulla poena sine lege, condemns "judicial crime creation." The converse, or legislative crime creation, which is an essential element of notice, evolved from the literary and philosophical enlightenment movement in Europe between [about] 1660 and [about] 1770. Or, as it was known in England, the Age of Reason. In adopting many of the ideologies prevalent at this time, the emerging American nation elected to replace common law crimes with systematic legislative enactment'.[74]

It is worth mentioning that fair notice derives from the due process of law as a matter of procedural fairness.[75] Namely, procedural fairness requires that actors should at least

[72] Ambos refers to foreseeability as an expression of the fair warning in its subjective version. K. AMBOS, *Artikel 7 EMRK, Common Law und die Mauerschützen*, in *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft (KritV)*, 86, 2003, p. 36, 42. P. BEAUVAIS, *Le droit à la prévisibilité en matière pénale dans la jurisprudence des cours européennes*, in *Archives de Politique Criminelle*, 29, 2007, p. 18. Moreover, I am referring in particular to a doctoral thesis discussed at the University of Trento in 2014 by Daria Sartori, D. SARTORI, *The lex certa principle. From the Italian Constitution to the European Convention of Human Rights*, Trento, 2014, p. 89. According to Sartori, the Strasbourg Court's focus on foreseeability is due to an influence of the Anglo-Saxon legal orders. She bases this affirmation on an in-depth case-law analysis. The perspective offered here is broader than Sartori's goal, which was only the analysis of *lex certa* and limited to the void-for-vagueness and maximum certainty doctrine.

[73] A. ASHWORTH, *Principles of Criminal Law*, Oxford-New York, 2009, p. 69.

[74] Texas Criminal Appellate Court, Bynum v. State, 767 S.W.2d 769, 773 (Tex. Crim. App. 1989), quoted by P.H. ROBINSON, *Fair Notice and Fair Adjudication: Two Kinds of Legality*, in *University of Pennsylvania Law Review*, 154, 2005, p. 343.

[75] See P.H. ROBINSON, *Fair Notice and Fair Adjudication*, cit., p. 345 f., 348 f., 353 f. and 364; J.C. JEFFRIES, *Legality, Vagueness, and the Construction of Penal Statutes*, in *Virginia Law Review*, 71, 1985, p. 205 ff.

have an opportunity to be aware of the prohibition imposed by criminal law, although it does not require an actual warning.[76] As Justice Holmes affirmed in the case of *McBoyle v. the United States*:

> 'although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in a language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear'.[77]

Now that the definition of fair warning has been given, the following paragraphs will show how this rationale, which resembles the concept of foreseeability in the Strasbourg case-law, is recalled both in Supreme Court case-law on *ex post facto* judicial decision making and on the void for vagueness doctrine, which correspond to the diachronic and synchronic aspect of foreseeability.

1.2.1. Bar to retroactive application of judicial interpretations and fair warning.

Ex post facto prohibition and bill of attainder are ruled in the Constitution and applicable to statute law. The application of *ex post facto* prohibition application to judicial decisions is excluded.[78] However, the rationales behind the *ex post facto* prohibition clearly apply in the case of retroactive application of judicial decisions to the defendant's detriment. This is the case of fair notice and, possibly, arbitrariness of state powers.[79]

The United States Supreme Court has anchored the prohibition of retroactivity to the due process clause in the case of *Bouie v. City of Columbia*. Judge-made law must rule only for the future and 'may not be applied retroactively, any more than a legislative enactment may be, to impose criminal penalties for conduct committed at a time when it was not fairly stated to be criminal'[80] and 'there can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an

[76] P.H. ROBINSON, *Fair Notice and Fair Adjudication,* cit., p. 364.
[77] U.S. Supreme Court, McBoyle v. U.S., 283 U.S. 25, 27 (1931). Also «[m]en of common intelligence cannot be required to guess at the meaning of an enactment' in U.S. Supreme Court, Winters v. New York, 333 U.S. 507, 515 (1948).
[78] P.H. ROBINSON, *Fair Notice and Fair Adjudication,* cit., p. 350. The U.S. Supreme Court has held that Art. 10 of the Constitution only covers legislation and, due to the implicit understanding of the term, cannot be extended to judicial decisions. U.S. Supreme Court, Ross v. Oregon, 227 U.S.150, 162-63 (1913): 'whilst thus uniformly holding that the provision is directed against legislative, but not judicial, acts, this court with like uniformity has regarded it as reaching every form in which the legislative power of a State is exerted'.
[79] W.R. LAFAVE, *Criminal Law,* St. Paul, 2010, p. 122. J. HALL, *General Principles of Criminal Law*, Indianapolis-New York, 1960, p. 63.
[80] U.S. Supreme Court, Bouie v. City of Columbia, 378 U.S. 347, 362 (1964), P.H. ROBINSON, *Fair Notice and Fair Adjudication,* cit., p. 354. Due process is safeguarded in the 14th Amendment of the American Constitution.

unforeseeable and retroactive judicial expansion of narrow and precise statutory language'.[81] In the present case, the Supreme Court showed great attention towards the case of a first impression interpretation of a statute which entered into force prior to the defendant's conduct. Although the judicial interpretation was only a clarification of the law in force (and not an amendment) and even if the decision was considered only an explanation of its meaning since the entrance into force, an element of retroactivity arose. The Supreme Court deemed the judicial construction of the statute to be '*unexpected* and indefensible by reference to the law which had been expressed prior to the conduct in issue'. As a consequence, non-retroactivity was applied to judge-made law.[82]

In the following years, the Supreme Court somehow mitigated its judgement on the unforeseeability of judicial constructions. Fair warning was, for example, considered accomplished in *Rogers v. Tennessee*, where the Supreme Court held that the application of the '*ex post facto* clause' to judicial decisions in the *Bouie* case was too extensive, although due process rationale involved 'notice, foreseeability, and, in particular, the right to fair warning as those concepts bear on the constitutionality of attaching criminal penalties to what previously had been innocent conduct'.[83] As a consequence, the judicial interpretation in the case was considered consistent with due process of law and, in particular, fair warning, not being an unpredictable departure from precedent and being justified by common sense.[84]

There remain, however, several doubts about what the new law created by judges is, going beyond interpretation.[85] While it is difficult to trace a consistent path in Supreme

[81] U.S. Supreme Court, Bouie v. City of Columbia, 378 U.S. 347, 352 (1964).
[82] U.S. Supreme Court, Bouie v. City of Columbia, 378 U.S. 347, 84 (1964). (emphasis added). This last statement of the Supreme Court refers to Hall's handbook, see J. HALL, *General Principles of Criminal Law*, cit., p. 61. In the case of *Bouie v. Columbia*, an important detail was that the Court had not considered the accused's behaviour as immoral *per se*. This could explain the easier application of the bar to retroactivity in the case. W.R. LAFAVE, *Criminal Law*, cit., p. 123 f. Although the conduct (killing of a fetus) was considered immoral, the California State Court applied the *Bouie* rule and considered the statute punishing murder not to cover the killing of a fetus in Keeler v. Superior Court, 470 P.2d 617, 627 (Cal. 1970).
[83] The *Rogers* case saw the retroactive application of the abolition of a year-and-a-day rule to the defendant's detriment, on the basis of the uselessness of the rule due to medical development and to its recent abolition in the majority of cases. U.S. Supreme Court, Rogers v. Tennessee, 532 U.S. 459 (2001), 466-67 and 460. See P.H. ROBINSON, *Fair Notice and Fair Adjudication*, cit., p. 354.
[84] U.S. Supreme Court, Rogers v. Tennessee, 532 U.S. 459 (2001), 458 f.
[85] LaFave tried to classify the possible cases of distinguishing in i) non-retroactivity of judicial decisions overruling a prior decision that would lead to the defendant's acquittal for unconstitutionality of the statute, apart from the case of *mala in se*; ii) retroactivity of first impression interpretation of a statute defining its meaning and scope, when the foreseeability (fair warning) assessment is crucial, as in the aforementioned cases of *Bouie* and *Rogers*; iii) retroactivity of judicial interpretation clarifying an otherwise

Court case-law, nonetheless the role of fair warning and fair notice as a rationale plays a crucial role in the assessment of the admissibility of the retroactive application of the judicial decision.

1.2.2. Void-for-vagueness prohibition and fair warning.

Void-for-vagueness doctrine is referred to statute law, while judicial decisions are regulated by the due process clause and the non-retroactivity obligation.[86] A statute is to be declared void by the Supreme Court every time it is so vague that 'men of common intelligence must necessarily guess at its meaning and differ as to its application'.[87] The vagueness doctrine, which has been defined as the operational arm of legality, 'requires that advance, ordinarily legislative crime definition be meaningfully precise or at least that it not be meaninglessly indefinite'.[88] Vagueness in a statute, if declared undue, is legitimate ground for a declaration of unconstitutionality. Its rationale has always been connected to the due process clause in the 5th and 14th Amendments to the Constitution (respectively, for federal statutes and state statutes).[89] The case-law of the Supreme Court on the topic identifies two main rationales: fair warning and protection against arbitrary and discriminatory enforcement.[90]

Leaving aside the second rationale,[91] fair warning is undoubtedly considered crucial both by courts and by scholarship.[92] Therefore, the average citizen shall be aware of the obligations and prohibitions in the law,[93] as this doctrine tests 'whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices'.[94] As absolute certainty is an impossible

unconstitutionally vague statute, in which this limitation to fair warning is considered limited to relatively simple and natural constructions. W.R. LAFAVE, *Criminal Law,* cit., p. 122-125.

[86] U.S. Supreme Court, Bouie v. City of Columbia, 378 U.S. 347, 350 (1964).

[87] U.S. Supreme Court, Connally v. General Constr. Co., 269 U.S. 385, 46 S. Ct. 126, 70 L.Ed. 322 (1926) and Collins v. Commonwealth of Kentucky, 234 U.S. 634, 638, 34 S. Ct. 924, 58 L. Ed. 1510 (1914).

[88] J.C. JEFFRIES, *Legality, Vagueness, and the Construction of Penal Statutes*, cit., p. 196.

[89] W.R. LAFAVE, *Criminal Law,* cit., p. 108 f.

[90] P.H. ROBINSON, *Fair Notice and Fair Adjudication,* cit., p. 356. W.R. LAFAVE, *Criminal Law,* cit., p. 110 ff. According to LaFave, a third rationale should be added: the provision of sufficient breathing space for First Amendment rights. W.R. LAFAVE, *Criminal Law,* cit., p. 113-114.

[91] According to LaFave, most cases involving arbitrariness and discrimination are related to fair warning, while Sartori in her doctoral thesis arguments on the prevalence of this second rationale in the Supreme Court case-law, at least after the 1970s. Sartori recalls Goldsmith's thesis. See W.R. LAFAVE, *Criminal Law,* cit., p. 113; D. SARTORI, *The lex certa principle,* cit., p. 107 ff.; A.E. GOLDSMITH, *The Void-For-Vagueness Doctrine in the Supreme Court Revisited*, in *American Journal of Criminal Law*, 30, 2003, p. 286 ff.

[92] W.R. LAFAVE, *Criminal Law,* cit., p. 110; P.H. ROBINSON, *Fair Notice and Fair Adjudication,* cit., p. 359.

[93] U.S. Supreme Court, Lanzetta v. New Jersey, 306 U.S. 451, 59 S. Ct., 618, 83 L.Ed. 888, (1939).

[94] U.S. Supreme Court, Connally v. General Constr. Co., 269 U.S. 385, 46 S. Ct. 126, 70 L.Ed. 322 (1926).

objective,[95] fair warning is considered achieved if vagueness is avoided through judicial interpretation.[96]

The achievement of fair warning also depends on the social group the law means to address. With regards to a general statute, fair warning will be accomplished if the individual is able to determine the meaning of the statute, with appropriate legal advice.[97] On the other hand, the more the addressed are professionals, subject to a certain regulation, the less the statute is likely to be declared void for vagueness.[98]

Under the perspective of the addressed, the void for vagueness doctrine and the rationale of fair warning become a subjective judgement. Therefore, it is not surprising that they are linked with the mistake of law and *scienter*. On the one side, the Supreme Court often upholds statutes because they require an intentional knowing or willful conduct. The Court raises the argument that requiring *scienter* as an element of the offence is sufficient in assessing fair warning and for not declaring the statute void.[99]

A larger use of the mistake of law has also been suggested by scholarship as a possible solution in those cases where the individual acts in good faith ignoring the law or considering his conduct reasonably lawful due to an *error juris*.[100] Nevertheless, the individual would bear the risk of not knowing the law, if such a solution were adopted. This scholarship therefore admits that this solution would neglect the real serious issues undermining the fair notice rationale.[101] Moreover, strict construction by courts is also

[95] Mathematical certainty is not required for a statute. P.H. ROBINSON, *Fair Notice and Fair Adjudication*, cit., p. 357 and the quoted case-law. J.C. JEFFRIES, *Legality, Vagueness, and the Construction of Penal Statutes*, cit., p. 207.

[96] Jeffries quotes two examples, one validating a statute and the other declaring it void because of the lack of clarifying case-law: in Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), the criminal offence was to 'address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place'. The Supreme Court ruling upheld the statute because the vague wording had been narrowed by courts. On the other hand, see Coates v. City of Cincinnati, 402 U.S. 611 (1971), where the Court voided the law because state courts had not narrowed down the meaning of the statute. J.C. JEFFRIES, *Legality, Vagueness, and the Construction of Penal Statutes*, cit., p. 208.

[97] I.e. U.S. Supreme Court, United States v. Lanier, 520 U.S. 259, 117 S.Ct. 1219, 137 L.Ed.2d., 432 (1997); Notes in 62 *Harvard Law Review*, 1948, p. 80.

[98] U.S. Supreme Court, Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 102 S. Ct. 1186, 71 L.Ed.2d 362, 1982). On the opposite, see Papachristou v. City of Jacksonville, 405 U.S. 156, 92 S. Ct. 839, 31 L.Ed.2d 110 (1972).

[99] U.S. Supreme Court, Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 (1982). In the present case, the Court estimated that *scienter* requirement was capable of mitigating vagueness, especially as far as adequate notice was concerned. Similarly, United States v. Gaudreau, 860 .2d 357, 360 10th Cir. 1988). P.H. ROBINSON, *Fair Notice and Fair Adjudication,* cit., p. 358; W.R. LAFAVE, *Criminal Law,* cit., p. 111.

[100] J.C. JEFFRIES, *Legality, Vagueness, and the Construction of Penal Statutes*, cit., p. 208.

[101] J.C. JEFFRIES, *Legality, Vagueness, and the Construction of Penal Statutes*, cit., p. 209.

affected by the idea that ignorance of law does not excuse and therefore makes notice in vain.[102] Although there are some concerns about the actual effectiveness of notice, its core meaning should be preserved.

1.2.3. Maximum certainty in British Criminal Law.

Maximum certainty in defining offences is a principle elaborated in English Criminal Law. It has been compared to the North American void-for-vagueness doctrine and with the fair warning rationale.[103] Moreover, the rationale of fair warning and maximum certainty are alike, as they both make reference to the defendant's knowability of criminal offences and penalties and involve individual autonomy.[104] Maximum certainty refers both to statutory offences and common law offences and has a relative scope: as absolute certainty cannot be realised, the principle requires its maximum possible application. It is crucial to highlight that maximum certainty was not really applied by English courts until the entry into force of the Human Rights Act in 1998.[105] Therefore, its development was influenced by the case-law of the Strasbourg Court on Art. 7 ECHR.[106] Later on English courts claimed that the principle had, alongside with its ECHR roots, a common law origin.[107] Although the relationship between certainty, non-retroactivity, statute and judge-made law is meaningful for a comparison with the Strasbourg Court, this is not an acceptable antecedent for its foreseeability concept.

[102] J.C. JEFFRIES, *Legality, Vagueness, and the Construction of Penal Statutes*, cit., p. 210.
[103] A. ASHWORTH, *Principles of Criminal Law*, cit., p. 63.
[104] *Ibidem*.
[105] A. ASHWORTH, B. EMMERSON, A. MACDONALD, *Human Rights and Criminal Justic*e, London, 2001, p. 282, 284. More specifically, scholars consider maximum certainty important only for bylaws, subordinate legislation under delegation by an act of Parliament.
[106] Among others, the following two cases were significant in establishing the link between maximum certainty and Art. 7 ECHR. In *R. v. Tagg* the concept of drunkenness, an element of Art. 57 Air Navigation Order 1995 and section 61 Civil Aviation Act 1982, was not considered vague and therefore sufficiently clear in compliance with the requirement of sufficient precision imposed by the European Convention on English Courts. See R. v. Tagg (2002) 1 Cr App R 2. In *R. v. Muhamad*, the claim of unforseeability of an offence related to bankruptcy was grounded on Art. 7 ECHR, although it was dismissed by the Court. See R. v. Muhamad (2003) QB 1031.
[107] The House of Lords affirmed the common law origin of maximum certainty in the famous case of R. v. Rimmington (2005) UKHL 63 (para. 33-34). It stated that 'these common law principles are entirely consistent with art 7(1) of the European Convention'. Quoting the case of *R. v. Misra and Srivastava* of the Court of Appeal it reported that 'it 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'. See also R. v. Misra and Srivastava (2005) 1 Cr App R 21 (para. 29-34).

1.3. Conclusions.

In conclusion, U.S. criminal and constitutional law are important in this case as they encompass, under the rationale of fair notice, both vagueness and non-retroactivity. U.S. law doctrines can be however compared to foreseeability only as a parallel and partially similar path but cannot represent a real antecedent of the concept of foreseeability.[108] Although the implicit idea is the same under a philosophical point of view, the Strasbourg definition of foreseeability cannot be considered deriving from the concept of fair warning. Moreover, the British maximum certainty principle developed in recent years and could be considered a consequence rather than an antecedent of the European notion of foreseeability. The Anglo-American approach is certainly offering a *similar* solution in the domain of *lex certa* in criminal law, which is a consequence of the common law tradition and the peculiarities of the U.S. system. The importance of Anglo-American perspective on fair warning and legal certainty in criminal law is much more interesting in order to compare the solutions and the common paths in the argumentation, rather than to see in it the roots of the foreseeability test.

It is more convincing to identify foreseeability in European case-law with the application of a broad philosophical concept, which was widespread in the 20th Century. Being developed both by positivist and realists (and anti-formalists in general) the concept of legal certainty as foreseeability is adequate for a supranational court that is not bound by national understanding of legal principles and that considers law an articulated phenomenon, not confined in the legislative. As it often happens with the Convention, its case-law applies philosophy of law rather than a precise positive legal-system.

2. The evolution of the ECHR definition of foreseeability: summary and presentation of the analysis.

As demonstrated in the previous chapter, foreseeability was elaborated by the European Court of Human Rights as a quality of the law since its early cases. It represents, together with accessibility, a requirement of the law in order to be a legitimate legal basis.[109] The Strasbourg Court declared that 'a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he

[108] For an interesting comparative study on *lex certa* in the European Court's case-law and the U.S. doctrine of void for vagueness, as well as British maximum certainty, see D. SARTORI, *The lex certa principle*, cit., p. 107 ff.
[109] See *above*, Chapter 2, para. 8.

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'.[110]

In the criminal field, this particular need for legal certainty can be translated into the need for precision of criminal law. The definition forcibly remains very general as this sub-principle in the context of the principle of legality lacks a unique definition in domestic legal orders. For example, in the United Kingdom, it may correspond to maximum certainty, which is derived from legal certainty; in France scholarship refers to *accessibilité*, *clarté* and *previsibilité*, directly referring to the Convention's definition; in Italy it could be the case of the principle of *tassatività/determinatezza*, while in Germany of the concept of *Bestimmtheit*.

The previous analysis has shown how the concept of foreseeability, due to its comprehensive nature, has two different components. It does not only include the principle of *lex certa* (*ius certum* would be more suitable in this context), but it also partially overlaps with non-retroactivity and the prohibition of analogy, in so far as its non-formal structure and its broad meaning have been used to regroup legality issues into a unique criterion, which is also convenient in the perspective of avoiding national divergencies and misunderstandings. Moreover, due to the autonomous definition of law made by the ECtHR, foreseeability both refers to written law and judicial interpretation.[111]

Consequently, the best way to look at foreseeability is to consider it as an application of the general concept of legal certainty. The reference to the philosophical concept enables the interpreter to overcome two main obstacles. On the one hand, the linguistic obstacle represented by the specific language of each legal field. Given the fact that foreseeability applies to different rights enshrined in the Convention, its definition is not limited to criminal law. On the other, the dogmatic obstacle consists of the (legitimate) national divergencies in the classification of the sub-principles of legality in the criminal field. Both an analysis of Strasbourg case-law and the broad scope of foreseeability have shown that it prescribes the application of a philosophical concept to cases that could involve violations of legality at different stages.

[110] ECtHR, the Sunday Times v. the United Kingdom, 26 April 1979, no. 6538/74, para. 49. ECtHR, Silver and others v. the United Kingdom, 25 March 1983, no. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75, para. 87-88.
[111] See *above*, Chapter 2, para. 8.

Firstly, the different classifications given to foreseeability by scholarship will be presented in a critical approach.[112] Secondly, an autonomous analysis of the Strasbourg case-law on the definition of foreseeability will be carried out. The aim of this new analysis is to offer an updated version of the criteria and the development of the standards applied by the Court. Special attention will be accorded to the Court's approach to case-law foreseeability. Methodologically, leading cases which are now well-established precedents will be analysed in depth and the case-law will be ordered according to which precedents are applied.[113] Consequently, the evolution in the interpretation of each precedent will give the sense of the real status of the Strasbourg jurisprudence, that will enable to draw conclusions.[114]

3. Classifications of foreseeability requirement in literature.

3.1. Foreseeability for Pascal Beauvais.

Beauvais believes that the essence of the European legality can be found in the individuals' *sécurité juridique*, which has partially replaced the monopoly influence that the legislator has had on criminal law. Accordingly, legality essentially demands for qualitative standards, which can be subsumed in the requirement of foreseeability. Foreseeability has a qualitative connotation that comprehends all other obligations enshrined in Art. 7 ECHR, such as non-retroactivity, accessibility, clarity, precision and the prohibition of extensive application of the criminal law.[115] Foreseeability is divided into two theoretical categories that differ in terms of function in the traditional framing of the principle of legality. Beauvais distinguishes between synchronic foreseeability and diachronic foreseeability as two different sides of the same individual right in the analysis of the European Court of Human Right's case-law. The equivalence between written and unwritten law is presumed and taken for granted in the definition of the qualitative requirement.[116]

3.1.1. Synchronic foreseeability.

Synchronic foreseeability is the quality of the law that enables individuals to foresee the legal consequences of their acts from the existing law, through written and unwritten

[112] See *infra*, para. 3.
[113] See *infra*, para. 4.
[114] See *infra*, para. 4.7.
[115] P. BEAUVAIS, *Le droit à la prévisibilité*, cit., p. 6.
[116] P. BEAUVAIS, *La légalité pénale à la lumière des droits européens*, in D. GUERIN, B. DE LAMY (eds.), *La Chambre Criminelle de la Cour de Cassation face aux droits européens*, Paris, 2017, p. 61 ff.

law. Apart from the physical accessibility of the law, the main feature of synchronic foreseeability is the clarity and precision of the written provision, as interpreted by judges.[117] In this formulation, the right to synchronic foreseeability is comparable to the *lex certa* principle, thanks to its focus on intelligibility.[118] The first relevant feature of synchronic foreseeability is the emerging and decisive role of the judges acknowledged by the Court and the bilateral relationship between written provision and its application. Beauvais holds that the Court focuses its attention on the precision of case-law and sets clarity and coherence of the statutes aside.[119] He reaches this conclusion by analysing the case-law of the Court which affirms (i) the necessary gradual clarification of the offence and the possible judicial specification of broad formulations,[120] (ii) the insufficiency of written provisions[121] and the necessity for judicial interpretation, deeming a certain degree of flexibility for admissible.[122]

Moreover, synchronic foreseeability must satisfy two standards, which Beauvais identifies in relativity and reasonableness.

a) *Relative foreseeability*. The standard required by the Court to fulfil the foreseeability obligation is only *relative.* The factors playing a role in this assessment are identified by the Author in 'the content of the text in issue, the filed it is designed to cover and the number and status of those to whom it is addressed'[123] and in the eventual resort to legal advice.[124] Relative in this context is used as a synonym for an *in concreto* assessment of the possibility to foresee the consequences of one's actions.[125] The reference to the concept of subjectivity and the relationship with mistake of law and, in the end, mental

[117] P. BEAUVAIS, *Le droit à la prévisibilité,* cit., p. 7.
[118] P. BEAUVAIS, *Le droit à la prévisibilité,* cit., p. 7.
[119] P. BEAUVAIS, *Le droit à la prévisibilité,* cit., p. 7.
[120] ECtHR, S.W. v. the United Kingdom, 22 November 1995, no. 20166/92, para. 36, ECtHR, Kokkinakis v. Greece, 25 May 1993, no. 14307/88, para. 40.
[121] ECtHR, Kokkinakis v. Greece, 25 May 1993, no. 14307/88, para. 40.
[122] ECtHR, Başkaya and Okçuoğlu v Turkey, 8 July 1999, no. 23536/94 and 24408/94, para. 39. Even the rules governing the application of a prolongation of a term resulting in the broader application of recidivism are considered synchronically foreseeable because of a consistent and precise case-law of the French *Cour de Cassation*, as in the case of *Achour v. France*. ECtHR, Achour v. France, 29 March 2006, no. 67335/01, para. 52.
[123] ECtHR, Cantoni v France, 15 November 1996, para. 35. P. BEAUVAIS, *Le droit à la prévisibilité,* cit., p. 8. In a later work, Beauvais also quotes the case of *Kononov v. Latvia*: ECtHR, Kononov v. Latvia, 17 May 2010, no. 36376/04, para. 235. P. BEAUVAIS, *La légalité pénale à la lumière des droits européens*, cit., p. 62.
[124] ECtHR, Başkaya and Okçuoğlu v Turkey, 8 July 1999, no. 23536/94 and 24408/94, para. 37.
[125] P. BEAUVAIS, *Le droit à la prévisibilité,* cit., p. 8. Although the first systematisation dates back to 2007 and refers to the elaboration of the concept at the time, Beauvais keeps the same view in more recent works, such as P. BEAUVAIS, *La légalité pénale à la lumière des droits européens*, cit., p. 62 f.

element is only sketched while dealing with the hard case of *Streletz, Kessler and Krenz v. Germany*. In this respect, the foreseeability amounts to a subjective standard, lifting the bar until the maximum individualisation of judgement.[126]

b) *Reasonable foreseeability*. The other standard applicable to synchronic foreseeability is reasonableness. The standard required is a reasonable degree of foreseeability in the circumstances of the concrete case: reasonably foreseeable is the probable result among several alternatives, and does not require only one interpretation. Beauvais identifies the rationale of the lower standard of reasonableness in legitimating the use of general clauses by the legislator, accepting that written law can be dubious in its external boundaries, motivating his conclusion by quoting the case of *Cantoni v. France.*[127] Reasonableness in the assessment of synchronic foreseeability is however unclear in this configuration and a clear definition does not emerge from the analysis of the Court's case-law.

3.1.2. Diachronic foreseeability.

According to the Author, diachronic foreseeability enables individuals to foresee the evolution of law. Focusing on the possible uncertainties created by the law changing in time, the rationale of diachronic foreseeability is certainly the same as the one of national criminal principles on succession of norms (*zeitliche Geltung*). Diachronic foreseeability therefore results in the prohibition of the retroactive application of criminal law.[128] Beauvais distinguishes the functioning of diachronic foreseeability when referred to written or unwritten law. If the law is written, the prohibition involves its retroactive application to facts happened before the entry into force of the provision. The prohibition is therefore absolute. On the contrary, if law is judge-made, the new rule is sometimes applicable to previous facts, if the rule gradually developed. The prohibition is therefore not absolute.

[126] The judgement of the Court in the case of the GDR guards is considered the expression of the 'subjectivation' of the foreseeability assessment because the individual profession, knowledge and role of the applicants play the main role in the non-violation assessment. In this respect, the foreseeability standard is much more related to the aspect of the mistake of law. Beauvais does not further develop the topic. ECtHR, Streletz, Kessler and Krenz v. Germany, 22 March 2001, no. 34044/96, 35532/97 and 44801/98, para. 77-78. P. BEAUVAIS, *Le droit à la prévisibilité,* op.cit., p. 8. The role of subjective criteria in the assessment of foreseeability will be examined in the following and will be distinguished from 'relative' foreseeability, see *infra*, para. 4.

[127] ECtHR, Cantoni v. France, 11 November 1996, no. 17862/91, para. 32-35. P. BEAUVAIS, *Le droit à la prévisibilité,* cit., p. 9.

[128] P. BEAUVAIS, *Le droit à la prévisibilité,* cit., p. 11.

a) *Diachronic foreseeability of written rules.* According to Beauvais, the prohibition of retroactive criminal statutes is the core of diachronic foreseeability of written rules and the main questions will arise with regards to the technical aspects of the succession of statutes. Doubts can arise especially on the scope of application of non-retroactivity with reference to the elements of the offence and penalty. The Author analyses the case *Achour v France,* which dealt with the extension of the safeguard of retroactive foreseeability to recidivism. These points, however interesting, do not need to be analysed thoroughly here in order to define foreseeability.[129]

b) *Diachronic foreseeability of judge-made rules*. With regards to unwritten law, Beauvais believes that diachronic foreseeability provides for an intertemporal regime of validity for judge-made law. The foreseeability standard balances the evolutive nature of case-law as a source of law and its authoritative role, which implies the application of the law in force at the time of the facts. Otherwise, judicial evolution of rules would be prohibited, as interpretation is intrinsically retroactively applied.[130] Non-retroactivity and the succession of norms are therefore guiding dogmatic relevant principles.[131] Analysing the *S.W. and C.R. v United Kingdom* case, the author identifies two possible indicators of foreseeability: reasonableness and the coherence of the new rule with the substance of the offence. Beauvais expresses concerns where these requirements are met using changes in morality or social conditions as parameter.[132] As a consequence, reasonable diachronic foreseeability can only be based on legal arguments. Moreover, the state of the art in 2007 enables Beauvais to consider a new stricter approach of the Court in the assessment of the diachronic foreseeability standard and its final acknowledgement starting from the case of *Pessino v. France*.[133] According to Beauvais, the Court does not rely on the usual criteria, such as the consistency with the substance of the offence, but instead finds the

[129] ECtHR, Achour v. France, 29 March 2006, no. 67335/01. The case focused on the inclusion of recidivism in the determination of the penalty, as an aggravating circumstance and therefore in the scope of application of the obligation to diachronic foreseeability. The problem was the assessment of the standard according to the first or the second offence and the Court ruled the question referring to the consistent case-law of the French *Cour de Cassation*. P. BEAUVAIS, *Le droit à la prévisibilité,* cit., p. 12.
[130] P. BEAUVAIS, *La légalité pénale à la lumière des droits européens*, cit., p. 63.
[131] P. BEAUVAIS, *Le droit à la prévisibilité,* cit., p. 14.
[132] The criteria of consistency with the essence of the offence and reasonable foreseeability are most of the time linked to diachronic foreseeability and will be analysed in the following. ECtHR, S.W. v. the United Kingdom, 22 November 1995, no. 20166/92, para. 36 ff. P. BEAUVAIS, *Le droit à la prévisibilité,* cit., p. 15. See *infra*, para. 4.2.2.
[133] ECtHR, Pessino v. France, 10 October 2006, no. 40403/02. P. BEAUVAIS, *Le droit à la prévisibilité,* cit., p. 15-16. The case in question was, strictly speaking, an application of the principles enshrined in the case of *Cantoni v. France*. See *infra*, para. 4.

violation of Art. 7 ECHR because of the absence of precedent.[134] The same principle is suggested by the jurisprudence of the European Court of Justice, which in the case of *Criminal proceedings against X* (joined cases C-74/95 and C-129/95) affirms the non-retroactive application of legal interpretation, even if based on the interpretation of a EU directive.[135]

In the end, Beauvais underlines that foreseeability as a requirement for the validity of law derives from the very concept of the rule of law. As a principle coming from common law countries, it focuses on individuals and their freedom. It does not include the 'democratic' or 'institutional' components traditionally identified by civil law.[136]

3.2. Foreseeability for Alessandro Bernardi.

Bernardi in his commentary to Art. 7 ECHR of 2001 states that the quality of the law are accessibility and foreseeability. In his view, these requirements safeguard the effective knowability of the criminal law. The orientation towards effectiveness is motivated by the need to address the lack of coherence of common law criminal normative systems, but also plays a crucial role in civil law countries for the sake of legal certainty. He does not stress on the accessibility test[137] and rather focuses on foreseeability. However, both concepts are defined as 'derived principles', originating from the autonomous definition of law.[138]

Foreseeability is defined as a two-sided principle for Bernardi. He divides foreseeability into foreseeability of the criminal law in its abstract formulation, both in statutes and in common law, and foreseeability of the interpretation of the written provision. The legal enactment is regarded in different perspectives: its formulation and origin and, on another level, its interpretation and application by courts. Apart from the definition of foreseeability as a principle, the stress is here still on the *lex certa* and on the precision of the legal rule. Bernardi's systematisation is different from Beauvais', who

[134] Beauvais is critical about this point, suggesting the possible interpretation of the problem in the framework of the gradual clarification of the written text by the judges, P. BEAUVAIS, *Le droit à la prévisibilité,* cit., p. 16.
[135] P. BEAUVAIS, *Le droit à la prévisibilité,* cit., p. 16-17. The author further mentions the case of Dansk Rørindustri and others v. Commission, C-189/02, 202/02, 205/02 to 208/02, 213/02.
[136] P. BEAUVAIS, *Le droit à la prévisibilité,* cit., p. 18.
[137] Accessibility is defined in the traditional way, as the publication and collection of legal norms in order for the individuals to effectively be aware of them. See in particular ECtHR, Groppera Radio AG and others v. Switzerland, 28 March 1990, no. 10890/84, para. 68. A. BERNARDI, *Art. 7*, in B. CONFORTI, S. BARTOLE, G. RAIMONDI (eds.), *Commentario alla Convenzione Europea dei Diritti dell'Uomo*, Padova, 2001, p. 260 f. On the contrary, 'objective accessibility' is crucial in the systematisation of Marco Scoletta. See *infra*, para. 3.3.3.
[138] A. BERNARDI, *Art. 7*, cit., p. 260.

considers law as a comprehensive concept and considers foreseeability in a time-based perspective, dividing it into synchronic and diachronic and clearing the link with the non-retroactivity principle.[139]

3.2.1. Precision of the criminal law.

The first sub-principle derived from foreseeability is *lex certa*. Bernardi uses the Italian term *determinatezza*, which could be equated to the maximum certainty in British Criminal Law, or alternatively as precision. This first sub-principle concerns the legal definition of the offence. In a civil law country, the legal definition of the offence would be the literal formulation of the statute, while in a common law country it would be the clear and precise definition of the offence in the common law.[140] The relevant aspects are the degree of precision required by the Court in order to consider a norm a proper law, and the parameters to evaluate it. According to Bernardi, the Court interprets the *lex certa* in a very broad sense, admitting that law is often formulated in general and abstract wording that need judicial clarification and interpretation. Nevertheless, the law is such only if it enables its addressed to foresee the consequences of their action, including resorting to legal advice.[141] As far as the assessment of the precision of the criminal law is concerned, Bernardi identifies several criteria in the case-law of the Strasbourg Court. Apart from the reference to literal and systematic interpretation, the most particular parameters are the characteristics of those to whom the law is addressed and the coherence of its interpretation.[142] The *in concreto* application of the law is therefore crucial in the assessment of its precision. As a consequence, foreseeability of judicial interpretation under this particular aspect coincides with the precision of the norm.[143] However, the criteria revealing the precision of the criminal law in Bernardi's analysis correspond to

[139] See *above*, para. 3.1.
[140] A. BERNARDI, *Art. 7*, cit. p. 261.
[141] The author here integrates the analysis of relevant Art. 7 ECHR case-law and Art. 8-11 ECHR judgements on the definition of law. As a consequence, he quotes the most prominent cases on the matter in a comprehensive approach. i.e. ECtHR, the Sunday Times v. the United Kingdom, 26 April 1979, no. 6538/74, para. 49; ECtHR, Cantoni v. France, 11 November 1996, no. 17862/91, para. 30; ECtHR, Kokkinakis v. Greece, 25 May 1993, no. 14307/88, para. 40; ECtHR, Müller and others v. Switzerland, 24 May 1988, no. 10737/84, para. 29. A. BERNARDI, *Art. 7*, cit., p. 262.
[142] In light of the limited amount of case-law on Art. 7 ECHR in 2001, Bernardi refers to the European Commission of Human Rights decisions, which added the evaluation of the law in light of the data offered by ordinary judicial experience. (' The range of sanctions covered is, however, so wide that it is not possible to predict, on the basis of ordinary legal experience, what the penalty will be'). EComHR, Crociani and o. v. Italy, 18 December 1980, nos. 8603/79, 8722/79, 8723/79, 8729/79, D. R. 22, p. 214. As far as the Court is concerned, the criteria list the results of the judgements in the leading cases of *Kokkinnakis v. Greece* (quoted *above*) and *Başkaya and Okçuoğlu v. Turkey.* ECtHR, Başkaya and Okçuoğlu v. Turkey, 8 July 1999, no. 23536/94 and 24408/94, para. 36. A. BERNARDI, *Art. 7*, cit., p. 263.
[143] A. BERNARDI, *Art. 7*, cit., p. 261-263.

the indicators of the relative character of synchronic foreseeability standard in Beauvais' investigation. Therefore, with regards to this particular point, the two analyses are substantially similar.

3.2.2. Reasonable interpretation of the criminal law.

The second sub-principle is the reasonable interpretation of criminal law, aimed at making its scope of application foreseeable. On account of the crucial role of judicial interpretation in granting legal certainty, the Author makes an additional distinction among the modalities used in the courts' interpretation. The element that enables the author to distinguish them is the object of the interpretation: reasonable interpretation can be based on the wording of the law (reasonable 'technical' interpretation), or it can derive from previous interpretative results of the text (reasonable 'historical' interpretation).[144] Therefore, reasonableness is here again a character of the interpretation, useful in accomplishing its foreseeability obligation. Nevertheless, the difference between technical and historical perspective does not completely overlap with the idea of synchronic and diachronic foreseeability. While the latter concepts look at the development of the Court's case-law on foreseeability both in the direction of *lex certa* and legal certainty and in the direction of intertemporal succession of judicial interpretations, technical and historical interpretation still set the discussion on the level of extensive interpretation. This is also a consequence of the restricted amount of case-law and its early development at the time the analysis was made (2001).

a) *Reasonable technical interpretation.* 'Technical' foreseeability rules the admissible interpretive methods of the text. Its reasonableness should be assessed on the basis of the wording of the text.[145] Therefore, Bernardi refers to the case-law which affirms the prohibition of extensive interpretation and analogy and fosters strict interpretation.[146] In reality, the available case-law shows a more flexible approach to the inevitable element of judicial interpretation, as long as it fulfils the reasonable foreseeability requirement. The standard can be met only if the results of interpretation process are foreseeable to a reasonable degree.[147] In light of this specification, Bernardi analyses the interpretive methods (analogy, extensive interpretation and addition). An analogic interpretation

[144] A. BERNARDI, *Art. 7*, cit., p. 263.
[145] A. BERNARDI, *Art. 7*, cit., p. 263 f.
[146] The leading cases are *Kokkinakis v. Greece* (quoted *above*, para. 52), *Cantoni v. France* (quoted *above*, para. 29) and *Başkaya and Okçuoğlu v. Turkey* (quoted *above*, para. 36). A. BERNARDI, *Art. 7*, cit., p. 264.
[147] *Ibid*., the exception is represented by the principles stated by the Court in the case of the marital rape exemption, see ECtHR, S.W. v. the United Kingdom, 22 November 1995, no. 20166/92, para. 34-36.

cannot be defined as foreseeable. On the other hand, extensive interpretation can be admissible by meeting certain conditions. In this regard, interpretive extension of the scope of application of a criminal provision can be foreseeable if it is the expression of a steady case-law development or even if it is consistent with the changing in the social conditions.[148]

b) *Reasonable historical interpretation*. 'Historical' interpretation refers to previous case-law, which could make the extensive interpretation foreseeable. Foreseeability in a diachronic perspective depends on two factors: i) a consistent development in case-law and ii) social and cultural changes.

i) *Consistent and well-established case-law*. On the one hand, interpretive historical foreseeability can be determined by a consistent and well-established extensive interpretation by national courts, which cannot justify the applicant's claim for violation of Art. 7 ECHR.[149] Moreover, such interpretation must have been adopted by courts after the applicant's conduct.[150] The focus is again on the risk of analogy that can be hidden in the criterion of consistent case-law evolutions in time.[151]

ii) *Social and cultural changing circumstances*. On the other hand, judicial interpretation can be considered reasonably foreseeable in an historical perspective thanks to the evolution in social and cultural circumstances, even if well-established case-law was absent.[152] The idea is the adaptation of the law through interpretation to new circumstances that were impossible to include at the time of the introduction of the offence but that result in a reasonable development.[153] Although here the case of *S.W. v. the United Kingdom* is not recalled, the author refers to Commission cases that defined

[148] The reference is to the case of *Başkaya and Okçuoğlu v. Turkey* (quoted *above*) and *S.W. v. the United Kingdom*. The author refers to a diachronic analysis of precedents in order to be able to evaluate the exceptions to technical foreseeability. In this way, he draws the link with the historical perspective on foreseeability. A. BERNARDI, *Art. 7*, cit., p. 265.
[149] A. BERNARDI, *Art. 7*, cit. p. 265-266.
[150] EComHR, X. v. Austria, 12 March 1981, no. 8490/79, D. R. 22, p. 143 and EComHR, Report, Zimmermann v. Austria, 6 July 1982, no. 8490/79, p. 6. In the case of *X. v. Austria*, the Commission had to assess the violation of Art. 7 ECHR in case of an extensive *ex post facto* interpretation, although the case never came to a decision because of its friendly settlement. In these cases, the Commission's approach was still influenced by civil law paradigms such as analogy. Nowadays the Court would probably set the same issues differently.
[151] The Author underlines sceptical opinions with regards to the above-mentioned criteria. S. VAN DROOGHENBROECK, *Interprétation jurisprudentielle et non rétroactivité de la loi pénale*, in *Rev. trim. dr. homme*, 1996, p. 472. Most of all see dissenting opinion of Judge Repik to X. v Austria, 12 March 1981.
[152] A. BERNARDI, *Art. 7*, cit. p. 266-267.
[153] A. BERNARDI, *Art. 7*, cit. p. 266-267.

the limits of the normative role of national courts.[154] This analysis still sketched the problem of contingency between non-retroactivity of judicial interpretation and the extensive interpretive application of a criminal offence to an accused's detriment. Moreover, the ECtHR developed its jurisprudence only partially adhering to the criteria identified in historical foreseeability.[155]

3.3. Foreseeability for Marco Scoletta.

Marco Scoletta investigates the topic in a commentary to Art. 7 ECHR of 2013 and applies the same classifying method used by Bernardi. Thus, he distinguishes the foreseeability of the written law (precision) from the foreseeability of judicial interpretation (reasonable foreseeability). The rationale is the acknowledgement of the plurality of the sources of law in the Court's system. He also aims at comparing national principles with the European foreseeability standard. The real innovation in his analysis is the relevance given to accessibility and its alleged subjective/objective components.

3.3.1. Precision.

Scoletta, like Bernardi, claims that judicial interpretation plays a crucial role if compared to the precision of the wording of the statutes. He recalls the case-law admitting the inevitable uncertainty of the text.[156] In particular, Scoletta underlines the irrelevance of drafting techniques of statutory law in the European Court's assessment of foreseeability. The distinction between common law and civil law with regards to the importance of the formal precision of statutes is equally irrelevant.[157]

3.3.2. Reasonable foreseeability of judicial interpretation.

Recalling the Italian doctrine of *determinatezza*, Scoletta sees foreseeability as a means to assess the concrete application of criminal provisions, in order to verify their

[154] EComHR, X. Ltd. and Y. v. the United Kingdom, 7 May 1982, no. 8710/79, p. 81, para. 9. The Commission referred the prohibition of extensive unreasonable interpretation to the accused's detriment even to common law offences but limited it in the cases where the extension was to be reasonably included in the original formulation. In *X. Ltd. and Y. v. the United Kingdom*, the extension of the mental element was debated. Further, the case of *Enkelmann v. Switzerland* was very similar, but it was framed under the non-retroactivity principle. The assessment of the Commission recalled the same principles quoted above. The limit to retroactive judicial interpretive extension was the unreasonable and unforeseeable inclusion of facts that did not constitute a criminal offence at the time they were committed. Although the principle was affirmed by the Commission, the solution of those cases was always towards the non-violation and the merely reasonable clarification of the offences. EComHR, Enkelmann v. Switzerland, 4 March 1985, no. 10505/83, p. 185.

[155] See *infra*, para. 4.

[156] See *above*, Chapter 2, para. 8.

[157] M. SCOLETTA, *La legalità penale nel sistema europeo dei diritti fondamentali*, in C.E. PALIERO, F. VIGANÒ (eds.), *Europa e diritto penale*, Milano 2013, p. 232 f.

compliance with *lex certa* principle. Hence, the assessment must be done on a case-by-case basis and focus on the previous judicial practice of national tribunals.[158] According to him, the interpretation of the obligation to reasonably foreseeable judicial interpretation is not an interpretive method (by analogy, extensive interpretation, etc.), but a criterion to evaluate the results of the interpretation. Therefore, rather than expressing rules on hermeneutics, the Strasbourg Court demands for an obligation of result to interpret the *regula iuris* in a reasonably foreseeable way.[159] Like in Bernardi's analysis, a case-law *revirement* is foreseeable even if it broadens the scope of a criminal offence in the presence of two factors: i) a former interpretation by courts[160] and ii) an evolution in the social and cultural context.[161] The analysis is once again very similar to the previous one, although he classifies the criterion 'essence of the offence' under the second factor. The evolution of the law and its adjustment to the cultural context through judicial interpretation must be consistent with the essence of the offence.[162] In particular, Scoletta speculates on possible parameters to evaluate the *consistency of the interpretation with the essence of the offence in light of the changing circumstances.* From the comparison between doctrines and case-law, Scoletta assumes that *mala in se* require a lower foreseeability standard, while an interpretive development within *mala quia prohibita* would still require a higher foreseeability standard.[163] However, he does not further

[158] M. SCOLETTA, *La legalità penale nel sistema europeo dei diritti fondamentali*, cit., p. 234 f.
[159] M. SCOLETTA, *La legalità penale nel sistema europeo dei diritti fondamentali*, cit., p. 235 f.
[160] The quoted leading cases are *Kokkinakis v. Greece* and *Cantoni v. France*, where the Court considered an extensive case-law trend sufficient in order to deem the criminal offence foreseeable. ECtHR, Kokkinakis v. Greece, 25 May 1993, no. 14307/88, para. 40 ff.; ECtHR, Cantoni v. France, 11 November 1996, no. 17862/91, para. 32-35, 34 in particular.
[161] M. SCOLETTA, *La legalità penale nel sistema europeo dei diritti fondamentali*, cit., p. 238 f. The changing in social and cultural circumstances represented a real criterion only in the case of the marital rape immunity and, eventually, in the GDR Border Guard cases. It would be difficult to consider it a real criterion in light of the recent case-law evolution. See *infra*, para. 4.3 and 4.4.
[162] Scoletta quotes the precedent admitting that 'Article 7 of the Convention does not outlaw the gradual clarification of the rules of criminal liability through judicial interpretation from case to case provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen'. The link with the changing social and cultural circumstances is more related to the cases of the marital rape exception, while other cases only generally refer to the 'changing circumstances'. On the one side see ECtHR, C. R. v. the United Kingdom, 11 November 1995, no. para. 34. On the other side see ECtHR, Streletz, Kessler and Krenz v. Germany, 22 March 2001, no. 34044/96, 35532/97 and 44801/98, para. 50; ECtHR, Radio France v. France, 30 March 2004, no. 53984/00, para. 20; ECtHR, Eurofinacom v. France, decision, 7 September 2004, no. 58753/00, para. 2; ECtHR, Jorgic v. Germany, 12 July 2007, no. 74613/01, para. 110; other cases did not refer to that precedent, i.e. ECtHR, Custers, Deveaux and Turk v. Danemark, 3 May 2007, no. 11843/03, 11847/03 and 11849/03.
[163] *S.W. v. the United Kindgom* is the example of a *malum in se*, which is evaluated with certain flexibility by the Court, while *mala quia prohibita* have a more formalised definition due to their artificial character. Scholarship often draws these conclusions, which are not always satisfying in practice. See V. ZAGREBELSKY, *La Convenzione europea dei diritti dell'uomo e il principio di legalità nella materia penale*, in V. MANES, V. ZAGREBELSKY (eds.), *La Convenzione europea dei diritti dell'uomo nell'ordinamento penale italiano*, Milano, 2011, p. 77 and V. MANES, *Art. 7*, cit., p. 282.

develop the topic because of its limited theoretical interest.[164] Even though the author does not try to classify the most recent case-law of the Court, he clears the way for the possibility that the Court's assessment of foreseeability has become stricter.[165]

3.3.3. Objective and subjective accessibility.

For the first time, Scoletta focuses the attention on the concept of 'objective and subjective accessibility', which had never before been classified this way neither by scholars nor by the Court. Objective accessibility is the traditional requirement of publicity for criminal statutes. Objective accessibility means that the individual can be aware of the acts or omissions which entail criminal liability thanks to the publication of criminal provisions and the clarity of their normative framework.[166] On the other hand, Scoletta reads the case-law in such a way as to create a new parameter: subjective accessibility, namely the possibility to be aware of the actual boundaries of the criminally relevant acts or omissions in relation to the specificities of the individual (or groups of individuals). The relevant factors are i) the field it is designed to cover (i.e. its scope of application) and ii) the number and characteristic of the addressed. Moreover, taking appropriate legal advice is a counter-obligation imposed on the addressees. According to Scoletta, these factors are part of a subjective accessibility assessment. Therefore, it is crucial to assess accessibility in accordance with the specificities of subjects involved. Professionals will be expected to have a higher level of knowledge of the area they operate in. Moreover, professionals will also be required to have particular diligence in taking appropriate legal advice on the possible risks of their activities. Thus, the quality of law is a changing parameter, subject to the circumstances of the case.[167]

[164] M. SCOLETTA, *La legalità penale nel sistema europeo dei diritti fondamentali*, cit., p. 240 f. See *infra*, para. 4.3.

[165] The relevant cases are those judged after 2006-2007, such as ECtHR, Dragotoniu et Militaru Pidhorni v. Romania, 24 May 2007, no. 77193/01 and 77196/01; ECtHR, Pessino v. France, 10 October 2006, no. 40403/02; ECtHR, Kafkaris v. Cyprus, 10 February 2008, no. 21906/04; ECtHR, Liivik v. Estonia, 25 June 2009, no. 12157/05.

[166] According to Scoletta, the case of *Kafkaris v. Cyprus* represents a good example of objective accessibility. The Court acknowledged a violation of Art. 7 ECHR due to the lack of quality of the law on life imprisonment. The assessment was however more similar to the one of foreseeability: precise formulation of the statute (para. 146-150), case-law and state practice (para. 146). ECtHR, Kafkaris v. Cyprus, 10 February 2008, no. 21906/04, para. 145-150. Another relevant case is *Sud Fondi v. Italy*, where the violation of Art. 7 ECHR was based on the obscurity of the statute, the chaotic case-law and the misleading administrative authority's advice. Although the Court addresses both qualities of the law, it is difficult to see a particular emphasis on accessibility. ECtHR, Sud Fondi s.r.l. and o. v. Italy, 20 January 2009, no. 75909/01, para. 112 ff. See M. SCOLETTA, *La legalità penale nel sistema europeo dei diritti fondamentali*, cit., p. 243.

[167] M. SCOLETTA, *La legalità penale nel sistema europeo dei diritti fondamentali*, cit., p. 243-245.

Two remarks can be made on subjective accessibility. Firstly, although the analysis of the parameters is thorough and convincing, in the cases mentioned by Scoletta the Court did not refer to accessibility but instead expressly to foreseeability.[168] Secondly, the link made by the author between subjective-based criteria used by the Court in its assessment and culpability is uncontroversial. As it will be explained in the following,[169] the traditional culpability doctrine in civil law requires the chance to be aware of the criminal law in force. Traditionally scholarship links this to the assessment of the 'subjective' requirements of the criminal offence. To this day, culpability and mental element are not part of the content of Art. 7 as interpreted by the Court. However, the subjective-oriented criteria enshrined from case-law go in this direction and link legality with culpability.[170]

4. Case-law analysis.

4.1. Relative and in concreto *foreseeability.*

It is unanimously recognised that in the Strasbourg case-law foreseeability is a relative concept providing for a definition of the quality of the law.[171] This relative feature, identified by the European Court of Human Rights, acknowledges that it is impossible to foresee the consequences of an individual's actions with absolute certainty.[172] This is

[168] In the following cases, the Court's precedent recalls professionals' special obligations to take appropriate legal advice and the need to evaluate foreseeability on the basis of the content of the law, its field of application and the number and status of the addressed, which in these cases were specific fields such as urban law or public administration. Moreover, other cases take into consideration the professional or peculiar nature of those to whom the law is addressed (Greenpeace activists, professional politicians, journalists). However, all these cases referred to foreseeability and did not mention accessibility. The most important acknowledgement is the role played by subjectivity, but this case-law cannot be interpreted as 'subjective accessibility', although one could suggest the adoption of this criterion. The cases recalling the principle: ECtHR, Pessino v. France, 10 October 2006, no. 40403/02, para. 33; see also ECtHR, Dragotoniu et Militaru Pidhorni v. Romania, 24 May 2007, no. 77193/01 and 77196/01, para. 35. The cases expressly taking subjectivity into consideration: ECtHR, Custers, Deveaux and Turk v. Danemark, 3 May 2007, no. 11843/03, 11847/03 and 11849/03, para. 94-95; ECtHR, Kuolelis, Bartoševičius and Burokevičius v. Lithuania, 19 February 2008, nos. 74357/01, 26764/02 and 27434/02, para. 120; ECtHR, Flinkkilä and o. v. Finland, 6 April 2010, no. 25576/04, para. 67-68.

[169] See *infra*, Chapter 4, section II, para. 1.

[170] In this demonstration, Scoletta refers to the German Border Guards cases. The difference between them in the assessment of foreseeability was the different subjective status of the applicants. In *Streletz, Kessler and Krenz v. Germany*, they were the party's senior members and members of the Government, while in *K.-H.W. v. Germany* the applicant was a simple guard to the wall. In this perspective, the argumentation in the first case was easy for the Court, while foreseeability was difficult to argue in the second case because of the different status of the subjects involved. See M. SCOLETTA, *La legalità penale nel sistema europeo dei diritti fondamentali*, cit., p. 246. ECtHR, Streletz, Kessler and Krenz v. Germany, 22 March 2001, no. 34044/96, 35532/97 and 44801/98, para. 77 ff. (in particular 78); ECtHR, K.-H. W. v. Germany, 22 March 2001, no.37201/97, para. 68 ff. (in particular 73-76). See infra, para. 4.6.

[171] P. BEAUVAIS, *Le droit à la prévisibilité*, cit., p. 8. The relative character of foreseeability is referred to its subjective components as well.

[172] ECtHR, the Sunday Times v. the United Kingdom, 26 April 1979, no. 6538/74, para. 49. ECtHR, Silver and others v. the United Kingdom, 25 March 1983, no. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75, para. 87-88.

because legal precision is unattainable and vagueness is a necessary part of the legal phenomenon.[173] Moreover, relative certainty is also considered fostering flexibility and avoiding excessive rigidity in law:

> 'One of the requirements flowing from the expression "in accordance with law" is foreseeability. Thus, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable citizens to regulate their conduct; they 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. Such consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, 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, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice (see Sunday Times v. the United Kingdom (no. 1), 26 April 1979, § 49, Series A no. 30; Kokkinakis v. Greece, 25 May 1993, § 40, Series A no. 260-A; Rekvényi v. Hungary [GC], no. 25390/94, § 34, ECHR 1999-III; and Centro Europa 7 S.r.l. and Di Stefano, cited above, § 141)'.[174]

Foreseeability is an assessment *in concreto*, because, as analysed in depth in Chapter 2, the Court offers a definition of law *in concreto* (substantial) and acknowledges that law can be defined only in practice.[175] Lawfulness 'requires precision and foreseeability of an applicable provision not necessarily on its own but as the competent courts have interpreted it'.[176] Therefore, the Court admits that statutes acquire 'uniform and authoritative meaning' by virtue of courts' practices.[177] The Court explicitly defines its tasks, by saying that 'where national legislation is in issue it is not the Court's task to review the relevant legislation in the abstract'.[178] As it has already been pointed out, the

[173] ECtHR, Müller and others v. Switzerland, 24 May 1988, no. 10737/84, para. 29, ECtHR, Radio France v. France, 30 March 2004, no. 53984/00, para. 20.
[174] ECtHR, De Tommaso v. Italy, 23 February 2017, no. 43395/09, para. 107. See also, among others, ECtHR, Cantoni v. France, 11 November 1996, no. 17862/91, para. 31
[175] 'The interpretation and application of such enactments depend on practice', ECtHR, Cantoni v. France, 11 November 1996, no. 17862/91, para. 31. See *above*, Chapter 2, para. 8.
[176] ECtHR, Porowski v. Poland, 21 March 2017, no. 34458/03, para. 125.
[177] ECtHR, Porowski v. Poland, 21 March 2017, no. 34458/03, para. 125. In the mentioned case, the Court positively evaluated the foreseeability test of the preventive detention under Art. 5(1) ECHR, thanks to the long-standing and uniform practice of Polish Courts. The Polish law admitting detention on remand up to two years was declared unconstitutional by the Polish Constitutional Court in 2008 for lack of legal certainty, as it needed to be clarified by case-law. The applicant was detained on remand according to the voided piece of legislation. In addition to considering the previous practice lawful in the sense of the Convention and affirming the admissibility of the substantial non-retroactivity of the Polish Constitutional Court's judgement, the Court affirms that detention was foreseeable due to its *in concreto* assessment.
[178] ECtHR, Elberte v. Latvia, 13 January 2015, no. 61234/08, para. 110. In the case of *Elberte v. Latvia*, the Court considered national law contrary to the Convention's obligation to clarity as the national enforcement authorities adopted contradictory approaches to the subject matter.

rationale is the object of the Court's assessment, which considers the effects of the State's conduct as a whole, and not just the formal enactment.[179]

4.2. The leading cases Kokkinakis v. Greece *and* Cantoni v. France *and legal certainty.*

This section analyses the Court's judgements referring to the clear definition of criminal offences and penalties. In this respect, foreseeability is related to precision in the legal definition of an offence, both in case-law and in written law. With some exceptions, it could be defined synchronic foreseeability.[180] The leading cases are *Kokkinakis v. Greece* and *Cantoni v. France.*

As mentioned above, in the case of *Kokkinakis v. Greece* the Court transposed the Art. 9 ECHR definition of law into the assessment of a possible Art. 7 ECHR violation, since the two were interconnected in the case.[181] The Court considers it possible avoiding the inevitable vagueness of the wording of statutes through a settled body of national case-law.[182] Even though the importance of *Kokkinakis* for the definition of law and the role of judicial interpretation has already been analysed above, the criteria used by the Court while applying the principles are a first hint of the future foreseeability test.

Firstly, the Court assesses the clear definition of the offence with the *in concreto* test under Art. 9 ECHR, which considers national practice in order to define legal precision, enabling the individual to foresee the consequences of his or her actions under Art. 7 ECHR.[183] Secondly, the Courts adopts a criminal law perspective, as it considers these principles consequences of *nullum crimen nulla poena sine lege* and the prohibition of extensive construction (for example, by analogy).[184]

[179] Similarly to *Elberte v. Latvia* see ECtHR, Maslák and Michálková v. Czech Republic, 14 January 2016, no. 52028/13, para. 70 '*La Cour rappelle à cet égard qu'il lui incombe non pas d'examiner in abstracto la législation et la pratique pertinentes en l'espèce, mais de rechercher si les conséquences que celles-ci ont eues sur le requérant ont enfreint la Convention*'. R. CHENAL, *Il principio di legalità e la centralità dei diritti fondamentali*, in *Fattore tempo e diritti fondamentali. Cassazione e CEDU a confronto* (Studi e Pubblicazioni della Corte di Cassazione), Roma, 2017, p. 66.
[180] See *above*, Chapter 2, para. 8. See ECtHR, Kokkinakis v. Greece, 25 May 1993, 14307/88.
[181] See *above*, Chapter 2, para. 5.2.
[182] ECtHR, Kokkinakis v. Greece, 25 May 1993, 14307/88, para. 40.
[183] ECtHR, Kokkinakis v. Greece, 25 May 1993, 14307/88, para. 40 and 52.
[184] ECtHR, Kokkinakis v. Greece, 25 May 1993, 14307/88, para. 52. In his dissenting opinion, Judge Martens claims that the violation of Art. 7 ECHR should have been assessed before Art. 9 ECHR. In particular, clarity to him has to be considered a component of the principle and not a consequence, in order to avoid arbitrariness, which is one of the rationales of legality. Judge Martens expresses concerns about the possibility to avoid arbitrariness through case-law since case-law is constantly changing.

With regards to the specific case, the definition of the offence of proselytism was to be found in section 4 of Law 1363/1938.[185] The applicant considered the offence not to be clearly defined in its essence, especially because the expression 'in particular' and the vague formula 'indirect attempt' determined a non-exhaustive list of possible acts amounting to proselytism.[186] Conversely, the Court did not find a violation, since national case-law was considered to sufficiently narrow down the meaning of the offence. Case-law was rather extensive in the construction of the offence, as national courts referred the expression 'in particular' to the means used and not to *actus reus*, while section 4 was concentrated in the attempt to impinge on religious beliefs by all means separately listed in the law.[187] In particular, the Court considers the multi-faceted and extensive interpretations of the offence sufficient to enable the individual to foresee its conviction.[188] The Court just refers to national case-law in an objective way. It does not refer to the individual's subjective situation nor to his particular religious beliefs. The assessment is concentrated in an *in concreto*, *ex ante* analysis of the judicial interpretation at the time the offence was committed.[189]

In *Cantoni v. France* (1996), the Court relies both on Art-8-11 ECHR precedents and on *Kokkinakis v. Greece* and *S.W. v. United Kingdom.*[190] The case dealt with the alleged absence of foreseeability in the material element of the offence, the 'unlawful sale of a

[185] The Law in question was amended the following year by Law 1672/1939 to clarify the terms. It established both imprisonment and a fine as penalties for 'anyone engaging in proselytism'. Proselytism was defined by the same law: 'by 'proselytism' is meant, in particular, any direct or indirect attempt to intrude on the religious beliefs of a person of a different religious persuasion (eterodoxos), with the aim of undermining those beliefs, either by any kind of inducement or praise of an inducement or moral support or material assistance, or by fraudulent means or by taking advantage of his inexperience, trust, need, low intellect or naïvety'. ECtHR, Kokkinakis v. Greece, 25 May 1993, 14307/88, para. 16.

[186] ECtHR, Kokkinakis v. Greece, 25 May 1993, 14307/88, para. 38. According to the applicant, this resulted both in a violation of Art. 7 ECHR and Art. 9 ECHR, as his freedom of religion was jeopardised by the extensibility of criminal liability to non-relevant acts.

[187] The Court refers to the Piraeus Criminal Court ruling no. 36/1962 and to Court of Cassation, no. 997/1975. ECtHR, Kokkinakis v. Greece, 25 May 1993, 14307/88, para. 18-19.

[188] The Court quotes several judgements of Greek courts convicting Jehovah's Witness and other religious people for various acts of proselytism, that were similar to the applicant's conduct and showed the existing judicial interpretation of the law. ECtHR, Kokkinakis v. Greece, 25 May 1993, 14307/88, para. 18-20. Moreover, on the sufficiently clear legal basis in written law, with the aid of judicial interpretations see, recently, ECtHR, Haarde v. Iceland, 23 November 2017, no. 66847/12, para. 132.

[189] Although the Court considered Greek law to be consistent with the legal basis requirements in the Convention, it declared the violation of the freedom of religion with regards to the 'necessity in a democratic society'. The dissenting opinion of Judge Martens adopted a much more severe approach to foreseeability. According to him, Art. 7 ECHR was breached as the written definition of the offence was insufficient to legitimately draw the boundaries of the offence, even considering the imprecise and very extensive interpretations given by Greek courts. The Court later confirmed its finding in the similar case of *Larissis v. Greece*. ECtHR, Larissis v. Greece, 24 Febraury 1998, n. 23372/94, para, 32-35.

[190] For the case of *S.W. v. the United Kingdom*, see *infra*, 4.3.

medicinal product' in Article L-517 of the French Public Health Code, and in particular with the uncertain meaning of the concept of 'medicinal product' (Article L-511) under national law, EU law and case-law.[191] As in *Kokkinakis*, the legal issue was the uncertain area of meaning surrounding the definition of an element of the offence, which had to be read 'in light of the accompanying interpretive case-law'.[192] In this respect, the Court considers two factors. Firstly, the conflicting synchronic conflicts within lower courts in the late 1980s and 1990s diverged in relation to questions of fact, and not because the definition of the respective element in the offence was uncertain. The Court analyses in depth the lower courts' case-law by considering its merits.[193] Secondly, the decisive argument is the uniform and established orientation of the *Cour de Cassation*, which always expresses itself in favour of the classification of parapharmaceutical products as medicinal products.[194]

Therefore, the role of the highest courts' case-law is crucial in the determination of the meaning of a statute. With regards to the same point, in the case of *Achour v. France*, the Court considered the case-law of the French *Cour de Cassation* as means for the applicant to foresee the consequences of his actions as the highest court had taken a 'clear and consistent position since the late nineteenth century'.[195] In contrast, the Court also deemed the ordinary meaning of words sufficient in order to consider a criminal provision foreseeable, even in the absence of case-law and just relying on its wording.[196]

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[191] ECtHR, Cantoni v. France, 11 November 1996, no. 17862/91, para. 26. The doubts concerned whether parapharmaceutical products had to be considered medicinal products, in light of the alleged *Cour de Cassation*'s arbitrariness and the ambiguity and inconsistency of lower courts. The groups of cases considered were about vitamin C, hydrogen peroxide and 70% strength alcohol, which were the object of a conflicting case-law of the lower courts in the late 1980s and early 1990s, while the *Cour de Cassation* upheld or quashed decisions in order to always consider them consistent with the definition of medicinal product.

[192] ECtHR, Cantoni v. France, 11 November 1996, no. 17862/91, para. 32, for the principles affirmed in the judgement on the role of case-law and the definition of law and its qualities see *above*, Chapter 2, para. 5.2. The assessment of legality only as the foreseeability of 'a real risk of prosecution' seems to be the standard for C. MURPHY, *The principle of legality in criminal law under the European Convention on Human Rights*, in *European Human Rights Law Review*, 2010, p. 200.

[193] ECtHR, Cantoni v. France, 11 November 1996, no. 17862/91, para. 32-34.

[194] ECtHR, Cantoni v. France, 11 November 1996, no. 17862/91, para. 34.

[195] The *Cour de Cassation*'s consistent interpretation admitted that the new rule on recidivism could be applied even if only the second offence was committed after its entry into force. ECtHR, Achour v. France, 29 March 2006, no. 67335/01, para. 52.

[196] In the case of *Grigoriades v. Greece*, where legality was examined in connection to Art. 7 and 10 ECHR, the Court 'saved' Art. 74 of the Military Code considering that the offence of 'insults to the flag or the armed forces' and the possibility to be held criminally liable were foreseeable, as the word 'insult' had a clear ordinary meaning, also thanks to the similarity with the word 'offend', even if the wording of the statute was broadly expressed. ECtHR, Grigoriades v. Greece, 25 November 1997, no. 121/1996/740/939, para. 37-38. In the case of *Başkaya and Okçuoğlu v. Turkey*, the Court considered the punishment of both the writer and the publisher of an academic book for 'propaganda against the indivisibility of the State'

4.2.1. Cantoni v. France *and the subjective assessment of foreseeability.*

Moreover, in *Cantoni v. France* the Court enriched the notion of foreseeability defining the elements that identify its scope, thanks to its case-law on Art. 8-11 ECHR:

> 'the scope of the notion of foreseeability depends to a considerable degree on the content of the text in issue, the field it is designed to cover and the number and status of those to whom it is addressed (see the Groppera Radio AG and Others v. Switzerland judgment of 28 March 1990, Series A no. 173, p. 26, para. 68). A law may still satisfy the requirement of foreseeability even if the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (see, among other authorities, the Tolstoy Miloslavsky v. the United Kingdom judgment of 13 July 1995, Series A no. 316-B, p. 71, para. 37). This is particularly true in relation to persons carrying on a professional activity, who are used to having to proceed with a high degree of caution when pursuing their occupation. They can on this account be expected to take special care in assessing the risks that such activity entails'.[197]

This precedent introduces elements of subjectivity into the foreseeability assessment, which until this point had been carried out on an objective basis. The relevant criteria are: i) the content of the text; ii) its field of application; iii) the number and status of those to whom it is addressed; iv) the admissibility of a necessary appropriate legal advice, in particular for those who carry out professional activity, burdened with an obligation to take special care in risk assessment.[198] Consequently, the Court refers the foreseeability assessment to the applicant, and not to the law in general, pointing out that he 'should have appreciated at the material time' that he ran an actual risk of being prosecuted in view of the well-established case-law, on the basis of an appropriate legal advice (duty to be informed) and taking into account that he was the manager of a supermarket (status of the addressed-professional activity).[199]

Similarly, in *Groppera Radio AG v. Switzerland*, the Court had elaborated the first three criteria that define the scope of foreseeability and applied them to Art. 10 ECHR. It declared national regulation of international communication foreseeable due to i) the

(subsections 1 and 2 of section 8 of the Prevention of Terrorism Act 1991) because, even in the more dubious case of the publisher, there was no doubt from the wording of the statute that such a publication would fall under the scope of the expression 'printed matter other than periodicals'. Art. 7 ECHR was declared violated for extensive construction by analogy only with regards to the imprisonment imposed on the publisher. ECtHR, Başkaya and Okçuoğlu v. Turkey, 8 July 1999, no. 23536/94 and 24408/94, para. 32-43. In the same sense also ECtHR, Erdoğdu and İnce v. Turkey, 8 July 1999, nos. 25067/94, 25068/94, para. 32 ff.; ECtHR, Polat v. Turkey, 8 July 1999, no. 23500/94, para. 32 ff.

[197] ECtHR, Cantoni v. France, 11 November 1996, no. 17862/91, para. 35.

[198] See *above*, para. 3.1.1. and 3.3.3. In Beauvais' opinion, these elements are included into 'relative foreseeability'. In Scoletta's understanding, these elements are required in 'subjective accessibility'. Attentive scholarship distinguishes between hyper-subjective criteria and criteria based on a model agent. C. SOTIS, *"Ragionevoli prevedibilità" e giurisprudenza della Corte Edu*, in *Questione Giustizia*, 4, 2018, p. 70.

[199] ECtHR, Cantoni v. France, 11 November 1996, no. 17862/91, para. 35.

highly specialised field of application of the communication legislation and ii) the professional qualification of its addressed (for example, a business), which could be expected to take appropriate advice when engaging in a transnational business venture.[200] In *Cantoni* the Court applied to Art. 7 ECHR the same criteria found in other provisions of the Convention, which are now undoubtedly also part of the legality assessment. These criteria have been criticised for their subjective orientation, which is risky in the field of legality. At the time, the European Commission of Human Rights held the opposite view that those criteria required a stricter application in Art. 7 ECHR. Consequently, the Commission's conclusion was applied differently in the present case.[201]

Considering foreseeability in light of an appropriate legal advice was an already established criterion in previous case-law on Art. 8 and 10 ECHR. It was clearly affirmed that foreseeability could be assessed, if need be, in light of the legal framework arising by consulting with a lawyer.[202]

4.2.2. The Cantoni *subjective criteria in diachronic perspective.*

The Court recalled the same criteria to define foreseeability in the case of *Pessino v. France*.[203] Although the principles affirmed where the subjective criteria of *Cantoni*,[204] the Court did not consider the professional activity of the applicant as a sufficient ground for considering the judicial development foreseeable.[205] The absence of case-law which equated the *sursis à execution du permis* with an *interdiction à construire* did not enable the individual to predict a possible criminal conviction for his conduct.[206] The Strasbourg

[200] ECtHR, Groppera Radio AG and others v. Switzerland, 28 March 1990, no. 10890/84, para. 68.
[201] ECtHR, Cantoni v. France, 11 November 1996, no. 17862/91, para. 27.
[202] ECtHR, the Sunday Times v. the United Kingdom, 26 April 1979, no. 6538/74, para. 49; ECtHR, Malone v. the United Kingdom, 2 August 1984, no. 8691/79, para. 66; ECtHR, Margareta and Roger Andersson v. Sweden, 25 February 1992, no. 12963/87, para. 75; ECtHR, Tolstoy Miloslavsky v. the United Kingdom, 13 July 1995, no. 18139/91, para. 37. For an explicit affirmation in the context of Art. 7 ECHR see ECtHR, Achour v. France, 29 March 2006, no. 67335/01, para. 54: '[i]n any event, a law may still satisfy the requirement of "foreseeability" where the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail'. See recently, ECtHR, Seychell v. Malta, 28 August 2018, no. 43328/14, para. 43 and 48, which was then solved in ECtHR, decision, Porsenna v. Malta, 22 January 2019, no. 1109/16.
[203] See *above*, Chapter 2, para. 5.2. for the description of the case. ECtHR, Pessino v. France, 10 October 2006, no. 40403/02.
[204] ECtHR, Pessino v. France, 10 October 2006, no. 40403/02, para. 33. The particularly strict assessment of the Court is highlighted by K. LUCAS, *Revirements de jurisprudence et non-rétroactivité de la "loi" : la Cour européenne des droits de l'homme face au sempiternel problème de la rétroactivité naturelle des changements de cap jurisprudentiels*, in *Revue trimestrielle des droits de l'homme*, 2012, p. 750 ff.
[205] Dourneau-Josette places the case *Pessino* under the application of the *Cantoni* precedent and presents it as a particularly strict application of the standard of the 'necessary legal advice' for professionals. P. DOURNEAU-JOSETTE, *CEDH: Jurisprudence de la Cour européenne des droits de l'homme en matière pénale*, in *Encyclopédie juridique Dalloz: répertoire de droit pénal*, Paris, 2013, p. 63.
[206] ECtHR, Pessino v. France, 10 October 2006, no. 40403/02, para. 35-36.

judges adopted a stricter and more objective approach and they did not consider the case in the perspective of analogy, but rather in the perspective of retroactivity.[207] Therefore, both the impossibility to assimilate a *sursis à exécution* with the *décision judiciaire ou arrêté* provided for by the statute and the absence of precedents qualifying this conduct as a criminal offence excluded the foreseeability of the criminal nature of the acts.[208]

The same principles were affirmed but disregarded in *Dragotoniu and Militaru Pidhorni v. Romania*, with regards to the subjective criteria and the importance of professional activity in order to assess the necessary degree of caution enshrined in the *Cantoni* judgement.[209] A first difference with the case of *Pessino v. France* is that the Court referred to analogy, instead of retroactivity of judicial interpretation, even though the two cases were very similar. National tribunals applied the offence of passive corruption to private corporation employees on the basis of the possibility to apply to them the notion of 'other employees' (*autres salariés*), although this extension was not provided for by the law at the time the offence was committed.[210] The Court, relying on objective and *in concreto* criteria, grounded its argumentation on the absence of precedent of the Romanian courts that, before the present case, had applied passive corruption to employees of private corporations.[211] According to the Court, in this case there had been an illegitimate analogy between bank employees and 'public officers' and 'other employees' in the sense of Art. 145 of the Criminal Code, excluding the relevance of scholars' opinions. For these reasons, foreseeability was unattainable even for professionals.[212] Although the qualification was different in terms of national law categories, the assessment of the Court on foreseeability was identical to the one carried out in *Pessino v. France*: objective and stricter, but also based on material cases where a new retroactive or analogic interpretation had been applied.

[207] Against see O. BACHELET, *Les revirements de jurisprudence, problèmes d'application dans le temps (arrêt Pessino du 10 octobre 2006)*, in P. TAVERNIER (ed.), *La France et la Cour européenne des droits de l'homme: la jurisprudence en 2006*, Bruxelles, 2007, p. 168. See *infra*, para. 4.4.
[208] ECtHR, Pessino v. France, 10 October 2006, no. 40403/02, para. 34-35.
[209] ECtHR, Dragotoniu et Militaru Pidhorni v. Romania, 24 May 2007, no. 77193/01 and 77196/01, para. 35.
[210] ECtHR, Dragotoniu et Militaru Pidhorni v. Romania, 24 May 2007, no. 77193/01 and 77196/01, para. 22-32.
[211] ECtHR, Dragotoniu et Militaru Pidhorni v. Romania, 24 May 2007, no. 77193/01 and 77196/01, para. 42-43.
[212] ECtHR, Dragotoniu et Militaru Pidhorni v. Romania, 24 May 2007, no. 77193/01 and 77196/01, para. 44.

4.2.3. The Cantoni *subjective criteria in new extensive interpretations and the precedent* Soros v. France.

Conversely, the Court recalled and applied *Cantoni* subjective criteria in other cases. Subjectivity was crucial in the assessment of foreseeability in a case where the uncertainty of the law came into consideration, but where diachronic perspective was not involved.[213]

In the case of *Flinkkilä v. Finland*, the Court considered a criminal offence to be foreseeable for the following reasons. The inclusion of the publishing of a person's name in the scope of 'private life' (an element of the offence) was foreseeable, even if case-law lacked, because it was possible to resort to legal advice, and foremost because the applicants had a professional activity.[214] As journalists, they 'could not claim to be ignorant about the content of the said provision' also due to their deontological code of conduct, which was not a legislative nor a criminal source.[215] It is particularly significant that the Court did not take into account the effective lack of judicial interpretation prior to the commission of the acts, but just relied on the subjective foreseeability by the applicants.

Similarly, in the case of *Soros v. France* the principles recalled in *Cantoni* were applied to a case of a new judicial interpretation of the criminal offence of *initié* (insider trading). In particular, the element of the offence '*à l'occasion de l'exercice de leur profession ou de leurs fonctions*' (in the exercise of their profession or their duties) was considered fulfilled even in the case of an individual without professional relations to the companies involved.[216] Like in *Flinkkilä*, the criminal liability of the applicant was considered foreseeable due to a subjective evaluation, even if the disputed interpretation was unprecedented. First of all, the Court admits that there was no case-law at the material time (1988) convicting for insider trading individuals without a professional relation to

[213] In the case of *Custers, Deveaux and Turk v. Denmark* the statutory definition of a 'non-freely accessible area', element of the offence of trespassing, was sufficiently foreseeable due to the status of the applicants (Greenpeace activists) and the evaluation of their intentions in light of the evidence at hand (photos, the purpose of their trip, website postings). ECtHR, Custers, Deveaux and Turk v. Danemark, 3 May 2007, no. 11843/03, 11847/03 and 11849/03, para. 95.

[214] The criminal offence in question was provided for by Chapter 27 section 3(a) of the Penal Code, punishing invasion of private life, but its scope of application was disputed at the material time. The Court assessed the requirements of a legitimate interference in the freedom of expression ('prescribed by law'), together with Art. 7 ECHR. The applicants considered including the citation of names in articles in the notion of 'private life' as unforeseeable at the material time, since the Supreme Court included them only in 2001-2002. Moreover, case-law dating back to 1997, even if subsequent to the commission of the offence, considered similar cases. ECtHR, Flinkkilä v. Finland, 6 April 2010, no. 25576/04, para. 67.

[215] ECtHR, Flinkkilä v. Finland, 6 April 2010, no. 25576/04, para. 67.

[216] ECtHR, Soros v. France, 6 October 2011, no. 50425/06, para. 54 ff.

the companies. Nevertheless, first instance cases dealing with professionally related individuals were considered sufficiently in proximity with the subjective situation of the applicant to enable him to doubt (at least) that his conduct was blameworthy.[217] Here the approach of the Court lowers the foreseeability standard to the simple doubt that the conduct could be criminally relevant. Secondly, even if the case was a new interpretive construction, it is considered in line with a progressive development in case-law.[218] Thirdly, due to his position as institutional investor, his experience and status, the applicant should not have ignored that his conduct could have been qualified as insider trading and that, despite the lack of case-law, he had to carry out his activities with particular caution.[219]

In other cases concerning first interpretations or rarely interpreted provisions, the Court recalled the principles enshrined in *Soros v. France.* In the 2015 judgment *Perinçek v. Switzerland,* the Court found that national tribunals 'cannot be blamed for that state of affairs, which was by all appearances due to the fact that they had not often had the occasion to be confronted with acts such as that committed by the applicant'.[220] Even though case-law was scarce and the courts' approach was unclear, the interpretation adopted in the case of the applicant could reasonably be expected.[221]

In 2016, the Court issued the judgement *X. and Y. v. France*, where a new legal question arising from newly introduced legislation was not considered in violation of accessibility and foreseeability *per se*, due to the fact that the interpretation was part of

[217] ECtHR, Soros v. France, 6 October 2011, no. 50425/06, para. 57: '*Toutefois, de l'avis de la Cour, ces jurisprudences, même si elles émanent de juridictions de première instance, ont trait à des situations suffisamment proches de celle du requérant pour lui permettre de savoir, ou à tout le moins de se douter, que son comportement était répréhensible. En effet, s'il était interdit aux professionnels qui, de par l'exercice de leurs fonctions, avaient connaissance d'une information privilégiée, d'intervenir sur le marché boursier, une interprétation raisonnable de cette jurisprudence permettait de penser que le requérant pouvait être concerné par cette interdiction, qu'il soit ou non lié contractuellement à la banque S*'.
[218] ECtHR, Soros v. France, 6 October 2011, no. 50425/06, para. 58.
[219] ECtHR, Soros v. France, 6 October 2011, no. 50425/06, para. 59.
[220] ECtHR, Perinçek v. Switzerland, 15 October 2015, no.27510/08, para. 138. With regards to the offence of racial discrimination (Art. 261 bis para. 4 of the criminal code '[…] or any person who on the same grounds denies, grossly trivialises or seeks to justify a genocide or other crimes against humanity') it was unclear whether the concept of genocide, which was an element of the offence, could capture the events (Armenian genocide) recalled by the applicant in his statement.
[221] ECtHR, Perinçek v. Switzerland, 15 October 2015, no.27510/08, para. 138.

the reasonably foreseeable options.[222] Moreover, the subjective criterion of the applicants' professional activity was applied.[223]

Although other groups of cases developed a much more objective approach, the Court maintained a group of cases, such as the ones mentioned above, where the professional activity and the subjective assessment still plays a role, especially in highly specialised sectors.[224]

4.2.4. The Cantoni *criteria in Art. 2 Prot. 4 ECHR.*

The criteria enshrined in *Groppera Radio v. Switzerland* and *Cantoni v. France* are also applied in the context of Art. 2 Prot. 4 ECHR. In the case of *De Tommaso v. Italy*, the Court made clear that the notion of foreseeability also covers the so-called procedural aspects of legality:

> 'The Court reiterates that a rule is "foreseeable" when it affords a measure of protection against arbitrary interferences by the public authorities (see *Centro Europa 7 S.r.l. and Di Stefano*, cited above, § 143, and *Khlyustov*, cited above, § 70). A law which confers a discretion must indicate the scope of that discretion, although the detailed procedures and conditions to be observed do not necessarily have to be incorporated in rules of substantive law (see *Khlyustov*, cited above, § 70, and *Silver and Others v. the United Kingdom*, 25 March 1983, § 88, Series A no. 61)'.[225]

With regards to Italian legislation on preventive measures (Law 1423/1956), the Court examined the foreseeability of i) the categories of individuals potentially affected by those measures and ii) the content of the measures, in light of the wording of the provisions and the relevant case-law of the Italian Constitutional Court. The need for a precise definition of a measure is combined with the need to avoid the judge's excessive discretion in its application. The Court assessed foreseeability objectively and apparently following the Constitutional Court's scrutiny on *tassatività/determinatezza* in light of living law. This

[222] ECtHR, X. and Y. v. France, 1 September 2016, no. 48158/11, para. 61, expressly quoting *Soros v. France*. The case dealt with the alleged lacking foreseeability of the amount of penalty for *manquement* to professionals buying pre-emptive rights in breach of their professional obligations, due to the unforeseeable joint application of different norms. Moreover, the Court positively considered that the first application of the interpretation in question was considered a mitigating factor to assess the entity of the sanction (para. 64).
[223] ECtHR, X. and Y. v. France, 1 September 2016, no. 48158/11, para. 62.
[224] ECtHR, dec., Bley v. Germany, 25 June 2019, no. 68475/10, para. 42-46; ECtHR, dec., Gherghe and Gună v. Romania, 1 October 2019, no. 32619/08 and 33622/08, para. 41-43.
[225] ECtHR, De Tommaso v. Italy, 23 February 2017, no. 43395/09, para. 109. Commentary by A.M. MAUGERI, *Misure di prevenzione e fattispecie a pericolosità generica: la Corte europea condanna l'Italia per la mancanza di qualità della "legge", ma una rondine non fa primavera*, in *Dir. pen. cont*., 3, 2017, p. 15 ff. and V. MAIELLO, *De Tommaso c. Italia e la cattiva coscienza delle misure di prevenzione*, in *Dir. pen. proc*., 2017, p. 1039 ff.

scrutiny is still *in abstracto*, as the Court does not examine the relevant practice of the tribunals in precising the subjective and objective scope of application of Law 1423/1956.

In particular, albeit the Constitutional Court's positive opinion on the clarity of the categories of individuals included in Law 1423/1956, the Court severely finds that the imposition of preventive measures was still a matter of discretion due to the act's lack of detailed provisions.[226] With regards to the content of the measures, the Court considered it unforeseeable because of the wording of the provision, since the Constitutional Court judgement was subsequent to the applicant's acts. Moreover, even the Constitutional Court's judgement was insufficient for that purpose.[227]

4.3. Consistency with the essence of the offence and reasonable foreseeability of the development in judicial interpretation: S.W. v. United Kingdom, Streletz, Kessler, Krenz v. Germany *and* K.-H.W. v. Germany.

In the following leading cases, the Court develops the criteria of consistency with the essence of the offence and reasonable foreseeability of the results of judicial

[226] ECtHR, De Tommaso v. Italy, 23 February 2017, no. 43395/09, para. 115-118. The first part of the judgment concerned section 1 of Law 1423/1956, defining the categories of individuals potentially subject to preventive measures. The Constitutional Court had already 'saved' this provision establishing that the description of the conducts 'capable of endangering society' was sufficiently clear, thanks to 'an objective assessment of the 'factual evidence' revealing the individual's habitual behaviour and standard of living, or specific outward signs of his or her criminal tendencies' (para. 116). The judgements of the Constitutional Court were: Corte Cost. n. 2/56, 27/59, 45/60, 126/62, 23/64, 32/69. In opposition, the ECtHR pointed out that those criteria determined a prospective analysis by judges and were not sufficiently precise.

[227] ECtHR, De Tommaso v. Italy, 23 February 2017, no. 43395/09, para. 119-122. Section 3 and 5 of Law 1423/1956 was scrutinised by the Constitutional Court in judgement no. 282/2010. Although the present case did not raise particular issues on foreseeability, it had a great impact on the national legal order. There were divergent opinions whether a reinterpretation of preventive measures according to Strasbourg principles was satisfactory, or an intervention by the Constitutional Court was necessary. The *Corte di Cassazione*, in its highest composition, reinterpreted preventive measures in light of the *De Tommaso* judgement in Cass. pen., SS. UU., 27 April 2017 (5 September 2017), no. 40076, Paternò with commentary by F. VIGANÒ, *Le Sezioni Unite ridisegnano i confini del delitto di violazione delle prescrizioni inerenti alla misura di prevenzione alla luce della sentenza De Tommaso*, in *Dir. pen. cont*., 9, 2017, p. 146 ff. and Cass. pen., SS. UU., 30 November 2018 (4 January 2018), no. 111, Gattuso, with the commentary by A. QUATTROCCHI, *Lo statuto della pericolosità qualificata sotto la lente delle Sezioni Unite*, in *Dir. pen. cont*., 1, 2018 p. 51 ff. Ultimately, the Constitutional Court addressed the question with reference to legislation in force (d.lgs. 159/2011). Judgement no. 24/2019 discussed the precision of the definition of the addressed by preventive measures (today disciplined in Art. 1 a) and b), d. lgs. 159/2011). In this case, the Constitutional Court voided only lit. a) of the said provision for it was unforeseeable *in abstracto* and subject to conflicting case-law and therefore violated Art. 117 Cost., by means of Art. 2 Prot. 4 ECHR and Art. 1 Prot. 1 ECHR. Corte Cost., 27 February 2019, no. 24, para. 12.3, commentary by E. APRILE, in *Cass. Pen*. 2019, p. 1884 ff. Foreseeability of the prescriptions applicable to the addressed was dealt with in judgement no. 25/2019. In this second case, the provision at stake was the criminal offence punishing the violation of the said prescriptions, that was declared partially unconstitutional (Art. 117 Cost., by means of Art. 7 ECHR and Art. 2 Prot. 4 ECHR) for the lack of foreseeability following, *mutatis mutandis*, the evaluation of the Strasbourg Court. (Art. 75, d.lgs. 159/2011). Corte Cost. 27 February 2019, no. 25.

interpretation. These criteria, often examined together, have had a very complicated outcome in the Court's case-law, as it will be demonstrated *infra*.

In the case of *S.W. v. United Kingdom* and *C.R. v. United Kingdom*, the Court had to rule on the retroactivity of a judicial interpretation.[228] In order to satisfy Art. 7 ECHR's requirements, the test used was twofold: the result of the judicial development had to be i) consistent with the essence of the offence and ii) reasonably foreseeable.[229] These two requirements were jointly assessed in a diachronic perspective. The Court analysed the case-law evolution and the law in England in order to assess whether the abolition of the immunity for a husband who forcibly had sexual intercourse with his wife was foreseeable.[230]

Although it implied that there had actually been an overruling, the Court considered it reasonably foreseeable for it 'continue[d] a perceptible line of case-law development', and 'there was an evident evolution', which was also said to be consistent with the essence of the offence.[231] At the time the offence was committed (19 September 1990) the Crown Court Decision in the case of *R. v. R* (30 July 1990) had affirmed the upholding of the immunity in specific cases, where the wife's consent was considered revoked: by a court order; an implicit or explicit agreement; and a withdrawal from cohabitation accompanied by a clear intention to end the consent to sexual intercourse (the latter was the case of *S.W.*). This precedent was then confirmed in 1991 by the House of Lords, which fully eliminated the immunity.[232] Moreover on 17 September 1990 the Law Commission in its paper 'Rape within Marriage' suggested that the immunity should be abolished.[233] In the meantime, English courts began to criticise the concept of marital rape immunity, even though there were still conflicting opinions among the judges.[234]

[228] ECtHR, S.W. v. the United Kingdom, 22 November 1995, no. 20166/92, para. 37 ff. and ECtHR, C.R. v. the United Kingdom, 22 November 1995, no. 20190/92, para. 35 ff. See *above*, Chapter 2, para. 5.2.
[229] ECtHR, S.W. v. the United Kingdom, 22 November 1995, no. 20166/92, para. 35 and ECtHR, C.R. v. the United Kingdom, 22 November 1995, no. 20190/92, para. 33.
[230] For a more detailed description see *above*, Chapter 2, para. 7, fn. 209.
[231] ECtHR, S.W. v. the United Kingdom, 22 November 1995, no. 20166/92, para. 43 and ECtHR, C.R. v. the United Kingdom, 22 November 1995, no. 20190/92, para. 41.
[232] Crown Court, R.v. R. (1991), All England Law Reports, 747. House of Lords, R. v. R, 23 October 1991. ECtHR, S.W. v. the United Kingdom, 22 November 1995, no. 20166/92, para. 11.
[233] ECtHR, S.W. v. the United Kingdom, 22 November 1995, no. 20166/92, para. 24.
[234] R. v. C. ([1991] 1 All England Law Reports 755; on the contrary, for the sake of legal certainty see R. v. J. ([1991] 1 All England Law Reports 759. ECtHR, S.W. v. the United Kingdom, 22 November 1995, no. 20166/92, para. 23.

Nonetheless, these acknowledgements were subsequent to the commission of the offence, even if prior to the final judgement. Before the *R. v. R.* case, there had been exceptional cases where English courts had considered it possible not to apply the immunity in case the consent was withdrawn.[235] Albeit these exceptional cases, the marital rape immunity was still following the precedent of Sir Matthew Hale of 1736 and thus the applicant's conduct would have fallen outside the scope of the offence of rape. A proper overruling had taken place before a first instance judge a few months before the conduct, and therefore the common law was actually undergoing an overruling *in malam partem* at the time the offence was committed.

The inconsistency of the mala in se-mala quia prohibita criteria. - One of the arguments of the Court was the manifest 'essentially debasing character of rape', which was considered having played a crucial role in the Court's assessment.[236] This argument was considered of great importance, as it was interpreted as a particularly loose foreseeability test for the so-called *mala in se*.[237] In those cases, foreseeability should have a particularly broad scope, as common sense seems to suggest the possibility to be held criminally liable for acts which are unlawful in a manifest way. In light of the development of the Court's jurisprudence, it can hardly be affirmed that those criteria still play a role in the foreseeability assessment.

Significantly, the Court stressed the idea of 'perceptible', 'evident' and 'manifest'. It seems that foreseeability of a possible diachronic evolution is reasonable, and therefore

[235] R. v. Clarence [1888] 22 Queen's Bench Division 23, [1886-90] All England Law Reports 113; R. v. Clarke [1949] 2 All England Law Reports 448; R. v. Miller [1954] 2 All England Law Reports 529; R. v. Reid [1972] 2 All England Law Reports 1350; R. v. O'Brien [1974] 3 All England Law Reports 663; R. v. Steele [1976] 65 Criminal Appeal Reports 22; R. v. Roberts [1986] Criminal Law Reports 188. ECtHR, S.W. v. the United Kingdom, 22 November 1995, no. 20166/92, para. 11.

[236] ECtHR, S.W. v. the United Kingdom, 22 November 1995, no. 20166/92, para. 44 and ECtHR, C.R. v. the United Kingdom, 22 November 1995, no. 20190/92, para. 42. A. ASHWORTH, A. MACDONALD, B. EMMERSON, *Human Rights and Criminal Justice*, London, 2001, p. 290 f.

[237] ECtHR, S.W. v. the United Kingdom, 22 November 1995, no. 20166/92, para. 44 and ECtHR, C.R. v. the United Kingdom, 22 November 1995, no. 20190/92, para. 42. Zagrebelsky proposed the distinction between *mala in se* and *mala quia prohibita* as a possible criterion to interpret the conflicting judgements of the Court on the subject matter, especially if considering later case-law such as *Pessino v. France*. In the latter case, the Court explicitly distinguished from the case of *S.W. v. the United Kingdom* as the offences of rape and attempted rape had a debasing character that could not be ignored. As a consequence, it is implicitly meant that the case of an 'artificial' offence such as the one of the *Code de l'urbanisme* should be treated with different parameters. V. ZAGREBELSKY, *La Convenzione europea*, cit., p. 106 and ECtHR, Pessino v. France, 10 October 2006, no. 40403/02, para. 36. According to Manes, this distinction is going towards the common law idea of social foreseeability. V. MANES, *Art. 7*, cit., p. 275. On the contrary, Scoletta gives the distinction only a partial validity, in M. SCOLETTA, *La legalità penale nel sistema europeo dei diritti fondamentali*, cit., p. 240 f. In the same vein, Ashworth criticises this distinction as evanescent. A. ASHWORTH, *Positive Obligations in Criminal Law*, Oxford-Portland, 2015, p. 83.

not absolute, for it is clearly observable and obvious from the existing circumstances and from the nature of the offence.[238] The assessment was purely objective and its severity seems to recall the common law *thin ice principle*.[239] As a 'counterpoint' to the non-retroactivity principle, the *thin ice principle* was proclaimed by Lord Morris in *Knuller v DPP* (1973) in the following terms: 'those who skate on thin ice can hardly expect to find a sign which will denote the precise spot where he will fall in'.[240] Therefore, he who acts in a grey area between legality and illegality, cannot later claim to have been unaware that his conduct was unlawful. Apart from obvious social deterrence objectives, the thin ice principle places the assessment of retroactivity (or foreseeability) at the fringes of a moral judgement.[241]

As it was mentioned above,[242] new elements are introduced in the foreseeability test, which seem to recall the relationship between the rule of law and morals.[243] In fact, the Court denied an application of Art. 7(1) ECHR resulting in a substantial violation of the same object and scope of the Convention, the respect for human rights and human dignity.[244] This argument will be used again in the following leading case, and opens the discussion on a possible balance between legality and other rights enshrined in the Convention.[245]

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[238] The Court further noted that the applicant never disputed that his acts could have amounted to rape in the sense of the legal definition of section 1 of the 1956 Sexual Offences Act. His complaints regarded the foreseeability of the overruling in the common law abolishing marital immunity. ECtHR, S.W. v. the United Kingdom, 22 November 1995, no. 20166/92, para. 41 and ECtHR, C.R. v. the United Kingdom, 22 November 1995, no. 20190/92, para. 39. Against see W. BENESSIANO, *Légalité pénale et droits fondamentaux*, Aix-Marseille, 2011, p. 212.

[239] In a positive vein, see C. MURPHY, *The principle of legality in criminal law*, cit. p. 200.

[240] Knuller v. DPP (1973), AC 435. The principle was applied both to judicial creation of an offence in Shaw v. DPP (1962) AC 220 and to the extension of an existing one in Tan (1983) QB 1053. A. ASHWORTH, *Principles of Criminal Law*, cit., p. 60 f.

[241] Continental law scholarship has considered the thin ice principle capable of introducing a neo-naturalist approach in criminal law. V. VALENTINI, *Diritto penale intertemporale. Logiche continentali ed ermeneutica europea*, Milano, 2012, p. 159 ff. and, recently, ID. *Continua la navigazione a vista. Europeismo giudiziario ed europeizzazione della legalità penale continentale: incoerenze, velleità, occasioni*, in *Dir. pen. cont.*, 20.01.2015, p. 16.

[242] See *above*, Chapter 2, paras. 5.3. and 7.

[243] Taking the affirmations in the present cases to their extreme consequences, these statements could lead to the unacceptable idea that an act can be punished only because it is considered *wrong*, and not by virtue of its incrimination by the law. S. VAN DROOGHENBROECK, *Interprétation jurisprudentielle et non-rétroactivité de la loi pénale*, in *Revue trimestrielle des droits de l'homme*, 1996, p. 475.

[244] ECtHR, S.W. v. the United Kingdom, 22 November 1995, no. 20166/92, para. 44. Valentini is very critical on this point and affirms that the criteria used by the Court are impossible to define since they include social and cultural elements, normative arguments etc. V. VALENTINI, *Diritto penale intertemporale*, cit., p. 142.

[245] See *infra*, para. 4.7.3.

The precedent of *S.W. v. the United Kingdom* was applied to the cases *Streletz, Kessler, Krenz v. Germany* and *K.-H.W. v. Germany.*[246] The previous chapter has already dealt with the question of the contingency between retroactivity and foreseeability *in concreto* with regards to judicial interpretation. Moreover, the influence of legitimacy or morality in the assessment of foreseeability has been already briefly pointed out. Nevertheless, both cases bear special importance for the criteria used in order to define foreseeability.

The Court expressly recalled the criteria of the essence of the offence and reasonable foreseeability in the section dedicated to 'general principles' but then evaluated different elements.[247] Having determined that the criminal prosecution and conviction of all applicants had a legal basis in national law,[248] the Court assessed foreseeability with respect to the actual situation in the German Democratic Republic. Foreseeability was tested through i) subjective criteria and ii) the legitimacy of State practice possibly putting foreseeability into question.

As far as subjectivity is concerned, the Court carried out a different assessment in the case concerning the leaders of the Socialist Unity Party (*Sozialistische Einheitspartei Deutschlands*, SED) and the case concerning the border guard. Streletz Kessler and Krenz considered their conviction unforeseeable because of the 'reality of the situation in the GDR'.[249] Nevertheless, the Court firstly considered the conviction foreseeable because, due to their senior positions, they were responsible for the same state practice they used as justification. Furthermore, thanks to those professional qualifications, they knew or should have known the national and international law they were in breach of (the GDR Constitution and legislation, international obligations, international criticism to GDR's border policy). Secondly, they had personally and decisively contributed to that regime in breach of fundamental human rights, hence it was illogical for them to be considered unaware thereof.[250] In the case of the border guard *K.-H.W.*, the Court considered once

[246] See *above*, Chapter 2, para. 7.
[247] ECtHR, Streletz, Kessler and Krenz v. Germany, 22 March 2001, no. 34044/96, 35532/97 and 44801/98, para. 50, in K. MARXEN, G. WERLE (eds.), *Strafjustiz und DDR-Unrecht. Band 2.1. Gewalttaten an der deutsch-deutschen Grenze*, Berlin, 2002, p. 189 ff., ECtHR, K.-H.W. v. Germany, 22 March 2001, no. 37201/97, para. 45, in K. MARXEN, G. WERLE (eds.), *Strafjustiz und DDR-Unrecht. Band 2.2. Gewalttaten an der deutsch-deutschen Grenze*, Berlin, 2002, p. 915.
[248] ECtHR, Streletz, Kessler and Krenz v. Germany, 22 March 2001, no. 34044/96, 35532/97 and 44801/98, para. 53-76.
[249] ECtHR, Streletz, Kessler and Krenz v. Germany, 22 March 2001, no. 34044/96, 35532/97 and 44801/98, para. 77.
[250] ECtHR, Streletz, Kessler and Krenz v. Germany, 22 March 2001, no. 34044/96, 35532/97 and 44801/98, para. 77-78.

more the subjective characteristics in the foreseeability assessment. Although bearing in mind K.-H.W.'s position as young and indoctrinated soldier, who had to follow orders, the Court considered foreseeability in light of the accessibility of written law, the voluntary enlisting and the unacceptable obedience to orders manifestly infringing universally recognised human rights and the state's own legal principles.[251]

The Court considered foreseeability whether the applicant 'knew or should have known' that his conduct amounted to a certain criminal offence. In addition, the Court went beyond the criterion of the 'professional activity' in risk assessment and considered subjective elements in the assessment of the mistake of law.[252]

In addition to this subjective evaluation, the Court also excluded the legitimacy of the State practice in the GDR. Therefore, although the regime change had created delicate problems, the Court reaffirmed that the principles enshrined in Art. 7(1) ECHR forcibly applied to a regime subject to rule of law and democracy. Thus, the very principles which inspire the Convention, in particular the respect for human rights and pre-eminence of the right to life, voided the justification of state practice which was, at the time of the offence, voiding the substance of GDR legislation and could not be regarded as law.[253]

These four cases were particularly controversial. In fact, the assessment of foreseeability seems to be carried out *ex ante,* at the material time of the offence, but the standard is an *ex post* evaluation of the consequences of the individual's actions. In these terms, the perspective was unacceptable especially for civil law countries.[254]

4.3.1. Consistency with the essence of the offence and the presumption of foreseeability in first impression.

The application of the criteria 'consistency with the essence of the offence' and 'reasonable foreseeability' led the Court to affirm a presumption of foreseeability in cases

[251] ECtHR, K.-H.W. v. Germany, 22 March 2001, no. 37201/97, para. 68-82.
[252] In the same vein, Kreicker defines foreseeability in the aforementioned cases as a subjective criterion that aims at assessing whether *Strafbarkeit* was recognisable. Since it acknowledges the unavoidable mistake of law, it includes culpability in the scope of Art. 7 ECHR. In this regard, Art.7 ECHR has a broader scope than Art. 103 II GG, which is limited to objective parameters. Nevertheless, Kreicker points out that the difference between foreseeability as quality of the law and as recognisability is not clearly defined. H. KREICKER, *Art. 7 EMRK und die Gewalttaten an der deutsch-deutschen Grenze*, Baden-Baden, 2002, p. 46-51.
[253] ECtHR, Streletz, Kessler and Krenz v. Germany, 22 March 2001, no. 34044/96, 35532/97 and 44801/98, para. 81-89, ECtHR, K.-H.W. v. Germany, 22 March 2001, no. 37201/97, para. 83-91. See further *Kononov v. Latvia*, ECtHR, Kononov v. Latvia, 17 May 2010, no. 36376/04, para. 241.
[254] K. AMBOS, *Artikel 7 EMRK, Common Law und die Mauerschützen*, in *KritV*, 86, 2003, p. 42.

concerning first interpretation of criminal offences, i.e. the first time an issue is addressed by a court. In particular, as the following analysis will show, the Court focuses on the consistency of the first impression with the essence of the offence.

In *Jorgic v. Germany* the Court had to assess the foreseeability of the German courts' interpretation of the intent to destroy in the crime of genocide provided for by Art. 220a of the German Criminal Code. In order to assert the consistency of the interpretation with the essence of the offence, the Court considered: the German Court's construction of the intent to destroy in a broad sense (not only physical); a systematic interpretation; scholars' opinions; the definition of genocide adopted in the Genocide Convention and in a UN Resolution.[255] The Court also stated that reasonable foreseeability must be presumed if the interpretation is consistent with the essence of the offence and it is a first application of a criminal offence:

> '[i]n these circumstances the Court finds that, as opposed to cases concerning a reversal of pre-existing case-law, an interpretation of the scope of the offence which was – as in the present case – consistent with the essence of that offence must, as a rule, be considered as foreseeable. Despite this, the Court does not exclude that, exceptionally, an applicant could rely on a particular interpretation of the provision being taken by the domestic courts in the special circumstances of the case'.[256]

The present case did not involve exceptional circumstances that could justify unforeseeability of the interpretation, since it was already consistent with the essence of the offence. Even though there were simultaneous conflicts in the case-law of international criminal tribunals and disagreement in literature, the Court stressed that the outcome of the decision was foreseeable in the light of the applicant's acts, that were particularly serious and of a long duration.[257]

The presumption of reasonable foreseeability of an interpretation which could be considered consistent with the essence of the offence was later applied to the case of *Moiseyev v. Russia*, where the applicant claimed the retroactive application of the criminal offence of espionage due to the inclusion of 'other information', i.e. different from State secrets, in its constitutive elements. The Strasbourg judges, considering that the domestic courts' interpretation was consistent with the essence of the offence for

[255] ECtHR, Jorgic v. Germany, 12 July 2007, no. 74613/01, para. 104-107.
[256] ECtHR, Jorgic v. Germany, 12 July 2007, no. 74613/01, para. 109. Similarly, the Court admitted doubts on the scope of application in first interpretations or rarely interpreted provisions, in ECtHR, Perinçek v. Switzerland, 15 October 2015, no.27510/08, para. 138.
[257] ECtHR, Jorgic v. Germany, 12 July 2007, no. 74613/01, para. 111-113.

normative and interpretive reasons,[258] pointed out that it was also reasonably foreseeable for two main reasons. Firstly, according to the *Jorgic* precedent an interpretation consistent with the essence of the offence must be, as a rule, considered foreseeable, even if in the *Moiseyev* case the offence was not being interpreted for the first time.[259] Secondly, the Court recalled the criterion of 'common sense' as an additional argument to affirm foreseeability, which comes on top of an appropriate resort to legal advice. Like in the case of *Kuolelis, Bartoševičius and Burokevičius v. Lithuania,* which will be analysed in the following, the Court also evaluates foreseeability in light of the concept of 'common sense'.[260]

In the case of *Berardi and Mularoni v. San Marino,* the Court applied the same principles, affirming that in 'assessing the foreseeability of a judicial interpretation, no decisive importance should be attached to a lack of comparable precedents' and recalling the precedents *Jorgic v. Germany* and *Moiseyev v. Russia*.[261] The case was in fact the first proceeding for bribery ever conducted in San Marino, which followed a statutory amendment of the relevant provision. The Court held that it was irrelevant whether the conduct had been carried out by commission or by omission, as a violation of duties by public officials was sufficient to configurate the offence of bribery (in its direct version), even before the amendment entered into force.[262] This element amounted to a satisfactory compliance with the 'consistency with the essence of the offence' requirement, especially as it was a case of first impression. Moreover, foreseeability was considered reasonable also because this interpretation was first and foremost a matter of common sense.[263]

[258] ECtHR, Moiseyev v. Russia, 9 October 2008, no. 62936/00, para. 240.
[259] ECtHR, Moiseyev v. Russia, 9 October 2008, no. 62936/00, para. 241. The Court applied the same precedent, affirming the foreseeability of the interpretation thanks to its consistency with the essence of the offence and used it as a presumption in ECtHR, Gestur Jónsson and Ragnar Halldór Hall v. Iceland, 30 October 2018, nos. 68273/14 and 68271/14, para. 93-95, now referred to the Grand Chamber.
[260] ECtHR, Moiseyev v. Russia, 9 October 2008, no. 62936/00, para. 241.
[261] ECtHR, Berardi and Mularoni v. San Marino, 10 January 2019, no. 24705/16 and 24818/16, para. 44. The case was about the application of the amended Art. 373 of the Criminal Code, which in 2008 introduced the offence of 'bribery inducing omission' to a continuing offence that had taken place before and after the reform. The applicants claimed that before 2008 the acts they carried out were not criminally relevant, as they were not included in the definition of bribery. The Court, looking at the interpretation of the previous version of Art. 373 and at the judgements in the cases, believed that the acts of the applicant could be qualified as bribery even before 2008, as, irrespective of their nature as commission or omission, they were referred to 'the receipt of undue profit or a promise of such in order to carry out an act contrary to the duties arising from the functions of a public official'. Besides, since the penalties were the same before and after the reform, a heavier penalty was not applied as a result thereof.
[262] ECtHR, Berardi and Mularoni v. San Marino, 10 January 2019, no. 24705/16 and 24818/16, para. 54.
[263] ECtHR, Berardi and Mularoni v. San Marino, 10 January 2019, no. 24705/16 and 24818/16, para. 54. On the opposite, the Court considered the first interpretation of the concept 'violence' extended to moral coercion by Turkish tribunals in violation of Art. 7 ECHR. Although case-law on the subject matter was

4.3.2. Consistency with the essence of the offence as a matter of common sense.

In another group of cases, the Court applied the 'consistency with the essence of the offence' criterion and often evaluated it in the light of 'common sense'.

Although common sense was not expressly recalled in the reasoning, the case of *Radio France v. France* can be considered an application of the 'consistency' criterion on the basis of the actual meaning of the provision and its reasonable interpretation in a new category of cases. The Court had to assess the foreseeability of an extensive application of the presumption of the publishing director's liability. The presumption required the content of the publication to have been fixed in advance in order to hold the director liable. Nevertheless, the publishing director in *Radio France* was convicted even though the contents of the offending statement had not been fixed in advance.[264] Both in the reference to precedents and in the application of the principles, the Court uses the criteria *essence of the offence* and *reasonable foreseeability* in order to evaluate the consistency with Art. 7(1) ECHR of the judicial interpretation in the case of the applicant.[265] In *Radio France* French judges had created a new category of cases that fell under the scope of the offence and that therefore were at the borders between judicial interpretation and creation of a new offence. Consistency with the essence of the offence and reasonable foreseeability were assessed together according to an objective and *in concreto* paradigm. The interpretation of the concept of 'prior fixing' in an extensive way by French courts was considered foreseeable. The Court considered the following elements: i) the circumstances of the case: the broadcast in question included both live and pre-recorded airings and Radio France had to be convicted for the broadcasts subsequent to the first live one (which was the 'prior fixing' in this case); ii) the meaning of the presumption of the publishing director's responsibility: as 'prior fixing' was aimed at placing the director

lacking, the Court assessed whether the interpretation was consistent with the essence of the offence. The interpretation under the Court's scrutiny infringed Art. 7 ECHR because it went beyond reasonable interpretive limits and was therefore unjustifiable. ECtHR, Parmak and Bakir v. Turkey, 3 December 2019, no. 22429/07 and 25195/07, para. 65-77.

[264] Section 93-3 of the Audiovisual Communication Act of 29 July 1982 stated that, if the offence of *défamation public* had been committed by an audiovisual operator, the publishing director 'shall be prosecuted as the principal offender provided that the content of the offending statement has been fixed prior to being communicated to the public'. Radio France was convicted even if the offending statements had been broadcasted live, but repeatedly. French courts had therefore extended the application of the offence of defamation in the case of a live programme that was repeatedly broadcasted. The French courts did not convict the applicant for the first live broadcast, but for the following later bulletins. ECtHR, Radio France v. France, 30 March 2004, no. 53984/00, para. 17 ff.

[265] The Court recalls the reference to the criteria in *Streletz, Kessler and Krenz v. Germany*: ECtHR, Radio France v. France, 30 March 2004, no. 53984/00, para. 20.

in the position of being aware of the content of the statements, which is usually ensured by pre-recording, the same rationale could have been granted in the case in question, given the fact that the statement was repeatedly broadcasted after its initial airing.

As mentioned above, the Court also referred to an element of 'common sense' in order to determine the essence of the offence and to evaluate the consistency of its interpretation in the cases of *Kuolelis, Bartoševičius and Burokevičius v. Lithuania*, *Moiseyev v. Russia* and *Berardi and Mularoni v. San Marino.* The application of this criterion is problematic, since it can allow the Court to substantially circumvent a proper assessment of the law in force through a non-technical reference to common sense.[266]

In the case of *Ashlarba v. Georgia*, the Court assessed foreseeability considering the concepts under its scrutiny as 'matters of common knowledge and widely understood'.[267] Although the criminal offence was introduced only a year before the commission of the relevant acts, the legislative reform was the result of the criminalisation of well-known concepts for the public at large.[268] Nonetheless, the case showed peculiarities, as foreseeability concerned the meaning of participation in the 'thieves'underworld' organisation and being a 'thief in law', a criminal organisation similar to mafia-type organisation operating in Georgia. Moreover, the Court was judging in the context of a newly introduced legislation.

4.3.3. The foreseeability assessment in hard cases: international crimes and the precedents in the Mauerschützenfälle.

The precedents of the German Border Guards cases had great success in the Court's jurisprudence. They were often recalled especially when the Court had to deal with hard cases concerning international crimes of succession of States. But the outcome of these proceedings shows a changing standard in respect of the leading cases of 2001.

Even if it is judged in another phase of the Court's jurisprudence, the case of *Kuolelis, Bartoševičius and Burokevičius v. Lithuania* is similar to the German Border Guard cases for several reasons. In the case against Lithuania the Court dealt with the peculiarity of

[266] ECtHR, Kuolelis, Bartoševičius and Burokevičius v. Lithuania, 19 February 2008, nos. 74357/01, 26764/02 and 27434/02, para. 121; ECtHR, Moiseyev v. Russia, 9 October 2008, no. 62936/00, para. 241; ECtHR, Berardi and Mularoni v. San Marino, 10 January 2019, no. 24705/16 and 24818/16, para. 54.
[267] ECtHR, Ashlarba v. Georgia, 15 July 2014, no. 45554/08, para. 37. The applicant was convicted for the criminal offence disciplined in Art. 223(1) (being a member of the 'thieves underworld' organisation) and claimed that the definition of such a concept was not foreseeable at the time he committed the offence, only one year after the entry into force of the new provision.
[268] ECtHR, Ashlarba v. Georgia, 15 July 2014, no. 45554/08, para. 38.

the transition between two states and its problems with succession of norms and retroactivity; moreover, as in both cases the objective criteria of 'consistency with the essence of the offence' and 'reasonable foreseeability' were mixed with subjective criteria.[269] With regards to the facts, the context was the transition between Soviet occupation and the new independent Lithuanian State in 1990-1991. Members of the Lithuanian Communist Party were convicted on the basis of two provisions of the criminal code amended in November 1990, which identified the Lithuanian State as the new protected entity, instead of the Soviet Party, in the offences of 'agitation and propaganda' and 'creation and active participation in organisations that affected public order'.[270] According to the Court, foreseeability had to be established looking at the profession of the applicants, who were leading professional politicians, who therefore must have been aware 'of the great risks they were running in maintaining their activities in the CPL/CPSU and its subsidiary organisations with a view to overthrowing the Government'.[271] Other criteria used by the Court in order to support its conclusion that Art. 7 was not violated are the necessary foreseeability with an appropriate legal advice and, more importantly, 'as a matter of common sense'.[272] Consequently, it can be assumed that the Court used both subjective and objective standards in order to assess foreseeability.

The precedent of the *Mauerschützenfälle* was then specifically applied to other cases concerning international crimes whose legal basis was still predominantly customary international law at the time of the facts. The prevailing opinion in scholarship is that they represent a particularly controversial application of foreseeability, which results in a weak version of the principle of legality.[273]

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[269] The present cases refer to the precedents of *Streletz, Kessler and Krenz v. Germany* and *Korbely v. Hungary* in the statement of the general principles. ECtHR, Kuolelis, Bartoševičius and Burokevičius v. Lithuania, 19 February 2008, nos. 74357/01, 26764/02 and 27434/02, para. 115.

[270] The applicants claimed the applicable law was the former Soviet law due to the *moratorium* issued in 1990 that was to be observed during the negotiations with Russia. According to Soviet law, these criminal offences were to be committed with an anti-Soviet purpose. ECtHR, Kuolelis, Bartoševičius and Burokevičius v. Lithuania, 19 February 2008, nos. 74357/01, 26764/02 and 27434/02, para. 119.

[271] ECtHR, Kuolelis, Bartoševičius and Burokevičius v. Lithuania, 19 February 2008, nos. 74357/01, 26764/02 and 27434/02, para. 120.

[272] ECtHR, Kuolelis, Bartoševičius and Burokevičius v. Lithuania, 19 February 2008, nos. 74357/01, 26764/02 and 27434/02, para. 121.

[273] E. MACULAN, *Il volto garantista di un principio di legalità flessibile,* cit. p. 98 f. (fn. 81). E. FRONZA, M. SCOLETTA, *Corti regionali, crimini internazionali e legalità penale: spunti (e problemi) a partire dal caso* Kononov, in *ius17@unibo.it*, 2012, p. 87 ff. Even though the inclusion of war crimes and crimes against humanity under the scope of application of Art. 7(1) ECHR instead of 7(2) ECHR is an encouraging evolution, the application of the legality principle is narrow in cases concerning international crimes,

The Court once distinguished from the cases of *Streletz, Kessler and Krenz* and *S.W.*, as it stated the violation of Art. 7 ECHR in the case of an imposition of a retroactive heavier penalty in a case of war crimes. In the case of *Maktouf and Damjanović v. Bosnia and Herzegovina*, excluding that in cases concerning crimes under the general principles of law there was an always applicable exception to the principle of non-retroactivity.[274]

The results of the application of the *Mauerschützenfälle* criteria were opposite in the case of *Korbely v. Hungary*, where the applicant claimed the absence of foreseeability in the application of the offence of crimes against humanity in national and international law at the time the applicant committed the acts.[275] The Court showed a stricter approach even to international crimes. Significantly, the stricter approach of the Court not only requires the criminal relevance of the conduct to be foreseeable but also its qualification as crimes against humanity has to be foreseeable. The Court assessed foreseeability in an objective way, based on international law, case-law and the circumstances of the case. The qualification of the applicant's acts as crimes against humanity under Art. 3 of the Geneva Conventions was motivated by national courts with post-dated authorities (a Constitutional Court's judgement and the ICJ's judgement in the case of *Nicaragua v. United States of America*). Even if murder amounted to a crime against humanity according to various formulations, included the one of Art. 3 of the Geneva Conventions, the problem was the absence of other elements of the crime, such as an assessment of the conduct being part of a state action.[276] Bearing in mind the interpretation of Art. 3 of the Geneva Conventions at the time the acts were committed, the scope of application of Art. 3 was not met, as the victims did not fall under the categories protected by the provision at the material time.[277]

according to T. MARINIELLO, *The Nuremberg Clause and beyond: Legality Principle and Sources of International Criminal Law in the European Court's Jurisprudence*, in *Nordic Journal of International Law*, 82, 2013, p. 237-241 and 247.

[274] ECtHR, Maktouf and Damjanović v. Bosnia and Herzegovina, 18 July 2013, nos. 2312/08 and 34179/08, para. 71-73.

[275] Korbely was tried for crimes against humanity according to common Art. 3 of the 1949 Geneva Conventions, due to multiple shootings to armed civilians irrupting in a police station during the 1956 Hungarian Revolution. In 1993, the Hungarian Parliament admitted the possibility to conduct criminal proceedings for time-barred offences in application of the 1968 United Nations Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, whose constitutionality was confirmed by the Hungarian Constitutional Court. ECtHR, Korbely v. Hungary, 19 September 2008, no. 9174/02.

[276] ECtHR, Korbely v. Hungary, 19 September 2008, no. 9174/02, para. 76-85.

[277] ECtHR, Korbely v. Hungary, 19 September 2008, no. 9174/02, para. 86-94.

Foreseeability was then assessed subjectively in the case of *Kononov v. Latvia*, where the Grand Chamber reversed the Chamber's judgement.[278] The Court considered a conviction for war crimes against civilians who took part in hostilities *hors de combat* in 1944 Latvia to have a sufficient legal basis in international law and customs of war, following the reasoning explained in the previous chapter.[279] Moreover, foreseeability for the applicant, a private soldier, was assessed in light of the subjective criteria enshrined in *Cantoni* and *Pessino*, and in a very similar way to the *Mauerschützenfälle* reasoning.[280] Foreseeability took into account i) subjective foreseeability according to the professional activity and the status of the applicant; and ii) *political* foreseeability of the conviction for war crimes in 1944.

As far as subjective foreseeability is concerned, the applicant raised similar concerns to K.-H.W., concerning his age and position in the army. The Court adopted again a very strict approach considering that 'even a private soldier could not show total, blind obedience to orders which flagrantly infringed not only domestic law, but internationally recognised human rights', especially because of the requirement to comply with fundamental human rights instruments.[281] Moreover, the Court considered the applicant's peculiar position as commanding military officer and therefore affirmed that it was reasonably expectable that he took special care in assessing the risks of a military operation. The flagrantly unlawful nature of the acts carried out (ill-treatment and killings) was sufficient for the court to foresee the application of laws and customs of war.[282]

With regards to the so-called 'political foreseeability', the Court admitted, in line with its previous case-law, that a succeeded State could prosecute crimes committed during a former regime according to the rule of law and the objectives of the Convention, especially with regards to the protection of the right to life. Again, a state practice which

[278] ECtHR, Kononov v. Latvia, 17 May 2010, no. 36376/04. The decisions of the Court both in *Kononov* and *Korbely* were considered too focused on the assessment of facts, which risked undermining the authority of the Court. J. RENZIKOWSKI, *Coming to Terms with One's Past: the Strasbourg Court's Recent Case-Law on Article 7 ECHR and Retroactive Criminal Liability*, in *European Yearbook on Human Rights*, 2010, p. 264 f.
[279] ECtHR, Kononov v. Latvia, 17 May 2010, no. 36376/04, para. 196 ff. See *above*, Chapter 2, para. 5.3.
[280] ECtHR, Kononov v. Latvia, 17 May 2010, no. 36376/04, para. 235.
[281] The Court explicitly referred to the situation of K.-H.W. Moreover, although international law on which the conviction was based was not referred to in the Criminal Code nor published, the Court considered it sufficient to affirm individual criminal responsibility. ECtHR, Kononov v. Latvia, 17 May 2010, no. 36376/04, para. 236.
[282] ECtHR, Kononov v. Latvia, 17 May 2010, no. 36376/04, para. 238. When the Court assessed subjective foreseeability, it recalled the principle enshrined in *Pessino v. France*.

was substantially contrary to fundamental rights could not be regarded as a legitimate justification for a violation of Art. 7 ECHR, which would result in the perpetrators of international crimes to go unpunished.[283] Again, the principle of legality was balanced with other fundamental rights, and in particular the right to life.

The criteria 'consistency with the essence of the offence' and 'reasonable foreseeability' were applied also in the case of *Vasiliauskas v. Lithuania*. In the present case the Court confirmed its stricter and more objective approach in the evaluation of foreseeability, even in cases involving international crimes.[284] The applicant was prosecuted after Lithuanian independence for acts committed in 1953 against partisans, which were qualified as genocide by national Courts according to an extensive interpretation. Conversely, the Court found that at the time the offence was committed, the inclusion of the intent to destroy a political group within the elements of genocide was not foreseeable. Moreover, the possible classification of the victims as national group, a category which fell under the scope of genocide at the material time, was not substantiated.[285] As the only legal basis at the time was customary and treaty international law (namely the 1948 Genocide Convention), national courts had wrongly and analogically applied a subsequent extensive interpretation of the offence to the applicant.[286] Subjective elements and balance with other fundamental human rights are not part of the judgement of the Court, which relies on its objective findings in the diachronic analysis of international customary law and international treaty law.[287]

[283] ECtHR, Kononov v. Latvia, 17 May 2010, no. 36376/04, para. 241.

[284] In opposition, Ambos affirms that the standard to assess foreseeability should be objective but is inevitably influenced by subjective elements. Even though in *Vasiliauskas* the standard of reasonableness was high, Ambos affirms that it only represents a minimum threshold that can be lifted every time the Court takes subjective elements into account. K. AMBOS, *The Crime of Genocide and The Principle of Legality Under Art. 7 of the European Convention on Human Rights*, in *Human Rights Law Review*, 17, 2017, p. 179.

[285] ECtHR, Vasiliauskas v. Lithuania, 20 May 2015, no. 35343705, para. 181.

[286] ECtHR, Vasiliauskas v. Lithuania, 20 May 2015, no. 35343705, para. 183.

[287] ECtHR, Vasiliauskas v. Lithuania, 20 May 2015, no. 35343705, para. 170 ff. It is important to underline that subjective elements and the necessary legal advice where grounds to affirm foreseeability for the dissenting judges: 'In assessing the issue of the reasonable foreseeability of the applicant's conviction, we are not persuaded that the applicant could not have known that he risked being charged with and found guilty of the offence of genocide. […] [I]t is likely that he would have been advised that what he was doing bore the essential characteristics of the crime of genocide as it stood under international law at the time. […] [W]e find it likely that the applicant could have foreseen that he risked being charged with and convicted of genocide […]'. ECtHR, Vasiliauskas v. Lithuania, 20 May 2015, no. 35343705, Dissenting opinion of judges Villiger, Power-Forde, Pinto de Albuquerque and Kuris, para. 30. In the same perspective see K. AMBOS, *The Crime of Genocide and The Principle of Legality Under Art. 7 of the European Convention on Human Rights*, cit., p. 180.

The Court recently overruled the findings of *Vasiliauskas*, with regards to the classification of Lithuanian partisans as a national group, in the case of *Drėlingas v. Lithuania*.[288] It held that Lithuania had offered a better explanation and a solution to the flaws highlighted by *Vasiliauskas*, which were sufficient elements, also in light of the Lithuanian Constitutional Court's judgment in 2014, to overrule its previous judgement[289]. In fact, the Court does not find any legal error in the national judgment that could lead to a renewed unforeseeable conviction.[290] It is interesting to note that the Court is satisfied with a better explanation of the legal framework of the offence in 1953, that enables it to overrule its former judgement on the foreseeability of the applicant's conviction for genocide. Nevertheless, the reasoning of the Court in its overruling was strictly objective and regarded the correct analysis of the legal basis.

4.4. Objective foreseeability of judicial construction in synchronic and diachronic conflicting interpretations.

Recently, the Court has developed a line of case-law that deals with foreseeability of a judicial development in cases where case-law is absent or conflicting. It is difficult to distinguish a common criterion, but it is useful to analyse these groups of cases separately. An unforeseeable judicial development is *per se* regarded as an autonomous violation of Art. 7(1) ECHR, which could give rise to a self-standing right to consistent judicial interpretation.

Although other cases dealt with unforeseeable judicial developments before, the leading case is *Del Río Prada v. Spain* in 2013.[291] The Court begins to configurate the lack of an accessible and foreseeable judicial interpretation as an autonomous violation:

[288] ECtHR, Drėlingas v. Lithuania, 12 March 2019, no. 28859/16.
[289] ECtHR, Drėlingas v. Lithuania, 12 March 2019, no. 28859/16, para. 103-107.
[290] ECtHR, Drėlingas v. Lithuania, 12 March 2019, no. 28859/16, para. 108-111.
[291] ECtHR, Del Río Prada v. Spain, 21 October 2013, no. 42750/09, see *above*, Chapter 2, paras. 5.2. and 7. Maculan sees the present case as the sign of the stricter interpretive approach of the Court, that condemns overrulings lacking reasonable foreseeability. The opposite approach of the Court is adopted when dealing with international crimes. Under the specific conditions in *Del Río Prada*, that are not, as the author says, universal in the case-law of the Strasbourg Court, Maculan thinks that the substantive approach of the Court can lead to acceptable results in the context of *nullum crimen*. This approach extends the protection in respect of the traditional formal approach. E. MACULAN, *Il volto garantista di un principio di legalità flessibile. Considerazioni sulla sentenza «Del Río Prada c. Spagna» della Corte di Strasburgo*, in *Diritto penale XXI secolo*, 2013, p. 98-101. On the importance of this case for the affirmation of the non-retroactivity of the overruling *in malam partem* and the necessity of predictability of judicial interpretation in diachronic perspective see E. PROFITI, *La sentenza "Del Río Prada" e il principio di legalità convenzionale: la rilevanza dell'overruling giurisprudenziale sfavorevole in materia di benefici penitenziari*, in *Cass. pen*., 2014, p. 687 f., 690.

> 'The lack of an accessible and reasonably foreseeable judicial interpretation can even lead to a finding of a violation of the accused's Article 7 rights (see, concerning the constituent elements of the offence, Pessino v. France, no. 40403/02, §§ 35-36, 10 October 2006, and Dragotoniu and Militaru-Pidhorni v. Romania, nos. 77193/01 and 77196/01, §§ 43-44, 24 May 2007; as regards the penalty, see Alimuçaj v. Albania, no. 20134/05, §§ 154-62, 7 February 2012). Were that not the case, the object and the purpose of this provision – namely that no one should be subjected to arbitrary prosecution, conviction or punishment – would be defeated'.[292]

The Court in this case put together the findings of several other cases in which the assessment of a foreseeable judicial development had been crucial and began to build a new precedent that influenced following case-law. Before analysing *Del Río Prada*, it is useful to briefly present its antecedents.

In the leading case *Del Río Prada*, the Court referred to *Pessino v. France* and *Dragotoniu and Militaru-Pidhorni v. Romania*. In the latter cases, Art. 7(1) ECHR was violated with regards to foreseeability when the highest court retroactively applied a criminal offence to a completely new group of cases in the absence of previous consistent jurisprudence on the subject matter.[293]

Although it was not quoted by the Court in *Del Río Prada v. Spain*, the case of *Liivik v. Estonia* also represents the ECtHR's orientation towards a consistent stricter and more demanding foreseeability standard under an objective perspective.[294] Having recalled the consistency/reasonable foreseeability criteria, the Court established a violation of Art. 7 ECHR for the absence of foreseeability in the interpretation of the offence 'misuse of official position'. The interpretation was too vague and unclear in order to enable the applicant to be aware that his acts constituted an offence at the time they were committed.[295] The main arguments of the Court were based on the lack of clarity and

[292] ECtHR, Del Río Prada v. Spain, 21 October 2013, no. 42750/09, para. 93.
[293] See *above*, para. 4.2.2. These cases could also be considered analogical interpretations if looked at from the perspective of the written provision. Nonetheless, the case of *Pessino v. France* is considered the sign of a first more attentive approach towards the rights of the accused concerning retrospective overrulings in criminal law. According to Donini, it represents a first step towards the stricter approach which culminated in *Del Río Prada v. Spain*. M. DONINI, *Il diritto giurisprudenziale penale*, in *Riv. trim. dir. pen. cont*., 3, 2016, p. 28. On the contrary, for Valentini this was an isolated decision in the context of a serious loose jurisprudence on foreseeability. V. VALENTINI, *Diritto penale intertemporale*, cit., p. 138.
[294] ECtHR, Liivik v. Estonia, 25 June 2009, no. 12157/05.
[295] ECtHR, Liivik v. Estonia, 25 June 2009, no. 12157/05, para. 92-95 for the principles, para. 96-98 for the case. The application of the former Soviet Criminal Code in the context of a new market economy had caused disorientations in the interpretation. Similar reasoning was applied in *Navalnyye v. Russia*, where the Court stated a violation of Art. 7(1) ECHR because in determining the criminal charges the Russian courts had applied an unforeseeable and extensive judicial construction in detriment of the accused. ECtHR, Navalnyye v. Russia, 17 October 2017, no. 101/15, para. 58-69, analysed by S. BERNARDI, *Una nuova pronuncia della Corte europea dei diritti dell'uomo in tema di imprevedibilità della condanna penale: il caso Navalnyye c. Russia*, in *Riv. trim. dir. pen. cont*., 1, 2018, p. 295 ff. In the same vein, ECtHR, Khodorkovskiy and Lebedev v. Russia (no. 2), 14 January 2020, nos. 51111/07 and 42757/07, para. 585.

vagueness of the interpretation and application of the criminal provision under its scrutiny (Art. 161 Criminal Code). In particular, there was no case-law defining one of the core elements of the offence ('causing significant non-pecuniary damage') in the way it was applied in the case of the applicant, which had not caused damage, but only created a risk of damage.[296] Moreover, the attempts of the Estonian Supreme Court to lay down criteria to define the non-pecuniary damage as moral damage were considered insufficient.[297] In addition, the legitimate reliance on a previous favourable interpretation of the prosecuting authorities and the subsequent doubts of the Constitutional Court on the respect of the *nullum crimen sine lege* principle were also recalled in favour of the violation assessment.[298] The case was at the crossroad between synchronic and diachronic uncertainty, caused by the newly established construction of the elements of the offence. In the end, there was clear evidence of the Court's stricter assessment of foreseeability.

In the case of *Alimucaj v. Albania*, foreseeability had to be tested with regards to the retroactive application of a heavier penalty which wasn't provided for by written or unwritten law. Albanian courts had convicted the applicant for deception and had calculated the penalty by multiplying counts in the number of the injured parties and therefore going beyond the maximum penalty provided for that criminal offence by the criminal code.[299] The Court analysed case-law in order to assess the foreseeability of the judicial construction that resulted in the imposition of a heavier penalty.[300] In its reasoning the Court considered that there was no case-law admitting such a calculation at the time the offence was committed (1998), highlighting that the Supreme Court only admitted it in 2000.[301] Moreover, as the cumulative penalty relied on Art. 55 of the Criminal Code, the Court ascertained that at the time the offence was committed its doctrinal and judicial interpretation limited it to the commission of two different offences. Thus, it was unforeseeable for the applicant in his case, where a single offence against multiple victims had been carried out.[302] In this case, the relevant points to highlight in the Court's reasoning are: i) the Supreme Court's crucial role in the definition of the existing judicial

[296] ECtHR, Liivik v. Estonia, 25 June 2009, no. 12157/05, para. 99.
[297] ECtHR, Liivik v. Estonia, 25 June 2009, no. 12157/05, para. 100.
[298] ECtHR, Liivik v. Estonia, 25 June 2009, no. 12157/05, para. 101-102.
[299] Article 143(1) of the Criminal Code did not foresee, at the time the offence was committed, any aggravating circumstances. ECtHR, Alimucaj v. Albania, 7 February 2012, no. 20134/05.
[300] ECtHR, Alimucaj v. Albania, 7 February 2012, no. 20134/05, para. 154 ff.
[301] ECtHR, Alimucaj v. Albania, 7 February 2012, no. 20134/05, para. 156-157.
[302] ECtHR, Alimucaj v. Albania, 7 February 2012, no. 20134/05, para. 159.

interpretation, ii) the very strict reasoning with regards to foreseeability, and iii) lack of subjective elements.

Going back to the leading case, *Del Río Prada v. Spain* dealt with the retroactive application of the *Parot doctrine*, a new method of application of remissions of sentence for work done in detention elaborated by Spanish courts, to acts committed prior to its elaboration.[303] Before examining foreseeability, the Court had to examine whether the execution of penalties could be considered to fall under the scope of application of Art. 7 ECHR, and answered the question positively.[304]

As far as foreseeability is concerned, the Court had to establish whether the new interpretation could be considered to reflect a perceptible case-law development, recalling the criteria of 'manifest', 'perceptible' and 'evident' from *S.W v. the United Kingdom*.[305] The elements taken into account by the Court were merely objective. It analysed *Tribunal Supremo*'s case-law at the time of the conviction and found that: i) the overruling of 2006 had only been anticipated by a single judgement in 1996;[306] ii) the common practice was to apply the remission of sentence to those same cases in the past;[307] iii) in 2006 the Spanish Supreme Court interpreted the code of 1973, which was in force at the time the

[303] The *Parot doctrine* had undoubtedly been created by the *Tribunal Supremo*'s overruling in 2006 (judgement no. 197/2006) offering a new interpretation of Artt. 70 and 100 of the 1973 Criminal Code on the maximum length of imprisonment and its possible reduction for work in prison. The application of the overruling to the applicant resulted in her penalty to remain thirty years imprisonment, without any reduction for work. The controversial point was the consideration of a cumulative penalty, resulting from multiple convictions, as a new autonomous penalty or as the sum of the different penalties to calculate the reduction for work. The applicant should have been set free in 2008 according to the previous interpretation, but she was kept in custody due to the retroactive application of the new interpretation given two years before by the *Tribunal Supremo*. For a detailed description of the Spanish legal background see E. MACULAN, *Il volto garantista di un principio di legalità flessibile*, cit., p. 85 ff.; S. HUERTA TOCILDO, *The Annulment of the Parot Doctrine by the European Court of Human Rights. ECtHR Judgement of 21 October 2013: Much Ado Over a Legally Awaited Judgement*, in M. PÉREZ MANZANO, J.A. LASCURAÍN SÁNCHEZ, M. MÍNGUEZ ROSIQUA (eds.), *Multilevel Protection of the Principle of Legality in Criminal Law*, Berlin, 2018, p. 141 ff.

[304] The execution regime of penalties does not fall necessarily under the scope of application of Art. 7 ECHR. It is crucial to look at the effective influence of the execution regime on the penalty itself. Here, it resulted in an effective change in the length of the imprisonment. ECtHR, Del Río Prada v. Spain, 21 October 2013, no. 42750/09, para. 127-132, in the same vein, ECtHR, Kafkaris v. Cyprus, 10 February 2008, no. 21906/04, para. 141.

[305] ECtHR, Del Río Prada v. Spain, 21 October 2013, no. 42750/09, para. 112. On the point see E. PROFITI, *La sentenza "Del Río Prada" e il principio di legalità convenzionale: la rilevanza dell'overruling giurisprudenziale sfavorevole in materia di benefici penitenziari*, cit., p. 691-693.

[306] ECtHR, Del Río Prada v. Spain, 21 October 2013, no. 42750/09, para. 112. Judicial interpretation had been consistent and long-standing in favour of the detainees with regards to the approach to the remission of sentence. When the *Tribunal Supremo* issued the *Parot* judgment, scholarship was divided on the admissibility of the *Parot doctrine*: some were in favour essentially for criminal policy reasons and proportionality, or even for the rule of law, while others opposed the application of such an interpretation. On this point, see E. MACULAN, *Il volto garantista di un principio di legalità flessibile*, cit. p. 90, fn. 43.

[307] ECtHR, Del Río Prada v. Spain, 21 October 2013, no. 42750/09, para. 112-113.

offence was committed, but no longer applicable, contradicting the transitional provisions of the new code which imposed the application of the more lenient law;[308] iv) the alleged consistency of the new doctrine with the essence of the provision claimed by the Government was considered unacceptable, since case-law had been applied consistently in an opposite sense;[309] and, most importantly, v) criminal policy considerations could not justify a retroactive application of an overruling due to the unconditional non-retroactivity obligation enshrined in Art. 7(1) ECHR.[310]

Therefore, the new line of case-law inaugurated by *Del Río Prada v. Spain* advances three principles: it carries out an objective evaluation of the case-law development, especially focusing on Supreme Courts' interpretation;[311] it does not take subjective elements into account; and it affirms the absolute value of the non-retroactivity principle.

The principles enshrined in the leading case *Del Río Prada v. Spain*, which held the violation of Art. 7(1) ECHR for a sudden overruling, were applied in the following years by the Court, which explicitly recalled its precedent.[312]

In 2015, the judgment *Contrada v. Italy* saw the Court dealing with the foreseeability of the conviction for *concorso esterno in associazione mafiosa ('external' participation in a criminal organisation)*, pursuant to the joint application of art. 110 and 416 *bis* of the Italian Criminal Code. The Court qualified it as a judge-made criminal offence, created by the *Corte di Cassazione* in 1994 in its highest composition (*Sezioni Unite*).[313] The

[308] ECtHR, Del Río Prada v. Spain, 21 October 2013, no. 42750/09, para. 114.
[309] ECtHR, Del Río Prada v. Spain, 21 October 2013, no. 42750/09, para. 115.
[310] ECtHR, Del Río Prada v. Spain, 21 October 2013, no. 42750/09, para. 116.
[311] For example, in the case of *Plechkov v. Romania*, the Court held the violation of Art. 7(1) ECHR because domestic courts did not provide for a well-established interpretation of the definition of 'exclusive economic zone' to determine the scope of application of the criminal offence punishing unlawful fishery. Disregarding subjective elements (such as a professional activity), the Court just considered the other three convictions in similar cases in order to conclude for the unforeseeability of the interpretation. ECtHR, Plechkov v. Romania, 16 September 2014, no. 1660/03, para. 73-74.
[312] Recently, see ECtHR, Koprivnikar v. Slovenia, 24 January 2017, no. 67503/13, para. 56 ff.; ECtHR, dec., Milewski v. Poland, 2 July 2019, no. 22552/12, para. 41-52, where the Committee verified foreseeability and consistency with the essence of the offence in a case of first impression, considering the necessary gradual clarification of law and the importance of the high degree of caution that a professional activity requires.
[313] On the contrary, Italian doctrine unanimously identified the legal basis in the two written provisions of the Criminal Code: G. INSOLERA, *Il concorso esterno nei delitti associativi: la ragione di Stato e gli inganni della dogmatica*, in *Foro it.*, 1995, II, p. 422, A. MANNA, *L'ammissibilità di un c.d. concorso "esterno" nei reati associativi, tra esigenze di politica criminale e principio di legalità*, in *Riv. it. dir. proc. pen.*, 1994, p. 1189, F. SIRACUSANO, *Il concorso esterno e le fattispecie associative*, in *Cass. pen.*, 1993, p.1870. Therefore, several scholars have expressed critical opinions on the qualification of *concorso esterno* as an autonomous criminal offence created by the *Corte di Cassazione*. Palazzo thinks it was rather a legitimate interpretation of Art. 110 c.p., narrowing down the definition of the offence F. PALAZZO, *La sentenza* Contrada *e i cortocircuiti della legalità*, in *Dir. pen. proc.*, 2015, p. 1062-1063. See also G. MARINO, *La*

Court approached the case as a retroactive application of an overruling in detriment of the accused for acts committed prior to the 'judicial creation' of the offence.[314] Although the conclusions of the Court were controversial, this judgement confirmed the importance of the autonomous foreseeability assessment of a judicial development, the objective criteria and the importance of the Supreme Court's jurisprudence for the foreseeability assessment.

First of all, the Court affirmed the retroactive application of a judge-made criminal offence because the judicial construction of the participation in the criminal offence of *associazione di tipo mafioso* had been developed by lower courts and the *Corte di Cassazione* since 1985, but only gave rise to a *Sezioni Unite* judgement in 1994, which definitively admitted this judicial construction. Even though the Court classified the case as a diachronic conflict of case-law, it was more of a synchronic conflict within the *Corte di Cassazione*, rather similar to *Alimucaj v. Albania*. Moreover, the alternative results of the conflicting interpretations qualified such conducts either as *concorso esterno* or as internal participation in the offence: the outcome was therefore always a conviction of the accused, at least for a minor offence.[315] However, the Court referred foreseeability to the exact qualification of the facts as a particular kind of offence, without considering that these acts were *per se* criminally relevant at the time they were committed.[316] Secondly,

presunta violazione da parte dell'Italia del principio di legalità ex art. 7 CEDU: un discutibile approccio ermeneutico o un problema reale?, in *Dir. pen. cont.*, 03.07.2015, p. 12. On the opposite, Maiello thinks that *concorso esterno* could not be included in the scope of application of those criminal offences, V. MAIELLO, *Consulta e CEDU riconoscono la matrice giurisprudenziale del concorso esterno*, in *Dir. pen. proc*. 2015, p. 1024. It is possible to define it as an 'improper' judge-made criminal offence according to F. VIGANÒ, *Il caso Contrada e i tormenti dei giudici italiani: sulle prime ricadute interne di una scomoda sentenza della Corte EDU*, in *Dir. pen. cont*., 27.04.2016, p. 2. Without focusing on the ambiguous terms used by the Court, Fornasari admits that in the case of the *concorso esterno*, Italian courts had actually subsumed a group of cases that weren't included before under the scope of application of the criminal offence provided for by Art. 416 *bis* (through Art. 110 c.p.). G. FORNASARI, *Un altro passo nella «riscrittura» della legalità? Appunti sulla sentenza Contrada*, in A. CAVALIERE, C. LONGOBARDO, V. MASARONE ET AL. (eds.), *Politica criminale e cultura giuspenalistica. Scritti in onore di Sergio Moccia*, Napoli, 2017, p. 451, in the same vein, D. PULITANÒ, *Paradossi della legalità. Fra Strasburgo, ermeneutica e riserva di legge*, in *Riv. trim. dir. pen. cont*., 2, 2015, p. 52 f.

[314] Differently, in a case concerning the alleged addition of a new element into the requirement of intention in the common law offence of contempt of court with regards to a juror, the Strasbourg judges pointed out that the law-making function of the courts had remained within reasonable limits. The British judges had only presumed the intention to create a risk of prejudice from the introduction, by the applicant, of extraneous evidence into the jury room. Moreover, the directions given by the judge were considered unambiguous by the Court, ECtHR, Dallas v. the United Kingdom, 11 February 2016, no. 38395/12, para. 77. Against, A. SANTANGELO, *Ai confini tra* common law *e* civil law*: la prevedibilità del divieto nella giurisprudenza di Strasburgo*, in *Riv. it. dir. proc. pen*., 2019, p. 348-352.

[315] G. FORNASARI, *Un altro passo nella «riscrittura» della legalità?*, cit., p. 452 f. Partially dissenting, M. DONINI, *Il Caso Contrada e la Corte EDU: La responsabilità dello Stato per carenza di tassatività/tipicità di una legge penale retroattiva di formazione giurisprudenziale*, in *Riv. it. dir. proc. pen*., 2016, p. 350.

[316] Similarly see ECtHR, Vasiliauskas v. Lithuania, 20 May 2015, no. 35343705, para. 169.

it is clear that the judgements of the *Corte di Cassazione*, as a Supreme Court of Cassation, have gained a particular role in the ECtHR's assessment. Thirdly, the criteria are purely objective. Even though the applicant was a professional working as senior officer and director in anti-mafia police units, its subjective characteristics did not play any role in the Court's assessment.[317]

The *Contrada* case has been regarded, especially by Italian scholarship, as an unusually strict approach of the Court to foreseeability. It has been pointed out that not considering both the role of previous case-law (even if conflicting) and the lower predictability standard was an unexpected outcome in respect of previous ECtHR's orientations.[318] Although the assessment in the present case was severe, the standard was in line with the more objective approach being applied by the Court during those years. Therefore, it is not appropriate to affirm that the Court considered an 'absolute certainty' standard instead of the usual 'reasonable foreseeability' one.[319] The possible controversial point could only be the parallel with the case of *Del Río Prada*, and in particular the qualification of the facts as a retroactive overruling.[320] In addition, looking at the principle affirmed *in the next paragraph,* the assessment of the Court was particularly severe only because it didn't take into account the admissible elaboration process of a consistent case-law.

[317] This stricter approach of the Court was criticised in the present case, in light of the usual standard of foreseeability, usually excluded if the individual is in doubt about the criminal character of his/her acts. F. PALAZZO, *La sentenza* Contrada, cit., p. 1063. Although the evaluation of the Court was particularly severe in the present case, it cannot be said that the foreseeability standard is always, especially now, so low that it only requires a doubt on the unlawfulness of the behaviour.

[318] Commentators refer to the cases of *Pessino* and *Soros v. France*. M.T. LEACCHE, *La sentenza della Corte EDU nel caso Contrada e l'attuazione nell'ordinamento interno del principio di legalità convenzionale*, in *Cass. pen*., 2015, p. 4618 f.

[319] According to Leacche, the Court has lifted its reasonable foreseeability standard to 'certainty of conviction'. M.T. LEACCHE, *La sentenza della Corte EDU nel caso Contrada e l'attuazione nell'ordinamento interno del principio di legalità convenzionale,* cit. p. 4620.

[320] While in *Del Río Prada* the overruling was unexpected and there was not any reasonably foreseeable development that could make the applicant aware of a possible modification, in *Contrada* the situation was that of a synchronic conflict within the *Corte di Cassazione*, which lasted for years before its solution in 1994. It could be added that for the greater part of the material time, case-law divergences were great and that the *Sezioni Unite* judgement intervened after the alleged criminal offence. See M.T. LEACCHE, *La sentenza della Corte EDU nel caso Contrada e l'attuazione nell'ordinamento interno del principio di legalità convenzionale,* cit. p. 4619.

4.4.1. Conflicting judicial interpretations and the role of the Supreme Courts.

The role of judicial development and the admissibility of a conflict within higher jurisdictions, together with the crucial role of Supreme Courts in ensuring foreseeability were the object of interesting acknowledgements in other cases.

In 2015, the Court made an important statement in the case of *Borcea v. Romania*:

> '[…] *la Cour admet que l'élaboration d'un consensus jurisprudentiel est un processus qui peut s'inscrire dans la durée et l'existence d'une divergence peut être tolérée dès lors que l'ordre juridique interne offre la capacité de la résorber (voir, mutatis mutandis, Maktouf et Damjanović c. Bosnie-Herzégovine [GC], nos 2312/08 et 34179/08, § 66, CEDH 2013* […]'.[321]

Although in this case the Court did not recognise any Art. 7(1) ECHR violation and declared the application inadmissible, it expressly accepted that the creation of a foreseeable and clear orientation in case-law could require some time, under the condition that the domestic legal order is able to 'reabsorb' the conflict and ensure consistent interpretation. In the Romanian case, the Court dealt with a judicial dialogue between the Romanian High Court and the Constitutional Court on the substantial nature of statutory limitation and the problem of successive statutes.[322] The reference to the principles enshrined in the *Maktouf and Damjanović v. Bosnia-Herzegovina* is crucial for this new and more specific version of the reasonable foreseeability standard. In fact, in the latter case progressive development of criminal law was considered admissible, as long as the development resulting from judicial interpretation was consistent with the essence of the offence and reasonably foreseeable, following the leading cases since 1995.[323] Although the same principle was recalled, the Court seemed to modify and precise it. In the specific case of conflicting interpretations, interpretive inconsistency can be admitted not solely because of the general criteria, but also because of a peculiar reason (the 'reabsorbing capacity'), directly linked to the structure and functioning of the domestic jurisdictions.

[321] ECtHR, decision, Borcea v. Romania, 22 September 2015, no. 55959/14, para. 66.

[322] Although the European Court classifies statutory limitation under procedural law and considers it subject to the rule *tempus regit actum*, it evaluated the effects of the conflicting case-law on the situation of the applicant. It concluded that Art. 7 ECHR was not violated since the solution in the applicant's case was similar to the solution of the conflict by the highest courts and that the changing in judicial interpretation had not affected the applicant's situation in terms of more lenient penalty, as his criminal offence would not have been time-barred, independently from the adopted interpretation. ECtHR, decision, Borcea v. Romania, 22 September 2015, no. 55959/14, para. 65-67.

[323] The quoted paragraph from *Maktouf and Damjanović v. Bosnia-Herzegovina* refers to the leading cases elaborating the above-mentioned criteria. ECtHR, Maktouf and Damjanović v. Bosnia and Herzegovina, 18 July 2013, nos. 2312/08 and 34179/08, para. 66. See D. ROETS, *Infraction continuée et principe de non-rétroactivité: cours magistral de droit pénal à la Cour de Strasbourg*, in *RSC*, 1, 2015, p. 161-165.

The same principle was applied in the case of *Arrozpide, Sarasola et al. v. Spain* , where the Court considered that in diachronic perspective a conflicting case-law in the *Tribunal Supremo*, reabsorbed within a year, was not grounds to declare the violation of Art. 7(1) ECHR under the perspective of foreseeability.[324] In the Court's understanding, it was decisive that there was only one single decision in favour of the applicants and it underlined that, given the fact that case-law is not a source of law in Spanish law, only a well-established and consistent case-law development would have been capable of completing the law.[325] In this perspective, it distinguished from the outcome of *Del Río Prada v. Spain*, since in the present case there wasn't a consistent and durable case-law, which had been overruled unexpectedly. It was rather a consistent less favourable

[324] The applicants claimed the retroactive application of the *Tribunal Supremo* judgment no. 874/2014, which followed *Ley orgánica* no. 7/14, that did not include penalties served abroad in the calculation of the maximum penalty. The applicants relied on the prior possibility opened by the same *Tribunal Supremo* earlier in 2014, which gave rise to several lower instance courts' judgements admitting such an eventuality, according to the EU Framework Decision 2008/675/JAI. The Court underlined that the acts committed by the applicants and their conviction had taken place before 2006 when the contrasts in case-law on the matter were resolved negatively by the *Tribunal Supremo*. Although their request (after the 186/2014 judgement) had been lodged in a different legal context, the existing contrasts within courts were considered acceptable in the perspective of a composition in the highest tribunal. ECtHR, Arrozpide, Sarasola et al. v. Spain, 23 October 2018, nos. 65101/16, 73789/16 and 73902/16, para. 126-128. The Court further confirmed the same principles in ECtHR, decision, Picabea Ugalde v. Spain, 26 March 2019, 3083/17.

[325] '*127. La Cour attache du poids au fait que les trois requérants n'ont formulé une demande de cumul des peines purgées en France sur la base de la décision-cadre no 2008/675/JAI qu'après l'adoption, le 13 mars 2014, de l'arrêt du Tribunal suprême no 186/2014, à savoir le 25 mars 2014, le 20 mars 2014 et le 30 avril 2014, respectivement. Dans cet arrêt, le Tribunal suprême était appelé pour la première fois à interpréter la décision-cadre no 2008/675/JAI, et, même s'il s'est montré favorable à la possibilité de tenir compte des peines purgées dans un autre État membre de l'UE aux fins du cumul des peines, il a précisé qu'il l'était en l'absence de législation nationale transposant la décision-cadre ou de réglementation expresse sur la matière (paragraphe 83 ci-dessus). En application de cette approche, certaines sections de la chambre criminelle de l'Audiencia Nacional ont cumulé des peines purgées en France avec des peines prononcées en Espagne aux fins de la détermination de la durée maximale d'accomplissement de trente ans. Toutes ces décisions, sauf dans trois cas isolés, ont été annulées par le Tribunal suprême à la suite de l'introduction de pourvois en cassation par le ministère public et de l'adoption par la formation plénière de la chambre pénale du Tribunal suprême de son arrêt no 874/2014 du 27 janvier 2015 (paragraphe 85 ci-dessus). La Cour observe que selon le droit espagnol la jurisprudence n'est pas une source du droit et que seule une jurisprudence établie de manière réitérée par le Tribunal suprême peut compléter la loi (paragraphe 89 ci-dessus). En tout état de cause, et indépendamment de la question de savoir si l'arrêt isolé no 186/2014 du 13 mars 2014 faisait jurisprudence au regard du droit espagnol (voir, mutatis mutandis, Del Río Prada, § 112), elle considère que cet arrêt n'était pas accompagné d'une pratique jurisprudentielle ou administrative qui se serait consolidée dans la durée et qui aurait pu créer des attentes légitimes chez les intéressés quant à une interprétation stable de la loi pénale. En cela, la présente affaire se distingue clairement de l'affaire Del Río Prada dans laquelle la requérante avait pu croire pendant qu'elle purgeait sa peine d'emprisonnement et au moment de l'adoption de la décision de cumul et plafonnement des peines que les remises de peine pour travail devaient être imputées sur la durée maximale de trente ans d'emprisonnement, conformément à une pratique constante des autorités pénitentiaires et judiciaires espagnoles appliquée pendant de nombreuses années (idem, §§ 98-100, 103, 112-113). C'est compte tenu de cette pratique antérieure concernant l'interprétation de la loi pénale et la portée de la peine infligée que la Cour a estimé que le revirement jurisprudentiel opéré par le Tribunal suprême (la « doctrine Parot ») et appliqué à la requérante ne pouvait pas passer pour prévisible, et qu'en conséquence il y avait eu violation de l'article 7 (idem, §§ 111-118)*'. ECtHR, Arrozpide, Sarasola et al. v Spain, 23 October 2018, nos. 65101/16, 73789/16 and 73902/16, para. 127.

interpretation, confirmed by the *Tribunal Supremo* with its last judgement in its highest composition, which had been transitorily the object of a conflict at the time of the request.[326] Moreover, the *Tribunal Supremo* issued judgment no. 874/2014 in its plenary session and therefore the decision had a particular authority in the context of a conflicting case-law.

Also in the case of *Prigală v. Moldova*, the Court considered the principle according to which judicial gradual clarification of the elements of the offence is admissible as long as its outcome is reasonably foreseeable and consistent with the essence of the offence.[327] The judges had to establish whether the concept of 'honoraries' was sufficiently foreseeable in written law and in judicial interpretation. The Court held the violation of Art. 7(1) ECHR for, at the time the acts were committed, the term was subject to conflicting interpretations, which nevertheless caused the application of the most favourable orientation to the individuals.[328] Moreover, the Supreme Court of Justice confirmed the existence of the contrast in its subsequent judgement and overruled the previous practice *in malam partem*. The principles enshrined in the Supreme Court's judgment, although in detriment of the accused, were applied retroactively on the applicant. As in *Pessino v. France*, which is also explicitly recalled, the applicant, although a professional, was not in the position to foresee the overruling of the Supreme Court.[329] The most relevant elements in the Court's assessment were i) conflicting interpretations; ii) a general practice in favour of individuals; and iii) an overruling by the Supreme Court. Although the applicant was convicted for a criminal offence related to his professional activity, the Court did not consider it a sufficient ground to deem the law foreseeable. On the contrary, an objective assessment highlighted a violation of the principle of foreseeability, thus confirming the ECtHR's stricter approach.

[326] ECtHR, Arrozpide, Sarasola et al. v Spain, 23 October 2018, nos. 65101/16, 73789/16 and 73902/16, para. 128. See ECtHR, Contrada v. Italy (no. 3), 14 April 2015, no. 66655/13.
[327] ECtHR, Prigală v. Moldova, 13 February 2018, no. 36763/06, para. 35.
[328] ECtHR, Prigală v. Moldova, 13 February 2018, no. 36763/06, para. 37. The uncertain meaning of the term 'honoraries' determined the impossibility to foresee the exact amount of taxes to be paid in the years 2000 and 2001 for a notary.
[329] ECtHR, Prigală v. Moldova, 13 February 2018, no. 36763/06, para. 39. See above, para. 4.2.2. The case was similar to *Contrada v. Italy*, where, despite conflicting jurisprudence, only the judgement of the *Corte di Cassazione* is considered an overruling establishing new law and therefore applied retroactively. ECtHR, Contrada v. Italy (no. 3), 14 April 2015, no. 66655/13.

4.4.2. Towards a right to a consistent practice of courts.

The Court further transposed the right to a consistent practice of the tribunals as a requirement in order to be able to 'distinguish between permissible and prohibited behaviour'.[330] In order to be foreseeable, the interpretation must 'result […] from a practice (case-law) of the domestic authorities which is consistent. That is so because an inconsistent case-law lacks the required precision to avoid all risk of arbitrariness and enable individuals to foresee the consequences of their actions'.[331] The *a fortiori* application of this principle to Art. 7 ECHR is a consequence of its object and purpose and therefore relies on the effectiveness of the protection against arbitrariness.[332] This particular approach in the interpretation of *nullum crimen* with regard to the requirement of consistency in case-law derives from the application of foreseeability in the context of Art. 1 Prot. 1 ECHR.[333]

With regards to the right to a fair trial (Art. 6 ECHR) the Court has developed a similar principle. Without the background of *nullum crimen*, the Court stressed the crucial role of legal certainty (*sécurité juridique*), which is one of the fundamental elements of the rule of law.[334] Since confidence in the courts is a component of the rule of law, persisting and unresolved conflicts within domestic courts can lead to an infringement in the rights safeguarded in the Convention.[335] Nevertheless, the Court did not recognise an absolute

[330] ECtHR, Žaja v. Croatia, 4 October 2016, no. 37462/09, para. 106. The case was about an administrative offence, considered by the Court under the scope of application of Art. 7 ECHR. The offence relied on a blanket norm, where the concept of 'temporary admission' was uncertain and had to be interpreted according to case-law and the Istanbul Convention. The Court found both that the wording was ambiguous due to a wrong translation of the Convention and that case-law and state practice were synchronically inconsistent and contradictory. In the same vein see ECtHR, Lopac and o. v. Croatia, 10 October 2019, nos. 7834/12, 43801/13, 19327/14, 63535/16, para. 59 and 68 ff.

[331] ECtHR, Žaja v. Croatia, 4 October 2016, no. 37462/09, para. 103.

[332] ECtHR, Žaja v. Croatia, 4 October 2016, no. 37462/09, para. 105.

[333] ECtHR, Belvedere Alberghiera S.r.l. v. Italy, 30 May 2000, no. 31524/96, para. 58; ECtHR, Carbonara and Ventura v. Italy, 30 May 2000, no. 24638/94, para. 65; ECtHR, Mullai and Others v. Albania, 23 March 2010, no. 9074/07, paras. 115-117; ECtHR, Saghinadze and Others v. Georgia, 27 May 2010, no. 18768/05, paras. 116-118; ECtHR, Brezovec v. Croatia, 29 March 2011, no. 13488/07, para. 67; ECtHR, decision, Matić and Polonia d.o.o. v. Serbia (dec.), 23 June 2015, no. 23001/08, para. 47.

[334] ECtHR, Ferreira Santos Pardal v. Portugal, 30 July 2015, no. 30123/10, para. 42. The link of the rule of law with fair trial is that the latter shall be interpreted in light preamble of the Convention, which includes the rule of law. See ECtHR, Nejdet Şahin and Perihan Şahin v. Turkey, 20 October 2011, no. 13279/05, para. 57. According to Viganò, the importance of recalling legal certainty is the basis of a possible construction of a right to foreseeable judicial decisions. F. VIGANÒ, *Il principio di prevedibilità della decisione giudiziale in materia penale*, in C.E. PALIERO, S. MOCCIA, G.A. DE FRANCESCO ET AL. (eds.), *La crisi della legalità. Il «sistema vivente» delle fonti penali*, Napoli, 2016, p. 216.

[335] 'Its assessment of the circumstances brought before it for examination has also always been based on the principle of legal certainty which is implicit in all the Articles of the Convention and constitutes one of the fundamental aspects of the rule of law […]. Indeed, uncertainty – be it legal, administrative or arising from practices applied by the authorities – is a factor that must be taken into consideration when examining the conduct of the State […]. 57. In this regard the Court also reiterates that the right to a fair trial must be

right to consistent case-law, as that would hinder the evolutive development of law.[336] Divergences and inconsistencies to a reasonable degree are therefore acceptable and inherent in a complex judicial system.[337]

Nonetheless, a violation of Art. 6 ECHR can be acknowledged when domestic supreme courts provide an uncertain legal framework due to conflicting case-law. In this respect, the Court defined the test to establish a violation of Art. 6 ECHR in the Grand Chamber judgement *Nejdet Şahin and Perihan Şahin v. Turkey.*[338] The criteria were following: i) the existence of 'profound and long-standing differences' in case-law of a supreme court;[339] ii) whether domestic law provides mechanisms to solve them; iii) whether and to what effect those mechanisms have been applied.[340] Hence, the role of supreme courts generally is solving conflicts and granting uniform interpretation, as far as they are requested to rule differences within the same branch of the judicial system.[341] As far as legal certainty is concerned, the long-standing and profound differences in the practice of the tribunals are considered in light of the reasonable predictability of their outcome, in

interpreted in the light of the Preamble to the Convention, which declares the rule of law to be part of the common heritage of the Contracting States. Now, one of the fundamental aspects of the rule of law is the principle of legal certainty […], which, inter alia, guarantees a certain stability in legal situations and contributes to public confidence in the courts […]. The persistence of conflicting court decisions, on the other hand, can create a state of legal uncertainty likely to reduce public confidence in the judicial system, whereas such confidence is clearly one of the essential components of a State based on the rule of law […]'. ECtHR, Nejdet Şahin and Perihan Şahin v. Turkey, 20 October 2011, no. 13279/05, para. 56-57.

[336] ECtHR, Unédic v. France, 18 December 2008, no. 20153/04, para. 74.

[337] ECtHR, Santos Pinto v. Portugal, 20 May 2008, no. 39005/04, para. 41 and ECtHR, Tudor Tudor v. Romania, 24 March 2008, no. 21911/03, para. 29.

[338] ECtHR, Nejdet Şahin and Perihan Şahin v. Turkey, 20 October 2011, no. 13279/05, para. 53. The case was particularly complicated, as the differences in judicial interpretation were between two different jurisdictions.

[339] In the case of *Ferreira Santos Pardal*, conflicting interpretations within the national highest jurisdiction, sometimes giving rise to opposite conclusions on the same day, brought the Court to consider the persisting conflict as a violation itself. Besides, the highest court was causing the persisting legal uncertainty. ECtHR, Ferreira Santos Pardal v. Portugal, 30 July 2015, no. 30123/10, para. 43-51. In the same sense, ECtHR, Beian v. Romania (no.1), 6 December 2007, no. 30558/05, para. 39.

[340] In the case of *Pérez Arias v. Spain*, the mechanism to solve conflicts within the *Tribunal Supremo* and the issuing of a judgement to that effect were considered sufficient not to find a violation of Art. 6 ECHR. ECtHR, Pérez Arias v. Spain, 28 June 2007, no. 32978/03, para. 25. In the case of *Iordan Iordanov v. Bulgaria*, Art. 6 ECHR was considered violated because the possibility to solve conflicting case-law was foreseen by national legislation, but it was not used, giving rise to a profoundly uncertain legal framework. ECtHR, Iordan Iordanov and others v. Bulgaria, 2 July 2009, no. 23530/02, para. 47 ff., in particular 52-53. In the context of Art. 1 Prot. 1 ECHR, but applying the same principles, see ECtHR, Păduraru v. Romania, 1 December 2005, no. 63252/00, para. 98-99.

[341] ECtHR, Zielinski and Pardal and Gonzalez and others v. France, 28 October 1999, nos. 24846/94, 34165/96 and 34173/96, para. 59. ECtHR, Nejdet Şahin and Perihan Şahin v. Turkey, 20 October 2011, no. 13279/05, para. 80.

accordance with the idea of foreseeability. The assessment of the Court is significantly, in its own words, *in concreto*.[342]

Nejdet Şahin and Perihan Şahin v. Turkey became a leading case within Art. 6 ECHR and its principles are well-established in the subsequent case-law of the Court.[343] It is undeniable that the Convention, if read as a whole, is undergoing a trend of interpretation which goes in the direction of considering conflicts in the courts, both in the same and in different jurisdictions, and the absence of mechanisms to solve them, as a violation of the Convention. In light of this, the case-law of the Court on Art. 7 ECHR on this subject matter is forcibly becoming more and more autonomous. Furthermore, despite remaining within the traditional framework, the Court has now developed an undeniable sensitivity towards the problems of conflicting case-law, both synchronical and diachronical.

4.5. Scope of application of foreseeability.

The scope of application of foreseeability is in the majority of cases referred to the qualification of the acts as the specific criminal offence in accordance to which the individual is convicted.[344]

On the contrary, in the case of *Rohlena v. Czech Republic*, the Court, even if recalling the precedent in the case of *Del Río Prada v. Spain*, looked at foreseeability of the law in its 'effects' (conviction) and concluded that the principle of non-retroactivity had not been violated.[345] This means that the Court considered that the scope of application of foreseeability was only the unlawfulness of the conduct, and not its correct legal characterisation.

[342] ECtHR, Nejdet Şahin and Perihan Şahin v. Turkey, 20 October 2011, no. 13279/05, para. 70.
[343] ECtHR, Ferreira Santos Pardal v. Portugal, 30 July 2015, no. 30123/10, para. 49 ff. The Court holds a violation of Art. 6 ECHR because the Supreme Court had overruled its precedent and therefore violated the principle of legal certainty. In addition, although national mechanisms to solve differences in interpretations existed, none of them applied to the case. ECtHR, Stanković and Trajković v. Serbia, 22 December 2015, nos. 37194/08 and 37270/08, para. 40 ff., in particular 42. The Court did not find a violation of Art. 6 ECHR because there were not profound and long-standing differences in the courts' practice, but rather a practice predominantly in favour of the plaintiffs, overruled in the applicants' case. According to the Court, this does not amount to a real wound in the principle of legal certainty. Both judgements consolidated the precedent summarising its main affirmations of principle.
[344] ECtHR, Korbely v. Hungary, 19 September 2008, no. 9174/02; ECtHR, Vasiliauskas v. Lithuania, 20 May 2015, no. 35343705; ECtHR, Contrada v. Italy (no. 3), 14 April 2015, no. 66655/13. In the same vein M. DONINI, *Il Caso Contrada e la Corte EDU*, cit., p. 360 and N. RECCHIA, *La Corte di cassazione alle prese con gli effetti nel nostro ordinamento della decisione Contrada della Corte EDU*, in *Giur. it.*, 2017, p. 1206.
[345] ECtHR, Rohlena v. Czech Republic, 27 January 2015, no. 59552/08, para. 70.

The applicant was convicted for a continuing offence according to the law in force at the time he committed the last act in 2006 (Art. 215a of the Criminal Code), although his conduct had started in 2000. The criminal offence of *maltraitance de personne vivant sous le meme toit* entered into force in 2004, but the acts of the applicant before that date were criminally relevant anyway (threat and harm).[346] For these reasons, and looking at the Supreme Court interpretation of continuing offence, the Court considered the law to be foreseeable. This case is only apparently contradicting the stable approach of the Court to the scope of application of the foreseeability test. The peculiarity of the case of a continuing offence is the main reason for the apparent (and isolated) contradictory acknowledgement.

4.6. Functional relationship legality-culpability.

It follows from the analysis of the requirements of foreseeability, that its assessment establishes a clear link between legality and culpability, intended both as a principle and as a dogmatic category. Especially when taking subjective elements into consideration, the Court inevitably touches the domain of culpability.[347] In particular, mistake of law can be caused by uncertain legal framework which inevitably convinces the individual of the lawfulness of its actions. The predictability of the consequences of a conduct does not just link the individual to the provision, but it also needs to establish a relationship between the individual and the criminal offence. This could be a consequence of the principle of individual autonomy which permeates the rule of law.[348]

The Italian Constitutional law has long established a link between legality and culpability when assessing the unavoidable mistake of law, which excludes culpability and therefore causes an acquittal decision.[349] Significantly, the Court for the first time

[346] ECtHR, Rohlena v. Czech Republic, 27 January 2015, no. 59552/08, para. 63. '*Elle ne voit aucune raison de douter que le requérant était à même de prévoir, pour ce qui est non seulement de la période postérieure à l'entrée en vigueur de cette disposition le 1er juin 2004 mais aussi de la période allant de l'année 2000 jusqu'à cette dernière date, que sa responsabilité pénale pouvait être engagée pour l'infraction continuée évoquée ci-dessus, et de régler sa conduite en conséquence*'.

[347] The subjective assessment of foreseeability is related to the principle of culpability according to K. AMBOS, *Internationales Strafrecht: Strafanwendungsrecht, Völkerstrafrecht, europäisches Strafrecht, Rechtshilfe*, München, 2018, p. 467 ff. In Kreicker's view, Art. 7 ECHR includes both legality and culpability. H. KREICKER, *Art. 7 EMRK und die Gewalttaten an der deutsch-deutschen Grenze*, cit., p. 106.

[348] In this sense see FR. MAZZACUVA, *Art. 7*, cit., p. 247.

[349] Corte Cost., 24 March 1988, no. 364. D. PULITANÒ, *Una sentenza storica che restaura il principio di colpevolezza*, in *Riv. it. dir. proc. pen.*, 1988, p. 686 ff. e G. FIANDACA, *Principio di colpevolezza ed ignoranza scusabile della legge penale: "prima lettura" della Sentenza n. 364/88*, in *Foro it*., 1988, I, p. 1385 ff.

explicitly affirmed such principles in cases against Italy. In the Grand Chamber judgment, the Court affirmed:

> 'There is certainly, as the Italian Court of Cassation noted in the case of Sud Fondi S.r.l. and Others (see paragraph 112 of the Court's judgment in that case, ibid.), a clear correlation between the degree of foreseeability of a criminal-law provision and the personal liability of the offender'.[350]

This statement followed an acknowledgement of lacking foreseeability in the Italian legislation concerning confiscation in the case of *Sud Fondi s.r.l. and others v. Italy*.[351] The Italian *Corte di Cassazione* had acquitted the applicants for inevitable mistake of law due to the obscurity of the legislation and the contradictory case-law, excluding culpability, but nevertheless applied confiscation. In the proceedings before the Court, the issue was considered under the perspective of foreseeability, which is a requirement of the law itself:

> '116. As regards the Convention, Article 7 does not expressly mention any mental link between the material element of the offence and the person deemed to have committed it. Nevertheless, the rationale of the sentence and punishment, and the 'guilty' concept (in the English version) and the corresponding notion of 'personne coupable' (in the French version), support an interpretation whereby Article 7 requires, for the purposes of punishment, an intellectual link (awareness and intent) disclosing an element of liability in the conduct of the perpetrator of the offence, failing which the penalty will be unjustified. Moreover, it would be inconsistent, on the one hand, to require an accessible and foreseeable legal basis and, on the other, to allow an individual to be found 'guilty' and to 'punish' him even though he had not been in a position to know the criminal law owing to an unavoidable error for which the person falling foul of it could in no way be blamed'.[352]

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[350] ECtHR, G.I.E.M. s.r.l. and others v. Italy, 28 June 2018, nos. 1828/06, 34163/07 and 19029/11, para. 242.

[351] ECtHR, Sud Fondi s.r.l. and others v. Italy, 20 January 2009, no. 75909/01. See FR. MAZZACUVA, *Un* "hard case" *davanti alla Corte europea: argomenti e principi nella sentenza su Punta Perotti*, in *Dir. pen. proc*., 2009, p. 1540-1552 and A. BALSAMO, C. PARASPORO, *La Corte europea e la "confisca senza condanna" per la lottizzazione abusive: nuovi scenari e problem aperti*, in *Cass. Pen*., 2009, p. 3183 ff. A confiscation measure had been imposed on the applicants, although their criminal trial concluded with an acquittal for lack of culpability since they had fallen in an inevitable mistake of law due to the obscurity of the law, the wrong indication of administrative authorities etc. Confiscation of abusive construction had however been admitted by Italian courts even in case of an acquittal. The applicants claimed the unforeseeability of the penalty (confiscation) at the time the offence was committed and therefore underlined the absence of the necessary link between foreseeability and personal liability.

[352] ECtHR, Sud Fondi s.r.l. and others v. Italy, 20 January 2009, no. 75909/01, para. 116. Significantly, the Court quoted the case of *Pessino v. France* as far as the subjective elements of foreseeability are concerned in the statement of principles. The important principle affirmed in *Sud Fondi* was not well-established. Other substantially opposite principles were stated in *G. v. the United Kingdom*, where the Court excluded that Art. 6(2) ECHR dictates that the elements of the offence shall include a blameworthy state of mind. The case was about the presumption of knowledge of the minor age of the victim in sexual offences. FR. MAZZACUVA, *Art. 7*, cit., p. 247. ECtHR, G. v. the United Kingdom, decision, 30 August 2011, no. 37334/08, para. 26. It could be argued that the case was examined under the Art. 6 ECHR perspective and that the problem was not expressed in terms of foreseeability, but rather concerned objective liability. Pulitanò underlines this aspect in D. PULITANÒ, *Personalità della responsabilità: problemi e prospettive*,

Considering foreseeability also in relation to the possibility of the applicant to be aware of the criminal law in subjective terms builds a circular reasoning that leads to the recognition of the principle of culpability. It represents therefore an implicit requirement of the principle of legality, fostering the 'universal' side of legality and its connection with individual autonomy.[353] A few critical points can be raised. Firstly, the reference of the Court to 'awareness and intent' as necessary intellectual link is ambiguous. It would be unacceptable to interpret it as full intent, while some suggest seeing it in the framework of the necessary *suitas*.[354] Secondly, the link is still quite loose, since accessibility and foreseeability as legality standards are more natural arguments before the Court, so that culpability would remain in the background.[355] Nevertheless, the consequences of choosing to set the case under the perspective of *nullum crimen* or under the perspective of culpability are different. If subjective elements are arguments with regards to the existence of the legal basis, a lack of subjective foreseeability would lead to the non-existence of the norm itself. In contrast, the acknowledgement of an inevitable mistake of law due to an unforeseeable legal background would just exclude culpability and therefore operate only for the applicant.[356] This is a consequence of the continental theory of crime, where unlawfulness and culpability represent two categories in the structure of the crime.[357]

Furthermore, the scope of application of foreseeability in the ECHR is broader than the scope of knowledge or knowability of law in continental law doctrines. If the mistake of law is inevitable and therefore the law is unknowable, this will also forcibly cause a

in *Riv. it. dir. proc. pen*., 2012, p. 245. However, the Court reaffirms the principles enshrined in *Sud Fondi* in the aforementioned Gran Chamber judgment, thus apparently recognising them with particular authority.

[353] E. COTTU, *Ambigua fenomenologia e incerto statuto del principio di colpevolezza nel dialogo tra le corti*, in *Ind. Pen.*, 2017, p. 375. t

[354] E. COTTU, *Ambigua fenomenologia e incerto statuto del principio di colpevolezza nel dialogo tra le corti*, cit., p. 377 f. and FR. MAZZACUVA, *L'interpretazione evolutiva del* nullum crimen *nella recente giurisprudenza di Strasburgo*, in V. MANES, V. ZAGREBELSKY (eds.), *La Convenzione europea*, cit., p. 425.

[355] G. PANEBIANCO, *Il principio nulla poena sine culpa al crocevia delle giurisdizioni europee*, in *Riv. it. dir. proc. pen*., 2014, p. 1347. On the other hand, Mazzacuva seems more open to the possibility of a satisfactory development of the principle in FR. MAZZACUVA, *L'interpretazione evolutiva del* nullum crimen *nella recente giurisprudenza di Strasburgo*, cit., p. 426.

[356] In the same vein see F. MAZZACUVA, *L'interpretazione evolutiva del* nullum crimen *nella recente giurisprudenza di Strasburgo*, cit., p. 424.

[357] Culpability here is meant in its normative meaning, and not just as a psychological factor. Unlawfulness (*illiceità, Unrecht*) and culpability (*colpevolezza, Schuld*) have no correspondent category in common law, where justifications and excuses fall within the more general 'defences' category and have the same consequence of a non-guilty verdict, without further distinctions. G. VANACORE, *Critical Remarks on the Accessibility/Foreseeability Standard as Applied in International Criminal Justice*, in P. LOBBA, T. MARINIELLO (eds.), *Judicial Dialogue on Human Rights. The practice of International Criminal Tribunals*, Leiden-Boston, 2017, p. 152, see also J.C. SMITH, *Justification and Excuse in the Criminal Law*, London, 1989, p. 7.

violation of foreseeability. On the contrary, not every unforeseeable legal framework can also be a possible ground for lack of knowability in the law.[358] However, the link between legality and culpability is at the level of a principle-bases reasoning. The aim of culpability would be void if there were no accessible and foreseeable criminal norms on which the individual could rely on.[359]

The link between legality and culpability cannot be interpreted as an exclusion of strict liability. In fact, the Convention outlaws the punishment of individuals without any causation relationship between conduct and its result but does not exclude criminal liability in absence of mental element. Therefore, culpability as a principle is not satisfactorily recognised.

The necessary link between legality and culpability has been also identified with regards to the connection between the presumption of innocence provided for by Art. 6(2) ECHR and the principle of legality in Art. 7(1) ECHR, in the cases of *Varvara v. Italy* and *G.I.E.M. s.r.l. and others v. Italy*:

> 'Nor can one conceive of a system whereby a penalty may be imposed on a person who has been proved innocent or, in any case, in respect of whom no criminal liability has been established by a finding of guilt. This is the third consequence of the principle of legality in criminal law: the prohibition on imposing a penalty without a finding of liability, which also flows from Article 7 of the Convention'.[360]

Before the above-mentioned cases, the connection between the prohibition of imposing a penalty without a finding of liability was developed in relation to procedural law in the case-law concerning the presumption of innocence. In the leading case *Salabiaku v. France*, the Court had not excluded liability for a material fact, even in the absence of intent or negligence.[361] Moreover, 'culpable' criminal liability seems to be generally disregarded by the Court, which admits the imposition of penalties on the basis

[358] G. VANACORE, *Critical Remarks on the Accessibility/Foreseeability Standard*, cit., p. 150 f.
[359] G. VANACORE, *Critical Remarks on the Accessibility/Foreseeability Standard*, cit., p. 153.
[360] ECtHR, Varvara v. Italy, 29 October 2013, no. 17475/09, para. 67 and ECtHR, G.I.E.M. s.r.l. and others v. Italy, 28 June 2018, nos. 1828/06, 34163/07 and 19029/11, para. 243.
[361] ECtHR, Salabiaku v. France, 7 October 1988, no. 10519/83, para. 27-28; in the same vein ECtHR, Vätsberga Taxi Aktiebolag and Vulic v. Sweden, 23 July 2002, no. 36985/97, para. 112; ECtHR, Janosevic v. Sweden, 23 July 2002, no. 34619/97, para. 100. In *Salabiaku v. France*, the Court tried to identify a minimum degree of intent in the conduct of the applicant. Some have seen it as a first sign of recognition of the principle *nulla poena sine culpa*. See R. SICURELLA, *Nulla poena sine culpa: un véritable principe commun européen?*, in *Revue de science criminelle*, 2002, p. 18. In these cases, the Court rather frames the problem as a presumption, that has to be reasonable in order to be legitimate. See ECtHR, Radio France v. France, 30 March 2004, no. 53984/00, para. 24.

of a presumption of knowledge with regards to crucial elements of the offence.[362] Although scholarship is quite critical of these arguments, some have identified a clear trend towards the recognition of the culpability principle in a substantive sense, through placing the burden of proof on the State in case of presumptions.[363]

4.7. Conclusions.

Having thoroughly examined all relevant judgements in the context of foreseeability, the following conclusions can be drawn. Foreseeability is referred to the evaluation of the legal framework *in concreto* enabling the applicant to be aware of the criminal offence and penalty that could be imposed on him. Its scope of application is the penalty, including its execution, and the exact legal characterisation of the facts.[364]

4.7.1. Subjective foreseeability.

Several commentators affirm that foreseeability in the ECtHR jurisprudence is a subjective standard.[365] In the previous analysis, it has become clear that subjective elements count on two different perspectives. Firstly, in case-law applying the *Cantoni* precedent, subjective evaluations look at the qualifications of the addressees and their status and number. In addition, if the professional activity of the addressees is relevant, it determines the degree to which it is possible to demand for a particular caution in risk assessment.[366] In cases that affirm these principles, which often deal with very specific

[362] It is the case of the *error aetatis* in the English Sexual Offences Act, where the Court admitted that consent to intercourse for a person under thirteen years of age and the actual knowledge or knowability of the age of the victim are irrelevant in the context of sexual offences, thus excluding the necessity of a minimum awareness with regards to this element of the offence. *Mens rea* is therefore only intent in carrying out the *actus reus*. ECtHR, G. v. the United Kingdom, decision, 30 August 2011, no. 37334/08, para. 26. While acknowledging some similar characteristics to the Italian legislation on the matter, Panebianco criticises the self-restraint of the Court in judging the necessary elements of the offence and therefore excluding *the knowledge of the law* from the requirements. G. PANEBIANCO, *Il principio nulla poena sine culpa al crocevia delle giurisdizioni europee*, in *Riv. it. dir. proc. pen*., 2014, p. 1341 f. Against, E. COTTU, *Ambigua fenomenologia e incerto statuto del principio di colpevolezza nel dialogo tra le corti*, cit., p. 374.

[363] According to Abbadessa, the requirement of a '*certain element intentionnel*' in the reasonableness of a presumption amounts to a recognition of the principle of culpability in cases where strict liability is possible and therefore the judgement on the minimum subjective link is crucial. G. ABBADESSA, *Il principio della presunzione di innocenza nella CEDU: profili sostanziali*, in V. MANES, V. ZAGREBELSKY (eds.), *La Convenzione europea*, cit., p. 396 ff.

[364] See *above*, para. 4.5.

[365] M. SCOLETTA introduces the concept of subjective accessibility, see *above*, para. 3.3.3. D. SARTORI, *The lex certa principle*, cit., p. 81. The role of subjective criteria is further analysed by De Blasis, who highlights approximately the same precedents and comes to very similar conclusions. According to her, it is impossible to establish a consistent practice in the application of the criteria, as the Court keeps applying them in an *unforeseeable* way. S. DE BLASIS, Oggettivo, soggettivo *ed* evolutivo *nella prevedibilità dell'esito giudiziario tra giurisprudenza sovranazionale e ricadute interne*, in *Riv. trim. dir. pen. cont*., 4, 2017, p. 132 and 134.

[366] See *above*, para. 4.2.3.

and limited areas of criminal law, the Court has often lowered the required degree of foreseeability. This has always been the case when national courts extended the scope of an offence to a new group of cases, especially when previous judicial interpretations were lacking.[367] The only exceptions were the cases of *Pessino* and *Dragotoniu et Militaru Pidhorni*, where the Court did not apply subjective criteria, since the structure of the case given by the parties underlined the retroactivity of the judicial interpretation.[368]

Subjective criteria were used in a different way in the cases that followed the precedents in *S.W. v. the United Kingdom* and the *Mauerschützenfälle*, which assessed the consistency with the essence of the offence and reasonable foreseeability of judicial interpretation. Firstly, this use of subjective criteria was anchored to the possibility for the applicant to be aware of the law in force as an index of reasonable foreseeability. The particular situation of the applicant comes into question, but not his qualification in the group of those addressed by the law.[369] Moreover, the criminal offences in questions did not belong to 'artificial' offences, i.e. *mala quia prohibita*, but were instead flagrantly unlawful actions that could possibly be justified only in the context of an armed conflict or of a permissible State practice.[370] Secondly, subjective criteria were used only in cases that dealt with the succession of States after a change in regimes or with particularly serious and manifest human rights violations. This could be a reason to justify this particularly loose and controversial application of subjective criteria in the foreseeability assessment in a diachronic perspective and in relation to reasonable predictability.[371]

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[367] See the cases of *Soros v. France* and *X. and Y. v. France*, cited *above*. In particular, the case of *Soros v. France* mixed objective and subjective criteria, considering the lack of pre-existent case-law.

[368] See *above*, para. 4.2.2. The particular configuration of the case in *Pessino v. France* has brought many to establish a link with the case-law on diachronic foreseeability.

[369] See *above*, para. 4.3. and 4.3.3. The Court considered the role of the leaders of the Communist Party and members of the Government in *Streletz, Kessler and Krenz*, the subjective peculiarities of K.H.W. as a voluntary soldier in the GDR border guard, the role of professional politician in *Kuolelis and others*, the role and standard of knowability as commander officer in *Kononov* (in which actually the *Pessino* precedent and the *Cantoni* criteria were recalled). The language of the Court recalls the national assessment on the mistake of law: 'Giving his position as a commanding military officer, the Court is of the view that he could have been *reasonably expected* to take such *special care in assessing the risks* that the operation […] entailed', ECtHR, Kononov v. Latvia, 17 May 2010, no. 36376/04, para. 238; 'the applicants *must have been aware*, as leading professional politicians […] of the great risks they were running […]', ECtHR, Kuolelis, Bartoševičius and Burokevičius v. Lithuania, 19 February 2008, nos. 74357/01, 26764/02 and 27434/02, para. 120; 'they evidently *could not have been ignorant* of the GDR's Constitution and legislation', ECtHR, Streletz, Kessler and Krenz v. Germany, 22 March 2001, no. 34044/96, 35532/97 and 44801/98, para. 78; '*knew* or *should have known*' ECtHR, K.-H.W. v. Germany, 22 March 2001, no. 37201/97, para. 72 (emphasis added).

[370] See the cases of the German Border Guards and *Kononov*, quoted *above*.

[371] See *above*, para. 4.3.3. Foreseeability is a more subjective standard in international law according to R. KOLB, *Réflexions de pholosophie du droit international*, Bruxelles, 2003, p. 280. See also H. VAN DER

4.7.2. Objective foreseeability.

In light of an overall analysis, an objective assessment of foreseeability seems to be the most suitable interpretation of foreseeability at the moment.[372] When speaking of objective criteria, the definition encompasses all standards used by the Court that only take into account elements that refer to the legal basis, both in a written and unwritten version, but not to the characteristics of the subject. This objective approach enables the Court to assess legality at the material time in a way that could be potentially valid for all the subjects which found themselves in the same factual situation as the applicant. Foreseeability is consequently a quality of that particular norm, as a result of written law and its interpretation. The objective criteria, especially when assessing foreseeability of the results of judicial interpretation, have more chances to be accepted in continental law, as they do not unsettle the different areas of lawfulness and culpability.[373] Objective criteria are here considered in a transversal perspective that encompasses all potential violations of foreseeability, without looking at the classifications elaborated in scholarship such as diachronic/synchronic foreseeability or precision of the norm/reasonably foreseeable interpretation.[374]

With regards to ECtHR's case-law, after 2011 there was only one relevant case, *X. and Y. v. France* in 2016, where subjective standards were applied to assess foreseeability.[375] Especially when evaluating predictable judicial developments according to their consistency with the essence of the offence and reasonable foreseeability,[376] the

WILT, *Nullum Crimen and International Criminal Law: the relevance of the Foreseeability test*, in *Nordic Journal of International Law*, 84, 2015, p. 519.

[372] De Blasis identifies an objective criterion in the ECtHR's case-law. However, she describes it differently. The substantive and *in concreto* definition of the legal basis, together with the consistency with the essence of the offence/reasonable foreseeability criteria are considered the real objective criterion, which can be found in the case of *Sunday Times v. the United Kingdom* (cited *above*, Chapter 2, para. 4.2.1.) and later in *Del Río Prada v. Spain*. This delimitation makes De Blasis distinguish the case of *Contrada v. Italy* from the objective criterion. A different standard, based on the existence of a 'qualified' precedent, seems to lead in a different direction than the objective criterion. Although the final decision in *Contrada* is controversial and the reasoning of the Court is controvertible, it is undeniable that only objective criteria were applied. S. DE BLASIS, Oggettivo, soggettivo *ed* evolutivo *nella prevedibilità dell'esito giudiziario tra giurisprudenza sovranazionale e ricadute interne*, cit., p. 137.

[373] An objective assessment of foreseeability is crucial when speaking of legality, as the reference to subjective foreseeability and the relevance of a simple doubt on the lawfulness of the conduct would be unacceptable. N. RECCHIA, *La Corte di cassazione alle prese con gli effetti nel nostro ordinamento della decisione Contrada della Corte EDU*, cit., p. 1207. Subjective foreseeability should otherwise be classified in the dogmatic category of culpability according to M. DONINI, *Il Caso Contrada e la Corte EDU*, cit., p. 361.

[374] See *above*, para. 3.

[375] ECtHR, X. and Y. v. France, 1 September 2016, no. 48158/11, see *above*, para. 4.2.3.

[376] In the cases following the *Cantoni* precedent there were objective assessments, such as *Pessino v. France* and *Dragotoniu et Militaru Pidhorni v. Romania*.

judgements of the Court in the last decade have become stricter and less inclined to declare the accomplishment of the foreseeability requirement. With regards to case-law concerning international crimes, only in the controversial Grand Chamber judgement of *Kononov v. Latvia* were subjective criteria applied. On the contrary, all other cases (*Korbely v. Hungary*, *Vasiliauskas v. Lithuania* and, recently, *Drėlingas v. Lithuania*) applied only an objective standard concerning the evaluation of the legal basis.[377] Objective elements were also the only parameter to measure foreseeability in case-law related to the leading case *Del Río Prada* and the diachronic or synchronic conflict between courts.[378]

a) The objective 'consistent with the essence of the offence' criterion. Compliance with foreseeability is often met when the case concerns a first interpretation of an element or the first application of the criminal offence itself. In these cases, the Court refers to a presumption of foreseeability if the interpretation is consistent with the essence of the offence or applies the standard of 'common sense'.[379] This presumption could be considered a consequence of a balance between the necessary retroactive nature of interpretation as well as the need for an evolution in law and the individuals' right to foreseeability.

The presumption of foreseeability is limited to cases of first application of a criminal offence or a first interpretation of a particular aspect of the provision, which should justify the difference in cases where pre-existing case-law is reversed. Nevertheless, the consistency with the essence of the offence is not clearly defined and its presumption seems rather to be dependent on the circumstances of the case.[380] This presumption is

[377] See *above*, para. 4.3.3. The application of objective standards led to find a violation of Art. 7 ECHR both in *Vasiliauskas v. Lithuania* and in *Korbely v. Hungary*.
[378] See *above*, para. 4.4. In these cases as well, a violation of Art. 7 ECHR was almost always declared. Only in the cases of *Arrozpide Sarasola and others v. Spain* and *Borcea v. Romania* the Court, although applying objective criteria, excluded that Art. 7 ECHR had been violated.
[379] See *above*, para. 4.3.1. and 4.3.2. In a different perspective, foreseeability according to common sense has been considered part of the reasoning of *S.W.* and *C.R. v. the United Kingdom* as well. The possibility to go beyond retrospectivity in cases where case-law development is in accordance with common sense has been therefore defined as an 'evolutive criterion', in addition to the subjective and objective ones. S. DE BLASIS, Oggettivo, soggettivo *ed* evolutivo *nella prevedibilità dell'esito giudiziario tra giurisprudenza sovranazionale e ricadute interne*, cit., p. 133.
[380] See the cases of *Jorgic v. Germany*, *Moiseyev v. Russia* and *Berardi and Mularoni v. San Marino*, cited *above*, para. 4.3.1. The latter case was the first application of an offence, but it was particularly critical in terms of criminal relevance of the conduct before the introduction of the new criminal offence. Only an extensive interpretation of bribery could, before the reform, comprehend the conduct of the applicant in its scope of application.

debatable, especially because it operates right where a first interpretation could easily result in a retroactive unforeseeable application of the criminal law.

The criterion of 'common sense', irrespective of its being expressly recalled, is equally relevant in cases of first interpretation or first application.[381] Even if its assessment is objective and is limited to the lawfulness of the conduct it is based on the rationale of the criminal provision, the common definition of a specific concept, and a non-legal evaluation of the circumstances of application of the law. The use of this specific standard can be criticised for the reference to common knowledge and for the potentially dangerous results of an evaluation of what was expectable according to the expectations of an average subject. Nevertheless, these results are more acceptable than subjective-based criteria, even if the former lie at the borders of the mistake of law.

b) Reasonable foreseeability and judicial interpretation. An objective evaluation of synchronic and diachronic foreseeability of judicial interpretation has become the core of *nullum crimen* and has given rise to new principles, especially if considering the whole Convention.[382] From the leading cases of *S.W.* and *C.R. v. the United Kingdom* with their objective but very loose version of foreseeability, the assessment has become stricter and is now focused on potential violations to legality due to conflicting interpretations within national jurisdictions.

From the analysis in the previous paragraphs, two conclusions can be derived. Firstly, the Court has become particularly strict in the evaluation of retroactive overrulings. When the conflict between opposing interpretations is diachronic, the solution most of the times is the violation of Art. 7 ECHR.[383] The Court only evaluates prior precedents, the actual detrimental effect of the overruling, synchronic pre-existing conflicts and the individual's legitimate expectations with regards to previous interpretation. Reasonableness is therefore objectively assessed in the light of the interpretation of the law at the material time of the offence.

[381] See above, para. 4.3.2. Expressly recalled in *Kuolelis, Bartoševičius and Burokevičius v. Lithuania*, *Moiseyev v. Russia* and *Berardi and Mularoni v. San Marino*. Indirectly relevant in *Radio France v. France* and *Ashlarba v. Georgia*.

[382] Maculan speaks in this regard of 'knowability' of the criminal offence and penalty. E. MACULAN, *Il volto garantista di un principio di legalità flessibile*, cit., p. 98. See *above*, para. 4.4., 4.4.1., 4.4.2.

[383] See *above*, para. 4.4. and quoted case-law. The Court held a violation of Art. 7 ECHR for a retroactive overruling, or a diachronic interpretive conflict in the cases of *Pessino v. France*, *Dragotoniu et Militaru Pidhorni v. Romania*, *Liivik v. Estonia*, *Del Río Prada v. Spain*, *Alimucaj v. Albania*, *Navalnyye v. Russia*, *Contrada v. Italy* (although the configuration of the case as diachronic, instead of synchronic conflict is dubious).

Secondly, synchronic conflicts within higher jurisdictions are tolerated, as long as the system is capable of some sort of composition between them.[384] If that is not the case, long-lasting conflicting interpretation can amount to a violation of the Convention. Especially when a conflicting interpretation is further resolved *in malam partem* by a higher court, and it is retroactively applied, the Court has shown a quite strict approach.[385] In this perspective, the role of the Supreme Courts in conflict resolution and uniform interpretation is crucial. Both in the cases where Art. 7 ECHR was violated and in those where it was not, the decisive argument was the effective composition of the conflict and its consequences on individuals.[386]

In general terms, an objective foreseeability standard is preferable, as it better suits a legality assessment that shall stay at an objective level. Some commentators suggest adding a subsequent subjective assessment that would exclude punishment in case the law is foreseeable, but it is subjectively impossible to know it.[387] Although this seems to be an evaluation more suited to a culpability assessment in the event of its explicit acknowledgement by the ECtHR, such suggestion could have positive effects only in case of a complete overturn in the application of subjective standards by the ECtHR, i.e. in favour of the applicant. Otherwise, re-introducing and legitimating a subjective assessment of legality in a system where the continental dogmatic distinction between *tipicità* and culpability does not exist risks reopening the door for a detrimental use of subjective standards. Moreover, it seems preferable to apply the objective side of foreseeability in order to emphasise its collocation in the *nullum crimen* principle under Art. 7 ECHR.

4.7.3. Foreseeability and the rule of law between absolute protection and balance.

Even if the assessment of foreseeability has become stricter and the standards could be considered less disappointing in terms of human rights protection and criminal law standards, the effective absolute protection granted by this principle and Art. 7 ECHR is still controversial.

[384] See the cases of *Borcea v. Romania* and *Arrozpide, Sarasola and others v. Spain*, cited *above*.
[385] See the case of *Prigală v. Moldova*, and, in light of a correct interpretation of the case, *Contrada v. Italy*.
[386] See *above*, para. 4.4.2. and the previous footnote.
[387] Santangelo suggests a twofold analysis of foreseeability, where the objective standards concerning *tipicità* precede a subjective assessment that resembles that of the inevitable ignorance of the law. Albeit the advantages for common law States, that traditionally do not admit acquittal for inevitable ignorance of the law, subjective standards have showed their negative potential in the ECtHR jurisprudence. A. SANTANGELO, *Ai confini tra* common law *e* civil law, cit. p. 348 ff.

Most of the criticism has come from the analysis of those hard cases which dealt with serious human rights violations or international crimes. Even though the case-law on international crimes has shown a significant turn towards an objective evaluation, doubts still remain as far as the leading cases of *Streletz, Kessler and Krenz* and *K.-H-W. v. Germany* and *Kononov v. Latvia*.[388]

Although the Court affirms that the principles enshrined in Art. 7 ECHR are absolute and cannot be derogated, its practice when dealing with hard cases seems to contradict this. In this chapter it has been noted that the Court has affirmed that Art. 7 ECHR cannot be read as means to justify, through its application, serious human rights violations that would be contrary to the object and scope of the Convention.[389] In these cases, subjective criteria were applied in order to deny the violation of the foreseeability standard.[390] Nonetheless, the use of subjective criteria is subordinated to the main argument, which is always the impossibility to consider a legal basis unforeseeable, if it results in the protection of a relevant human right that was allegedly 'lawfully' violated prior to the new unforeseeable interpretation. Especially in the succession of States, but also in simple interpretations, the Court has considered a practically retroactive law in detriment of the accused foreseeable under a political *ex post* perspective, oriented at human rights protection.[391]

Such cases can be explained as the result of a balance between conflicting rights.[392] Legal certainty and the rule of law can be recessive in front of other fundamental rights being violated, such as the right to life (*Kononov v. Latvia*, GDR Border Guards cases)[393]

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[388] See *above*, para. 4.3. and 4.3.3. and the cases of *Streletz, Kessler and Krenz* and *K.-H-W. v. Germany* and *Kononov v. Latvia* in opposition to *Korbely v. Hungary* and *Vasiliauskas v. Lithuania*, where the Court held a violation of Art. 7 ECHR and just referred to objective criteria.

[389] See *above*, para. 4.3. and 4.3.3. See also the case of *S.W. v. the United Kingdom*.

[390] Foreseeability was subjectively assessed in the German Border Guard cases and in *Kononov v. Latvia*. ECtHR, Streletz, Kessler and Krenz v. Germany, 22 March 2001, no. 34044/96, 35532/97 and 44801/98, para. 77-78; ECtHR, K.-H.W. v. Germany, 22 March 2001, no. 37201/97, para. 68-82; ECtHR, Kononov v. Latvia, 17 May 2010, no. 36376/04, para. 235.

[391] See the reasoning on the so called 'political foreseeability' in *Kononov v. Latvia* (*above*, para. 4.3.3.) and in *Streletz, Kessler and Krenz* and *K.-H-W. v. Germany* and *S.W. v. the United Kingdom* (*above*, para. 4.3.).

[392] S. VAN DROOGHENBROECK, *Interprétation jurisprudentielle et non rétroactivité de la loi pénale*, in *Rev. trim. dr. homme*, 1996, p. 476; W. BENESSIANO, *Légalité pénale et droits fondamentaux*, cit., p. 214.

[393] Werle gives a different explanation of the GDR cases before the ECtHR, based on the German prosecution of crimes committed under the GDR regime. According to Werle, a human-rights-friendly interpretation of GDR law imposes not to consider justifications violating human rights irrespective of a possible infringement of the non-retroactivity principle. Therefore, human rights protection through a human-rights-friendly interpretation prevails over state sovereignty. G. WERLE, *Rückwirkungsverbot und Staatskriminalität*, in *NJW*, 2001, p. 3007 f.

or human dignity and freedom (*S.W. v. the United Kingdom*). The reason for a balance lies, according to the Court, in the prominent place these rights occupy in the Convention, but the same argumentation could be easily extended to other rights. The consequence would be an instable protection of Art. 7(1) ECHR, which should be absolute, due to the potential different results of such a balance.

This interpretation is supported by Art. 17 ECHR, which has been defined a 'consistency clause' in the Convention.[394] Art. 17 ECHR bans the abuse of rights, prohibiting to interpret any provision in the Convention as a justification for the destruction or limitation of any right provided for in the Convention.[395] Such a reasoning is implicit but clear in all the above-mentioned cases, where substantially retroactive interpretations are confirmed by the Court in light of the coherence with the object and scope of the Convention.[396] In this perspective, there are no authentic absolute rights in the Convention, as the principle of proportionality, at various degrees, represents an explicit (such as in Art. 8-11 ECHR) or implicit limit to every right.[397] This is a consequence of the principle that every right enshrined in the Convention succumbs if its affirmation leads to the sacrifice of other rights protected by the Convention itself.[398]

[394] A. ESPOSITO, *Il diritto penale "flessibile". Quando i diritti umani incontrano i sistemi penali, Torino*, 2008, p. 343 ff., V. VALENTINI, *Diritto penale intertemporale*, cit., p. 140. According to others, the real absolute nature of the provision as a principle of interpretation is dubious, W. SCHABAS, *The European Convention*, cit., p. 615.

[395] 'Art. 17 – Prohibition of abuse of rights. Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention'.

[396] ECtHR, S.W. v. the United Kingdom, 22 November 1995, no. 20166/92, para. 44; ECtHR, Streletz, Kessler and Krenz v. Germany, 22 March 2001, no. 34044/96, 35532/97 and 44801/98, para. 83-85 and 87: expressions such as 'in conformity […] with the fundamental objectives of the Convention, the very essence of which is respect for human dignity and human freedom', '[c]ontrary reasoning would run counter to the very principles on which the system of protection put in place by the Convention is built', 'regard being had to the pre-eminence of the right to life', '[t]he Court considers that a State practice such as the GDR's border-policing policy, which flagrantly infringes human rights and above all the right to life, the supreme value in the international hierarchy of human rights, cannot be covered by the protection of Article 7 § 1 of the Convention' underline the balance behind the Court's reasoning.

[397] Art. 3 ECHR is taken as an example of an absolute right which in reality depends on the proportionality between the violated right and the aim of the violation. Moreover, the fair balance test is widely used by the Court also in the context of absolute rights. J. CHRISTOFFERSEN, *Fair Balance: Proportionality, Subsidiarity, Primarity in the European Convention on Human Rights*, London-Boston, 2009, p. 83-84, 87, 110 f.

[398] In the context of Art. 10 ECHR, this reasoning was implicitly applied in ECtHR, Orban and others v. France, 15 January 2009, no. 20985/05, para. 35. W. SCHABAS, *The European Convention*, cit., p. 616 ff. See in particular the debate on the possible limitation of the freedom of expression by means of the abuse of rights in cases of denialism and hate speech, see P. LOBBA, *Holocaust Denial before the European Court of Human Rights: Evolution of an Exceptional Regime*, in *European Journal of International Law*, 2015, p. 237-253.

Some have also identified the problem with an increasing importance of the rights of the victims in detriment of the rights of the accused in such cases.[399] Another possible interpretation is to see foreseeability (and *nullum crimen sine lege* in general) as a principle, instead of as a rule. The same interpretation of Art. 17 ECHR as an essential clause in the Convention leads to consider all rights enshrined in it as principles, instead of rules.[400] In this perspective, a principle-right can be balanced with other conflicting principle-rights, as it does not benefit from the absoluteness of a rule.[401]

This opposition follows Ronald Dworkin's distinction between principles and rules, which has become a common ground of dispute in legal theory.[402] Principles constitute the standards for lawyers to deal with rights and obligations.[403] Although both principles and rules aim to a particular decision, their distinction is logical: '[r]ules are applicable in an all-or-nothing fashion. If the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision'.[404] On the contrary, principles do not dictate a particular result, but set a standard that could be derogated in a potentially infinite number of cases carrying counter-instances. They state 'a reason that argues in one direction, but does not necessitate a particular decision'.[405] Another consequential difference is that a conflict between rules must be resolved with the validity of one and the invalidity of the

[399] According to Valentini, the marital rape immunity case was protecting particularly vulnerable victims, while the GDR Border Guard cases were protecting the rule of law. The victim-centred approach of supranational law has, therefore, the consequence of loosening the continental idea of the accused and his rights at the centre of the criminal law. V. VALENTINI, *Diritto penale intertemporale*, cit., p. 64 f. and 141 and E. NICOSIA, *Convenzione europea dei diritti dell'uomo e diritto penale*, Torino, 2006, p. 67.

[400] In the same vein, K. AMBOS, *Artikel 7 EMRK, Common Law und die Mauerschützen*, cit., p. 42, V. VALENTINI, *Diritto penale intertemporale*, cit., p. 140.

[401] In the context of German *Bundesverfassungsgericht* on the GDR Border cases, see R. ALEXY, *Der Beschluss des BVerfG zu den Tötungen an der innerdeutschen Grenze*, Göttingen, 1997, p. 23 ff.

[402] Although Dworkin's theory had some antecedents, the debate became lively after his article *The Model of Rules*. A possible antecedent is identified in J. ESSER, *Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts*, Tübingen, 1956.

[403] Dworkin criticises the positivist belief in law only as a system of rules and dismantles Hart's conception. The standards can be generally defined as principles or more precisely distinguished into principles, policies and other standards. Policies define a goal to be reached in an economic, political or social area. Principles set out a standard in order to reach a requirement of justice, fairness or morality in general. R. DWORKIN, *The Model of Rules*, in *The University of Chicago Law Review*, 35, 1967, p. 22 f.

[404] Dworkin exemplifies rules with the rules of a game. If in baseball a batter is out after three strikes, an official cannot decide to apply the rule differently, i.e. that a batter shall not be out after three strikes. The only exceptions will be the ones provided for by the rule itself. Valid rules 'dictate results, come what may'. R. DWORKIN, *The Model of Rules*, cit., p. 25, 36.

[405] Counter-instances cannot be enlisted and classified such as the exceptions to a rule. Dworkin uses the example of the principle 'no man may profit from his own wrong' and all the possible counter-instances where that principle is recumbent in front of others. R. DWORKIN, *The Model of Rules*, cit., p. 26.

other rule. In contrast, principles have a 'weight', that must be balanced in case of interception.[406]

In the context of continental law, but always following an anti-positivist approach, Robert Alexy further elaborated his own theory of principles, which could be applied to constitutional rights.[407] In particular, given the general definition mentioned above, principles are optimization commands. They are 'norms commanding that something be realized to the highest degree that is actually and legally possible' and their accomplishment is a matter of degree.[408] They differ from rules in a qualitative perspective, since principles are limited by other countervailing principles and rules.[409] The definition of principles as optimization commands implies the principle of proportionality, which is at the basis of such a theory of principles. An obligation to realise a principle to the possible highest degree, relative to the countervailing principles is in fact the statement of the principle of proportionality.[410]

Hard cases in the Strasbourg jurisprudence can successfully be interpreted according to this framework, which is, however, the result of anti-positivist positions. Other opinions look in fact at those hard cases within the traditional debate between the principles of legality and justice.[411] In this perspective, hard cases on Art. 7 ECHR can be interpreted as a testimony of the Court's own concept of the rule of law, which is to be in accordance with justice or morality. Thus, the Court would follow the debate that dealt with the problematic inter-relationship between morality-rule of law or justice-rule of law.[412]

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[406] R. DWORKIN, *The Model of Rules*, cit., p. 27 f.

[407] Alexy's position is anti-positivist and in line with Radbruch's conception of the rule of law. He accepts the Radbruch's formula and considers part of the nature of law to be morally correct. See recently R. ALEXY, *Legal Certainty and Correctness*, in *Ratio Juris*, 20, 2015, p. 441-443.

[408] R. ALEXY, *On the Structure of Legal Principles*, in *Ratio Juris*, 13, 2000, p. 295 ff. R. ALEXY, *Theorie der Grundrechte*, Frankfurt, 1996, p. 77 ff.

[409] Alexy further explains the difference between rules and principles in case of collision. Similarly to Dworkin, he identifies the solution to a conflict of rules in the invalidity of one of them, whereas the one to a conflict of principles is conditional. It is based on a relative priority relationship between them. R. ALEXY, *On the Structure of Legal Principles*, cit., p. 297

[410] R. ALEXY, *On the Structure of Legal Principles*, cit., p. 297 f. The formula of balancing law can be formulated as follows: '[t]he more intensive the interference in one principle, the more important the realization of the other principle'. R. ALEXY, *Theorie der Grundrechte*, cit., p. 100 ff. and 146.

[411] K. AMBOS, *Artikel 7 EMRK, Common Law und die Mauerschützen*, cit., p. 42.

[412] According to Kelsen, the obligation not to apply criminal law retroactively could be subject to exceptions in case of conflict with another postulate of justice, solving the antinomy through ordering the postulates in a hierarchy: 'In case two postulates of justice are in conflict with each other, the higher one prevails; and to punish those who were morally responsible for the international crime of the Second World War may certainly be considered as more important than to comply with the rather relative rule against ex post facto

In any of these eventualities, the possibility to balance the rule of law with justice, or the right enshrined in Art. 7 ECHR with other rights, through the foreseeability assessment has a groundbreaking effect on continental legal orders. This is a peculiarity that could actually lead to a collision with not only constitutional and criminal law systems, but also with different conceptions of the rule of law.

laws, open to so many exceptions'. This contribution must be read bearing in mind that it was aimed at justifying international criminal liability. H. KELSEN, *Will the Judgement in the Nuremberg Trial Constitute a Precedent in International Law?,* in 1 *International Law Quarterly* 153, 1947, p. 165. According to Radbruch, legal certainty is not the only value that law pursues, but it must be considered together with appropriateness (*Zweckmäßigkeit*) and justice (*Gerechtigkeit*). In a regular case, legal certainty should prevail over justice, even if the result would be inappropriate and unfair. Nevertheless, in the event of an unbearable (*unerträglich*) injustice through legal injustice (*gesetzliches Unrecht*, which should be translated into legal unlawfulness), justice should prevail. G. RADBRUCH, *Gesetzliches Unrecht und übergesetzliches Recht*, in *Süddeutsche Juristen-Zeitung*, 1946, p. 105-108. See *above*, Chapter 2, fn. 19.

5. Conclusions of Chapter 3.

The concept of foreseeability in relation to legality and rule of law in the ECHR originates from philosophy of law. Foreseeability as a common definition of legal certainty is a common background between different philosophical orientations. Positivists identify legal certainty with foreseeability of judicial decisions, link it with individual liberty and consider it a relative concept, while realists relate it with the validity of law. In opposition, ECHR foreseeability does not derive from the U.S. rationale of fair notice or the U.K. principle of maximum certainty, although they share a common inspiration.

Scholars have classified foreseeability in the ECtHR interpretation in diachronic perspective (historical interpretation) linked to non-retroactivity, and synchronic perspective (technical interpretation) linked to *lex certa*. Foreseeability further ensures the precision of legal rules and the predictability of judicial interpretation, corresponding to the twofold definition of law.

The analysis of ECtHR case-law confirms the widespread concept of relative and *in concreto* foreseeability. Nevertheless, the description of foreseeability only as a subjective assessment has been partly disproved, since subjective standards were applied in cases following the *Cantoni* precedent (first impressions) or dealing with succession of states and manifest human rights violations. In opposition, foreseeability nowadays is mainly assessed objectively. Furthermore, a new interpretive orientation, mirrored also in Art. 6 ECHR, stresses the role of supreme courts in the preservation of legal certainty and applies the objective foreseeability standard autonomously to diachronic and synchronic interpretive conflicts.

The case-law study further reveals a functional relationship between legality and culpability, in particular with regards to the possibility of the applicant to be aware of the law in force. In the end, the most controversial point in Art. 7 ECHR is proven to be the challenge to its absoluteness represented by hard cases on serious human rights violations or international crimes. In these cases, *nullum crimen* and the rule of law appear to be balanced with other conflicting fundamental rights (i.e. right to life, human dignity), thus putting the traditional understanding of legality in jeopardy.

CHAPTER FOUR

FORESEEABILITY BETWEEN CRIMINAL LAW DOGMATIC, JUDGE-MADE LAW AND FUNDAMENTAL RIGHTS

I. TRADITIONAL RATIONALES OF *NULLUM CRIMEN* AND THE ROLE OF THE JUDGE

In light of the above analysis on European legality and the foreseeability standard, its possible application in a concrete legal order will be examined. The following analysis is particularly concentrated on the Italian legal order, since the peculiar rank of the ECHR in its hierarchy of sources has promoted this new substantial version of legality. The role of the European definition of legality is crucial in criminal law since it intervenes in a scenario where traditional subprinciples of *nullum crimen* are questioned.

In this light, possible solutions to the function of case-law in criminal law will be examined in objective and subjective perspective, as well as from a procedural point of view. Due reference will be made to debate among scholars on the influence of European legality and foreseeability (section 1). The German legal order and its solutions to judge-made law will be compared with the Italian counterpart considering three important insights: first, their structure is very similar; second, European legality seems to play small role in Germany in this regard; third, the German criminal system represents a clear example of satisfactory solutions already in the books to certain issues that in Italy now often trigger European legality (section 2).

After having analysed the possible solutions to synchronic and diachronic conflicts of case-law in civil law legal orders, and in light of European legality as well, the focus will be on the law of the European Union. This investigation, then, concentrates on the non-formalised nature of the EU legal order, its application of the ECHR fundamental rights and the focus on the principle of effectiveness, which seems to be the most suitable environment for a test of the (still limited) application of the notion of foreseeability (section 3). In the end, conclusions will be drawn on the possible role of foreseeability in the Italian legal order, in light of the previous analysis, and especially whether the introduction of the foreseeability standard could ensure more protection with regards to case-law than existing solutions both in the books and offered through other proposals (section 4).

1. Rationales of nullum crimen sine lege *and judge-made law.*

The principle *nullum crimen nulla poena sine lege* has represented both a logical need and safeguard for the individual against arbitrary prosecution and the protection of legal certainty in continental legal tradition. The rationales behind this principle date back to the Enlightenment and have since been implemented in the Member States' constitutions, enriching them with new features, especially under a formal point of view.[1] This section will briefly analyse the different rationales behind the principle *nullum crimen sine lege* for the purpose of understanding their relationship to the role of judge-made law in criminal law. With regards to a possible integration of a more substantial conception of legality, i.e. one encompassing judge-made law, it is useful to outline the status of its 'formal' side, i.e. the limitation to formal sources.

A first rationale is linked with the coercive function of the criminal law and general preventive purposes. Under the perspective of the intrinsic logic of the criminal rule, a clear and previous criminal provision is pivotal in order to comply with its main function: influencing the behaviour of the addressed through its imperative role.[2] This perspective leads to general preventive considerations. On condition of an improved and modern conception of general prevention, only a lawful imposition of a criminal command can build an individual's trust and carry out the awareness-building-function of criminal law.[3] According to the traditional rationale, Feuerbach's *psychologische Zwangstheorie* considered that the psychological determination of an addressee's will was possible only through a previously and clearly established norm. In this theory, this is a means to accomplish the deterrence function of criminal law. Such a general conception of general prevention, even in connection with legality, is no longer acceptable.[4]

[1] The first traces of the principle (prohibition of retroactivity in particular) date back to Roman Law and *ius commune*, H.L. SCHREIBER, *Gesetz und Richter*, Frankfurt a.M., 1976, p. 17 ff.
[2] P. NUVOLONE, *Il sistema del diritto penale*, II ed., Padova, 1982, p. 22 f. ('command' and 'safeguarding' function of the criminal rule), B. PETROCELLI, *Appunti sul principio di legalità*, in ID., *Saggi di diritto penale*, Napoli, 1965, p. 188. Petrocelli links logically the imposition of a penalty to the violation of a previously clearly established obligation to behave. The citizen complies with the criminal precept as long as it is clearly established. F. PALAZZO, *Legalità*, in S. CASSESE (eds.), *Dizionario di diritto pubblico*, Milano, 2006, p. 3373.
[3] B. SCHÜNEMANN, *Nulla poena sine lege?: rechtstheoretische und verfassungsrechtliche Implikationen der Rechtsgewinnung im Strafrecht*, Berlin, 1978, p. 11 f., C. ROXIN, *Strafrecht: Allgemeiner Teil*, I, München, 2006, p. 147.
[4] P.J.A. VON FEUERBACH, *Lehrbuch des gemeinen in Deutschland geltenden peinlichen Rechts*, Gießen, 1801, para. 20. Although Feuerbach is seen as one of the 'founding fathers' of the principle *nulla poena sine lege*, his thesis was influenced both by Enlightenment and Liberalism. The most important objective was the fight against judges' arbitrariness (*Willkür*). V. KREY, *Keine Strafe ohne Gesetz. Einführung in die Dogmengeschichte des Satzes "nullum crimen nulla poena sine lege"*, Berlin-New York, 1983, p. 19-20.

On the other hand, the principle *nullum crimen nulla poena sine lege*'s main function is connected to the safeguarding of individuals against arbitrary prosecution both under constitutional and international law perspective.[5]

Under this perspective, the principle of legality safeguards individual autonomy and liberty. This rationale has its roots in the Age of Enlightenment especially in the work of Cesare Beccaria. By the latter half of the 18th Century Beccaria had already identified the origins of the State's punitive power in the sum of the singles portions of liberty that citizens sacrificed for necessity (i.e. 'defend public liberty from the usurpation of individuals') and that should be restricted as little as possible.[6] Therefore, individual autonomy must be conceived of in a positive way, as the obligation for the State to rule all restrictions as clearly as possible and to predictably establish the required behavioural standards.[7] Personal self-mastery grounds both the government of individuals' behaviour and the possibility for individuals to regulate their conduct. In this respect, it is a direct consequence of human dignity, which builds a particularly important component of legality into the German constitutional framework.[8]

The individual liberty rationale is the basis for the elaboration of the principle as a human right. This aspect of the principle of legality represents its *non-historical* or

The expression *nulla poena sine lege* was introduced by Feuerbach, G. DELITALA, *Criteri direttivi del nuovo codice penale,* in *Riv. it. dir. pen*., 1935, p. 585.

[5] F. PALAZZO, *Legalità,* cit., p. 3373 and ID., *Il principio di determinatezza nel diritto penale*, Padova, 1979, p. 166, 170. Palazzo, with statements that are also valid in the more general context of the principle of legality, affirms the necessary protective function of the *lex certa* principle (*principio di determinatezza*) in order to avoid judges' arbitrariness and foster the principle of equality and to grant the necessary knowability of the law, preordained to the individual freedom. On the exclusively protective function of the principle of legality in the Italian Constitution see F. BRICOLA, *Legalità e crisi: l'art. 25, commi 2° e 3°, della Costituzione rivisitato alla fine degli anni '70*, in *La Questione Criminale*, 1981, p. 185,189; V. KREY, *Keine Strafe ohne Gesetz*, cit., p. 133, 135, 137.

[6] C. BECCARIA, *Dei delitti e delle pene*, F. VENTURI (ed.), Torino, 2007, p. 12. In German scholarship see V. KREY, *Keine Strafe ohne Gesetz*, cit., p. 14.

[7] H.L.A. HART, *Punishment and Responsibility: Essays in the Philosophy of Law*, Oxford, 1968, p. 44–47. In the Italian scholarship following the so-called '*indirizzo tecnico-giuridico*', Vincenzo Manzini underlined the importance of individual autonomy, legal certainty and fair warning in the affirmation of the legislative source (general and abstract statutes) as legitimate in criminal law. See G. FIANDACA, *Crisi della riserva di legge e disagio della democrazia rappresentativa nell'età del protagonismo giurisdizionale*, in *Criminalia*, 2011, p. 82.

[8] G. GRÜNWALD, *Bedeutung und Begründung des Satzes* nulla poena sine lege, in *ZStW*, 76, 1964, p. 1 after W. SAX, *Grundsätze der Strafrechtspflege*, in K.A. BETTERMAN, H.C. NIPPERDEY, U. SCHEUNER (eds.), *Die Grundrechte: Handbuch der Theorie und Praxis der Grundrechte*, Berlin, 1959, p. 998 f. Sax highlights the human dignity rationale and considers Art. 103 II GG as a consequence of the principle of culpability. See also W. KARGL, *Strafrecht. Einführung in die Grundlagen von Gesetz und Gesetzlichkeit*, Baden-Baden, 2019, p. 61 and 176, who considers the rationale of human dignity both in constitutional and philosophical perspective.

universal rationale. The principles of non-retroactivity and legal certainty (*lex certa* and the prohibition of analogy) derive from the basic requirement of individual autonomy.[9]

The protective function of the principle of legality can be further read in light of the democratic rationale. This aspect boosts the limitation of the sources legitimated to introduce a criminal provision. In this respect, the democratic dimension of the principle imposes that the most democratically representative institutions and organs in a legal order shall be the sources of production of the criminal law. In the classical continental law vision only statute law and parliamentary enactments in particular are issued through a process that guarantees the democratic principle, as it comes from an elected body. Only the institution that represents citizens in the most immediate way can properly create criminal norms and impose sanctions.[10] The logic behind this rationale is the Enlightenment idea of social contract between State and citizens: the latter give up a part of their liberty, but this liberty can be limited only by the organ that represent popular sovereignty.[11] Therefore, its 'qualified' author confers legitimacy to the criminal law, independently of its content.[12] Popular representation avoids arbitrariness by the judiciary or the executive, as the elected body should impose penalties only in light of the protection of concurring relevant interests.[13] The democratic rationale is also in accordance with the idea of a constitutional state in the 20th Century, as well as Kelsen's idea of democracy as a compromise between majority and minority. Only the widest consent ensures fundamental freedoms in criminal law and involves minorities in the deliberation of which behaviour should be criminalised.[14] This component of *nullum*

[9] 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*, Napoli, 2006, p. 51¸ C. GRANDI, *Riserva di legge e legalità penale europea*, Milano, 2010, p. 7 ff.
[10] C. ROXIN, *Strafrecht: Allgemeiner Teil*, cit., p. 146.
[11] G. GRÜNWALD, *Bedeutung und Begründung des Satzes* nulla poena sine lege, cit., p. 13-14., F. PALAZZO, *Legalità*, cit., p. 3375.
[12] P. BEAUVAIS, *Le principe de la légalité pénale dans le droit de l'Union européenne*, Ph.D. thesis, Université Paris X Nanterre, UFR, 2006, p. 131. Francesco Mazzacuva points out that the focus on the statutory source and the democratic rationale in continental law is also due to a compromise between substantial and formal conceptions of the rule of law. Parliament is the organ that should be able to link justice with legal certainty. FR. MAZZACUVA, *Le pene nascoste. Topografia delle sanzioni punitive e modulazione dello statuto garantistico*, Torino, 2017, p. 208.
[13] M. GALLO, *La legge penale (Appunti di diritto penale)*, Torino, 1967, p. 22 and ID. *Appunti di diritto penale. I. La legge penale*, Torino, 1999, p. 48 f., G. DELITALA, *Cesare Beccaria e il problema penale*, in *Riv. it. dir. proc. pen*., 1964, p. 968.
[14] G. FIANDACA, *Legalità penale e democrazia*, in *Quaderni fiorentini per la storia del pensiero giuridico moderno*, XXXVI, 2007, p. 1247 ff. The democratic principle helps to avoid the manipulation of formal legality by absolute power. The citizens' participation ensures the respect of a substantial safeguard of legality. P. CALAMANDREI, *Appunti sul concetto di legalità*, in ID., *Opere giuridiche*, III, Napoli, 1967, p. 93 ff.

crimen supports statutory reservation and it is classified as its *historical* rationale. The *historical* rationale is strictly connected with the legal order and the time where it applies and it is not universally recognised as a component of *nullum crimen*. The need for statutory reservation presupposes a determined number of legal sources that have to be hierarchically ordered. The possibility to choose the most appropriate legal source is clearly dependent on the concrete political circumstances of the legal system in question.[15]

In the German system, the democratic rationale is expressed by the so-called *Rechtsstaatlichkeit* (rule of law). Its legal basis is Art. 20 Abs. 3 GG, that includes the binding force of law and statutes on every state power. Therefore, all kinds of restrictions of citizens' rights must be carried out pursuant to a statute previously established by the people in its most representative organ.[16] However, more demanding requirements are set for legality in criminal law, due to its particularly intrusive nature. Therefore, Art. 103 Abs. 2 GG is seen as *lex specialis* in respect of Art. 20 Abs. 3 GG. [17]

The democratic rationale is strictly linked with the rationale of the separation of powers. In this perspective, the creation of law, and criminal law in particular, is excluded for the judiciary and the executive. These other powers should only apply the law.[18] This rationale is specially significant in civil law countries, even though some common law scholars have highlighted it in order to affirm the pre-eminence of statutory law, especially in the U.S..[19] This rationale should however be read jointly with the individual

[15] F. PALAZZO, *Legalità e determinatezza della legge penale*, cit., p. 51.
[16] V. KREY, *Studien zum Gesetzesvorbehalt im Strafrecht. Eine Einführung in die Problematik des Analogieverbots*, Berlin, 1977, p. 206 ff.
[17] D. BÖHM, *Strafrechtliche Gesetzlichkeit als Prinzip? Eine Untersuchung über das Spannungsverhältnis zwischen positivrechtlichen und erkenntnistheoretischen Grundlagen strafrechtlicher Gesetzlichkeit*, Frankfurt a.M., 2013, p. 31. W. KARGL, *Strafrecht. Einführung in die Grundlagen von Gesetz und Gesetzlichkeit*, cit., p. 58 ff.
[18] According to Montesquieu, the three state powers shall be governed by a system of checks and balances that avoids one power to prevail on the others. In particular, the limitation of the tasks of the judiciary to *bouche de la loi* was not only a consequence of the need to avoid arbitrariness, nor to the prevalence of the legislative, but of the more general aim of a balance among constitutional powers. C.L. DE MONTESQUIEU, *De l'esprit des lois*, 1748, Livre XI Chapitre VI, Paris, 1956. For German scholarship see, among others, the reference made by V. KREY, *Keine Strafe ohne Gesetz*, cit., p. 13 f. Piero Calamandrei explained the relationship between separation of powers and legality as a consequence of the different functions judiciary and legislative power have. The legislative has an objective and generally-oriented approach, while the judiciary has to focus on the peculiarities of the case. The separation of powers avoids contamination between these two perspectives in the creation or application of the law. The ultimate goal is legal certainty, as a concentration of all those functions on one power would result in arbitrariness. P. CALAMANDREI, *Appunti sul concetto di legalità*, cit., p. 67 f.
[19] See K. GALLANT, *The Principle of Legality in International and Comparative Criminal Law*, Cambridge, 2009, p. 26. For the importance of statutory law and the abolition of the judicial creation of penal rules, G.

autonomy and freedom through the rule of law, since separation of power alone could not justify all sub-principles of *nullum crimen*. In fact, while *lex certa*, *lex stricta* and *lex scripta* can be inferred from the separation of powers and the democratic principle, the principle of non-retroactivity should be derived from other rationales.[20]

With regards to the so-called *universal* component of *nullum crimen*, legality is identified with the general need for accessibility and knowability (or foreseeability) of the criminal law, as a consequence of the principle of individual autonomy. It refers to the general concept of legal certainty and security (*Rechtssicherheit*), ensuring the possibility to predict the consequences of the individual's behaviour.[21] It is debated among scholars whether in Beccaria's thought the need for knowability is a component of culpability or a crucial component of legality. Some scholars identify the core of the legality principle in Beccaria in democracy, protection from arbitrariness, and individual liberty, while considering 'knowability' only in the domain of culpability.[22] Conversely, other thinkers identify the essence of legality in Beccaria to reside in the possibility to be aware of the consequences of the individual's actions on a criminal level.[23]

German literature identifies another rationale of *nullum crimen* in *Vertrauensschutz* (legitimate expectations): subjective foreseeability and calculability of the law for the individual, who should be able to decide, before undertaking an action, whether to act or not on the basis of the (knowable) legal characterisation of his or her acts in light of the law in force.[24] The criticism is that this would reformulate objective safeguards into a subjective perspective and would not add supplementary protection.[25]

The principle of culpability is considered a rationale for the principle of legality, especially by German literature. It has often been described as a remedy for the too formal

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FLETCHER, *The Grammar of Criminal Law*, I, New York, 2007, p. 83. P.H. ROBINSON, *Fair Notice and Fair Adjudication: Two Kinds of Legality*, in *University of Pennsylvania Law Review*, 154, 2005, p. 337 ff.

[20] C. ROXIN, *Strafrecht: Allgemeiner Teil*, cit., p. 146 f.

[21] F. PALAZZO, *Legalità*, cit., p. 3376; V. KREY, *Keine Strafe ohne Gesetz*, cit., p. 132: Krey refers the foreseeability rationale, as a consequence of the rule of law (*Rechtsstaatlichkeit*): on the one side, the individual foreseeability of law for the citizen, on the other side the 'objective quality of the law'.

[22] A. CAVALIERE, *Radici e prospettive del principio di legalità. Per una critica del "diritto penale vivente" interno ed europeo*, in *Ind. Pen*., 2017, p. 657.

[23] A. CADOPPI, *Perchè il Cittadino possa "…esattamente calcolare gli inconvenienti di un misfatto". Attualità e limiti del pensiero di Beccaria in tema di legalità*, in *Ind. Pen*., 2015, p. 584.

[24] H.L. SCHREIBER, *Zur Zulässigkeit der rückwirkenden Verlängerung von Verjährungsfristen früher begangenen Delikten*, in *ZStW*, 1968, p. 350; ID., *Gesetz und Richter*, cit., p. 214; B. SCHÜNEMANN, *Nulla poena sine lege?*, cit., p. 16.

[25] B. SCHÜNEMANN, *Nulla poena sine lege?*, cit., p. 16.

definition of legality in the Enlightenment.[26] Moreover, a retroactive law is contrary to justice, as it will punish the offender without having established his or her culpable contribution.[27] Some scholars saw the *Schuldprinzip* as broadening the scope of the principle *nulla poena sine lege*. [28] The link between culpability principle and the principle of legality leads to the consideration of the recognisability (*Erkennbarkeit)* of the consequences of the conduct as a component of the *principle nulla poena sine lege*. Nevertheless, some would limit the *Erkennbarkeit* to the unlawfulness of the conduct but would consider it incorrect to extend it to the legal characterisation of the fact. Some scholars disagree and oppose that culpability refers to the prohibition (*Verbot*) and not to the criminal statutory provision, which would exclude the relevance in this context of the knowledge of the punishment.[29]

The so-called universal component of legality is destined to foster the 'human right' side of the principle against the *democratic* component, that reflects the overwhelming role played by human rights in respect of the parliamentary and representative democracy ideal of the 20th Century.[30]

2. The crisis of formal legality and the role of judge-made law in criminal law: the historical aspect of legality in crisis.

The so-called historical component of legality is facing a long-lasting and profound crisis, which is due to multiple causes. The crisis of the political and legal models of the past, the conclusion of the era of the legislator coming from the modern age and the crumbling of previous social uniformity have led to a relativization of the pivotal role of written law.[31] The new multi-faceted legal context faces the challenges of soft law sources, internationalisation, non-institutional actors and most of all the judge playing a

[26] W. SAX, *Grundsätze der Strafrechtspflege*, cit., p. 997; V. KREY, *Keine Strafe ohne Gesetz*, cit., p. 134.
[27] P. BOCKELMANN, *Niederschriften über die Sitzungen der Großen Strafrechtskommission*, III, Bonn, 1958, p. 288, See also H.L. SCHREIBER, *Gesetz und Richter*, cit., p. 209 ff.
[28] G. BOPP, *Die Entwicklung des Gesetzesbegriffes im Sinne des Grundrechtes „nulla poena, nullum crimen sine lege". Eine Untersuchung zu Artikel 103 Absatz 2 des Bonner Grundgesetz*, Freiburg i.B., 1966, p. 145.
[29] G. GRÜNWALD, *Bedeutung und Begründung des Satzes* nulla poena sine lege, cit., p. 11.
[30] F. PALAZZO, *Legalità fra* law in the books *e* law in action, in *Riv. trim. dir. pen. cont.*, 3, 2016, p. 7.
[31] A crisis of legality is a *topos* in legal literature. The misuse of legality during totalitarian regimes, especially in Germany, Italy and Russia, has been defined as a crisis of legality as well. P. CALAMANDREI, *Costruire la democrazia (premesse alla Costituente)*, in ID., *Opere giuridiche*, III, Napoli, 1967, p. 127 ff. Authoritative scholars define the contemporary age as an age of crisis of State-centred legalism, as opposed to the complexity of the flowing model of the post-modern age P. GROSSI, *Storicità* versus *prevedibilità: sui caratteri di un diritto* pos-moderno, in *Questione Giustizia*, 4, 2018, p. 22.

crucial role.[32] As it will be analysed in the following, the role of the judge has a particularly great impact on criminal law. Moreover, constitutionalism and later multilevel constitutionalism have placed consistent interpretation and fundamental rights at the centre of the legal discourse.[33]

This crisis is particularly evident in the inability of traditional *nullum crimen*, and statutory reservation in particular, to handle the problems arising from judicial interpretation in criminal law. Judicial interpretation and judicial law-making represent the most difficult challenges under the perspective of the sources of incrimination, of non-retroactivity and of legal certainty. In the following, the nature of the crisis will be described.

2.1. The crisis of statutory sources in criminal law.

Statutory reservation and the judge *bouche de la loi* have often been described as a myth.[34] These concepts derive from the ideals of the Enlightenment and the German concept of *Rechtsstaat*, which places written law at the centre of the system and considers general and abstract statutes the best obstacle to tyranny and absolutism.[35] Even at the end of the 19th Century there were scholars doubting the effective reach of the statutory reservation and the marginal role of the judge as described by the Enlightenment.[36] Especially after legality had been disregarded and misused during totalitarian regimes in the first half of the 20th Century, scholarship had to face the crisis of the dominant role of

[32] F. VIOLA, *Il* rule of law *e il pluralismo giuridico contemporaneo*, in M. VOGLIOTTI (ed.), *Il tramonto della modernità giuridica. Un percorso interdisciplinare*, Torino, 2008, p. 113 and M. VOGLIOTTI, *Introduzione*, *ibidem*, p. 12 ff.

[33] See *above*, Chapter 1, para. 3.

[34] G. FIANDACA, *Diritto penale giurisprudenziale e ruolo della Cassazione*, in E. DOLCINI, C.E. PALIERO (eds.), *Studi in onore di Giorgio Marinucci*, I, Milano, 2006, p. 240. On the role of mythology for the preservation of the modern legalistic paradigm see P. GROSSI, *Mitologie giuridiche della modernità*, Milano, 2001. The possibility to achieve a statutory system that regulates aspects of reality without leaving room for judicial creation see W. SAX, *Grundsätze der Strafrechtspflege*, cit., p. 997 f. In a different vein, legal certainty is a myth for Frank, who identifies it as an illusion of the still 'immature' human being. This psychological theory can difficultly be accepted. J. FRANK, *Law and the Modern Mind*, New York, 1930, p. 20 ff. On the crisis of legality, Ferrajoli believes the usual distance between *Sein* and *Sollen* has become pathological. In particular, contemporary criminal law faces a crisis vis-à-vis the new forms of criminality (mainly economic and political) and the obsolete tools of a too 'old' criminal law. L. FERRAJOLI, *Principia juris. Teoria del diritto e teoria della democrazia. 2. Teoria della democrazia*, Bari, 2007, p. 362 ff.

[35] G. FIANDACA, *Crisi della riserva di legge*, cit., p. 82.

[36] For an historical perspective see M. VOGLIOTTI, *Legalità*, in *Enc. Dir*., VI, Milano, 2013, p. 374 ff., According to Justice Holmes in common law, 'The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law', O.W. HOLMES, JR., *The Path of the Law*, in *Harvard Law Review*, 10, 1897, p. 460 f.. In Germany, Oskar Bülow equated *Richterrecht* with *Gesetzesrecht*, in O. BÜLOW, *Gesetz und Richteramt*, Leipzig, 1885, *passim*. See also A. BRUNIALTI, *La legge nello Stato moderno*, in ID. (ed.), *Biblioteca delle scienze politiche*, IV, Torino, 1888, CCIV. Karl Binding's criticism of *nullum crimen sine lege* had a great impact on German scholarship in 19th Century, that remained however contrary to his vision, K. BINDING, *Lehrbuch des Strafrechts*, Berlin, 1885, p. 19 ff.

written law.[37] Statutory reservation had to be considered only relatively absolute and multiple factors determined its failure.[38] Some scholars also find a major cause of the crisis of formal legality in criminal law in the rise of constitutions at the centre of the legal order, replacing statutory law.[39] Nevertheless, there are also contrary opinions that see a re-birth of legality in practice.[40]

Scholarship identified both endogenous and exogenous factors determining the crisis of the role of written law.[41] As far as endogenous factors are concerned, the erosion of the parliamentary prerogative in the production of criminal statutes has been twofold. On the one hand, the executive and administrative authorities gain an increasingly pivotal role in the integration of the criminal statute with subordinated sources.[42] On the other hand, parliamentary procedure succumbs to the executive power, which erodes parliamentary prerogatives by substituting the representative body in legislative activities.[43] Both situations involving the substitution of the executive to Parliaments and

[37] H.L. SCHREIBER, *Gesetz und Richter*, cit., p. 191 ff.

[38] M. VOGLIOTTI, *Legalità*, cit., p. 374. In respect of the German constitution, Schünemann underlines the usual infringements of legality in practice. In particular, he still considers non-retroactivity and the prohibition of customary law as crucial components, whereas *lex certa* and the prohibition of analogy are completely disregarded in practice. B. SCHÜNEMANN, *Nulla Poena sine lege?*, cit., p. 8-9. With regards to *lex certa* see T. ROTSCH, *Betrug durch Wegnahme – Der lange Abschied vom Bestimmtheitsgrundsatz*, in *ZJS*, 2008, p. 132 ff.

[39] The crisis of legality is, according to some, also due to the intervention of the constitutions after World War II. The failure of statutory law at the centre of the system during totalitarian regimes had shown its weakness. The Constitution, instead of ordinary law, became the fulcrum of the system. M. VOGLIOTTI, *Legalità*, cit., p. 376. In a wide perspective, authoritative scholars, despite their different orientations on the subject, place the principle-based method of the Constitution at the centre of the crisis of the legal definition in written law (*fattispecie*), N. IRTI, *La crisi della fattispecie*, in *Rivista di diritto processuale*, 2014, p. 41 and ID., *Un diritto incalcolabile*, Torino, 2016, p. 26 and P. GROSSI, *Storicità* versus *prevedibilità*, cit., p. 23.

[40] Roxin speaks about *lex certa*, but his remarks are potentially extensible to the role of statutory sources in *nullum crimen*. C. ROXIN, *Der Grundsatz der Gesetzesbestimmtheit im deutschen Strafrecht*, in E. HILGENDORF (ed.), *Das Gesetzlichkeitsprinzip im Strafrecht*, Tübingen, 2015, p. 118.

[41] C. GRANDI, *Riserva di legge e legalità penale europea*, cit., p. 24. According to Romano, the situation is due to the fact that statutory reservation is not necessarily implied in the principle of legality, M. ROMANO, *Complessità delle fonti e Sistema penale. Leggi regionali, ordinamento comunitario, Corte Costituzionale*, in *Riv. it. dir. proc. pen*., 2008, p. 538 f.

[42] V. MANES, *L'eterointegrazione della fattispecie penale mediante fonti subordinate. Tra riserva "politica" e specificazione "tecnica"*, in *Riv. it. dir. proc. pen*. 2010, p. 84 ff. especially in comparative perspective. See G. FORNASARI, A. MENGHINI, *Percorsi europei di diritto penale*, Torino, 2012, p. 5 ff., F. BRICOLA, *Legalità e crisi: l'art. 25, commi 2° e 3°, della Costituzione rivisitato alla fine degli anni '70*, cit., p. 191-203. On the multiple factors influencing the decline of legality, especially with regards to executive power, T. PADOVANI, Jus non scriptum *e crisi della legalità nel diritto penale*, Napoli, 2014, p. 14 f. See also L. KUHLEN, *Das Gesetzlichkeitsprinzip in der deutschen Praxis*, in E. HILGENDORF (ed.), *Das Gesetzlichkeitsprinzip im Strafrecht*, Tübingen, 2015, p. 50 ff.

[43] In Italy, even if the practice of introducing criminal provisions with legislative procedures that involve the Government (*decreti legge* and *decreti legislativi*) is accepted, some scholars still oppose the idea. G. MARINUCCI, E. DOLCINI, *Note sul metodo della codificazione penale*, in *Riv. it. dir. proc. pen*., 1992, p. 385 ff. Even if admitting a substantive statutory reservation, the characteristics of these two acts are debated by F. PALAZZO, *Legge penale*, in *Dig. disc. pen*., VII, 1993, p. 346 f. The Constitutional Court has recently

the integration of executive sources in statutes could lead, in extreme cases, to a change of paradigm from a liberal State to a totalitarian State. In this second case, the power of majority would eclipse the debate amongst all political forces that represent the complexity of the society, thereby ensuring equitable legislation.[44]

Moreover, the central role of the representative bodies in the introduction of criminal provisions has been diminished by other factors influencing the decline of representative democracy. Lack of debate, abdication in favour of Governments, crisis of traditional political parties, and populistic use of criminal law are amongst the most destructive forces. In addition, extensive media coverage concerning criminal justice and the simplification of legislative procedures, dismantling the debate in the parliamentary chambers have aggravated an already instable framework.[45] While it is impossible to report all causes, this crisis has undoubtedly involved all aspects of the principle of legality related to statutory law.

As far as exogenous factors are concerned, the influence both of the European Union and the Council of Europe have contributed to increase pressure on the traditional paradigm of legality. This phenomenon has taken place at the level of the principles, in particular through judicial dialogue among European courts. The interpretive obligations descending from EU Law has directly affected the interpretation in Criminal Law.[46] Furthermore, positive obligations arising from the European Convention on Human Rights on the one side, and the criminal law competence of the European Union on the

stressed the importance of the parliamentary discussion and mediation even in issuing *decreti legge*. Corte Cost., 25 February 2014, no. 32, para. 4 ff.

[44] S. MANACORDA, *Le fonti del diritto penale nella costruzione di un pluralismo ordinato. A proposito dell'opera di Mireille Delmas-Marty*, in M. DELMAS-MARTY, *Studi giuridici comparati e internazionalizzazione del diritto*, Torino, 2004, p. 34. Mireille Delmas-Marty refers to a particularly loose version of statutory reservation in the French legal order. A classical critique on the possibility to introduce contraventions through regulation, instead of statute (Art. 34 and 37 of the French Constitution of 1958) can be found in F. BRICOLA, *Limiti di operatività della regola «nullum crimen, nulla poena, sine lege» nel diritto penale francese*, in *Ind. Pen*., 1967, p. 22 ff. On the criminal policy of totalitarian states see M. DELMAS-MARTY, *Les grands systèmes de politique criminelle*, Paris, 1992, p. 391 ff.

[45] G. FIANDACA, *Crisi della riserva di legge*, cit., p. 85 f., O. DI GIOVINE, *Diritti insaziabili e giurisprudenza nel sistema penale*, in *Riv. it. dir. proc. pen*., 2011, p. 1478, C. GRANDI, *Riserva di legge e legalità penale europea*, cit., p. 25 ff., recently A. LANZI, *Il caos punitivo e la nomofilachia: una medicina o un inutile accanimento terapeutico?*, in *Ind. Pen*., 2018, p. 292.

[46] Romano expressed restrained positive expectations on the influence of EU judge-made law on the Italian legal order. Nevertheless, he saw this phenomenon as an erosion of the strict legality principle. M. ROMANO, *Complessità delle fonti e Sistema penale*, cit. p. 550-551.

other have apparently transferred part of criminal policy choices and sources to other actors.[47]

In the end, another major cause of the crisis of legality comes down to logical studies that questioned the application of law only as a perfect syllogism,[48] as well as to theories acknowledging the intrinsic ambiguity in language and the constitutive role of interpretation.[49] These considerations could lead, in their extreme consequences, to see the substantial analogy inside every interpretation as a justification to circumvent the limitations imposed by the wording of the statute.[50]

2.2. The role of judge-made law in criminal law.

As mentioned above, the perspective of an integration between domestic and European legality has raised several questions on the sources of the criminal law, especially in civil law countries. A definition of law including both statute and judge-made law, even though it must not be perceived in a prescriptive sense, has undoubtedly enhanced the debate on the interaction between judge-made law and *nullum crimen*. Moreover, the application of the principles of non-retroactivity and legal certainty to judge-made law has highlighted possible insufficiencies of the traditional version of the principle of legality.[51]

[47] F. VIGANÒ, *Obblighi convenzionali di tutela penale?*, in V. MANES, V. ZAGREBELSKY (eds.), *La Convenzione europea dei diritti dell'uomo nell'ordinamento penale italiano*, Milano, 2011, p. 253. The debate on the respect of the democratic principle, especially by EU criminal provisions, has been almost unanimously solved with the new legislative procedure introduced by the Treaty of Lisbon. G. FORNASARI, *Riserva di legge e fonti comunitarie. Spunti per una riflessione*, in D. FONDAROLI (ed.), *Principi costituzionali in materia penale e fonti sovranazionali*, Padova, 2008, p. 17 ff., C. GRANDI, *Riserva di legge e legalità penale europea*, cit., p. 49 ff., G. GRASSO, L. PICOTTI, R. SICURELLA (eds.), *L'evoluzione del diritto penale nei settori d'interesse europeo alla luce del Trattato di Lisbona*, Milano, 2011, *passim*, C. SOTIS, *Il diritto senza codice. Uno studio sul sistema penale europeo*, Milano, 2007, p. 42 ff.

[48] For example, Engisch saw the application of law as an open concretisation procedure. In Engisch's model, the orientation to statutory law remains stable, although the interdependence between *Obersatz* (major premise) and fact is continuous, the concrete rule in the case is determined through a relationship with the facts and needs the intervention of a judge. K. ENGISCH, *Logische Studien zur Gesetzesanwendung*, Heidelberg, 1960, p. 14 ff. and 26 f. ID., *Die Idee der Konkretisierung in Recht und Rechtswissenschaft unserer Zeit*, Heidelberg, 1968, p. 239 ff.

[49] See *above*, Chapter 2, para. 6.2.

[50] W. HASSEMER, *Tatbestand und Typus. Untersuchungen zur Strafrechtlichen Ermeneutik*, Köln, 1968, p. 118 ff. translated in W. HASSEMER, *Fattispecie e tipo. Indagini sull'ermeneutica penalistica*, (translated by G. Carlizzi), Napoli, 2007, p. 188 ff. Hassemer defines interpretation as an 'analogical process' that looks for a *tertium comparationis* between *Tatbestand* and fact. This third element is the 'sense' or the 'synthesis'. His findings are inspired by A. KAUFMANN, *Analogie und "Natur der Sache": zugleich ein Beitrag zur Lehre vom Typus*, Karlsruhe, 1965, p. 44 ff.

[51] See *above*, Chapter 2, para. 6.2. and 6.3.

The substantial creative role of the judge has been studied extensively in the last twenty-five years and has made some affirm that the present is the 'judges' era',[52] where judicial criminal law (*diritto penale giurisprudenziale*) is a common expression in literature.[53]

Attention to the contribution of the judge to criminal law and its relationship with the principle of legality is interpreted according to different paradigms, suggesting different solutions. Several orientations are represented in literature and there are several differing approaches to understanding them. A first approach is to deal with the problem at the level of the sources, both under the perspective of the theory of law and the constitutional perspective; a second way is to approach the problem in light of theories of interpretation. The debate has been harsh in the last decades and culminated in particularly open positions towards a new role of judge-made law. Moreover, the role of the judge in criminal law and the difficulties in managing the problem with traditional tools create side-effects and secondary solutions which are of interest to explore.

2.2.1. The perspective of sources of law and the theories of interpretation.

A first interpretation of the role of the judge in criminal law is related to the Theory of Law and the definition of sources. As mentioned above, the acknowledgement of the role of judicial interpretation in the definition of the norm, as a broader concept than the 'disposition', has also found its way into the criminal law debate.[54] Nevertheless, the identification of judge-made law as a source of cognition of law or as a source of production has significant consequences on the principle of legality.

Some see the judge as a proper creator of law, who does not only apply statutes but inevitably also contributes to the life of the norm. Judge-made law is considered through comparative analysis as the main expression of the power of the judge to actually modify

[52] G. FIANDACA, *Crisi della riserva di legge*, cit., p. 92 f. In similar terms also M. DELMAS MARTY, *Mondializzazione e ascesa al potere dei giudici*, in M. VOGLIOTTI (ed.), *Il tramonto della modernità giuridica*, Torino, 2008, p. 128 ff. See H.L. SCHREIBER, *Gesetz und Richter*, cit., p. 220 ff.
[53] M. DONINI, *Il diritto penale giurisprudenziale*, in *Riv. trim. dir. pen. cont.*, 3, 2016, p. 13 ff.
[54] See *above*, Chapter 2, para. 6.2.

and create law.[55] While the crucial role of the judges is never denied, its role as a proper source of law creation is debated.[56]

A first orientation in literature seems to consider the judge undoubtedly essential in the determination of the meaning of the norm in its application. However, its role is not a proper creation of law in the perspective of constitutional sources.[57] The norm is namely the result of judicial interpretation, guided by teleological or criminal policy evaluations, as well as the creation of a series of pre-determined cases for dispositions that lack precision.[58]

According to Donini, judge-made law is both a substantial and formal source of the criminal law. It is a source in a formal sense when it creates new law with general scope and has a binding force. It is a substantial source every time it is not binding and is therefore source only under a sociological perspective.[59]

Other authors still consider the criminal rule a result of judicial construction but give this acknowledgement a different value. This theory is based on the acknowledgement of a peculiar architecture in criminal law, where the criminal rule (definition of the relevant

[55] A. CADOPPI, *Il valore del precedente nel diritto penale. Uno studio sulla dimensione* in action *della legalità*, Torino, 2014, p. 107 ff., G. FIANDACA, *Il diritto penale tra legge e giudice*, Padova, 2002, *passim*, S. RIONDATO, *Retroattività del mutamento giurisprudenziale sfavorevole, tra legalità e ragionevolezza*, in U. VINCENTI (ed.), *Diritto e clinica per l'analisi e la decisione del caso*, Padova, 2000, p. 239 ff., E. GRANDE, *La sentenza n. 364/88 della Corte Costituzionale e l'esperienza di common law: alcuni possibili significati di una pronuncia in tema di errore di diritto*, in *Foro it*., I, 1990, p. 415 f. See also F. WIEACKER, *Gesetz und Richterkunst: zum Problem der außergesetzlichen Rechtsordnung*, Karlsruhe, 1958, p. 5

[56] V. MANES, *Il giudice nel labirinto. Profili delle intersezioni tra diritto penale e fonti sovranazionali*, Roma, 2012, p. 22 ff.; H.L. SCHREIBER, *Gesetz und Richter*, cit., p. 224; H. SCHRÖDER, *Gesetz und Richter im Strafrecht*, Kiel, 1953, p. 29.

[57] V. VALENTINI, *Continua la navigazione a vista. Europeismo giudiziario ed europeizzazione della legalità penale continentale: incoerenze, velleità, occasioni, in Dir. pen. cont*., 20.01.2015, p. 3, D. PULITANÒ, *Paradossi della legalità. Fra Strasburgo, ermeneutica e riserva di legge*, in *Riv. trim. dir. pen. cont*., 2, 2015, p. 50 f. Seems to be open to a cooperation of the sources, but not a dismantling of statutory legality V. KREY, *Zur Problematik richterlicher Rechtfortbildung contra legem*, in *JZ*, 1978, p. 431.

[58] In this perspective see W. HASSEMER, *Tatbestand und Typus*, cit., 1968, p. 121 f. For example, until the amendments on Art. 416 *ter* c.p., the criminal liability for an exchange money-votes between mafia-organisation members and politicians was only foreseen in case money was involved. To solve the case of an exchange of votes against influence/favours, judges had applied the combined dispositions of Art. 110 c.p. and Art. 416 *bis* c.p., including this series of cases in the external participation in the offence (*concorso esterno*). Only in 2014, L. 14 April 2014, no. 62 introduced the concept of '*altra utilità*', which could include favours, in the wording of Art. 416 *ter* c.p.. V. MAIELLO, *Una "judge made law" all'italiana: l'affermata punibilità, ex art. 110 e 416 bis c.p., del candidato alle elezioni che promette favori alla mafia in cambio di voti*, in ID., *Il concorso esterno tra indeterminatezza legislativa e tipizzazione giurisprudenziale*, Torino, 2014, p. 4 ff.

[59] M. DONINI, *Il diritto penale giurisprudenziale*, cit., p. 18.

conduct and penalty) only lives in trial. Therefore, under this theoretical perspective, and outside a constitutional discourse, case-law is a source of production of the criminal law.[60]

Under the perspective of theories of interpretation, the constitutive role of interpretation in the definition of the criminal offence has become an issue.[61] The problem has been identified in the relationship between the statute as source and judicial interpretation as a *legal formant* that contributes to the definition of the rule.[62] Moreover, the influence of legal realism, together with other non-dogmatic orientations, has focused the attention on the law in action, and in particular on judicial law-making.[63] The further influence of *Methodenlehre* in Germany has had a great impact on the debate on the role of interpretation.[64] In particular, traditional formalist/cognitivist theories of interpretation have been dismantled by antiformalist/sceptical theories, that see the meaning of the law as a pure creation of the judge. In the criminal law debate, most scholars seem oriented towards a third solution, that mediates between the cognitivist Enlightenment model and the judge as pure creator of law. The most diffused position seems to acknowledge a

[60] In the German legal doctrine, Geiger considered the *Rechtsnorm* acquiring its substantial value only in its application: T. GEIGER, *Vorstudien zu einer Soziologie des Rechts*, Neuwied-Berlin, 1970, p. 259 and Esser in civil law affirmed the prevalence of *Richterrecht* on statutory law, in J. ESSER, *Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts: rechtsvergleichende Beiträge zur Rechtsquellen- und Interpretationslehre*, Tübingen, 1956, p. 300. Among Italian scholars, Trapani specifies that his theory on the criminal rule (*norma*) is both descriptive *and* prescriptive. According to him, the Constitution acknowledges case-law as a source of production of law in Art. 13 Cost. This provision gives the judge the exclusive power to interpret statutory sources coercively. Moreover, the constitutive role of case-law is a result of the achievements of the general theory of law and the definition of legal norms. The norm is the outcome of the creative operation of the interpreter with regards to the wording of the statute. M. TRAPANI, *Creazione giudiziale della norma penale e suo controllo politico*, in *Archivio Penale*, 1, 2017, p. 14-17, 20 ff., 25 ff.

[61] Di Giovine prefers to consider the issue under the perspective of the theory of argumentation and interpretation, rather than focusing on the theory of sources. To justify her approach she refers to an observation by Ruggeri, who focuses on norms, rather than formal sources. To be able to do that, the only possible perspective is the theory of argumentation. O. DI GIOVINE, *Come la legalità europea sta riscrivendo quella nazionale. Dal primato delle leggi a quello dell'interpretazione*, in *Riv. trim. dir. pen. cont*., 1, 2013, p. 159, A. RUGGERI, *La Corte Costituzionale "equilibrista" tra continuità e innovazione, sul filo dei rapporti con la Corte EDU*, in *Dir. pubb. comp. europ*., 2011, p. 1763.

[62] According to Rodolfo Sacco's theory, legal formants are those elements that contribute to the living law, such as statutory law, judge-made law and the formulation of scholars. The rule is then the result of an interpretation that consequently takes into account the relevant elements among the different formants. R. SACCO, *Legal Formants: A Dynamic Approach to Comparative Law*, in *American Journal of Comparative Law*, 39, 1991, p. 22 f.

[63] Sacco refers to historical, rational and sociological methods. R. SACCO, *Legal Formants*, cit., p. 26.

[64] K. LARENZ, *Methodenlehre der Rechtswissenschaft*, Berlin-Heidelberg, 1995, p. 206. Moreover, Esser refers to the concept of 'law in action' in his analysis and considers law its interpretation, J. ESSER, *Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts*, cit., p. 14 and 253 respectively.

minimum linguistic meaning of the written provision, that shall guide the interpreter, who nevertheless has the greatest room to maneuver in the interpretation.[65]

2.2.2. An increasing debate.

The analysis of the role of judicial law making has been increasing during the last few decades. In Italy numerous contributions have enriched the debate. The most updated scholarship has focused the debate on the role of judges and judicial interpretation. Significantly, the debate in the last decades of the 20th Century, at least in Italy, was still focused on the crisis of the formal and absolute definition of statutory reservation.[66] The crucial role of judge-made law and interpretation was part of the later debate that scrutinised the status of the law in action.[67]

Particular attention attributed to the topic by Italian scholarship is due to context-related factors. The major cause is the crisis of statutory legality mentioned above, which has showed its particularly harsh side in the Italian legal order. In addition, the increasingly autonomous and crucial importance of judicial interpretation has had a particularly great impact in the Italian legal order.[68] At the end of the 1980s scholarship began to deal with the problem of the role of judge-made law in criminal law and the function of the highest courts in determining the exact interpretation.[69]

The majority in literature acknowledges the problem of the judge's intervention in criminal law but upholds the statutory nature of criminal law and the traditional

[65] G. FIANDACA, *Diritto penale giurisprudenziale e ruolo della Cassazione*, cit., p. 239 ff.; F. PALAZZO, *Testo, contesto e sistema nell'interpretazione penalistica*, in E. DOLCINI, C.E. PALIERO (eds.), *Studi in onore di Giorgio Marinucci*, I, Milano, 2006, p. 525.

[66] A paradigmatic example is the above-mentioned work of Franco Bricola, F. BRICOLA, *Legalità e crisi: l'art. 25, commi 2° e 3°, della Costituzione rivisitato alla fine degli anni '70*, cit.

[67] While the previous debate was focused on the written norm in its determinacy, the later debate 'discovered' the importance of the law in action. In the first sense, among others, F. PALAZZO, *Il principio di determinatezza nel diritto penale*, cit.; F. BRICOLA, *La discrezionalità nel diritto penale*, Milano, 1965; in the second M. DONINI, *Il volto attuale dell'illecito penale. La democrazia penale tra differenziazione e sussidiarietà*, Milano, 2004.

[68] It has been observed that the role of the judge in criminal law has represented an emergency in Italy for historical-sociological reasons. In the 1970s part of the judiciary turned to activism and the use of criminal law to specific criminal policy purposes, and in the following decades achieved a primary role, often in opposition to politics. M. CATENACCI, *"Legalità" e "tipicità del reato" nello Statuto della Corte Penale Internazionale*, Milano, 2003, p. 128 and the bibliographical references.

[69] A significant example is the round table published in the Italian review *Il Foro Italiano* in 1988, on '*La Cassazione penale: problem di funzionamento e ruolo*' (The Court of Cassation: functional and role problems). In particular the role of judge-made law was investigated by N. MAZZACUVA, *Diritto penale giurisprudenziale e ruolo della Cassazione: spunti problematici*, in *Foro it.*, 1988, V, p. 491 ff. and G. CONTENTO, *Principio di legalità e diritto penale giurisprudenziale*, *ivi*, p. 484 ff. Contento considered the creative role of judges as a fact, although he highlighted its possible contradictions with a formal conception of legality. In particular, the author underlined the lack of remedies for an additive judicial interpretation.

interpretation of the principle of legality as a non-negotiable basis.[70] Conversely, part of scholarship acknowledges the constitutive role of judicial interpretation and remains open to possible new solutions.[71]

On the one hand, Di Giovine adopts an antiformalist approach. She considers the force of interpretation to be the new functional core of the legal order, which cannot be analysed according to a formalist (sources-based) paradigm.[72] In her understanding, refusing to deal with interpretation due to formal arguments determines the radicalisation of the positions both in literature and case-law.[73] However, her goal is not to undermine the sources' architecture under a constitutional perspective, but rather to unveil the inconsistencies of the traditional paradigms.[74] In this perspective, her conclusions, which suggest focusing *nullum crimen* on the knowability of the *norm,* are consistent with the following orientations.[75]

These observations of the law in action however lead others to adopt more open positions on the possibility to extend the protection of legality against interpretive abuses as well. The role of the judge in legal practice therefore highlights insufficiencies of the

[70] Pulitanò strongly affirms the formal nature of legality and the statute as the only source of the criminal law. Judicial interpretation interplays with legal certainty, but its role is on a different level than that of the sources. D. PULITANÒ, *Crisi della legalità e confronto con la giurisprudenza, in Riv. it. dir. proc. pen*., 2015, p. 36. Padovani acknowledges the role of judicial interpretation. In his understanding, constitutionally consistent interpretation is often a means to expand the boundaries of the criminal law. T. PADOVANI, Jus non scriptum *e crisi della legalità nel diritto penale*, cit., p. 16 f. See also M. GALLO, *Le fonti rivisitate. Appunti di diritto penale*, Torino, 2016, *passim*; N. MAZZACUVA, *A proposito della 'interpretazione creativa' in materia penale: nuova garanzia o rinnovata violazione dei principi fondamentali?,* in E. DOLCINI, C.E. PALIERO (eds.), *Studi in onore di Giorgio Marinucci*, I, Milano, 2006, p. 437 ff. , C. ROXIN, *Der Grundsatz der Gesetzesbestimmtheit*, cit., p. 129.

[71] Among others, A. MANNA, *Il principio di legalità*, in *Archivio penale*, 3, 2017, p. 2. G. FIANDACA, *Prima lezione di diritto penale*, Bari, 2017, p. 114 ff.

[72] Di Giovine motivates the rejection for a source-based discourse on legality on three grounds i) despite the pre-eminence of Art. 25 Cost. over Art. 7 ECHR, European courts will probably impose their interpretation anyway; ii) the differences between European and domestic legality shall not be overestimated, as the probable result will be integration; iii) democracy inspires European legality as well, but differently. O. DI GIOVINE, *Il ruolo costitutivo della giurisprudenza (con particolare riguardo al precedente europeo)*, in C.E. PALIERO, S. MOCCIA, G.A. DE FRANCESCO ET AL. (eds.), *La crisi della legalità. Il «sistema vivente» delle fonti penali*, Napoli, 2016, p. 155 ff.

[73] Focusing the problem only in the formal perspective of the precision and definiteness of the statute and thus not dealing with interpretation would jeopardise even more the possibility to manage the real contradictions. O. DI GIOVINE, *L'interpretazione nel diritto penale tra creatività e vincolo alla legge*, Milano, 2006, p. 21 ff.

[74] Although often criticised for her anti-formalist approach, Di Giovine seems not to reject constitutional principles, but rather to tackle the problem on a different level. She explicitly affirms the validity of a formal model of legality, although admitting the limits of a strong model of *tassatività*. Nevertheless, she opts for the introduction of interpretation (and of consistent orientations in particular) under the umbrella of legality. O. DI GIOVINE, *L'interpretazione nel diritto penale tra creatività e vincolo alla legge*, cit., p. 289 ff.

[75] O. DI GIOVINE, *L'interpretazione nel diritto penale tra creatività e vincolo alla legge*, cit., p. 296.

traditional paradigms of legality.[76] Thus, the law in action should guide to a new broader conception of legality.[77]

2.2.3. Side-effects.

The debate on the judge's role in criminal law creates side-effects that nevertheless play a role in the main framework. First, the aforementioned crisis of *nullum crimen* and its focus on statutory law has contributed to making the debate urgent. As the recessive role of the legislator and its limits became evident, the judges often covered the gaps with interpretation.

Second, the procedural aspect of legality must be taken into consideration. The need for legal certainty is in fact already part of the debate at procedural level. The mechanisms foreseen for the judiciary to ensure consistent interpretations and uniformity in law are in charge of a crucial function related to legality. The highest jurisdictions and criminal procedure codes, together with the rules ruling appeals, take into account the general need for legal certainty in the doctrines emerging from case-law.

Lastly, the pivotal role of the judge has become undeniable in handling the consequences of the ECtHR and CJEU case-law. As the European judges' jurisprudence is a source of law in those supranational legal orders, the use of European judge-made law in domestic law faces the risk of becoming a simple cherry-picking operation. As scholars explain, the fallacy of cherry-picking consists in selecting only those cases favourable to a certain interpretation, while ignoring cases that might present opposite orientations that would in turn undermine the argumentation. In addition, the interpreter further falls into the trap of dis-analogy, thus de-contextualising a specific precedent and applying it in a universal perspective.[78]

[76] To unveil the constitutive role of the judge does not mean to deny *nullum crimen*, but rather to better control the relationship between written law and interpretation, in light of the limits of statutory reservation. Recently, G. FIANDACA, *Prima lezione di diritto penale*, cit., p. 127 ff.

[77] A. CADOPPI, *Il valore del precedente nel diritto penale*, cit., p. 67 ff., 118 ff. In a partially different perspective, Viganò focuses on the interaction between European and domestic legality, but inevitably copes with the regulation of judicial law, F. VIGANÒ, *Il principio di prevedibilità della decisione giudiziale in materia penale*, in C.E. PALIERO, S. MOCCIA, G.A. DE FRANCESCO ET AL. (eds.), *La crisi della legalità. Il «sistema vivente» delle fonti penali*, Napoli, 2016, p. 213 ff. and, among other works dedicated to the topic, ID., *Il nullum crimen conteso: legalità 'costituzionale' vs. legalità 'convenzionale'?*, in *Dir. pen. cont.*, 05.04.2017.

[78] V. MANES, *Il giudice nel labirinto*, cit., p. 28 ff.

2.3. Problems arising from the law in action.

Even though the validity of the traditional 'historical' rationale of legality is still generally accepted, the real questions arise in the law in action. The correct solution to the problem of judge-made law in the domain of legality often does not find a satisfactory response in the traditional sub-principles, which are often misused to achieve *in malam partem* results.[79] Although sometimes a stricter and more effective application of the traditional principles could solve the problem, it is often logically and normatively impossible to 'translate' the problem in terms of statutory law, since it is only concentrated at interpretive level, leaving the statutory provision untouched.

The observation of the law in action shall not mean abandoning the advantages of a formal version of legality. As some pointed out, the ontological substance of the legal order must not play a role at deontological level. That is to say, the concrete articulation of the legal order shall not influence the principles and, most of all, these two levels must not be confused.[80] Most scholars still consider statutory reservation and the role of written law crucial in the criminal system, although often suggesting improvements to deal with judicial interpretation.[81] Nevertheless, minority opinions point out that the historical contingency of statutory reservation could also clear the way for European integration, without diminishing the level of protection of legality.[82] Although the historical side of legality is inevitably dependent on the conditions at the considered time, its validity as a guideline for the criminal system remains untouched.

Recent developments in criminal law have taken place at the interpretive level, whereas written law remained untouched, for example in Italy *dolus eventualis*, negligence and culpability; and the offence of *Nötigung* in Germany. Denying the essential role of judge made law in these cases would be unacceptable according to part of the scholarship. The problem can be classified both as a violation of statutory reservation and a lack of legal certainty, identifying the solution in the need for a more detailed and reasoned legislation. [83]

[79] O. DI GIOVINE, *Il ruolo costitutivo della giurisprudenza*, cit., p. 159 f. Di Giovine underlines the misuse of formal legality to ensure unacceptable judicial creations, such as in the extension of the confiscation to institutions in Cass. pen., SS.UU., 30.01.2014 (dep. 05.03.2014).
[80] A. CAVALIERE, *Radici e prospettive del principio di legalità*, cit., p. 654 f.
[81] Among several others see L. STORTONI, *Il difficile equilibrio tra supremazia della legge e prevedibilità della giurisprudenza*, in A. CADOPPI (ed.), *Cassazione e legalità penale*, Roma, 2017, p. 125.
[82] C. GRANDI, *Riserva di legge e legalità penale europea*, cit., p. 71 f.
[83] G. FIANDACA, *Crisi della riserva di legge*, cit., p. 94.

It is important to distinguish between physiological and pathological use of interpretation. Physiological interpretation is extensive but remains within the limits of the literal meaning or within the boundaries of a teleological-systematic interpretation.[84] In opposition, pathological uses of interpretation are illicit interpretations that create new law. Scholars have suggested using foreseeability as criterion to distinguish them: a pathological and therefore illicit interpretation is non-foreseeable, since it is not reasonable, i.e. not grounded on teleological systematic arguments, and is not based on precedents.[85]

Within the category of pathological interpretations, judge-made law is relevant in the genesis of new criminal offences or in new groups of cases, in their synchronic and diachronic development, as it will be demonstrated in the following.

2.3.1. The creation of the criminal rule and judge-made law.

Judicial law is relevant in the phase of definition of a criminal offence. Apart from the judicial concretisation of written provisions, case-law is crucial because it directly influences individual autonomy in case of conflicting interpretations and, in an early phase, in the first application of a statutory offence. Moreover, the judge properly creates law when he or she applies a statutory provision by analogy.

Taking these results to their extreme consequences, authoritative scholarship has identified a significant common path in the genesis of some Scottish and Italian criminal offences. The first were the result of proper judicial creation, whereas the latter were judge-made criminal offences subsequently transposed into statutory dispositions.[86] According to Cadoppi, the creation of some criminal offences by the High Court of Justiciary in Scotland, as a result of its declaratory power, could be compared with the equivalent Italian offences, that were firstly developed by extensive interpretation and then codified in the 1930 criminal code.[87]

[84] The traditional reading is to consider the literal formulation, while new studies opt for the limit of teleological and systematic interpretation. D. PIRRONE, *Nullum crimen sine iure*, Torino, 2019, p. 345.
[85] D. PIRRONE, *Nullum crimen sine iure*, cit., p. 343 ff.
[86] A. CADOPPI, *Il valore del precedente nel diritto penale*, cit., p. 84 ff.
[87] Apart from the two further cited examples, Cadoppi refers to the extension of rape to the hypothesis of a substitution, despite lacking elements of violence or constriction in the case of *William Fraser* (1847) and the correspondent extensive interpretation of the offence of rape while the previous criminal code (Code Zanardelli) was in force, which determined the introduction of a specific criminal offence in the 1930 criminal code (art. 519 co. 2 n. 4, today art. 609 *bis* c.p.). Moreover, also the cases concerning the extension of the offence of attempting to pervert the course of justice in respect of false information given to police officers (instead of the judge) and the one of *favoreggiamento personale* were similar. In the case of *Dalton*

For example, the case of stealing an object with the intention of using it and later giving it back had a similar development in Scotland and in Italy. The distinction of the offence of theft from clandestine taking and using or other offences of temporary deprivation of property was made by the High Court of Justiciary in 1926 in the case of *Strathern v. Seaforth*. Although the offence of theft was based on the *mens rea* of permanently depriving the victim, the High Court extended its scope of application to this case. This orientation was further confirmed by the introduction of a specific statutory offence punishing the temporary theft of a vehicle (Art. 28 of the Road Traffic Act, 1930).[88] Similarly, the Italian *Corte di Cassazione* overruled its previous case-law admitting *furto d'uso.* Before the introduction of the 1930 criminal code, there was a judicial conflict on the admissibility of this particular case of theft under the scope of application of the general offence of theft (*furto*). Cadoppi refers to the sudden overruling of the *Corte di Cassazione,* extending criminal liability to this case, raising several criticism from scholars. It was regulated in statutory law in Art. 626 of the 1930 criminal code, with the intention of mitigating differences within judge-made laws.[89]

Another useful and more recent example is the liability of the person supplying drugs to another who in turn dies as a consequence of the consumption of those drugs. A link of causation between drug supplying and the death of the person was dubious in order to convict the supplier for culpable homicide. The High Court of Justiciary applied its declaratory power, by admitting the liability for culpable homicide in this new case in *Lord Advocate Ref. 1994,* due to culpable and reckless conduct.[90] Causing death by supplying drugs was also a significant development in the Italian case-law, which extended the scope of causation in order to include this peculiar case. The only limit to this judicial extension was the foreseeability of the event (death).[91]

Another example of creation of judge-made law, even if imprecisely so, is by use of analogy. Analogy is often hidden through the concept of *Typus* (i.e., different from the

v. H.M. Advocate (1951), JC 76, the High Court of Justiciary admitted it, while the Italian *Corte di Cassazione* extended the *favoreggiamento personale* at the limits of analogy, in the impossibility to apply the offence of *falsa testimonianza* (limited to the judicial authority as addressee, Art. 372 c.p.). A. CADOPPI, *Il valore del precedente nel diritto penale*, cit., p. 87 and 94 f.

[88] Strathern v. Seaforth, JC 100; 1926 SLT 445. Art. 28 of the Road Traffic Acto of 1930 punished the offence of joy-riding. A. CADOPPI, *Il valore del precedente nel diritto penale*, cit., p. 86.

[89] A. CADOPPI, *Il valore del precedente nel diritto penale*, cit., p. 92.

[90] Lord Advocate's Reference (No 1 of 1994) 1996 JC 76. A. CADOPPI, *Il valore del precedente nel diritto penale*, cit., p. 88 f.

[91] The applied provision is usually art. 586 c.p. A. CADOPPI, *Il valore del precedente nel diritto penale*, cit., p. 97.

tipicità, typical statutory formulation of the Italian legal tradition). In the German conception, *Typus*, as opposed to *Tatbestand*, should be the essence of the offence underlying its statutory formulation and enabling analogy. In the understanding of Arthur Kaufmann, *Typus* is the essence that lies in a middle ground between fact and concept.[92]

An analogical reasoning gave rise to a legislative amendment of a criminal offence in the case of *corruzione per la funzione* (bribery for the function).[93] The original version of the statute (Art. 318 c.p.) simply provided liability for those who bribe a public officer with regards to specific acts related to his office. The case-law systematically extended the offence to bribery relating to the overall function of the public officer, i.e. giving money to a public officer to be systematically favoured in the exercise of his functions. According to literature, this was a typical case of analogy.[94] The creation of a new *fattispecie* that went beyond the limits of the statutory provision was confirmed by the legislative reform of 2012 (L. 6 November 2012, no. 190). The new version of Art. 318 c.p. foresees bribery for the exercise of the public officer's functions or powers.

2.3.2. Synchronic interpretive conflicts and the specification of the criminal offence and penalty through interpretation.

Conflicting interpretations can, as demonstrated above, co-exist synchronically, or succeed one another diachronically. Here the perspective of analogy is disregarded to focus on conflicting interpretations resulting in an uncertain legal framework for the individual, going beyond the scope of application of the prohibition of analogy.

It is now useful to define the concepts of synchronic and diachronic conflict in order to carry out the following analysis. While synchrony and diachrony are used to describe the temporal relationships between objects, in linguistic and legal contexts this concept has been transposed into criminal law and has now become the standard to look at possible temporal relation between norms.[95] Synchrony describes the relationship between two co-existing norms in the same legal order. A specific moment in time is considered in order

[92] According to Kaufmann, interpretation is analogical in its essence. An attentive reading nevertheless shows that Kaufmann did not deny the importance of *nullum crimen*, which he considered still at the basis of the rule of law. A. KAUFMANN, *Analogie und "Natur der Sache"*, cit., p. 8 and 29 ff.
[93] Donini refers to this example in the context of analogy in M. DONINI, *Il diritto penale giurisprudenziale*, cit. p. 23.
[94] M. DONINI, *Il diritto penale giurisprudenziale*, cit. p. 23.
[95] M. GAMBARDELLA, Lex mitior *e giustizia penale*, Torino, 2013, p. 19 refers to Riccardo Guastini, who describes the legal order as a static group of norms, if observed synchronically, or a dynamic succession of norms, if observed diachronically. R. GUASTINI, *Le fonti del diritto*, Milano, 2010, p. 433.

to establish which norms are valid in that temporal framework. i.e. in the temporal framework t_1, norms N_1 and N_2 were valid. Diachrony is the relationship between two (or more) norms that succeed one another over time. In the legal order, one norm substitutes the other. i.e. in the temporal framework t_1-t_2 norm N_1 is valid, while in the framework t_2-t_3 norm N_2 is.[96]

In the Italian legal order, the judicial construction and the conflicting interpretations on the admissibility of *external participation (concorso esterno)* in *associazione mafiosa* (participation in a mafia-organisation), art. 416 *bis* c.p., which gave rise to the ECtHR case *Contrada v. Italy*, present a clear example for a synchronic conflict. This interpretive construction consists in the joint reading of the disposition disciplining participation (Art. 110 c.p.) and the criminal offence provided for by Art. 416 *bis* c.p., whose basic form consists in the participation in a mafia-organisation. The dogmatic and interpretive orientations debating whether it was possible to apply the general provision on participation (*concorso eventuale nel reato*) to a criminal offence that already foresaw participation as the relevant conduct for the realisation of the offence were conflicting during the 1980s. This debate gave rise to a synchronic conflict within the *Corte di Cassazione*, especially between 1987 and 1993. Some sections of the Court sometimes applied the new *concorso esterno* to all conducts that could not be included into the proper participation in the sense of art. 416 *bis* c.p. (as the offenders were not part of the organisation) but nevertheless contributed to the existence and proliferation of the criminal organisation. In other cases, the Sections considered similar conducts to be proper participation in the organisation pursuant to Art. 416 *bis* c.p.[97] Others qualified similar facts pursuant to different (and less serious) criminal offences. The synchronic conflict was then resolved by the *Sezioni Unite* in 1994, which admitted this new interpretation. However, the definition of this hybrid construction was not definitive. Later on, the *Sezioni Unite* further defined and developed the definition of external

[96] M. GAMBARDELLA, Lex mitior *e giustizia penale*, cit., p. 20.
[97] Cass. pen., 21 March 1989, Agostani; Cass. pen., 24 June 1992, Alfano e altri; Cass. pen., 13 June 1987, Altivalle; Cass. pen., 4 February 1988, Barbella e altri; Cass. pen., 23 November 1992, Altomonte; Cass. pen., 18 May 1994 Clementi; Cass. pen., 27 June 1994, Mattina; Cass. pen., 18 June 1993, Turiano; Cass. pen., 31 August 1993, Di Corrado; Cass. pen., 6 June 1994, Bargi; Cass. pen., 1 September 1994, Graci; Cass. pen., 24 June 1992, Alfano e altri.

participation, extending its boundaries and judicially changing the definition of the relevant offence.[98]

The role of case law often becomes crucial in defining a criminal offence. Particularly broad formulations often give rise to judicial interpretation that goes beyond the specification of the wording of the statute and creates new groups of cases to be subsumed under the statutory offence, even if often within the boundaries of the possible meaning of the terms of the provision. In the German context, an example is the development of the offence of *Untreue (embezzlement and abuse of trust)*, section 266 StGB. Mayer pointed out that outside the traditional cases of *Untreue*, nobody could foresee the exact scope of application of such an offence.[99] The wording of the provision is very broad and has given rise to several judicial constructions: 'Whosoever abuses the power accorded him by statute, by commission of a public authority or legal transaction to dispose of assets of another or to make binding agreements for another, or violates his duty to safeguard the property interests of another incumbent upon him by reason of statute, commission of a public authority, legal transaction or fiduciary relationship, and thereby causes damage to the person, whose property interests he was responsible for, shall be liable to imprisonment not exceeding five years or a fine'. In particular, the concept of 'damage' has been extended to a possible risk of pecuniary loss, which is not included in the wording of the provision. However, case law has built a group of cases around speculative business that could, with some difficulty, be considered to be included in the original disposition.[100] This scenario has led several scholars to doubt the constitutional

[98] Cass. pen., SS. UU. 5 October 1994, Demitry, in *Cass. pen.*, 1995, p. 423 ff.; Cass. pen., SS. UU. 30 October 2002, Carnevale, in *Cass. pen*., 2003, p. 3276; Cass. pen., SS. UU., 12 July 2005, Mannino, in *Cass. pen*., 2005, p. 3732. Scholars were similarly divided: in favour G. SPAGNOLO, *L'associazione di tipo mafioso*, Padova, 1984 e 1993, p. 124, C. F. GROSSO, *La contiguità alla mafia tra partecipazione, concorso in associazione mafiosa ed irrilevanza penale*, in *Riv. it. dir. proc. pen*., 1993, p. 1185; against, G. INSOLERA, *Il concorso esterno nei delitti associativi: la ragione di Stato e gli inganni della dogmatica*, in *Foro it*., II, 1995, p. 422, A. MANNA, *L'ammissibilità di un c.d. concorso "esterno" nei reati associativi, tra esigenze di politica criminale e principio di legalità*, in *Riv. it. dir. proc. pen*., 1994, p. 1189, F. SIRACUSANO, *Il concorso esterno e le fattispecie associative*, in *Cass. pen*., 1993, p. 1874, G. FIANDACA, *La contiguità mafiosa degli imprenditori tra rilevanza penale e stereotipo criminale*, in *Foro it*., II, 1991, p. 472.

[99] H. MAYER, *Die Untreue, Materialien zur Strafrechtsreform, Bd. 1, Gutachten der Strafrechtslehrer*, Bonn, 1954, p. 337. In the same vein, Sax reproaches that the indefinite offence in question has caused legal uncertainty in its application, which depends on 'the luck of an intuition' rather than on definite legal parameters. W. SAX, *Überlegungen zum Treubruchtatbestand des § 266 StGB*, in *JZ*, 1977, p. 663.

[100] A. DIERLAMM, *§ 266*, in W. JOECKS, K. MIEBACH (eds.), *Münchener Kommentar zum StGB*, 2019, p. 752, para. 228 ff.

legitimacy of section 266 StGB, and especially of the extensive judicial interpretation enshrined by it, as will be discussed in the following.[101]

2.3.3. Diachronic interpretive conflicts.

Diachronic interpretive conflicts can have the same effects of the introduction of a new detrimental, incriminating provision. The overruling *in malam partem* of a previously established orientation, which results in the incrimination of a conduct that was not punished before, does not find limitations in traditional legality paradigms. The statute remains untouched and, therefore, not giving rise to any issue under the perspective of non-retroactivity. Nonetheless, the new detrimental and sudden change in interpretation has the effects of an *ex post facto* criminal law on the individual.

Scholars prompted a distinction within diachronic conflicts according to the applied interpretive criteria: i) analogical overruling, i.e. interpretation that fills a gap in legislation; ii) evolutive overruling, i.e. extensive interpretation the expands the scope of application of the offence; iii) innovative overruling, i.e. necessary overruling to remedy a previous incorrect interpretive orientation.[102]

Take for example the interpretive orientations on the threshold of criminal relevance in the offence of 'driving while under the influence of drink or drugs' in Germany. The relevant provision of section 316 StGB, punished with maximum one-year imprisonment or a fine, provides for criminal liability with regards to '[w]hosoever drives a vehicle in traffic (Sections 315 to 315d) although due to consumption of alcoholic beverages or other intoxicants he is not in a condition to drive the vehicle safely'. The minimum alcohol concentration to be considered not in the condition to drive safely has been fixed by case-law of German courts in a specific amount of alcohol level (*Permille)*. Although the first concentration was fixed at 1.5‰ (permille), the German *Bundesgerischthof* has lowered the required alcohol level in two main stages (1.3‰ in 1967 and 1.1‰ in 1990), thus lowering the threshold of criminal liability retroactively through judicial interpretation. Therefore, the material time of the offence was relevant in relation to the interpretive diachronic conflict.

[101] Saliger claims the violation of legal certainty and prohibition of analogy, F. SALIGER, *Wider die Ausweitung des Untreutatbestandes*, in *ZStW*, 2000, p. 563. Kargl suggests a violation of the *lex certa* principle in W. KARGL, *Die Mißbrauchskonzeption der Untreue (§ 266 StGB)*, in *ZStW*, 2001, p. 589. See *infra*, section III, para. 3.2.

[102] D. PIRRONE, *Nullum crimen sine iure*, cit., p. 355 ff. Analogical overruling seems to be the traditional analogical interpretation.

Leaving aside the debate on the nature of judge made law, these examples clarify that the issue at stake goes beyond the statutory provision. The judge in these cases rather dialogues with previous or contemporary interpretive orientations. In this perspective, the abstract formulation is not disregarded but it is necessarily integrated by considering the norm as it has been previously interpreted. As a consequence, the subprinciples to the principle of legality must be considered in respect of the *regula juris* enshrining from judicial interpretation, in order not to exclude serious threats to legality from scrutiny.[103] Therefore, appropriate instruments to deal with legality in action must be examined on different levels.[104]

2.4. Tipicità *and nullum crimen.*

The principle of legality has been analysed, until now, in the domain of abstract principles and fundamental rights. Although the crucial role of judicial interpretation has been demonstrated, the necessary statutory definition of criminal offence and penalties is still a milestone in civil law countries. In some cases, the pathological side of judge-made law can emerge and *de facto* create new categories within the scope of a criminal offence and consider 'typical', in a retroactive way, a conduct that wasn't considered 'typical' before. A conduct can be considered 'typical' (*tipico*, *tatbestandsmäßig*) when it can be subsumed under the umbrella of the definition of a criminal offence, as defined by the respective statutory provision. 'Typical' is therefore what is defined through statutory *typoi*.[105] Moreover, uncertain interpretations of the boundaries between 'typical' and 'atypical' (i.e. correspondent or non-correspondent to the statutory definition) could result in chaotic case-law. In addition, a particularly authoritative interpretation could intervene to determine the limits of what is a 'typical' form of conduct and be retroactively applied to all previous cases. In all those cases, the real issue at stake, under a dogmatic point of view, is the uncertain or suddenly overruled definition of what is the *typical offence to be subsumed under the respective statutory provision*. It is now useful to recall, as it would be impossible to analyse it in depth in this context, the role and definition of *tipicità*.

[103] R. BARTOLI, *Legalità europea* versus *legalità nazionale? Un tentativo di possibile integrazione*, in C.E. PALIERO, S. MOCCIA, G.A. DE FRANCESCO ET AL. (eds.), *La crisi della legalità. Il «sistema vivente» delle fonti penali*, Napoli, 2016, p. 287-288.
[104] F. PALAZZO, *Legalità fra* law in the books *e* law in action, cit., p. 7.
[105] A. GARGANI, *Dal* corpus delicti *al* Tatbestand. *Le origini della tipicità penale*, Milano, 1997, p. 15 and F. MANTOVANI, *Diritto penale*, Padova, 2017, p. 13 f. These concepts are among the most controversial in German and Italian criminal law. The only purpose of this section is to introduce relevant concepts with regards to *nullum crimen*, trying to isolate the most suitable definitions amongst the several contributions to the subject matter.

Tipicità is a twofold category in criminal law dogmatic. On the one side, *tipicità* is an attribute of the abstract *Tatbestand/fattispecie* (i.e. the legal definition of the elements of an offence). It consists in the pre-determination of the cases when a fact can be qualified as a criminal offence, its subjective and objective elements and penalties.[106] On the other side, it consists in the correspondence between behaviour and *Tatbestand (Tatbestandmäßigkeit)*.[107] Both abstract and concrete *tipicità* refer to objective and subjective elements of the offence, as a result of a long theoretical discussion both in Germany and Italy.[108]

For the principle of legality in general, and *lex certa* in particular, *tipicità* plays a pivotal role, as only a precise and determinate law can ensure the possibility to define what is 'typical' (i.e. is included in the legal definition of the offence). When the judge intervenes in the *typisation* process in a more decisive way, his or her intervention could substitute the legislative in the definition of new 'typical' conducts, or in the interaction between general categories and single offences. The dogmatic category of *tipicità* is lacking in the ECHR, but the effects of the ECHR judgments in the national legal order also affect the dogmatic aspect of criminal law, which must be taken into consideration.

Tipicità has a further bilateral relationship with *nullum crimen* in domestic legal orders.[109] In criminal law in particular, *tipicità* and *nullum crimen* are necessarily linked, as criminal offences and penalties must be 'typical' and *provided for by law*.[110] First of all, legality can only be safeguarded if a group of 'typical' conducts can be subsumed into the statutory definition of an offence. Moreover, the control over the assessment of correspondence between the legal definition and the concrete case is the only possibility

[106] G. VASSALLI, *Tipicità*, in *Enc. Dir*., XLIV, Torino, 1992, p. 536 f. Emilio Betti first applied the term *fattispecie* in Italy, E. BETTI, *Diritto Romano*, Padova, 1935, p. 4 and ID., *Teoria generale del negozio giuridico*, 2 ed., Napoli, 1994, p. 8.

[107] In German theory, the correspondence of the fact with the abstract *Tatbestand* is an element of the offence. See E. BELING, *Die Lehre vom Verbrechen*, Tübingen, 1906, p. 21. *Fattispecie* can further be intended as the objective element of the offence in Italy, while in Germany it encompasses both objective and subjective elements: see further G. FORNASARI, *I principi del diritto penale tedesco*, Padova, 1993, p. 87 ff.

[108] G. VASSALLI, *Tipicità*, cit., p. 537 f.

[109] According to Roxin, the ultimate criminal policy aim of *Tatbestand* is the effectiveness of *nullum crimen sine lege*. Therefore, statutory criminal offences are already the result of criminal policy evaluation by the legislator; dogmatic shall be guided by nullum crimen principle in its systematisation of the choices of the legislator. C. ROXIN, *Kriminalpolitik und Strafrechtssystem*, Berlin-New York, 1973. In Italian ID., *Politica criminale e sistema del diritto penale*, trans. by S. MOCCIA, Napoli, 1986, p. 40.

[110] G. VASSALLI, *Tipicità*, cit., p. 536 f. Only in criminal law *tipicità* is strictly linked with statutory provisions. In other branches, such as civil law, *tipicità* can be also reached through judge-made law or custom. See also A. GARGANI, *Dal* corpus delicti *al* Tatbestand, cit. p. 15 ff., who underlines the specificities of *tipicità* in criminal law.

to enforce *nullum crimen* into the legal order. Some have defined *tipicità* as the 'dogmatic' side of *nullum crimen,* since they are autonomous categories but necessarily interconnected.[111] *Tipicità* safeguards legal certainty and therefore its scope of application involves the relevant sub-principles in *nullum crimen,* which aim at delimiting what is criminal from what is not.[112]

In the Italian legal order the principle of *tipicità* is considered entailed in Art. 25 co. 2 Cost. Ronco underlines that the formal safeguard of the principle of legality would be void without the substantial and procedural-related safeguard of *tipicità,* which builds a bridge between formality and the concrete level of the trial. Moreover, also the wording of the constitutional provision seems to include the principle, since the reference to the term 'fact' is also, in one of its definitions, related to the concept of *Tatbestand*.[113]

Considering the concept of *fattispecie* in its multiple meanings, the relevant definition in a study on legality is one linked with the constitutional framework of legality. It consists in all elements that have an influence on conviction and penalty.[114] To sum up, the relevant *fattispecie* for our purposes is the one that describes the precept and makes the consequences of criminal law foreseeable. Ronco underlined that the reaction to the need of legal certainty and rationalism in criminal law after the Enlightenment ground the idea of *tipicità* (instead of a case-based system) as 'predictability' of the consequences of the legal provision while maintaining the role of statutory law.[115]

[111] M. CATENACCI, *"Legalità" e "tipicità del reato"*, cit., p. 110.
[112] A. GARGANI, *Dal* corpus delicti *al* Tatbestand, cit. p. 31-32, who explains that the Italian principles of *determinatezza* and *tassatività* correspond to a static and dynamic side of *tipicità*.
[113] M. RONCO, *Il principio di tipicità della fattispecie penale nell'ordinamento vigente*, Torino, 1979, p. 107 ff., 112 f.
[114] This definition does not include circumstances, which do not fall under the relevant elements as far as legality is concerned in Italy. On the contrary, circumstances are included in *Garantietatbestand* in German literature. R. ALAGNA, *Tipicità e riformulazione del reato*, Bologna, 2007, p. 231. On *Garantietatbestand* see, for the extensive literature reference: J. EISELE, *Die Regelbeispielsmethode im Strafrecht*, Tübingen, 2004, p. 114.
[115] M. RONCO, *Il principio di tipicità della fattispecie penale nell'ordinamento vigente*, cit., p. 89 f., who highlights that certainty is neverteheless a relative safeguard.

II. ITALY

The solutions to the interaction between the traditional principle of legality and judicial interpretation will be analysed both in the Italian and German legal orders. The analysis will be carried out in light of the domestic dogmatic mechanisms and, with regards to the Italian legal system, in light of the role of European principles in the direction of a new controversial approach to legality.

In the following, the problem of the foreseeability of judicial interpretation in the dynamic of the Italian legal order will be analysed. The possible solutions *de lege lata* will be presented, and divided into 'subjective', at the level of culpability, and 'objective' solutions, at the level of legality/sources. Moreover, the possible role of the *Corte di Cassazione* in fostering case-law stability will be analysed.

1. Subjective solutions under culpability: mistake of law.

Foreseeability has a subjective side that fosters those characteristics to distinguish a certain category of subjects. Under this perspective, it has been pointed out that the assessment of the ECtHR often takes into consideration elements referring to the domain of culpability or *mens rea*.[116] Another criticism was the absence of a proper acknowledgement of the principle of culpability in the case- law of the ECtHR. The only exceptions are represented by cases against Italy, where the necessary mental link between criminal offence and individual is deemed necessary.[117]

It has been already briefly noted that the Strasbourg jurisprudence resembles in some components the Italian Constitutional Court's on the unavoidable mistake of law. This is the starting point to analyse a possible solution to conflicting case-law under the domain of the mistake of law. Several voices in literature opt for the inevitable ignorance of the law as a possible way out of the *impasse*, while others voice their concerns about it.

It is now useful to analyse how and to what extent the mistake of law could be a suitable means to deal with legality and case-law-related legal uncertainty in the criminal law, especially because it represents the most natural solution *de lege lata*.

[116] See *above*, Chapter 3, para. 4.7.1.
[117] See *above*, Chapter 3, para. 4.6.

1.1. The mistake of law in Italy and the inevitable ignorance of the criminal law.

In the Italian legal order, until European case-law intervened, inconsistent or conflicting interpretations played a role in the discipline of mistake of law and the so-called inevitable ignorance of the law. Art. 5 c.p. affirms the principle *ignorantia legis non excusat*, that excludes the possibility to invoke the ignorance of the law as excuse.[118] The absolute validity of this principle was harshly criticised and gave origin to the Constitutional Court's judgment no. 364/1988, which re-wrote art. 5 c.p., by declaring it partially unconstitutional and following the example of other legal systems. [119]

1.1.1. The background of art. 5 c.p.

The previous impossibility to exclude criminal liability in cases of inevitable ignorance was due to the particularly strong position occupied by art. 5 c.p. in the criminal code: it is situated under the general discipline of criminal statutes (*Titolo I - Della legge penale*), and therefore conceived as distinguished from culpability.[120] More than a presumption, art. 5 c.p. affirmed the binding nature of criminal statutes.[121] The Constitutional Court had further confirmed the validity of the principle, declaring the inadmissibility of a question on the constitutional legitimacy of art. 5 c.p.[122]

[118] '*Art. 5 – Ignoranza della legge penale. Nessuno può invocare a propria scusa l'ignoranza della legge penale*'.

[119] I.e. the German system, see *infra*, section III, para. 1. The Swiss, Portuguese and Spanish systems as well.
The proposal of the Corpus Juris in 2000 for the regulation of the mistake of law, in Art. 11(2), considered mistake of law the one on the prohibition and the one on interpretation as well, thus explicitly referring to this second aspect. It excludes liability if it is unavoidable. The standard is that of a '*homme prudent et raisonnable*'. If the mistake is avoidable, the sentence will be mitigated. It is inspired by Spanish and German criminal codes, as well as Italian doctrine and jurisprudence. M. DELMAS-MARTY (ed.), *Corpus Juris der strafrechtlichen Regelungenzum Schutz der finanziellen Interessen der Europäischen Union*, Köln-Berlin-Bonn-München, 1998, p. 128 f. '*L'erreur sur la prohibition, ou sur l'interprétation de la loi, exclut la responsabilité au cas d'une erreur inévitable par un homme prudent et raisonnable. Si l'erreur était évitable, la sanction sera diminuée, ce qui exclut alors la possibilité pour le juge de prononcer le maximum de la peine encourue*'.

[120] F. PALAZZO, *Ignoranza della legge penale*, in *Dig. disc. pen.*, VI, Torino, 1992, p. 120 f.

[121] D. PULITANÒ, *Ignoranza della legge (dir. pen.)*, in *Enc. dir*., XX, Milano, p. 25 (now updated in *Enc. dir*., 1997). Some scholars approved the content of art. 5 c.p., following a more conservative view, i.e. V. MANZINI, *Trattato di diritto penale italiano*, II, Torino, 1981, p. 31. Some saw the roots of this particularly strict approach in Francesco Carrara's thought, according to whom the principle safeguarded the criminal law itself, avoiding to subordinate it to the individual's will: F. PALAZZO, *Colpevolezza e ignoranza legis nel pensiero di Francesco Carrara*, in *Ind. Pen*., 1988, p. 507 ff. and G. FIANDACA, *Principio di colpevolezza ed ignoranza scusabile della legge penale: "prima lettura" della Sentenza n. 364/88*, in *Foro it*., I, 1988, p. 1386 f. For an historical perspective on the justifications of art. 5 c.p. see F. PALAZZO, *L'errore sulla legge extrapenale*, Milano, 1974, p. 113-115.

[122] Corte Cost., 25 March 1975, no. 74.

After some limited attempts to undermine the absolute reach of this provision through the criterion of *bona fides* in the domain of *contravvenzioni*[123] and several criticism from scholars,[124] the Constitutional Court finally admitted a new interpretation of art. 5 c.p., which was in line with the *Schuldtheorie* accepted in most European Criminal codes.[125] As it will be explained *infra* in the analysis of the German system, the final prevalence of the *Schuldtheorie* over the *Vorsatztheorie* saw the inevitable ignorance of the law as a ground excluding culpability (*Schuld*).[126]

In light of the *Schuldtheorie*, the possibility to know the law is to be considered an additional autonomous requirement to fulfil the dogmatic category of culpability. Therefore, a non-excusable mistake of law does not stand in the way of a conviction supported by intent as a mental element.[127] On the other hand, *Vorsatztheorie* considers both *error facti* and *ignorantia legis* as only excluding intent.[128] On this basis, the dogmatic considerations have been connected with a constitutionally-oriented reading of the criminal law system. Only the possibility to be aware of the unlawfulness of the conduct determines a reasonable basis of a culpable criminal liability, which can be considered consistent with the Constitution. Consistency with the Constitution means that the requirements of culpability shall comply with the principle of personal criminal liability (Art. 27 co. 1 Cost.) and the re-educational function of penalty (Art. 27 co. 3 Cost.). The avoidable ignorance therefore does not exclude culpability if there is the

[123] Italian courts excluded criminal liability only for *contravvenzioni*, less serious criminal offences, in cases where the ignorance of the unlawful nature of the act or omission was determined by *bona fides*. In particular, the requirement was the existence of 'positive facts' of a public authority (an opinion, a precedent etc.) that could mislead the individual. The difficult identification of 'positive facts' of a public authority and the limited scope of application (only *contravvenzioni*) caused criticism. M. BONAFEDE, *Delitti e contravvenzioni; elemento soggettivo nelle contravvenzioni; buona fede ed errore in tema di reati contravvenzionali*, in F. BRICOLA, V. ZAGREBELSKY (eds.), *Giurisprudenza sistematica di diritto penale. Parte generale*, I, Torino, 1984, p. 337 ff. The unreasonable limitation to *contravvenzioni* was criticised by scholars, who opted for an extension to the more serious *delitti*. F. BRICOLA, *Teoria generale del reato*, in *Novissimo Digesto Italiano*, XIV, Torino, 1974, p. 57 ff. Before judgement 364/88, some first instance courts had accepted this extension. See G. FORNASARI, *Buona fede e delitti: limiti normativi dell'art. 5 c.p. e criteri di concretizzazione*, in *Riv. it. dir. proc. pen*., 1987, p. 449 ff.

[124] Among others, the criticism by Domenico Pulitanò, under the perspective of constitutional principles, has become classic in the literature on the mistake of law. D. PULITANÒ, *L'errore di diritto nella teoria del reato*, Milano, 1976, p. 123 ff. See also M. SPASARI, *Diritto penale e costituzione*, Milano, 1966, p. 84.

[125] F. PALAZZO, *Ignoranza della legge penale*, cit. p. 119.

[126] See *infra*, section III, para. 1.

[127] In the event of an 'avoidable' ignorance, legal systems have different consequences in terms of penalty. Some criminal codes, such as the German one, foresee the possibility to mitigate the penalty, while others leave it untouched. F. PALAZZO, *Ignoranza della legge penale*, cit., p. 120.

[128] H.H. JESCHECK, T. WEIGEND, *Lehrbuch des Strafrechts, Allgemeiner Teil*, Berlin, 1996, p. 453 ff.

concrete possibility to know the law. Conversely, if ignorance of the law is inevitable, the respective mistake will be excused.[129]

1.1.2. The Constitutional Court judgement no. 364/1988.

The Constitutional Court in judgement no. 364/88 declared art. 5 c.p. partly unconstitutional, where it did not consider the hypothesis of an inevitable ignorance of the law as a possible ground for giving relevance to such a mistake of law. With this historic judgement, the Constitutional Court created a new *scusante*,[130] excluding culpability, by interpreting art. 5 c.p. in light of the principle of culpability enshrined in Art. 27 co. 1 Cost. and the re-educational function of penalty enshrined in Art. 27 co. 3 Cost.[131]

The judgement starts with a reconstruction of the historical, dogmatic, methodological and ideological conditions that determined art. 5 c.p.. The Court already shows the direction it is going to follow by criticising the traditional ideologies founding the theory of the binging nature of criminal law. Hence, the Court refuses to separate compliance with the law from its knowledge; it rejects the idea of the legal order being based on a 'common sense' that excludes a requirement such as the knowledge of the law; and it criticises the Enlightenment idea of the supreme value of the law, whose validity cannot be put into question by an inquiry on the concrete knowledge of the law.[132] Methodologically, the Constitutional Court opts for examining not only the subjective situation of the individual at the material time of the offence but also the possible causes of the ignorance of the law.[133] The constitutional judges observe that the principle

[129] D. PULITANÒ, *L'errore di diritto nella teoria del reato*, cit., p. 426, F. BRICOLA, *Teoria generale del reato*, cit., p. 51 ff. and F. PALAZZO, Ignorantia legis: *vecchi limiti ed orizzonti nuovi della colpevolezza*, in *Riv. it. dir. proc. pen*., 1988, p. 920 ff. in particular p. 931 ff.

[130] Corte Cost., 23-24 March 1988, no. 364. Art. 5 c.p. was declared unconstitutional in the part where it did not exclude an inevitable ignorance from the non-excusability of the *ignorantia legis* ('[…] *dichiara l'illegittimità costituzionale dell'art. 5 c.p. nella parte in cui non esclude dall'inescusabilità dell'ignoranza della legge penale l'ignoranza inevitabile*'). Commentaries by D. PULITANÒ, *Una sentenza storica che restaura il principio di colpevolezza*, in *Riv. it. dir. proc. pen.*, 1988, p. 686 ff. e G. FIANDACA, *Principio di colpevolezza ed ignoranza scusabile della legge penale*, cit., p. 1385 ff.

[131] The Constitutional Court substantially accepted the position expressed by Tullio Padovani, who affirmed the necessity of a declaration of partial unconstitutionality of art. 5 c.p.. This provision excluded the relevance of an inevitable ignorance of the law, which could not be interpreted as prescribing the 'possibility to know the law'. T. PADOVANI, *Spunti giurisprudenziali sulla coscienza dell'illiceità come elemento del dolo*, in *Cass. Pen*. 1977, p. 584. Padovani argued Pulitanò's opinion, that saw a possible consistent interpretation with art. 27 co. 1 Cost. D. PULITANÒ, *L'errore di diritto nella teoria del reato*, cit., p. 427. For a complete analysis of the debate see G. FIANDACA, *Principio di colpevolezza ed ignoranza scusabile della legge penale*, cit., p. 1387.

[132] Corte Cost., 23-24 March 1988, no. 364, para. 3.

[133] Corte Cost., 23-24 March 1988, no. 364, para. 4.

provided for by art. 5 c.p. is unacceptable both under an historical and dogmatic point of view. In particular, there have always been exceptions to the absolute validity of the principle in the past.[134]

More importantly, the Court underlines the constitutional validity of the principle of culpability and highlights its focus on personal liberty and autonomy. It was unreasonable to try and affirm the constitutional coverage of the principle of culpability as an essential relationship between subject and fact, if the system is incapable of ensuring a relationship between subject and fact *vis-à-vis* its unlawfulness.[135] The Court distinguishes between culpability as a principle (enshrined in Art. 27 co. 1 Cost.) and culpability as a dogmatic category. Culpability appears therefore as a guiding principle for the whole criminal system. The constitutional judges build a link between culpability and legality, affirming that the principle of legality would be pointless if conducts carried out in a non-culpable ignorance of the criminal law were punished.[136]

The following analysis of the principle of culpability enables the constitutional judges to argue against the absolute validity of art. 5 c.p.. Art. 27 co. 1 Cost. is read not only in light of the *travaux préparatoires* to the Constitution but also through a systematic reading of Art. 27 co. 1 and 3 Cost., together with Art. 2, 3 25 co. 2 and 73 co. 3 Cost. The Court articulates its reasoning on two main points.

Firstly, the re-educational function of penalty implies that the personal criminal liability of Art. 27 co. 1 Cost. has to require a minimum coefficient of negligence in order for the penalty to have a true 'constitutional' effect.[137] In the words of the Court, its interpretation of the principle of culpability does not follow a particular normative theory of culpability. Rather, it is an autonomous interpretation of constitutional principles that happens to have the same results as the normative theory.[138] Therefore, a minimum

[134] Corte Cost., 23-24 March 1988, no. 364, para. 5-6.
[135] Corte Cost., 23-24 March 1988, no. 364, para. 7.
[136] Corte Cost., 23-24 March 1988, no. 364, para. 8. The historical importance of these points is highlighted by G. FIANDACA, *Principio di colpevolezza ed ignoranza scusabile della legge penale*, cit., p. 1388 f.
[137] Corte Cost., 23-24 March 1988, no. 364, para. 11. It is useful, for the Italian reader, to quote the original text of the judgement ' *Collegando il primo al terzo comma dell'art. 27 Cost. agevolmente si scorge che, comunque s'intenda la funzione rieducativa di quest'ultima, essa postula almeno la colpa dell'agente in relazione agli elementi più significativi della fattispecie tipica. Non avrebbe senso la "rieducazione" di chi, non essendo almeno "in colpa" (rispetto al fatto) non ha, certo, "bisogno" di essere "rieducato"*'. In this respect, the Court refers to its previous judgements where criminal statutes were declared constitutionally legitimate due to a minimum psychological link between fact and author, limiting criminal liability for '*fatto proprio*' (fact committed by the person itself, and not by another). (*ibidem*, para. 12).
[138] Corte Cost., 23-24 March 1988, no. 364, para. 13.

threshold of negligence with regards to the most relevant elements (subjective and objective) of the criminal offence has to be fulfilled in order to affirm criminal liability. Criminal liability has to be therefore not only personal, but more broadly, culpable.[139]

Secondly, the Constitutional Court derives another conclusion from the same joint reading. This second point appears to be the crucial one describing the relationship with legality. If a personal and re-education oriented criminal liability requires only those facts to be punished, showing a conscious and reprehensible violation of social norms, then the possibility to know criminal law has to be an autonomous requirement for the individual's liability. Therefore, the Constitution does not require the effective knowledge of the law, but at least the possibility to know it. This requirement is autonomous in light of other constitutional rights as well.[140] The principle of legality, in the perspective of statutory reservation, non-retroactivity and *lex certa*, is preordained to the possibility for individuals to know those provisions and to safeguard lawful and free choices in the context of legal certainty.[141] Moreover, Art. 73 co. 3 and 25 co. 2 Cost. safeguard the *riconoscibilità* (*recognisability*) of the contents of criminal provisions, which descends from the *extrema ratio* nature of criminal law. In fact, prior to the subjective relationship between individual and criminal law, 'recognisability' characterises the relationship between the legal order and an individual who abides by its provisions. Therefore, the State must ensure an effective possibility to 'recognise' the content of the norms, as their appearance to the society is the basis of their value. [142] Another limit of personal criminal liability is therefore a requirement that comes logically before the subjective link between individual and fact: the objective impossibility to know the criminal law, which affects

[139] *Ibidem*.
[140] Corte Cost., 23-24 March 1988, no. 364, para. 14-15.
[141] Corte Cost., 23-24 March 1988, no. 364, para. 16.
[142] Corte Cost., 23-24 March 1988, no. 364, para. 17. '[…] *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. L'osservazione dell'"istante" in cui si viola la legge penale nell'ignoranza della medesima non può far dimenticare, come s'è avvertito all'inizio, che, "prima" del rapporto tra soggetto e "singola" legge penale, esiste un ben definito rapporto tra ordinamento e soggetto "obbligato" a non violare le norme, dal quale ultimo rapporto il primo è necessariamente condizionato. È stato osservato e ribadito, esattamente, che un precetto penale ha valore, come regolatore della condotta, non per quello che è ma per quel che appare ai consociati. E la conformità dell'apparenza all'effettivo contenuto della norma penale dev'essere assicurata dallo Stato che è tenuto a favorire, al massimo, la riconoscibilità sociale dell'effettivo contenuto precettivo delle norme* […]'.

every individual.[143] These conclusions are the consequence of the emblematic Enlightenment idea of contract between State and citizens, having mutual obligations.[144] As the Court affirmed later, the protection of personal liberty is directly linked with the possibility to calculate the consequences of one's own actions, which would be inevitably violated if the individual were blamed for facts outside his control and foreseeability.[145]

After this systematic reading, the Court further establishes an obligation for individuals to access to information and knowledge. These obligations are inferred from Art. 2 Cost., that foresees social solidarity obligations for citizens. The crucial point is the limit of duty to be aware of criminal law. Only those who have not complied with these obligations can be held criminally liable even if they ignored the content of the criminal law. However, the Court subordinates these obligations to the actual possibility, ensured by the State, to know criminal law. This happens in the context of written provisions that need interpretations and, sometimes, the mediation of legal experts, state bodies etc.[146] If all these instrumental and foreseeable obligations have been fulfilled, and nevertheless the individual is ignorant of the law, his ignorance will be inevitable and therefore will exclude culpability.[147]

The Court then draws a parallel between these obligations and obligations in the context of negligence. The aforementioned obligations are similar to the more specific negligence-related obligations, but they are placed at a more general level.[148] As in negligence, the standard is not merely subjective but is a normative standard. Moreover,

[143] Corte Cost., 23-24 March 1988, no. 364, para. 17. '[…] *Oltre alle condizioni relative al rapporto soggetto-fatto, esiste, pertanto, un altro "presupposto" della responsabilità penale, costituito, appunto, dalla "riconoscibilità" dell'effettivo contenuto precettivo della norma. L'oggettiva impossibilità di conoscenza del precetto, nella quale venga a trovarsi "chiunque" (non soltanto il singolo soggetto, particolarmente considerato) non può gravare sul cittadino e costituisce, dunque, un altro limite della personale responsabilità penale*'.

[144] Pulitanò appreciates these affirmations of the Court in the perspective of modern criminal law, involving State duties together with a citizen's obligations. D. PULITANÒ, *Una sentenza storica che restaura il principio di colpevolezza*, cit., p. 699.

[145] Corte Cost., 24 July 2007, no. 322, para. 2.3. This judgment refers to the *error aetatis* in sexual offences. '*Il principio di colpevolezza partecipa, in specie, di una finalità comune a quelli di legalità e di irretroattività della legge penale (art. 25, secondo comma, Cost.): esso mira, cioè, a garantire ai consociati libere scelte d'azione (sentenza n. 364 del 1988), sulla base di una valutazione anticipata ("calcolabilità") delle conseguenze giuridico-penali della propria condotta; "calcolabilità" che verrebbe meno ove all'agente fossero addossati accadimenti estranei alla sua sfera di consapevole dominio, perché non solo non voluti né concretamente rappresentati, ma neppure prevedibili ed evitabili*'.

[146] Here the Court considers the absolute legal certainty of written law as a myth of the Age of the Enlightenment, Corte Cost., 23-24 March 1988, no. 364, para. 18.

[147] Corte Cost., 23-24 March 1988, no. 364, para. 18.

[148] Corte Cost., 23-24 March 1988, no. 364, para. 18.

these standards, such as 'foreseeability' and the 'possibility to avoid' in negligence, differ on the basis of the different situations and contexts.[149]

In the end the personal criminal liability also includes the possibility to know the criminal norm.[150] Art. 5 c.p. violates Art. 27 co. 1 Cost., by obstructing the correct functioning of the other requirements of culpability. Under a subjective point of view, the culpable requirement of the criminal offence could not be considered fulfilled in the absence of the knowledge of the law.[151] Moreover, art. 5 c.p. violates the principle of equality (Art. 3 Cost.) as it does not distinguish between two different situations, namely those who commit the offence inevitably ignoring the law and those who committed the offence in full knowledge will be subject to the same punishment.[152]

1.1.3. Objective and subjective criteria and the inevitable ignorance of the law.

Having established the unconstitutionality of the absolute irrelevance of the ignorance of the law, the Constitutional Court examines the criteria to assess the inevitable ignorance.

First, although under a general perspective the content of the criminal provision is unknowable, the individual that, in exceptional subjective circumstances, is nevertheless aware of its content, cannot be excused. [153]

With regards to the criteria, the Court creates three groups: subjective, objective and mixed subjective-objective criteria. Even if the Constitutional Court deals with culpability, the analysis of the criteria will show surprising analogies with the foreseeability assessment by the European Court of Human Rights, which on the contrary operates in the domain of legality.

a) The Constitutional Court refuses *pure subjective criteria* in the assessment of the inevitable mistake of law. Factors that only influence the knowledge in light of the specific characteristics of the individual, such as education, social environment, cognitive skills etc., cannot be taken into consideration.[154] Only in extreme cases, for example in

[149] D. PULITANÒ, *Una sentenza storica che restaura il principio di colpevolezza*, cit., p. 713-716. For German scholarly opinions see H.-W. SCHÜNEMANN, *Verbotsirrtum und faktische Verbotskenntnis*, in *NJW*, 1980, p. 742.
[150] Corte Cost., 23-24 March 1988, no. 364, para. 19.
[151] Corte Cost., 23-24 March 1988, no. 364, para. 23.
[152] Corte Cost., 23-24 March 1988, no. 364, para. 24. The Court speaks of the 'unrecognisability' or unforeseeability of the laws.
[153] Corte Cost., 23-24 March 1988, no. 364, para. 26.
[154] Corte Cost., 23-24 March 1988, no. 364, para. 27.

cases of social exclusion or foreigners, subjective criteria could be useful to reach a satisfactory solution.[155] The *Corte di Cassazione* seems to have accepted this rigorous approach of the Constitutional Court, since it highlighted the necessity of an acknowledged disadvantageous position of the individual to let subjective elements count.[156] Nevertheless, individuals are never exempted from the accomplishment of all expectable information obligations.[157] Take, as example, the recent judgement of the *Corte di Cassazione*, which denied the relevance of the individual being a foreigner claiming an excusable mistake in the field of home arrest.[158]

In light of these findings, the Constitutional Court opts for pure objective criteria or mixed criteria (subjective-objective).

b*) Objective criteria* only consider a general inevitable ignorance of the law, i.e. inevitable for every subject within the legal order. The examples are significant for a comparison with legality under European perspective: take, for example, the impossibility to *recognise* the written disposition for the obscurity of its wording or for a seriously chaotic interpretive approach of the judicial authorities. This latter criterion has to be considered, in the words of the Court, in light of the category of the offence taken into account.[159] The criterion of the absolute obscurity of the wording has scarcely been applied by Italian courts, as it often implies a violation of legal certainty (*tassatività/determinatezza*), which logically comes first. The *Corte di Cassazione* has often relinquished the application of the mistake of law in cases where provisions were hardly comprehensible.[160] The link built between legality and culpability is significant under this perspective, as the approach taken by the ECtHR seems to be confirmed in these cases. Such faults in the law must be handled with the tools of legality, which are logically prior to those of culpability.

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[155] G. FIANDACA, E. MUSCO, *Diritto penale. Parte generale*, Bologna, 2019, p. 420.
[156] Cass. pen., III, (9 May 996) 12 June 1996, no. 2149.
[157] Cass. pen., I, (4 May 1995) 27 June 1995, no. 7323.
[158] Cass. pen., VI, (8 January 2004) 16 April 2004, no. 17687.
[159] Corte Cost., 23-24 March 1988, no. 364, para. 27. See *above* Chapter 3, para. 4.3.
[160] Cass. pen., I, 14 October 1992, Zentile; Cass. pen., VI, 28 June 1993, no. 9987; Cass. pen., III, 13 July -21 November 2011, no. 49266. One of the rare cases of inevitable mistake of law involved a foreigner prosecuted for the criminal offences of art. 651 c.p., as he erroneously thought Italian legislation entitled him to get all communication regarding his criminal proceeding in his native language (a minority language). Cass. pen., VI, (17 May 2012) 27 July 2012, no. 30778. For example, in a case dealing with a mistake in the wording of the law, the Constitutional Court, reasoning from the principles affirmed in its judgement no. 364/88, found a violation of art. 25 co. 2 Cost., without even reaching the domain of culpability. This was due to the link established by the Court between legality and culpability. See Corte Cost., 22 April 1992, no. 185, para. 2.

As far as the consequences of chaotic case-law are concerned, it is important to recall that in the Constitutional Court's understanding from the obligation to abide by the rules of criminal law descends the duty of the State to make criminal law 'knowable'. Moreover, this objective criterion was seen at the time of judgement no. 364/88 as a means to improve interpretive consistency.[161] Consequently, when the text is absolutely uncertain, there is no need to assess culpability, as the criminal provision does not exist *per se*.[162] On the contrary, some have pointed out that a synchronic conflict in case-law would determine at least a state of doubt in the addressed, that could never justify his or her unlawful acts. The correct solution, according to this opinion, would be abstention from carrying out the act.[163] The *Corte di Cassazione* often disregards the problem, although it admits in principle the possibility of an inevitable mistake of law caused by contradictory case-law. In those cases, the *Corte di Cassazione* still refers to the concept of *bona fides* in the subjective element of *contravvenzioni*.[164]

Moreover, some consider the sudden overruling of judicial interpretation. This criterion should be nevertheless mitigated by taking exceptional subjective knowledge or personal 'abilities' into consideration. Some voices in scholarship have compared this situation with that of retroactivity of the criminal provision.[165]

[161] E. GRANDE, *La sentenza n. 364/88 della Corte costituzionale*, cit. p. 421.
[162] G. FIANDACA, E. MUSCO, *Diritto penale. Parte generale*, cit., p. 421.
[163] G. MARINUCCI, E. DOLCINI, *Diritto penale. Parte generale*, cit., p. 432.
[164] Cass. pen., III, 19 March 2015, no. 29080, para. 5 '*E' ovvio che, ai fini della sussistenza del fumus criminis ed in particolare dell'integrazione dell'elemento soggettivo, va considerato, in relazione agli aspetti del caso concreto, come non sia possibile esigere dal privato cittadino una corretta interpretazione della normativa di per sè intrinsecamente ed oggettivamente antinomica, con la conseguenza che va accertato quale ricaduta abbia avuto il testo normativo su un eventuale comportamento assunto in "buona fede" da parte dell'indagato circa la mancata richiesta dell'autorizzazione semplificata, impregiudicate le misure di carattere amministrative a tutela degli interessi paesaggistici, posto che "la buona fede" è predicabile ove la mancata coscienza della illiceità del fatto derivi da un elemento positivo, cioè da una circostanza che induce nella convinzione della sua liceità, come un comportamento o un provvedimento dell'autorità amministrativa, una precedente giurisprudenza assolutoria o contraddittoria, una equivoca formulazione del testo della norma (Sez. 3, n. 6160 del 08/03/1989, Greco, Rv. 181118)*'. Similarly see Cass. pen., III, 6 November 2007, no. 172; Cass. pen., III, 4 November 2011, no. 49910; Cass. pen., III, 20 May 2016, no. 35314.
[165] In the same vein E. GRANDE, *La sentenza n. 364/88 della Corte costituzionale*, cit., p. 415 f., who affirms the insufficiency of the remedy of mistake of law in cases where interpretation does not remain within its legitimate boundaries. T. PADOVANI, *L'ignoranza inevitabile della legge penale e la declaratoria di incostituzionalità parziale dell'art. 5 c.p.*, in *Legisl. Pen.*, 1988, p. 453 ff., G. FIANDACA, E. MUSCO, *Diritto penale. Parte generale*, cit., p. 421.

In addition, in the case of *first impressions* (first interpretations of an unclear provision), mistake of law is considered a subsidiary remedy, while waiting for the proper declaration of unconstitutionality.[166]

c) *Mixed criteria* consider exceptional factual circumstances that would have mislead every individual, such as previous acquittal for the same fact, assurances by qualified subjects etc., but the Court requires such objectivation of the judgement to be mitigated with the specific characteristics of the subject.

The *Corte di Cassazione* has elaborated following objective criteria to be mixed with the subjective ones: i) misleading directions given by competent authorities, such as circulars;[167] ii) administrative authorisations;[168] iii) administrative practice in favour of the individual;[169] iv) prior acquittals for the same fact; v) a consistent case-law orientation in favour of the applicant. This last criterion has also been scarcely applied by the courts. The principle enshrined in the *Cassazione*'s case-law is the possibility to exclude culpability in case of a 'comprehensive and established case-law orientation that induced the individual to consider his conduct correct'. Nevertheless, if case-law is contradictory or the wording of the law uncertain, the doubt insinuated in the individual makes his conduct impossible to justify, giving rise to a duty to abstain.[170] For example, the *Corte di Cassazione* considered a single favourable judgment, in the context of an established contrary case-law, insufficient to consider the mistake of the applicant inevitable.[171] A

[166] E. GRANDE, *La sentenza n. 364/88 della Corte costituzionale*, cit., p. 425.
[167] Cass. pen., III, 31 January 1992, Santoni; Cass. pen., I, 1 July 1993, no. 8860, that acquitted the president of a club who made another person carry out his duties on the basis of an incorrect circular communication of the Ministry of the Interior.
[168] The *Sezioni Unite* judgement dealt with the problem of prior administrative authorisations. Cass. pen., SS. UU., 10 June 1994, no. 8154.
[169] A communication from the local police office, that declared it unnecessary to report the possession of less than 200 units of munitions was considered sufficient to declare the mistake of law unavoidable. The subject had therefore legitimately thought that he only needed to report the possession of the firearm but not that of the munitions he had inherited. Therefore, the requirement of culpability was not fulfilled in the case of the *contravvenzione* disciplined in art. 697 co. 1 c.p.. In this particular case, the *Corte di Cassazione* did not consider subjective elements in its assessment, deeming the accused's status irrelevant in front of a clear (even if incorrect) information by police authorities. Cass. pen., I, 15 July-2 December 2015, no. 47712; Cass. pen., III, 18 July 2014, no. 42021; Cass. pen., 4 November 2011, no. 49910. These cases were however all dealing with *contravvenzioni*.
[170] Cass. pen., III, 16 April 2004, no. 28397; in the same sense, affirming the necessary well-established orientation of case-law see Cass. pen., III, 17 December 1999, no. 4951. In the same vein, Cass. pen., V, 24 November 2016, no. 2506 and Cass. pen., VI, 25 January 2011, no. 6991.
[171] Cass. pen., VI, 25 January 2011, no. 6991, para. 2. The question dealt with the lawfulness of growing cannabis plants in a private house for personal use. Moreover, the *Corte di Cassazione* in the assessment of the accused's subjective behaviour and knowledge of the unlawfulness of his acts highlighted the attempt of the defendant to hide the plants as he received visits at home. This element, in the Court's understanding, testified the defendant's lack of non-culpable ignorance.

non-established orientation, that at the time of the offence seemed to be in favour of the applicant, but is later reversed, is another possible hypothesis. The *Corte di Cassazione* affirmed that its inconsistent practice was instead a decisive argument to refrain from committing the offence (an omission) and to adopt a particular standard of diligence.[172]

Subjective criteria must however be introduced in order to properly evaluate the objective ones. The individual's social and cultural level, together with his or her profession and social position must be kept in mind while assessing the relevance of the objective criteria. For example, the administrative authorisations or directions have a different relevance for a common citizen than for a professional lawyer.

1.1.4. Limitations and distinctions.

The protection of the unavoidable mistake of law is not absolute, since the Constitutional Court's judgement 364/1988 also foresees some limitations. A particular duty of information is therefore expected from qualified subjects.[173] The *Sezioni Unite* of the *Corte di Cassazione* pointed out that a common citizen could be excused under the condition of the fulfilment, according to due diligence, of his duty to be informed, with every available means, about the law in force. Conversely, those who carry out professional activities are criminally liable even for *culpa levis* if they lack to fulfil their information duties in the assessment of the legal framework they are working in.[174] The Court however considers the situation of professionals with particular severity, usually denying the inevitable ignorance of the law for them.[175] In spite of objective criteria being

[172] The omitted communication of income modifications in case of preventive measures was allegedly considered unnecessary in case the modifications had been made with *atto pubblico* (peculiar notary act with publicity). The *Corte di Cassazione* excluded the unavoidable mistake, as the contrasts in case-law should have raised doubts on the lawfulness of the conduct, and therefore motivating the existence of culpability. Besides, the Court evaluated mental element (intent) while assessing the mistake of law, with a non-completely clear reference to intent instead of culpability as a comprehensive element. In addition, the Court considered again the conduct of the applicant in the context of subsequent commission of other criminal offences as a wilful attempt to dismiss his possessions. This element was also decisive in the evaluation of the conduct. Cass. pen., V, 24 November 2016, no. 2506, para. 2.

[173] Corte Cost., 23-24 March 1988, no. 364, para. 27.

[174] Cass. pen., SS. UU., 10 June 1994, no. 8154, where the *Corte di Cassazione*, even if the accused was a professional, considered his ignorance unavoidable, as the absence of administrative obstacles to construction had been affirmed by several administrative judicial orders and in official acts of the competent Ministry.

[175] On the particularly severe information duties of professionals see Cass. pen., III, 20 May 2016, no. 35314, para. 6.1, on a criminal offence punishing the non-authorised collection, transport and trading of metallic waste, where the accused was a person willing to professionally collect them from private individuals to transport them to a professional recycler (art. 256 co. 1, d. lgs. 152/2006); Cass. pen., III, 15 April 2004, no. 22813, on the abusive occupation of maritime soil, whose legal framework was part of the professional information duties of the responsible of a maritime company. Cass. pen., III, 18 February 2015, no. 11045, para. 3-4 denied the relevance of the alleged ignorance of the law of the director of a building site on urbanistic norms. Similarly see also Cass. pen., III, 20 May 2008, no. 26522.

met, culpability will not be excluded by inevitable ignorance of the law every time the subject has omitted to fulfil his or her obligation to collect all proper information in order to regulate his or her conduct.[176]

The Court further limits the impossibility to know the criminal relevance of the acts to those offences which are lacking a specific social negative perception and the ones not surely provided with a social negative disvalue. In the context of *mala in se*, it would be almost impossible to have an excusable ignorance of the law, while the proper scope of application of these principles would be *mala quia prohibita*.[177] This point raises some criticism, especially with regards to diachronic changes in judicial orientations on the criminal relevance of an act, even if it is a *malum in se*. From a common law perspective, this case would fall under the umbrella of non-retroactivity through a mitigation of the apparently absolute statement of the Court.[178] The possible hypotheses are: i) that the subject foresees the possibility of his acts being unlawful. In this case ignorance is avoidable rather than inevitable, as the subject has predicted unlawfulness; ii) that the subject does not foresee the unlawfulness of his acts. The judge shall investigate the reasons why the subject did not imagine the act to be unlawful. This mistake becomes avoidable rather than inevitable as well, if found in violation of the information duty, especially for professionals.

1.1.5. The negligence standard of homo eiusdem condicionis et professionis.

In the end, the Court affirms the need to refer the assessment to previously established criteria in the domain of negligence and *bona fides* in *contravvenzioni*.[179] Firstly, scholars usually agree with the application of the criterion '*homo eiusdem condicionis et professionis'*, despite being possibly assessed according to subjective criteria.[180] As in the

[176] Cass. pen., III, 5 April-3 October 2011, no. 35694, para 1. The alleged objective element that should have excused the conduct was the troublesome administrative procedure and the difficulty of having information about the Region's competences in the field. The Court recalled the mentioned *Sezioni Unite* judgement n. 8154/1994 to motivate its dissent.
[177] Further see D. PULITANÒ, *L'errore di diritto nella teoria del reato*, cit., p. 465. See also A. CALABRIA, *Delitti naturali, delitti artificiali e ignoranza della legge penale*, in *Ind. Pen*., 1991, p. 35.
[178] E. GRANDE, *La sentenza n. 364/88 della Corte costituzionale*, cit. p. 426.
[179] Corte Cost., 23-24 March 1988, no. 364, para. 28.
[180] G. FIANDACA, *Principio di colpevolezza ed ignoranza scusabile della legge penale*, cit., p. 1391 f. In favour of the extension of negligence assessment criteria to *ignorantia legis* see H.H. JESCHECK, T. WEIGEND, *Lehrbuch des Strafrechts, Allgemeiner Teil*, cit., p. 458. Palazzo identifies in the criterion *homo eiusdem condicionis et professionis* as an adequate objective limit, although he does not deny the need to add a subjective assessment. Moreover, Palazzo opts for an *ex post* assessment instead of an *ex ante* evaluation. The only problem would be an avoidable mistake *ex ante* that became avoidable *ex post* and must be consequently mitigated with subjective criteria. F. PALAZZO, Ignorantia legis: *vecchi limiti ed orizzonti nuovi della colpevolezza*, cit., p. 951-953.

evaluation of negligence, the threshold must be adapted to the particular group of standard-agents to which the individual belongs. Professionals would be required a particular information duty and should refrain from carrying out the act if they doubt its legitimacy, except for an unavoidable doubt.[181] The behaviour of those who negligently ignore the information duty is compared with the negligent behaviour of those who carry out a conduct they were unable or forbidden to do.[182] Secondly, the nature of the criminal offence can influence the inevitability assessment. For example, omissions punished by the law (*reati omissivi propri*) could be particularly difficult to represent in their content.[183]

1.2. Parallels Rome-Strasbourg: foreseeability and the mistake of law.

The previous analysis has shown that the Italian regulation of the inevitable ignorance of law and the Strasbourg concept of foreseeability share some significant similarities. However, the essential difference between them is that ignorance of law and its relevant assessment criteria play a role in the domain of culpability: while foreseeability, as a quality of the law, retains logical priority. Nevertheless it operates in the domain of legality and influences the existence of the criminal provision. Before the dialogue with the ECtHR, the only way to take into account conflicting case-law was the perspective of the mistake of law. The Constitutional Court had attributed relevance to serious uncertainties in judicial interpretation in order to acquit the accused. Although still in the domain of culpability, the Constitutional Court affirmed the link between culpability and legality, referring to the concept of 'recognisability' of the law in relation to individual autonomy, freedom, and the reciprocal obligations between individual and State. The obligation of the State to ensure recognisable criminal provisions as a component of the principle of culpability, in relation to *nullum crimen* (Art. 25 co. 2 Cost.), is similar to the ECtHR's definition of foreseeability. According to the ECtHR, the law must enable the citizen to regulate his or her conduct, as he or she must be in the condition to foresee, to a reasonable degree, the consequences of his or her actions.[184]

[181] M. ROMANO, *Commentario sistematico del codice penale*, I, Milano, 2004, p. 111 f.
[182] D. PULITANÒ, *Una sentenza storica che restaura il principio di colpevolezza*, cit., p. 715; F. PALAZZO, Ignorantia legis: *vecchi limiti ed orizzonti nuovi della colpevolezza*, cit., p. 951-953.
[183] A. CADOPPI, *La nuova configurazione dell'art.5 c.p. ed i reati omissivi propri*, in A.M. STILE (ed.), *Responsabilità oggettiva e giudizio di colpevolezza*, Napoli, 1989, p. 227 ff.
[184] See *above* Chapter 3, para. 2. See also F. MAZZACUVA, *Le pene nascoste*, cit., p. 227 ff.

Scholars have often raised similar remarks while debating the admissibility of an integration between domestic and European legality.[185] In light of the previous analysis, it is interesting to compare the relationship between the objective and subjective criteria in both legal orders. Ignorance of the law plays its role in the necessarily individually-centred assessment of culpability, as a necessary requirement that precedes the assessment of the mental element. Therefore, the assessment must be individualised: objective criteria that undermine the knowledge of the law have to be mixed with the evaluation of the characteristics of the individual. In opposition, in the ECtHR case-law, although subjective criteria (such as number and status of the addressed, profession) have played a major role in the past, they are now more and more abandoned in favour of an objective evaluation.[186]

a) *Objective criteria*. In order to investigate the different approach to the aspects connecting with legality and, in particular, the role of case-law, the Constitutional Court's reference to obscurity of the law and chaotic case-law is to be compared specifically with the ECtHR's approach. Moreover, diachronically or synchronically conflicting case-law has been analysed by the *Corte di Cassazione*.

The overall results of the previous analysis show that i) conflicting synchronic case-law, although in principle one of the objective criteria to assess inevitable ignorance, is usually considered evidence of uncertainty about the unlawfulness of the acts. Therefore, in the context of culpability and pursuant to negligence standards, the effective uncertainty of the law justifies a reasonable doubt on the lawfulness of the conduct. In a subjective perspective, the decision to act despite these doubts leads to a more severe evaluation.[187]

On the contrary, synchronic conflicts in case-law give rise to a violation of Art. 7 ECHR under the perspective of foreseeability, if they amount to persistent conflicts within higher jurisdictions that cannot be 'reabsorbed' by an appropriate judicial mechanism according to the most updated European case-law. The case of *Contrada v. Italy* was paradigmatic, as the conflicting case-law was considered a violation of the

[185] A. CADOPPI, *Il valore del precedente nel diritto penale*, cit., 268 ff, 319 ff., R. BARTOLI, *Legalità europea* versus *legalità nazionale?*, cit. p. 296 ff., G. FORNASARI, *Un altro passo nella «riscrittura» della legalità? Appunti sulla sentenza Contrada*, in A. CAVALIERE, C. LONGOBARDO, V. MASARONE ET AL. (eds.), *Politica criminale e cultura giuspenalistica. Scritti in onore di Sergio Moccia*, Napoli, 2017, p. 457, F. PALAZZO, *La sentenza* Contrada *e i cortocircuiti della legalità*, in *Dir. pen. proc*., 2015, p. 1064.
[186] See *above*, Chapter 3, para. 4.7.
[187] See *above*, section II, para. 1.1.3.

principle of legality and the subsequent judgment of the *Corte di Cassazione*, *Sezioni Unite* as a sign of a retroactive overruling. [188]

ii) Diachronic conflicts are considered, at least in affirmations of principle, a possible ground for excluding culpability. Italian courts have rarely faced similar cases and they are not easily applicable. The standard to consider an interpretation sufficiently well-established to convey a legitimate incorrect expectation in the accused is very high. Both a previous single favourable judgment and a favourable orientation of a local court are insufficient to be considered a well-established favourable case-law.[189] In this perspective, the ECtHR has had several occasions to express its view on the subject. Nowadays the objective assessment of foreseeability in cases of sudden overruling leads to a violation of Art. 7 ECHR.[190]

Another difference between the two standards is their different scope of application with regards to the categories *mala in se*/*mala quia prohibita*. The initial alleged different standard for *mala in se* and *mala quia prohibita* has been overcome by the ECtHR,[191] while the Constitutional Court seems to exclude the possibility of having inevitable ignorance of the law in cases regarding the so-called natural criminal offences. Consequently, the proper domain of the ignorance of the law shall refer to *mala quia prohibita*.[192]

iii) A peculiar case is first impression interpretation. As demonstrated above, the ECtHR often loosens its standard when dealing with the first application of a criminal offence, making reference to criteria such as common sense or the essence of the offence.[193] This case would with difficulty trigger the ignorance of law, apart from exceptional cases, since it would be more correct to look at it as a lack of precision and definiteness of the provision.

To sum up, a macroscopic difference between the two approaches is the general evaluation made by the ECtHR, that recently assessed foreseeability almost purely objectively. On the contrary, the Italian courts' evaluation is individualised on both the situation and the subject. Therefore, the *Corte di Cassazione* has rarely acquitted an

[188] See *above*, Chapter 3, para. 4.4., 4.4.1.
[189] See *above*, section II, para. 1.1.3.
[190] See *above*, Chapter 3, para. 4.4.
[191] On the inconsistency of the distinction between the two criteria, see *above*, Chapter 3, para. 4.3.
[192] See *above*, section II, para. 1.1.4.
[193] See *above*, Chapter 3, para. 4.3.1.

accused for inevitable mistake of law, excluding culpability among the elements of the criminal offence. The acquittal usually intervened in exceptional cases that did not concern case-law, but rather contradictory and incorrect information or directions given by administrative authorities to non-qualified subjects.[194]

b) *Subjective criteria*. Another important similarity is the use of subjective criteria, especially in less recent case-law of the ECtHR. The subjective side of foreseeability runs parallel to the assessment of the mistake of law in Italy. First of all, the criteria of Italian courts are surprisingly similar to the ones listed by the ECtHR.[195] Secondly, the particularly severe standard used for professionals, affirmed by the Constitutional Court and applied by the *Corte di Cassazione* is similar to the ECtHR case-law especially in the application of the *Cantoni v. France* precedent.[196] Both in national law and in European cases, the severity of the assessment is dependent on the professional activity of the subject, if the criminal offence in question is in his area of competence.

The two assessment further converge at a deeper level. In fact, the ECtHR case-law makes explicit reference to a standard of caution in risk assessment that is not part of a legality assessment, but rather triggers culpability and recalls negligence standards.[197] In this perspective, another issue raised by judgment no. 364/88 comes into question. The adoption of the *homo eiusdem professionis et condicionis* standard and the negligence criteria of 'foreseeability' and 'possibility to avoid' is significant even as a standard for the avoidable ignorance of the law. Since the *Sezioni Unite* of the *Corte di Cassazione* transposed the standards of negligence, the reference to the lower minimum threshold of *culpa levis* for professionals has astonishing similarities with cases like *Soros v. France*. In the latter case, the standard was lowered to the state of doubt on the lawfulness of the conduct and the professional qualification supported the request for a particular degree of caution.[198] The group of European cases following *Cantoni* and *Soros* are debated especially because they bend towards a too subjective conception of foreseeability. The ECtHR can be criticised as far as it assesses the quality of the legal basis according to the

[194] See *above*, section II, para. 1.1.3.
[195] The criteria of number and status of the addressed and their profession in ECtHR case-law can be compared with the Italian courts' reference to personal status, subjective behaviour, exceptional circumstances of the accused, the need for legal advice. See *above*, Chapter 3, para. 4.2.1. and this section, para. 1.1.3.
[196] See *above*, Chapter 3, para. 4.2.1.
[197] See in particular the case of *Soros v. France*, and the group of cases following the *Cantoni v. France* precedent. See *above*, Chapter 3, para. 4.2.3.
[198] ECtHR, Soros v. France, 6 October 2011, no. 50425/06, para. 59.

normative standard of negligence, transposed into the ignorance of the law. It is important to underline that these cases were often dealing with first impressions.

Moreover, the profession and status of the accused was relevant in cases concerning grave breaches of human rights and the consequent punishment under a retroactive framework. These cases do not have any parallel in the Italian courts' case-law, as they have to be treated as exceptional in the ECtHR jurisprudence as well, for the reasons explained in the previous Chapter.[199]

In the end, information duties descending from Art. 2 Cost. and the ECtHR widespread requirement of a prior appropriate legal advice are moved by the same rationale: the contingency between legality and culpability. The idea of the contract between State and individuals and their reciprocal obligations does not belong only to these principles but is also at the basis of the contemporary idea of criminal law.[200]

1.2.1. Insufficiencies of the reduction of foreseeability to mistake of law: different consequences under legality and culpability.

These similarities between the Constitutional Court conception of inevitable ignorance of the law and ECtHR definition of foreseeability could make some consider the limited practical impact of the European concept of foreseeability. In light of the aforementioned comparison, the argument can be convincing only with regards to subjective foreseeability and cases dealing with professionals. It would be therefore pointless to try and read domestic legality in the light of foreseeability in order to solve problems arising from conflicting case-law and retrospective overruling, as they are already taken care of by the constitutionally oriented interpretation of art. 5 c.p.. Moreover, it is more appropriate to approach them under the scope of application of culpability. Hence, unforeseeable judicial interpretation shall cause an acquittal for lack of culpability because of the inevitable ignorance of the law. Especially in comments following the debated case of *Contrada v. Italy*, some scholars supported this idea, despite making some observations.[201] Pulitanò refers to culpability as the second aspect of legality and,

[199] See *above*, Chapter 3, para. 4.3.
[200] See *above*, Chapter 3, para. 4.1. and this section, para. 1.1.2.
[201] D. PULITANÒ, *Paradossi della legalità*, cit., p. 51 f.; F. PALAZZO, *La sentenza* Contrada, cit., p. 1064-1065. On the possibility to solve the problem, with *de iure condito* remedies, M. T. LEACCHE, *La sentenza della Corte EDU nel caso Contrada e l'attuazione nell'ordinamento interno del principio di legalità convenzionale*, in *Cass. pen*. 2015, p. 4621.

generally refuses a diminishing interpretation of legality through foreseeability.[202] In particular he only refers to the case of a sudden overruling and to prospective overruling. In his understanding, the exceptional solution of prospective overruling is equivalent to the exceptional solution of acquittal for inevitable mistake of law due to a diachronic interpretive conflict. In the specific case liability shall be excluded, even though the more severe interpretation was already established. [203] He admits that in a case like *Contrada v. Italy*, the results of a possible evaluation under art. 5 c.p. would have been opposite to the findings of the ECtHR. The possibility to know the law would be sufficient to establish the link between awareness of the unlawfulness and the formulation of the offence. This is due to the fact that under a subjective perspective intent and mental element should be, in standard cases, a satisfactory element to substitute the effective knowledge of the law.[204]

Commenting on the same case, Palazzo identifies the mistake of law as interpreted by the Constitutional Court as a general remedy to solve, *ex post*, problems arising from the relationship with European legality and, in particular, foreseeability.[205] A less strict approach of the *Corte di Cassazione* to declare the inevitable ignorance of the law due to a chaotic case-law would be satisfactory and represent the least intrusive means. Palazzo solves the problem of the different operative levels of culpability and legality relying on the inevitable link between legality and culpability, as Pulitanò did as well.[206] Art. 5 c.p. would have less ground-breaking effect than importing prospective overruling into a civil law system.[207]

Art. 5 c.p. could be a satisfactory remedy for those cases where interpretation is only substantiating the written provision, if the innovative interpretation is a legitimate extensive interpretation. That is to say, judicial interpretation is only legitimate when it stays within the boundaries of the wording of the provision. In these cases, ignorance of the law could exclude culpability for the individual on the basis of objective arguments,

[202] D. PULITANÒ, *Paradossi della legalità*, cit., p. 51 and 53. He refers to an expression by Ombretta Di Giovine, that looks at legality and culpability as 'far from distant and non-communicating worlds', O. DI GIOVINE, *Come la legalità europea sta riscrivendo quella nazionale*, cit., p. 165.
[203] D. PULITANÒ, *Paradossi della legalità*, cit., p. 52.
[204] D. PULITANÒ, *Paradossi della legalità*, cit., p. 54.
[205] F. PALAZZO, *La sentenza* Contrada, cit., p. 1065.
[206] F. PALAZZO, *La sentenza* Contrada, cit., p. 1064.
[207] O. DI GIOVINE, *Come la legalità europea sta riscrivendo quella nazionale*, cit., p. 165. According to her, the scarce application of the principle by the *Corte di Cassazione* is not a decisive argument to reject this proposal.

if a new legitimate group of cases (first impression) is included in the scope of application of the offence. Culpability could also be excluded on the basis of subjective arguments when the interpretation is only a concretisation of the 'typical' offence.[208] In cases where the interpretation is not legitimate, because it creates new law and goes beyond the boundaries of the statutory offence, art. 5 c.p. would be insufficient and an intervention by the *Sezioni Unite* necessary.[209]

Other scholars prompt a legislative amendment of the criminal code to introduce a *mistake on the interpretation*. This new kind of mistake should have the same outcomes in terms of acquittal but differ in the object: it should be a mistake on the interpretive meaning of the law. Its scope of application should be limited to synchronic temporary interpretive contrasts and persisting conflicts, since, contrary to overrulings, these cases could be solved within the domain of culpability in a twofold test: i) existence and nature of the conflict and ii) whether the mistake was avoidable according to negligence standards (*homo eiusdem*).[210] Despite the well-founded argumentation, the over-reliance on negligence standards risks to assign a difficult task to the judge, who could unrealistically find proof of a distinction in the subjective attitude of the accused between a mistake made on excusable grounds and one made because of a negligent omission in the information duty. Moreover, this solution seems too risky in terms of equality, since it paves the way for potentially differentiated outcomes only depending on subjective elements.

It is undeniable that culpability and legality, especially if looking at the reasoning of judgement no. 364/88, have similar goals. The ultimate aim is the acknowledgement of the possibility for the individual to foresee a possible criminal conviction on the basis of 'knowable' criminal norms, in light of the principle of equality, personal criminal liability, re-educational function of penalty, and legality.[211] The principle of

[208] A new case, without involving new creation of law, could be the application of fencing (*ricettazione*, art. 648 c.p.) to real estate assets, as it is clear from the wording of the provision that it could be applicable both to movable and immovable assets. M. DONINI, *Il diritto penale giurisprudenziale*, cit., p. 31.
[209] M. DONINI, *Il diritto penale giurisprudenziale*, cit., p. 32.
[210] D. PIRRONE, *Nullum crimen sine iure*, cit., p. 364-368.
[211] O. DI GIOVINE, *Come la legalità europea sta riscrivendo quella nazionale*, cit., p. 165; F. PALAZZO, *La legalità fra* law in the books *e* law in action, cit., p. 7.

'recognisability' of criminal law implies the possibility to know criminal law in the perspective of its *extrema ratio* nature and the necessity to comply with *Kulturnormen*.[212]

However, the idea of a complete exchangeability between inevitable ignorance and foreseeability to solve the problems arising from conflicting case-law cannot be supported for several reasons.

Despite the deep connection between legality and culpability, a criminal provision that does not comply with the principle of legality is to be treated as non-existent in the legal order.[213] Therefore, according to a dogmatic construction of the criminal offence, the offence itself cannot be considered existent in trial. In the Italian legal order, this would result in the most favourable acquittal for the accused with the formula '*il fatto non è previsto dalla legge come reato' (the fact is not provided for by the law as a criminal offence)*. On the contrary, an acquittal because of an inevitable ignorance of the law would only exclude the culpable element and therefore the formula '*il fatto non costituisce reato*' (*the fact is not a criminal offence*) will be applicable.

Furthermore, an objective solution with legality would have effects for cases which have already been decided with a definitive judgement. On the contrary, *res judicata* would forcibly remain untouched in the domain of culpability, as it would be impossible to re-open the cases for a new evaluation of the facts. Re-assessing the subjective element in order to get to an acquittal judgment would be impossible with the current procedural remedies to re-open a case after its definitive decision.[214] This point was sketched out in Palazzo's considerations, which revealed a possible obstacle to the solution of art. 5 c.p. in the impossibility to apply it to cases already decided with a definitive judgement. On the contrary, legality issues can be relevant beyond the intervention of *res judicata*.[215]

Moreover, the subjective evaluation of mistake of law imposes to consider subjective aspects. Scholarship has criticised the subjective perspective, instead of adopting the objective perspective of 'applicable law', in light of a synchronic or diachronic conflict

[212] Cadoppi sees a possible solution in the principle of 'recognisability' of criminal law, in compliance with *extrema ratio*, but considers it unrealistic in a context dominated by the uncontrolled expansion of criminal law. A. CADOPPI, *Il valore del precedente nel diritto penale*, cit., p. 56 ff. and 123 ff.
[213] V. ZAGREBELSKY, *La Convenzione europea dei diritti dell'uomo e il principio di legalità nella materia penale*, in V. MANES, V. ZAGREBELSKY (eds.), *La Convenzione europea dei diritti dell'uomo nell'ordinamento penale italiano*, Milano, 2011, p. 100-101.
[214] The remedy of *revisione* (art. 630 c.p.p.) does not foresee such an eventuality. The only cases in which a trial can be re-opened are conflicting *res judicatae*, new evidence motivating acquittal, conviction as a result of fraud or a criminal offence.
[215] F. PALAZZO, *La sentenza* Contrada, cit., p. 1064.

in case-law.[216] Similar situations in terms of applicable law will be considered differently, depending on the subjective situation of the accused. Moreover, the reference of Italian case-law to the *in dubio abstine* standard would diminish the protection against an uncertain interpretive framework or overruling. The mere doubt on the lawfulness of the conduct would therefore be ground to convict the applicant.[217]

1.2.2. Insufficiencies of the reduction of foreseeability to mistake of law: exceptional nature of mistake of law.

The mistake of law is *per se* an exceptional solution that takes into account exceptional circumstances, both subjective and objective.[218] It represents the exceptional subjective impossibility to know the law or the exceptional impossibility of the law to be knowable due to special circumstances.[219] An obscure text of the provision or a chaotic case-law would violate legal certainty in the first place.[220] It could with difficulty have been regarded as a standard solution for the recurring diachronic and synchronic conflicts within courts, that result in unforeseeable changes *erga omnes* of the elements of the offences or of the application regime of penalties. Moreover, it would create destabilising situations leading to even more uncertainty.[221] Although it has been depicted as a pragmatic solution, it substantially deviates from the crucial question at stake.[222] The same supporters of the solution of the mistake of law admit that this would achieve only *subjective* legal certainty, i.e. the possibility to self-determination of the subject. It would fail to solve the objective normative confusion within the legal order, since it would not urge the legislator to solve the legal certainty problem.[223]

[216] S. RIONDATO, *Retroattività del mutamento giurisprudenziale sfavorevole,* cit., p. 243 ff. and M. VOGLIOTTI, *Penser l'impensable: le principe de la non-rétroactivité du jugement pénal in malam partem. La perspective italienne*, in *Diritto e Questioni pubbliche*, 2003, p. 348.
[217] In the same vein, M. VOGLIOTTI, *Penser l'impensable*, cit., p. 348-350 and 361-364, referring to the Italian case-law that considers a synchronic conflict an element to put the accused in a state of doubt.
[218] M. DONINI, *Il Caso Contrada e la Corte EDU: La responsabilità dello Stato per carenza di tassatività/tipicità di una legge penale retroattiva di formazione giurisprudenziale*, in *Riv. it. dir. proc. pen*., 2016, p. 362.
[219] A. CADOPPI, *Il valore del precedente nel diritto penale*, cit., p. 270-271.
[220] A. CADOPPI, *Il valore del precedente nel diritto penale*, cit., p. 270.
[221] G. FIANDACA, *Nota introduttiva* a *La Cassazione penale: problemi di funzionamento e di ruolo con nota introduttiva*, in *Foro it.*, 1988, I, p. 441 f.
[222] G. FORNASARI, *Un altro passo nella «riscrittura» della legalità?*, cit., p. 458.
[223] F. PALAZZO, *Legalità fra* law in the books *e* law in action, cit., p. 9.

1.2.3. Insufficiencies of the reduction of foreseeability to mistake of law: the principle of equality.

A subjectively-based assessment would further easily lead to non-equal solutions.[224] In the context of a synchronic or diachronic conflict in case-law, two different subjects could easily be treated differently, if the judgment is based on subjective elements and concerns culpability. A synchronic case-law conflict on the constitutive elements of an offence could amount to a violation of foreseeability but could lead to different results in terms of culpability. For example, the lower standard of *culpa levis* would be applied to a lawyer, while for a common citizen due diligence would be sufficient. This would lead to the finding of culpability and conviction, as the mistake of law was avoidable, in the case of the lawyer. Conversely, the common citizen would be acquitted, as the ignorance in his case was inevitable. Furthermore, if the criminal offence is carried out by more than one individual, the discipline of participation would apply. Subjective circumstances regarding single perpetrators would have different effects on culpability, and on a possible acquittal, as the other participants would not benefit from the same circumstances justifying the mistake of law. Since long lasting and unresolved conflicts in case-law are a structural problem of the criminal law, the principle of equality enshrined in art. 3 Cost. would be inevitably violated.

After judgment no. 364/88, a far-sighted voice in scholarship warned about the possible distortive effect of a reduction of the problems of legality to culpability and, in particular, subjectivity in the domain of *ignorantia legis*.[225] The risk of an exploitation of the inevitable mistake of law in order to hide faults in the legal order under the perspective of legality is a reasonable deduction. The consequence would be the use of palliative subjective solutions to maintain the *status quo*, both under the perspective of precision and of judicial construction. According to Stortoni, this was a sign of the lack of reasonableness in the criminal system and the use of art. 5 c.p. as a 'safety valve' in order to ensure eequality, at least under a subjective perspective.[226] These considerations adapt to the present situation where illicit interpretive modifications of statutory offences jeopardise *nullum crimen*, except for the unsatisfactory application of art. 5 c.p..

[224] In the same vein, A. CADOPPI, *Il valore del precedente nel diritto penale*, cit., p. 271.
[225] L. STORTONI, *L'introduzione nel sistema penale dell'errore scusabile di diritto: problemi e prospettive*, in *Riv. it. dir. proc. pen.*, 1988, p. 1347 f.
[226] L. STORTONI, *L'introduzione nel sistema penale dell'errore scusabile di diritto,* cit., p. 1348.

2. Objective solutions: determinatezza, *living law and synchronic foreseeability.*

The principle of *determinatezza* (definiteness) has two components: one concerns the statutory provision and the other refers to the judge. *Determinatezza* is the obligation to formulate criminal statutes in a precise and clear way. It is often juxtaposed with the principle of *tassatività*, that foresees strict and exhaustive formulations and prohibits lists that could be analogically interpreted.[227] It is now considered constitutionally protected in Art. 25 co. 2 Cost. thanks to the Constitutional Court,[228] although in the past the Court had showed little interest for the problem.[229] On the other hand, the principle of *determinatezza* imposes upon the judge an obligation to strict interpretation and the prohibition of analogy. The objective is therefore twofold: the possibility to recognise the consequences of one's conduct and to limit the judge's arbitrariness.[230] For the purposes of this chapter, the focus will be on the relationship of judge-made law with *determinatezza*, especially in light of the Constitutional Court's case-law.

In literature, the principle was analysed by Francesco Palazzo, who also described its logical and political rationales. Among these rationales, two are particularly significant with regards to a potential relationship with the concept of foreseeability and to find a solution in the books to the questions concerning case-law. One of the possible logical rationales of the principle in criminal law is legal certainty. Although some opinions exclude it, legal certainty is instrumental to the ultimate rationale of personal freedom.[231]

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[227] F. PALAZZO, *Il principio di determinatezza nel diritto penale*, cit., p. 5 ff. Fiandaca and Musco use the terms *determinatezza-tassatività* without distinction in G. FIANDACA, E. MUSCO, *Diritto penale. Parte generale*, cit., p. 88 ff.

[228] Corte Cost., 9 April 1981, no. 96, para. 2. It was the first acknowledgement of a violation of the principle of *lex certa*, due to the lack of concrete substance of the concept of *plagio* (subjugation, in this context), representing the core of the criminal offence provided for by art. 603 c.p. In this judgement, the Constitutional Court pointed out that *lex certa* requires criminal offences not only to have an abstract validity but also a material essence susceptible of being verified. Similarly see also Corte Cost., 11 June 2014, no. 172, para. 3. The ultimate systematisation of the principle of *lex certa* as *determinatezza* instead of *tassatività* was made by the Court in the pivotal judgment no. 247/1989. Corte Cost., 15-16 May 1989, no. 247, para. 3 (in particular). See further Corte Cost., 17-28 January 1991.

[229] See, i.e., Corte Cost., 23 May 1961, no. 27. The case concerned the so-called *anticipated analogy* at art. 669 c.p. (abolished today), where the Constitutional Court 'saved' the provision, considering it acceptable due to its merely 'extensive expression'. The statutory provision concerned a criminal offence punishing 'nomad professions' (*mestieri girovaghi*) through a list of professions provided for by another statutory disposition (Art. 121 T.u.l.p.s.) and concluded with a possible analogic clause 'and other similar professions'.

[230] Lately, see the Constitutional Court's order in the case *Taricco*: Corte Cost., 26 January 2017, no. 24, para. 5.

[231] F. PALAZZO, *Il principio di determinatezza nel diritto penale*, cit., p. 53 ff. German literature shows particular sensitivity towards the rationale of personal freedom behind *lex certa*. Palazzo refers to H.L. SCHREIBER, *Gesetz und Richter*, cit., p. 218 and G. KOHLMANN, *Der Begriff des Staatsgeheimnisses ([Art.] 93 StGB und [Art.] 99 Abs, 1 StGB a. F.) und das verfassungsrechtliche Gebot der Bestimmtheit von*

Legal certainty has a subjective side, the knowability of the law by the addressed, and an objective side, that a certain conduct results in certain legal consequences. Therefore, legal certainty is based on stability, uniformity and necessary consequences deriving from the law.[232] The mechanisms to ensure legal certainty are either binding precedent or the subjection of the judge to the law. In particular, even in a written law State general formulations need uniform interpretation to be effective.[233] Under the political perspective, *determinatezza* is the basis of the possibility to know the law, which in the end is the requirement of personal freedom, as the free exercise of individual rights includes foreseeability of the consequences of human behaviour.[234] Consequently, the rationales of the principle seem not to exclude a possible attention to case-law.[235]

2.1. Determinatezza *in the books and doctrine of living law of the Constitutional Court.*

Leaving these theoretical aspects aside, the concrete application of the principle at constitutional level has shown less promising results with regards to case-law. The Constitutional Court, when assessing *determinatezza* (Art. 25 co. 2 Cost.) uses the parameter of the so-called living law (*diritto vivente*). Living law is the object of the Court's assessment: the law as it lives in courts and especially in the *Corte di Cassazione*. The parameter to assess *determinatezza* is therefore the *regula juris*, instead of the abstract formulation of the provision.[236] A first reason is the impossibility to have an absolutely precise and clear written provision: the structure of the language would make it impossible.

The declarations of constitutional illegitimacy due to undetermined formulations are very rare in the case-law of the Constitutional Court.[237] In the analysis of the

Strafvorschriften (Art. 103 Abs. 2 GG), Köln, 1969, p. 151. Kohlmann focuses on the risk of arbitrariness in the absence of precise statutory provisions.

[232] F. PALAZZO, *Il principio di determinatezza nel diritto penale*, cit., p. 55, 57.

[233] F. PALAZZO, *Il principio di determinatezza nel diritto penale*, cit. p. 59, 72 ff.

[234] F. PALAZZO, *Il principio di determinatezza nel diritto penale*, cit. p. 163 ff.

[235] Palazzo does not exclude a possible application of binding precedent even in a civil law State where the judges are subject to the law. F. PALAZZO, *Il principio di determinatezza nel diritto penale*, cit. p. 59.

[236] Sergio Moccia is critical towards the progressive focus of the Constitutional Court on the application of the norm, instead of its abstract formulation, as he sees in it the weakness of the written norm. According to him, the focus of living law on case-law is a consequence of Eugen Ehrlich's concept of *lebendes Recht* in the sociology of law. S. MOCCIA, *La 'promessa non mantenuta'. Ruolo e prospettive del principio di determinatezza/tassatività nel sistema penale italiano*, Napoli, 2001, p. 64. Against, Mantovani affirms the observance of the principle of *determinatezza* if it is possible, considering judicial interpretation, to determine the scope of criminal liability. He considers the principle of legality as a means to achieve the highest possible certainty but admits it is impossible to achieve absolute certainty. F. MANTOVANI, *Diritto penale. Parte generale*, Padova, 2017, p. 63 ff.

[237] F. PALAZZO, *Legalità e determinatezza della legge penale*, cit., p. 57 ff.

Constitutional Court's judgments on *determinatezza*, the focus has rarely been on the linguistic formulation of the provision,[238] and it has become almost centred on its judicial application. As a consequence, a definition of the concept of living law is necessary. Living law[239] is the norm as it operates 'in its daily judicial application, that makes it concrete and effective', since the Court cannot ignore a consistent and well-established judicial interpretation that gives the norm its value in the legal order. [240] Starting from the first applications of the concept in the 1970s, in judgements no. 276/74 and 286/74, its application increased and became commonplace in the Constitutional Court's case-law.[241]

In criminal law and in the domain of *determinatezza*, the living law as judicial interpretation of the norm is instrumental in two senses.[242]

First, living law plays a role *ex ante*. The Constitutional Court has refrained from declaring statutory provisions constitutionally illegitimate because a violation of *lex certa* only occurs when they are 'impossible to interpret'. Therefore, a provision subject to multiple interpretations could with difficulty trigger Art. 25 co. 2 Cost. Moreover, this component of *determinatezza* does not cover synchronic interpretive conflicts. In this group of cases, the Court excludes that doubts in the interpretation of the provision could lead to a violation of *nullum crimen*. The Court usually suggests appropriate interpretive criteria, hence it is concretely almost impossible to find a provision that cannot be interpreted according to them.

Consequently, all questions of constitutional legitimacy have been rejected.[243] The arguments are the systematic interpretation of the text, the aim of the statutory provision

[238] Corte Cost., 10 December 1970, no. 191 was still focused on the linguistic formulation and meaning of the provision. It dealt with the alleged uncertainty of the notion of 'obscene'. The assumption of the Court was that non-physical legal goods are inevitably concepts to be interpreted according to the common understanding and that this was not a reason *per se* to hold a violation of the principle of legality.
[239] The first application of the term was in Corte Cost., 5 December 1974, no. 276, para. 3 and Corte Cost., 19 December 1974, no. 286, para. 5.
[240] Corte Cost., 15 April 1956, no. 3, para. 6: '*[…] non può non tenere il debito conto di una costante interpretazione giurisprudenziale che conferisce al precetto legislativo il suo effettivo valore nella vita giuridica, se é vero, come é vero, che le norme sono non quali appaiono proposte in astratto, ma quali sono applicate nella quotidiana opera del giudice, intesa a renderle concrete ed efficaci'.*
[241] Pugiotto analyses the use of the concept of living law in the Italian constitutional jurisprudence in the 1980s, which shows that the case-law of the *Corte di Cassazione* is given the definition of living law when it is well-established. A. PUGIOTTO, *Sindacato di costituzionalità e diritto vivente*, Milano, 1994, p. 368 ff.
[242] F. PALAZZO, *Legalità e determinatezza della legge penale*, cit., p. 64 ff.
[243] Corte Cost., 6-13 February 1995, no. 34; Corte Cost., 12-27 January 1995, no. 31; Corte Cost., 25-29 March 1993, no. 122; Corte Cost., 15-16 May 1989, no. 247; Corte Cost., 6-11 July 2000, no. 263; Corte Cost., ord., 21 October 2005, no. 395; Corte Cost., ord., 23 February-3 March 2004, no. 80; Corte Cost., 27-29 September 2004, no. 302.

and a joint reading of the single, allegedly indeterminate constitutive element of the offence with the others.[244] The criteria of the 'objectives of the incrimination' and 'the normative framework' have been applied to a famous case on art. 434 c.p., that punished the negligent causation of the collapse of a building.

Art. 434 c.p. extended its scope of application to an 'atypical disaster' (*disastro innominato*), which raised some interesting points for our goal. In the criminal offence in question, a list of possible 'disasters' is completed with a controversial formula that leaves room to other, atypical cases: 'another disaster' ('*un fatto diretto a cagionare* […] *un altro disastro'*). In particular, the atypical disaster was the starting point to create a new judge-made offence of 'environmental disaster'.[245] While endorsing the provision, on the basis of the uniformity with the listed 'disasters' and according to a systematic interpretation of the concept 'disasters', the Court raises relevant points in terms of judicial interpretation, thus not ignoring the concerns about judicial law making.[246]

[244] Corte Cost., 18 December 2003-13 January 2004, no. 5, para. 2. The judgement concerned the alleged indeterminate constitutive element of 'justifiable ground' in the criminal offence of 'foreigner that stays in the State's territory, without justifiable ground, against a police commissioner's order', disciplined in art. 14, co. 5-ter, d.lgs. n. 286/1998 (modified by L. no. 189/2002). The Court opted for the possibility to interpret this element in light of the objectives of incrimination and of the normative framework in which it was included. '*Deve essere peraltro di guida, in tale indagine, il criterio, reiteratamente affermato da questa Corte, per cui la verifica del rispetto del principio di determinatezza va condotta non già valutando isolatamente il singolo elemento descrittivo dell'illecito, ma raccordandolo con gli altri elementi costitutivi della fattispecie e con la disciplina in cui questa si inserisce. L'inclusione nella formula descrittiva dell'illecito penale di espressioni sommarie, di vocaboli polisensi, ovvero — come nella specie — di clausole generali o concetti "elastici", non comporta un del parametro costituzionale evocato, quando la descrizione vulnus 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*' (para. 2.1.).

[245] Corte Cost., 30 July 2008, no. 327, commentary by A. GARGANI, *Il disastro ambientale una fattispecie penale di creazione giurisprudenziale*, in *Giurisdizione amministrativa*, IV, 2010, p. 151. Another alleged violation of the principle in question was the concept of 'danger for public safety', which was rejected by the Court as well. Recently, the above-mentioned criteria were applied in Corte Cost., 11 June 2014, no. 172, para. 3. The referring judge warns against the risk of a substitution of the judge to the legislator because of this interpretive construction. His goal was therefore to make the Constitutional Court intervene in the domain of *determinatezza*. F. GIUNTA, *I contorni del "disastro innominato" e l'ombra del "disastro ambientale" alla luce del principio di determinatezza*., in *Giur. cost*., 4, 2008, p. 3539 ff., 3541 f. Significantly, a specific statutory criminal offence of 'environmental disaster' was introduced by L. 22 May 2015, no. 68 (art. 452 *quater* c.p.), which is applicable outside the scope of art. 434 c.p. and lists possible 'disasters', that correspond of some of the categories of cases constructed by the courts.

[246] The Court further rejects the question on the basis of the legitimacy of the express analogy in art. 434 c.p., reinforcing the recent developments in case-law on a possible legitimate interpretation of this offence. F. GIUNTA, *I contorni del "disastro innominato"*, cit., p. 3543.

The living law within the *Corte di Cassazione*, which created a standard interpretation for the atypical disaster, is an argument in support of *determinatezza*.[247] The Constitutional Court however affirms that a well-established case-law is not able to supply to the lack of precision of a written provision on two grounds. First, the judge would create the *regula juris* and therefore the legislator's prerogative would be voided. Second, the individuals would be deprived of the knowledge of the law, as this would only be possible once case-law has reached a uniform and stable position on the matter. A well-established case-law is therefore only a 'confirmation of the possibility to identify, on the basis of an ordinary hermeneutic process, the most precise value of an ambiguous, generic or polysemic norm'.[248] *A contrario*, it can be argued that the Court is excluding case-law from active contribution to legal certainty, confining it to an accessory role. In addition, the functions of the principle of *lex certa*, the exclusive statutory origin of *regulae juris* and the preventive knowledge of the law by the addressed cannot be referred to case-law. In this sense, there is an insurmountable distance between the idea of *lex certa* in the Constitution and in the ECHR, that makes it unlikely for the constitutional judge to declare a criminal statute partly unconstitutional for illegitimate conflicts within judges.

Second, living law plays a role in an *ex post* perspective. *Determinatezza* is assessed with regards to the effective interpretation of the norm. Living law is used as an argument to support precision in the wording, on the basis of the interpretations offered by courts. Therefore, consistent and well-established interpretations in living law contribute avoiding a declaration of constitutional illegitimacy.[249] Conversely, the absence of a

[247] Corte Cost., 30 July 2008, no. 327, para. 6. The case-law of the *Corte di Cassazione* defined the concept of 'disaster' as referred to a dimensional element and to its potential to violate the legal good.

[248] Corte Cost., 30 July 2008, no. 327, para. 6. '*Al riguardo, è opportuno rilevare come l'esistenza di interpretazioni giurisprudenziali costanti non valga, di per sé, a colmare l'eventuale originaria carenza di precisione del precetto penale. Sostenere il contrario significherebbe, difatti, "tradire" entrambe le funzioni del principio di determinatezza. La prima funzione – cioè quella di garantire la concentrazione nel potere legislativo della produzione della regula iuris – verrebbe meno giacché, nell'ipotesi considerata, la regula verrebbe creata, in misura più o meno ampia, dai giudici. La seconda funzione – cioè quella di assicurare al destinatario del precetto penale la conoscenza preventiva di ciò che è lecito e di ciò che è vietato – non sarebbe rispettata perché tale garanzia deve sussistere sin dalla prima fase di applicazione della norma, e non già solo nel momento (che può essere anche di molto successivo) in cui si è consolidata in giurisprudenza una certa interpretazione, peraltro sempre suscettibile di mutamenti. Ciò non esclude, tuttavia, che l'esistenza di un indirizzo giurisprudenziale costante possa assurgere ad elemento di conferma della possibilità di identificare, sulla scorta d'un ordinario percorso ermeneutico, la più puntuale valenza di un'espressione normativa in sé ambigua, generica o polisensa. Ed è in questa prospettiva che va letto, per l'appunto, il precedente richiamo alla corrente nozione giurisprudenziale di «disastro» '.*

[249] Corte Cost., 19-28 June 2002, no. 295, para. 2.1. According to the Court, the well-established interpretive orientation of the concept of 'confidential information' (*notizie riservate*) in art. 262 c.p. could support the statute's precision. The Court further holds the question of constitutional legitimacy inadmissible because

well-established interpretation leads the Constitutional Court to suggest one, which shall be the ground for excluding the uncertainty of the written norm. [250] Although sometimes the Court affirms the consistent interpretation with the Constitution, often its goal is only to prove the possibility to interpret the provision.[251]

2.2. Effectiveness of a solution under the principle of determinatezza.

Despite the Court's affirmations of principle, the interpretive component inevitably contributes to legal certainty. Thus, the Constitutional Court seems to consider judicial interpretation in its assessment. The problem is to identify which level of interpretation can grant a satisfactory legal certainty. From the above-mentioned analysis it seems that the Constitutional Court does not look at possible interpretive conflicts, but rather considers the mere possibility to interpret a provision sufficient ground to avoid its constitutional illegitimacy and to consider it compliant with Art. 25 co. 2 Cost. Having analysed the Constitutional Court's orientation on *determinatezza*, its application to judicial interpretation shall be examined. In particular, synchronic conflicts and uncertain judicial interpretations could find a solution *in the books*, broadening the scope of Art. 25 co. 2 Cost. This solution relies on the fact that synchronic conflicts in case-law are the denial of *determinatezza* in a dynamic perspective, although diachronic conflicts rarely trigger the same principle in the law in action. Moreover, the rationales of the principle seem not to hinder such an interpretation.[252]

Looking at the probability of this scenario, the jurisdiction of the Constitutional Court is limited to the constitutional legitimacy of Italian statutes and written provisions. The

of consistent precise interpretations, Corte Cost., 11-19 October 1988, no 983; in judgment 247/1997, the Court considers its previous interpretation on the matter and a consistent case-law of the *Corte di Cassazione* as sufficient grounds to exclude legal uncertainty, Corte Cost., 18 July 1997, no. 247, para. 2. On the alleged imprecision of the criminal offence of *stalking* (art. 612 *bis* c.p.) see Corte Cost., 11 June 2014, no. 172, para. 5.

[250] The military criminal offence of 'violation of military order' (*violata consegna*, art. 120 c.p.m.p.), whose actual definition depended on the order by the military authority, was considered consistent with Art. 25 co. 2 Cost., since the Court opted for a systematic interpretation also in light of the existing case-law. Corte Cost., 6-11 July 2000, no. 263, para. 2; moreover, the normative framework and a systematic interpretation enabled the Court to deny the lack of legal certainty of art. 172 c.p.m.p. (*disobbedienza*, disobedience to an order), Corte Cost., ord., 5-14 February 2001, no. 39; on the legitimacy of criminal offences constructed by generally comprehensible and widespread concepts (art. 290 c.p. *vilipendio*, contempt), Corte Cost., 24 January 1974, no. 20, para. 6 and Corte Cost., 15-23 November 2000, no. 531; furthermore, the Court defines the so-called 'legal objectivity' of the criminal offence and the sufficient precision of its elements, referring to the military criminal offence of treasonous activities (art. 182 c.p.m.p., *attività sediziosa*). In the same judgment, the legal certainty of the other allegedly illegitimate disposition was motivated on the basis of its consistent judicial interpretation (art. 183 c.p.m.p., treasonous demonstrations or shouting, *manifestazioni e grida sediziose*), Corte Cost., 15-20 November 2000, no. 519, para. 3-4.

[251] F. PALAZZO, *Legalità e determinatezza della legge penale*, cit., p. 70-71.

[252] A. CADOPPI, *Il valore del precedente nel diritto penale*, cit., p. 110.

problems foreseeability in European legality have raised are often only illicit interpretations, conflicts or retroactive overruling. In most cases, the problem would with difficulty be identified with the written provision itself and therefore the Constitutional Court would have a very strict operative margin.[253] It has been pointed out that it is not likely that the Constitutional Court will adopt a stricter approach declaring norms illegitimate for their uncertain judicial application. In these cases, the Constitutional Court would have to express a preference for a certain interpretation, hence taking the place of the *Corte di Cassazione*, which should be the appropriate organ to ensure a uniform interpretation of the law. This would lead, in extreme cases, to an undesirable conflict or tension between the Judge of the Laws (Constitutional Court) and the nomophylactic judge (*Corte di Cassazione*).[254] Moreover, living law is an *argument* in the reasoning of the Constitutional Court, not the object of the Court's scrutiny.[255] Using *Richterrecht* as a ground to pronounce a violation of legal certainty would in effect equate case-law to a source of criminal law.[256] The application of Art. 25 co. 2, in the perspective of *determinatezza*, to judge-made law is rejected also because, even if consistent case-law is useful for equality and legal certainty, it is not linked with the principle of legality.[257]

2.3. Prohibition of analogy.

The other side of the principle of legal certainty, the prohibition of analogy, is common both to the ECtHR and the Italian Constitutional framework. An investigation on analogy will be excluded from this chapter for the following reasons. It would be impossible in this context to give an exhaustive reconstruction of the evolution of this principle in the Italian legal order.[258] Moreover, the assessment of European legality is centred on

[253] Cadoppi highlights how legislative techniques are insufficient to handle the problem of case-law, as, even in the best possible scenario, the judge will always have discretion on the interpretation and therefore such questions will always be unsolved. A. CADOPPI, *Il valore del precedente nel diritto penale*, cit., p. 133 ff, 139.
[254] F. PALAZZO, *Legalità fra* law in the books *e* law in action, cit., p. 8-9, S. RIONDATO, *Retroattività del mutamento giurisprudenziale sfavorevole*, cit., p. 246.
[255] S. MOCCIA, *La 'promessa non mantenuta'*, cit., p. 64.
[256] F. PALAZZO, *La sentenza* Contrada, cit., p. 1065. A. CAVALIERE, *Radici e prospettive del principio di legalità*, cit., p. 664. On the contrary, *lex certa* depends on the norm, rather than on the disposition according to M. DONINI, *Il diritto penale giurisprudenziale*, cit., p. 18.
[257] A. CAVALIERE, *Radici e prospettive del principio di legalità*, cit., p. 667.
[258] G. VASSALLI, *Analogia*, in *Dig. disc. pen*., I, Torino, 1987, p. 158 ff.; M. BOSCARELLI, *Analogia e interpretazione estensiva nel diritto penale*, Palermo, 1955. On the constitutional protection of the prohibition of analogy F. BRICOLA, *La discrezionalità nel diritto penale*, cit., p. 297 ff.

foreseeability and the cases where analogy is expressly recalled are very rare in the most recent case-law of the Court.

As mentioned above, analogy is a judicial creation, since it fills a normative gap with new contents and applies the rationale behind a statutory provision in a similar area to a new group of cases.[259] Since analogy is prohibited explicitly by Art. 14 prel.c.c. (preliminary provisions to the Civil Code) and implicitly by Art. 25 co. 2 Cost. and art. 1 c.p., this chapter will avoid referring to cases where an analogical interpretation took place and therefore an already established prohibition is applicable.

Moreover, in the analysis of foreseeability the question is whether it is possible to expand legal certainty (in the sense on *Rechtssicherheit*) to case-law. A fundamental right to a reasonably foreseeable interpretation is aimed at avoiding diachronic and synchronic conflict having detrimental effects on the individual. Therefore, the investigation goes beyond the perspective of analogy.

In addition, analogy would hardly be accepted as a valid plea of constitutional illegitimacy before the Constitutional Court, since the point at stake is an illicit interpretation but not a fault in the statutory provision. Attentive scholarship has noted that the quashing of lower instance judgements by the *Corte di Cassazione* due to a violation of the prohibition of analogy happens quite often. The same scholarship however highlights that it is often a method of rejecting an interpretation and to affirm a different one.[260]

Moreover, a thorough investigation of analogy would have to give space to the debate on the very possibility to distinguish it from extensive interpretation. The most updated theories, following philosophical and hermeneutical studies, put this distinguishing into question,[261] although authoritative scholars still believe in the possibility to separate extensive interpretation from analogy.[262]

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[259] See V. KREY, *Zur Problematik richterlicher Rechtfortbildung contra legem*, cit., p. 361.
[260] M. DONINI, *Il diritto penale giurisprudenziale*, cit. p. 21 f.
[261] O. DI GIOVINE, *L'interpretazione nel diritto penale tra creatività e vincolo alla legge*, cit., p. 268 f. Vogliotti harshly criticises the 'exceptional exclusion' of criminal law from the results of hermeneutics, in M. VOGLIOTTI, *Il risveglio della coscienza ermeneutica nella penalistica contemporanea*, in *Rivista di filosofia del diritto*, 2015, p. 94 ff. See B. SCHÜNEMANN, *Die Gesetzesinterpretation im Schnittfeld von Sprachphilosophie, Staatsverfassung und juristische Methodenlehre*, in G. KOHLMANN (ed.), *Festschrift für Ulrich Klug zum 70. Geburtstag*, Köln, 1983, p. 169 ff.
[262] G. MARINUCCI, *L'analogia e la "punibilità svincolata dalla conformità alla fattispecie penale",* in *Riv. it. dir. proc. pen*., 2007, p. 1255.

3. Objective solutions: non-retroactivity and diachronic foreseeability.

The interaction between European and domestic legality, and in particular foreseeability has intensified the debate on the possible solutions to the problems of detrimental judicial interpretation in an intertemporal perspective. Not only diachronic, but also synchronic conflicts could be handled under the objective perspective of intertemporal law and non-retroactivity. The three main points at stake are i) the possible introduction of a prospective overruling mechanism and the extension of the prohibition of retroactivity to case-law; ii) the extension of the discipline of intertemporal law to case-law (art. 2 c.p.); iii) the introduction of a relative and partially binding precedent in the Italian legal system as well.

The Italian legal framework on the principle of non-retroactivity and the succession of norms is composed by constitutional provisions and the criminal code. As far as the principle of non-retroactivity is concerned, Art. 25 co. 2 Cost. affirms it. Its main rationale is legal certainty, with regards to the protection of personal liberty: the individual must know the boundaries between lawful and unlawful when he acts infringing the criminal law.[263]

On the other hand, the succession of criminal provisions is disciplined in detail in art. 2 c.p., which foresees the regime for detrimental and favourable provisions.[264] While the principle of non-retroactivity has a direct safeguard in the Constitution, the principle of retroactivity of *lex mitior* has been awarded constitutional protection only at a later stage.[265] It is now obvious to point out that the whole intertemporal law regulation is

[263] Art. 25 co. 2 Cost.: 'No punishment may be inflicted except by virtue of a law in force at the time the offence was committed'. M. SINISCALCO, *Irretroattività delle leggi in materia penale,* Milano, 1987, p. 96 ff., who points out that legal certainty is the knowledge that the individual will not be subject to a detrimental treatment. This particular interpretation of certainty is due to the necessity of including the *lex mitior* principle into the rationale of legality.

[264] Art. 2 (1),(2),(4) c.p. (succession of statutes) reads: '(1) No one may be punished for an act which did not constitute an offence at the time it was committed; (2) No one may be punished for an act which does not constitute an offence according to a subsequent statute; and if the sentence has been imposed, the execution and the penal consequences thereof shall cease. […] (4) If the statute in force at the time an offence was committed and a subsequent statute are different, that statute shall be applied whose provisions are more favourable to the accused, unless a final judgement has been issued. […]'.

[265] Corte Cost., 23 November 2006, no. 393 and Corte Cost., 23 November 2006, no. 394. The Constitutional Court anchored the principle of more lenient criminal law to Art. 7 ECHR in Corte Cost., 22 July 2011, no. 236.

based on the succession of criminal statutes and their mutual relationship with respect to detrimental or more lenient consequences on individuals.[266]

3.1. Prospective overruling and non-retroactive case-law.

As far as diachronic conflicts are concerned, the scientific debate has focused on a *de lege ferenda* perspective. A prohibition of retroactive overrulings or the prospective overruling mechanism have been suggested. These reforms nevertheless exclude the possible introduction of an horizontal binding precedent.[267]

The rule of prospective overruling, almost disregarded in all common law States, limits the effect of an overruling *in malam partem* to future cases, excluding its effects for the case under scrutiny.[268] In the criminal law an overruling *in malam partem* would have the same effects as a retroactive criminal statute on individuals who committed the offence before the overruling. Consequently, the principle of non-retroactivity enshrined in art. 25 co. 2 Cost. shall be extended to judicial overrulings, at least imposing their prospective validity.

Several scholars have supported this solution, which has become more and more popular, sometimes invoking the introduction of a rule such as prospective overruling, sometimes only suggesting the extension of the prohibition of retroactivity to case-law.[269] Some have suggested prohibiting retrospective effects of judicial interpretation until a qualified decision from a higher court intervenes. This qualified decision is identified in

[266] M. D'AMICO, *Art. 25 co. 2*, in R. BIFULCO, A. CELOTTO, M. OLIVETTI (eds.), *Commentario alla Costituzione*, I, Torino, 2006, p. 545. For the scope of application of Art. 25 co. 2 see M. LEONE, *Il diritto penale nel tempo. Aspetti costituzionali del principio di irretroattività*, Napoli, 1980, p. 40 ff.

[267] A. CADOPPI, *Il valore del precedente nel diritto penale*, cit., p. 316 ff. Common law States admit some exceptions to the *stare decisis* rule. In Britain, the 1966 Practice Statement testimonies the possibility to have exceptions to the prohibition of the House of Lords to overrule its precedents, referring to the House of Lords ruling in the case *London Street Tramways v. London County Council*, 1898. R. CROSS, J. W. HARRIS, *Precedent in English Law*, Oxford-New York, 1991, p. 135.

[268] U. MATTEI, *Precedente giudiziario e stare decisis*, in *Dig. Disc. Priv. (sez. civ.)*, XIV, Torino, 1996, p. 157 ff., R. CROSS, J.W. HARRIS, *Precedent in English Law*, Oxford-New York, 1991.

[269] S. RIONDATO, *Retroattività del mutamento giurisprudenziale sfavorevole*, cit., p. 241 ff.; A. BALSAMO, *La dimensione garantistica del principio di irretroattività e la nuova interpretazione giurisprudenziale "imprevedibile": una "nuova frontiera" del processo di "europeizzazione" del diritto penale*, in *Cass. pen.*, 2007, p. 2202 ff., FR. MAZZACUVA, *Le pene nascoste*, cit., p. 245 ff. Scholarly opinions suggest the rule of prospective overruling, applying new interpretations only to criminal offences *committed* after the overruling, M. SCOLETTA, *La legalità penale nel sistema europeo dei diritti fondamentali*, in C.E. PALIERO, F. VIGANÒ (eds.), *Europa e diritto penale*, Milano 2013, p. 253. M. GAMBARDELLA, Lex mitior *e giustizia penale*, cit., p. 268. M. VOGLIOTTI, *Penser l'impensable*, cit., p. 369 ff.

the *Sezioni Unite* judgement. This rule shall not introduce formal binding precedent, but just be limited to a procedural binding force.[270]

Although in favour of a prospective overruling solution, scholars suggest focusing on an hermeneutical approach, in order not to stumble upon constitutional principles. Without trying to modify the constitutional interpretation of retroactivity, these rules should be conceived of as interpretive rules, like the prohibition of analogy.[271] The disadvantage would certainly be the difficult enforcement of interpretive rules. *De lege lata*, prospective overruling could be a possible interpretive solution to the risk of interpretive abuse, but the Italian legal system does not have a remedy in case the rule is violated. Conversely, it could give rise to a violation of the ECHR.

In this perspective, some scholars suggested to apply prospective overruling with the standard of European objective foreseeability, prohibiting all extensive interpretations (apart from analogy, which is already prohibited). This prospect preliminarily requires reconsidering the link legality-culpability through foreseeability and acknowledging that legality has modified its essence. [272]

Trying to give a concrete substance to these proposals, the extensive construction outside the boundaries of *Tatbestand* would amount to an interpretive abuse. On the one hand, if the new interpretation went beyond the limits of concretisation, it would trigger the prohibition of analogy and therefore could not be 'saved' by prospective overruling. On the other hand, an overruling *in malam partem*, if innovative but inside the possible concretisations of the *Tatbestand*, would be possible, even though limited by prospective overruling.[273] In these cases the rule of prospective overruling shall be valid, in respect of *Sezioni Unite* judgements.[274]

[270] M. DONINI, *Il volto attuale dell'illecito penale*, cit., p. 166 and ID., *Il diritto penale giurisprudenziale*, cit., p. 30 ff.
[271] Despite apparently preferring prescriptive interpretive rules, Donini also affirms the necessity of applying art. 2 c.p. to overrulings on the basis of the concept of *sottofattispecie*. M. DONINI, *Europeismo giudiziario e scienza penale*, cit., p. 114-117. See *infra*, next paragraph.
[272] V. MANES, Common law-isation *del diritto penale?*, in *Cass. pen.*, 2017, p. 974 f. and ID., *Dalla" fattispecie" al "precedente": appunti di "deontologia ermeneutica"*, in *Dir. pen. cont.*, 2018, p. 25, where he suggests a possible application of art. 2 c.p. to the new 'interpretive content' of the law as well.
[273] M. DONINI, *Il diritto penale giurisprudenziale*, cit., p. 30 f.
[274] Art. 5 c.p. would apply only to non-established case-law, M. DONINI, *Il diritto penale giurisprudenziale*, cit., p. 31.

3.2. The extension of art. 2 c.p. to case-law.

The acknowledgement of the common characteristics and rationales between European and domestic legality has led some to try figuring out a possible extension of the discipline of inter-temporal law to case-law. This solution would include both detrimental and more lenient overrulings.[275]

Even before the ECHR's influence, some scholars already saw a possible extension of Art. 25 co. 2 Cost. to judicial orientations *in malam partem*. These detrimental overrulings were defined as 'judicial developments due to socio-cultural changes'. In these cases, scholarship identified the possibility to extend the scope of Art. 25 co. 2 Cost., when the evolutive interpretation of the courts causes a detrimental treatment for the individual that is equivalent to a new *in malam partem* retroactive statute. In particular, these scholars suggested that Art. 25 co. 2 Cost. could be referred not only to criminal statutes but also to norms and therefore aimed not only at limiting the legislator, but also the judges. The outcome of these remarks was sometimes in favour of an extensive application of Art. 25 co. 2 Cost., [276] although sometimes scholars suggested introducing a 'directive' for the judge to avoid *ex post facto* detrimental judicial constructions, but not a binding principle.[277]

With regards to more recent orientations, scholarship focused on a new interpretation of intertemporal law in light of the inclusion of judge-made law into its scope of application. A first obstacle is the implementation of this proposal: some scholars suggest a consistent interpretation of art. 2 c.p. (and Art. 25 co.2. Cost.) with Art. 7 ECHR,[278] while others opt for a legislative amendment of art. 2 c.p..[279]

A second major problem is the object of the judicial overruling or of the judicial contrast which could be relevant in terms of art. 2 c.p.

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[275] R. BARTOLI, *Legalità europea* versus *legalità nazionale?*, cit. p. 283 ff., see M. DONINI, *Europeismo giudiziario e scienza penale*, cit., p. 114-117.

[276] Judicial developments motivated by socio-cultural changes are opposed to judicial developments motivated by statutory amendments, that already fell under the scope of Art. 25 co. 2 Cost. M. LEONE, *Il diritto penale nel tempo*, cit., p. 57 and 59.

[277] C. ESPOSITO, *Irretroattività e «legalità» delle pene nella nuova Costituzione*, in ID., *La Costituzione Italiana. Saggi*, Padova, 1954, p. 98-99.

[278] R. BARTOLI, *Legalità europea* versus *legalità nazionale?*, cit. p. 283 ff., see also M. DONINI, *Europeismo giudiziario e scienza penale*, cit., p. 114-117 (although not referring to the ECHR).

[279] D. PIRRONE, *Nullum crimen sine iure*, cit., p. 380 f. The legislative amendment should add a *comma* 1 *bis* to art. 2 c.p. that reads '*nessuno può essere punito per un fatto la cui punibilità, secondo l'interpretazione della legge del tempo in cui fu commesso, era imprevedibile*'.

According to Bartoli, whose reasoning is based on the interaction between European and domestic perspective, both 'legalities' apply to the interpreted source in the law in action. This is the starting point to underline another important common feature.[280] In case of an overruling or a judicial conflict, the object of both legalities is a so-called *typological-teleological dimension*. The typological-teleological dimension corresponds to the essence of the offence in the Strasbourg case-law on foreseeability and to the limits of the 'typological' description of the criminal offence in the Italian legal order, which seems to refer to *Typus*, but not the 'typical' description of the offence.[281]

The parallel between the so-called 'typological-teleological' dimension and the essence of the offence recalls some observations made by Palazzo on analogy and a possible influence of European legality. Palazzo, suggesting a possible criterion to distinguish a real (and therefore prohibited) analogy from an ordinary interpretation, considered the 'typical disvalue' of the offence (*disvalore tipico*) as a possible parameter.[282] In this perspective he saw a link between the idea of 'typical disvalue' and the concept of 'essence of the offence' in the Strasbourg jurisprudence. Considering it a positive characteristic, the essence of the offence could contribute to support the idea of 'typical disvalue' in order to establish the boundaries of the expansive potential of the offence. [283] In this perspective, a constructive idea of *lex certa* is presented as a written norm which is able to offer a sufficiently 'typical disvalue'. That disvalue will further be the basis for a legitimate interpretation of the norm, within the limits of its concretisation, without falling into analogy and that will legitimately connect the abstract wording of the norm to the concrete facts.[284]

Although these observations follow a common path, Palazzo seem to refer to the 'typical disvalue' in the sense of *tipicità*, i.e. the possibility to subsume the case under the

[280] According to Bartoli, both legalities refer to the relationship citizen-legal order, that prohibits retroactivity, and the relationship legal order-judges, that binds the interpretation of the judge. R. BARTOLI, *Legalità europea* versus *legalità nazionale?*, cit. p. 294 ff.
[281] R. BARTOLI, *Legalità europea* versus *legalità nazionale?*, cit. p. 295 f. and ID., *Lettera, precedente, scopo: tre paradigmi interpretativi a confronto*, in *Riv. it. dir. proc. pen*., 2015, p. 1778 f.
[282] The linguistic approach conceals the real meaning of the interpretation and often a misuse of its function by the judge. F. PALAZZO, *Legalità penale: considerazioni su trasformazioni e complessità di un principio 'fondamentale'*, in *Quaderni fiorentini per la storia del pensiero giuridico moderno*, XXXVI, Milano, 2007, p. 1308-1313. The focus of the interpretation in criminal law is *Typus* and the possibility to identify an identical or homogenous content of disvalue expressed in the linguistic formulation of the offence. Therefore, an analogy would be the application of the same norm to heterogeneous facts with respect of the level of their disvalue. ID., *Legalità e determinatezza della legge penale*, cit., p. 75.
[283] F. PALAZZO, *Legalità penale: considerazioni*, cit., p. 1318-1321.
[284] F. PALAZZO, *Legalità penale: considerazioni*, cit., p. 1321.

scope of application of the statutory criminal offence, Bartoli seems to refer to the essence of the offence in the direction of the concept of *Typus*.[285] If that was the case, applying the regulation of intertemporal law to case-law on the basis of its modification of the *Typus*, and not of the statutory essence of the offence, could lead to possible negative results in terms of analogy.

On the other hand, Donini identifies the object of the overruling, which makes it different from a simple interpretation, in the creation of a new *sottofattispecie*.[286] *Sottofattispecie* is a concept elaborated in order to apply art. 2 *co*. 2 and 4 c.p. to *partial abolitio criminis*.[287] The said provisions have been applied in practice to partial amendments of the criminal offence, that do not abolish the criminal provision, but only intervene on a particular aspect: *sottofattispecie*, i.e. a group of facts that can be considered into the scope of application of a statutory criminal offence. Donini suggests applying the same concept of *sottofattispecie* to judicially constructed *sottofattispecie*. The judge shall therefore recognise the creation of an innovative *sottofattispecie* and subject it to Art. 2 c.p.[288]

Having defined the object of an overruling, scholars investigate the possible application of the principles of the succession of norms to case-law, that involve following scenarios.

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[285] A. KAUFMANN, *Analogie und "Natur der Sache": zugleich ein Beitrag zur Lehre vom Typus*., Karlsruhe, 1965, p. 29 ff. According to Kaufmann, *Typus* is a *tertium genus*, the essence that lies in the middle between fact and concept.

[286] M. DONINI, *Europeismo giudiziario e scienza penale*, cit., p. 115; A. CADOPPI, *Il valore del precedente nel diritto penale*, cit., p. 170.

[287] *Sottofattispecie* refers to the norm, rather than to the succession of new criminal provisions. This concept has been elaborated both in substantial and procedural law, especially under the perspective of the execution of judgements. Tullio Padovani gave a great input to this doctrine and introduced a structural criterion in order to assess the succession of norms, opposing the criterion of the 'unlawfulness continuity' (*continuità nel tipo d'illecito*, *Unrechtskontinuität*), more oriented towards the protected legal good, and most popular in German doctrine. T. PADOVANI, *Tipicità e successione di leggi penali*, in *Riv.it. dir. proc. pen*., 1982, p. 1354 ff. See K. TIEDEMANN, *Zeitliche Grenzen des Strafrechts*, in J. BAUMANN (ed.), *Einheit und Vielfalt des Strafrechts: Festschrift für Karl Peters zum 70. Geburtstag*, Tübingen, 1974, p. 205 f.

[288] M. DONINI, *Europeismo giudiziario e scienza penale*, cit., p. 115. The *sottofattispecie* is the category of facts that can be considered included into the scope of application of a statutory criminal offence. Padovani is trying to solve the specific problem of the succession of norms in case the second provision is *lex specialis* with reference to the first one and criminalises only a portion of the original conduct. In this case, problems arise with regards to those who committed the offence at the time the first provision was in force but whose conduct is fully typical pursuant to the second provision as well. The second typical fact, as expressed by the second provision, can be considered 'already entailed' in the first one, as it is its *sottofattispecie* (under-typical fact). This peculiar relationship gives rise to a partial 'abolition' of the criminal offence, while two subsequent provisions which do not share this relationship give rise instead to a complete abolition of the offence. T. PADOVANI, *Tipicità e successione di leggi penali*, cit., p. 1374-1376.

a) *Diachronic conflicts*. First of all, an overruling *in malam partem* should not be applied retroactively if it punishes an act or an offence which was not considered a criminal offence before. In this case, the mechanism of prospective overruling would apply. Some scholars identify an overruling with a judgement of the *Sezioni Unite* of the *Corte di Cassazione* or the reversal of a previously consistent and well-established interpretation.[289] Other commentators distinguish between unforeseeable overruling without precedent and overruling of a well-established case-law (diachronic conflicts).[290]

Secondly, an overruling *in bonam partem* could be subject to art. 2 *co*. 2 and 4 c.p. An overruling *in bonam partem* capable of triggering art. 2 could be either i) one that relinquishes the criminal characterisation of a fact, considering it 'atypical' i.e. not infringing criminal law; ii) a favourable new interpretation. The Italian legislation, unlike most European criminal codes, distinguishes between these two options and considers the first one (abolition) capable of triggering also a definitive judgement, whereas the second (more favourable provision) limits its scope to legal situations not yet decided with a definitive judgement.

With regards to *res judicata*, the same principle of equality that supports (together with Art. 7 ECHR and 117 Cost.) the constitutional protection of the principle of retroactivity of *lex mitior*, would suggest the retroactive application of a favourable overruling to those cases still waiting a definitive judgment or all those offences committed after the intervention of the mentioned overruling. Moreover, Bartoli suggests distinguishing the facts committed before, but judged after the *Sezioni Unite* favourable judgment and facts committed after the favourable overruling. In the first hypothesis, the judge should retroactively apply the principle affirmed by the *Sezioni Unite*, while in the second case he or she should apply it; however, it would have the possibility to overcome it, as long as the unfavourable interpretation will not be applied in the case in question. This would lead to a possible infringement of the principle of equality, as potentially lower instance judges could have different approaches to the overruling and diverge in its application.[291] Conversely, it would be unreasonable to apply the favourable overruling retroactively in cases were the *res judicata* has already effect.[292] In this perspective, this proposal seems

[289] R. BARTOLI, *Legalità europea* versus *legalità nazionale?*, cit. p. 297.
[290] D. PIRRONE, *Nullum crimen sine iure*, cit., p. 354 ff.
[291] R. BARTOLI, *Legalità europea* versus *legalità nazionale?*, cit. p. 298.
[292] Corte Cost., 12 October 2012, no. 230, and R. BARTOLI, *Legalità europea* versus *legalità nazionale?*, cit. p. 297. Against, M. LEONE, *Il diritto penale nel tempo*, cit., p. 60 f.

to generally exclude the application of an overruling *in bonam partem* to cases already decided with a definitive judgement. This interpretation could also be in accordance with the ECtHR.[293]

b) *Synchronic conflicts, later composed by a qualified precedent.* Another case is that of synchronic conflicts resolved by a qualified precedent (a *Sezioni Unite* judgment) that affirms the correct interpretation. In these cases, some opt for a non-retroactivity solution, while others for the application of art. 5 c.p. (inevitable ignorance of the law) to the cases verified before the qualified judgement.[294] In case of synchronic conflicts resolved *in bonam partem*, the new rule shall apply retroactively, with the limitation of *res judicata*, pursuant to the principle of equality.[295] Especially as far as *lex mitior* is concerned, the principle of equality could support the idea of an application of art. 2 to case-law as well. In fact, the same principle of equality has been considered the main constitutional rationale for the principle of retroactive more lenient criminal law by the Constitutional Court.[296]

In case of an *in malam partem* conflict resolution, the prohibition of retroactivity would operate.[297] It remains nevertheless dubious whether in this case the impossibility to apply the overruling retroactively should apply to those cases where the offence was committed *before* the 'qualified precedent', but whose trial is being conducted *after* the precedent was stated. This peculiar case, would lead to a difficult adaptation *de lege lata*: without amending the criminal code or the criminal procedure code, it would be difficult to implement this orientation in concrete proceedings pending before a judge, since the judge would be forced to create another interpretive conflict by not applying the new *in*

[293] The ECtHR seems to limit the application of the *lex mitior* principle before a final judgement. ECtHR, Scoppola v. Italy (no. 2), 17 September 2009, no. 10249/03, para. 109; Although this was an incidental affirmation, in different contexts the same principle has been affirmed beyond *res judicata*, ECtHR, Gouarré Patte v. Andorra, 12 January 2016, no. 33427/10, para. 29. ECtHR, Ruban v. Ukraine, 12 July 2016, no. 8927/11, para. 38-39.

[294] See *above*, this section, para. 1.2.1. and 1.2.3. Bartoli seems to adopt the Constitutional Court's solution that investigates subjective elements to assess culpability or to apply subjective foreseeability. If the accused was aware of the synchronic conflict, then his behaviour cannot be excused. R. BARTOLI, *Legalità europea* versus *legalità nazionale?*, cit. p. 297.

[295] The principle of equality would not tolerate the non-equal treatment of the same cases. R. BARTOLI, *Legalità europea* versus *legalità nazionale?*, cit. p. 299.

[296] Corte Cost., 23 November 2006, no. 394. The Constitutional Court anchored the principle of more lenient criminal law to Art. 7 ECHR in Corte Cost., 22 July 2011, no. 236.

[297] Against, D. PIRRONE, *Nullum crimen sine iure*, cit., p. 364, who considers only overrulings and diachronic conflicts as a violation of legality, while synchronic conflicts are violate the principle of culpability. Therefore, she opts for the introduction of a new 'mistake on the interpretation' in case of synchronic conflicts.

malam partem interpretation to a whole group of cases, or applying prospective overruling to several individuals, thus making it difficult to enforce the new interpretation in the absence of a binding precedent doctrine.

c) *Synchronic long-lasting conflicts*. The only excluded cases would be the cases concerning long lasting and unresolved conflicts within the *Corte di Cassazione*. In those cases, the regulation of the succession of norms could hardly help. According to constitutional jurisprudence, the written provision would with difficulty be declared unconstitutional and the mistake of law would be a too subjective assessment. The only possibility, according to some, would be interpreting Art. 111 Cost. consistently with art. 6 and 7 ECHR and recognising a right to foreseeable judicial interpretations, which is a hypothesis that will be analysed *infra*.[298]

3.3. Criticism on prospective overruling and the application of art. 2 c.p. to case-law.

Both these solutions (prospective overruling and an extensive interpretation of art. 2 c.p.) could solve the problem of diachronic conflicts and of synchronic conflicts 'reabsorbed' by a *Sezioni Unite* judgement affirming the correct interpretation. Long lasting conflicts would however remain untouched from such a reform.

Apart from these general remarks, some critical points have been discussed in literature. It is useful to briefly address them before analysis the Constitutional Court's approach.

In a *substantial and constitutional perspective*, a first obstacle both to prospective overruling and the extension of Art. 25 co. 2 Cost. and art. 2 c.p. to case-law would be the impossibility, in light of the present situation, to interpret the constitutional principle of legality including case-law in its scope of application.[299] Since this would be an analogical interpretation, statutory reservation would prohibit an equivalence between statutory and judicial sources of law, even though *in bonam partem*. Hence, it would be impossible to make an analogy between statutory law and judge-made law as sources, as the latter does not enjoy the same status.[300] In addition, the separation of powers and subjection of the judge to the law (in the sense of statutory law) enshrined in Art. 101 Cost. would represent another strong obstacle. The only possibility would be a legislative amendment or an intervention of the Constitutional Court, reinterpreting art. 2 c.p. or Art.

[298] See *infra*, section V, para. 1. Against, D. PIRRONE, *Nullum crimen sine iure*, cit., p. 364.
[299] A. CADOPPI, *Il valore del precedente nel diritto penale*, cit., p. 316 ff.
[300] S. RIONDATO, *Retroattività del mutamento giurisprudenziale sfavorevole*, cit., p. 251.

25 *co*. 2 Cost.. Authoritative scholarship, with regards to the sole extension of Art. 2 co. 1 c.p. (non-retroactivity) to case-law, has predicted a possible legitimation of the judge-made law as a source of criminal law and a negative effect on European legality as well, since the dynamic force of judicial interpretation would be limited by such reform.[301]

Although this objection is hardly controvertible *de iure condito*, some have tried to substantiate this claim on the basis of a different reading of constitutional principles. For example, it has been argued that, regardless the persistent strong statutory legality, the principle of non-retroactivity is not founded on the rationale of separation of powers (art. 101 Cost.) but rather only protects individual autonomy, legal certainty and protection of legitimate expectations.[302] As a consequence, the principle of non-retroactivity could be more easily adapted to the protection against retroactive overruling in detriment of the accused. Moreover, at the level of Art. 25 co. 2 cost., the rationale of the principle of non-retroactivity vested in Art. 25 co. 2 Cost. would be unreasonably violated by an overruling in detriment of the accused, which would have the same effects of a retroactive statute.[303]

Prospective overruling and the non-retroactivity solution as well could both raise doubts under a *procedural perspective*. An overruling *in malam partem*, that would result in the conviction of the applicant, or in a higher penalty, at the level of the *Corte di Cassazione* would come, in the majority of cases, from the appeal of a more favourable decision. Thus, the Public Prosecutor (*Pubblico Ministero*) would be usually involved. It has been pointed out that the perspective of an acquittal decision due to prospective overruling (or to the application of non-retroactivity) would prevent the public accuse to have an interest in triggering the last instance court. Conversely, the Public Prosecutor would probably try to convince the court that his or her alleged new interpretation is in fact following an already established case-law, or that it is undergoing a synchronic conflict.[304] Moreover, the interest of the public prosecutor could also be the affirmation of the *regula juris* for the future.

The implementation of this reform would raise even more serious doubts, such as: i) the definition of 'overruling' and in which situation judicial interpretation could be

[301] F. PALAZZO, *La sentenza* Contrada, in *Dir. pen. proc*., 2015, p. 1066.
[302] Valentini makes this point, considering the prohibition of retroactivity only coherent with statutory reservation, but not necessarily limited by the latter principle in having wider effects. V. VALENTINI, *Diritto penale intertemporale. Logiche continentali ed ermeneutica europea*, Milano, 2012, p. 155 f.
[303] A. CADOPPI, *Il valore del precedente nel diritto penale*, cit., p. 319.
[304] V. VALENTINI, *Diritto penale intertemporale*, cit., p. 157 f.

considered diachronically changed, ii) the difference between a relevant overruling and a simple legitimate extensive interpretation and iii) what would be its scope of application. On the definition of overruling, it is still unclear what could be considered a new judicial construction. A possibility would be to identify an overruling with a new authoritative interpretation of the *Sezioni Unite*, which could be an acceptable solution. However, some *regulae juris* could not yet be the object of a *Sezioni Unite* judgement and there could also be first interpretations. Moreover, a question would arise in the case of a synchronic conflict between the different Sections of the *Cassazione* 'reabsorbed' by *Sezioni Unite, quid juris* for those who committed the offence at the time the conflict was still lasting.[305]

Moreover, although some attempts have been made to define the object of the overruling, its definition would still need elaboration.[306]

A last crucial question concerns which elements of the offence and penalty would be affected. Some scholars suggest limiting them to those elements of the offence that can affect legal certainty, such as the alternative between lawfulness and unlawfulness or the scope of general principles (in the sense of *parte generale* in the Italian criminal law). More dubious would be the cases of statutory limitation, imputability, penalties and their execution.[307]

Although it would be possible to overcome some of these obstacles, the most appropriate solution would still be difficult to identify: whether at dogmatic level (art. 2 c.p.), in a hermeneutical perspective or through prospective overruling. Nevertheless, a common point among these solutions is that they all rely on a *de lege ferenda* perspective.

3.4. The approach of the Constitutional Court to case-law in intertemporal law.

The Constitutional Court's approach to the subject is a strong defence of the traditional (and constitutional) dimension of legality. The principles of statutory reservation and separation of powers have been invoked in order to reaffirm the role of statutory law, the subsidiary role of case-law, which could never be a source of law.[308] The Constitutional Court had the chance to address the subject in cases concerning judicial overruling that determined a more lenient criminal law, and in particular, a substantial abolishing of the

[305] Bartoli tries to solve this point, *above*, para. 3.2.
[306] See *infra*, para. 4.1.
[307] A. CADOPPI, *Il valore del precedente nel diritto penale*, cit., p. 336 ff. On this point see the definition of the scope of application of foreseeability, *infra*, section V, para. 4.
[308] Manes underlines this aspect in V. MANES, Common law-isation *del diritto penale?,* cit., p. 968 f.

offence through judicial interpretation. It is important to note the difference between the abolition of the offence and a simple favourable provision (for example mitigating penalty), since in the Italian legal order a more lenient criminal provision that abolishes the criminal offence has different consequences than a criminal provision that simply establishes a more lenient framework pursuant to art. 2 co. 2 and 4 c.p.

The Constitutional Court was directly asked to intervene and declare a judicial overruling *in melius* equivalent to a new statute abolishing a criminal offence (*abolitio criminis*) in judgment no. 230/2012.[309] The question regarded a complicated and specific issue on the possibility to revoke *res judicata* due to a *Sezioni Unite* judgement establishing a new interpretation, which *de facto* considered the criminal offence abolished. Although a statutory amendment had occurred before, there was a synchronic conflict within the highest court about whether it was an *abolitio criminis* or not.[310] The problem was to extend the extraordinary remedy of *revoca della sentenza* (art. 673 c.p.p.), which admits the revocation of a definitive judgement in case of an *abolitio criminis* or of a declaration of constitutional illegitimacy of an offence (Art. 30 co. 4 L. 87/1953), to a substantial *abolitio criminis* through a *Sezioni Unite* overruling in light of art. 3, 13, 25, 27 co. 3 and 117 (art. 5,6,7 ECHR).[311]

Although the principles enshrined in the judgment are undoubtedly crucial and expressive of a strong conservative approach of the Constitutional Court, these principles must be necessarily read in light of the peculiarities of the legal question. The Constitutional Court affirmed the lack of statutory reservation in the ECHR version of legality.[312] Therefore, with regards to the possible equivalence between a judicial

[309] Corte Cost., 12 October 2012, no. 230. See, among others V. NAPOLEONI, *Mutamento di giurisprudenza* in bonam partem *e revoca del giudicato di condanna: altolà della Consulta a prospettive avanguardistiche di (supposto) adeguamento ai* dicta *della Corte di Strasburgo,* in *Riv. trim. dir. pen. cont.*, 3-4, 2012, p. 164 ff.

[310] There were uncertainties within the *Corte di Cassazione* whether the criminal offence disciplined in art. 6, *comma* 3, *Testo Unico dell'immigrazione*, d. lgs. 25 July 1998, no. 286 had been partly abolished due to a statutory amendment in 2009. After a first negative orientation of the Court, the *Sezioni Unite* established that the statute in question had modified the previous one, having the effect of a partial *abolitio criminis*. Therefore, according to some scholars, the problem was already solved on a statutory basis, and the *Corte di Cassazione* had simply clarified the correct interpretation of the law. O. MAZZA, *Il principio di legalità nel nuovo sistema penale liquido*, in *Giur. cost*., 2012, p. 3464 ff.

[311] While analysing the debate on the role of art. 673 c.p.p. in these cases, Gambardella opts for the exclusion of the effects of a favourable overruling beyond the limits of *res judicata*. M. GAMBARDELLA, Lex mitior *e giustizia penale*, cit., p. 237 ff.

[312] Corte Cost., 12 October 2012, no. 230, para. 7, *'[al] principio convenzionale di legalità penale […] resta, infatti, estraneo il principio è […] della riserva di legge, nell'accezione recepita dall'art. 25, secondo comma, Cost.; principio che, secondo quanto reiteratamente puntualizzato da questa Corte, demanda il potere di normazione in materia penale – in quanto incidente sui diritti fondamentali dell'individuo, e*

overruling and a new statute, the Court underlined that the abolition of statutory provisions 'cannot depend, in the constitutional architecture, from judicial rules, but only from the will of the legislator (*eius est abrogare cuius est condere*)'.[313] The separation of powers and statutory reservation are depicted as essential features of the Italian legal order that cannot be abandoned.[314] Moreover, the Court excludes that Art. 7 ECHR could dictate to transpose the principles affirmed for non-retroactivity of case-law *in malam partem* also to *in bonam partem* cases, especially in the absence of a stance by the ECtHR. Therefore, according to constitutional judges, the Strasbourg principle of legality does not impose to remove judicial decisions in contrast with a subsequent favourable overruling.[315] This is due to the different nature of the principles: the principle of non-retroactivity is based on the need for predictability, while the *lex mitior* principle is due to the principle of equality.[316] Moreover, the *Sezioni Unite* judgment is not a precedent, but it is rather a well-established and generally valid decision, since it could be overruled any time from any judge.[317]

Some have seen this judgment as a will to protect the current institutional architecture of checks and balances,[318] but surely an extension of the protection of the principle of legality to the results of judicial interpretation seems still unlikely. Other scholars underlined an *obiter dictum* of the Court, which excludes the possibility of making the

segnatamente sulla libertà personale – all'istituzione che costituisce la massima espressione della rappresentanza politica: vale a dire al Parlamento, eletto a suffragio universale dall'intera collettività nazionale […]'.

[313] Corte Cost., 12 October 2012, no. 230, para. 11 '*non può, infatti, dipendere, nel disegno costituzionale, da regole giurisprudenziali, ma soltanto da un atto di volontà del legislatore* (eius est abrogare cuius est condere)' see O. DI GIOVINE, *Come la legalità europea sta riscrivendo quella nazionale*, cit., p. 174.

[314] Against, M. VOGLIOTTI, *Lo scandalo dell'ermeneutica per la penalistica moderna*, in *Quaderni costituzionali*, 2015, p. 132 ff.

[315] Corte Cost., 12 October 2012, no. 230, para. 7. *A contrario* this reference of the Constitutional Court to the principle of non-retroactivity and its extension to case-law in the obligations arising from Art. 7 ECHR could be seen as a sign of a possible future inclusion of the principle.

[316] The Court recalls its findings on equality as basis and limit of the *lex mitior* principle, and its non-absolute nature in the Strasbourg jurisprudence, Corte Cost., 19 July 2011, no. 236.

[317] Corte Cost., 12 October 2012, no. 230, para. 9: '*l'orientamento espresso dalla decisione delle Sezioni unite «aspira» indubbiamente ad acquisire stabilità e generale seguito: ma […] si tratta di connotati solo «tendenziali», in quanto basati su una efficacia non cogente, ma di tipo essenzialmente «persuasivo». Con la conseguenza che, a differenza della legge abrogativa e della declaratoria di illegittimità costituzionale, la nuova decisione dell'organo della nomofilachia resta potenzialmente suscettibile di essere disattesa in qualunque tempo e da qualunque giudice della Repubblica, sia pure con l'onere di adeguata motivazione; mentre le stesse Sezioni unite possono trovarsi a dover rivedere le loro posizioni, anche su impulso delle sezioni singole, come in più occasioni è in fatto accaduto*'.

[318] V. MANES, *Prometeo alla Consulta: una lettura dei limiti costituzionali all'equiparazione tra "diritto giurisprudenziale" e "legge",* in *Giur. cost.*, 2012, p. 3474 ff. According to Manes, the Constitutional Court had interpreted constitutional principles in order to avoid a 'Prometheus' judge, at the mercy of the pluralist and chaotic sources of contemporary law. He then substantiates his idea in ID., *Il giudice nel labirinto*, cit., p. 26-27.

overruling retroactive for offences committed before the judgment but seems to leave the possibility of the non-retroactivity of a (future) detrimental overruling.[319]

Other relevant points with regards to the possible application of non-retroactivity or the succession of norms to case-law can be found in judgement no. 210/2013. The Constitutional Court dealt with the implementation of the ECtHR judgement *Scoppola v. Italy*, which had found a violation of the *lex mitior* principle pursuant to Art. 7 ECHR, with regards to those who were in the same situation as the applicant.[320] Despite the interesting procedural profile and the debate on the implementation of ECtHR judgements, we shall only consider the relevant points in term of the relationship between intertemporal law and judge-made law.[321] The Constitutional Court admitted, in this peculiar case, that a final judgement could be overcome and therefore the sentence could be revoked by a subsequent ECtHR judgement declaring a domestic provision incompatible with Art. 7 ECHR.[322] The consequence is therefore similar to that of a more lenient statute. Although under a procedural perspective the Court seems to introduce a new case overcoming *res judicata*, the Court had to declare the constitutional illegitimacy of the domestic provision before considering it in the perspective of art. 673 c.p.p. and Art. 30 co. 4 L. 87/1953.[323] This could be rather a sign of the (still) necessary statutory parameter in order to assess the succession of norms in the substantial and procedural perspective.

The opposition to a possible extension of *lex mitior* to judicial interpretation was then confirmed in the recent Constitutional Court's judgement no. 25/2019, dealing with the

[319] Corte Cost., 12 October 2012, no. 230, para. 10. R. BARTOLI, *Legalità europea* versus *legalità nazionale?*, cit. p. 298.
[320] Corte Cost., 18 July 2013, no. 210.
[321] Several scholars analysed the principles enshrined in the judgement both in substantive and procedural perspective. C. PECORELLA, *Dichiarata finalmente illegittima la norma del caso Scoppola: lex mitior o tutela dell'affidamento?,* in *Dir. pen. proc*., 2013, p. 1433; R. CONTI, *Il rilievo della CEDU nel "diritto vivente": in particolare, il segno lasciato dalla giurisprudenza "convenzionale" nella giurisprudenza dei giudici comuni*, in *ConsultaOnline*, 2, 2015, p. 417 ff.; E. APRILE, *Sulle pronunce della Consulta che hanno definito gli effetti della sentenza della Corte di Strasburgo sul "caso Scoppola"*, in *Cass. pen*., 2013, p. 4388 ff.; M. GAMBARDELLA, *Norme incostituzionali e giudicato penale: quando la bilancia pende tutta da una parte*, in *Cass. pen*., 2015, p. 65 ff.; E. LAMARQUE, F. VIGANÒ, *Sulle ricadute interne della sentenza Scoppola (ovvero: sul gioco di squadra tra Cassazione e Corte costituzionale nell'adeguamento del nostro ordinamento alla sentenza di Strasburgo)*, in *Giur. it.*, 2014, p. 393 ff.
[322] The Constitutional Court's reasoning is based on the rationale of personal liberty, as opposed to certainty ensured by the stability of final judgements. Corte Cost., 18 July 2013, no. 210, para. 7.3.
[323] Corte Cost., 18 July 2013, no. 210, para. 8-9.

consequences of the Strasbourg case of *De Tommaso v. Italy*.[324] The Court, with regards to the extension of *abolitio criminis* to judicial overruling, stated that

> '*abolitio criminis* – for *jus superveniens* or a constitutional illegitimacy decision – is different from judicial development, at the level of the *Corte di Cassazione*, that reaches similar results, considering a conduct not to represent a criminal offence any more'.[325]

In this perspective, the principle enshrined in Art. 101 Cost., which affirms that the judge is only subject to the law, imposes that case-law only has a declaratory content and therefore could never be placed on the same level as statutory amendments in the perspective of the succession of norms.[326] In a different context, the Constitutional Court in order no. 24/2017 expressly rejected the idea of the judge making decisions in the domain of criminal policy, which in effect would make him or her equal to the legislator. The reasoning focused on the formal distinction between sources and the impossibility to let the judiciary overcome the limits imposed by Art. 101 c.p., that need to be particularly stringent in criminal law.[327] However, the Constitutional Court in the same order no. 24/2017 applied the 'foreseeability test' to a judicial rule created by the CJEU in the *Taricco* case: one of the aspects of the constitutional control of legitimacy of the European preliminary ruling with the Italian legal order was the foreseeability of the possible disapplication of the Italian regulation on statutory reservation in cases relating to Art. 325 TFEU. [328]

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[324] As a consequence of the ECtHR judgment in the case of *De Tommaso v. Italy*, the *Corte di Cassazione* had to face the need to reinterpret, in light of the Strasbourg principles, the criminal offence linked to the violation of the prescription imposed with the preventive measure (Art. 75, d.lgs. 159/2001), which resulted in a judicial *abolitio criminis* by the *Sezioni Unite* in the judgment *Paternò*. In the *Sezioni Unite* judgment *Paternò*, the *Corte di Cassazione* refused to address the new favourable interpretation as *jus superveniens* but denied its retroactive application. Cass. pen., SS. UU., 27 April 2017, no. 40076. This was the issue at stake in the Constitutional Court's judgement.

[325] Corte Cost., 24 January 2019, no. 25, para. 5: '*Va innanzi tutto condivisa l'affermazione della Corte rimettente secondo cui l'abolitio criminis – per ius superveniens o a seguito di pronuncia di illegittimità costituzionale – è cosa diversa dallo sviluppo della giurisprudenza, essenzialmente di legittimità, che approdi all'esito (simile) di ritenere che una determinata condotta non costituisca reato*'.

[326] Corte Cost., 24 January 2019, no. 25, para. 5. See S. FINOCCHIARO, *Due pronunce della Corte costituzionale in tema di principio di legalità e misure di prevenzione a seguito della sentenza De Tommaso della Corte Edu*, in *Dir. pen. cont.*, 04.03.2019.

[327] Corte Cost., ord., 26 January 2017, no. 24, para. 5.

[328] Corte Cost., ord., 26 January 2017, no. 24, para. 5 '[…] *La compatibilità della regola enunciata dalla sentenza resa in causa Taricco con la CEDU, pertanto, andrebbe valutata sulla base della premessa che in Italia la prescrizione ha natura sostanziale. Per tale ragione, è poi necessario chiedersi, alla luce dell'art. 7 della CEDU, se tale regola fosse prevedibile, e avesse perciò base legale (tra le molte, Grande Camera, sentenza 21 ottobre 2013, Del Rio Prada contro Spagna, paragrafo 93). In tale prospettiva questa Corte è convinta che la persona non potesse ragionevolmente pensare, prima della sentenza resa in causa Taricco, che l'art. 325 del TFUE prescrivesse al giudice di non applicare gli artt. 160, ultimo comma, e 161, secondo comma, cod. pen. ove ne fosse derivata l'impunità di gravi frodi fiscali in danno dell'Unione in un numero considerevole di casi, ovvero la violazione del principio di assimilazione*'. See *infra*, section IV, para. 6.

3.5. The approach of the Corte di Cassazione *to case-law and intertemporal law.*

The confrontation with European *nullum crimen* and the role of the judge has led domestic highest courts to a different consideration of the effects of their *precedent*, especially in an intertemporal perspective. The approach of the Italian highest court seems more flexible than that of the Constitutional Court. Before focusing on the Italian scenario, a brief reference to the French *Cour de Cassation* and its modified approach towards judge-made law highlights some common patterns with the Italian *Corte di Cassazione*.

3.5.1. The French Cour de Cassation *and the influence of European legality.*

The French *Cour de Cassation*'s approach has become attentive towards overruling and case-law as factors potentially violating individual rights, both in civil law and criminal law matters. Although the *Cour* had already shown sensitivity with regards to the relevance of judicial overruling,[329] its attention towards the problem became vivid after the ECtHR judgment *Pessino v. France*, that, similarly to the case *Contrada v. Italy*, imposed the domestic legal order to consider the potentially detrimental effect of judicial overruling or interpretive conflicts.

In civil law, the *Cour de Cassation* reversed its previous stances on the non-retroactivity of precedents.[330] It affirmed that the immediate (and therefore retrospective) application of an overruling is contrary to the principle of legality and non-retroactivity enshrined in the ECHR, in a case where an overruling provoked detrimental effects for the time bar imposed on the possibility to sue for damage.[331]

Conversely, the *Chambre criminelle* rejected the relevance of case-law in the perspective of non-retroactivity.[332] The approach changed after the *Pessino* judgment,

[329] N. MOLFESSIS, *Les revirements de jurisprudence. Rapport remis à monsieur le Premier Président Guy Canivet, par le groupe de travail présidé par Nicolas Molfessis*, Paris, 2004, quoted by W. BENESSIANO, *Légalité pénale et droits fondamentaux*, Marseille, 2011, para. 369.
[330] Only an isolated opinion was in favour of extending the prohibition of retroactivity to case-law. Cass., II Chambre civil, 8 July 2004, in *Bull. Civ*., 2004, II, n. 361, p. 306. V. ZAGREBELSKY, *La Convenzione europea dei diritti dell'uomo*, cit., p. 98.
[331] The case concerned the violation of the presumption of innocence through the press. Cass., Ass. plénière, 21 December 2006, in *Dalloz*, 2007, p. 835, referred to by V. MANES, *Introduzione. La lunga marcia della Convenzione europea ed i "nuovi" vincoli per l'ordinamento (e per il giudice) penale interno*, in V. MANES, V. ZAGREBELSKY (eds.), *La Convenzione europea*, cit., p. 38.
[332] Cass., crim., 30 January 2002, 01-82593, see P. BEAUVAIS, *La légalité pénale à la lumière des droits européens*, in D. GUERIN ET B. DE LAMY (eds.), *La Chambre Criminelle de la Cour de Cassation face aux droits européens*, Paris, 2017, p. 49 f.

where the *Assemblée Plénière* forcibly acknowledged the principles affirmed in Strasbourg.[333]

Accessibility and foreseeability have become the effective parameters to measure legality, particularly legal certainty. The *Cour de Cassation* has referred to the quality of the law and directly applied the ECHR standards. Moreover, scholars, while affirming accessibility and foreseeability as part of legal certainty, link foreseeability with the necessity of the pre-determination of offence and penalty enshrined in Art. 111-2 *code pénal*.[334]

In particular, scholars underlined the objective approach of the *Cour de Cassation* towards legal certainty and the possibility to know the law with regards to the relationship between domestic and EU law. According to this scholar, the foreseeability assessment takes place in a synchronic perspective, on an objective basis.[335]

3.5.2. The Corte di Cassazione *and judge-made law as a source of law.*

With regards to the Italian *Corte di Cassazione*, a good example to show a more attentive approach towards the relationship *nullum crimen*-case-law is the *Sezioni Unite* judgment in the *Beschi* case. The legal issue concerned the execution of an imprisonment penalty. An overruling of the *Sezioni Unite* admitted the possibility to apply the Italian provisions even to convictions pronounced abroad but executed in Italy. Accordingly, in the *Beschi* case, the possibility to avoid the preclusion of art. 666 co. 2 c.p.p., which admits the possibility to trigger the judge during the execution of a sentence if new legal elements intervene, was extended to the intervention of an overruling. A judicial overruling, especially if a qualified one, was considered an admissible '*elemento di diritto*' (legal element).[336] The inclusion of an overruling among the admissible legal elements capable of overcoming *res judicata in executivis* meant to expand the concept beyond the classical statutory sources. In this respect, the *Corte di Cassazione* opens the

[333] Cass., Ass. Plénière, 13 February 2009, no. 01-85826.
[334] The *Cour de Cassation* has applied the notion of quality of the law in Cass. Crim. 27 March 1995, Bul. Crim. No. 125, Cass. Crim., 6 January 2001, Bull crim. No. 19; Cass. Crim., 20 february 2001, no. 9884846. The *Conseil Constitutionnel* has defined accessibility and foreseeability (*principe de accessibilité et intelligibilité*) as constitutionally valuable objectives (*objectifs de valeur constitutionnel*) in C. Const. 99-421, 16 dec. 1999, para. 13. X. PIN, *Droit pénal général*, Paris, 2018, p. 51 ff., P. BEAUVAIS, *La légalité pénale à la lumière des droits européens*, cit., p. 63.
[335] Cass. Crim., 22 March 2016, no. 15-80944. P. BEAUVAIS, *La légalité pénale à la lumière des droits européens*, cit., p. 64. This judgement refers to the clarity and precision of the wording of the law, but not to case-law.
[336] Cass. pen., SS. UU., 21 January 2010, no. 18288, Beschi, para. 9 in *Cass. pen*., 2011, p. 17 ff.

discussion on a possible interaction between European and domestic legality. With regards to the interpretation of Art. 7 ECHR, the *Corte di Cassazione* sees it as a 'substantial version of legality' that, under certain circumstances, has more effective protection than the domestic version of legality. With regards to the role of case-law, the Court describes judicial law as playing 'a crucial role in the exact identification of the scope of the criminal norm'.[337] Therefore, the Court does not affirm the equivalence between statute and judge-made law as sources of criminal law.[338] The role of case-law seems to be complementary, considering the constitutional definition of living law covering the scope of the ECHR substantive definition of law.[339] Due to the acknowledgement of the role of judicial law, the Court's reasoning implies the relevance of living law also in the domain of intertemporal law, thus treating it as if it is a statute.[340] The reasoning on the point is motivated by the principle of equality (Art. 3 Cost.) and the compliance with Art. 7 ECHR, interposed parameter according to art. 117 Cost. In the words of the Court:

> 'having regard to the general principles inspiring the criminal system, not every overruling that innovates a legal question legitimates […] to overcome the preclusion provided for by art. 666 co. 2 c.p.p.. Surely, a new and different interpretation in malam partem of substantive criminal law norms does not permit it, in light of the principle of non-retroactivity of in malam partem norms (and of in malam partem overruling) enshrined both in national law (art. 25 co. 2 Cost. and art. 2 c.p.) and art. 7 ECHR'.[341]

It is not recommendable to attribute general validity to this reasoning, since, like in the case of 'judicial' *abolitio criminis*, the affirmations of the *Corte di Cassazione* were made in the context of the controversial possibility to overcome a final judgement and, above all, the perspective was that of the overruling *in bonam partem*. Applying the same

[337] Cass. pen., SS. UU., 21 January 2010, no. 18288, Beschi, para. 6-7.
[338] A. DI MARTINO, *Una legalità per due? Riserva di legge, legalità CEDU e giudice-fonte*, in *Criminalia*, 2014, p. 96.
[339] Cass. pen., SS. UU., 21 January 2010, n. 18288, Beschi, para. 8. Bartoli highlights this point. R. BARTOLI, *Legalità europea* versus *legalità nazionale?*, cit. p. 289.
[340] A. DI MARTINO, *Una legalità per due?*, cit., p. 96 ff., V. MANES, *Art. 7*, in S. BARTOLE, P. DE SENA, V. ZAGREBELSKY (eds.), *Commentario breve alla Convenzione europea*, cit., p. 276, G. INSOLERA, *Luci e ombre del diritto penale vivente tra legge e diritto delle corti*, in M. BERTOLINO, L. EUSEBI, G. FORTI (eds.), *Studi in onore di Mario Romano*, Napoli, 2011, p. 2366-2367, O. DI GIOVINE, *Come la legalità europea sta riscrivendo quella nazionale*, cit., p. 172.
[341] Cass. pen., SS. UU., 21 January 2010, no. 18288, Beschi, para. 10: '*tenuto conto dei principi generali che ispirano il sistema penale, non qualsiasi mutamento giurisprudenziale, che attribuisce carattere di novità ad una determinata* quaestio iuris, *legittima […] il superamento della preclusione di cui all'art. 666 c.p.p., comma 2. Non lo consente certamente una diversa e nuova interpretazione* contra reum *di norme sostanziali, considerato che tanto la legge nazionale (art. 25 Cost.* e *art. 2 c.p.) quanto l'art. 7 della Convenzione europea sanciscono il principio della irretroattività delle norme sfavorevoli al reo (e, per quanto detto, della mutata interpretazione più sfavorevole'.*

principle to an *in malam partem* situation, would mean to introduce something similar to prospective overruling, which, until now, has not had any applications in practice.[342]

Except for the application of the principles governing the succession of norms to case-law, which was done only *in bonam partem* in the above-mentioned peculiar situations, the *Corte di Cassazione* began to show interest for foreseeability described as a principle, although with contradictory results and in an incoherent approach.

For example, the *Corte di Cassazione* (*Sezioni Unite*) seems to admit the equivalence between statutory and judicial sources in a judgement of 2012.[343] In light both of Art. 25 co. 2 and Art. 7 ECHR, the Court accepts the criterion (*sic*) of foreseeability as a standard to evaluate the principle of legality, that considers both statutory and judicial law.[344] Although the Court seems to presume the equivalence between written and unwritten law, the crucial point is the use of foreseeability as a parameter for legality.[345] In particular, the issue at stake was the foreseeability of the legal characterisation. The fact was the attempted abduction of an object with the use of violence. The characterisation alternatives were attempted robbery (art. 56 c.p. and *rapina* art. 628 c.p.) or theft concurring with violence. The dominant opinion opted for the first hypothesis, while a second minor orientation was more favourable and chose the second. The *Corte di Cassazione* had to adjudicate the correct legal characterisation, bearing in mind that the characterisation as 'attempted improper robbery' was allegedly violating the principle of legality. The Court qualified the facts as attempted robbery, but excluded a breach of *nullum crimen*, given the integration between the two 'legalities'. Since the chosen interpretation reflected a well-established judicial orientation, which was only

[342] The *Corte di Cassazione* would be facing a hard case, if it had to establish when an overruling *in malam partem* is illegitimate. Russo assumes that the Court would not apply Strasbourg principles, in order not to violate art. 25 co. 2 Cost. R. RUSSO, *Il ruolo della law in action e la lezione della Corte europea dei diritti umani al vaglio delle Sezioni Unite. Un tema ancora aperto*, in *Cass. pen*., 2011, p. 26 ff.
[343] Cass. pen., SS.UU., 19 April 2012, no. 34952, in *Dir. pen. proc*., 2012, p. 1457.
[344] Cass. pen., SS.UU., 19 aprile 2012, no. 34952, para. 5: '*Il dato decisivo da cui dedurre il rispetto del principio di legalità, sempre secondo la Corte EDU, è, dunque, la prevedibilità del risultato interpretativo cui perviene l'elaborazione giurisprudenziale, tenendo conto del contenuto della struttura normativa, prevedibilità che si articola nei due sotto-principi di precisione e di stretta interpretazione (Corte EDU, 02/11/2006, Milazzo c. Italia; Grande Camera, 17/02/2004, Maestri c. Italia; 17/02/2005, K.A. e A.D. c. Belgio; 21/01/2003, Veeber c. Estonia; 08/07/1999, Baskaya e Okcuoglu c. Turchia; 15/11/1996, Cantoni c. Francia; 22/09/1994, Hentrich c. Francia; 25/05/1993, Kokkinakis c. Grecia; 08/07/1986, Lithgow e altri c. Regno Unito'.* On the integration between the two legalities and the use of foreseeability in respect of judicial orientations see Cass. pen., SS. UU., 19 January 2011 (28 October 2010), no. 1235, Giordano, para. 2.
[345] Di Martino focuses on the integration between the two legalities and the question of sources, while Bartoli on the application of foreseeability, A. DI MARTINO, *Una legalità per due?*, cit., p. 99; R. BARTOLI, *Legalità europea* versus *legalità nazionale?*, cit. p. 289 f.

contradicted by recent limited opposite opinions, the principle of legality was not violated. The Court admitted the modification of an otherwise 'normally foreseeable' result of judicial interpretation, only in case it violated the principles of precision and strict interpretation. In the case under its scrutiny, the chosen orientation reflected the courts' majority opinion, while the minority orientation was in line with scholarship. Consequently, the interpretation was reasonably foreseeable.[346]

Even though these statements remained isolated, the *Corte di Cassazione* recently dealt with the European definition of foreseeability in a different perspective, which will be analysed in the following.[347]

The *Corte di Cassazione,* Civil Section and the Consiglio di Stato (Administrative Supreme Court) have faced the problem of prospective overruling as well. The *Corte di Cassazione* has confirmed the obligation of prospective overruling in particular in the domain of expiration of terms. Without referring to the principle of legality, the Court has developed the principle on the basis of the 'legitimate expectations' of the citizen (*principio di affidamento*).[348]

3.5.3. The Corte di Cassazione *and European foreseeability: a new perspective.*

In recent times, the *Corte di Cassazione* dealt with the foreseeability standard, as interpreted in Art. 7 ECHR, under three perspectives. This remarkable increase in the number of judgments dealing with foreseeability is due to the above-mentioned ECtHR's decisions in the cases of *Contrada v. Italy* and *De Tommaso v. Italy*. These judgements had a great impact on the implementation of foreseeability both in the concrete follow-up

[346] Cass. pen., SS.UU., 19 aprile 2012, no. 34952, para. 5 '*Non vi è dubbio che nel caso in esame la prevedibilità del risultato interpretativo con riferimento al "diritto vivente" è piuttosto rappresentata da una giurisprudenza, non proprio maggioritaria, ma addirittura granitica, per molti decenni, fino alla pronuncia di alcune sentenze difformi. Si discute, pertanto, della modifica di un risultato interpretativo "normalmente" prevedibile, in quanto assistito da una consistente e pluridecennale giurisprudenza, e ciò può avvenire solo nel caso in cui tale risultato contrasti, in modo chiaro ed evidente, con i principi di precisione e di stretta interpretazione. In verità, si tratta di una questione sulla quale si è manifestata in modo evidente la differenza tra gli orientamenti assunti dalla quasi totalità della giurisprudenza di legittimità e gli approdi ermeneutici cui è pervenuta la maggior parte della dottrina. Gli argomenti a favore della tesi giurisprudenziale minoritaria si traggono, quindi, soprattutto dalla dottrina, alla quale si richiama il ricorrente, e con tali argomenti occorre confrontarsi'.*

[347] See *infra,* section V.

[348] Cass. civ., SS. UU., 11 luglio 2011, no. 15144, in *CED Cass.*, no. 617905, see F. CAVALLA, C. CONSOLO, M. DE CRISTOFARO, *Le S.U. aprono (ma non troppo) all'errore scusabile: funzione dichiarativa della giurisprudenza, tutela dell'affidamento, tipi di* overruling, in *Corr. giur.*, 2011, p. 1392 ff., Cass. civ., SS. UU., 12 February 2019, no. 4135 and Cons. Stato, Ad. Plen. 22 December 2017, no. 13.

of the judgements and in the debate they opened on the definition and scope of foreseeability.

a) In the first perspective, the *Corte di Cassazione* scrutinised the spill-over effect caused by *De Tommaso v. Italy*, which declared a violation of Art. 7 ECHR due to the unforeseeable provisions on preventive measures.[349] Before the Constitutional Court's intervention with judgments no. 24 and 25/2019, the *Corte di Cassazione* was in charge of the consistent interpretation of the provisions still in force with the principles affirmed in Strasbourg. As mentioned above in the analysis of the ECtHR judgment, foreseeability standard was applied to the wording of the law in the provisions concerning preventive measures. Since Art. 7 ECHR was violated already by the wording of the said provisions, its assessment was very similar to the one made by the Constitutional Court in terms of *tassatività/determinatezza* with regards to living law. Therefore, the great amount of domestic case-law dealing with foreseeability was only re-affirming the principles already found in the constitutional interpretation of *lex certa*.[350] Foreseeability can also be reached through a well-established and consistent interpretive orientation in case-law, even when facing a general clause.[351] However, especially in the two *Sezioni Unite* judgments (so-called *Paternò* and *Gattuso*) that re-interpreted the relevant domestic provisions, foreseeability is undeniably applied, as a complementary parameter to *tassatività/determinatezza*, to define the boundaries of *lex stricta et certa*.[352] In addition, acquittal decisions were confirmed under art. 129 c.p.p. due to the 'overruling' (*sic*.) by the Court of Cassation in the *Paternò* judgement.[353]

Still in the area of preventive measures, the *Corte di Cassazione*, *Sezioni Unite*, was triggered to assess the foreseeability of the penalty in a case of a synchronic conflict in case-law. The case concerned the obligation to communicate asset modifications (art. 80, d.lgs. 159/2011), whose omission was criminally relevant (art. 76 d.lgs. 159/2011) for

[349] See *above*, Chapter 3, para. 4.2.3.
[350] Cass. pen., VI, 20 June 2017, no. 27607; Cass. pen., I, 17 May 2018, no. 21954; Cass. pen., VI, 7 June 2018, no. 26023; Cass. pen., VI, 30 November 2018, no. 53941; Cass. pen., V, 25 February 2019, no. 8190.
[351] Cass. pen., II, 24 June 2019, no. 27854, para. 1.
[352] Cass. pen., SS. UU., 27 April 2017 (5 September 2017), no. 40076, Paternò with commentary by F. VIGANÒ, *Le Sezioni Unite ridisegnano i confini del delitto di violazione delle prescrizioni inerenti alla misura di prevenzione alla luce della sentenza De Tommaso*, in *Dir. pen. cont.*, 9, 2017, p. 146 ff., and Cass. pen., SS. UU., 30 November 2018 (4 January 2018), no. 111, Gattuso, with a commentary by A. QUATTROCCHI, *Lo statuto della pericolosità qualificata sotto la lente delle Sezioni Unite*, in *Dir. pen. cont.*, 1, 2018, p. 51 ff.
[353] Cass. pen., I, 22 December 2017, no. 57439; Cass. pen., I, 22 December 2017, no. 53436; Cass. pen., I, 22 December 2017, no. 53438; Cass. pen., I, 30 November 2017, no. 54080.

those subject to a preventive measure according to legislation entered into force in 2011. The legal question was whether to apply this criminal offence even to those preventive measures ordered according to previous legislation (L. 1423/1956), in cases where the order had become final before the introduction of the obligation with d.lgs. 159/2011. The *Corte di Cassazione* applied the foreseeability principle and, excluded these elements, in light of its previous case-law, from the scope of the non-retroactivity principle. In particular, the Court excluded that a synchronic conflict within the *Corte di Cassazione* would violate the principle of foreseeability and therefore determine the non-retroactivity of the new unforeseeable decision. In the Court's understanding, the judicial result is foreseeable, as long as there is trace of it in the jurisprudence, even if it is the object of conflicting case-law.[354]

b) In a second perspective, the *Corte di Cassazione* applies the foreseeability standard as part of *nullum crimen* and not merely recalling it among the principles enshrined in Art. 7 ECHR.

Firstly, the *Sezioni Unite* had to deal with the question of the applicable law in cases where the conduct was carried out while a more favourable provision was in force and the event occurred under an unfavourable statute (in terms of penalty).[355] Although the question at stake was the criterion to determine *tempus commissi delicti* in light of succession of norms (art. 2 co.4 c.p.), the Court recalled the principle of foreseeability of the consequences of the acts or omissions as part of the principle of legality, under the perspective of Artt. 3, 25 co. 2 and 27. Co. 1 Cost. and Art. 7 ECHR.[356] The foreseeability of the event in terms of culpability and the foreseeability of the penalty were the link. The reasoning of the Court on the point was not made completely clear, but it certainly refers

[354] Cass. pen., SS. UU., 16 April 2019, no. 16896, para. 12. '*Analogamente, deve escludersi che abbia avuto in qualche modo incidenza negativa la sussistenza del contrasto giurisprudenziale che ha condotto all'odierna decisione, essendo sufficiente richiamare quanto condivisibilmente ribadito in una recente pronuncia (Sez. 5, n. 37857 del 24/04/2018, Fabbrizzi, Rv. 273876), richiamata anche nell'ordinanza di rimessione, osservando, dopo aver richiamo plurimi precedenti, che la non prevedibilità di una decisione giudiziale che ne preclude l'applicazione retroattiva deve certamente escludersi in una situazione di contrasto giurisprudenziale, in cui l'esito interpretativo, seppur controverso, è comunque presente, come avvenuto nel caso in esame, peraltro con un numero di decisioni decisamente contenuto*'.

[355] It was the case of the criminal offence of 'vehicular homicide' pursuant to art. 589 *bis* c.p. (*omicidio stradale*, introduced by L. 41/2016), which entered into force after the conduct of the driver, but before the death of the victim (event). At the time of the conduct the criminal offence of culpable homicide (art. 589 co. 2 c.p.) was applicable and provided for a more lenient penalty, especially because the characterisation of the fact was that of an aggravating circumstance that could be balanced.

[356] Cass. pen., IV, 14 May 2018, no. 21286, para. 7.

to the foreseeability of legal characterisation and penalty *in concreto* and *ex ante*.[357] The *Sezioni Unite,* after having analysed the different interpretive orientations on the matter, analysed the *questio juris* only under the perspective of the non-retroactivity rationale (Art. 25 co. 2 Cost. and the predictability of the consequences of the actions) and *lex mitior* (Art. 3 Cost.), to support the choice for the conduct-centred criterion.[358]

In other cases, the *Corte di Cassazione* faced questions under the perspective of the foreseeability of the criminal offence. Although they were not successful, the approach of the Court is interesting. The criminal offence of false medical certificates (art. 481 c.p.) (*falsità ideologica in certificati commessa da persone esercenti un servizio di pubblica necessità*) was extended, with regards to the element of the relevant documents, to a new category of documents (internal documents). As this interpretation was deemed unforeseeable, a violation of the principle of legality was invoked. The legal basis allegedly violated in this case was only art. 117 Cost. (in relation to Art. 7 ECHR), without referring to Art. 25 co. 2 Cost.[359]

c) Another relevant judicial application of the principle of foreseeability was the possible prohibition of retroactive application of an overruling and prospective overruling. The provision at stake was art. 615 *ter* c.p. on the illegal access to a computer system (*accesso abusivo ad un sistema informatico o telematico*). Pursuant to a 'precedent' of the *Sezioni Unite* in 2011, the offence was applied also to those who, although provided with legitimate access, violated requirements and limitations imposed by the provider, regardless the purpose of the access.[360] The defence claimed the retroactive application of the 2011 overruling to the conduct of the applicant (which had taken place before 2011), in violation of Art. 7 ECHR. In a similar case, invoking the same retroactive overruling, another applicant directly invoked the application of Art. 25

[357] Cass. pen., IV, 14 May 2018, no. 21286, para. 6 '*Se però si sposta il tema della (necessaria) prevedibilità dall'evento alla sanzione, è di tutta evidenza che le considerazioni che sorreggono il criterio della prevedibilità in concreto non soccorrono più, atteso che non può certo evocarsi, e porsi a carico del soggetto attivo, l'onere di prevedere che medio tempore (dopo il compimento della condotta e prima del verificarsi dell'evento) il legislatore decida di colpire il reato con maggiore gravità. Diversamente opinando, la minaccia penale verrebbe deprivata della sua funzione di influenza dell'autodeterminazione dei consociati (funzione rivolta necessariamente alle azioni presenti e future, giammai a quelle passate); al tempo stesso, si abdicherebbe a un'essenziale ratio garantistica che ispira e contraddistingue l'intero sistema penale, sotto il profilo dell'individuazione non solo del precetto, ma anche della sanzione di applicarsi ratione temporis*'.
[358] Cass. pen., SS. UU., 24 April 2018, no. 40986, para. 7.
[359] Cass. pen., V, 12 July 2017, no. 34141, para. 1 and 4.
[360] Cass. pen., SS. UU., 27 October 2011, no. 4694.

co. 2 Cost. and art. 2 c.p. as violated norms in case of a retroactive unforeseeable overruling *in malam partem*.[361]

The Court affirmed that not every new interpretation is affected by the non-retroactivity clause, since the prohibition of retroactive application only falls on interpretations that were not reasonably foreseeable at the time the offence was committed.[362] The reasonable foreseeability of judicial interpretation is the parameter that allows to distinguish between a conduct that can be punished even in light of a subsequent interpretation and conducts that should not be criminally sanctioned.[363] Constitutional Court's judgement 230/2012 is read, *a contrario*, to support the principle of reasonable foreseeability: an extensive judicial interpretation that applies to facts committed before the said orientation violates Art. 7 ECHR if it was not reasonably foreseeable. Another argument is based on the principles applied by the *Corte di Cassazione*, Civil section, which defined the requirements of an overruling in order to bar its retrospectivity. An overruling in order to trigger the non-retroactivity rule shall: i) concern procedural law; ii) be unforeseeable for the long-lasting character of the previous orientation that induced the individual to legitimately expect its application; iii) cause a preclusion in *diritto d'azione o difesa della parte*.[364]

Again, the *Corte di Cassazione* denies the possibility to consider an interpretation unforeseeable if it was the object of interpretive contrasts before the *Sezioni Unite* judgement.[365] In particular, the Court affirmed that a long-lasting and relevant orientation in favour of the *Sezioni Unite* principle excludes the alleged unforeseeability.[366] In

[361] Cass. pen., V, 6 August 2018, no. 37857, para. 3.1.
[362] Cass. pen., V, 21 July 2016, no. 31648, para. 1. '*conformemente interpretato dalla giurisprudenza della Corte EDU - non consente l'applicazione retroattiva dell'interpretazione giurisprudenziale di una norma penale nel caso in cui il risultato interpretativo non fosse ragionevolmente prevedibile nel momento in cui la violazione è stata commessa (Sez. F, n. 35729 del 01/08/2013 Rv. 256584). La stessa difesa mostra, nel ricorso, di condividere l'assunto per cui la ragionevole prevedibilità di una interpretazione giurisprudenziale rappresenta il discrimine fra condotte che possono essere punite anche in ragione di una interpretazione che si è affermata in epoca successiva al loro compimento e condotte che debbono andare, invece, esenti da pena*'. Similarly, Cass. pen., V, 6 August 2018, no. 37857, para. 3.1.; Cass. pen., II, 18 February 2016, no. 21596 and Cass. pen., F, 1 August 2013, no. 35729.
[363] Cass. pen., V, 6 August 2018, no. 37857, para. 3.2.
[364] Cass. pen., V, 6 August 2018, no. 37857, para. 3.2., according to Cass. civ., 11 March 2013, no. 5962 and Cass., ord., 12 March 2015, no. 9443.
[365] The extensive interpretation focused on the presumed dissent of the provider for a legitimate access that went beyond the terms and conditions of use. Cass. pen., V, 21 July 2016, no. 31648, para. 1.1. Cass. pen., V, 6 August 2018, no. 37857, para. 3.3.
[366] Cass. pen., V, 21 July 2016, no. 31648, para. 1.1. '*Si può quindi ritenere che l'interpretazione prospettata dalle Sezioni unite si ponga nel solco di un corposo e risalente orientamento giurisprudenziale da tempo affermatosi nell'ambito delle Sezioni semplici della Corte di Cassazione e che nulla di "non ragionevolmente prevedibile" sia intervenuto né con riguardo alla massima giurisprudenziale elaborata*

another case, after having analysed the two interpretive orientations on art. 615 *ter* c.p., the Court also concludes that even if the *Sezioni Unite* adopted a minority orientation, the reasonable foreseeability of the incrimination is still to be presumed due to the existence of the contrast.[367]

Two main criticism can be opposed. The first is that the principles enshrined in the ECtHR jurisprudence do not exclude the violation of legality in presence of a synchronic conflict: the case in question could have been similar to the *Contrada v. Italy* case. Nevertheless, the ECtHR also affirms that the capacity to reabsorb contrasts avoids the possible foreseeability claims if a qualified precedent solved the legal issue.[368]

Moreover, the choice to follow the one or the other interpretation in this case meant classifying the relevant fact as 'typical' or 'atypical', i.e. to be subsumed under the criminal provision. Therefore, the alternative was between the imposition of a criminal sanction or the absence of relevance under a criminal law perspective, which leads to the dogmatic perspective mentioned above. Such an extensive interpretation, which was not analogy, would affect the individual, as it would result in a conviction. The question at stake is whether the judicial construction has gone beyond the limits or has stayed within the limits of *Tatbestand*.

d) In a fourth perspective, foreseeability was applied also with regards to the implementation into the Italian legal order of the principles expressed in *Contrada v. Italy*. The problems at stake were i) which procedural remedy was admissible for the applicant;[369] ii) whether the principles enshrined in the judgment were extensible to all individuals convicted for *concorso esterno* before the *Sezioni Unite* judgement of 1994; iii) whether the *res judicata* in Strasbourg could be extended *erga omnes* also beyond final judgements; iv) in this eventuality, which procedural remedy was admissible.[370] It

né al ragionamento sotteso. Né si può invocare la "non prevedibilità" di un orientamento giurisprudenziale soltanto perché vi sia stato clamore mediatico riguardo ad una pronuncia di segno opposto, così come si sostiene nel ricorso', Cass. pen., V, 6 August 2018, no. 37857, para. 3.3.

[367] Cass. pen., V, 6 August 2018, no. 37857, para. 3.3. '*Nessuna rilevanza assume, infine, la circostanza che l'orientamento adottato dalle Sezioni Unite sia quello minoritario, atteso che l'unico aspetto rilevante è che al momento in cui ha posto in essere la propria condotta, l'imputato potesse ragionevolmente prefigurare l'astratta integrazione degli estremi della fattispecie criminosa, nel caso di specie quelli di cui all'art. 615-ter c.p.*'.

[368] See *above*, Chapter 3, para. 4.4.1.

[369] Cass. pen., II, 17 October 2016, no. 43886; Cass. pen., I, 20 September 2017, no. 43112 finally removed Contrada's conviction thanks to art. 666 and 670 c.p.p.

[370] A similar problem emerged in the implementation of *Scoppola v. Italy*. Among several contributions on the implementation of ECtHR judgements see M. CAIANIELLO, *La riapertura del processo* ex *art. 625*-bis *c.p.p. a seguito della condanna della Corte Europea dei Diritti dell'Uomo*, in *Cass. pen*., 2009, p. 1465 ff.;

would be impossible to report all procedural law problems arising from the implementation of this judgment. The most relevant is whether the judgment of the Court had to be compared with a declaration of constitutional illegitimacy of the provision (Art. 110 – 416 *bis* c.p., before 1994) for the violation of the principle of legality.

This debate within the *Corte di Cassazione*, which culminated in an order requesting the intervention of *Sezioni Unite*, focuses on the possible enforcement of the notion of foreseeability in the national legal order. The section referring the question to the *Sezioni Unite* summarised the debate in a very effective way.[371]

A more recent interpretative orientation refuses to transpose the principles enshrined in the *Contrada* judgment, focusing on the impossibility to make the equivalence between written and unwritten law and therefore highlighting a violation of constitutional principles.[372] The referral judge criticised these orientations by highlighting the substantive nature of legality in the Strasbourg jurisprudence and the crucial role of foreseeability.[373] As a matter of fact, the *Corte di Cassazione* has considered judicial law as a source in the *Beschi* judgement.[374] Moreover, the Court refers to the above-mentioned orientations that apply the principle of reasonable foreseeability to overrulings *in malam partem*, in order to prohibit their retrospectivity if they are unforeseeable.[375] As explained above, foreseeability is the dividing line between legitimate overruling and illegitimate non-retroactive ones.[376]

The other orientation was affirmed in the *Dell'Utri* judgment and was then adopted in the *Gorgone* case.[377] In these cases, the *Corte di Cassazione* tries to apply the European

C. MUSIO, *Il rimedio per la revoca della sentenza definitiva ritenuta iniqua dalla Corte europea dei diritti dell'uomo*, in *Cass. pen*., 2011, p. 209 ff.; M. GIALUZ, *Il riesame del processo a seguito di condanna della Corte di Strasburgo: modelli europei e prospettive italiane*, in *Riv. it. dir. pen. proc*. 2009, p. 1844 ff.; M. GIALUZ, *Una sentenza "additiva d'istituto": La Corte costituzionale crea la "revisione europea"*, in *Cass. pen*., 2011, p. 3309 ff.; A. LOGLI, *La riapertura del processo a seguito della sentenza CEDU. Questioni interpretative sul nuovo caso di "revisione europea"*, in *Cass. pen*., 2012, p. 937 ff.

[371] Cass. pen., 17 May 2019, no. 21767.

[372] Cass. pen., I, 22 February 2018, no. 8661, Esti, that was followed by: Cass. pen., I, 30 July 2018, no. 36505, Corso; Cass. pen., I, 30 July 2018, no. 36509, Marfia; Cass. pen., I, 2 January 2019, no. 37, Grassia; Cass. pen., I, 9 April 2019, no. 15574, Papa; Cass. pen., I, 29 March 2019, no. 13856, Genco; Cass. pen., V, 12 December 2018, no. 55894 (on preventive measures).

[373] Cass. pen., VI, 17 May 2019, no. 21767, para. 14.

[374] Cass. pen., SS. UU., 21 January 2010, no. 18288, Beschi.

[375] Cass. pen., V, 9 August 2018, no. 47510; Cass. pen., V, 24 April 2018, no. 37857.

[376] Cass. pen., VI, 17 May 2019, no. 21767, para. 14.3. Cass. pen., V, 6 August 2018, no. 37857, para. 3.1.; Cass. pen., II, 18 February 2016, no. 21596 and Cass. pen., F, 1 August 2013, no. 35729; Cass. pen., V, 21 July 2016, no. 31648.

[377] Cass. pen., I, 18 October 2016, no. 44193, Dell'Utri; Cass. pen., I, 27 November 2017, no. 53610, Gorgone.

definition of legality. The European concept of foreseeability is therefore 'adapted' to the Italian legal order. Foreseeability is described as the foreseeability of the legal characterisation, thus depending on the different penalties imposed, exclusive of the criminal relevance of the act.[378] Given the fact that the foreseeability has direct consequences on a possible more lenient penalty, its assessment must be strictly subjective. Although foreseeability has a subjective side in Strasbourg, the ECtHR assessment in *Contrada v. Italy* was, as demonstrated above, strictly objective.[379] The link between legality-foreseeability and culpability, although affirmed by the ECtHR and the Constitutional Court, was not the point at stake in this case. Moreover, it bases its reasoning on controversial 'subjective' indicators, such as the behaviour of the accused during the proceedings, considering it evidence of his knowledge of the criminal offence, and the 'level' of the legal advice he was resorting to.[380] On the other hand, the subsequent *Gorgone* judgment made a distinguishing from the *Dell'Utri* principles. The Court referred to the different material time of the offence (which took place until 1993, even if still before 1994) and the different strategy in trial (he never claimed the violation of foreseeability).[381]

The referral to the *Sezioni Unite* was critical on both orientations and suggested a new definition of foreseeability, completely in line with the ECtHR one and going beyond the above-mentioned jurisprudence. In the referral judges' understanding, the principles enshrined in the *Contrada* case were extensible to all subjects convicted for *concorso esterno* (art. 110 and 416 *bis* c.p.) for facts prior to the 1994 *Demitry* judgement. This is a consequence of the acknowledgement of a broader and objective conception of legality. A judicial source of law has the same effects on the rule as the statutory one: it invalidates the rule in the direction of all its addressees. Thus, the subjective definition of foreseeability seems to have been abandoned. Therefore, the Court goes further suggesting the application of the principle of foreseeability in order to declare the contrast with Art. 7 ECHR, in the domestic legal order as well. The principles affirmed in Strasbourg are valid:

[378] The following judgement appreciates this point Cass. pen., VI, 17 May 2019, no. 21767, para. 14.4.
[379] Against see Cass. pen., VI, 17 May 2019, no. 21767, para. 14.3.
[380] Cass. pen., I, 18 October 2016, no. 44193, para. 4.3-4.4.
[381] Cass. pen., I, 27 November 2017, no. 53610 (the law).

> '[a]ny time there is a judicial conflict, then resolved by the *Sezioni Unite* (as an expression of "living law"), since every conviction preceding the "establishment" of the judicial interpretation *in malam partem* has to be considered reasonably unforeseeable'[382]

Furthermore, accessibility is said to be granted only to the *Sezioni Unite* precedent.[383] The *Sezioni Unite* judgment is still pending.[384]

4. The operational side of legality.

4.1. Binding precedent.

Each legal order foresees mechanisms to ensure well-established interpretations and to avoid interpretive chaos, as conflicting interpretations can be part of a physiological development process of law. However, interpretive orientations within the *Corte di Cassazione* often seem to be incoherent and uncertain, which inevitably has repercussions on the individuals' fundamental rights. Legal certainty includes the rationales of uniform and well-established law. The mechanisms to ensure uniformity and stability are the subjection of the judge to the law or a binding precedent system, which therefore have a common background.[385]

Legal uncertainty is the result of the difficulties the *Corte di Cassazione* is facing in coping with its 'nomophylactic' role. The nomophylactic role of the Court is, in the Italian legal tradition, a duty to 'protect' the law. i.e. the correct interpretation and uniform application of national law.[386] The difficult accomplishment of these functions is due to multiple factors, not least the enormous amount of case-law the Court must deal with on a daily basis. Hence, scholarship and the legislator have addressed the issue both proposing to introduce a binding precedent system, at least at the level of the highest Court or with solutions involving its re-organisation.

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[382] Cass. pen., VI, 17 May 2019, no. 21767, para. 14.5: '*ogni qualvolta sia presente un contrasto giurisprudenziale, poi risolto dalle Sezioni Unite (quale espressione del "diritto vivente"), dovendosi pertanto ritenere ragionevolmente imprevedibile qualunque condanna per fatti commessi prima del "consolidamento" della giurisprudenza sfavorevole al reo*'.

[383] Cass. pen., VI, 17 May 2019, no. 21767, para. 14.5.

[384] According to a press release of the Court, the *Sezioni Unite* have taken a negative decision on the subject matter. Nevertheless, the judgement has not been published yet. Cass. pen., SS. UU., 24 October 2019, no. 1168 (reasoning not published), see http://www.cortedicassazione.it/corte-di-cassazione/it/dettaglio_questione_penale.page?tipologia=&anno=&inevidenza=true&testo=contrada&contentId=QSP22868, last accessed 13.02.2020.

[385] As seen above, Palazzo underlines this aspect of legal certainty in F. PALAZZO, *Il principio di determinatezza nel diritto penale*, cit., p. 72.

[386] The term 'nomophylactic' has been introduced in this domain by Piero Calamandrei and refers to the Greek terms 'nomos' (law) and 'phylax' (guardian). The Nomophylax in Ancient Greece was 'guardian of the law', the magistrate in charge of keeping the text of the laws of the town. P. CALAMANDREI, *La cassazione civile*, II, Milano, 1920, p. 22 ff.

Two clarifications are necessary. *Precedent* is a single decision that subsequently becomes a rule and is applied to other similar cases in the future. Case-law is, in general, a body of judicial decisions that can deal with the same legal questions and can entail conflicts. Precedent is expressed in the *ratio decidendi* of the judgment: i.e. the legal rule the judge resorted to, when establishing the legal characterisation and decision of the case. Its application is based on analogy between cases, while the judge will have to use the distinguishing technique in different cases.[387] Precedent can be vertical or horizontal. Vertical precedent consists in the binding nature of superior courts' decisions towards lower courts. Horizontal precedent foresees a binding precedent within the same court: the previous *regulae juris* have to be followed by the court which adopted them in the first place.[388]

Some scholars suggest introducing the culture of precedent.[389]Precedent should therefore be based on the conscious elaboration of general cases, destined to become the *rationes decidendi*. These cases are paradigmatic and show common characteristics that make them potentially extensible to a whole category of cases.[390] The justification comes down to incrementing the nomophylactic role of the *Corte di Cassazione*, in spite of the democratic principle that subjects judges only to the law.[391] Consequently, some suggest to partially adopt a binding precedent system, or at least ensure a particularly binding nature of the *Sezioni Unite* precedent.

Cadoppi proposed to introduce binding precedent in his body of work of 1999, re-edited in 2014. His suggestion was positively accepted by a part of the scholars.[392] He suggested the introduction of a relative (and only vertical) binding precedent.

Any proposal to introduce a binding precedent has to face two major counter-arguments. First, a potential violation of Art. 25 co. 2 and 101 Cost. These provisions shape the legal order as a statutory-source-based system that also protects the right to an

[387] M. TARUFFO, *Aspetti del precedente giudiziale*, in *Criminalia*, 2014, p. 39. See also U. MATTEI, *Precedente giudiziario e stare decisis*, cit., p. 148 ff.
[388] Vertical precedent depends on the organisation of the judiciary, while horizontal precedent is commonly disregarded. Supreme courts are usually given the right to overrule their own precedent in order to safeguard the development of the law. M. TARUFFO, *Aspetti del precedente giudiziale*, cit., p. 41 and 48 ff.
[389] A. CADOPPI, *Il valore del precedente nel diritto penale*, cit., *passim*.
[390] G. FIANDACA, *Diritto penale giurisprudenziale e ruolo della Cassazione*, cit., p. 257.
[391] G. FIANDACA, *Diritto penale giurisprudenziale e ruolo della Cassazione*, cit., p. 263 f.
[392] Francesco Mazzacuva seems to consider it admissible FR. MAZZACUVA, *Le pene nascoste*, cit., p. 236. Against, M. VOGLIOTTI, *Penser l'impensable*, cit., p. 369; Riondato admits the retroactivity of the overruling but suggests applying the mistake of law. S. RIONDATO, *Retroattività del mutamento giurisprudenziale sfavorevole*, cit., p. 254.

individualised decision and free debate among judges.[393] Second, a further point against binding precedent is the cultural difference between common law and civil law. While precedent in common law is considered the expression of a selected and restricted social group of jurists, the legal environment in civil law countries is a much more heterogeneous context.[394]

In light of the counterarguments, Cadoppi's proposal is conceived in a *de lege ferenda* perspective. He deems it unlikely to affirm the binding nature of precedent in the legal framework in force, as other scholarship had suggested.[395] The binding precedent should be relative and vertical, in order to comply with the statutory reservation (art. 25 co. 2 Cost.) and separation of powers.[396] Moreover, the need not to hinder the natural development of law through diachronic modifications is ensured by refusing horizontal precedent and proposing a vertical *stare decisis* between lower and higher courts.[397] The model is that of the German system.[398] With regards to the relationship lower courts-*Corte di Cassazione*, lower courts should be relatively bound by the *Corte di Cassazione*'s precedent, and could modify it with due motivation and referring the question to the *Sezioni Unite*.[399] As to binding precedent within the *Corte di Cassazione*, Cadoppi suggests that the Sections (*Sezioni Semplici*) shall be bound by the *Sezioni Unite*'s precedent. Moreover, in case of dissenting opinions with other sections or with the *Sezioni Unite*, the *Sezioni Semplici* would have an obligation to refer the question to

[393] D. PULITANÒ, *Paradossi della legalità*, cit., p. 51.
[394] Gallo uses the example of the *Taricco* case to explain the different approach in Italy, where the rule of precedent does not fit with the characteristics of the legal order. He considers statutory law as the most effective protection against every form of totalitarism. M. GALLO, *Le fonti rivisitate*, cit., p. 99 ff. and 105 ff.
[395] A. CADOPPI, *Il valore del precedente nel diritto penale*, cit., p. 299. On the different value of precedent in comparative perspective see U. VINCENTI (ed.), *Il valore dei precedenti giudiziali nella tradizione europea*, Padova 1998 and D.N. MACCORMICK, R.S. SUMMERS (eds.), *Interpreting precedents. A comparative study*, Darthmouth, 1997.
[396] Cadoppi overcomes the usual criticism to binding precedent by limiting it to a relative and vertical validity. Moreover, a possible contrast with the subjection of the judiciary to the law (art. 101 Cost.) should be resolved with a balance with the principle of equality and the nomophylactic role of the *Corte di Cassazione*. A. CADOPPI, *Il valore del precedente nel diritto penale*, cit., p. 281 ff., 287 ff.
[397] A. CADOPPI, *Il valore del precedente nel diritto penale*, cit., p. 290, p. 303 ff. Cadoppi only suggests introducing an improper horizontal binding precedent that is limited to an obligation of prospective overruling. See *above*, section II, para. 3.1.
[398] See *infra*, section III, para. 4.2.
[399] The model is similar to the German system, where the *Vorlagepflicht* imposes the *Oberlandesgerichte* (highest State courts in the *Länder*) to refer controversial questions to the *Bundesgerichtshof*, BGH (the highest federal court). A. CADOPPI, *Il valore del precedente nel diritto penale*, cit., p. 307 ff. See *infra*, section III, para. 4.2.

the *Sezioni Unite*.[400] The aspiration of such a relative binding precedent would be synchronic coherence of interpretive orientations, both between lower and higher courts and within the supreme court. Without imposing a real absolute *stare decisis*, the possibility to refer dissenting opinions to higher courts or sections would limit binding precedent to a relatively, indirect bond.[401]

Other scholars partially agree with this proposal, but limit the binding force only to the precedent of the *Sezioni Unite*.[402] If only a single judgment by the *Sezioni Semplici* became binding, it would perhaps result in a non-democratic imposition of a judicial rule, while the progressive debate leading to a *Sezioni Unite* judgment would preserve the nature of judicial dialogue in Italy.[403] The main reason is the dialogical tradition of the Italian judiciary, whose principles of law base their validity on authority and persuasiveness, rather than on the binding precedent.[404] Some underline the possible weakness of binding precedent, which could be easily circumvented with the distinguishing technique as well.[405]

The second part of Cadoppi's proposal has recently been partially implemented in the Code of Criminal Procedure, with the amendment of art. 618 c.p.p., introducing *comma* 1-*bis*, that governs the referral of the *Sezioni Semplici* to the *Sezioni Unite*. The original disposition provides the possibility for the *Sezione Semplice* to refer the question to the Court in its highest composition (*Sezioni Unite*) if contrasts on the legal question under scrutiny exist or may arise. This rule remains untouched.[406] Despite the power to refer the

[400] At the time Cadoppi published, art. 618 c.p.p. was still only providing for the possibility to refer the question to *Sezioni Unite*. A. CADOPPI, *Il valore del precedente nel diritto penale*, cit., p. 312 ff. The model is the German *Vorlagepflicht* between the sections of the *Bundesgerichthof* and its *Großer Senat*, pursuant to sections 121 and 132 GVG. See *infra*, section III, para. 4.2.
[401] A. CADOPPI, *Il valore del precedente nel diritto penale*, cit., p. 31.
[402] G. FIANDACA, *Diritto penale giurisprudenziale e ruolo della Cassazione*, cit., p. 262; M. DONINI, *Diritto penale giurisprudenziale*, cit., p. 36; V. MANES, Common law-isation *del diritto penale?*, cit., p. 974.
[403] G. FIANDACA, *Diritto penale giurisprudenziale e ruolo della Cassazione*, cit., p. 262.
[404] M. DONINI, *Le garanzie istituzionali della legalità penale e un "nuovo" volto della Corte di Cassazione a fianco o al posto del vecchio? Recensione a A. Cadoppi, Il valore del precedente nel diritto penale*, in *Cass. pen*., 2002, p. 1177 f.
[405] Excessive hopes on binding precedent should not be encouraged, both for the distinguishing technique and the distinction between *ratio decidendi* and *obiter dictum*, V. MANES, Common law-isation *del diritto penale?*, cit., p. 974.
[406] Art. 618 co. 1 c.p.p.: '*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 delle parti o di ufficio, può con ordinanza rimettere il ricorso alle sezioni unite*'.

subject to the *Sezioni Unite* being discretional, it is commonly considered a 'functional obligation' for the sections.[407]

However, Law 103/2017 introduced *comma* 1 *bis* that imposes the *Sezione Semplice* an obligation to refer the question to the *Sezioni Unite* if it disagrees with the principle affirmed by the latter.[408] Synchronic conflicts between the single sections will still be potentially unresolved, until a Section discretionally decides to refer the question. Nonetheless, undesirable contradictions between the principles affirmed by the *Sezioni Unite* and following dissenting opinions by *Sezioni Semplici* should be resolved. The latter is probably the most deplorable situation, since the conflict would cause serious legal uncertainty and impossibility to foresee the correct judicial interpretation.[409] This mechanism transposes the one already ruled in the Code of Civil Procedure (art. 374 c.p.c.).[410] As it was previously argued for the identical provision of the Code of Civil Procedure, the binding effect should only have a procedural but not a substantial nature.[411] The reform has yet been considered the introduction of an obligation to refer the question to the *Sezioni Unite*, and therefore *de facto* going in the direction of the relative binding

[407] Gorla defined this 'functional obligation' according to Art. 111 Cost. (fair trial) and art. 65 *ord. giur*., G. GORLA, *Postille su "l'uniforme interpretazione della legge e i tribunali supremi",* in *Foro it.*, 1976, V, p. 134 ff. Accordingly, for an obligation *de lege lata*, see F. VIGANÒ, *Il principio di prevedibilità*, cit., p. 251.

[408] Art. 618 co. 1 *bis* c.p.p.: '*Se una sezione della corte ritiene di non condividere il principio di diritto enunciato dalle sezioni unite, rimette a queste ultime, con ordinanza, la decisione del ricorso*'. The provision is completed by *comma* 1 *ter* that allows the *Sezioni Unite* to affirm the principle in law also in case the referral is inadmissible, following art. 363 co. 3 c.p.c. Di Giovine, before the reform, had expressed positive comments about a possible introduction of this rule in O. DI GIOVINE, *Antiformalismo interpretativo: il pollo di Russell e la stabilizzazione del precedente giurisprudenziale* in *Riv. trim. dir. pen. cont*., 2, 2015, p. 19.

[409] This was the case, for example, of the aggravating circumstance of the 'massive quantity' of drugs (art. 80 co. 2 D.P.R. 309/90) and its judicial definition. A first *Sezioni Unite* judgment in 2000 (Cass. pen., SS. UU., 21 June 2000, no. 17, Primavera) was followed by new interpretive contrasts and a new *Sezioni Unite* judgement in 2012 (Cass. pen., SS. UU., 20 September 2012, no. 36258, Biondi). Today, two opposite interpretive orientations still persist within the *Corte di Cassazione*, after a statutory amendment in 2014. A first orientation supports the persisting validity of the 2012 criteria, while the other opts for a modification. A. CHIBELLI, *La "ingente quantità" di stupefacenti: la "storia senza fine" di un'aggravante al bivio tra legalità* in the books *e legalità* in action, in *Riv. trim. dir. pen. cont*., 2, 2017, p. 143 ff.

[410] It is similar to a Spanish mechanism, A. RUIZ MIGUEL, F.J. LAPORTA, *Precedent in Spain*, in D.N. MACCORMICK, R.S. SUMMERS (eds.), *Interpreting Precedents*, cit. p. 271 ff.; A. CADOPPI, *Giudice penale e giudice civile di fronte al precedente*, in *Ind. Pen.*, 2014, p. 11 ff.

[411] According to some commentators, art. 618 c.p.p. even after the reform does not really bind the *Sezioni Semplici*, as its violation is not sanctioned. L. DALTILIA, *L'inganno delle illusioni. A proposito dello* stare decisis *in materia penale e dei risvolti politico-giudiziali*, in *Ind. Pen*., 2018, p. 133, who also refers to R. APRATI, *Le sezioni unite fra l'esatta applicazione della legge e l'uniforme interpretazione della legge (commi 66-69 l.n. 103/2017),* in A. MARANDOLA, T. BENE (eds.), *La riforma della giustizia penale*, 2017, p. 278. This argument is not convincing, as the obligation to refer the question would be imposed by law, the only real limit to the judiciary according to art. 101 Cost.

precedent.[412] The purpose is not creating a hierarchy between the sections, but rather the attempt to enhance the *Corte di Cassazione*'s function as judge of the *jus constitutionis*, instead of the *jus litigatoris,*[413] without creating an obstacle to the natural development of law.[414]

It has been pointed out that a modification of the mechanisms involved in the stability of case-law could be insufficient in order to solve the long-lasting and pathological interpretive conflicts and incoherent orientations. The real medicine to the pathology of the judiciary would be a *cultural overruling*. This would be possible only in light of a general improvement in democracy, especially with a renewed legislator.[415]

Moreover, the *Sezioni Unite* could still modify their precedent, as the amendment does not introduce horizontal binding precedent.[416] Situations like the contrast and gradual modification of the principle of law affirmed by the *Sezioni Unite* in the development of the *concorso esterno,* would still be possible. They could be considered a *physiological* development of the criminal law as well. Nevertheless, legal certainty shall be granted to the individual who placed confidence in the *Sezioni Unite* principle. In this perspective, a solution similar to prospective overruling could be a balanced alternative, taking into account all interests at stake. [417]

4.2. Fostering of the nomophylactic role of the Corte di Cassazione *through operative remedies.*

Legal certainty and well-established case-law are the result of the good functioning of supreme courts as well. In Italy, the crucial role of the *Corte di Cassazione* in ensuring stable interpretations has been put into jeopardy by several factors. With regards to a broader discussion on the reform of the *Corte di Cassazione* in Italy, several

[412] G. FIDELBO, *Verso il sistema del precedente? Sezioni Unite e principio di diritto*, in *Dir. pen. cont*., 29.01.2018, p. 15 ff., today published in M. BARGIS, H. BELLUTA, *La riforma delle impugnazioni tra carenze sistematiche e incertezze applicative*, Torino, 2018.
[413] Fidelbo thinks that the relative nature of this version of binding precedent saves the provision from a contrast with art. 25 co. 2 Cost. and 101 Cost. G. FIDELBO, *Verso il sistema del precedente?*, cit., p. 16. Against, C. IASEVOLI, *Le nuove prospettive della Cassazione penale: verso l'autonomia dalla Costituzione?*, in *Giur. it*., 2017, p. 2300 ff.
[414] Against, L. DALTILIA, *L'inganno delle illusioni*, cit. p. 133.
[415] G. FIANDACA, *Prima lezione di diritto penale*, cit., p. 149 f.
[416] For example, after the *Demitry* judgement in 1994, several judgments of the *Sezioni Unite* intervened to modify the precedent and the requirements of the *concorso esterno*, on the same normative basis (art. 110 and 416 *bis* c.p.) Cass. pen., SS. UU. 12 July 2005, Mannino, in *Riv. pen*., 2005, p. 1169 e in *Cass. pen*., 2005, p. 3732 and Cass. pen., SS. UU., 30 October 2002, Carnevale, in *Foro it*., 2003, p. 453 e in *Cass. pen*., 2003, p. 3276.
[417] See *above*, section II, para. 3.1.

commentators have identified an improvement of operational conditions as a possible solution to uncertainties created by judicial interpretation.

The *Corte di Cassazione* is in charge of several functions, which are not limited to the nomophylactic role and thus has a double nature. Therefore, the Court is described as an 'ambiguous apex' (*vertice ambiguo*).[418]

On the one side, it operates as a supreme court: it establishes the *jus constitutionis* instead of the *jus litigatoris* and is essentially aimed at ensuring legal certainty. It affirms the correct interpretation and safeguards the uniform application of the law. This function follows Piero Calamandrei's view on the *nomophylactic* role of the Court.[419] This fundamental idea is expressed in art. 65 of the *ordinamento giudiziario* (Basic Law on the Judiciary, r.d. 30 January 1941, no. 12), that reads:

> 'the supreme *Corte di Cassazione*, supreme jurisdiction, ensures the exact observance and uniform interpretation of the law, the unity of the national objective law, compliance with the limits of national jurisdictions; rules competence and attribution conflicts and carries out other tasks provided for by the law'[420]

On the opposite, Giovanni Leone fostered the idea of the *Corte di Cassazione* as a judge of the *jus litigatoris*, i.e. a *judge of legitimacy*. The Court shall therefore scrutinise third instance cases.[421]

Both these orientations enhanced the debate on the drafting of Art. 101 co. 2 Cost., which provides for the subjection of the judges to the law. Therefore, the *Corte di Cassazione* controls the legitimacy of the application of the law. However, the extension of its scrutiny to the reasoning of the judgements and the general clause, according to which the referral to the Court '…is always admitted' ('*Il ricorso per cassazione….è*

[418] M. TARUFFO, *Il vertice ambiguo: saggi sulla Cassazione civile*, Bologna, 1991.
[419] Calamandrei's body of work investigates the civil section of the *Corte di Cassazione* and analyses its origins dating back to the French *Tribunal de Cassation*, a para-legislative entity which decided on *référé legislatif*. The Tribunal then developed into the supreme judicial institution: it became a Court of law (*Cour de Cassation*) in charge of the correct observance and uniform application of the law. P. CALAMANDREI, *La cassazione civile*, II, Milano, 1920, p. 72 ff. For an historical analysis fo the role of the Corte di Cassazione in Italy, with regards to the criminal law, see A. CADOPPI, *Il valore del precedente nel diritto penale*, cit., p. 222 ff., and E. LUPO, *Il ruolo della Cassazione: tradizione e mutamenti*, in *Archivio Penale*, 2012, p. 155 ff.
[420] Art. 65, r.d. 30 January 1941, no. 12: '*La corte suprema di cassazione, quale organo supremo della giustizia, assicura l'esatta osservanza e l'uniforme interpretazione della legge, l'unità del diritto oggettivo nazionale, il rispetto dei limiti delle diverse giurisdizioni; regola i conflitti di competenza e di attribuzioni, ed adempie gli altri compiti ad essa conferiti dalla legge*'.
[421] The appeal in cassation may be lodged against decisions by courts of appeal or first instance courts. The pleas may be in criminal matters: the violation of procedural or substantive law, the exercise of non-foreseen competences, the failed consideration of evidence, or jurisdiction, lack, insufficiency or contradiction in the reasoning. If the Court finds one of these violations, it can quash the lower instance decision.

sempre ammesso') have fostered its role as a third instance judge (art. 111 co. 6 and 7 Cost.). [422]

The nomophylactic role of the Court in the criminal matter not only means safeguarding statutory reservation but also ensuring a uniform interpretation, which shall be equally applicable to all addressed, and ultimately serve the aims of Artt. 3, 25 co. 2 and 101 co. 2 Cost.

The recent institution of Section VII, in charge of admissibility, has further incremented the number of functions the *Corte di Cassazione* is deputed to. This plurality of functions (*jus constitutionis*, *jus litigatoris* and admissibility) jeopardises its effectiveness in the safeguard of well-established judicial interpretation. In addition, the enormous amount of case-law submitted every year to the Court threatens the feasibility of a uniform application and correct interpretation of the law.[423] In light of present conditions, the sections of the *Corte di Cassazione* are unable to ensure legal certainty and foreseeability. The nomophylactic role converges therefore on the *Sezioni Unite*, that can be invoked by the President (art. 610 c.p.p.) and by the sections in the cases provided for by art. 618 (c.p.p).[424]

As a consequence, several voices have suggested operative remedies in order to prevent legal uncertainty and interpretive chaos within the *Corte di Cassazione.*

Since the *Corte di Cassazione* states the principles of law and indicates the correct interpretation, a deputed office of the Court (*Ufficio del Massimario*) is in charge of identifying and isolating the principles of law in the most relevant judgements, thus enouncing the rule (*massima*). One of the proposals is to improve the functioning of the *Ufficio del Massimario*, in order to better formulate the rules and identify the most important principles.[425]

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[422] G. LATTANZI, *La Cassazione penale tra lacune legislative ed esigenze sovranazionali*, in *Cass. pen.*, 2012, p. 3243 ff., 3246 and E. LUPO, *Il ruolo della Cassazione*, cit., p. 160. The debate on the scrutiny of the Court on the reasoning of the judgement is about the substantive re-evaluation of evidence which often happens before the court. While the original version of the 1988 Code of Criminal Procedure limited the control over reasoning only to the wording of the judgement (Art. 606 co. 1(e)), the so-called *Legge Pecorella* (L. 20 February 2006, no. 46), broadened the scope of the Court's scrutiny.

[423] In 2018, the official statistics of the Court, Criminal Section, show that 51.956 referrals have been lodged. In 2017 they were 56.632. On 31.12.2018, 24.609 proceedings were still pending before the Court. The statistics are published in the *Annuario Statistico* 2018 of the *Corte di Cassazione*, available at http://www.cortedicassazione.it/corte-di-cassazione/it/statistiche_penale.page, last accessed 13.02.2020. See also E. LUPO, *La Corte di Cassazione nella Costituzione*, in *Cass. pen*., 2008, p. 4458.

[424] A. CADOPPI, *Il valore del precedente nel diritto penale*, cit., p. 248.

[425] G. FIANDACA, *Diritto penale giurisprudenziale e ruolo della Cassazione*, cit., p. 259.

Moreover, reducing the amount of case-law would be crucial to grant the Court the opportunity to effectively ensure uniform interpretation and application of the law, which is impossible with such a disproportionate number of pending cases.[426]

In the understanding of some representatives of the judiciary, the limitation in the number of professionals involved in the proceeding before the highest court is a valid proposal. For example, reducing the lawyers entitled to appear before the Court would ensure quality and reduce the number of appeals. In addition, reducing the number of judges of the *Corte di Cassazione* would increase the chances to have uniform orientations.[427] Nevertheless, this proposal could have advantages only if included in a wider reform project, otherwise only making the situation worse.

Another suggestion is reducing the competence of the Court to the *jus constitutionis*, by excluding the appeal of the reasoning of previous decisions (Art. 606 co. 1(e)).[428] Such modification would however require an amendment of the Constitution.

[426] O. DI GIOVINE, *Antiformalismo interpretativo*, cit., p. 19.
[427] G. FIDELBO, *Verso il sistema del precedente?*, cit., p. 16, who refers to M. BARGIS, H. BELLUTA, *Rimedi per i "mali" della Corte di cassazione: ovvero "Carta di Napoli" e dintorni*, in M. BARGIS, H. BELLUTA (eds.), *Impugnazioni penali. Assestamenti del sistema e prospettive di riforma*, Torino, 2013, p. 311 f.; E. LUPO, *Cassazione e legalità penale (Convegno Parma, 9-10 Ottobre 2015). Relazione introduttiva*, in *Cass. pen*., 2016, p. 453.
[428] E. LUPO, *Cassazione e legalità penale*, cit., p. 453.

III. GERMANY

The German legal system is analysed with regards to the relationship between judge-made law and *nullum crimen*. The problem of *Richterrecht* in Germany has been raised in the past but seems to have found satisfactory solutions *in the books*. Germany and Italy share similar background and features. Both legal orders have a strong formal legality model and criminal law has a similar dogmatic structure. The solutions in the books for the problems arising from case-law in Germany seem to be the same as the solutions suggested in the Italian legal system. Nevertheless, the German criminal system seems to have found a good balance without the intervention of European legality, which is now predominant in Italy. Both the different role of ECHR in the German legal system and the lack of relevant European case-law against Germany on this specific aspect have determined the absence of debate.

Historically, the creative role of the judge in Germany had been particularly crucial in the first decades of the 20th Century, with a massive use of analogical techniques during the National Socialist regime. Instead of giving the judge strict interpretive margin, despite the acknowledgement of its creative role and the overcoming of the Enlightenment ideas, the judge operated in the much more dubious context of analogy. Nevertheless, before the totalitarian regime the judge had remained faithful to the Enlightenment and Liberal inspiration of the criminal code. After the end of World War II, interpretation led again within the limits of the prohibition of analogy.[429]

Therefore, the main purpose of the following investigation will be highlighting similarities and differences in the solutions in the books, while discovering which points are crucial in the German system in order to avoid the impasse in which the Italian legal order usually incurs when dealing with the subject matter without the intervention of European legality.

[429] In his historical analysis of the evolution of the prohibition of analogy in Germany, Christoph Fitting identifies the setback of the principle and its transformation in the 'obligation of analogy' only in the decade 1935-1945. The rest of German history since 1871 showed continuity in the formal recognition of the prohibition of analogy. In the GFR, after some difficulties in the 1950s and 1960s, German courts complied with the prohibition in practice as well, especially since the 1970s. The exception is the misuse of the principle of legality in the former GDR, since Socialist policies had to be granted priority in legal interpretation. C. FITTING, *Analogieverbot und Kontinuität*, Berlin, 2016, p. 58-68, 173 f. and 196 f.
A. BARATTA, *Antinomie giuridiche e conflitti di coscienza. Contributo alla filosofia e alla critica del diritto penale*, Milano, 1963, p. 148 ff. and 152. Baratta quotes the critical opinion of Dahm on the increase of the judge's role in the 1930s in G. DAHM, *Die Zunahme der Richtermacht im modernen Strafrecht*, in *Recht und Staat*, H. 78, 1931, p. 16.

1. Subjective solutions under culpability: mistake of law.

Similarly, to the Italian scholarship, the German scientific debate often suggests the application of section 17 StGB (*Verbotsirrtum,* mistake of law) in cases where judicial interpretation is deceptive. Therefore, it is useful to analyse how German scholars and courts have dealt with the problem of judicial interpretation with regards to the possible exclusion of culpability (*Schuld*).

1.1. Verbotsirrtum *and judicial interpretation.*

The German regulation on the mistake of law is the result of a very similar legal background to the Italian system. Section 17 StGB foresees the exclusion of culpability (*Schuld*) if at the time the offence was committed the offender lacks the awareness that he or she is acting unlawfully due to an unavoidable mistake of law. If the mistake was avoidable, differently from the Italian situation, the sentence might be mitigated pursuant to section 49(1) StGB.[430]

Section 17 StGB was adopted with the reform of the Criminal Code in 1975, which accepted and transposed the principles expressed by the BGH (*Großer Senat*) in the historic judgement of 18 March 1952.[431] The BGH in 1952 introduced innovative principles with regards to three main points: i) it abandoned the distinction between *error facti* and mistake of law and suggested a new interpretation, dividing them in *Tatbestandsirrtum* (which includes mistake on normative elements) and *Verbotsirrtum*; ii) the unavoidable *Verbotsirrtum* excludes not only intent but also the whole category of *Schuld* (culpability); iii) the Court adopts the *Schuldtheorie* instead of the *Vorsatztheorie*, especially with reference to the avoidable mistake of law. In this area, the judge will apply the penalty provided for intentional conduct, but he or she might mitigate it.[432]

In the definition of the unavoidable mistake of law, German dogmatic considers it necessary that the addressees try to avoid the mistake with a due ascertainment of the law. The requested level of ascertainment is defined by scholarship and courts, and the role of

[430] Section 17 StGB reads: ' If at the time of the commission of the offence the offender lacks the awareness that he is acting unlawfully, he shall be deemed to have acted without guilt if the mistake was unavoidable. If the mistake was avoidable, the sentence may be mitigated pursuant to section 49(1)'.

[431] Previous discipline of the mistake of law was inspired, as the Italian regulation, by the *ius commune* and roman law tradition of the irrelevance of the ignorance of the law. H.H. JESCHECK, *L'errore di diritto nel diritto penale tedesco e italiano,* in *Ind. Pen.*, 1988, p. 181 ff. On the draft of new section 17 StGB see C. ROXIN, *Die Behandlung des Irrtums im Entwurf 1962,* in *ZStW*, 1964, p. 583 ff.

[432] This was the result of the influence of the normative theory of culpability and Binding's theory of culpability as the awareness of unlawfulness according to H.H. JESCHECK, *L'errore di diritto nel diritto penale tedesco e italiano,* cit., p. 191.

case-law in the efforts to clear the lawfulness of a conduct is crucial. Moreover, its evaluation depends on the number and characteristics of the addressees and the content of the provision.[433]

The knowledge of the unlawfulness is not necessarily a real knowledge. The knowledge is presumed, when the individual should have known the law or is unaware thereof at his or her fault. If the lack of knowledge is not a completely avoidable mistake of law, the sentence might be mitigated according to section 49(1) StGB (section 17(2) StGB).

Scholars have regarded *Verbotsirrtum* as a satisfactory solution for the uncertainties arising from judicial interpretation, instead of the extension of the principle of legality to case-law. These scholars do not deny that the addressees' legitimate expectations in the courts' interpretation are violated, and that a conviction must be excluded. But the means is the application of the mistake of law, which excludes culpability in the individual case.[434]

Scholars nevertheless doubted whether, with regards to the objective legal uncertainty caused by inconsistent case-law orientations, the scope of application of section 17 StGB is triggered or whether the objective clarity that the legal order should have ensured is lacking.[435] It is the case of a sudden overruling and of synchronic conflicts both within same level courts and courts of different levels.

a) For example, a consistent case-law orientation, especially when it expresses the majority opinion, can be an element building the addressees' legitimate expectations in a

[433] C. ROXIN, *Strafrecht: Allgemeiner Teil*, cit., p. 940 ff.

[434] According to Jakobs, the mistake of law is applicable to an overruling, especially in the context of a well-established case-law. G. JAKOBS, *Strafrecht. Allgemeiner Teil*, Berlin-New York, 1991, p. 106. Similarly, H.J. RUDOLPHI, *Unrechtsbewusstsein, Verbotsirrtum und Vermeidbarkeit des Verbotsirrtums*, Göttingen, 1969, p. 98 ff., who acknowledges the substantial difference between statutory law and judge-made law, that hinder the application of Art. 103 II GG to *Richterrecht*. Since the judges only complete the law and their interpretation remains within its boundaries, the best solution is to be found in *Verbotsirrtum*. Roxin sees the mistake of la was the *de lege lata* solution for the violation of legitimate expectations in case of a subsequent overruling. C. ROXIN, *Strafrecht: Allgemeiner Teil*, cit., p. 169. Legitimate expectations are constitutionally relevant, i.e. BVerfG 16.5.2011 – 2 BvR 1230/10, in *BeckRS* 2011, p. 52468 ff.

[435] U. NEUMANN, *Der Verbotsirrtum (§ 17 StGB)*, in *JuS*, 1993, p. 798 and I. PUPPE, *Bemerkungen zum Verbotsirrtum und seine Vermeidbarkeit*, in K. ROGALL (ed.), *Festschrift für Hans-Joachim Rudolphi zum 70. Geburtstag*, 2004, p. 234. Naucke defined imprecise law and the mistake of law doctrine as complementary, in W. NAUCKE, *Über Generalkaluseln und Rechtsanwendung im Strafrecht*, Tübingen, 1973, p. 24, referred to by J. RODENBECK, *Die Berufung auf einen Verbotsirrtum als Schutzbehauptung: gleichzeitig eine kritische Betrachtung der Verbotsirrtumsdogmatik*, Baden-Baden, 2012, p. 63.

given interpretation with regards to unlawfulness.[436] Therefore, in case of a sudden overruling, culpability shall not be affirmed on the basis of section 17 StGB. Some scholars praise this solution, as the most suitable under a dogmatic perspective. Nevertheless, with regards to the theory of law, a mistake of law cannot be affirmed in such cases, when new judicial constructions were applied retroactively.[437]

Jakobs makes the example of the possibly avoidable mistake of law when a well-established case-law of higher courts (OLG), that excludes criminal liability is suddenly overruled by the *Bundesgerichtshof* (BGH), thus determining the criminal relevance of the conduct. According to Jakobs, the accused could have avoided the mistake by doubting the absoluteness of the previous orientation or not considering the problem. Consequently, he considers this kind of mistake not completely avoidable. Differently, if the legal position the defendant believes correct is not well-founded, his mistake would be considered avoidable.[438]

b) In the case of conflicting synchronic interpretations within courts of different level, the offender shall not be punished, excluding culpability, if he has counted on the interpretation of the highest courts, thus relying on the hierarchical criterion.[439] Therefore, the offender shall not be held liable if he has relied on an OLG interpretation, in the absence of a BGH intervention. A rather old case-law further considered the offender's interest at stake, in order to evaluate the possibility to avoid the mistake of law.[440]

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[436] C. ROXIN, *Strafrecht: Allgemeiner Teil*, cit., p. 956. G. JAKOBS, *Strafrecht. Allgemeiner Teil*, cit., p. 563, H.J. RUDOLPHI, *Unrechtsbewusstsein, Verbotsirrtum und Vermeidbarkeit des Verbotsirrtums*, cit., p. 104 ff., 107. Case-law is inconsistent in this respect: an unavoidable mistake of law was acknowledged and caused by consistent interpretation following the scholars' dominant opinion (section 168 StGB) KG, 20.11.1989 – 4 Ws 80/89, in *NJW*, 1990, p. 782; against, see BGH, 25.06.2008 – 5 StR 109/07, in *NStZ*, 2008, p. 627 ff., that expanded the definition of 'party' in the offence of 'violating the attorney-client relationship', without considering sufficient a possible unavoidable mistake of law due to the previous stricter interpretation and the consideration of the awareness of a general unlawfulness of the conduct. (section 356 StGB, *Parteiverrat*). Scholars criticised this latter judgement both under the perspective of the sufficiency of the awareness of a general unlawfulness and the lack of consideration of mistake of law or the application of Art. 103 II GG. B. MÜSSIG, *Tatbeteiligte und Verfahrensbeteiligte als ‚Partei' i.S.d. § 356 StGB? – (Neue?) strafrechtliche Grenzziehungen - Anmerkung zu BGH vom 25. 6. 2008 – 5 StR 109/07 (NStZ 2008, 627ff.)*, in *NStZ*, 2009, p. 425, see N. BOSCH, *Reichweite des Parteiverrats*, in *JA*, 2008, p. 905.
[437] U. NEUMANN, *§ 17*, in U. KINDHÄUSER, U. NEUMANN, H.U. PAEFFGEN (eds.), *Strafgesetzbuch*, Band 1, 5 ed., Baden-Baden, 2017, p. 874.
[438] G. JAKOBS, *Strafrecht. Allgemeiner Teil*, cit., p. 556.
[439] C. ROXIN, *Strafrecht: Allgemeiner Teil*, cit., p. 956. H.J. RUDOLPHI, *Unrechtsbewusstsein, Verbotsirrtum und Vermeidbarkeit des Verbotsirrtums*, cit., p. 112, U. NEUMANN, *§ 17*, cit., p. 875, See also K. GAEDE, *§ 17*, in H. MATT, J. RENZIKOWSKI (eds.), *Strafgesetzbuch: Kommentar*, München, 2013, p. 233. J. RODENBECK, *Die Berufung auf einen Verbotsirrtum als Schutzbehauptung*, cit., p. 72-73. Against, T. WALTER, *Der Kern des Strafrechts: die allgemeine Lehre vom Verbrechen und die Lehre vom Irrtum*, Tübingen, 2006, p. 319.
[440] In the first case, the OLG makes the difference between a confusing case-law of OLG and lower courts and confusing OLG case-law, in opposition to a correct interpretation at OLG level. In particular, if the

Similarly, one can rely on the consistent judicial interpretation, although majority in scholarship supports another interpretation. Thus, the latter would not be a ground to affirm the avoidable mistake of law.[441]

c) A synchronic conflict between courts of the same level has different solutions in literature. According to some orientations, it would not completely exclude culpability.[442] The mistake of law would be considered avoidable and therefore section 17(2) StGB and the consequent mitigated sentence could apply.[443] From another perspective, it is considered a conditioned (or limited) ignorance of the unlawfulness, therefore having the same legal consequences of the application of section 17(2) StGB. But, apart from the legal consequences, according to this interpretation the mistake of law would not be applicable in case of synchronic interpretive conflicts.[444]

Another possibility is to deny criminal liability at all, through the application of the unavoidable mistake of law[445] or, for some others, through the application of *Unzumutbarkeit*.[446] The latter option focuses on the necessity of a general and identical result (the exclusion of culpability) independently from the circumstances of the case. It has been opposed that such an indiscriminate exclusion of culpability would result in offenders choosing the most convenient interpretation.[447] A last option would be to resort to operative remedies within the same courts (i.e. section 121(2) GVG for OLGs).[448]

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offender's economic existence is at stake, the OLG Bremen considered the unavoidable mistake of law even before an OLG interpretation that contradicted the dominant one, although the BGH did not issue any decision on the matter. OLG Bremen, 30.09.1959 – Ss 54/59, in *NJW*, 1960, p. 163 f. OLG Frankfurt/Main, 06.11.1963 – 1 Ss 273/63, in *NJW*, 1964, p. 508 f.

[441] H.J. RUDOLPHI, *Unrechtsbewusstsein, Verbotsirrtum und Vermeidbarkeit des Verbotsirrtums*, cit., p. 108 f.

[442] C. ROXIN, *Strafrecht: Allgemeiner Teil*, cit., p. 956.

[443] C. ROXIN, *Strafrecht: Allgemeiner Teil*, cit., p. 956; H.J. RUDOLPHI, *Unrechtsbewusstsein, Verbotsirrtum und Vermeidbarkeit des Verbotsirrtums*, cit., p. 108 ff., 111; U. NEUMANN, *§ 17*, cit., p. 875 f. and the dominant orientation in case-law, quoted by Neumann, OLG Köln, 22.03.1960 – Ss 66/60, in *GA*, 1960, p. 318; OLG Stuttgart, 07.09.1966 – 1 Ss 314/66, in *MDR*, 1967, p. 63 (64); against see OLG Schleswig 20.9.1961 – 1 Ss 288/61, in *SchlHA*, 1961, p. 350; OLG Schleswig, 13.04.1966 – 1 Ss 64/66, in *SchlHA*, 1966, p. 206 (207). Others exclude culpability and apply the unavoidable mistake of law, G. STRATHENWERTH, L. KUHLEN, *Strafrecht. Allgemeiner Teil, Die Straftat*, München, 2004, p. 214 ff.

[444] T. FISCHER, *Strafgesetzbuch mit Nebengesetzen*, München, 2019, p. 142. A mistake of law is avoidable also when the offender *hopes* that the law he is aware of does not apply in his case.

[445] J. RODENBECK, *Die Berufung auf einen Verbotsirrtum als Schutzbehauptung*, cit., p. 93ff.

[446] U. NEUMANN, *§ 17*, cit., p. 876. G. WARDA, *Schuld und Strafe beim Handeln mit bedingtem Unrechtsbewußtsein*, in G. STRATENWERTH, *Festschrift für Hans Welzel zum 70. Geburtstag am 25. März 1974*, Berlin, 1974, p. 527-528. The existence of the mistake is denied in principle.

[447] W. JOECKS, *§ 17*, in W. JOECKS, K. MIEBACH (eds.), *Münchener Kommentar zum StGB*, 3. ed., 2017, p. 893.

[448] J. RODENBECK, *Die Berufung auf einen Verbotsirrtum als Schutzbehauptung*, cit., p. 72-73.

German courts recently seem to opt for the unavoidable mistake of law in cases where higher courts of the same level show a conflicting interpretation of the same legal issue. Therefore, the risk of an 'extremely unclear legal situation' cannot fall on the addressed. Culpability has been excluded in those cases by applying the unavoidable mistake of law.[449]

d) Moreover, scholars and judges dealt with the case of a single interpretation of the provision. In these cases, culpability is generally excluded applying the unavoidable mistake of law.[450] This was also the case for an interpretation of lower instance court, still not confirmed by higher instance courts.[451]

1.2. Conclusions on mistake of law and legality.

Undoubtedly there are several points in common between the German and Italian application of the mistake of law, with regards to chaotic case-law or overruling. German courts seem to be more inclined to apply the legislative discipline, even though the constitutional principle at stake both in Italy and Germany is always the legitimate expectations (*Vertrauensschutz/legittimo affidamento*). Despite the wider application in German practice, scholars often oppose where the mistake of law protects legitimate expectations only on a case-by-case basis.[452]

With regards to the issues concerning *nullum crimen* and judge-made law, the *Verbotsirrtum* has been defined as the 'second-best' solution by its critics, since it would be subject to the high standards to affirm unavoidability.[453] Scholars also pointed out that the subjective solution would lead to uncertainties, as it is often based on fictional evaluations.[454] Moreover, Hassemer believes that a solution under *Verbotsirrtum* would 'postpone' the problem at the level of culpability, even if it is a question of the content of

[449] OLG Stuttgart, 19.11.2007 - 2 Ss 597/07, in *NJW*, 2008, p. 245. See also BGH, 16.08.2007 - 4 StR 62/07 (LG Saarbrücken), in *NJW*, 2007, p. 3079. J. VOGEL, *§ 17*, in H.W. LAUFHÜTTE, R. RISSING-VAN SAAN, K. TIEDEMANN, *Strafgesetzbuch. Leipziger Kommentar*, 1. Band, Berlin, 2007, p. 1196 f.
[450] C. ROXIN, *Strafrecht: Allgemeiner Teil*, cit., p. 956. U. NEUMANN, *§ 17*, cit., p. 876; W. JOECKS, *§ 17*, cit., p. 892.
[451] OLG Düsseldorf, 21.01.1981 – 5 Ss (OWi) 727/80 I, in *NJW*, 1981, p. 2478; with regards to a statement of the public prosecution (*Staatsanwaltschaft*) in BayObLG, 20.12.1979 – RReg. 5 St 237/79, in *NJW*, 1980, p. 1057.
[452] G. DANNECKER, *§ 1*, in H.W. LAUFHÜTTE, R. RISSING-VAN SAAN, K. TIEDEMANN, *Strafgesetzbuch. Leipziger Kommentar*, 1. Band, Berlin, 2007, p. 257.
[453] Schreiber highlights the different scope of application of the mistake of law, that would be limited to the elements of the offence linked to culpability but would exclude others. H.L. SCHREIBER, *Rückwirkungsverbot bei einer Änderung der Rechtsprechung im Strafrecht?*, in *JZ*, 1973, p. 717. W. HASSEMER, W. KARGL, *§ 1*, in U. KINDHÄUSER, U. NEUMANN, H.U. PAEFFGEN (eds.), *Strafgesetzbuch*, Band 1, 5 ed., Baden-Baden, 2017, p. 225.
[454] H.L. SCHREIBER, *Rückwirkungsverbot*, cit., p. 717; W. NAUCKE, *Anmerkungen*, in *NJW*, 1968, p. 759.

the law. As a consequence, the only possible solution would be an application of the prohibition of retroactivity to case-law, that would have a 'completing value' in respect of written law.[455] While these observations are supported with respect of overruling, scholars are dubious about the best solution to offer in case of synchronic conflicts.[456]

2. Objective solutions: non-retroactivity and overruling in malam partem.

The prohibition of retroactivity is provided for by Art. 103 II GG, together with section 2 I,V StGB.[457] The rule of law in Germany provides a particularly high protection in criminal law.[458] The democratic principle is, unlike the other principles, not part of its rationales. Some scholars have defined the rationales of the principle of non-retroactivity both under an objective and a subjective point of view.[459] On the one hand, the subjective dimension are the concepts of *Rechtssicherheit* (legal certainty) and *Vertrauensschutz* (legitimate expectations), which both fall under the umbrella of the rule of law.[460] In this respect, the culpability principle is often considered another rationale.[461] Nevertheless, some scholars refuse this interpretation.[462]

On the other hand, the objective side of the principle is expressed by those rationales that were affirmed in the Enlightenment. Individual liberty can only be safeguarded through a limitation of State power, which in this context means to limit the power of the legislator from introducing statutes retroactively.[463] To the purposes of dealing with

[455] W. HASSEMER, W. KARGL, *§ 1*, cit., p. 225.
[456] H.L. SCHREIBER, *Rückwirkungsverbot*, cit., p. 718. H.J. RUDOLPHI, *Unrechtsbewusstsein, Verbotsirrtum und Vermeidbarkeit des Verbotsirrtums*, cit., p. 108; against, N. GROSS, *Rückwirkungsverbot und richterliche Tatbestandsauslegung im Strafrecht*, Freiburg i.B., 1969, p. 128 ff. and ID., *Über das „Rückwirkungsverbot" in der strafrechtlichen Rechtsprechung* in *GA*, 1971, p. 19 ff.
[457] Art. 103 II GG '(2) An act may be punished only if it was defined by a law as a criminal offence before the act was committed'. §2 Jurisdiction ratione temporis; lex mitior '(1)the penalty and any ancillary measures shall be determined by the law which is in force at the time of the act. (2) If the penalty is amended during the commission of the act, the law in force at the time the act is completed shall be applied. (3) If the law in force at the time of the completion of the act is amended before judgment, the most lenient law shall be applied. (4) A law intended to be in force only for a determinate time shall be continued to be applied to acts committed while it was in force even after it ceases to be in force, unless otherwise provided by law'. These translations of German law, and the following translations reported in this thesis, are offered by the *Bundesministerium der Justiz und für Verbraucherschutz*, and available at https://www.gesetze-im-internet.de/englisch_gg/index.html, last accessed 13.02.2020.
[458] H.H. JESCHECK, T. WEIGEND, *Lehrbuch des Strafrechts, Allgemeiner Teil*, cit., p. 137.
[459] H.L. SCHREIBER, *Rückwirkungsverbot,* cit., p. 715.
[460] H.H. JESCHECK, T. WEIGEND, *Lehrbuch des Strafrechts, Allgemeiner Teil*, cit., p. 138.
[461] H.L. SCHREIBER, *Rückwirkungsverbot,* cit., p. 715.
[462] H.H. JESCHECK, T. WEIGEND, *Lehrbuch des Strafrechts, Allgemeiner Teil*, cit., p. 137; W. SAX, *Grundsätze der Strafrechtspflege*, cit., p. 999; R. MAURACH, K.H. GÖSSEL, H. ZIPF, *Strafrecht. Allgemeiner Teil*, Heidelberg, 1983, p. 149 do not include the culpability rationale.
[463] H.L. SCHREIBER, *Rückwirkungsverbot,* cit., p. 715.

retroactive application of judicial overruling, the so called *strafrechtliche Gründe*[464] of the non-retroactivity principle do not come into question: Feuerbach's *psychologische Zwangstheorie* does not really fit with the following observations.[465]

The principle of non-retroactivity covers all elements of the criminal offence that involve the *Strafwürdigkeitsgehalt*, i.e. the content of punishability that only covers statutory law.[466]

In light of the aforementioned rationales of the principle, both scholars and courts discussed a possible application of the principle of non-retroactivity to *Richterrecht*. The acknowledgement of the role of judge-made law in the law in action was already evident to scholarship writing in the 1960s. The autonomous role of case-law in defining the offence was therefore not taboo in literature.[467]

The possible prohibition of non-retroactivity with regards to a judicial overruling had the attention of German scholarship and courts especially in the 1960s and 1970s.

2.1. The case of Promillefälle.

The German debate on the inclusion of an overruling in the prohibition of retroactivity was raised in 1966, when the *Bundesgerichtshof* (BGH) lowered the necessary alcohol blood level to declare a driver 'absolutely unable to drive' (*unbedingt fahruntüchtig*) from 1.5‰ to 1.3‰.[468] The threshold to be held criminally liable for the criminal offence of driving while under the influence of drink or drugs (*absolute Fahruntüchtigkeit* in *Trunkenheit im Verkehr*, section 316 StGB) was reduced as a result of the BGH decision.[469] In particular, in the case in question the responsibility was for negligence.[470]

[464] Binding in his 1885 *Lehrbuch* considered the prohibition of retroactivity to be based only on Feuerbach's *psychologische Zwangstheorie*, as all other rationales would lead instead to consider retroactive criminal statues reasonable. K. BINDING, *Lehrbuch des Strafrechts*, cit., p. 25.
[465] See *above*, section I, para. 1.
[466] G. DANNECKER, *Das intertemporale Strafrecht*, Tübingen, 1993, p. 390; G. JAKOBS, *Strafrecht. Allgemeiner Teil*, cit., p. 92 ff.; H.H. JESCHECK, T. WEIGEND, *Lehrbuch des Strafrechts, Allgemeiner Teil*, cit., p. 139 with further references.
[467] H.L. SCHREIBER, *Rückwirkungsverbot,* cit., p. 715. Schreiber refers to Welzel's statement according to which the law in force is the law that is to find in its application and the law that changes in its application ('*in Anwendung befindliche und in dieser Anwendung sich wandelnde Recht'*).
[468] BGHSt. 21, 157, 09.12.1966 - 4 StR 119/66, in *NJW*, 1967, p. 116. Previously, the 1.5‰ was established by BGH, 05.11.1953 – 3 StR 504/53, in BGHSt 5, 168. For motorcycles the threshold was 1.3‰, according to BGH, 06.03.1959 – 4 StR 517/58, in BGHSt 13, 278.
[469] The BGH in this case confirmed the *Amtsgericht* (AG) decision. The case was referred to the BGH by the *Oberlandesgericht* Hamm (OLG Hamm), as the accused had opposed the impossibility to convict her for the criminal offence in question for the well-established case-law of the BGH that had fixed the threshold at 1.5‰. OLG Hamm, 09.03.1966, in *NJW*, 1966, p. 696.
[470] The offender was charged with culpable 'causing bodily harm' and 'endangering road traffic' (section 315 c).

The reasoning of the BGH was based on scientific reports and considerations on the risk assessment.[471]

The BGH in the following years made several other overrulings *in malam partem*, progressively lowering the alcohol level,[472] for other vehicles as well.[473] In 1990, it overruled the 1.3‰ level again *in malam partem*, reducing it to 1.1‰, which gave rise to a *Bundesverfassungsgericht* (BVerfG) Chamber judgement as well.[474]

The first BGH decision in 1966 provoked a debate that had been limited to a few scholars until that time.[475] With regards to the so-called *Permille* cases (*Promillefälle*), scholarship was divided in two main orientations. On the one hand, some denied the extension of the prohibition of retroactivity to overruling. On the other hand, some tried to find a solution in the domain of the non-retroactivity principle *de lege lata* or with proposals *de lege ferenda*.

With reference to the negative orientation, both German courts[476] and part of the scholarship did not see any legal obstacle to the implementation of such an overruling. It was considered already included in the *Tatbestand* of the offence and the possible extensive application of Art. 103 II GG to judicial interpretation was rejected. In their understanding, a different interpretation would have been contrary to the wording of the constitutional norm, to the intention of the drafters, to its teleological and systematic

[471] BGHSt. 21, 157, 09.12.1966 - 4 StR 119/66, in *NJW*, 1967, p. 118.
[472] BGH Beschl. v. 09.12.1966 – 4 StR 119/66, in BGHSt 21, 157 (159); in 1971, the BGH admitted the inability to drive (*Fahruntüchtigkeit*) in a case where the alcohol level was between 1.2‰ and 1.3‰ as well, but the police officer testified the absolute inability to drive, in BGH Beschl. v. 19.08.1971 – 4 StR 574/70, in BGHSt 24, 200 ff., in *NJW*, 1971, p. 1997 ff.
[473] For bicycles the BGH established the alcohol level at 1.7‰ in BGH, 17.07.1986 – 4 StR 543/85, in BGHSt 34, 133 and was then lowered to 1.6‰ with the BGH 1990 judgement. Other vehicles were considered equivalent to *Kraftfahrzeuge*: moped BGH, 29.10.1981 – 4 StR 262/81, in BGHSt 30, 251, 253f., in *NJW*, 1982, p. 588 ff. and later, equivalent to the new 1,1‰ level: motorised wheelchair in OLG Nürnberg, 13.12.2010 – 2 St OLG Ss 230/10, in *DAR*, 2011, 152; horse carriage in OLG Oldenburg, 24.02.2014 – 1 Ss 204/13, in *BA*, 2014, 176, 178, see P. KÖNIG, *Anmerkung* zu *OLG Oldenburg: Absolute Fahruntüchtigkeit eines Pferdekutschers bei einer BAK von 1,1 ‰,* in *DAR*, 2014, p. 399 f.
[474] BGH, 18.01.1990 – 4 StR 292/89, in BGHSt 36, 341, 346ff., in *NJW*, 1990, p. 1245 ff. and BVerfG Beschl./K v. 23.6.1990 – 2 BvR 752/90, in *NJW*, 1990, p. 3140.
[475] G. RADBRUCH, *Der Geist des englischen Rechts*, Heidelberg, 1946, p. 33-37; J. MEYER-LADEWIG, *Der Satz „nulla poena sine lege" in dogmatischer Sicht*, in *MDR*, 1962, p. 262; P. BOCKELMANN, *Niederschriften über die Sitzungen der Großen Strafrechtskommission*, cit., p. 289; W. STREE, *Deliktsfolgen und Grundgesetz*, Tübingen, 1960, p. 80 ff.
[476] OLG Karlsruhe, 05.10.1967, in *NJW*, 1967, p. 2167 ff. Naucke criticises the OLG Karlsruhe, that relinquished the first instance judgement, in order to apply the new Permille levels to previously committed facts. Naucke complains that the criminal liability depends on the practice approach of the judge, and of the BGH in particular. W. NAUCKE, *Anmerkungen*, cit., p. 758 ff.

interpretation.[477] Moreover, the determination of the alcohol levels was considered an element of evidence, and therefore part of procedural law, outside the scope of application of the principle of legality.[478] Another argument was the fictitious character of the problem, since it did not make sense in the German legal order for the following reasons.[479]

Since some scholars suggested to introduce a mechanism similar to prospective overruling, the arguments against *Änderungswarnungen* (i.e. a sort of prospective overruling) was the impossibility to implement it. The question was indeed how the citizen could be made aware of judicial overrulings. The subjection of the judge only to the law (Art. 97 I GG) was endangered by a judge only declaring the correct interpretation and not to applying it, thus becoming an '*ad hoc* legislator'.[480] Moreover, scholars further refused prospective overruling for the absence of an adequate procedural instrument that could limit the judge's powers.[481]

On the contrary, several voices in literature identified a violation of Art. 103 II GG and demanded its application to judicial overruling as well. The relativity of *Bestimmtheitsgebot* and the crucial role of case-law reflected in the prohibition of retroactivity. Moreover, statute and judge-made law could be equated only at the level of their effects.[482] Otherwise, the simple equivalence between judges and legislator at the level of sources would result in potentially legitimating the judge as legislator.[483] Scholars already recognised a possible role of the judge in the co-creation of law, especially when concepts needed to be given a value.[484]

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[477] H. TRÖNDLE, *Rückwirkungsverbot bei Rechtsprechungswandel? Eine Betrachtung zu einem Scheinproblem der Strafrechtswissenschaft*, in H.H. JESCHECK, H. LÜTTGER (eds.), *Festschrift für E. Dreher zum 70. Geburtstag*, Berlin-New York, 1977, p. 124 f. See also B. HAFFKE, *Rückwirkungsverbot des Art. 103 II GG bei Änderung der Rechtsprechung zum materiellen Recht*, Göttingen, 1970, p. 42.

[478] W. SARSTEDT, *Beweisregeln im Strafprozeß*, in E.E. HIRSCH (ed.), *Festschrift für E. Hirsch zum 65. Geburtstag*, Berlin, 1968, p. 184.

[479] It is a *Scheinproblem* for H. TRÖNDLE, *Rückwirkungsverbot bei Rechtsprechungswandel?*, cit., p. 123 ff.

[480] H. TRÖNDLE, *Rückwirkungsverbot bei Rechtsprechungswandel?*, cit., p. 126.

[481] H. TRÖNDLE, *Rückwirkungsverbot bei Rechtsprechungswandel?*, cit., p. 128. German criminal procedure only provided for exceptions, within the same legal issue, to the judge's discretionary power.

[482] W. STRAßBURG, *Rückwirkungsverbot und Änderung der Rechtsprechung im Strafrecht*, in *ZStW*, 1970, p. 950, Against, H. SCHRÖDER, *Gesetz und Richter im Strafrecht*, cit., p. 8 ff.

[483] W. STRAßBURG, *Rückwirkungsverbot*, cit., p. 965.

[484] In particular, the complicated relationship between *nulla poena sine lege* and concepts needing to be completed to define their value T. LENCKNER, *Wertausfüllungsbedürftige Begriffe und der Satz "nulla poena sine lege",* in *JuS*, 1968, p. 249-257, 304-310. W. STRAßBURG, *Rückwirkungsverbot*, cit., p. 952 refers to *normative Tatbestandsmerkmale*, normative elements of the offence.

The risk to endanger *Vertrauensschutz* would have been serious only if the legal system was going to simulate a common law system.[485]

Moreover, denying the application of Art. 103 II GG would violate the principle of equality (Art. 3 I GG), for those who were tried at the time the BGH decision was issued, but had committed the offence before it and who would therefore suffer from a detrimental treatment. In addition, legal certainty *in concreto* would have been disregarded.[486]

The proposal was similar to prospective overruling.[487] Predictability and judicial development shall therefore play together in a '*Von-nun-an-Klausel*' (from-now-on-clause) which introduces a decision that does not yet modify the previous rule, but announces *obiter dictum* the new interpretation.[488] These opinions did not mean to prohibit interpretation in the concrete case but to ensure the development of the law only with future application of that interpretation. According to these scholars, the new interpretation gains authority and builds the *ratio decidendi* for future cases.[489] A new interpretation would be the interpretation affecting *Tatbestand* and issued by highest jurisdictions.[490] Nevertheless, scholars excluded that this could result in an analogic application of Art. 103 II GG to judge-made law.[491] On the contrary, the legislator should provide rules that safeguard predictability in the application of law according to Art. 103 II GG.

In 1990 the BGH with a new overruling lowered the alcohol concentration again from 1.3‰ to 1.1‰.[492] The second instance judge considered it possible to convict the applicant for *absolute Fahruntüchtigkeit* pursuant to section 316 StGB. The *Oberlandesgericht* (OLG), facing the previous 1966 BGH judgment, referred the question

[485] W. STRAßBURG, *Rückwirkungsverbot*, cit., p. 956.
[486] W. STRAßBURG, *Rückwirkungsverbot*, cit., p. 962.
[487] H.L. SCHREIBER, *Rückwirkungsverbot*, cit., p. 717; H. MÜLLER-DIETZ, *Verfassungsbeschwerde und richterliche Tatbestandsauslegung im Strafrecht*, in F.-C. SCHROEDER, H. ZIPF (eds.) *Festschrift für Reinhart Maurach zum 70. Geburtstag*, Karlsruhe, 1972, p. 41 ff.
[488] Straßburg considers the improved awareness of the judge introducing a prospective overruling. W. STRAßBURG, *Rückwirkungsverbot*, cit., p. 968.
[489] W. STRAßBURG, *Rückwirkungsverbot*, cit., p. 963.
[490] The prohibition of retroactivity should fall on general dispositions included in judge-made law constructions potentially completing the law. This would be possible for their convincing and authoritative force which would replace a statutory intervention. W. STRAßBURG, *Rückwirkungsverbot*, cit., p. 964 and W. GRUNSKY, *Grenzen der Rückwirkung bei einer Änderung der Rechtsprechung*, in *Juristische Studiengesellschaft Karlsruhe*, Schriftenrehe Heft 94, Karlsruhe, 1970, p. 7 ff.
[491] W. STRAßBURG, *Rückwirkungsverbot*, cit., p. 966.
[492] BGH, 28.06.1990 - 4 StR 297/90, in *NJW*, 1990, p. 2393 ff.

to the BGH, which overruled its previous decision. While the reasoning was based on biological and medical evidence, most of all the BGH referred to statistics on changed traffic conditions, that requested stricter and higher performance requirements to drivers.[493]

This new overruling led to the judgement of the BVerfG's Second Chamber (*Zweite Kammer*) on the alleged violation of Art. 103 II GG. German criminal courts allegedly applied the new threshold (1.1‰) retroactively to offenses which took place before the BGH overruling in 1990. [494] The BVerfG defined the *Tatbestand* as incapacity caused by alcohol consumption, but not as incapacity caused by a fixed permille alcohol level. Therefore, the criminal provision empowers the judge to discretionally determine the exact threshold to declare *Fahruntüchtigkeit*. The principle of *lex certa* (*Bestimmtheitsgebot*) and prohibition of retroactive aggravation of criminal liability enshrined in Art. 103 II GG are not violated.[495] According to the Constitutional Court, not only did the overruling not interfere with the penal disvalue of the conduct, but it included new cases in the scope of the criminal offence for a changed insight on the subject matter. Hence, the prohibition of retroactivity and *Vertrauensschutz* do not hinder such new applications.[496]

2.2. Precedent, prospective overruling and non-retroactivity of judge-made law in the German debate.

The early debate on the so-called *Promillefälle* expanded the discussion among scholars on binding precedent, prospective overruling and non-retroactivity of judge-made law. The possible solutions are very similar to the Italian scholarship's, yet they were confined to scientific debate. The courts, unlike the Italian situation, did not play a great role in the debate.

[493] BGH, 28.06.1990 - 4 StR 297/90, in *NJW*, 1990, p. 2394.
[494] BVerfG (2nd Chamber of the 2nd Senate), 23.06.1990, 2 BvR 752/90, in *NJW*, 1990, p. 3140.
[495] BVerfG (2nd Chamber of the 2nd Senate), 23.06.1990, 2 BvR 752/90, in *NJW*, 1990, p. 3140.
[496] *Ibidem*. In addition, the BVerfG rejected the argument based on the prohibition of arbitrariness (Art. 3 I GG), as the courts' evaluation of the cases do not concern the BVerfG, whose competence *ratione materiae* is about the possible violation of the Constitution through an incorrect application of law. On the contrary, the case in question remained within the limits of a legitimate adjudication.

2.2.1. Favourable opinions to the prohibition of retroactive overruling.

Most of the opinions do not attribute judge-made law the same role as statutory law within the sources of law.[497] Nevertheless, scholarship admits that under certain circumstances, also judge-made law could have the same effects as statutory law. In particular, well-established case-law of the highest courts could produce principles (*Entscheidungsmaximen*) that would replace statutory regulations, as far as their effects are concerned. Therefore, the introduction and immediate application of a new detrimental interpretation would have the same *in malam partem* effects as a retroactive statute.[498]

In these cases, the objective validity of these principles should be subject to the prohibition of retroactivity pursuant to Art. 103 II GG.[499] The main argument is a strong emphasis on the *Vertrauensschutz* and *Rechtssicherheit* rationales of the non-retroactivity principle, as a component of the rule of law (*Rechtsstaatsprinzip*).[500] Moreover, the *Schuldprizip* and the prohibition of arbitrariness descending from the principle of legality are recalled as possible grounds to apply the prohibition of non-retroactivity to judicial interpretations.[501]

With regards to the application of Art. 103 II GG, a first orientation sees the possibility of directly applying Art. 103 II GG to overrulings as well, especially on the basis of a link

[497] H.L. SCHREIBER, *Rückwirkungsverbot,* cit., p. 716 seems to acknowledge a role of the judge a source of law.
[498] S. SCHMAHL, *Art. 103*, in B. SCHMIDT-BLEIBTREU, H. HOFMANN, H.G. HENNEKE (eds.), *GG Kommentar zum Grundgesetz*, Köln, 2018, p. 2783 ff.; see also R. SCHMITZ, *§ 1*, in W. JOECKS, K. MIEBACH (eds.), *Münchener Kommentar zum StGB*, München, 2017, p. 65; especially in respect of the orientation function of the prohibition of retroactivity see M. HETTINGER, A. ENGLÄNDER, *Täterbelastende Rechtsprechungsänderungen im Strafrecht. Zur Reichweite von Art. 103 Abs. 2 GG*, in A. ESER (ed.), *Strafverfahrensrecht in Theorie und Praxis: Festschrift für Lutz Meyer-Gossner zum 65. Geburtstag*, München, 2001, p. 152 f., B. REMMERT, *Art. 103 Abs. 2 GG*, in T. MAUNZ, G. DÜRIG (eds.), *Grundgesetz. Kommentar*, München, 2017, p. 107, para. 129.
[499] H.L. SCHREIBER, *Rückwirkungsverbot,* cit., p. 714. H. MÜLLER-DIETZ, *Verfassungsbeschwerde und richterliche Tatbestandsauslegung im Strafrecht*, cit., p. 50; N. GROSS, *Rückwirkungsverbot und richterliche Tatbestandsauslegung*, cit., p. 125 ff. and ID., *Über das „Rückwirkungsverbot"*, cit., p. 13 f.; W. STRAßBURG, *Rückwirkungsverbot*, cit., p. 968; W. GRUNSKY, *Grenzen der Rückwirkung*, cit., p. 14 ff.; J. BAUMANN, U. WEBER, *Strafrecht. Allgemeiner Teil, Lehrbuch*, Bielefeld, 2016, para. 9, rn. 36; B. HECKER, *§ 2*, in A. SCHÖNKE, H. SCHRÖDER, B. HECKER (eds.), *Strafgesetzbuch: Kommentar*, München, 2019, p. 54; W. NAUCKE, *Anmerkungen*, cit., p. 758.
[500] B. HAFFKE, *Rückwirkungsverbot des Art. 103 II GG*, cit., p. 131 ff. Haffke investigates the rationales of the principle of non-retroactivity and concludes it has to be applied to judicial interpretations. Nonetheless, he struggles with the question whether judges have a duty to apply this principle. On the *Vertrauensschutz* rationale see W. HASSEMER, W. KARGL, *§ 1*, cit., p. 224 and M. HETTINGER, A. ENGLÄNDER, *Täterbelastende Rechtsprechungsänderungen im Strafrecht*, cit., p. 152; U. NEUMANN, *Rückwirkungsverbot bei belastenden Rechtssprechungsänderungen der Strafgerichte?*, in *ZStW*, 1991, p. 331; V. KREY, *Keine Strafe ohne Gesetz*, cit., p. 119.
[501] H.L. SCHREIBER, *Rückwirkungsverbot,* cit., p. 716

between *Bestimmtheitsgebot* and non-retroactivity principle.[502] The direct application to *Richterrecht* of Art. 103 II GG reflects the rationales of this provision and does not contradict its historical origins nor the provision of statutory reservation.[503]

A second orientation finds the direct application of Art. 103 II GG to judge-made law not convincing and further suggests applying this constitutional provision to overruling through analogy instead.[504] The main criticism to the analogy argument is that analogy requires a gap in legislation to be fulfilled: but Art. 103 II GG expressly and intentionally refers only to statutory law (*Gesetz*). On the contrary, in other provisions the GG refers both to statutory law and law in general (*Gesetz und Recht*), for example in Art. 20 III GG.[505] The acknowledgement of this role of the constitutional *nullum crimen* is now quite widespread in criminal law and constitutional law scholarship.[506]

Despite the similar reasoning on the non-retroactivity principle, the possible scenarios to apply the prohibition of retrospective judicial interpretations go in different directions.[507]

The possible scenarios are i) the overruling of an 'absolutely consistent' orientation[508] or ii) an interpretation that completes the content of the statute.[509] Nonetheless, the prohibition of retroactivity would only concern those overrulings that reverse the previous orientation and attribute a new criminal disvalue to the conduct (*Unwerturteil*); those

[502] See U. NEUMANN, *Rückwirkungsverbot bei belastenden Rechtssprechungsänderungen*, cit., p. 334 ff.
[503] G. DANNECKER, *§ 1*, cit., p. 255.
[504] H.L. SCHREIBER, *Rückwirkungsverbot,* cit., p. 715; H. MÜLLER-DIETZ, *Verfassungsbeschwerde und richterliche Tatbestandsauslegung im Strafrecht*, cit., p. 41ff., R. SCHMITZ, *§ 1*, cit., p. 65 f., para. 37-38; partially U. NEUMANN, *Rückwirkungsverbot bei belastenden Rechtssprechungsänderungen*, cit., p. 336, G. DÜRIG, *Art. 103 Abs. 2 GG*, in T. MAUNZ, G. DÜRIG (eds.), *Grundgesetz. Kommentar*, München, 1990, p. 41, para. 112; I. PUPPE, *Bemerkungen zum Verbotsirrtum und seine Vermeidbarkeit*, cit., p. 234.
[505] J. RODENBECK, *Die Berufung auf einen Verbotsirrtum als Schutzbehauptung*, cit., p. 87.
[506] With particular emphasis on the *Vertrauensschutz* rationale of legality, that enables to extend Art. 103 GG to *Richterrecht*, see E. KEMPF, H. SCHILLING, *Revisionsrichterliche Rechtsfortbildung in Strafsachen*, in *NJW*, 2012, p. 1853 f. Also L. KUHLEN, *Gesetzlichkeit und Untreue*, in *JS*, 2011, p. 250; ID., *Aktuelle Probleme des Bestimmtheitsgrundsatzes*, in H. KUDLICH, J.P. MONTIEL, J.C. SCHUHR (eds), *Gesetzlichkeit und Strafrecht*, Berlin 2012, p. 439; A. LEITE, *Grund und Grenzen eines Rückwirkungsverbots bei täterbelastenden Rechtsprechungsänderungen im Strafrecht*, in *GA* 2014, p. 220 (231 ff.); U. NEUMANN, *Die Rechtsprechung im Kontext des verfassungsrechtlichen Prüfungsprogramms zu Art. 103 Abs. 2 GG (Rückwirkungsverbot, Analogieverbot, Bestimmtheitsgebot)*, in C. FAHL, E. MÜLLER, H. SATZGER ET AL. (eds.), *Festschrift für Werner Beulke zum 70. Geburtstag*, Heidelberg, 2015, p. 197.
[507] H.L. SCHREIBER, *Rückwirkungsverbot,* cit., p. 718.
[508] W. STRAßBURG, *Rückwirkungsverbot*, cit., p. 964.
[509] B. REMMERT, *Art. 103 Abs. 2 GG*, cit., p. 107, para. 129; B. PIEROTH, *Art. 103*, in H. JARASS, B. PIEROTH (eds.), *Grundgesetz für die Bundesrepublik Deutschland: Kommentar*, München, 2018, p. 1152 f., H. SCHULZE-FIELITZ, *Art. 103*, in H. DREIER (ed.), *Grundgesetz: Kommentar*, Tübingen, 2000, p. 665 f.

interpretations simply modifying previous orientations do not trigger the non-retroactivity clause.[510]

Some suggested to impose the prohibition of retroactivity to all overrulings introduced between the commission of the fact and the conviction.[511] Others confined the proposal to the cases where a consistent case-law had established a solution to a legal question that completed the written norm and was suddenly overruled.[512]

These proposals are nevertheless limited to a sudden overruling *in malam partem* of a previously well-established consistent interpretation by the highest courts.[513] In case of synchronic conflict, regardless being between lower-higher courts or within highest courts, scholars have suggested the application of the *Verbotsirrtum* as a possible solution.[514] The solution of the mistake of law (*Verbotsirrtum*) did not seem to be appropriate in the case of a synchronic conflict, for reasons that will be explained later.[515]

With regards to the possible solutions, the two options are very similar to the ones suggested by Italian literature: binding precedent or prospective overruling.

a) Some scholars recommend the adoption of *binding precedent*, which imposes upon the judge an obligation to rule similar cases according to the same principles.[516] Thus, the proposal was to follow a common law system. The main argument to support the binding precedent would be the principle of equality. If the judges were to give different solutions to similar cases because they were not bound by the principles affirmed by other courts, the outcome would treat similar situations in a different way, thus violating the principle of equality. Moreover, another argument is the possibility to introduce a soft version of binding precedent, which shall be of a 'limited binding nature'.[517] Although the German judiciary already followed the principles enshrined in case-law by its highest courts, some

[510] B. REMMERT, *Art. 103 Abs. 2 GG*, cit., p. 107, para. 130.
[511] W. NAUCKE, *Anmerkungen*, cit., p. 758 ff.
[512] B. HECKER, *§ 2*, cit., p. 54; W. GRUNSKY, *Grenzen der Rückwirkung*, cit., p. 19.
[513] This was Gross's criticism to this 'objective' solution. N. GROSS, *Rückwirkungsverbot und richterliche Tatbestandsauslegung*, cit., p. 73 ff., 109.
[514] H.L. SCHREIBER, *Rückwirkungsverbot*, cit., p. 718. Rudolphi considers this mistake of law avoidable. H.J. RUDOLPHI, *Unrechtsbewusstsein, Verbotsirrtum und Vermeidbarkeit des Verbotsirrtums*, cit., p. 108.
[515] N. GROSS, *Rückwirkungsverbot und richterliche Tatbestandsauslegung*, cit., p. 83 ff., H.L. SCHREIBER, *Rückwirkungsverbot*, cit., p. 717.
[516] For an historical perspective on the precedent in Germany see H. WELLER, *Die Bedeutung der Präjudizen im Verständnis der deutschen Rechtswissenschaft*, Berlin, 1979.
[517] G. DANNECKER, *Das intertemporale Strafrecht*, cit., p. 379 ff. W. GRUNSKY, *Grenzen der Rückwirkung*, cit., p. 14 ff.

scholars highlighted that following precedents was done in practice but was not a normative obligation of the judges[518].

b) Moreover, as explained in the *Promillefälle,* some scholars suggest introducing a mechanism similar to *prospective overruling* (*Von-nun-an-Klausel*).[519] The legal certainty at the basis of the legality principle can be safeguarded with an 'interpretation bar' for the concrete case and the application only to future cases. The criterion to identify the overruling is determining whether the overturn of the previous interpretation would have requested a statutory amendment.[520]

One of the most widespread criticism to the prospective overruling solution is the potential violation of human dignity, which is safeguarded at Art. 1 GG. In fact, the individuals whose case would benefit from prospective overruling would be prosecuted only for ensuring the development of the law. Consequently, the individual would be treated only as a means. With regards to this criticism, scholarship suggested a new procedural remedy, that would enable the *Staatsanwaltschaft* to ask the highest courts, independently from a concrete case, to revert their long-established interpretation.[521]

Conversely, other scholars considered it impossible in practice to implement prospective overruling in the German criminal procedure system.[522] These voices pointed out that it would be impossible to proceed without the necessary requirement of *prozessuale Verurteilungsverdacht* (procedural suspect of conviction, §170 *Abs*. 1 StPO), since the prosecution would only be aimed at declaring the new interpretation, and not at convicting the accused. This contradiction, according to scholarship, derives from the procedural provisions ruling *Vorlagepflicht* (i.e. the obligation to refer to the higher courts). The German legislation does not conceive this referral as means to foster the rule-

[518] B. SCHÜNEMANN, *Nulla Poena sine lege?*, cit., p. 28; W. GRUNSKY, *Grenzen der Rückwirkung*, cit., p. 14 ff.
[519] B. RENNERT, *Art. 103 Abs. 2 GG*, in T. MAUNZ, G. DÜRIG (eds.), *Grundgesetz. Kommentar*, München, 2017, p. 95, para. 112; Knittel p. 44, 55-59; Kohlmann focuses on the realisation of the possibility to predict the consequences of the actions (*Berechenbarkeitsmaxime*) G. KOHLMANN, *Der Begriff des Staatsgeheimnisses*, cit., p. 289 ff.; B. HAFFKE, *Rückwirkungsverbot des Art. 103 II GG*, cit., p. 139 ff.; Hassemer seems to find it the best solution, moving from the results of the *Methodenlehre* on the conception of *Richterrecht*. W. HASSEMER, W. KARGL, *§ 1*, cit., p. 224 f.
[520] J. BAUMANN, *Strafrecht. Allgemeiner Teil, Lehrbuch*, Bielefeld, 1958, p. 110, quoted by Haffke, B. HAFFKE, *Rückwirkungsverbot des Art. 103 II GG*, cit., p. 27.
[521] B. HAFFKE, *Rückwirkungsverbot des Art. 103 II GG*, cit., p. 144-145.
[522] H.L. SCHREIBER, *Rückwirkungsverbot*, cit., p. 717.

making function of higher courts, but the provisions in force only considers it a third instance remedy.[523]

Some scholars suggested that the judge shall state the new interpretation and subsequently qualify the facts according to it in the operative section of the judgement. The application of prospective overruling is then made in the section that declares conviction and defines the penalty: only here the prohibition of retroactivity will apply and the judge will pronounce an acquittal formula.[524]

2.2.2. Contrary opinions to the prohibition of retroactive overruling.

Despite the favourable opinions analysed in the previous section, several scholars deny the possibility to extend the prohibition of retroactivity to judge-made law.[525] Even if the statute remains untouched, judicial interpretation can intervene and modify the statute's scope of application, in order to extend the criminally relevant behaviour. In these cases, scholars do not however identify a violation of Art. 103 II GG.[526]

The main argument not to extend the application of *nullum crimen* is the limitation of Art. 103 II GG only to statutory law.[527] Another major cause comes down to the separation of powers, affirmed by Art. 103 II GG, which limits the judge to the application of law and refuses to put statutory law and judge-made law on the same level as sources.[528]

As a consequence, the impossibility to compare statutory and judge made-law also depends on the risk of seeing judges acting as legislators. Since the judges' discretion is balanced by their subjection to written law and the obligation to motivate their decisions, admitting a law-making power of the judge would mean to undermine their subjection to

[523] U. NEUMANN, *Rückwirkungsverbot bei belastenden Rechtssprechungsänderungen*, cit., p. 354.
[524] U. NEUMANN, *Rückwirkungsverbot bei belastenden Rechtssprechungsänderungen*, cit., p. 355 f.; G. KOHLMANN, *Der Begriff des Staatsgeheimnisses,* cit., p. 290.
[525] The ground is primarily the separation of powers. Recently, C. ROXIN, *Der Grundsatz der Gesetzesbestimmtheit*, cit., p. 129.
[526] H.H. JESCHECK, T. WEIGEND, *Lehrbuch des Strafrechts, Allgemeiner Teil*, cit., p. 139; G. JAKOBS, *Strafrecht. Allgemeiner Teil*, cit., p. 105; P. KUNIG, *Art. 103*, in P. KUNIG (ed.), *Grundgesetz-Kommentar*, München, 2012, p. 926.; G. NOLTE, *Art. 103*, in H. MALGOLDT, F. KLEIN, C. STARCK (eds.), *Grundgesetz: Kommentar*, München, 2018, p. 1074; G. ROBBERS, *Rückwirkende Rechtsprechungsänderung*, in *JZ*, 1988, p. 481, 484 f.; C. ROXIN, *Strafrecht. Allgemeiner Teil*, 2006, p. 168 f.; G. DANNECKER, *§ 1*, cit., p. 252 ff.
[527] W. STREE, *Deliktsfolgen und Grundgesetz*, cit., p. 80 ff.; C. ROXIN, *Strafrecht. Allgemeiner Teil*, 2006, p. 169; B. HECKER, *§ 2*, cit., p. 54. G. DANNECKER, *§ 1*, cit., p. 255.
[528] C. ROXIN, *Strafrecht. Allgemeiner Teil*, 2006, p. 169. In the same vein, Schünemann sees prospective overruling as a possible solution only *de lege ferenda*. B. SCHÜNEMANN, *Nulla Poena sine lege?*, cit., p. 28.

the law.[529] Moreover, the judges' influence in the specification of *Tatbestand* does not exceed the separation of powers, otherwise violating Art. 103 II GG. Some scholars also raise doubts in with regards to procedural law, which have been described above.[530]

Since the strongest argument to support the extension of non-retroactivity is *Vertrauensschutz*, its opposers consider that *Vertrauensschutz* only refers to written law.[531] In addition, some scholars have argued that, despite the advantage coming from protecting legitimate expectations, binding precedent or the prohibition of overruling *in malam partem* would cause the immobility of the law applied in the courts. Hence, these solutions would become undesirable in practice.[532] Moreover, the objective approach to *Vertrauensschutz* that characterises Art. 103 II GG is not adequate to divert its main function, which is the protection of legal certainty. Legal certainty cannot be balanced with substantive justice in the absolute formulation of Art. 103 II GG.[533]

According to the same scholars, *Vertrauensschutz*, as a component of the rule of law, could perhaps ground a constitutionally-oriented argumentation limiting the retroactive application of detrimental interpretations. This would however result in the application of the *Rechtsstaatsprinzip* (Art. 20 GG), rather than the more specific Art. 103 II GG.[534]

Those scholars who are contrary to a solution within the framework of *nullum crimen* usually opt for the application of the mistake of law (*Verbotsirrtum*, section 17 StGB).[535]

3. Objective solutions: Bestimmtheitsgebot and the new obligation of the judges (Präzisierungsgebot).

The role of case-law in criminal law expresses in the possibility to face synchronic conflicts or diachronic conflicts determined by uncertain criminal provisions as well, which therefore leave space to the judge's discretional interpretation. The *lex certa* principle comes into question in this respect, together with its relationship with judicial interpretation. It is interesting to analyse the status of German scholarship and constitutional case-law on this subject, since there have been recent developments that seem to open the way for a more crucial role of the judges in the domain of legality. It is

[529] G. JAKOBS, *Strafrecht. Allgemeiner Teil*, cit., p. 105.
[530] B. HECKER, *§ 2*, cit., p. 54.
[531] See B. HECKER, *§ 2*, cit., p. 54.
[532] G. JAKOBS, *Strafrecht. Allgemeiner Teil*, cit., p. 105.
[533] G. DANNECKER, *§ 1*, cit., p. 256 f. Nevertheless, the author seems to suggest a broader concept of 'constitutional prohibition of retroactivity' in extreme cases.
[534] G. DANNECKER, *Das intertemporale Strafrecht*, cit., p. 386 ff.
[535] B. HECKER, *§ 2*, cit., p. 54.

preliminarily necessary to underline that the mentioned solutions never refer to the ECHR. The German criminal system seems to remain within national borders on this issue and to find a solution *in the books*.

3.1. Bestimmtheitsgebot *and the role of judicial interpretation.*

The so-called *Bestimmtheitsgebot* is the *lex certa* principle in Art. 103 II GG and section 1 StGB. It refers to the criminal statute, which has to describe the criminal offence and penalty with appropriate and sufficient precision. *Lex certa* is the core of the *nullum crimen, nulla poena sine lege*.[536] Traditionally scholarship has attributed *lex certa* the main rationale of foreseeability, as a consequence of legal certainty: *lex certa* serves the purposes of foreseeability and predictability of State penalties for the individual.[537] Contrary opinions refute this rationale to the effect that absolute foreseeability and predictability in law is an impossible ideal. Secondly, the objective quality of the law is separate from the individual's possibility to predict the law.[538]

The BVerfG usually attributes two purposes to the *Bestimmtheitsgebot*.[539] On the one side, it stands to protect the addressees: it ensures the possibility to foresee the consequences of the individuals' actions thanks to a precise statutory formulation and its avoidance of arbitrariness.[540] On the other side, it also ensures the primacy of the legislator in choosing which behaviour shall be criminalised.[541]

Similarly to what happens in Italy, in Germany the wording of the provision plays a very limited role as well when a possible violation of *Bestimmtheitsgebot* is at stake. Like

[536] Welzel saw the real threat to legality in indeterminate statutes, rather than in the prohibition of analogy. The description of *Tatbestand* must be so clear und determinate that unlawfulness is immediately comprehensible. H. WELZEL, *Das deutsche Strafrecht: eine systematische Darstellung*, Berlin, 1969, p. 23.
[537] V. KREY, *Keine Strafe ohne Gesetz*, cit., p. 137, who refers to K. TIEDEMANN, *Tatbestandsfunktionen im Nebenstrafrecht*, Tübingen, 1969, p.193 ff and G. KOHLMANN, *Der Begriff des Staatsgeheimnisses*, cit., p. 248 ff.
[538] G. GRÜNWALD, *Bedeutung und Begründung des Satzes* nulla poena sine lege, cit., p. 13, who speaks about *Erkennbarkeit* (recognisability) and H.L. SCHREIBER, *Gesetz und Richter*, cit., p. 215.
[539] BVerfG, 17.01.1978 - 1 Bv, in *NJW*, 1978, p. 933; BVerfG, 23.10.1985 - 1 BvR 1053/82, in *NJW*, 1986, p. 1671 (on analogy); BVerfG, 20.10.1992 - 1 BvR 698/89, in *NJW*, 1993, p. 1457; BVerfG, 20.3.2002 - 2 BvR 794/95, in *NJW*, 2002, p. 1779; BVerfG, 11.11.1986 - 1 BvR 713/83, in *NJW*, 1987, p. 43; BVerfG, 18.09.2006 - 2 BvR 2126/05, in *NJW*, 2007, p. 1193; BVerfG, 01.09.2008 - 2 BvR 2238/07, in *NJW*, 2008, p. 3627; BVerfG, 21.09.2016 – 2 BvL 1/15, in *NJW*, 2016, p. 3648. R. SCHMITZ, *§ 1*, cit., p. 67, B. HECKER, *§ 1*, in A. SCHÖNKE, H. SCHRÖDER, B. HECKER (eds.), *Strafgesetzbuch: Kommentar*, cit., p. 27.
[540] C. ROXIN, *Strafrecht. Allgemeiner Teil*, cit., p. 172; H.H. JESCHECK, T. WEIGEND, *Lehrbuch des Strafrechts, Allgemeiner Teil*, cit., p. 136 f.
[541] R.-P. CALLIESS, *Der strafrechtliche Nötigungstatbestand und das verfassungsrechtliche Gebot der Tatbestandsbestimmtheit*, in *NJW*, 1985, p. 1512 f. Callies identifies in the separation of powers another rationale of the *Bestimmtheitsgebot*.

the Italian Constitutional Court, the BVerfG has specified that even a vague element of the offence, as it is described in the statute, can be considered sufficiently determinate if there is evidence of a consistent judicial interpretation which contributes to making it explicit. Hence, case-law plays a role in the determination of the meaning of written provisions.[542] Another criticised orientation of the BVerfG considers criminal provisions entailing general clauses legitimate, when at least a risk of punishment can be recognised.[543] The majority in scholarship however demands absolute clarity in statutes, although isolated opinions assume that 50% of the elements of the offence shall be a clear, while imprecision in the rest could be acceptable.[544]

The possibility to refer the *Bestimmtheitsgebot* to the judge as an obligation to make the content of the criminal provision explicit has been brought up in German courts' case-law. Some orientations of the BVerfG and BGH in the past interpreted the principle of *lex certa* as an obligation imposed on the judge to give a clear and precise interpretation of the norm.[545] Differently from the prohibition of analogy, this obligation does not include an interpretation outside the boundaries of the possible literal meaning, but rather an indeterminate interpretation within legitimate extensive interpretations. The rationale for such an extension of the principle to the judge was the cooperation between judge and legislator in order to determine the meaning of a statute. Moreover, legal certainty imposes the judge to contribute to the definition of written rules.[546] Authoritative scholars speak about an 'extension' of the legal certainty safeguard from statutory law to the judge.[547]

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[542] R. SCHMITZ, *§ 1*, cit., p. 71.
[543] See i.e. BVerfG, 12.12.2000 - 2 BvR 1290/99, in *NJW*, 2001, p. 1848, where the BVerfG was questioned with the constitutional legitimacy of the definiteness of the clause 'intent to destroy' (*Zerstörungsabsicht*) in the German definition of genocide (section 220a VStGB, *Völkermord*).
[544] B. SCHÜNEMANN, *Nulla Poena sine lege?*, cit., p. 35, who believes that the most precise elements are descriptive and mathematical elements. He is criticised by H. KIRSCH, *Zur Geltung des Gesetzlichkeitsprinzips im Allgemeinen Teil des Strafgesetzbuchs*, Berlin, 2014, p. 143 f., who highlights that it would be impossible to establish the necessary definiteness; the elements of the offence play a different role in the architecture of the criminal offence and cannot be considered as a homogenous group. In particular, Kirsch finds it dubious that descriptive concepts can be considered precise and determinate.
[545] BVerfG, 20.10.1992 - 1 BvR 698/89 in *NJW*, 1993, p. 1459 (BVerfGE, 87, 209, 229). The BVerfG considers the *interpretation* given by lower instance courts of the element of the offence '*in einer der Menschenwürde verletzenden Weise*' (in a way that violated human dignity) of section 131 *Abs*. 1 StGB sufficiently defined. The element was interpreted as including every pointless and aimless showing of brutal violence in films that was not otherwise motivated. Therefore, the interpretation of the element does not allow a precise determination of the content. See also BGH, 05.05.1988 - 1 StR 5/88, in *NJW*, 1988, p. 1739 ff.
[546] L. KUHLEN, *Zum Verhältnis vom Bestimmtheitsgrundsatz und Analogieverbot*, in G. DANNECKER, W. LANGER, O. RANFT ET AL. (eds.), *Festschrift für Harro Otto*, Köln, 2007, p. 103 f.
[547] K. TIEDEMANN, *Tatbestandsfunktionen im Nebenstrafrecht*, cit., p. 190.

3.2. The BVerfG judgement on Präzisierungsgebot.

Despite these first statements, the BVerfG made a crucial development in 2010, when it established a new interpretation of Art. 103 II GG, that seems to apply the *Bestimmtheitsgebot* to judges. In judgment 2559/08 of 23 June 2010, the BVerfG affirmed the *Präzisierungsgebot*, an obligation to make the law explicit falling on the judges. In the case under scrutiny, the criminal offence of *Untreue* (§ 266 StGB, embezzlement and abuse of trust) was allegedly lacking the sufficient determinacy and therefore violating Art. 103 II GG. The BVerfG analysed the obligations enshrining from Art. 103 II GG both for the legislator and the judge, since the criminal offence pursuant to section 266 StGB had been extensively interpreted and used, thanks to its broad formulation, as a 'default criminal offence' in order to punish economic crimes.[548] Thus, this constitutional proceeding gave the chance to the BVerfG to make important developments in the definition of *Bestimmtheitsgebot*.

With regards to the legislator's *Bestimmtheitsgebot*, consistent constitutional case-law acknowledges that general clauses or concepts in need of specification must not be prohibited *per se*. The determination of the meaning depends on the single characteristics of the criminal offence under scrutiny, and even the characteristics of the addressees play a limited role.[549] The obligation to provide for definite criminal provisions can be fulfilled also *through a consistent case-law of the highest courts*,[550] as *precision can be reached also through interpretation*. Nevertheless, in some exceptional cases, the BVerfG identifies the threshold in 'the recognisability of the risk to be punished'.[551] Moreover, the BVerG reaffirms both the objective (separation of powers) and subjective (predictability for the addressed) rationales of the principle. [552]

In particular, while speaking of the protection of individual liberty according to Art. 103 II GG, the BVerfG points out that 'everyone shall be able to foresee which behaviour

[548] The expression is the translation of Petra Wittig's '*Auffangtatbestand*' in P. WITTIG, *Wirtschaftsstrafrecht*, München, 2017, § 20, para. 5.
[549] BVerfG, 23.06.2010 – 2 BvR 2559/08, 2 BvR 105/09, 2 BvR 491/09, in BVerfGE 126, p. 170 (198 f.), and in *NJW*, 2010, p. 3211 (para. 75).
[550] BVerfG, 23.06.2010 – 2 BvR 2559/08, 2 BvR 105/09, 2 BvR 491/09, in *NJW*, 2010, p. 3211 (para. 76). Against, M. KRÜGER, *Neues aus Karlsruhe zu Art. 103 II GG und § 266 StGB*, in *NStZ*, 2011, p. 371.
[551] '*Soweit es nach der Rechtsprechung des BVerfG in Grenzfällen ausnahmsweise genügt, wenn lediglich das Risiko einer Bestrafung erkennbar ist*' BVerfG, 23.06.2010 – 2 BvR 2559/08, 2 BvR 105/09, 2 BvR 491/09, in *NJW*, 2010, p. 3211 (para. 76). See also BVerfG, 15.03.1978 - 2 BvR 927/76 in *NJW*, 1978, p. 1423; BVerfG, 10.01.1995 - 1 BvR 718/89, 719/89, 722/89, 723/89, in *NJW* 1995, p. 1141 ff.
[552] BVerfG, 23.06.2010 – 2 BvR 2559/08, 2 BvR 105/09, 2 BvR 491/09, in *NJW*, 2010, p. 3210 (para. 70).

is prohibited and which penalty is provided for'.[553] Under this point of view, there is a clear link but also a potential conflict between the *Bestimmtheitsgebot* and mistake of law (*Verbotsirrtum*, section 17 StGB). Since the German Criminal Code requires a knowledge of the law that enables the addressed to know they are acting unlawfully, the knowledge only entails *Unrecht* (unlawfulness), but not *Strafbarkeit* (punishability).[554] On the contrary, the BVerfG seems to affirm that in the domain of legality the individual shall know, if the behaviour in question is punishable (*strafbar*).[555] Nevertheless, this point remains dubious.[556]

3.2.1. The affirmation of the Präzisierungsgebot.

In the following, the BVerG analyses the obligations for the judge enshrined in *nullum crimen*. The crucial role played by judicial interpretation was already clear in previous judgements, when the BVerfG held the state of case-law as a standard to assess the determinacy of a law.[557]

With regards to the obligations imposed on the judges by virtue of the principle of legality, the BVerfG identifies the prohibition of analogy as first obligation and links it

[553] '*Jedermann soll vorhersehen können, welches Verhalten verboten und mit Strafe bedroht ist. Art. 103 II GG hat insofern freiheitsgewährleistende Funktion*' BVerfG, 23.06.2010 – 2 BvR 2559/08, 2 BvR 105/09, 2 BvR 491/09, in *NJW*, 2010, p. 3210 (para. 71). See also BVerfG, 06.05.1987 - 2 BvL 11/85, in *NJW*, 1987, 3175 ff.: '*Die Voraussetzungen der Strafbarkeit und die Art der Strafe müssen für den Bürger schon aufgrund des Gesetzes, nicht erst aufgrund der hierauf gestützten Verordnung voraussehbar sein*'.

[554] M. KRÜGER, *Neues aus Karlsruhe zu Art. 103 II GG und § 266 StGB*, cit., p. 371. On the scope of application of section 17 StGB see J. RODENBECK, *Die Berufung auf einen Verbotsirrtum als Schutzbehauptung*, cit., p. 65.

[555] BVerfG, 23.06.2010 – 2 BvR 2559/08, 2 BvR 105/09, 2 BvR 491/09, in *NJW*, 2010, p. 3211 (para. 72).

[556] The principle of culpability only requires the recognisability of the *Unrecht*, but not of the penalty, see B. SCHÜNEMANN, *Nulla Poena sine lege?*, cit., p. 15. See *above*, this section, para. 1.

[557] The criminal offence of *Nötigung* (section 240 I StGB, Using threats or force to cause a person to do, suffer or omit an act) was declared in violation of Art. 103 II GG because, according to a renewed evaluation of the Court, its interpretation was not sufficiently clear, according to the persisting conflicts within case-law. BVerfGE, 10.01.1995 - 1 BvR 718/89, 719/89, 722/89, 723/89, in *NJW*, 1995, p. 1141 ff.; on the legitimacy of the non-intentional leaving-the scene-of an accident according to section 142 II StGB. BVerfG (1. Kammer des Zweiten Senats), 19.03.2007 - 2 BvR 2273/06, in *NJW*, 2007, p. 1666 ff.; on the uncostitutionality of the interpretation that extended the offence of *Bedrohung* (section 241 StGB, threatening the commission of a felony) to the case of a threat towards a non-existing third person. BVerfG (2. Kammer des Zweiten Senats), 19.12.1994 - 2 BvR 1146/94, in *NJW*, 1995, p. 1776 ff.

to the obligation to strict interpretation.[558] Thus, the judges shall not adopt obscure interpretations of those norms whose scope of application is already uncertain.[559]

With a significant evolution of its jurisprudence, the BVerfG identifies a second obligation in the so-called *Präzisierungsgebot*. The BVerfG admits that there is also an obligation for the judges enshrined in Art. 103 II GG, that imposes them to contribute with their interpretation to the determinacy of the norm. According to the BVerfG, the judge is obligated to 'overcome remaining uncertainties of a norm through clarification and concretisation by means of interpretation'.[560] Especially in particularly wide formulations, where a well-established case-law can represent a reliable element for interpreting and applying the norm,[561] judges have the obligation to contribute making the requirements of liability recognisable.[562] In addition, the rationale of *Vertrauensschutz* can also be the basis of similar obligations for judicial overrulings.[563] These principles, that lay an obligation for the judge to clarify the wording of the law and create a link with retroactivity, have been seen as a great innovation in the interpretation of art. 103 II GG.[564]

[558] The BVerfG highlights that a behaviour abstractly included in the wording of the norm is not necessarily regarded as worth being punished. BVerfG, 23.06.2010 – 2 BvR 2559/08, 2 BvR 105/09, 2 BvR 491/09, in *NJW*, 2010, p. 3211 (para. 79-80). According to Fitting, the BVerfG adopts four criteria to assess judicial interpretation: i) prohibition to dissolve the boundaries of the wording of the provision; ii) obligation to strict interpretation; iii) obligation to minimise legal uncertainty; iv) obligation to precision; v) recognisability of the punishable behaviour. C. FITTING, *Analogieverbot und Kontinuität*, cit., p. 156 f.

[559] BVerfG, 23.06.2010 – 2 BvR 2559/08, 2 BvR 105/09, 2 BvR 491/09, in *NJW*, 2010, p. 3210 (para. 81). The BVerfG also quotes ist previous case-law: BVerfG, 23.10.1985 - 1 BvR 1053/82, in *NJW*, 1986, p. 1671; BVerfG, 20.10.1992 - 1 BvR 698/89, in *NJW*, 1993, p. 1457; BVerfG, 10.01.1995 - 1 BvR 718/89, 719/89, 722/89, 723/89, in *NJW*, 1995, p. 1141.

[560] BVerfG, 23.06.2010 – 2 BvR 2559/08, 2 BvR 105/09, 2 BvR 491/09, in *NJW*, 2010, p. 3210 (para. 81) '*erbleibende Unklarheiten einer Norm durch Präzisierung und Konkretisierung im Wege der Auslegung nach Möglichkeit auszuräumen (Präzisierungsgebot)'* L. KUHLEN, *Gesetzlichkeit und Untreue*, cit., p. 249; U. NEUMANN, *Die Rechtsprechung im Kontext*, cit., p. 205 ff.; H. KIRSCH, *Zur Geltung des Gesetzlichkeitsprinzips*, cit., p. 154 ff., K. CORNELIUS, *Die Verbotsirrtum zur Bewältigung unklarer Rechtslagen – Ein dogmatischer Irrweg*, in *GA*, 2015, p.117 f.

[561] The Court quotes BVerfG, 14.05.1969 - 2 BvR 238/68, in *NJW*, 1969, p. 1759; BVerfG, 21.06.1977 - 2 BvR 308/77, in *NJW*, 1977, p. 1815.

[562] This has been considered as an acknowledgement of the constitutive function of the judge in the determination of the norm, abandoning the argument of every interpretation being already included in the wording. U. NEUMANN, *Die Rechtsprechung im Kontext*, cit., p. 205.

[563] BVerfG, 23.06.2010 – 2 BvR 2559/08, 2 BvR 105/09, 2 BvR 491/09, in *NJW*, 2010, p. 3211 (para. 81).

[564] Saliger defines it as a '*Grundsatzentscheidung*' in F. SALIGER, *Das Untreuestrafrecht auf dem Prüfstand der Verfassung*, in *NJW*, 2010, p. 3195. On the contrary, some deny the autonomy of this new obligation from the prohibition of analogy and reduce it to a theoretical distinction, L. SCHULZ, *Neues zum Bestimmtheitsgrundsatz – Zur Entscheidung des BVerfG vom 23. Juni 2010*, in M. HEINRICH, C. JÄGER, B. SCHÜNEMANN ET AL. (eds.), *Festschrift für Claus Roxin zum 80. Geburtstag*, Berlin, 2011, p. 321 ff. and C. FITTING, *Analogieverbot und Kontinuität*, cit., p. 158.

Even before the BVerfG decision, several voices in scholarship had spoken in favour of *Bestimmtheitsgebot* as an obligation for the judge.[565]

3.2.2. The implementation of the Präzisierungsgebot.

The BVerfG goes further and seems to affirm a constitutional control over the respect of such obligations by judges as well. The point at stake is the degree of interference the BVerfG assumes. In light of the wording of the judgement, the BVerfG does not seem to claim a sort of 'over-appeal' instance function.[566] The BVerfG's task is not only a control over fungibility but also an incisive control over Art. 103 II GG, since the judges' activity defines the boundaries of the criminal liability and the distinction between legislative and judiciary.[567]

The BVerfG seems to opt for a formal control.[568] If the case-law is based on a well-established interpretation of an element of the offence, the BVerfG will address its control over the effective long-lasting interpretation. If a wide-structured statute is specified through steady complex major premises (*Obersätze*), the BVerfG will address the interpretation of the norm. It will check if the judges have remained within the well-established and defined major premises (*Obersätze*) or whether they have modified the characterisation of the case.[569] As a consequence, if the interpretation has gone beyond the limits of the well-established interpretation, with a hidden overruling *in malam partem*, it could be reasonably affirmed that the BVerfG will sanction this behaviour of the courts.[570] Hence, next to the *Präzisierungsgebot* and the prohibition of analogy, a prohibition of departing from well-established case law in detriment of the accused can be affirmed.[571] The question whether and in which way this can be carried out is still dubious.

Conversely, the merits of the interpretation will not be the subject to Constitutional control. A substantial control will only intervene in case the interpretation is unable to

[565] L. KUHLEN, *Zum Verhältnis vom Bestimmtheitsgrundsatz und Analogieverbot*, cit., p. 102 f. and literature quoted by H. KIRSCH, *Zur Geltung des Gesetzlichkeitsprinzips*, cit., p. 155, although these contributions only consider the *lex certa* principle also as a directive in judicial interpretation.
[566] F. SALIGER, *Das Untreuestrafrecht*, cit., p. 3196, contrary opinions: L. KUHLEN, *Gesetzlichkeitsprinzip und Untreue*, in *JW*, 2011, p. 249.
[567] BVerfG, 23.06.2010 – 2 BvR 2559/08, 2 BvR 105/09, 2 BvR 491/09, in *NJW*, 2010, p. 3212 (para. 82).
[568] In favour, L. KUHLEN, *Gesetzlichkeitsprinzip und Untreue*, cit., p. 249.
[569] BVerfG, 23.06.2010 – 2 BvR 2559/08, 2 BvR 105/09, 2 BvR 491/09, in *NJW*, 2010, p. 3212 (para. 83).
[570] L. KUHLEN, *Gesetzlichkeitsprinzip und Untreue*, cit., p. 250.
[571] According to Kuhlen, the *Abweichungsverbot* has the same rationale as the *Präzisierungsgebot*. It differs from the prohibition of analogy, that only refers to the wording of the statute, as it addresses well-established case-law. L. KUHLEN, *Gesetzlichkeitsprinzip und Untreue*, cit., p. 250.

contour the provision. However, this control does not involve the responsibility of the courts.[572]

3.2.3. The consequences of the BVerfG judgement.

Scholarship has generally welcomed this judgement, as it acknowledges the role of case-law already made clear by *Methodenlehre*. Moreover, it manages to have an impact on wide formulated norms, where the prohibition of analogy could possibly fail to protect.[573]

According to some scholars, the application of *Präzisierungsgebot* to judge-made law could determine an extension to *Richterrecht* of the other principles enshrined in Art. 103 II GG. In particular, the possible extension of the non-retroactivity principle comes again into consideration. Notwithstanding the incorporation of the ECHR into the German legal order, the interpretation of Art. 7 ECHR have not yet emerged in scholarship or case-law with regards to this particular aspect. Although the dogmatic questions are very similar to the Italian debate, the relatively easy argument of the Strasbourg case-law has never come into consideration. However, some scholars affirmed that, since *lex certa* is applied both to statutes and judge-made law, it would be a natural consequence to do the same for the principle of non-retroactivity.[574]

Recently the BVerfG has showed renewed interest for the role of judicial interpretation. The status of judicial interpretation has been considered relevant to establish when an interpretive statute has constitutive value in the domain of tax law. In fact, if the new interpretation established by the interpretive statute is consistent with previous interpretation by courts, then the BVerfG admits its retrospectivity.[575]

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[572] BVerfG, 23.06.2010 – 2 BvR 2559/08, 2 BvR 105/09, 2 BvR 491/09, in *NJW*, 2010, p. 3212 (para. 84). On the unclear extension of the constitutional control see M. KRÜGER, *Neues aus Karlsruhe zu Art. 103 II GG und § 266 StGB*, cit., p. 373

[573] L. KUHLEN, *Gesetzlichkeitsprinzip und Untreue*, cit., p. 249.

[574] U. NEUMANN, *Die Rechtsprechung im Kontext*, cit., p. 198 f.

[575] BVerfG, 17.12.2013 – 1 BvL 5/08, in *NVwZ*, 2014, p. 577. Commentary by P. SELMER, in *JuS*, 2014, p. 763 ff. The norms in questions were KAGG §§ 40 a I 2, 43 XVIII and KStG § 8 b III, in relation to the rule of law principle enshrined in Art. 20 III GG. According to the BVerfG (para. 55-56): 'In any event, the legislature's retrospective clarification of the legal situation is to be qualified as constitutive retroactive regulation if the legislature thereby seeks to retrospectively undermine the interpretation of the law as clarified by the highest courts. Regarding the past, the legislature generally has to accept that the courts interpret the law applicable at that time with binding effect, within the constitutional limits of the judicial interpretation and development of the law. If this interpretation does not or not any longer correspond to the political will of the legislature, it may amend the law with effects for the future. The legislature's retroactive clarification of the legal situation generally also qualifies as constitutive retroactive regulation if the retroactive regulation decides on a question of interpretation that is controversial amongst the regular courts and has not yet been settled by the highest courts. A clarifying provision is already constitutive if it

4. The operational side of legality.

4.1. The role of highest courts and case-law.

The analysis of German literature on the relationship between the principle of legality and the role of judge-made law has showed that the issue seems to have less impact than in the Italian context. Even though the debate between objective and subjective answers to synchronic or diachronic judicial conflicts has given similar results, there seems to be little interest for the subject in German legal environment. The major cause comes down to the fact that legal certainty and uniform interpretation is not perceived as particularly urgent in the contemporary German judicial system. On the contrary, it has been already pointed out that in Italy both the so-called crisis of legality and the parallel difficulties the *Corte di Cassazione* is facing in its uniform-interpretation function have lead both criminal law and criminal procedure law scholars to frequent discussions. Leaving aside the substantive criminal law aspects, a brief examination of the judicial mechanism deputed to ensure uniform interpretation and legal certainty in Germany can provide some interesting insights.

4.2. The German highest courts and the development of the law.

The *Bundesgerichtshof* (BGH) is the federal supreme court in Germany and is composed by 12 *Zivilsenate* (civil sections) and 5 *Strafsenate* (criminal section). Both the civil and criminal branch of the court can also sit in the *Großer Senat* (Great Panel) composition. Furthermore, a very rarely meeting *Vereinigte Große Senate* reunites both civil and criminal judges from the *Großer Senat* and the President. It is competent for last instance questions, defined in first instance before OLG (section 120 I, 135 GVG).[576] The BGH is in charge of judging the case (*Einzelfallgerechtigkeit*), uniform interpretation (*Rechtseinheit*) and development of the law (*Rechtsfortbildung*). *Revision* is the legitimacy appeal that ensures justice in the case and can be referred not only to the BGH but also to OLG, depending on which one is the last instance court. It is regulated by

intends to exclude an interpretation by the regular courts – be it only by the lower courts – by retroactive intervention in a settled matter. By aiming to retroactively clarify a legal situation, which is apparently unclear or at least non-uniform in terms of its application, with the introduction of a law whose relevant statement is now clear-cut, the legislature gives constitutive effect to the retroactive law'.

[576] BGH has competence as last instance judge for LG decisions that must not be appealed before an OLG. BGH is not last instance judge for all cases, since for less serious offences the *Oberlandesgericht* (24 in the whole federation) are last instance courts, after the *Amtsgericht* and *Landsgericht*. Moreover, BGH is also in charge of judging the so-called *Beschwerde*, in cases listen in section 135 II GVG. See C. ROXIN, B. SCHÜNEMANN, *Strafverfahrensrecht*, München, 2012, p. 32 f.

section 337 and 338 StPO, which provide all the grounds of violation of the law that could justify the appeal.[577]

Similarly to the *Ordinamento giudiziario* (r.d. 30 January 1941, no. 12) in the Italian legal system, legal certainty and uniform interpretation, as well as development of the law, are ensured by the provisions of the Courts Constitution Act (*Gerichtsverfassungsgesetz*, GVG).[578] In cases of divergent orientations between different OLG, between OLG and BGH or between the Panels of the BGH, German law provides for an obligation to refer the question respectively to the BGH or to the *Großer Senat* (Great Panel). This mechanism, with the following peculiarities, is considered a satisfactory compromise between development and legal certainty and it has shown its potential in ensuring uniform interpretation.[579]

4.2.1. Vorlagepflicht *between BGH and OLG.*

An obligation to submit the matter to the BGH lies on the OLG pursuant to section 121(2) GVG. The *Vorlagepflicht* is included in the regulation of the OLG's function as last instance judge. Section 121(1) GVG establishes the competence of OLG, in particular for the *Revision* in cases concerning criminal offences prosecuted before AG or LG in first instance.[580] Section 121(2) GVG provides for the obligation of the OLG to refer the question to a higher court when it is judging as last instance court. If the OLG 'wishes to deviate in its decision' from a decision 'by another Higher Regional Court or from a decision of the Federal Court of Justice, it must submit the matter to the Federal Court of Justice' (section 121(2) GVG). Therefore, the cases of possible submission of the matter to the BGH are: i) a synchronic conflict between different OLG and ii) a synchronic conflict between OLG and BGH. The possible contrast between different sections of the same OLG is not regulated.[581]

[577] B. SCHMITT, *StPO § 337,338*, in L. MEYER-GOßNER (ed.), *Strafprozessordnung*, München, 2019, p. 1464 ff., 1477 ff.; S. KÖNIG, *Revision*, in M. HEGHMANNS, U. SCHEFFLER (eds.), *Handbuch zum Strafverfahren*, München, 2008, p. 997 ff. See also H.H. KÜHNE, *Strafprozessrecht*, Heidelberg, 2010, p. 240.
[578] GVG is Federal Law, 9 May 1975, Federal Law Gazette [Bundesgesetzblatt] Part I, p. 1077, (last amended by Federal Law 30 October 2017, Federal Law Gazette Part I, p. 3618).
[579] R. ORLANDI, *Rinascita della nomofilachia: sguardo comparato alla funzione "politica" delle corti di legittimità*, in *Cass. pen*., 2017, p. 2599.
[580] The OLG's competence is regulated in section 121 I GVG. W. DEGENER, M. DEITERS, W. FRISCH ET AL., *Systematischer Kommentar zur Strafprozessordnung*, Köln, 2013, p. 442 ff.
[581] Against, H. LILIE, *Obiter dictum und Divergenzausgleich in Strafsachen: ein Spannungsfeld zwischen Revisionsrecht und Gerichtsverfassungsrecht*, Köln, 1993, p. 47 f. On this point see also R. ORLANDI, *Rinascita della nomofilachia*, cit., p. 2603. The only German Land that provides for a mechanism to ensure the domestic uniform interpretation is the *Großer Senat für Strafsachen* in Bavaria (§ 10 EGGVG).

The obligation to refer to the BGH in cases of conflicting orientations between different OLGs is rarely complied with. Although the possible conciliation procedure between the sections is only foreseen within the BGH, often the obligation to refer is neglected by the OLG. In order to avoid synchronic contrasts, an inquiry procedure (*Anfrage*) is carried out. This procedure is regulated within the BGH but is applied in practice for OLGs as well. The dissenting OLG receives a statement from the OLG which first affirmed an orientation, affirming that it is no longer following that *regula juris*. As a consequence, the dissenting OLG can affirm the new principle and refrain from referring the question to the BGH.[582] Moreover, in cases where OLG works as a last instance court at State level, synchronic conflicts between the different *Länder* are not really taken into consideration. Nonetheless, some scholars note that the lack of referrals is not usually perceived as a problem.[583]

4.2.2. Vorlagepflicht *within the BGH.*

A similar obligation is imposed on the *Senate* (Panels) of the BGH in order to ensure uniform interpretation pursuant to section 132(2) GVG. Section 132(2) GVG provides that the *Großer Senat für Strafsachen* (Grand Panel for Criminal Matters) shall decide upon a referral from a criminal panel, that wishes to deviate from another criminal panel's or from the Grand Panel's jurisprudence. Moreover, the *Vereinigte Große Senate* (United Grand Panels) are in charge of issues of common interest between civil and criminal panels.[584] The object of the referral must be a *Rechtsfrage*, in cases where a legal provision or a legal concept shall be applied differently in similar cases.[585]

[582] KOTZ, OĞLAKCIOĞLU, *GVG § 121*, in C. KNAUER, H. KUDLICH, H. SCHNEIDER (eds.), *Münchener Kommentar zur StPO*, München, 2018, p. 335; B. FEILCKE, *GVG § 121*, in B. FEILCKE (ed.), *Karlsruher Kommentar zur Strafprozessordnung*, 2019, p. 2806. BGH, 21.06.1960 – 5 StR 106/60, in BGHSt 14, 319 and in *NJW*, 1960, p. 1533 f.: according to the BGH, OLG have neither an obligation nor a prohibition to carry out an *Anfrage* pursuant to the BGH regulation. Simplification is the rationale of such practice, that has no reasons to be abandoned within OLGs. Within OLGs an *Anfrage* would void the obligation to refer as well. The BGH further takes for granted the attempt of the lower court to solve the contrast with an *Anfrage* to the OLG Hamburg in BGH, 30.07.1996 – 5 StR 37/96, in BGHSt 42, 200 and in *NJW*, 1996, p. 3219; B. SCHMITT, *GVG § 121*, in L. MEYER-GOßNER (ed.), *Strafprozessordnung*, cit., p. 2073 ff.; W. DEGENER, M. DEITERS, W. FRISCH ET AL., *Systematischer Kommentar zur Strafprozessordnung*, cit., p. 448.

[583] R. ORLANDI, *Rinascita della nomofilachia*, cit., p. 2603.

[584] The United Grand Panels will decide i) upon referral of a civil panel, in case of deviation from a criminal panel or the grand panel in criminal matters or the United Grand Panels and ii) upon referral of a criminal panel, in case of deviation from a civil panel or the grand panel in civil matters or the United Grand Panels. W. DEGENER, M. DEITERS, W. FRISCH ET AL., *Systematischer Kommentar zur Strafprozessordnung*, cit., p. 471 ff.

[585] J. CIERNIAK, J. POHLIT, *GVG § 132*, in C. KNAUER, H. KUDLICH, H. SCHNEIDER (eds.), *Münchener Kommentar zur StPO*, München, 2018, p. 351.

The admissibility requirement for the submission is the inquiry pursuant to section 132(3) GVG. The adjudicating panel must submit an inquiry to the panel whose interpretation it wishes to deviate from. If the latter declares it stands by its legal opinion, the submission shall be admissible, otherwise there would be a contrast. In the opposite case, the panel will respond to the inquiry relinquishing its previous legal opinion. The rationale behind this provision is the preference for a settlement of the interpretive conflicts between the Panels, limiting the intervention of the Grand Panel to exceptional cases when the single panels cannot find a common interpretive orientation. Due to the tendency to refrain from referring to the Grand Panel, it is often defined as '*horror pleni*' (i.e. fear of the plenary).[586] The interests of legal certainty (*Rechtssicherheit*) and development of law (*Rechtsfortbildung*) inspire such a regulation, that ensures a consistent interpretation within the highest federal jurisdiction. [587]

Although the *Vorlagepflicht* cannot be considered a *stare decisis* rule, its effects are similar. Moreover, the interest of development of the law and its uniform application is guaranteed through the *Rechtsfortbildungsvorlage*, which happens without a conflicting case-law on the issue. Section 132(4) GVG foresees a submission of an issue having fundamental importance for a decision to the Grand Panel, if the Panel deems the solution to the issue necessary for i) the development of the law or ii) in order to ensure uniform application of the law. This submission is an option left to the discretion of Panels.

The German system seems to be satisfactory under the perspective of uniform application and development of the law. The major cause is probably due to the effectiveness of the *Vorlage* mechanism and especially the low numbers of cases the BGH has to decide each year. As pointed out about the *Corte di Cassazione*, a low number of cases and principles to be decided enables the supreme court to ensure a real uniform interpretation.[588]

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[586] With reference to civil panels, C. JUNGMANN, *Ein neuer "horror pleni" in den Zivilsenaten des BGH?*, in *JZ* 2009, p. 380.

[587] H. BEISSE, *Von der Aufgabe des Großen Senats*, in F. KLEIN, K. VOGEL (eds.), *Der Bundesfinanzhof und seine Rechtsprechung: Grundfragen - Grundlagen; Festschrift für Hugo von Wallis zum 75. Geburtstag am 12. April 1985*, Bonn, 1985, p. 47 and CH. MEYER, *Die Sicherung der Einheitlichkeit höchstrichterlicher Rechtsprechung durch Divergenz- und Grundsatzvorlage*, Baden-Baden, 1994, p. 14 ff.

[588] The number of cases lodged before the BGH, *Strafsenate* were 3156 in 2018, according to the BGH Statistics, available at https://www.bundesgerichtshof.de/SharedDocs/Downloads/DE/Service/StatistikStraf/jahresstatistikStrafsenate2018.pdf?__blob=publicationFile&v=4, last accessed 13.02.2020. See also R. ORLANDI, *Rinascita della nomofilachia*, cit., p. 2605 f.

IV. EUROPEAN UNION

1. The principle of legality and foreseeability in EU Law.

The consequences of the Strasbourg definition of foreseeability are crucial for the *nullum crimen* principle at EU level. The normative and interpretive reasons that place the ECHR definition of *nullum crimen* at the core of the correspondent EU fundamental right have been explained *above*.[589] The role of foreseeability in its output into the European Union legal order will be analysed both before the Treaty of Lisbon, when it was part of the fundamental rights as general principles of EU law, and after 2011, when Art. 49 CFREU, as the Charter in its entirety, was attributed the same legal value as the Treaties. The Treaty of Lisbon was crucial for the application of the principles to actual criminal law as well, since it attributed criminal law competences to the European Union. Prior to the Treaty of Lisbon's entry into force, the principle of legality was applied under the umbrella of other EU competences involving sanctioning procedures such as competition, fishery, agriculture, environment and internal market,[590] as well as applied in cases involving judicial cooperation in criminal matters.[591]

Necessary premise to the analysis of the characteristics and use of foreseeability is considering that the CJEU acknowledges the autonomous concept of law developed by the ECtHR, as a consequence of the transposition of the Strasbourg principles into EU law.[592] The CJEU expressly refers to ECHR leading cases of *S.W. v. the United Kingdom* and *Cantoni v. France*.[593]

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[589] See *above*, Chapter 2, para. 3.

[590] Competition: CJEU, Degussa v. Commission, 5 April 2006, T-279/02; CJEU, Dansk Rørindustri, 28 June 2005, joined cases C-189/02 P, C-202/02 P, C-205/02 P to 208/02 P and C-213/02 P; CJEU, Groupe Danone v. Commisson, 8 February 2007, C-3/06. Fishery: CJEU, Regina v. Kirk, 10 July 1984, C-63/83. Agriculture: CJEU, The Queen v. Ministry of Agriculture, Fisheries and Food, ex parte FEDESA and o., 13 November 1990, C-331/88. Environment: CJEU, Pretore di Salò v. X., 11 June 1987, C-14/86. Internal market: CJEU, Kolpinghuis Nijmegen, 8 October 1987, C-80/86; CJEU, Berlusconi and o., 3 May 2005, C-387/02; CJEU, Spektor Photo Group NV, 23 December 2009, C-45/08.
CJEU, Criminal proceedings against X, 12 December 1996, C-74/95 and C-129/95. See R. SICURELLA, *Art. 49*, in R. MASTROIANNI, O. POLLICINO, S. ALLEGREZZA ET AL. (eds.), *Carta dei Diritti Fondamentali dell'Unione Europea*, Milano, 2017, p. 976.

[591] CJEU, Advocaten voor de Wereld, 3 May 2007, C-303/05; CJEU, Pupino, 16 June 2005, C-105/03.

[592] The Court affirmed the validity of the Strasbourg definition of *law* in EU law, considering even the Commission's general competition policy subject to the principles of legal certainty and non-retroactivity, although they are not the proper legal basis for sanctions in competition law. CJEU, Dansk Rørindustri, 28 June 2005, joined cases C-189/02 P, C-202/02 P, C-205/02 P to 208/02 P and C-213/02 P, para. 216-217, 222. Similarly see CJEU, Groupe Danone v. Commisson, 8 February 2007, C-3/06, para. 23.

[593] CJEU, Dansk Rørindustri, 28 June 2005, joined cases C-189/02 P, C-202/02 P, C-205/02 P to 208/02 P and C-213/02 P, para. 215.

As a consequence, law entails the necessary qualities of accessibility and foreseeability. The CJEU applies foreseeability in the same sense as the ECtHR: a comprehensive principle that includes the national categories of non-retroactivity, legal certainty, precision etc. Moreover, the principle of non-retroactivity is part of the general principles of EU law, as it is part of the common constitutional traditions and enshrined in Art. 7 ECHR.[594]

1.1. Foreseeability and the general principles of legal certainty and legitimate expectations.

The requirement for foreseeability is part of the *nullum crimen sine lege* principle, and therefore a component of the principle of legal certainty ruling the EU system. The requirement for foreseeability/predictability of the legal consequences of the individual's actions is nevertheless already part of the principle of legal certainty, independently from its anchoring in the principle of legality in criminal matters and it is linked with the protection of legitimate expectations.[595] Scholars have seen the reference to the principle of legal certainty as a sign of a particularly loose standard of protection granted by the CJEU in terms of legality.[596] Well-established case-law of the CJEU requires legal rules to have accessible, precise and foreseeable effects and adopts a particularly high standard when they have detrimental effects on individuals or undertakings.[597]

Foreseeability already applies to interpretation in all EU law areas. In its diachronic perspective, the individual cannot be requested to behave according to principles affirmed by national courts in decisions that are subsequent to his conduct, especially when the new interpretation is departing from what reasonably expectable.[598]

[594] CJEU, Regina v. Kirk, 10 July 1984, C-63/83. A.M. MAUGERI, *I principi fondamentali del sistema punitivo comunitario: la giurisprudenza della Corte di Giustizia e della Corte europea dei diritti dell'uomo*, in G. GRASSO, R. SICURELLA (eds.), *Per un rilancio del progetto europeo. Esigenze di tutela degli interessi comunitari e nuove strategie di integrazione penale*, Milano, 2008, p. 123 f.
[595] CJEU, National Iranian Oil Company v. Council, 16 July 2014, T-578/12, para. 111-112, now appealed in CJEU, National Iranian Oil Company v. Council, 1 March 2016, C-440/14. CJEU, Intertanko and others v. the Secretary of State for Transport, 3 June 2008, C-308/06, para. 69; CJEU, Kingdom of Belgium v. Commission, 14 April 2005, C-110/03, para. 30. See A.M. MAUGERI, *I principi fondamentali del sistema punitivo comunitario*, cit., p. 118.
[596] P. BEAUVAIS, *La légalité pénale à la lumière des droits européens*, cit., p. 51.
[597] CJEU, Deza a.s. v. European Chemicals Agency, 11 May 2017, T-115/15, para. 135 and quoted case-law.
[598] These deductions are confirmed in CJEU, Volkmar Klohn v. An Bord Pleanála, 17 October 2018, C-167/17, para. 70 (environment).

1.2. The principle of non-retroactivity.

The principle of non-retroactivity is enshrined in Art. 49(1) CFREU, but, as discussed above, it has also been part of the general principles of EU Law (within the broader *nullum crimen* guarantees) since before the CFREU was attributed the rank of primary EU law.[599]

The CJEU acknowledges the principle of non-retroactivity in the case of *Regina v. Kirk*, considering it 'common to all the legal orders of the Member States and […] enshrined in Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms as a fundamental right' and therefore among the general principles of law whose observance is ensured by the CJEU.[600] In particular, the CJEU excluded that the effects of a Regulation could amount to impose penalties to the effect that an act which was not punishable at the time it was committed could be subject to criminal law *ex post facto*.[601] Before the entry into force of the Treaty of Lisbon, the CJEU referred to the principle of non-retroactivity with regards to the ECHR interpretation,[602] but recently it has become more and more common to simply refer to Art. 49 CFREU, which has the same meaning as the ECHR.[603]

When applying the principle of non-retroactivity to the sanctioning powers of the EU (such as in competition law) the CJEU has adopted a particularly loose standard. For when a sanction is considered 'criminal' the whole 'criminal law' shield (i.e. principle of legality) protects it and so the CJEU has sometimes avoided the stricter scrutiny in criminal matters refusing the 'criminal character' of a measure.[604] More often, as it will be demonstrated in the following, the 'criminal shield' has been applied, but non-retroactivity has been assessed thanks to the ECHR foreseeability standard.

Foreseeability, however, mainly recalled through the *S.W.* and *Cantoni* precedents, has been applied with a particularly low standard.

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[599] R. SICURELLA, *Art. 49*, cit., p. 984.
[600] CJEU, Regina v. Kirk, 10 July 1984, C-63/83, para. 22.
[601] CJEU, Regina v. Kirk, 10 July 1984, C-63/83, para. 21.
[602] CJEU, Dansk Rørindustri, 28 June 2005, joined cases C-189/02 P, C-202/02 P, C-205/02 P to 208/02 P and C-213/02 P, para. 202; CJEU, Advocaten voor de Wereld, 3 May 2007, C-303/05, para. 49.
[603] See *infra*, this section, para. 5.3. With regards to the principle of precision, that requires EU rules to clearly define offences and penalties, CJEU, ThyssenKrupp Nirosta GmbH v. Commission, 29 March 2011, C-352/09, para. 80.
[604] For example, an additional levy on milk was allegedly been imposed retroactively, but the Court denied the possible application of non-retroactivity principle, as a corollary of the principle of legal certainty. CJEU, Gerenkens and Procola, 15 July 2004, C-459/02, para. 36-38.

Despite the implementation of ECHR principles (i.e. autonomous definition of law, non-retroactivity, accessibility and foreseeability), the CJEU applied them with disappointing results especially in terms of level of protection, as scholars reproached before the Treaty of Lisbon's entry into force.[605]

2. Foreseeability standard in EU Competition law.

The application of *nullum crimen* in the EU legal order has taken place especially in those areas where the EU has direct sanctioning powers. Therefore, particular attention will be attributed to the EU jurisprudence in competition law, where the CJEU had the chance to apply the principle of legality and to refer it both to the common constitutional traditions and Art. 7 ECHR, as well as to Art. 49 CFREU. The focus will be on the use of the standard of foreseeability both in relation with synchronic and diachronic conflicts in practice, i.e. both to legal certainty and non-retroactivity.

2.1. Foreseeability and EU competition law before Lisbon.

In the case of *Hoffman La Roche v. Commission*, the CJEU was asked to evaluate an infringement of the general principle relating to the degree of certainty and foreseeability that a rule imposing a penalty must display before an infringement against that rule can give rise to the imposition of the penalty.[606] The allegedly violated principles were certainty and foreseeability of the rules imposing penalties. The appellant claimed the imprecision and uncertainty of the terms 'dominant position' and 'abuse' in Art. 86 of the Treaty in force at the time. By considering the principle *nullum crimen nulla poena sine lege*, the Commission should have applied these penalties only if those concepts had been given a sufficiently specific meaning either by administrative practice or by case-law to enable undertakings to know where they stood.[607] Foreseeability, which was not yet widespread in the context of Art. 7 ECHR, was considered not only in the wording of the provision, but also in light of the comprehensive system where the provision was included and as a result of the practice of the competent authorities.[608] Moreover, the CJEU speaks of 'possibility, if not probability' for a 'vigilant commercial operator'.[609] The

[605] A. BERNARDI, *All'indomani di Lisbona: note sul principio europeo di legalità penale*, in *Quaderni costituzionali*, 2009, p. 51.
[606] CJEU, Hoffman-La Roche & Co. AG v. Commission, 13 February 1979, C-85/76, p. 469 (facts and issues).
[607] CJEU, Hoffman-La Roche & Co. AG v. Commission, 13 February 1979, C-85/76, p. 470 (facts and issues).
[608] CJEU, Hoffman-La Roche & Co. AG v. Commission, 13 February 1979, C-85/76, para. 128 ff.
[609] CJEU, Hoffman-La Roche & Co. AG v. Commission, 13 February 1979, C-85/76, para. 134.

reasonableness standard is recalled as well, when the Court excludes the validity of a precedent invoked by the applicant.[610] Foreseeability was already, at this early stage, similar to the ECtHR's findings in *Cantoni*. It is still focused on the precision of the *regula iuris* according to a reasonable standard and on the subjective qualities of the addressed. The minimum threshold seems to be that of the possibility to be aware of the meaning of the norm.

In *Degussa v. Commission*, the CJEU (Court of first instance) affirmed the principle of legality with particular regard to synchronic foreseeability in the domain of sanctions for breach of competition law. In particular, the applicant invoked a violation of foreseeability in the lack of a maximum amount of fine the Commission could impose due to the uncertainty of Regulation 17/62. The Tribunal referred to the relevant leading cases of the Strasbourg Court and admitted that a norm cannot be formulated with such precision as to enable to foresee its application with absolute certainty.[611] However, case-law has the task to precise it. In referring to the ECtHR case-law, the CJEU adopts the autonomous substantive notion of *law*.[612] Moreover, in the subjective assessment of foreseeability the standard is that of a *prudent trader with appropriate legal advice.*[613] The legitimacy of a lower degree of foreseeability of the maximum amount of fines is justified by 'objectives of punishment and deterrence', in order for undertakings not to calculate in advance costs and benefits from an eventual infringement.[614]

In *Dansk Rørindustri*, the CJEU was asked to establish the retroactive application of the method of calculating the fines according to the new Guidelines instead of the previously established practice, thus referring to diachronic foreseeability.[615] The CJEU applied *nullum crimen* as interpreted in Art. 7 ECHR and the autonomous notion of law in order to consider the new methods of calculation as relevant 'law'. Moreover, the Court assessed the possible breach of the non-retroactivity principle thanks to the link to foreseeability. In this respect, the Court quoted the leading cases of *S.W. and C.R. v. the United Kingdom*, *Cantoni v. France* and *Coëme and o. v. Belgium*, adopting the

[610] CJEU, Hoffman-La Roche & Co. AG v. Commission, 13 February 1979, C-85/76, para. 136.
[611] CJEU, Degussa v. Commission, 5 April 2006, T-279/02, para. 72.
[612] P. BEAUVAIS, *Le droit à la prévisibilité en matière pénale dans la jurisprudence des cours européennes*, in *Archives de Politique Criminelle*, 29, 2007, p. 51.
[613] CJEU, Degussa v. Commission, 5 April 2006, T-279/02, para. 83.
[614] CJEU, Degussa v. Commission, 5 April 2006, T-279/02, para. 83.
[615] CJEU, Dansk Rørindustri, 28 June 2005, joined cases C-189/02 P, C-202/02 P, C-205/02 P to 208/02 P and C-213/02 P, para. 198 ff.

'reasonable foreseeability' standard in order to assess the possible illegitimate retroactive application of a new interpretation. The Court adopted the ECtHR's idea of balance between the development of the law and non-retroactivity through foreseeability. In fact, although the principle *nullum crimen sine lege* cannot hinder the development of the law, it could outlaw 'a retroactive application of a new interpretation of a rule establishing an offence', especially for 'a judicial interpretation which produces a result which was not reasonably foreseeable at the time when the offence was committed, especially in the light of the interpretation put on the provision in the case-law at the material time'.[616]

As far as the definition of reasonable foreseeability is concerned, the Court makes reference to the subjective criteria enshrined in *Cantoni v. France*. Therefore, its scope

> 'depends to a considerable degree on the content of the text in issue, the field it is designed to cover and the number and status of those to whom it is addressed. A law may still satisfy the requirement of foreseeability even if the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. This is particularly true in relation to persons carrying on a professional activity, who are used to having to proceed with a high degree of caution when pursuing their occupation. They can on this account be expected to take special care in assessing the risks that such an activity entails'.[617]

In this case, the raising of fines through new methods of calculation was considered reasonably foreseeable because it was motivated by the effectiveness of EU competition law (i.e. the raise in the amount of fine is foreseeable if it ensures the implementation of EU competition law) and it was considered in light of the subjective characteristics of the appellants ('for undertakings such as the appellants'). Therefore, on account of a substantive definition of the relevant legal basis (case-law, the Commission Guidelines and methods of calculation), the new methods of calculation were foreseeable and, therefore, not retroactive.[618]

These principles are already considered an obligation for the national judge as well when interpreting EU law, as the Court recalls its precedent in *Kolpinghuis Nijmegen*, where the CJEU limited consistent interpretation with a Directive and its direct application, since they have to comply with the general principles of EU law and in

[616] CJEU, Dansk Rørindustri, 28 June 2005, joined cases C-189/02 P, C-202/02 P, C-205/02 P to 208/02 P and C-213/02 P, para. 217-218. See P. BEAUVAIS, *Le droit à la prévisibilité*, cit., p. 17.
[617] CJEU, Dansk Rørindustri, 28 June 2005, joined cases C-189/02 P, C-202/02 P, C-205/02 P to 208/02 P and C-213/02 P, para. 219.
[618] CJEU, Dansk Rørindustri, 28 June 2005, joined cases C-189/02 P, C-202/02 P, C-205/02 P to 208/02 P and C-213/02 P, para. 227-232. Bernardi criticises this low standard of foreseeability-retroactivity, which results in the retroactive application of more severe penalties, A. BERNARDI, *All'indomani di Lisbona*, cit., p. 51.

particular with legal certainty and non-retroactivity. Thus the CJEU stated in *Dansk Rørindustri* that an interpretation cannot lead 'to the imposition on an individual of an obligation laid down by a directive which has not been transposed or, a fortiori, have the effect of determining or aggravating, on the basis of the decision and in the absence of a law enacted for its implementation, the liability in criminal law of persons who act in contravention of that directive's provisions'.[619]

In *Groupe Danone v. Commission*, the CJEU had to face a plea alleging breach of the principle of legal certainty and *nulla poena sine lege* because of the retrospective application of the aggravating circumstance of repeated infringement before it was introduced by the relevant Commission Guidelines. The Court, recalling its precedent in *Dansk Rørindustri*, did not find a violation of *nulla poena sine lege*, as the application of the aggravating circumstance was foreseeable due to the discretion of the Commission in assessing the gravity of the fines, which was not based on the Guidelines but on the discretional interpretation of the Regulation 17/62. The Court again assessed retroactivity on the basis of a foreseeability assessment.[620]

In *Treuhand AG* (2008), the CJEU (Court of first instance) recalled the principles affirmed in *Dansk Rørindustri* and considered a settled case-law a sufficient ground to reject the plea for breach of *nullum crimen* in the definition of the relevant conduct pursuant to Art. 81(1) EC.[621] Even though the definition of co-perpetration, which was the issue at stake, had been given by the CJEU after the time when the infringement was committed, the Court considered it sufficient, to satisfy the requirement of foreseeability that the elements of individual liability were already clear from previous case-law.[622] In addition, the CJEU excludes that an express provision of liability for co-perpetration is necessary, also considering a standard provision of individual liability in compliance with *nullum crimen* in light of ECtHR case-law.[623]

In *Lafarge v. Commission* the Court affirmed the same principles and expressly referred to legal certainty in relation to foreseeability.[624] The CJEU admits that foreseeability may further be safeguarded in case of a discretionary power in sanctioning,

[619] CJEU, Dansk Rørindustri, 28 June 2005, joined cases C-189/02 P, C-202/02 P, C-205/02 P to 208/02 P and C-213/02 P, para. 221. On the case *Kolpinghuis Nijmegen* see *infra*, this section, para. 5.2.
[620] CJEU, Groupe Danone v. Commisson, 8 February 2007, C-3/06, para. 23-31.
[621] CJEU, AC-Treuhand AG v. Commission, 8 July 2008, T-99/04, para. 145.
[622] CJEU, AC-Treuhand AG v. Commission, 8 July 2008, T-99/04, para. 146.
[623] CJEU, AC-Treuhand AG v. Commission, 8 July 2008, T-99/04, para. 149.
[624] CJEU, Lafarge v. Commission, 17 June 2010, C-413/08 P, para. 92-93.

as long as its exercise is limited with sufficient clarity and objectivity.[625] Under a subjective point of view, the standard of the CJEU is that of a 'prudent trader' with the help of an 'appropriate legal advice' in order to foresee the method and the order of magnitude of the sanctions imposed upon him.[626] This statement is following the Court's findings in the case of *Degussa v. Commission*, where the CJEU applied a lower standard in terms of foreseeability, than the one of the ECtHR. The amount of penalty imposed does not need to be foreseen with absolute certainty, according to the Luxembourg Court, essentially for reasons of dissuasiveness.[627] Under this perspective, although the sanctions are not to be considered criminal in nature, the role of dissuasiveness is controversial. On the one hand, the qualities of the law and the principle of legal certainty should be a limit to the repression/dissuasiveness objectives. On the other, true dissuasiveness relies only on foreseeable penalties.[628] Recalling the *LaFarge* principle, the Court stressed the importance of dissuasiveness in order to assess foreseeability, together with considering the 2006 Guidelines only a specification of the legal basis (the Regulation).[629]

2.2. Foreseeability and EU competition law after Lisbon.

The precedent on retroactive foreseeability in the case of *Dansk Rørindustri* was further recalled by the Court and the Tribunal in cases concerning competition law and especially the plea of violation of the principle of non-retroactivity with regards to the 2006 Guidelines. The rule enshrined in the leading case *Dansk Rørindustri* is that an interpretive rule can be applied retroactively if two requirements are met: i) its application is reasonably foreseeable; ii) it is necessary to ensure the implementation of EU competition policy. Moreover, since the cases are subsequent to the entry into force of the Treaty of Lisbon, Art. 49 CFREU is recalled as an additional legal basis for the principle of legality and foreseeability.

2.2.1. Diachronic foreseeability.

In *Wabco* the Tribunal recalled the *Cantoni* criteria, as enshrined in *Dansk Rørindustri*, in order to assess foreseeability, focusing on the importance of legal advice and the

[625] CJEU, Lafarge v. Commission, 17 June 2010, C-413/08 P, para. 94-95. The elements to grant objectivity are: a maximum amount of penalty, rules of conduct for the Commission and a judicial review by the CJEU.
[626] CJEU, Lafarge v. Commission, 17 June 2010, C-413/08 P, para. 95.
[627] CJEU, Degussa v. Commission, 5 April 2006, T-279/02, para. 50-55.
[628] P. BEAUVAIS, *Le droit à la prévisibilité*, cit., p. 10.
[629] CJEU, Ori Martin SA and o. v. Commission, 14 September 2016, C-490/15 and 505/15, para. 90-91.

peculiar risk assessment demanded to professionals. The relevant point is that the allegedly violated provisions of EU primary law are Art. 49 CFREU and Art. 7 ECHR.[630]

Even though the application of the 2006 Guidelines, that resulted in a more detrimental treatment for the appellants, was retroactive, the Court considered that it was foreseeable. Foreseeability was again assessed according to a low standard, considering that an undertaking such as the appellant had to expect, according to existing case-law, that the Commission would have raised the level of penalties in order to adjust it to the needs of the implementation of EU competition law.[631] Neither the legal framework at the time of the infringement nor the legitimate expectations of the appellants on the application of the previous Guidelines could overcome the argument of the Court. In fact, 'it was reasonably foreseeable that the Commission would adjust the level of fines to the needs of its policy and thus apply the 2006 Guidelines to the facts of the present case'.[632]

In the case of *Saint Gobain* the CJEU applied the precedent *Dansk Rørindustri*. The plea alleging the retroactive application of the rules of the 2006 Guidelines, on the basis of the autonomous notion of law, concerned the importance of the duration of the infringement in the multiplication of the fine imposed. Art. 49 CFREU and Art. 7 ECHR were again the allegedly violated provisions, where the principle of non-retroactivity constitutes a general principle of EU law. [633] With regards to the non-retroactivity test, the CJEU assesses reasonable foreseeability according to the subjective *Cantoni* criteria, as transposed by *Dansk Rørindustri*, and admitting a gradual clarification of the law and its adaptation to the changing circumstances (pursuant to ECHR case *Jorgic v. Germany*).[634] Moreover, the Court considers the necessity to implement EU competition policy, and attributes particular relevance to deterrence and the predictability of the need of the Commission to adjust its parameters to the needs of its policy.[635]

Similar points were further raised in *Sasol*, with regards to the non-foreseeable application of the 2006 Guidelines. The CJEU, applying the twofold test, focused on the

[630] CJEU, Wabco Europe and o. v. Commission, 16 September 2013, T-380/10, para. 172-175.
[631] CJEU, Wabco Europe and o. v. Commission, 16 September 2013, T-380/10, para. 177-179.
[632] CJEU, Wabco Europe and o. v. Commission, 16 September 2013, T-380/10, para. 181-182.
[633] CJEU, Saint Gobain Glass France and o. v. Commission, 27 March 2014, T-56/09, T-73/09, para. 264-270.
[634] CJEU, Saint Gobain Glass France and o. v. Commission, 27 March 2014, T-56/09, T-73/09, para. 271-272.
[635] Moreover, the possibility to calculate the amount of fines arithmetically was considered a sufficient ground to affirm foreseeability. CJEU, Saint Gobain Glass France and o. v. Commission, 27 March 2014, T-56/09, T-73/09, para. 273-276.

balance of the principle of non-retroactivity with the duty of the Commission to effectively pursue competition policy.[636] Taking into account Art. 6 and Art. 7 ECHR, the Court affirms that, despite their applicability to the penalties applied by the Commission in its proceedings, they 'will not necessarily apply with their full stringency in the field of competition law'.[637] Moreover, with regards to the assessment of the legal basis, the Court affirmed that a high standard of foreseeability in competition law could undermine the effectiveness of its sanctions:

> '[i]t must also be noted in that context that, in the area of competition law, unlike criminal law, both the benefits and the penalties for unlawful activities are purely pecuniary, as is the motivation of the offenders whose actions are in line with an economic logic. Consequently, were the fine to be imposed for participation in an unlawful cartel to be more or less predictable, this would have highly damaging consequences for European Union competition policy, since the undertakings committing the infringements could directly compare the costs and benefits of their unlawful activities, and also take into account the chances of being discovered, and thus attempt to ensure that those activities are profitable […]'.[638]

In *Telefónica and Telefónica de España* the Court faced pleas alleging the violation of Art. 7 ECHR (directly) for the rule imposed by the Commission was not foreseeable due to the absence of clear precedents, which made the law unpredictable. Foreseeability was therefore a parameter in the middle between uncertainty and diachronic foreseeability. In this apparent case of non-clarity in case-law, the CJEU reaffirmed its precedent and rejected the appellants' plea, arguing that the case-law at the material time of the infringement was clear and therefore the rule applied by the Commission was foreseeable.[639]

2.2.2. Synchronic foreseeability.

In *Treuhand AG* (2015), the CJEU dealt with legal certainty and *nulla poena sine lege* and refrained that although offences have to be defined clearly, they must be read in light of the accompanying case-law as well, which can legitimate a gradual clarification of the offence if reasonably foreseeable.[640] Recalling the *Dansk/Cantoni* criteria to assess foreseeability, the CJEU affirmed the foreseeability of a 'first interpretation' when the EU courts had not yet had the opportunity to rule on the role of a consultancy firm in an

[636] CJEU, Sasol and o. v. Commission, 11 July 2014, T-541/08, para. 209-212.
[637] CJEU, Sasol and o. v. Commission, 11 July 2014, T-541/08, para. 213.
[638] CJEU, Sasol and o. v. Commission, 11 July 2014, T-541/08, para. 207.
[639] CJEU, Telefónica and Telefónica de España v. Commission, 10 July 2014, C-295/12, para. 147-149
[640] CJEU, AC Treuhand AG v. Commission, 22 October 2015, C-194/14, para. 40-41. On this point see also P. BEAUVAIS, *Le droit à la prévisibilité*, cit., p. 52, who focuses on the admissibility of case-law as a legal basis for punishment, if its result is reasonably foreseeable.

Art. 81(1) TFEU infringement. According to the CJEU, 'that firm should have expected, if necessary after taking appropriate legal advice, its conduct to be declared incompatible with the EU competition rules, especially in the light of the broad scope of the terms 'agreement' and 'concerted practice' established by the Court's case-law'.[641] Moreover, the Commission's administrative practice seemed to speak in favour of foreseeability.

Following its precedent in *Treuhand AG* (both 2008 and 2015 judgements), the Court applied the above-mentioned principles in *Icap*, where it focused on the possibility that case-law gradually clarifies the rules on criminal liability. The object of the CJEU judgement was an alleged violation of the principle of legal certainty due to the extensive application of the classification of 'facilitator' introduced by *Treuhand AG* (2008) to a new different case that was not inferable from precedent.[642] The CJEU adopted a very low standard again and considered the application of the said classification foreseeable for an undertaking such as the appellant, with appropriate legal advice, 'especially in the light of the broad scope of the terms 'agreement' and 'concerted practice' established by the case-law of the Court of Justice' and the significance of the appellant's participation.[643]

3. Foreseeability of EU sanctions.

In other areas of EU competence the CJEU has been facing pleas with regards to the violation of *nullum crimen*, when the EU had an express power to impose sanctions and to impose the Member States the obligation to implement them.

In the area of Common Foreign and Security Policy, the EU currently adopts sanctions (i.e. restrictive measures) pursuant to Art. 215 TFEU in order to implement a Council decision according to Title V, Chapter 2 TEU. These restrictive measures, which include asset freeze, travel bans etc. to natural and legal persons, groups and non-state entities (Art. 215(2) TFEU) are now issued in the areas of EU competence in common foreign and security policy. The importance of the principle of foreseeability with regards to these sanctions has already been underlined with reference to the general principle of legal certainty ruling EU law,[644] but in the following it will be analysed under the criminal lens with regards to Common Foreign and Security Policy sanctions. Particular attention is

[641] CJEU, AC Treuhand AG v. Commission, 22 October 2015, C-194/14, para. 42-43.
[642] CJEU, Icap and o. v. Commission, 10 November 2017, T-180/15, para. 192-196.
[643] CJEU, Icap and o. v. Commission, 10 November 2017, T-180/15, para. 197-198.
[644] CJEU, National Iranian Oil Company v. Council, 16 July 2014, T-578/12, para. 111-112.

given to the rule of law, since Art. 215(3) TFEU already requires that these acts 'shall include necessary provisions on legal safeguards'.

In the case of the restrictive measures adopted with a Council Regulation in view of Russia's actions destabilising the situation in Ukraine (Reg. 833/2014), Rosneft (major Russian oil company), which was enlisted and subject to some of those measures, sought annulment of the contested acts before UK courts. In this context, the CJEU was referred to in a preliminary ruling, where one of the relevant questions was whether the Member States were precluded from imposing a criminal penalty according to art. 8 Reg. 833/2014 in case the mentioned regulation was violated, before the scope of the relevant offences had been sufficiently clarified by the CJEU, in order not to violate the principles of legal certainty and *nulla poena sine lege certa*.[645]

A first relevant point is the application of the principle of legality in order to evaluate the provisions of a Council Regulation in breach of which criminal penalties were imposed. The Court, recalling the *lex certa* principle affirmed in *Advocaten voor de Wereld*, which provides that the individual must be able to know the consequences of its actions, admits the lack of clarity of the wording of the Regulation.[646] Nevertheless, the Court refers to the Art. 7 ECHR case-law (*Cantoni* judgement in particular), to which the rights enshrined in Art. 49 CFREU correspond pursuant to Art. 52(3) CFREU[647] and acknowledges that the general wording of statutes admits grey areas at the fringes of the definitions, but '[i]t follows that, while the use of the legislative technique of referring to general categories, rather than to exhaustive lists, often leaves grey areas at the fringes of a definition, those doubts in relation to borderline cases are not sufficient, in themselves, to make a provision incompatible with Article 7 of that convention, provided that the

[645] CJEU, PJSC Rosneft Oil Company v. Her Majesty's Treasury and o., 28 March 2017, C-72/15, para. 152.

[646] CJEU, PJSC Rosneft Oil Company v. Her Majesty's Treasury and o., 28 March 2017, C-72/15, para. 161-162: 'With respect to, second, the principle of nulla poena sine lege certa, cited by the referring court, it is clear that that principle, which falls within the scope of Article 49 of the Charter, headed 'Principles of legality and proportionality of criminal offences and penalties', and which, according to the Court's case-law, constitutes a specific expression of the general principle of legal certainty (see judgment of 3 June 2008, Intertanko and Others, C-308/06, EU:C:2008:312, paragraph 70), implies, inter alia, that legislation must clearly define offences and the penalties which they attract. That condition is met where the individual concerned is in a position, on the basis of the wording of the relevant provision and, if necessary, with the help of the interpretation made by the courts, to know which acts or omissions will make him criminally liable (judgment of 3 May 2007, Advocaten voor de Wereld, C-303/05, EU:C:2007:261, paragraph 50)'.

[647] The CJEU quotes its precedent in the *Taricco* judgment with regards to the correspondence of the rights enshrined in Art. 49 CFREU with those enshrined in Art. 7 ECHR. CJEU, PJSC Rosneft Oil Company v. Her Majesty's Treasury and o., 28 March 2017, C-72/15, para. 164.

provision proves to be sufficiently clear in the large majority of cases'.[648] Therefore, since Rosneft had the duty to take appropriate legal advice, the contested terms were not as imprecise as to determine an impossibility to know which acts or omissions determined criminal liability.[649] Moreover, in light of the principles established in *Dansk Rørindustri*, which admit a gradual clarification of the rules of criminal liability by case-law, a subsequent gradual clarification of the terms of the Regulation did not prevent the States from imposing criminal penalties, with respect to the reasonable foreseeability of the development and in order to ensure the effective implementation of the Regulation.[650]

4. Foreseeability in the European Arrest Warrant.

The importance of *nullum crimen* principle and its primary role in EU law was discussed by the CJEU in cases concerning the European Arrest Warrant (Framework Decision 2002/584/JHA). Even though the European Arrest Warrant is part of the judicial cooperation in criminal matters under a procedural perspective, substantive criminal law issues are nevertheless likely to come up.

In the case of *Advocaten voor de Wereld*, the CJEU affirmed some important principles that are still recalled in its reasoning. The legal issue before the Court was the legitimacy of the abandonment of the double criminality requirement in the European Arrest Warrant, which does not require a control of the offence for which the warrant is sought to be criminalised in both States for 32 categories listed in the Framework Decision, if it is 'punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years and as they are defined by the law of the issuing Member State'. In particular, the list of offences in Art. 2(2) of the Framework Decision was not sufficiently precise, according to the appellant, to enable the individual to distinguish punishable acts from acts not constituting a criminal offence. Although the

[648] CJEU, PJSC Rosneft Oil Company v. Her Majesty's Treasury and o., 28 March 2017, C-72/15, para. 163.
[649] CJEU, PJSC Rosneft Oil Company v. Her Majesty's Treasury and o., 28 March 2017, C-72/15, para. 166.
[650] CJEU, PJSC Rosneft Oil Company v. Her Majesty's Treasury and o., 28 March 2017, C-72/15, para. 167-168. 'Further, the case-law of the Court states that the principle of nulla poena sine lege certa cannot be interpreted as prohibiting the gradual clarification of rules of criminal liability by means of interpretations in the case-law, provided that those interpretations are reasonably foreseeable (see, to that effect, judgment of 28 June 2005, Dansk Rørindustri and Others v Commission, C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraphs 217 and 218). 168 Accordingly, contrary to what is claimed by Rosneft, the fact that the terms used in Regulation No 833/2014 may be subject to clarification, gradually and subsequently, by the Court does not prevent a Member State from establishing penalties, on the basis of Article 8(1) of that regulation, in order to ensure its effective implementation'.

CJEU did not hold a violation of the principle of precision, clarity and foreseeability in the case of the European Arrest Warrant, it affirmed relevant principles with regards to *lex certa*, as requested by the appellants. *Vis-à-vis* the nature of the principle as a general principle of law, enshrined in international treaties,

> '[t]his principle implies that legislation must define clearly offences and the penalties which they attract. That condition is met in the case where the individual concerned is in a position, on the basis of the wording of the relevant provision and with the help of the interpretative assistance given by the courts, to know which acts or omissions will make him criminally liable […]'.[651]

The notion of foreseeability was further applied in the context of the European Arrest Warrant. With regards to the legal basis of this safeguard in this procedural framework, Art 49 ECHR was not directly triggered. The CJEU could nevertheless apply foreseeability as a requirement of a lawful restriction to the right to liberty and security enshrined in Art. 6 CFREU and corresponding to Art. 5 ECHR. Since the definition of law and qualities of the law in Art. 5 ECHR, which speaks of 'lawful' (thus correspondently in Art. 6 CFREU) is equivalent to the one of Art. 7 ECHR, the findings of the CJEU are still relevant in the domain of *nullum crimen*.[652]

Therefore, Art. 5 ECHR must be taken into account as a minimum threshold with regards to the protection of the right to liberty and security in the CFREU.[653] EU law came into question because Dutch provisions on the terms to maintain in custody a suspect pending his surrender in execution of a European Arrest Warrant were inconsistent with the Framework Decision. Dutch courts had tried a consistent interpretation of Dutch legislation in order to adapt it to EU provisions, but the result was a conflicting and chaotic framework that caused a prolongation of the terms of custody (Art. 12 of the Framework Decision) for more than 90 days.[654] Therefore, the CJEU had

[651] CJEU, Advocaten voor de Wereld, 3 May 2007, C-303/05, para. 50. See remarks by S. MANACORDA, *La deroga alla doppia punibilità nel Mandato di Arresto Europeo e il principio di legalità,* in *Cass. pen.*, p. 4346 ff., 4351 f.

[652] The lawfulness assessment under Art. 5 ECHR and Art. 6 CFREU plays a role in assessing Art. 23(3) of the Framework Decision as well. In particular, Advocate General Bobek finds that detention cannot be lawfully continued if its legal basis (a combination of provisions of the Framework Decision and implementing national provisions) does not comply with the requirements of accessibility, precision and foreseeability. Opinion of Advocate General Bobek, Minister for Justice and Equality v. Tomas Vilkas, 27 October 2016, C-640/15, para. 53. Furthermore, he stresses the principle of foreseeability with regards to double criminality in Opinion of Advocate General Bobek, Grundza, 28 July 2016, C-289/15, para. 31.

[653] CJEU, TC, 12 February 2019, C-492/18 PPU, para. 57. See *above*, Chapter 2, para. 3.2.

[654] The Framework Decision requires not to release the person if there is a risk of absconding and all other possible necessary measures are not in the place to prevent it. According to Art. 12 of the Framework Decision, it is the executing State's decision to keep the person in detention, as long as it ensures his or her surrender.

to assess whether the consistent interpretation of Dutch law with the Framework Decision, determining a synchronic conflict in case-law, and imposing a longer period of custody, was in breach the principle of legality with regards to infringements in the right to liberty and security pursuant to Art. 6 CFREU.

In the assessment of the lawfulness of the legal basis of the prolonged custody, the CJEU makes reference to the ECHR standards of clarity, predictability and accessibility.[655] The Court directly assesses clarity and predictability (i.e. foreseeability) of the relevant legal framework. Whereas the Framework Decision, Dutch provisions, and the obligation to consistent interpretation were clear and predictable, Dutch case-law interpreting Dutch legislation in conformity with EU law was not, since different orientations in Dutch courts would possibly produce divergent results.[656] Therefore, not only the uncertain national legal framework did not ensure compliance with the Framework Decision, but the synchronic conflicting interpretations within national courts were in breach of the obligation to respect fundamental rights enshrined in Art. 1 of the Framework Decision.[657]

The breach of the principle of foreseeability on the basis of synchronic conflicts within national courts determined the following interpretation of Art. 6 CFREU, precluding

> 'national case-law which allows the requested person to be kept in detention beyond that 90-day period, on the basis of an interpretation of that national provision according to which that period is suspended when the executing judicial authority decides to refer a question to the Court of Justice for a preliminary ruling, or to await the reply to a request for a preliminary ruling made by another executing judicial authority, or to postpone the decision on surrender on the ground that there could be, in the issuing Member State, a real risk of inhuman or degrading detention conditions, in so far as that case-law does not ensure that that national provision is interpreted in conformity with Framework Decision 2002/584 and entails variations that could result in different periods of continued detention'.[658]

5. Direct and indirect role of legality and foreseeability in EU legislation.

The principle of legality in criminal law and the general principle of legal certainty play a role in EU legislation as well. Especially after the entry into force of the Treaty of Lisbon, Art. 49 CFREU addresses all institutions of the EU and the Member States when implementing EU law. Nevertheless, as already said, non-retroactivity and foreseeability were already general principles of EU law thanks to the CJEU jurisprudence. Therefore,

[655] CJEU, TC, 12 February 2019, C-492/18 PPU, para. 60. See the quoted CJEU, Al Chodor, 15 March 2017, C-528/15.
[656] CJEU, TC, 12 February 2019, C-492/18 PPU, para. 66-71.
[657] CJEU, TC, 12 February 2019, C-492/18 PPU, para. 74.
[658] CJEU, TC, 12 February 2019, C-492/18 PPU, para. 77.

both the EU legislator and the national legislative organs are bound by *nullum crimen* when issuing secondary law acts relevant in the criminal matter. It goes without saying that in this case the certainty requirements would be applied to written law, thus not answering the question of the relationship with case-law.

5.1. Direct role of precision and foreseeability in EU criminal law legislation: a false friend.

In areas subject to harmonisation, the EU has indirect competence in issuing legislation in criminal matters: as far as substantive criminal law is concerned, Art. 83(1) and (2) TFEU provides for the possibility to issue Directives in the areas listed in paragraph (1) or in the harmonisation areas if it is essential to ensure the implementation of a Union's policy in paragraph (2).[659] Therefore, the EU obliges the States to ensure the results requested in the Directive, leaving them margin as far as forms and methods are concerned. As a consequence, there is a debate whether the EU legislator is bound by *nullum crimen*. According to some, the compliance with the principle of legality is demanded only to national legislative organs when implementing the Directive,[660] while others believe that the EU legislative procedure shall ensure *nullum crimen* already in the wording of the Directive. In particular, despite the necessary vagueness of EU instruments aimed at leaving the Member States room to maneuver, EU legislation shall comply with the principle of *lex certa*. The less margin of appreciation the States have in the implementation, the more EU instruments shall ensure the principle of legality.[661] Moreover, Art. 83(3) TFEU foresees the possibility to apply the emergency brake mechanism: if a State considers that the draft directive would affect fundamental aspects of its criminal justice system it may request that the draft is referred to the European Council. The activation of the emergency brake is interpreted to the effect that the principle of non-retroactivity and *lex certa* be part of the possible fundamental aspects of the national criminal system, together with culpability principle, ultima-ratio principle, theory of legal goods etc.[662]

[659] B. HECKER, *Europäisches Strafrecht*, Berlin-Heidelberg, 2015, p. 286 ff.
[660] Advocate General Kokott believes Directives shall not comply with the requirements of *lex certa*, which the legislator is in charge of. Opinion of Advocate General Kokott, The International Association of Independent Tanker Owners and Others, 20 November 2007, C-308/06, para. 143-144.
[661] EUROPEAN CRIMINAL POLICY INITIATIVE, *A Manifesto on European Criminal Policy*, in *ZIS*, 12, 2009, p. 708 and H. SATZGER, *Le principe de légalité*, in G. GIUDICELLI-DELAGE, C. LAZERGES (eds.), *Le droit pénal de l'Union Européenne au lendemain du Traité de Lisbonne*, Paris, 2012, p. 91.
[662] B. HECKER, *Europäisches Strafrecht*, cit., p. 298.

In the domains where the EU could have direct competence, i.e. where the EU could introduce supranational provisions for example through Regulations, the EU legislator would have to directly ensure the respect of *nullum crimen*.[663] Although it is still debated, some see Art. 325 TFEU as a possible legal basis for a direct competence of the EU (in providing for criminal sanctions in order to protect the financial interests of the Union).[664] In particular, the possible legal basis could be Art. 325(4) TFEU, which rules that the European Parliament and the Council 'shall adopt the necessary measures in the fields of the prevention of and fight against fraud affecting the financial interests of the Union'.[665] Despite the possible direct competence, the influence of the obligation for the States to protect EU interests also through criminal sanctions (assimilation) nevertheless determines a possible questioning of its compliance with the principle of legality (Art. 325 (2) TFEU).[666]

Especially in the case of harmonisation, every possible concern with regards to legality would transit through national implementation provisions, even though some relevant cases with regards to the Directive came into question, as it will be explained in the following.

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[663] H. SATZGER, *Le principe de légalité*, cit., p. 90.

[664] The protection of the financial interests of the Union has specific characteristics. The obligations for the State come directly from the principle of loyalty according to Art. 4(3) TEU, differ from the criminal competences of Artt. 82 e 83 TFEU and are not subject to the so-called emergency brake. Following scholars consider Art. 325 TFEU as a possible legal basis for direct criminal law competence: A. KLIP, *European Criminal Law. An Integrative Approach*, Cambridge, 2016, p. 185; H. SATZGER, *International and European Criminal Law*, München, 2012, p. 81-82; with regards to offences against EU financial interests Art. 325 is *lex specialis*, and grounds a competence to issue regulations in connection with Art. 86 TFEU, L. PICOTTI, *Le basi giuridiche per l'introduzione di norme penali comuni relative ai reati oggetto di competenza della Procura europea*, in G. GRASSO, G. ILLUMINATI, R. SICURELLA, S. ALLEGREZZA (eds.), *Le sfide dell'attuazione di una Procura Europea: definizione di regole comuni e loro impatto sugli ordinamenti interni*, Milano, 2013, p. 88 ff., p. 102 ff. Scholars criticise the extension of the emergency brake outside Art. 83 TFEU, in order not to confound harmonisation areas with areas where the EU is entitled to create supranational law. Art. 325 TFEU is therefore the core of EU Criminal Law for R. SICURELLA, *Diritto penale e competenze dell'Unione europea*, Milano, 2005, p. 245 ff.

[665] Apart from the possible issuing of regulations through Art. 325 TFEU, Art. 325(4) TFEU is not even unanimously considered a legal basis for directives concerning criminal law harmonisation. See G. GRASSO, *Il Trattato di Lisbona e le nuove competenze penali dell'Unione europea*, in M. BERTOLINO, L. EUSEBI, G. FORTI (eds.), *Studi in onore di Mario Romano*, Napoli, 2011, p. 2347 ff. The subject became particularly problematic in issuing the so called PIF Directive (Directive 2017/1371 of the European Parliament and the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law), which in the end was issued with Art. 83(2) TFEU as legal basis. With regards to the Proposal for the Directive (11.07.2012, COM (2012)), which had chosen Art. 325(4) TFEU as legal basis, some scholars excluded that the latter provision could be a possible legal basis for directives in criminal law, identifying rather Art. 83(2) TFEU for this purpose: S. PEERS, *EU Justice and Home Affairs Law*, Oxford, 2011, p. 765-766; on the other hand, the modification of the legal basis of the PIF Directive from Art. 325(4) TFEU to Art. 83(2) TFEU was criticised by J. VERVAELE, *European Criminal Justice in the Post-Lisbon Area of Freedom, Security and Justice*, Napoli, 2014, p. 49.

[666] B. HECKER, *Europäisches Strafrecht*, cit., p. 229

Apart from the case of harmonising criminal provisions or (hypothetical) supranational criminal provisions, the possible direct effects of a Directive could trigger the scope of application of the principle of legality, for example indirectly aggravating or determining punishment; in the same sense, the duty of consistent interpretation with EU law could aggravate or determine punishment in the criminal matters.

5.2. Limited direct role of legality and foreseeability in Directives.

With regards to the role of the principle of legality and foreseeability of the provisions of a Directive, the following case is a good, even though isolated, example of the possible problems arising. Although the principle of legality here refers to written law (the Directive) it is still interesting to briefly address it in order to draw a complete framework of the subject matter.

In *Intertanko,* the Court had to judge on the plea alleging that the concept of 'serious negligence' within art. 4 of Directive 2005/35/EC, which imposed the Member States the introduction of penalties for violations of the provisions on ship-source pollution, violated the principle of legal certainty, namely the principle *nullum crimen sine lege* with respect to clarity and precision. The Court affirmed that the principle *nullum crimen sine lege* is a general principle derived from the common constitutional traditions and an expression of the general principle of legal certainty, that must be complied with by the Directives (recalling its precedent in *Advocaten voor de Wereld*). The obligations enshrining from these principles are those affirmed by the ECtHR as well: that the addressed shall comprehend, from the wording of the provision and if necessary with appropriate legal advice, which acts or omissions will make him criminally liable.[667] The Court considers the definition given in most Member States to negligence and serious negligence as sufficiently clarifying the concepts. Nevertheless, the problem of the definiteness of Directives obligating the States to impose penalties is a 'false friend' since Directives need to be transposed into national law. As a consequence, the actual definition of infringements, relevant for a legality assessment, is that of the rules adopted by the States to comply with the Directive.[668]

[667] CJEU, Intertanko and others v. the Secretary of State for Transport, 3 June 2008, C-308/06, para. 69-71.
[668] CJEU, Intertanko and others v. the Secretary of State for Transport, 3 June 2008, C-308/06, para. 72-80.

5.3. Indirect role: limitation to the duty of consistent interpretation and to the direct effects of Directives.

In the following, the investigation will focus on the possible indirect role of the principle of legality and foreseeability with regards to EU legislation. Since national judges have a duty to interpret national law consistently with EU law, the principle of legality and foreseeability could represent a limit to this duty. In particular, national judges have a duty to consistent interpretation with directives pursuant to Art. 4 (2) and (3) TEU, in connection with Art. 288(3) TFEU. Moreover, since a directive could have direct effects in national legal orders (if not transposed, unconditional and sufficiently precise), the principle of legality and foreseeability could play a role in limiting these effects.

This possible role of legality was confirmed in the leading case *Criminal Proceedings against X*. The CJEU affirmed the applicability of the principle of legality and legal certainty as a general principle enshrined in the common constitutional traditions and in Art. 7 ECHR. Its validity also applies to the national judge, when he interprets national law adopted to implement a Directive in light of the object and purpose thereof.[669] According to the Court, legal certainty, as a general principle of EU law, entails the *lex certa* principle and prohibition of analogy and stands in the way of a consistent interpretation with a directive that would be in breach of those principles.[670] The Court pointed out:

> 'More specifically, in a case such as that in the main proceedings, which concerns the extent of liability in criminal law arising under legislation adopted for the specific purpose of implementing a directive, the principle that a provision of the criminal law may not be applied extensively to the detriment of the defendant, which is the corollary of the principle of legality in relation to crime and punishment and more generally of the principle of legal certainty, precludes bringing criminal proceedings in respect of conduct not clearly defined as culpable by law. That principle, which is one of the general legal principles underlying the constitutional traditions common to the Member States, has also been enshrined in various international treaties, in particular in Article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms (see, inter alia, the judgments of the European Court of Human Rights in Kokkinakis v Greece, 25 May 1993, Series A, No 260-

[669] CJEU, Criminal proceedings against X, 12 December 1996, C-74/95 and C-129/95, para. 22,26. The case concerned the criminal prosecution for the violation of the provisions included in the *D. lgs.*, 19 September 1994, no. 626, which implemented Directive 90/270/EEC, and was interpreted by the Prosecutor according to it.

[670] CJEU, Criminal proceedings against X, 12 December 1996, C-74/95 and C-129/95, see B. HECKER, *Europäisches Strafrecht*, cit., p. 354 and C. SCHRÖDER, *Europäische Richtlinien und deutsches Strafrecht: eine Untersuchung über den Einfluß europäischer Richtlinien gemäß Art. 249 Abs. 3 EGV auf das deutsche Strafrecht*, Berlin, 2002, p. 386.

A, paragraph 52, and in S.W. v United Kingdom and C.R. v United Kingdom, 22 November 1995, Series A, No 335-B, paragraph 35, and No 335-C, paragraph 33)'.[671]

In the case of *Kolpinghuis Nijmegen* the CJEU assessed both the possibility to directly apply a non-transposed EU Directive with *in malam partem* effects and, if not, the possible consistent interpretation of national law with EU law (the Directive) even though the effects would be *in malam partem*. With regards to the direct effects *in malam partem* of a non-transposed directive, the Court affirms its well-established principle to the effect that a directive cannot impose obligations on the individual.[672]

In addition, the obligation imposed on national judges to interpret national law in light of the wording and purpose of the Directive[673] is not boundless: since the general principles of law limit consistent interpretation, the principles of legal certainty and non-retroactivity shall be taken into account when evaluating the effects of consistent interpretation. In fact, '[…] a directive cannot, of itself and independently of a national law adopted by a member state for its implementation, have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of the provisions of that directive'.[674]

These principles were further reaffirmed in case of a mistake in the transposition of a directive, when the CJEU restated the impossibility to interpret national law in accordance with EU law 'more especially' where it has the effect of determining or aggravating the criminal liability of a person.[675]

Some scholars have described a consistent interpretation with an EU Directive resulting in determining or aggravating criminal liability as something different than a consistent interpretation with EU law only imposing a detrimental interpretation in national criminal law within the limits of domestic interpretive criteria (i.e. extensive interpretation). According to these scholars, the CJEU has excluded the possibility to determine criminal liability on the basis of consistent interpretation with a non-transposed directive, but not that a consistent interpretation necessarily outlaws an interpretation that, *vis-à-vis* national interpretive criteria and constitutional law, determines an overruling

[671] CJEU, Criminal proceedings against X, 12 December 1996, C-74/95 and C-129/95, para. 25.
[672] CJEU, Kolpinghuis Nijmegen, 8 October 1987, C-80/86, para. 9.
[673] CJEU, Kolpinghuis Nijmegen, 8 October 1987, C-80/86, para. 12.
[674] CJEU, Kolpinghuis Nijmegen, 8 October 1987, C-80/86, para. 13. On the point see H. SATZGER, *Die Europäisierung des Strafrechts: eine Untersuchung zum Einfluß des Europäischen Gemeinschaftsrechts auf das deutsche Strafrecht*, Köln, 2001, p. 538 ff. and B. HECKER, *Europäisches Strafrecht*, cit., p. 351.
[675] CJEU, Criminal proceedings against Luciano Arcaro, 26 September 1996, C-168/95, para. 42.

with reference to the previously established case-law. Therefore, such an interpretation would not be in breach of the principles of legal certainty and non-retroactivity. In this perspective, the principle of legality at national level (i.e. Art. 103 II GG in the case) is not extended to case-law. consequently, the legitimate expectations of the individual would be only limited to the application of statutory law, and not to the application of the established interpretive practice of the national tribunals. In the event of an unforeseeable interpretation, the suggested solution is the application of the mistake of law.[676]

German scholars rely on the BGH positive orientations on a possible extensive interpretation consistent with a directive: i.e. in the *Pyrolyse* case, the BGH admitted an extensive definition of the element of the offence 'waste' (pursuant to section 326 I StGB) according to EU directives.[677] Moreover, the BGH has confirmed the duty to consistent interpretation in cases concerning market abuse through the so-called 'scalping'.[678] The BGH recently affirmed that consistent interpretation shall not only include those pieces of national legislation directly transposing the directive, but that the obligation falls on the whole national law, even if precedent or independent from the directive.[679]

It can be opposed that the CJEU case-law excludes both interpretations determining *and* aggravating criminal liability, thus it seems appropriate to exclude such an interpretation. First, it is not doubtless that Art. 103 II GG and the principle of legality have no connection with case-law. Moreover, the principles of foreseeability that are valid in EU law seem to hinder unforeseeable interpretations. On this point, it is interesting to analyse the principles affirmed by the CJEU in the *Taricco* case, especially after the referral of the Italian Constitutional Court.

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[676] B. HECKER, *Europäisches Strafrecht*, cit., p. 357 f.; ID., *Die richtlinienkonforme und die verfassungskonforme Auslegung im Strafrecht*, in *JuS*, 2014, p. 389; H. SATZGER, *Die Europäisierung des Strafrechts*, cit., p. 557.

[677] BGH, 26.02.1991 - 5 StR 444/90, in BGHSt 37, p. 333, 334, 336; with a substantially positive commentary by H. FRANZHEIM, C. KREß, *Die Bedeutung der EWG-Richtlinien über Abfälle für den strafrechtlichen Abfallbegriff – Zugleich eine Besprechung der Entscheidung des BGH vom 26.2.1991 – 5 StR 444/90*, in *JR*, 1991, p. 402-406; see K. AMBOS, *Internationales Strafrecht: Strafanwendungsrecht, Völkerstrafrecht, europäisches Strafrecht, Rechtshilfe*, München, 2018, p. 602.

[678] BGH, 06.11.2003 - 1 StR 24/03 (LG Stuttgart), in *NStZ*, 2004, p. 285 ff., further on 'scalping' and its possible contrast with Art. 103 II GG See J. VOGEL, *Scalping als Kurs- und Marktpreismanipulation Besprechung von BGH, Urteil vom 6. 11. 2003 - 1 StR 24/03*, in *NStW*, 2004, p. 252 ff., 255.

[679] BGH, 5.3.2014 – 2 StR 616/12, in *NJW*, 2014, p. 2595, 2597, with commentary by B. VON HEINTSCHEL-HEINEGG, *In die Kostenfalle getappt – Betreiben von „Abo-Fallen" im Internet ist betrügerisch*, in *JA*, 2014, p. 790 f. and B. HECKER, *Der BGH äußert sich erstmals zur Relevanz des europäischen Verbraucherleitbildes im Anwendungsfeld des Betrugstatbestands*, in *JuS*, 2014, p. 1043 ff.

6. The principle of foreseeability and EU primary law: the Taricco saga.

The use of the European principle of legality and in particular the sub-principle of foreseeability had backfire effects on the interpretation of the CJEU in the so-called *Taricco* case.

In the preliminary ruling *Taricco and others*, the CJEU affirmed that the obligations enshrining from Art. 325 (1) and (2) TFEU (primary law) imposed the Member State to disapply national legislation (namely Art. 160 and Art. 161 c.p.) whose effect prevented the Member State to comply with Art. 325 (1) and (2) TFUE. In particular the Italian rules on limitation periods of criminal offences provided that the interruption of criminal proceedings concerning serious fraud in relation to value added tax (VAT) had the effect of extending the limitation period by only a quarter of its initial duration. Therefore, proceedings for frauds to VAT were concluded with an acquittal for the intervention of statutory limitation. As a consequence, the CJEU affirmed that, if national judges found that those national rules prevented 'the imposition of effective and dissuasive penalties in a significant number of cases of serious fraud affecting the financial interests of the European Union, or provides for longer limitation periods in respect of cases of fraud affecting the financial interests of the Member State concerned than in respect of those affecting the financial interests of the European Union' in breach of Art. 325 (1) and (2) TFEU, national courts had to give full effect to Article 325(1) and (2) TFEU, disapplying national provisions to that effect as well.[680]

The hypothetical application of the so-called *Taricco* rule raised several criticisms by scholars and judges, especially under the perspective of the principle of legality. At first, this aspect was disregarded by the CJEU, since Art. 49 CFREU was considered not in contrast with the interpretation offered in the preliminary ruling, since the regulation of the statute of limitations falls under procedural law and therefore not under the scope of *nullum crimen*.[681] On the contrary, the great part of Italian scholars and the Constitutional Court consider time limitation of criminal offences part of substantive law and therefore

[680] CJEU, Ivo Taricco and o., 9 September 2015, C-105/14, para. 58.

[681] A minority scholarly opinion agreed with the CJEU on this point, as limitation period is considered an issue of procedural law and, even if it were substantive law, it would concern a profile not infringing the individual's fundamental rights. F. VIGANÒ, *Disapplicare le norme vigenti sulla prescrizione delle frodi in materia di IVA?*, in *Dir. pen. cont*., 14.09.2015, p. 10 f., 14 ff.; ID., *Il caso Taricco davanti alla Corte Costituzionale: qualche riflessione sul merito delle questioni e sulla reale posta in gioco*, in A. BERNARDI (ed.), *I controlimiti. Primato delle norme europee e difesa dei principi costituzionali*, Napoli, 2016, p. 256 ff.

subject to the principle of legality (and in particular non-retroactivity and legal certainty).[682]

Although here it is useful to focus on the criticism based on foreseeability, Italian scholars relied on several other points. First, a possible disapplication of the maximum term for limitation (Art. 160 *ult. co.* and 161 c.p.) would result in a retroactive application of a detrimental criminal rule. All those who committed relevant offences before the *Taricco* judgement, would be charged with the adverse effects of a retroactive interpretation.[683] Second, several scholars pointed out that statutory reservation would be violated if the criminal judge were allowed to make criminal policy choices in deciding when to disapply national law in the wide discretion margin left by the *Taricco* rule.[684] Third, the *Taricco* rule violates *lex certa* principle, since scholars highlight the uncertain scope of application of its formulation (significant number of cases, serious fraud affecting the financial interests of the European Union etc.), which would also lead to judicial discretion in assessing general preventive objectives.[685] Under this perspective, several voices raised doubts in respect of the effective subjection of the judge to the law (art. 101 Cost.) in this scenario.[686] In addition, authoritative doctrine has found a possible

[682] In Italian scholarship see, as representative opinion considering limitation periods substantive law, G. FIANDACA, E. MUSCO, *Diritto penale. Parte generale*, cit., p. 830 ff. With an almost isolated position, the so-called Milan school considers limitation period part of procedural law and therefore subject to the *tempus regit actum* rule, G. MARINUCCI, E. DOLCINI, G.L. GATTA, *Manuale di diritto penale*, Milano, 2019, p. 122 (specifying that in case limitation period is already expired, the new unfavourable law shall not apply. It applies only if the term for the statute of limitation is not yet expired). This interpretation relies on the distance of the provision ruling limitation periods from the *Bestimmungsnorm*, as explained by V. VALENTINI, *La ricombinazione genica della legalità penale:* bio-technological strengthening *o manipolazione autodistruttiva?*, in *Dir. pen. cont*., 20.06.2016, p. 13. The Italian Constitutional Court has acknowledged the provisions of limitation period as substantive criminal law in several occasions: among others, Corte Cost., 23 November 2006, no. 394, para. 6.1; Corte Cost., 1 August 2008, no. 324, para. 5; Corte Cost., 28 May 2014, no. 143.

[683] See E. LUPO, *La* primauté *del diritto dell'Unione e l'ordinamento penale nazionale*, in *Riv. trim. dir. pen. cont.*, 1, 2016, p. 225. Conversely, the CJEU, following Advocate General Kokott's opinion, had dismissed the question of the possible violation of Art. 49 CFREU.

[684] *Ex multis* F. ROSSI, *La sentenza* Taricco *della Corte di Giustizia e il problema degli obblighi di disapplicazione* in malam partem *della normativa penale interna per contrasto con il diritto UE*, in *Dir. pen. proc*., 2015, p. 1568; L. EUSEBI, *Nemmeno la Corte di Giustizia dell'Unione europea può erigere il giudice a legislatore*, in *Riv. trim. dir. pen. cont*., 2, 2015, p. 42, V. VALENTINI, *La ricombinazione genica della legalità penale*, cit., p. 5 ff.

[685] V. MANES, *La "svolta" Taricco e la potenziale "sovversione di sistema": le ragioni dei controlimiti*, in A. BERNARDI (ed.), *I controlimiti*, cit., p. 203 ff. Criticising the general preventive objectives, L. EUSEBI, *Nemmeno la Corte di Giustizia dell'Unione europea*, cit., p. 42; Manacorda tries to offer an interpretation *in abstracto* and *in concreto* of the concept 'significant number of cases of serious fraud', both possibly referred to the whole Italian judicial system or to more specific areas i.e. a great number of VAT frauds within a criminal association offence, S. MANACORDA, *La prescrizione delle frodi gravi in materia di IVA: note minime sulla sentenza Taricco*, in *Arch. pen*., 3, 2015, p. 869.

[686] V. MANES, *La "svolta" Taricco e la potenziale "sovversione di sistema"*, cit., p. 206 f.; G. RICCARDI, *"Patti chiari, amicizia lunga". La Corte costituzionale tenta il dialogo nel caso Taricco esibendo l'arma dei controlimiti*, in A. BERNARDI, C. CUPELLI (eds.), *Il caso Taricco e il dialogo tra le Corti*, cit., p. 361; C.

violation of the culpability principle as well, since the *Taricco* rule would impose a penalty based on general preventive rationales, which would disregard the limits of individual criminal liability of the offender and would give precedence to law enforcement over culpability.[687]

In the end, the disapplication of national law pursuant to the CJEU judgement would result in a disapplication *in malam partem*, due to the pre-eminence of EU primary law. Several scholars expressed doubts on this point,[688] since the CJEU had previously excluded the possibility to attribute direct effects to a Directive (EU secondary law) that would result in *in malam partem* effects for the individual in the case of *Berlusconi and others*.[689] Others consider the two questions separately and admitted *in malam partem* effects due to disapplication according to EU primary law.[690]

When the Italian Constitutional Court, challenged with the possible constitutional legitimacy of the said provision, referred the question to the CJEU again, following points were relevant in its assessment. The Constitutional Court considered the interpretive rule derived from the CJEU decision as part of the national regulation on statutory limitation. Therefore, even though the rule was judge-made, it had to comply with the principle *nullum crimen sine lege* and in particular the principle of legal certainty.[691] The Court asked whether the foreseeability of the application of EU Law, and in particular the interpretation of Art. 325 (1) and (2) TFEU, would have imposed the judge to disapply art. 160 *ult. co*. and art. 161 c.p.[692] The so-called *Taricco* rule was not foreseeable by the individual who had committed the offence before its affirmation by the CJEU. In this respect, foreseeability of the judicial interpretation is seen as part of the assessment of

SOTIS, *"Tra Antigone e Creonte io sto con Porzia". Riflessioni su Corte Costituzionale 24 del 2017 (caso* Taricco*), ibidem*, p. 449. Against, L. PICOTTI, *Riflessioni sul caso Taricco. Dalla "virtuosa indignazione" al rilancio del diritto penale europeo*, in A. BERNARDI (ed.), *I controlimiti*, cit., p. 465. See Cass. pen., III, ord. 30 March 2016, para. 4.7.

687 D. PULITANÒ, *La posta in gioco nella decisione della Corte costituzionale sulla sentenza Taricco*, in *Riv. trim. dir. pen. cont*., 1, 2016, p. 233.

688 C. AMALFITANO, *Da una impunità di fatto a una imprescrittibilità di fatto della frode in materia di imposta sul valore aggiunto?*, in *Quaderni di SIDIBlog*, 2, 2015, p. 570-572; V. MANES, *La "svolta" Taricco e la potenziale "sovversione di sistema"*, cit., p. 315.

689 CGUE, Berlusconi and o., C-387/02, 391/02 e 403/02, para. 73. See B. HECKER, *Europäisches Strafrecht*, Berlin – Heidelberg, 2015, p. 310; G. INSOLERA, V. MANES, *La sentenza della Corte di Giustizia sul "falso in bilancio": un epilogo deludente?*, in *Cass. pen*., 2005, 2768 ff.

690 L. PICOTTI, *Riflessioni sul caso Taricco*, cit., p. 452.

691 Corte Cost., ord., 26 January 2017, no. 24, para. 5.

692 Corte Cost., ord., 26 January 2017, no. 24, para. 5.

legality, and of *lex certa* in particular.[693] The Court assesses its consistency with the foreseeability requirements imposed by Art. 7 ECHR.[694] This context was clearly at the borders with retroactivity, since the new rule possibly introduced a detrimental legal framework which was, according to the findings of the CJEU, to be applied retroactively.[695] The Constitutional Court however concluded, without further details, for the unforeseeability of the EU judge-made rule imposing the disapplication of art. 160 *ult. co*. and 161 c.p. in cases of impunity for serious tax frauds affecting the Financial interests of the European Union in a significant number of cases. Moreover, the Constitutional Court considered that legal certainty was further violated by the *Taricco* rule in its effects, that gave the national judge the power to substantially determine the time limitation of those criminal offences, thus making criminal policy choices and infringing against the principles of statutory limitation, legal certainty and separation of powers.[696] In the following, the Court invoked the possible application of *counter-limits doctrine* and therefore the possible declaration of constitutional illegitimacy of the statute ratifying the European Treaties.[697] Without further inquiring on the preliminary questions referred to the CJEU, it is interesting to investigate how the CJEU responded on the specific aspect of foreseeability.

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[693] Castronuovo highlights the attention of the Constitutional Court for foreseeability to assess judicial rules. D. CASTRONUOVO, *Tranelli del linguaggio e* "nullum crimen": *il problema delle clausole generali nel diritto penale*, in *La legislazione penale*, 2017, p. 41. According to Sotis, the Constitutional Court here applied foreseeability as a fairness obligation, involving every element that influences punishability in order to include statutes of limitation under its scope. C. SOTIS, *"Ragionevoli prevedibilità" e giurisprudenza della Corte Edu*, in *Questione Giustizia*, 4, 2018, p. 75 ff.

[694] Critical remarks on the Constitutional Court's reference to ECtHR case-law in the domain of statute of limitations are to be found in R. SICURELLA, *Oltre la* vexata quaestio *della natura della prescrizione. L'*actio finium regundorum *della Consulta nell'ordinanza* Taricco *tra sovranismo (strisciante) e richiamo (palese) al rispetto dei ruoli*, in A. BERNARDI, C. CUPELLI (eds.), *Il caso Taricco e il dialogo tra le Corti*, cit., p. 428.

[695] Advocate General Kokott, in her conclusions on the *Taricco* case, considered a possible violation of Art. 49 CFREU under the perspective of retroactivity of the detrimental legal framework possibly enshrining from the disapplication of the national legislation. Opinion of Advocate General Kokott, Ivo Taricco and o., 30 April 2015, C-105/14, para. 114-115.

[696] Corte Cost., ord., 26 January 2017, no. 24, para. 5. Scholarship is mainly critical on this point, as the Court did not refer to statutory limitation and to the EU legitimate co-determination of the requirements of criminal liability, F. VIGANÒ, *Le parole e i silenzi. Osservazioni sull'ordinanza n. 24/2017 della Corte costituzionale sul caso Taricco*, in A. BERNARDI, C. CUPELLI (eds.), *Il caso Taricco e il dialogo tra le Corti*, cit., p. 484 ff. e V. MANES, *La Corte muove e, in tre mosse, dà scacco a "Taricco" (note minime sull'ordinanza n. 24 del 2017)*, *ibidem*, p. 212; A. BERNARDI, *L'ordinanza* Taricco *della Corte costituzionale alla prova della pareidòlia*, in *Riv. it. dir. proc. pen*, 2017, p. 68.

[697] Corte Cost., ord., 26 January 2017, no. 24, para. 6-7. Authoritative scholarship goes even further, linking the principle of legality with the principle of culpability D. PULITANÒ, *Ragioni della legalità. A proposito di Corte Cost. n. 24/2017*, in *Riv. trim. dir. pen. cont*., 4, 2017, p. 111. The Constitutional Court distinguishes from the CJEU *Melloni* case with regards to the effects of the *counter-limits* in this case. In Melloni the unity of EU law was at stake, while in the present case constitutional obstacles were. Against, A. BERNARDI, *L'ordinanza* Taricco *della Corte costituzionale*, cit., p. 75 ff.

In the following preliminary ruling *M.A.S. and M.B.*, the CJEU considered whether Art. 325(1) and (2) TFEU was to be interpreted as imposing the Member State to disapply national provisions on limitation period in the cases described in the *Taricco* judgement, even though the application of this judicial rule would cause an infringement in the legality principle either under the perspective of precision or under the one of non-retroactivity.[698]

The CJEU, after having reaffirmed its interpretation of Art. 325 (1) and (2) TFEU, holds that the principles of foreseeability, precision and non-retroactivity as enshrined in Art. 49 CFREU limit the application of Art. 325 TFEU. In particular, since Art. 49 CFREU has the same meaning of Art. 7 ECHR, it must be interpreted accordingly. In particular, the Court acknowledges the qualities of the law, accessibility and foreseeability, and the requirement of precision, that imposes the State to grant the individual the knowledge of criminal provisions that may imply his criminal liability, as well as the principle of non-retroactivity. Therefore, disapplication is excluded if it breaches *nullum crimen*, and if disapplying national law in respect of those who committed the offence before the intervention of the *Taricco* rule means violating the principles of foreseeability, non-retroactivity and precision, then national judges shall not disapply. As a result of the application of the *Taricco* rule, '[t]hose persons could thus be made subject, retroactively, to conditions of criminal liability that were stricter than those in force at the time the infringement was committed'.[699] Therefore retroactivity and foreseeability are assessed together again, as testified by the subsequent judgement of the Italian Constitutional Court, that spoke of non-retroactivity of the *Taricco* rule for those who committed the offence before the judgement.[700]

In conclusion, the Constitutional Court in judgement no. 115/2018 nevertheless affirmed that the principle of legal certainty, defined by the CJEU as foreseeability, has a particular meaning in Italy, since it requires the precision of the written provision that *a priori* hinders the application of the *Taricco* rule, if the legislative framework remains uncertain.[701] The foreseeability of the introduction of the *Taricco* rule was *per se* excluded, since it was a judicial interpretation and not derivable from the wording of the

[698] CJEU, M.A.S. and M.B., 5 December 2017, C-42/17, para. 29.
[699] CJEU, M.A.S. and M.B., 5 December 2017, C-42/17, para. 60.
[700] Corte Cost., 31 May 2018, no. 115, para. 7.
[701] Corte Cost., 31 May 2018, no. 115, para. 5-11. The *Taricco* rule would violate both Art. 25 co. 2 Cost. and Art. 101 Cost.

law.[702] This peculiar evaluation of determinacy considers the foreseeability *ex ante* of a judicial rule, which must be already predictable from the wording of the provision it is meant to interpret.[703] In other words, the *Taricco* rule, according to the Constitutional Court, was not foreseeable even for those whose acts or omissions are subsequent to the CJEU judgement. Authoritative scholarship has criticised this peculiarly strict approach to *lex certa* (i.e. foreseeability), since *lex certa* does not hinder the development of judicial interpretation, but only imposes the judges to remain within the boundaries of the wording of the law. The Constitutional Court seems to require foreseeability not at the time the offence was committed, but rather at the time the respective provision entered into force.[704]

With regards to the determinacy (or foreseeability) of the *Taricco* rule, Art. 325 TFUE was not sufficiently determined as to suggest such a reading. The illegitimacy of the *Taricco* rule is such therefore for EU law as well.[705]

7. Conclusion.

Nullum crimen and the subprinciples enshrined in Art. 7 ECHR undoubtedly play a great role in the EU. Although the EU has not a direct competence in issuing criminal law legislation directly applicable in the Member States, the subprinciples of precision, foreseeability and non-retroactivity seem to be part of EU law and thus should be implemented in EU legislation. When the EU issues directives, *nullum crimen* plays a limited role with regards to the actual wording of the directive but has a great potential in the interpretation and implementation of the Directive. The respect for *nullum crimen* in judicial interpretation becomes an issue when Member States should ensure direct effect of a Directive, interpret national law consistently with it especially in case EU legislation has not properly been transposed. In these cases, the CJEU has acknowledged the prevalence of legality over the possibility that EU law could interpretively determine or aggravate criminal liability. Moreover, with regards to EU primary law (i.e. Art. 325 TFEU) direct application of EU primary law and consequential disapplication of national

[702] Corte Cost., 31 May 2018, no. 115, para. 12.
[703] M. DONINI, *Lettura critica di Corte Costituzionale n. 115/2018. La determinatezza* ante applicationem *e il vincolo costituzionale alla prescrizione sostanziale come controlimiti alla regola* Taricco, in *Riv. trim. dir. pen. cont.*, 2, 2018, p. 235.
[704] M. DONINI, *Lettura critica di Corte Costituzionale n. 115/2018,* cit., p. 235-236.
[705] Corte Cost., 31 May 2018, no. 115, para. 12.

law can be avoided when the judicial rule applying to the accused would be unforeseeable and therefore contrary both to the principle of legal certainty and retroactivity.

With regards to the sanctioning powers of the EU, although not properly issuing criminal sanctions (i.e. in competition law or in CFSP), the CJEU has applied the Strasbourg standards and, in particular, foreseeability. Assessing synchronic and diachronic foreseeability, the CJEU seems to use a quite low standard and to usually apply foreseeability in detriment of the applicants. The causes are mainly two: i) the focus on subjective criteria and, most of all, ii) the balance of *nullum crimen* with the effectiveness principle. The effectiveness principle aims at enforcing EU law in the Member States and at implementing its policies.[706] In criminal law or in areas related to sanctioning measures, effectiveness and the implementation of EU policies seem to be a slippery slope when fundamental rights are concerned, especially because in criminal law effectiveness would mean, apart from effective enforcement, deterrence and symbolic function.[707] This application of foreseeability should be seen as a negative example of its potential in terms of protection against State arbitrariness, since in these cases it has rather become an instrument of policy.

[706] The role of the principle of effectiveness has mainly an overcriminalisation effect in criminal law, although scholarship recognises de-criminalising effects as well. V. MITSILEGAS, *From overcriminalisation to decriminalisation. The many faces of effectiveness in European Criminal Law*, in *New Journal of European Criminal Law*, 5, 2014, p. 416 ff.
[707] See A. SUOMINEN, *Effectiveness and functionality of substantive EU criminal law*, in *New Journal of European Criminal Law*, 5, 2014, p. 403 ff.

V. CONCLUSIONS ON THE PRINCIPLE OF FORESEEABILITY

1. The principle of foreseeability as a possible integration of European and domestic legality.

The above-mentioned solutions, both objective and subjective, seem to be difficult to implement, considering the difficult integration between civil law legality and a common law perspective and the multi-faceted criticism analysed *above*. Therefore, other solutions may be investigated, trying to look for a more compatible perspective with a civil law legal order. The analysis of the German legal order, which finds its balance in *de lege lata* solutions, highlights the insufficiencies of the Italian legal framework, or at least its implementation in the Italian legal system. Moreover, the analysis of the application of European legality in EU law has shown not only its potential in view of a limitation of interpretive detrimental constructions but also the possible risks of applying foreseeability as a low standard aimed at ensuring effectiveness of policies.

Applying the so-called *principle of foreseeability* could represent a possible integration of the European and domestic legality and a solution to the problems that cannot be successfully solved with traditional dogmatic categories. Some scholars have defined it *foreseeability of judicial decisions*, others *foreseeability of the legal characterisation of the offence*. Although the Italian Constitutional Court does not explicitly recognise this principle, it has already referred to it. Moreover, the *Corte di Cassazione* has recently introduced the concept of foreseeability into its reasoning.[708] The following analysis will try to investigate the possible scope of application of the principle, its feasibility in relationship with constitutional principles and the possible additional protection in respect of domestic legality, bearing in mind the preservation of dogmatic categories.

2. Rationales and previous applications of the principle of foreseeability.

Introducing the principle of foreseeability means finding its rationales. The main rationale is the principle of legal certainty, as composed by precision and definiteness of the law, non-retroactivity, legitimate expectations, legal security. The principle of foreseeability will be considered only in the perspective of legal certainty with regards to case-law and the orientations of the highest courts. In this respect, legal certainty is a rationale of the principle in a peculiar sense. Since legal certainty is a principle ruling

[708] See *above*, section II, para. 3.4., 3.5.

both the sources of law and law in its application, for the purposes of this section foreseeability will trigger the principle of legal certainty only in the perspective of the law in action.[709] Even in a civil law country legal certainty implies that the individuals have a right not to see similar cases decided differently and frequent overrulings, which would undermine the principle of equality. Moreover, the individuals have the right to know the law and not be subject to reversal in case-law.[710]

The 'calculability' of judicial decisions is a component of the principle of legal certainty as well, but it should rather be placed among the limits imposed to the judges' discretional powers in sentencing as opposed to a rationale of the need for a foreseeable application of the law.[711] In this perspective, it is a safeguard against arbitrariness that intervenes at the final stage of the proceeding.

The proposal of applying a principle of foreseeability is not new: in the context of European Union Criminal Law the extension of the principle of legality, through foreseeability, to case-law was discussed with regards to the principles ruling the possibility of an harmonised or supranational criminal law. In particular, there are interesting references in Delmas-Marty's and Vervaele's elaboration of the Corpus Juris in 2000[712] and in the Manifesto on European Criminal Policy created by the European Criminal Policy Initiative.[713]

Among the guiding principles, the Corpus Juris dedicated a section to traditional principles guiding criminal law. In particular, the principle of legality was completed with the following statement:

> 'Changes of interpretation are only permitted when they are reasonably predictable'.[714]

This statement is significant since the clarification that accompanies the text expressly mentioned the intention not to emphasise the difference between common law and civil

[709] This distinction is made by authoritative scholarship: P. NUVOLONE, *Discrezionalità del giudice e certezza del diritto*, in ID., *Il diritto penale degli anni Settanta*, Milano, 1982, p. 152.
[710] P. NUVOLONE, *Discrezionalità del giudice e certezza del diritto*, cit., p. 155. Nuvolone affirms these principles in order to distinguish the safeguard of legal certainty from the legitimate judicial discretion.
[711] See T. DELOGU, *Potere discrezionale del Giudice penale e certezza del diritto*, in *Riv. it. dir. proc. pen.*, 1976, p. 374, who analyses the discretionary power of the judge in sentencing.
[712] M. DELMAS-MARTY, J. VERVAELE (eds.), *The Implementation of the Corpus Juris in the Member States*, Antwerp-Groningen-Oxford, 2000.
[713] The European Criminal Policy Initiative is an academic group of 14 criminal law professors from several EU Member States, founded in Munich. See EUROPEAN CRIMINAL POLICY INITIATIVE, *A Manifesto on European Criminal Policy*, in *ZIS*, 12, 2009, p. 707 ff.
[714] M. DELMAS-MARTY, J. VERVAELE (eds.), *The Implementation of the Corpus Juris*, cit., p. 187.

law and to take inspiration from the definition of legality by the ECHR.[715] The drafters pointed out that

> '[t]his proposed draft takes its inspiration from continental legal traditions and particularly from the principles of lex scripta, lex certa, lex stricta and lex praevia […]and takes into account current trends in the Common Law and new requirements as to "the quality of the law", particularly with regard to foreseeability in relation to evolving interpretation'.[716]

Therefore, in order to build the basis of a new supranational substantive criminal law, the principle of legality was significantly enriched by a safeguard from unpredictable overrulings.

With regards to the European Criminal Policy Initiative, the Manifesto on European Criminal Policy elaborated in 2009 did not explicitly apply the principle of legality to case-law but it recognised the importance of foreseeability both under the perspective of *lex certa* and non-retroactivity. The principle of legality, amongst the fundamental principles of a new European criminal policy, balanced and based on fundamental principles, includes the traditional subprinciples of *lex certa*, non-retroactivity and *lex mitior* and *lex parlamentaria*. In particular, foreseeability plays a role in *lex certa*, where the scope of the principle is declared:

> 'a) Subprinciple 1: Lex certa Requirement
>
> […] Under any circumstances the norm must ensure that (1) the objective and (2) the subjective prerequisites for criminal liability as well as (3) sanctions which could be imposed if an offence is committed are *foreseeable*. […]'[717]

Within the principle of non-retroactivity, foreseeability is an additional rationale of the principle:

> 'b) Subprinciple 2: The Requirements of Non-retroactivity and the Principle of lex mitior
>
> Punitive provisions must not apply retroactively to the detriment of the citizen involved. This principle, which also helps to reinforce *foreseeability*, implies that the European legislator cannot request that the Member States harmonise their criminal law by introducing criminal legislation to apply retroactively'.[718]

[715] M. DELMAS-MARTY, J. VERVAELE (eds.), *The Implementation of the Corpus Juris*, cit., p. 34.
[716] M. DELMAS-MARTY, J. VERVAELE (eds.), *The Implementation of the Corpus Juris*, cit., p. 35.
[717] EUROPEAN CRIMINAL POLICY INITIATIVE, *A Manifesto on European Criminal Policy*, cit., p. 708 (emphasis added).
[718] EUROPEAN CRIMINAL POLICY INITIATIVE, *A Manifesto on European Criminal Policy*, cit., p. 708. (emphasis added).

Since foreseeability has been recognised as a component of the principle of legality in the most authoritative attempts to build supranational criminal law or an acceptable criminal policy for European Criminal Law, these documents can be taken as example for national legal orders, in light of a virtuous circulation of ideas.

The following proposal will however try to adapt foreseeability to the peculiar needs of the Italian legal system, that essentially consist in the preservation of statutory reservation of *lex parlamentaria* as a source and the solution to the problem of diachronic and synchronic inconsistent case-law.

3. Consistency with constitutional principles.

Since the Constitutional Court has not recognised foreseeability as a principle, it should be underlined that its possible application remains within the limits of an interpretive construction.

First of all, it is necessary to investigate the possible normative basis for affirming the principle of foreseeability and verify its consistency with constitutional principles. Francesco Viganò has elaborated one of the most complete systematisations of the rationales of this new principle, which will be referred to when appropriate.[719]

The possible legal basis to affirm the principle could be a joint reading of Art. 117 Cost., in relation to Art. 6 and 7 ECHR, within the limits of Art. 25 co. 2 Cost. and Art. 101 co. 2 Cost.[720] It could be supported, at constitutional level, by the principle of culpability (Art. 27 co. 1 Cost.) and the principle of equality (Art. 3 Cost.), as well as fair trial (Art. 111 Cost.).

Another possible legal basis is Art. 49 CFREU, which enjoys the same rank as primary EU law but is subject to the scope of application of the CFREU. Its application would therefore be limited to the cases where the State is implementing EU law with regards to its internal dimension, pursuant to Art. 51 CFREU.[721]

[719] F. VIGANÒ, *Il principio di prevedibilità*, cit., p. 213 ff.

[720] Similarly, Viganò suggests Art. 25 co. 2, Art. 27 co. 1 and 3, Art. 3, Art. 7 ECHR as possible rationales for the principle of foreseeability of judicial decisions. In particular, the crisis of formal legality and its insufficiencies justify this new principle. F. VIGANÒ, *Il principio di prevedibilità*, cit., p. 217 ff. and 221 ff.

[721] Art. 51(1) CFREU states that 'The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers'. In this context, the EU institutions and bodies clearly do not come into question.

As the analysis in Chapter 3 has demonstrated, the principle of foreseeability is an embodiment of the general principle of legal certainty. Legal certainty is elaborated in several ways in the different legal orders, i.e. international, European or domestic, but it undoubtedly represents a common feature within the rule of law. Moreover, it has been shown how foreseeability/predictability is a rationale of the principle of legal certainty, rule of law and legality in criminal law.

Art. 7 ECHR and the relevant profiles of Art. 6 ECHR, as interpreted by the ECtHR, in conjunction with Art. 117 Cost. could be considered the legal basis for the principle of foreseeability. Thus, the principle of foreseeability would be incorporated in the national legal order through consistent interpretation with the ECHR. With regards to foreseeability of judicial interpretation and the right to consistent interpretation by national courts, the relevant aspects of Art. 7 ECHR and Art. 6 ECHR would occupy a sub-constitutional rank and be an interposed parameter of constitutional legitimacy.[722]

Viganò identifies Art. 7 ECHR as one of the rationales and a possible legal basis for the principle of foreseeability as well. He focuses on its multi-faceted dimension, due to the different roles ECHR provisions play in the national legal order. ECHR (and Art. 7 ECHR in particular) is 'integrated law', and can therefore be directly applied by the judge (L. 4 August 1955, no. 848); it plays a role in interpretation, since it influences the interpretation of ordinary law and it is a criterion to interpret Constitutional provisions; it is an interposed parameter to invoke before the Constitutional Court. [723]

Moreover, the *Corte di Cassazione* seems to have linked foreseeability with the principle of legality, sometimes considering it as a component of the principle of legality according to Artt. 3, 25 co. 2 and 27. Co. 1 Cost. and Art. 7 ECHR. [724] In other cases, it directly referred to Art. 7 ECHR through Art. 117 Cost., without recurring to Art. 25 co. 2 Cost.[725]

National judges, and the *Corte di Cassazione* in particular, could 'sanction' pathological synchronic or diachronic conflicts as a consequence of the violation of the

[722] This approach seems to be that of the *Corte di Cassazione* referring the issue of the implementation of the *Contrada* judgement to the *Sezioni Unite*. Cass. pen., VI, 17 May 2019, no. 21767, para. 14.5, See *above*, section II para. 3.5.3.
[723] F. VIGANÒ, *Il principio di prevedibilità*, cit., p. 224 ff.
[724] Cass. pen., IV, 14 May 2018, no. 21286, para. 7. The *Sezioni Unite* referred to the predictability of the consequences of the individual's action with regards to Art. 25 co. 2 Cost. as well. Cass. pen., SS. UU., 24 April 2018, no. 40986, para. 7. See also Cass. pen., V, 6 August 2018, no. 37857, para. 3.2. See *above*, section II, para. 3.5.3.
[725] Cass. pen., V, 12 July 2017, no. 34141, para. 1 and 4. See *above*, section II, para. 3.5.3.

principle of foreseeability. The principle could be considered an interpretive duty of the judge (like the prohibition of analogy) when applying the law to the concrete case.[726]

But attentive scholarship believes that the attempt to formalise the foreseeability criterion is destined to fail. Foreseeability should be considered only a directive for the judge, since it would certainly be deceptive if it was considered a legally binding rule.[727]Although the criticism can be shared in a general perspective, applying the principle of foreseeability as a fundamental right could be a possible answer to it.

The principle of foreseeability should be seen as an additional element to the *nullum crimen* principle, included in the domestic legal order only through a consistent interpretation with the ECHR. The principle in question would not replace the domestic construction of legality, but rather complete it under the perspective of detrimental and illicit judicial constructions, both synchronic and diachronic. The reason lies in well-known normative arguments. Under a constitutional perspective, consistent interpretation is possible and mandatory for judges, as long as it does not violate constitutional principles.[728] As a consequence, every attempt to apply the principle of foreseeability or the European version of legality to manipulate statutory reservation or the separation of powers, would be inconsistent with the Constitution. The direct application of European principles in a detrimental way would consequently never overcome the Constitutional fortress. Moreover, the recent developments in Constitutional case-law, that limit the obligation to consistent interpretation to established case-law could be an advantage, as it would hinder undesirable effects caused by the application of non-established precedents of the ECtHR.[729]

Under the perspective of the ECHR, the subsidiarity principle and *Günstigkeitsprinzip* (Art. 53 ECHR) would apply to the effect that the States are in principle in a better position to implement the Convention and to safeguard human rights and limiting or derogating pre-existing rights cannot be carried out interpreting the Convention.

[726] See *above* Manes's proposal as well, V. MANES, Common law-isation *del diritto penale?,* cit., p. 974 f. and ID. *Dalla" fattispecie" al "precedente"*, cit., p. 25.
[727] O. DI GIOVINE, *Il ruolo costitutivo della giurisprudenza*, cit., p. 161.
[728] See *above*, Chapter 1, para. 3.2. Both considering the limit of the protection of fundamental rights as enshrined in the Constitution or the entire Constitution, the *nullum crimen sine lege* principle in Art. 25 co. 2 Cost. as interpreted by the Constitutional Court would hinder the implementation of an approach to legality that contradicts it. See Corte Cost., 28 November 2007, no. 348, para. 4.7 and Corte Cost., 28 November 2007, no. 349, para. 6.2.
[729] Corte Cost., 26 March 2015, no. 49, para. 7.

Consequently, an application of the principle of foreseeability should not violate previously established rights, such as constitutional principles, and should be implemented consistently with national principles.[730]

a) *First limitation*. As far as the relationship with Art. 25 *co*. 2 Cost. is concerned, the traditional subprinciple of statutory reservation, determinacy, prohibition of analogy and prohibition of retroactivity would remain untouched. They would be only referred to statutory law, as the Constitutional Court recently affirmed.[731] Although it is possible to interpretively extend Art. 25 co.2 Cost. to case-law, it seems unlikely at the moment that the Constitutional Court would endorse this interpretation. Moreover, the focus would be probably placed on the sources of law and statutory reservation would be consequently jeopardised.

In addition, the democratic principle and separation of powers would not be undermined by the limited and relative application of the principle of foreseeability of judicial interpretation. The judges shall apply this principle only in the gaps of protection left by the constitutional interpretation of Art. 25 co. 2 Cost., which have been shown in the previous analysis. Therefore, the principle of foreseeability could prohibit interpretations resulting in the illegitimate extension of the offence (as provided for by statutory law) and operating retroactively in the first place. Secondly, it would avoid a synchronic conflict resulting in the uncertainty of the scope of offence and penalty and pathologically affecting the citizen's rights. Thirdly, it would solve a synchronic pathological conflict then settled by a *Sezioni Unite* judgement, with regards to those who committed the act before the *Sezioni Unite* declared the correct interpretation. The principle of foreseeability shall not be applied in detriment of the accused, for example validating a retroactive *in malam partem* interpretation because of its alleged foreseeability or enabling the *Corte di Cassazione* to substantially create new offences.[732]

The principle of foreseeability would be useful especially when interpretation does not overcome the threshold of analogy and statutory law remains untouched with regards to the principle of legality. In these cases, analogy or non-retroactivity would not be triggered, and individuals affected by incoherent or retroactive case-law would be

[730] See *above*, Chapter 1, para. 3.2.
[731] See *above*, section II, para. 3.4.
[732] Art. 25 co. 2 Cost. shall hinder the application of that interpretation of foreseeability as a lower standard in detriment of the accused, as the ECtHR did in *S.W.* and *C.R. v. the United Kingdom* or *Streletz, Kessler and Krenz v. Germany* and *K.-H.W. v. Germany*. See *above*, Chapter 3, para. 4.3.

deprived of a remedy, as Art. 25 co. 2 Cost. would hardly cover such cases.[733] Since Art. 7 ECHR and Art. 25 co. 2 Cost. ensure a partially coincident protection, whenever Art. 25 co. 2 is sufficient or more efficient, the principle of foreseeability would not come into question. For example, if the precision of the wording of a statute is put into question, both the principle of foreseeability (Art. 117 Cost. and Art. 7 ECHR) and the principle of *determinatezza* would apply. Nevertheless, the constitutional principle of *determinatezza* should prevail.

To the extent that a modification in the interpretation of Art. 25 co. 2 Cost. could be rejected with valid arguments, the principle of foreseeability would not be interpretively added to Art. 25 co. 2 Cost. Similarly to what happened with the constitutional protection of the *lex mitior* principle, it would be difficulty incorporated into Art. 25 co. 2 Cost., but the reference both to the ECHR as interposed parameter and to other constitutional principles could be helpful to grant it a constitutional coverage.[734]

The principle of foreseeability could therefore represent an autonomous right enshrined in Art. 117 Cost and Art. 6-7 ECHR. Such a construction would be faithful to its origin as a human right and allow to interpretively adapt it to the national context. Moreover, the principle of foreseeability would not threaten the so-called 'universal' side of the principle of legality ruled in Art. 25 co. 2 Cost., and in particular its rationale of protection against arbitrariness and the protection of individual liberty, since this rationale stays in the background of both principles.

b) *Second limitation*. Art. 101 co. 2 Cost. ('Judges are subject only to the law') could ensure constitutional limitations to a detrimental interpretation of the principle of

[733] F. VIGANÒ, *Il principio di prevedibilità*, cit., p. 220. Viganò considers Art. 25 co. 2 Cost. in a partly different perspective. He seems to consider it among the rationales of the principle of foreseeability. Although Art. 25 co. 2 Cost. is supported by the rationale of the safeguard of individual free choices, the principles enshrined in it (statutory reservation, precision and prohibition of analogy in particular) are unable to ensure the foreseeability of judicial decisions. Therefore, Art. 25 co. 2 Cost. seems to be a justification of the principle *a contrario*.

[734] The principle of the retroactivity of the *lex mitior*, although provided for by art. 2 c.p., lacks an explicit constitutional provision. Especially after the development of the principle at EU level, in the case of *Berlusconi and o.*, the Constitutional Court showed more sensitivity towards the issue and accorded the *lex mitior* principle constitutional protection through Art. 3 Cost. After the ECtHR judgment in the case of *Scoppola v. Italy*, it referred to Art. 117 Cost in relation to Art. 7 ECHR as well. However, it still refused to include it among the principles enshrined in Art. 25 co. 2 Cost. Corte Cost., 23 November 2006, no. 393, para. 7 (and no. 394), later Corte Cost., 22 July 2011, no. 236, para. 10-11. ECtHR, Scoppola v. Italy (no. 2), 17 September 2009, no. 10249/03; CJEU, Berlusconi and o., 3 May 2005, C-387/02, 391/02, 403/02.

foreseeability that would undermine the role of statutory law in the principle of legality.[735] The subjection of judges only to the law, meant as statutory law,[736] and the Constitution would stand in the way of a possible misuse of the principle, for example applying it to affirm an absolute *stare decisis* rule.[737] The application of the principle in question would not jeopardise the functional independence of the judge, as it would not impose a limitation to its constitutionally protected autonomy, but it would limit illegitimate violations of the separation of powers, that would be difficulty sanctioned by a constitutional referral.[738]

i) *First rationale*. The rationale of an interpretive construction like the principle of foreseeability further lies in the principle of culpability (Art. 27 co. 1 and 3 Cost.). It has already been explained that the principle of legality and the principle of culpability share a common ground. As mentioned above, the Constitutional Court had identified 'recognisability' as the link between *nullum crimen* and *nulla poena sine culpa*. At the basis of criminal liability lies the possibility to 'recognise' what is the content of the law. Therefore, if the content of the law depends also on what the judges say it is, the State should not affirm criminal liability if the impossibility to know the law was objective and potentially affected all individuals. When case-law is so uncertain that the boundaries of criminal liability are impossible to define, it would violate the principle of culpability to hold someone criminally liable for acts or omissions which are not univocally qualified as a criminal offence.

ii) *Second rationale*. Moreover, the principle of equality (Art. 3 Cost.) would stand in the way of inconsistent judicial interpretations that result in the non-equal treatment of similar situations and cases, i.e. only because that have been assigned to one section

[735] According to the official English translation of the Constitution, provided by the Senate of the Italian Republic, and available at https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf, last accessed 13.02.2020.
[736] A minority opinion considered the notion of 'law' in this provision to refer to law in a substantial sense, therefore every source of law. V. CRISAFULLI, *Fonti del diritto (dir. cost.)*, in *Enc. Dir*., XVII, Milano, 1968, p. 930, fn. 11.
[737] A. CADOPPI, *Il valore del precedente nel diritto penale*, cit., p. 287.
[738] Taking the prohibition of analogy as example, since it refers to the limits of legitimate judicial interpretation, it is difficult to put it under the Constitutional Court's scrutiny. The Constitutional Court would hardly be able to scrutinise such a violation, as it is in charge of the assessment of a constitutional violation by a law or an enactment having force of law (Art. 136 Cost.). The prohibition of analogy is rather protected by the prudent evaluation of the *Corte di Cassazione*. It has been pointed out that the *Corte di Cassazione* often rejects lower instance interpretations as analogical, but, according to this scholarship, this is used as an argument to affirm a different interpretation. See M. DONINI, *Il diritto penale giurisprudenziale*, cit., p. 21-22, fn. 29. Similarly, F. VIGANÒ, *Il principio di prevedibilità*, cit., p. 219 f.

instead of another within the *Corte di Cassazione*.[739] The principle of equality, and its specification in the principle of reasonableness, is defined as a general principle that influences the structure of the whole legal order.[740] As already mentioned in the subjective solutions to the problem, synchronic conflicts within the highest jurisdictions would result in uncertainty in judicial decisions and, most of all, a different interpretation of the same criminal offence could lead to acquittal in some cases while others would be convicted. As far as diachronic conflicts are concerned, all offenders who allegedly carried out the act before the overruling are, objectively speaking, in the same condition. A subsequent overruling would result in different treatment, since those who were tried and sentenced before the overruling would enjoy more favourable conditions than the ones who would be sentenced after the detrimental overruling. The link between the principle of equality and consistent case-law has already been underlined by those who support the introduction of binding precedent.[741] On the contrary, in the perspective of the law in the books, some have linked the principle of equality with the principle of *lex certa*. This particular link has to be specified, as equality intervenes rather in the application of the statute to concrete cases and, therefore, in the domain of the more general concept of legal certainty.[742] Those unequal treatments would make the individuals lose their reliance in the criminal system.[743]

iii) *Third rationale*. Fair trial (Art. 111 Cost.) in the Constitution is a concept that includes several components. In particular, the right to a fair hearing could ground the principle of foreseeability: nobody could be granted a fair hearing when the legal framework he or she deems valid is subject to arbitrary changes. Moreover, interpreting fair trial in light of Art. 6(1) ECHR would mean to focus on the link between fair trial and

[739] Apart from inconsistent case-law, another possible threat to the principle of equality is unforeseeability in sentencing. F. VIGANÒ, *Il principio di prevedibilità*, cit., p. 233.
[740] Corte Cost., 23 March 1966, no. 25.
[741] Among others, A. CADOPPI, *Il valore del precedente nel diritto penale,* cit., p. 271 ff., G. FIANDACA, *Nota introduttiva* a *La Cassazione penale: problemi di funzionamento e di ruolo con nota introduttiva,* cit. p. 444.
[742] According to Bricola, equality was violated in case of indefiniteness of the law, but the discretionary power of the judge in the application of the law is the only way to ensure equality. F. BRICOLA, *La discrezionalità nel diritto penale*, cit., p. 287 f.
[743] Nuvolone made similar remarks, referring to the situation in the 1970s. Speaking of legal certainty, he underlined that in the application of law the role of a consistent case-law is crucial and wished for a certain stability in the principles of law affirmed by the *Corte di Cassazione*. According to him, the unequal treatment caused by case-law was one of the most serious threats to security (in the sense of *Rechtssicherheit*) in social life. Moreover, lack of legal certainty would undermine the citizen's trust in justice. P. NUVOLONE, *Discrezionalità del giudice e certezza del diritto,* cit., p. 156.

the rule of law. [744] Since the rule of law ensures legal certainty, the stability of a legal situation and the protection of legitimate expectations, public confidence in the legal system would be reduced by conflicting case-law, thus jeopardising one of its main functions.

In addition, fair trial is linked with the right of defence, enshrined in Art. 24 Cost. The Constitution ensures an inviolable right to be defended in court by an entitled professional and to be able to defend one's legal position in court, pursuant to the right to a fair hearing. An unforeseeable legal framework would jeopardise the possibility for the individual to properly build his defence.

4. Scope of application.

As the principle of foreseeability of judicial interpretation can be interpretively constructed also in a national legal order, it is relevant to define what its object is (i.e. its scope of application). In the Italian debate scholars have expressed different views on the subject matter. Some have opted for the *foreseeability of judicial decisions*, others for the *foreseeability of the legal characterisation*.

The great part of scholars identified the principle with *foreseeability of judicial decisions*.[745] This concept needs specifications. One possible option is to identify the concept with the foreseeability of the judicial results.[746] This first option would be unacceptable, as the judicial results in the concrete case are *per se* impossible to foresee, since they depend on multiple variables that have not necessarily to do with the legal framework of the offence.

Considering foreseeability of judicial decisions in this sense could lead to misinterpret its object and identify it with the predictability of the results of the trial. In this perspective, foreseeability of the judicial result seems rather to refer to the calculability of sentencing, which is a question of the discretionary power of the judge and the assessment of the rightful penalty (Art. 133 c.p.). Furthermore, scholars pointed out that only in a system based on binding precedent the decision in the case would be predictable,

[744] See *above*, Chapter 3, para. 4.4.2.
[745] F. VIGANÒ, *Il principio di prevedibilità*, cit., p. 213. V. MANES, *Dalla" fattispecie" al "precedente"*, cit., p. 24.
[746] Esposito speaks of foreseeability of the judicial results in the peculiar case of *Contrada v. Italy*, where the ECtHR only assessed the foreseeability of the application of *concorso esterno* to the concrete case of the applicant. Otherwise, it would have been assessed the abstract development of the legal framework. A. ESPOSITO, *Ritornare ai fatti. La* materia del contendere *quale nodo narrativo del romanzo giudiziario*, in *Riv. trim. dir. pen. cont*., 2, 2015, p. 31.

while in a civil law system the predictability of judicial decisions would only be *indirect*. Strictly speaking, to foresee the judicial decision would presuppose the existence of individualised cases valid as a rule. That is not the case of a civil law system, where abstract principles are the content of higher court decisions.[747]

Another option is the identification of the scope of foreseeability, as other scholarship has made, with 'judicial decisions' in a different sense.[748] This complex category would include i) the unlawfulness of the conduct; ii) the relevance in criminal law of the conduct; iii) the penalty. The latter category is the widest and includes several elements. In particular, the legal characterisation of the conduct into a definite criminal offence, the applicable circumstances, statutory penalty, the discretional criteria in sentencing, requirements to suspend trial or penalty, alternative sanctions and the applicable law in the execution of the sentence.[749]

Those who have opted for foreseeability of *legal characterisation* identify its object in the concrete application of the abstract rule to cases. The foreseeability of the law is the foreseeability of the possible judicial solutions in a given case. Technically speaking, the object of foreseeability is the legal characterisation of the fact or *tipicità*.[750] In this perspective, a synchronic conflict on the legal characterisation violates legal certainty but represents a lack of precision/definiteness in the legal provision as well. Especially if the conflicting case-law affects a new judicial rule, the result would be the lack of *tipicità* of the criminal offence: i.e. it is difficult to define exactly which are the boundaries of the scope of application of the offence. On the other hand, an uncertain solution with regards to the legal characterisation, like the case of a later 'resolved' synchronic conflict, would result in an unclear legal framework, but not in an unforeseeable conviction.[751]

The two definitions of the scope of application of foreseeability are not so different in their outcomes, since both, despite different literal formulations, aim at defining the scope of criminal liability and, as a consequence, the applicable penalty. A good solution could

[747] M. DONINI, *Il Caso Contrada e la Corte EDU*, cit., p. 361, fn. 36. Donini criticises Viganò's approach on foreseeability of judicial decisions. Apart from the differing expressions, both scholars seem however to be headed in the same direction in the specifics.
[748] F. VIGANÒ, *Il principio di prevedibilità*, cit., p. 214 f. Viganò in the end suggests extending the definition to all decisions taken by law enforcement agencies in the application of the criminal law.
[749] F. VIGANÒ, *Il principio di prevedibilità*, cit., p. 216.
[750] M. DONINI, *Il diritto penale giurisprudenziale*, cit., p. 35. On the same page, considering the specific case of *Contrada v. Italy* as the application of a formal and objective concept of foreseeability as *tipicità*, C. SOTIS, *"Ragionevoli prevedibilità" e giurisprudenza della Corte Edu*, cit., p. 77 ff.
[751] M. DONINI, *Il diritto penale giurisprudenziale*, cit., p. 35.

be to consider not only the foreseeability of the unlawful nature of the act but also of the possible criminal liability and its exact scope of application. As far as the execution of the sentence is concerned, as well as statute of limitations and other circumstances that could aggravate a penalty, the principle of foreseeability shall be based on a substantive reasoning: if a certain interpretation leads to an aggravated penalty than the one foreseeable at the time the offence was committed.

All these ideas are going in the same direction, which is not limiting foreseeability to foreseeability of the unlawfulness of the act or omission but tailor foreseeability on the specific requirements of criminal law. In this perspective, the suggestion of the Manifesto on European Criminal Policy (although speaking of *lex certa*) could be useful: the scope of application could be extended to the objective and subjective requirements of criminal liability (thus including all elements of the offence) and penalty, which should be considered in an extensive sense. In particular, the notion of penalty would include in the scope of application of the principle all elements which could result in an aggravating punishment and were not foreseeable at the time the offence was committed, regardless of their procedural or substantive nature.[752] The jurisprudence of the ECtHR on the point would be helpful, since cases like *Del Río Prada v. Spain* have showed attention towards the execution of penalty and its influence on the substantial penalty imposed on the individual.

Scholarly opinions on the scope of the prohibition of retroactive overruling can contribute to this debate as well. In opposition to the above-mentioned orientations, some scholars have limited its scope to judicial interpretations that have an incriminating effect or re-characterise the offence in detriment of the accused. In opposition, interpretations with an aggravating effect on the penalty (also in its execution) or on the grounds that influence the punishment of the offence (*cause che condizionano la punibilità*) shall be excluded.[753] Despite the persuasive practical arguments, this proposal risks creating inconsistencies between the scope of the principle of legality when referred to statutory law and when referred to judicial interpretation. Albeit a legitimate choice, the result could be misleading and determine a non-otherwise justifiable different treatment: for example, a detrimental statutory amendment of statute of limitations would be non-

[752] The Constitutional Court attributes the principle of legality a wider scope than European sources, since it includes every substantive element influencing punishability ('*ogni profilo sostanziale concernente la punibilità*'). Corte Cost., ord., 26 January 2017, no. 24, para. 8.
[753] D. PIRRONE, *Nullum crimen sine iure*, cit., p. 371 ff.

retroactive, while an overruling with detrimental effect on the individual would apply retroactively.

A possible solution would be to look at the scope of application of Art. 25 co. 2 Cost. and apply the foreseeability principle in the same area. For example, statute of limitation would be safeguarded by the principle of foreseeability with regards to a possible interpretive conflict (as it happened in the *Taricco* case by the CJEU). A good hint is the reference to the concept of *Garantietatbestand* in the German criminal system. Amongst the multiple definitions of *Tatbestand/fattispecie* (i.e. the legal definition of the elements of an offence), *Garantietatbestand* refers to the requirements of the safeguard of Art. 103 II GG (the safeguard function of the criminal law in order to avoid arbitrary prosecution and punishment). The scope of *Tatbestand* is in this case its requirements in the legislative formulation of the offence that limit the judge in the punishment of an individual, in order to safeguard legal certainty and legitimate expectations. Therefore, its scope of application is the scope of Art. 103 II GG and therefore it is not only not limited to the so-called *Unrechtstatbestand* but also includes the requirements of culpability and some procedural requirements.[754] It encompasses all legal requirements that define the criminally relevant conduct from the non-relevant one, or influence the amount of penalty imposed on the individual.[755]

5. Advantages of the introduction of the principle of foreseeability.

In light both of the analysis of European foreseeability and the national application of mistake of law, foreseeability of judicial interpretation shall be limited to objective foreseeability, as the subjective foreseeability standard involves evaluations that should be made within the domain of culpability. Therefore, foreseeability, unlike what the *Corte*

[754] K. TIEDEMANN, *Tatbestandsfunktionen im Nebenstrafrecht*, cit., p. 172 f.; J. EISELE, *Die Regelbeispielsmethode im Strafrecht*, Tübingen, 2004, p. 114; C. ROXIN, *Strafrecht: Allgemeiner Teil*, cit., p. 281; G. JAKOBS, *Strafrecht. Allgemeiner Teil*, cit., p. 92 ff.; H.H. JESCHECK, T. WEIGEND, *Lehrbuch des Strafrechts, Allgemeiner Teil*, cit., p. 246 and 133; K. ENGISCH, *Die normative Tatbestandselemente im Strafrecht*, in P. BOCKELMANN, K. ENGISCH (eds.), *Festschrift für Edmund Mezger zum 70. Geburtstag*, München, 1954, p. 131, who defines *Garantietatbestand* as those elements of the offence that need to be fixed by law pursuant to *nullum crime nulla poena sine lege*.

[755] Roxin considers *Garantietatbestand* having a different scope than the *Tatbestand* ruling mistake. He points out that this double function of *Tatbestand* was attributed by Beling. C. ROXIN, *Strafrecht: Allgemeiner Teil*, cit., p. 281, referring to E. BELING, *Die Lehre vom Verbrechen*, Tübingen, 1906, p. 21-23. Engisch includes the elements of culpability, but excludes *Unzumutbarkeit*, K. ENGISCH, *Die normative Tatbestandselemente im Strafrecht*, cit., p. 131, in the same vein, G. STRATENWERTH, *Strafrecht Allgemeiner Teil*, Köln, 2000, p. 85. On the uncertain scope of *nullum crimen*, H. WELZEL, *Auf welche Bestandteile einer Strafvorschrift bezieht sich der Satz: nulla poena sine lege?*, in *JZ*, 1952, p. 617.

di Cassazione has recently made, shall be assessed objectively, applying the ECHR most recent standards.

If applied to a diachronic conflict of case-law, it could hinder the retroactive application of a detrimental overruling which was not foreseeable at the time the offence was committed.

If applied to a synchronic conflict, it would solve both a synchronic conflict later settled by a *Sezioni Unite* judgement and a synchronic conflict still pending. In particular, this latter case happened to be without a solution both under prospective overruling and under the extension of art. 2 c.p. to case-law.

In this perspective, the application of the principle of foreseeability avoids some of the difficulties domestic formal legality is facing, without amounting to a modification of the sources of law in the legal order.

As far as its justiciability is concerned, the *Corte di Cassazione*, also in light of the current developments, should apply it in third instance cases. Nevertheless, the possible disregard by the *Corte di Cassazione* could lead to a violation of Art. 117 Cost. in conjunction with Art. 7 ECHR and 6 ECHR. In this case, attempts could be made to refer the question of the constitutional legitimacy of the legal provision in question, as interpreted by the *Corte di Cassazione*, *vis-à-vis* Art. 117 Cost., Art. 7 ECHR and Art. 6 ECHR. If the State is implementing EU law, Art. 49 CFREU would come into question, but it will have the same rank of the Constitution, as long as the Constitutional Court does not declare it contrary to the fundamental principles.

In case the Constitutional Court would not be able to admit the question, which is in fact quite anomalous, since the Constitutional Court judges the compatibility of statutory sources with the Constitution, the remedy left would be to lodge an application before the European Court of Human Rights. Furthermore, if Italy ratifies Prot. 16 to the Convention, Italian highest courts will be able to directly address the ECtHR with the request for an advisory opinion.

VI. CONCLUSIONS OF CHAPTER FOUR.

The analysis of the traditional rationales of *nullum crimen* and of the crisis of the traditional paradigm of legality has shown that the disregard for the role of the judge in criminal law in civil law countries with formal legality has left some blank spaces in the protection of individuals in relation to synchronic and diachronic conflict of case-law.

Italy and Germany, as example of civil law countries with a particularly strong legality protection, have similar solutions to deal with diachronic and synchronic conflicts: the application of the mistake of law in subjective perspective and the extension of lex certa and non-retroactivity to case-law in constitutional perspective, as well as the introduction of prospective overruling. Moreover, procedural law provides for judicial mechanisms for the highest court to ensure legal certainty and uniform interpretation.

Comprehensively, the German criminal system seems to offer satisfactory results in terms of stability in case-law through the application of section 17 StGB and the judicial mechanisms ensuring legal certainty, as well as with the new *Präzisierungsgebot* affirmed by the BVerfG. Moreover, ECHR legality could have limited effects since it has statutory law status. In Italy *de lege lata* solutions show non satisfactory results, thus enhancing the debate on a possible implementation of ECHR *nullum crimen* to this purpose thanks to the sub-constitutional status of the Convention.

The reach of the ECHR concept of foreseeability and of legality in general has a multifaceted effect in EU law. Foreseeability operates both under the umbrella of *nullum crimen* (now Art. 49 CFREU) and the general principles of legal certainty and legitimate expectations. With regards to EU sanctioning powers, the CJEU has used foreseeability as a subjective standard, both in synchronic and diachronic perspective, in detrimental perspective and balances it with the principle of effectiveness. In this context, the use of foreseeability has shown its negative potential, especially if applied subjectively and aimed at ensuring the implementation of effectiveness objectives.

Apart from its limited reach in EU criminal legislation, legality and foreseeability play a crucial role limiting the obligation to consistent interpretation and attribution of direct effects to directives if they determine or aggravate criminal liability. Moreover, the principles of foreseeability, precision and non-retroactivity as enshrined in Art. 49 CFREU and having the same meaning of Art. 7 ECHR, limit the disapplication of national law due to the direct effects of EU primary law (Art. 325 TFEU). In this perspective, the

influence of European legality and foreseeability expresses its positive potential in terms of protection of the individual from detrimental applications of the law.

The preceding analysis of the implementation of ECHR foreseeability and of the current insufficiencies to the negative effects of interpretive conflicts in criminal law suggest applying the principle of foreseeability in the Italian legal order. Its antecedents in the Corpus Juris 2000 and in the Manifesto on European Criminal Policy, as well as its initial application by the *Corte di Cassazione* seem to clear the way for a possible implementation. In order to interpret it according to the objective foreseeability standard, its legal basis should be Art. 117 in connection with Art. 6-7 ECHR. But in order not to jeopardise constitutional more extensive safeguards, it should be applied within the limits of Art. 25 co. 2 and 101 co. 2 Cost. Further legal basis can be the principle of culpability (Art. 27 co. 1 Cost.) and the principle of equality (Art. 3 Cost.), as well as fair trial (Art. 111 Cost.). Another possible legal basis is Art. 49 CFREU, within the scope of application of the CFREU. Its scope of application could be the objective and subjective requirements of criminal liability and the notion of penalty in a substantive sense. Its implementation could be attributed to the *Corte di Cassazione*, bearing in mind a possible last resource in the application to the ECtHR.

CONCLUSIONS [*]

The concluding remarks will follow the structure of the thesis, analysing the main results of the research and their possible future perspectives.

As seen in Chapter One, important aspects to take into consideration in an investigation of European principles are the features and challenges of a 'European' approach in Criminal Law. The 'Europeanisation' in Criminal Law is a multi-faceted phenomenon, since it involves several legal orders (European Union, Member States, Council of Europe) and several factors (human rights, harmonisation, assimilation etc.). The interweaving between pluralism and relativism in the Europeanisation and internationalisation of Criminal Law highlights the need to interconnect different normative levels through different mechanisms. With regards to the relationship between criminal law and human rights, crucial supranational instruments as the ECHR and the CFREU were introduced in a legal framework where the fundamental rights already enshrined in the Constitutions have shaped the contemporary approach to criminal law as a protective *shield* against State arbitrariness. Nevertheless, human rights in criminal law have also been used as a means to protect legal goods or subjects through criminal law (*sword* function of criminal law).

The analysis of ECtHR case-law imposes to identify the specific interpretive criteria and principles that regulate it and its relationship with domestic legal orders. Crucial importance is attributed to evolutive interpretation, autonomous notions, margin of appreciation and the so-called principle of favourability, or minimum standard. The ECHR has different harmonisation potential depending on its status within the sources of the States party to the ECHR. Different statuses determine a different reach of the Strasbourg principles in the national legal orders, especially with regards to possible conflicts arising between constitutional principles and European human rights.

As it happens for constitutional principles and European Union law, the ECHR is subject to consistent interpretation as well. If under a constitutional perspective consistent interpretation with the ECHR has played a great role in contemporary criminal law, then

[*] The Italian and German versions of these conclusions are available in Appendix II and III.

the specific influence of a constitutional perspective in criminal law must not be disregarded, as it plays an important part in the Italian criminal law tradition.

As seen in Chapter Two, the origin of *nullum crimen nulla poena sine lege* as a human right is concentrated in the 20th Century. The formulation of Art. 7 ECHR was conceived on the basis of Art. 11(2) of the 1948 Universal Declaration of Human Rights. The intertwined *travaux préparatoires* of both the Universal Declaration and the ECHR show that i) the main discussion only concerned the legitimation of the prosecution of war criminals after 1945 through the so-called 'Nuremberg clause'; ii) national versions of the principles were nearly completely disregarded in their drafting; iii) the legitimate sources of criminal law (including international law) were not well debated.

Art. 7 ECHR, which is part of a broader international legal framework, has a comprehensive reach into the European definition of legality, since the 'Strasbourg' legality plays a crucial role for the European Union as well, for normative and interpretative reasons. Therefore, *nullum crimen* at European level must be studied in the ECHR perspective.

Art. 7 ECHR is a component of the rule of law and safeguards, implicitly and explicitly, legality of offences and penalties; non-retroactivity; the so-called qualities of the law (accessibility and foreseeability); retroactivity of more lenient criminal law; and affirms that it cannot be applied to obstruct the prosecution and punishment of crimes provided by the general principles of law recognised by civilised nations. Furthermore, its scope of application is that of the autonomous definition of 'criminal' or 'penalty'.

The autonomous definition of *law* is common to several rights enshrined in the Convention, includes both written and unwritten law and is therefore referred imprecisely to civil law and common law countries. Considering judge-made law as a legal basis for criminal law in civil law countries, which is a consequence of the evolutive interpretation of the Convention, is controversial. Moreover, Art. 7 ECHR also provides that offences and penalties can be prescribed by international law and the 'Nuremberg clause' in Art. 7(2) ECHR apparently foresees an exception to *nullum crimen*.

The autonomous definition of law is highly controversial, especially for civil law countries, since it can potentially cause antinomies with national principles as statutory reservation or the hierarchy of sources. A first critical orientation argues that such a definition of law risks to place judge-made law at the same level of the statutory sources

of criminal law, while a second interpretive orientation identified the attention of the ECHR for the law in action as an acknowledgment of the difference between 'disposition' and 'norm' in general theory of law or as validating anti-formalist theories. To these arguments it can be opposed that the ECHR does not trigger the regulation of the sources of law, but rather adopts a substantive approach that looks at the consequences of the State's behaviour on the individual and is not aimed at circumventing constitutional rights, since its guarantees must be interpreted only as a minimum standard that can be raised by States (i.e. by imposing statutory reservation in criminal law). Although the attention of the ECtHR to the law in action is undeniable, its rationale is a looser footing at best. *Law* must be interpreted as a *descriptive* definition and not as a prescriptive rule, thus it does not impose judge-made law as a source of criminal law. It only focuses on the legal framework *in concreto* in order to assess *ex post facto* a possible violation of the Convention.

This substantive definition of law further plays a role in the definition of the other subprinciples, which are inevitably referred both to statutory and judge-made law. The analysis focuses on the role of case law both in the assessment of non-retroactivity and of the so-called qualities of the law (accessibility and foreseeability). The ECHR prohibits the retroactive application of a judicial interpretation to an accused's detriment (i.e. indirect retroactivity), both for civil law and common law countries, if the interpretation was not reasonably foreseeable at the time the offence was committed. In particular, an initial survey of ECtHR case-law reveals how the assessment of legality of judicial interpretation became progressively detached from domestic law understanding and instead focuses on the foreseeability test. Therefore, the evaluation of non-retroactivity overlaps that of foreseeability due to their similar effects. With regards to the qualities of the law, while accessibility is a minor requirement, foreseeability assesses the predictability of the *regula juris*, which must be formulated with sufficient precision, but nevertheless needs to be interpreted by courts.

In Chapter Three, the notion of foreseeability is investigated with regards to its origin and rationale, scholarly opinions and case-law analysis.

The concept of foreseeability in the ECHR can derive either from philosophy of law or from common law countries. On the one hand, in philosophy of law and general theory of law foreseeability represents a possible common definition of legal certainty. Legal

certainty as foreseeability is an understanding of legal positivism, that interpreted it as a concretisation of the relative ideal of legal certainty or of the rule of law. The common points to positivists are the identification of legal certainty or the rule of law with foreseeability/predictability of judicial decisions, the link between foreseeability and individual liberty and the relativisation of the concept. Realists do not recognise the possibility to reach legal certainty and identify law with its application. However, realists link foreseeability to the validity of law. In the Italian philosophical scenario, for example, these patterns seem to partly repeat, since positivists refer to foreseeability as the need to control criminal law through rationally verifiable criteria and antiformalists ground their definition of legal certainty as foreseeability on the idea that law is a broader concept including both written law and judicial interpretation.

On the other hand, foreseeability can derive from the U.S. rationale of fair notice (or fair warning), grounding both non-retroactivity and vagueness prohibition, and from the maximum certainty principle in the United Kingdom. Although U.S. fair warning shares a common rationale with European foreseeability, the analysis of American doctrine and case-law, as well as U.K.'s jurisprudence, shows that they do not have a direct connection. It is more convincing to identify the concept of foreseeability in the ECHR with the philosophical concept of foreseeability, as predicament of legal certainty, since it represents a common ground of discussion between several philosophical orientations.

With regards to classifications in literature, scholars have underlined the double nature of foreseeability both in diachronic perspective (historical interpretation), linked to non-retroactivity, and synchronic (technical interpretation), linked to *lex certa*. Moreover, foreseeability is both connected to the precision of legal rules and the predictability of judicial interpretation, reflecting the twofold definition of law.

Case-law analysis shows that foreseeability consists in a relative and *in concreto* assessment. Instead of focusing on the statements of principles, case-law has been analysed trying to identify the leading cases and to verify their application. Particular attention is given to the alternative between objective or subjective assessment of foreseeability. Its non-formal structure and broad meaning have been used to regroup legality issues into a unique criterion. The alternative method used leads to the following quite different results from the usual considerations on foreseeability.

From the aforementioned analysis it emerges that the scope of foreseeability is the definition of the offence and penalty, included its execution.

a) The Court adopts a *subjective approach* towards foreseeability in two different perspectives. First, in case-law applying the *Cantoni* precedent, subjective elements include the qualifications of the addressees, their status and number, as well as their professional activity. In cases that affirm these principles, which often deal with specific areas of criminal law, the Court has mostly lowered the required degree of foreseeability. This has always been the case when national courts extended the scope of an offence to a new category of cases, especially in cases of first impression. Second, subjective criteria were used in cases following *S.W. v. the United Kingdom* and the *German Border Guard* precedents, that assessed the consistency with the essence of the offence and reasonable foreseeability of judicial interpretation. Subjective foreseeability was assessed with a low standard and related to the possibility of the offender to be aware of the law in force while carrying out flagrantly unlawful actions, especially in cases concerning the succession of States or particularly serious and manifest human rights violations.

b) Nonetheless, *objective foreseeability* seems to be the most widespread criterion at the moment, thus proving the common criticism of it being a strictly subjective assessment to be wrong. It encompasses all standards used by the Court that only take into account elements that refer objectively to the legal basis, thus potentially applicable to other subjects in the same situation. Thus, this version of foreseeability shall be preferred. Following the leading case *S.W.* and *C.R. v. the United Kingdom,* the Court applies the *'consistent with the essence of the offence'* and *'reasonably foreseeable'* criteria to evaluate the results of judicial interpretation.

Although the Court seems to have introduced a controversial presumption of foreseeability with regards to cases of first impression, using the 'consistent with the essence of the offence' criterion, which risks giving way to retroactive overruling, the objective evaluation of synchronic and diachronic foreseeability has become the core of *nullum crimen* and the assessment is now focused on potential violations of legality due to conflicting interpretations within national jurisdictions.

With regards to non-retroactivity and diachronic foreseeability, the Court follows the leading case *Del Río Prada v. Spain*. It evaluates existing precedents, the detrimental effect of overrulings, synchronic pre-existing conflicts and the individual's legitimate

expectations. Reasonableness is therefore objectively assessed in light of the interpretation of the law at the material time of the offence.

With regards to synchronic foreseeability and legal certainty, synchronic conflicts within higher jurisdictions are tolerated, as long as the system is capable of settling them. If that is not the case, a long-lasting conflicting interpretation can constitute a violation of the ECHR. Especially when a conflicting interpretation is further resolved *in malam partem* by a higher court, and is retroactively applied, the Court adopts a strict approach. These considerations show that the ECtHR includes in Art. 6 and 7 ECHR a safeguard concerning the role of the Supreme Courts in ensuring well-established case-law and uniform interpretation.

The analysis of case-law further reveals a functional relationship between legality and culpability, especially when the Court takes subjective elements into consideration. The predictability of the consequences of a conduct does not only link the individual to the provision but also urges to establish a subjective relationship between the individual and the criminal offence, as a consequence of the principle of individual autonomy. Moreover, considering foreseeability in relation to the possibility of the applicant to be aware of the criminal law in subjective terms builds a circular reasoning that leads to the acknowledgement of the principle of culpability, but does not reduce foreseeability to the above-mentioned subjective criteria, that could (and have been) easily misused in detriment of the accused.

In the end, the actual absolute protection ensured by Art. 7 ECHR is questioned. Hard cases on serious human rights violations or international crimes seem to balance between conflicting rights, thus making legal certainty and the rule of law recessive before the violation of other fundamental rights (i.e. human dignity, right to life). This interpretation seems to be supported by the so-called 'consistency clause' in Art. 17 ECHR and the increasing importance of the rights of the victims, as well as applying Dworkin's approach on the balance of principle-rights (among which *nullum crimen* makes no exception). Hard cases in the Strasbourg jurisprudence seem to uncover a different approach to the rule of law, thus hypothetically infringing fundamental principles of traditional continental law tradition.

The final Chapter focuses on a possible application of the principle of foreseeability with regards to the Italian legal order, so as to mitigate the effects of case-law in criminal

law. The possible role of foreseeability is preceded by an analysis of the current solutions to diachronic and synchronic conflicts in case-law under the perspective of legality and culpability in light of the role of case-law in criminal law and the 'crisis' of the statutory model. In this regard, the solutions of the Italian legal order are compared to the ones of the German legal order.

The analysis of the Italian and German legal orders, which share similar criminal law and constitutional traditions, shows common patterns with reference to the solutions to the role of case-law in criminal law. a) Both in Germany and in Italy conflicting interpretations jeopardising legal certainty and foreseeability have been dealt with in a subjective perspective. The unavoidable mistake of law, which excludes culpability, is applicable to cases where judicial interpretation is conflicting, thus representing one of the elements to consider a mistake unavoidable. This interpretation is based on the above-mentioned contingency between legality, culpability, and the possibility to foresee the applicable law. Nevertheless, the outcomes are different. In Italy art. 5 c.p. (as interpreted in judgement 364/1988 of the Constitutional Court) has been rarely applied in favour of the accused, since the mixed objective and subjective criteria, applied according to the standards of negligence, have seldom led to the exclusion of culpability. On the contrary, conflicting case-law is considered an element to affirm culpability, since the state of doubt of the accused should have led him to refrain from action. In Germany section 17 StGB is applied to (and culpability is excluded for) i) overrulings from a consistent interpretation of the highest courts; ii) conflicting interpretations of different level courts, iii) conflicting interpretations of same level courts; iv) a single interpretation of a provision that has never before been interpreted. Scholarship both in Germany and in Italy is divided whether the mistake of law is a good solution to inconsistent case-law. Although this solution would keep the dogmatic structure of both systems, at the same time it risks jeopardising the principle of equality with its case-by-case assessment; it 'postpones' the issue within culpability instead of legality; it has different outcomes in terms of acquittal.

b) Both in Germany and Italy scholars have suggested objective solutions, i.e. solutions concerning the principle of legality. These proposals usually extend the scope of the principle of non-retroactivity or *lex certa* to case-law, in order to cope with diachronic and synchronic conflicts. In both legal orders the interpretation of the Constitution and Criminal Code seems to exclude this solution on the basis of the possible

equation between case-law and statutory law at the level of sources, thus jeopardising the principle of statutory reservation and separation of powers.

b1) *Lex certa*. In both legal orders the constitutional courts admit that judicial interpretation contributed to determine the meaning of the statute. Nevertheless, in Italy the Constitutional Court has rarely found violations of the principle of *lex certa* (*determinatezza*). The concept of living law (*diritto vivente*), which encompasses judicial interpretation of a written provision, is not a sufficient ground to exclude the consistency of a statutory provision with the Constitution because of its uncertain interpretation. With regards to Germany *lex certa* (*Bestimmtheitsgebot*) has been similarly assessed with due reference to the interpretation of the written provision by courts. The BVerfG has further specified that consistent judicial interpretation helps determining a vague element of the offence. Nevertheless, the BVerfG has recently charged the judiciary with an obligation to specify the law (*Präzisierungsgebot*). When a well-established case-law is a reliable element for interpreting and applying the norm, judges have the obligation to contribute, making the requirements of liability recognisable. In addition, the rationale of *Vertrauensschutz* can ground similar obligations for judicial overrulings. These principles are considered a possible start for an innovative interpretation of Art. 103 II GG.

b2) *Non-retroactivity*. With regards to the principle of non-retroactivity and the succession of norms, both in Italy and Germany two main points emerge. On the one hand, scholars have suggested the introduction of prospective overruling mechanism. In the Italian and German systems prospective overruling has not been implemented, but scholars' debate sees this solution as an interpretive correction to the substantive effects of case-law inconsistencies. On the other hand, both in Italy and Germany scholars have suggested the extension of the constitutional principle of non-retroactivity to case-law. In Germany those favourable to the extension of Art. 103 II GG to case-law have focused either on a direct application or an analogical interpretation of Art. 103 II GG, stressing the rationale of legitimate expectations, legal certainty and culpability. In Italy the debate has been inspired by the interaction with European legality and by the application of non-retroactivity or foreseeability to case-law, through consistent interpretation with the ECHR. The Italian debate focuses on the application of Art. 2 c.p. (succession of penal statutes) to case-law. This solution would satisfy both the case of diachronic conflicts (for more lenient law as well) and synchronic conflicts reabsorbed by a 'qualified precedent' of a higher court, while synchronic persisting conflicts would remain unsolved under the

perspective of legality. Contrary opinions argue that such an extension of constitutional principles is unacceptable and creates procedural and practical obstacles. Moreover, it is unlikely that the Constitutional Court will accept such an extension in the near future, especially in light of the principle of statutory reservation and the separation of powers. On the contrary, the *Corte di Cassazione* seems to be more open towards an integration between European and domestic legality. First, in some judgements it equates or juxtaposes statutory and judge-made law. Second, in recent case-law inspired by the European legality, the *Corte di Cassazione* applies the European foreseeability standard/principle in different perspectives (especially as a right to consistent interpretation).

b3) Operative remedies under the perspective of highest courts and procedural law have been suggested. First, the possible introduction of binding precedent *de lege ferenda*, although only as a relative vertical obligation, is common both to Italian and German scholars. The counterarguments are identical to the above-mentioned criticism to prospective overruling: an inappropriate extension of *nullum crimen*, in addition to the difficult juxtaposition of a common law approach in a civil law country. Although previous solutions make good points, they are difficulty imaginable or at least not likely to be implemented in a *de lege ferenda* perspective.

Second, both German and Italian procedural law rules mechanisms ensuring legal certainty, uniform interpretation and the development of the law within highest courts enhancing legal certainty in diachronic and synchronic perspective with regards to case-law (Art. 618 c.p.p. and *Vorlagepflicht*). Nevertheless, the outcomes are opposite. In Italy due to both normative and practical reason, the *Corte di Cassazione* is overloaded with case-law and is not able to ensure consistency in interpretation. Recent amendments seem to go in the direction of an enhanced role of the *Sezioni Unite*, but practical reasons seem to keep a good nomophylactic role of the Court still far in the future. On the contrary, the *Vorlagepflicht* mechanism between OLGs and BGH and between the Panels of the BGH seems to ensure an acceptable level of stability in case law and most of all avoid interpretive conflicts. The reasons are practical (reduced amount of case-law) but also technical, especially procedures discouraging judges to create conflicts. However, these instruments seem rather to solve the problem of synchronic conflicts in case-law but would still leave the problem of an overruling open for discussion.

Comprehensively, the German criminal system seems to offer satisfactory results in terms of stability in case-law and possible solutions, in particular with regards to the application of section 17 StGB and the judicial mechanisms ensuring legal certainty. Moreover, the ECHR has the status of an ordinary statutory law and could have limited effects in this perspective. On the contrary, In Italy both courts and scholars' debates focus on the implementation of European legality, thanks to the sub-constitutional status of the ECHR, since remedies *de lege lata* seem to offer unsatisfactory results.

The role of European legality and foreseeability in particular has been verified also with regards to the European Union in several perspectives, given the non-formalised nature of the EU legal order, its application of the ECHR fundamental rights and the focus on the principle of effectiveness seem to be good conditions to test the (still limited) application of the notion of foreseeability. Foreseeability operates both under the umbrella of *nullum crimen* and the general principle of legal certainty and legitimate expectations. Apart from criminal law, foreseeability and the principle of legality play a role where the EU exercises direct or indirect sanctioning powers. In EU competition law, the foreseeability standard has been applied both to synchronic and diachronic conflicts in practice, due to the autonomous definition of law and focusing on subjective criteria of the *Cantoni* leading case. The rule introduced in *Dansk Rørindustri* is the most followed, especially in diachronic perspective. An interpretive rule can be applied retroactively if two requirements are met: i) its application is reasonably foreseeable; ii) it is necessary to ensure the implementation of EU competition policy. Synchronic foreseeability is assessed according to subjective criteria and with regards to the professional nature of the activity. In other cases where the EU has sanctioning powers (i.e. the adoption of restrictive measure in the area of Common Foreign and Security Policy), the CJEU adopts the same test (reasonable foreseeability and effectiveness) and admits the gradual clarification of legal rules. This application of 'reasonable foreseeability' has disappointing results in terms of standards of protection of fundamental rights, especially for the use of subjective criteria and because the principle of effectiveness (implementation of a EU policy) is balanced with fundamental rights. As a consequence, this subjective and recessive interpretation of foreseeability must be rejected, as it shows the negative potential of such criteria.

With regards to legislative competence of the EU in harmonisation in criminal matters (Art. 83 TFEU), the principle of legality has an indirect influence: since these

competences are implemented through directives, *nullum crimen* concerns the national implementing legislation. Only in case a competence to issue directly applicable legislation in criminal matters was acknowledged, the EU itself would have to apply *nullum crimen* in its legislation procedure.

The influence of European legality and foreseeability expresses its positive potential in terms of protection of the individual from detrimental applications of the law in the following perspective. Although a Directive is not necessarily issued in criminal law, the CJEU holds that the principles of legality and legal certainty represent a limit for the Member States in the obligation to consistent interpretation with a Directive or in the attribution of direct effects to a Directive determining or aggravating criminal liability. Therefore, possible detrimental effects determined by judicial interpretation due to EU law are excluded.

The CJEU admits that the principles of foreseeability, precision and non-retroactivity as enshrined in Art. 49 CFREU and having the same meaning of Art. 7 ECHR, limit the application of Art. 325 TFEU. Therefore, disapplication is excluded if disapplying national law means violating the principles of foreseeability, non-retroactivity and precision.

The above-mentioned considerations yield future perspectives on a possible integration between national and European legality in Italy. Applying the so-called *principle of foreseeability* could represent a possible integration of European and domestic legality and a solution to the problems that cannot be successfully solved with traditional dogmatic categories.

i) The main rationale would be the principle of legal certainty, composed by precision and definiteness of the law, non-retroactivity, legitimate expectations. Moreover, both the *Corpus Juris* and, on a different level, the Manifesto on European Criminal Policy considered foreseeability respectively with reference to admissible overrulings and as a component of both *lex certa* and *non-retroactivity*.

ii) The possible legal basis to affirm the principle could be a joint reading of Art. 117 Cost., in relation to Art. 6 and 7 ECHR. In light of the ‘principle of favourability’ at Art. 53 ECHR, the principle shall respect the limits imposed by Art. 25 co. 2 and 101 co. 2 Cost. It could be supported, at constitutional level, by the principle of culpability (Art. 27 co. 1 Cost.) and the principle of equality (Art. 3 Cost.), as well as fair trial (Art. 111 Cost.).

Another possible legal basis is Art. 49 CFREU, within the scope of application of the CFREU.

iii) With regards to its scope of application, the alternatives are *foreseeability of legal qualification* or *foreseeability of judicial decisions*. These two concepts nevertheless aim in the same direction, since they both refer to the unlawfulness, the correct legal qualification as a particular offence and to the applicable penalty. The scope of application could be extended to the objective and subjective requirements of criminal liability (thus including all elements of the offence) and penalty, which should be considered substantively (i.e. all non-foreseeable elements which aggravate punishment).

In order to avoid the partial negative results emerged in the analysis of the EU legal order and the obstacles highlighted in the domestic application of mistake of law, foreseeability of judicial interpretation must be limited to objective foreseeability, applying the ECHR standards. If applied to a diachronic conflict of case-law, it could hinder the retroactive application of a detrimental overruling that was not foreseeable at the time the offence was committed. If applied to a synchronic conflict, it would solve both a synchronic conflict later resolved by a *Sezioni Unite* judgement and a synchronic conflict still pending. Its advantage in respect to other valid solutions is avoiding a modification of the sources of law in the legal order. Its justiciability would be left to the *Corte di Cassazione*, with the extreme remedy of an application to the ECtHR or, in case of Italian ratification, through an advisory opinion pursuant to Protocol no. 16 to the ECHR.

APPENDIX I

The preceding discussion on the European elaboration of the principle of legality and the role played by foreseeability with regards to judge-made law yields the following 15 conclusions:

I. The Europeanisation of Criminal Law is a complex phenomenon that involves multiple legal orders and multiple factors. This phenomenon requires to find new methods to interconnect different normative levels. The ECtHR plays a pivotal role in the Europeanisation of fundamental rights, as well as in domestic and EU perspective. Evolutive interpretation, autonomous concepts, margin of appreciation and the principle of favourability are the milestones to interpret the ECHR.

II. The drafting of Art. 7 ECHR is intertwined with the drafting of Art. 11(2) UN Declaration of Human Rights. Both *travaux préparatoires* reveal an overwhelming interest in the legitimation of the prosecution of war criminals after 1945 and do not deal with the domestic understanding of *nullum crimen*, nor with its consistency with national law provisions.

III. Art. 7 ECHR features an autonomous definition of *law*, that encompasses both statutory and judge-made law and applies both to civil law and common law States. The equation between statutory and judge-made sources of the criminal law raises antinomies in civil law legal orders. In order to overcome these obstacles, law is conceived as a descriptive concept and as a substantive means to assess *in concreto* the State's conduct towards individuals, without regulating the hierarchy of sources. The substantive definition of law further determines the application of the subprinciples of non-retroactivity and the qualities of the law (accessibility and foreseeability) to judge-made law as well.

IV. The assessment of legality of judicial interpretation by the ECtHR progressively became detached from domestic law frameworks and focused on a foreseeability test, both under the perspective of retroactivity and *lex certa*.

V. The concept of foreseeability in relation to legality and rule of law is common to positivism and realism and represents a general definition of legal certainty.

Positivists identify legal certainty with foreseeability of judicial decisions, link it with individual liberty and consider it a relative concept, while realists relate it with the validity of law.

VI. With regards to classifications of the ECHR foreseeability, scholars have underlined the double nature of foreseeability both in diachronic perspective (historical interpretation), linked to non-retroactivity, and synchronic (technical interpretation), linked to *lex certa*. Moreover, foreseeability is both connected to the precision of legal rules and the predictability of judicial interpretation, reflecting the twofold definition of law.

VII. The analysis of ECtHR case-law shows that foreseeability is a relative and *in concreto* assessment. Foreseeability is a subjective standard i) in cases of first interpretation; ii) in cases dealing with succession of states and manifest human rights violations. Nowadays foreseeability applies as an objective standard, in particular with regards to the criteria of 'consistency with the essence of the offence' and 'reasonable foreseeability'. Recent case-law of the ECtHR focuses on diachronic and synchronic interpretive conflicts according to an objective foreseeability standard, where the safeguard of well-established case-law within the highest courts is becoming a component of Art. 6-7 ECHR.

VIII. The analysis of case-law further reveals a functional relationship between legality and culpability, in particular with regards to the possibility of the applicant to be aware of the law in force. Hard cases on serious human rights violations or international crimes in the ECtHR jurisprudence call the absolute protection of Art. 7 ECHR into question, since they show a possible balance between rule of law or *nullum crimen* and other fundamental rights.

IX. With regards to the *de lege lata* solutions to the problems raised by case-law in criminal law, Italian and German legal orders show similar solutions. Under a subjective perspective, the possibility to apply mistake of law and exclude culpability for diachronic or synchronic interpretive conflicts; under an objective perspective, the consideration of case-law in the perspective of *lex certa* and, in the perspective of non-retroactivity, the possible application of prospective overruling, or the extension of the non-retroactivity prohibition to case-law are commonly suggested solutions, that can difficulty be implemented. Under the

perspective of operative remedies, judicial mechanisms within the highest court are foreseen in order to ensure legal certainty and uniform interpretation.

X. Comprehensively, the German criminal system seems to offer satisfactory results in terms of stability in case-law and possible solutions, in particular with regards to the application of section 17 StGB and the judicial mechanisms ensuring legal certainty, as well as with the new *Präzisierungsgebot* affirmed by the BVerfG. Moreover, the ECHR legality could have limited effects since it has statutory law status.

XI. In Italy, remedies *de lege lata* seem to offer unsatisfactory results. Therefore, both courts and scholars' debates focus on the implementation of European legality, given the sub-constitutional status of the ECHR.

XII. The reach of the ECHR concept of foreseeability and legality has a multifaceted effect in EU law. In this context, the use of foreseeability has shown its negative potential, especially if applied subjectively and aimed at ensuring the implementation of effectiveness objectives. Foreseeability operates both under the umbrella of *nullum crimen* (now at Art. 49 CFREU) and that of the general principles of legal certainty and legitimate expectations. With regards to EU sanctioning powers, the CJEU applies foreseeability as a subjective standard (synchronically and diachronically) in detrimental perspective and balances it with the principle of effectiveness.

XIII. The influence of European legality and foreseeability in EU law expresses its positive potential in terms of protection of the individual from detrimental applications of the law in following perspective. Apart from its limited reach in EU criminal legislation, legality and foreseeability play a crucial role in limiting the obligation to consistent interpretation and the attribution of direct effects to Directives if they determine or aggravate criminal liability. According to the CJEU, the principles of foreseeability, precision and non-retroactivity as enshrined in Art. 49 CFREU and having the same meaning of Art. 7 ECHR, limit the disapplication of national law due to EU primary law (Art. 325 TFEU).

XIV. The application of the principle of foreseeability in the Italian legal order could help solving the problems originating from conflicting case-law in the criminal law. Although the Constitutional Court does not seem intentioned to embrace

ECHR legality, the *Corte di Cassazione* has already begun to apply the principle in its case-law.

XV. The rationale of this principle could be the principle of legal certainty and the legal basis Art. 117 Cost., in connection with Art. 6-7 ECHR. In light of the 'principle of favourability' at Art. 53 ECHR, the principle shall respect the limits imposed by Art. 25 co. 2 and 101 co. 2 Cost. Other legal basis could be the principle of culpability (Art. 27 co. 1 Cost.) and the principle of equality (Art. 3 Cost.), as well as fair trial (Art. 111 Cost.). Another possible legal basis is Art. 49 CFREU, within the scope of application of the CFREU. Foreseeability must be limited to the objective foreseeability standard in order to avoid negative effects. Its scope of application could include the objective and subjective requirements of criminal liability and the notion of penalty in a substantive sense. The *Corte di Cassazione* would be in charge of its justiciability, with the extreme remedy of an application to the ECtHR.

APPENDIX II
CONCLUSIONI

Lo scopo della presente ricerca è indagare il principio *nullum crimen sine lege* a livello europeo, e dunque di analizzare in via principale l'interpretazione dell'art. 7 CEDU da parte della Corte EDU. Nel più ampio contesto dell'europeizzazione del diritto penale e della sua relazione con la tutela dei diritti fondamentali, nella prima parte della tesi sono affrontate la definizione autonoma di *law* e l'impiego della prevedibilità, una delle c.d. qualità del diritto, come parametro principale per valutare la legalità. Particolare attenzione è stata attribuita al ruolo del diritto giurisprudenziale nell'interpretazione dell'Art. 7 CEDU. La seconda parte della tesi si focalizza sul possibile ruolo della prevedibilità, espressione della legalità europea, come mezzo per risolvere i nodi creati dal diritto giurisprudenziale nella legalità penale. In seguito, sono state analizzate le attuali soluzioni offerte da due paesi di *civil law* (Italia e Germania) al problema del diritto giurisprudenziale. Inoltre, il ruolo di prevedibilità e legalità nell'ordinamento dell'Unione Europea è stato considerato come esempio di applicazione dei medesimi principi in un ordinamento non formalistico e orientato al principio di effettività. Alla luce dell'analisi svolta, sono state avanzate infine prospettive future per l'attuazione del principio di prevedibilità con riferimento all'ordinamento italiano.

Come analizzato nel primo capitolo, in un lavoro sul *nullum crimen* a livello europeo è necessario tenere in considerazione importanti aspetti generali quali le caratteristiche e sfide del metodo 'europeo' in diritto penale. La c.d. europeizzazione del diritto penale è un fenomeno ricco di sfaccettature, poiché coinvolge diversi ordinamenti (UE, Stati Membri, Consiglio d'Europa) e diversi fattori (diritti umani, armonizzazione, assimilazione ecc.). In primo luogo, la dialettica tra pluralismo e relativismo tipica di fenomeni come l'internazionalizzazione ed europeizzazione del diritto penale rende necessario mettere in comunicazione livelli normativi e ordinamentali differenti con nuovi meccanismi. Di conseguenza, l'analisi della giurisprudenza CEDU impone l'identificazione degli specifici criteri interpretativi e dei principi che ne governano la relazione con altri livelli normativi: particolare importanza è svolta dall'interpretazione evolutiva, nozioni autonome e principio di vantaggiosità (o livello di protezione più favorevole).

Con riferimento alla relazione tra diritto penale e diritti umani, importanti strumenti sovranazionali come la CEDU o la CDFUE sono intervenuti in un contesto in cui i diritti fondamentali garantiti dalle carte costituzionali già fungevano da *scudo* nella protezione degli individui dall'arbitrio statale. Tuttavia, i diritti umani in diritto penale sono stati impiegati anche come mezzo per proteggere beni giuridici o soggetti attraverso il diritto penale (funzione di *spada* del diritto penale).

La CEDU in particolare svolge un ruolo di armonizzazione differente a seconda del rango che occupa all'interno delle fonti del diritto negli Stati Parte alla Convenzione. Inoltre, come accade per principi costituzionali e diritto dell'Unione Europea, la CEDU è soggetta a interpretazione conforme. Se dal punto di vista della Costituzione l'interpretazione conforme alla CEDU ha giocato un ruolo chiave nel diritto penale attuale, non va dimenticato che l'influenza di una prospettiva costituzionale in diritto penale è parte della tradizione giuridica italiana.

2) Come dimostrato nel secondo capitolo, l'origine del principio *nullum crimen nulla poena sine lege* come diritto umano è concentrata nel XX secolo. La formulazione dell'art. 7 CEDU in particolare è stata concepita sulla scorta dell'Art. 11(2) della Dichiarazione Universale del 1948. I lavori preparatori di entrambe le Carte rivelano infatti come la discussione si sia concentrata principalmente sulla legittimazione dei processi nei confronti dei criminali di guerra per mezzo della c.d. clausola di Norimberga, tralasciando quasi del tutto la trattazione dei principi equivalenti a livello nazionale e la discussione sulle fonti del diritto penale (compreso il diritto internazionale).

L'analisi si concentra sull'art. 7 CEDU, poiché tale norma, parte di un più ampio contesto giuridico a livello internazionale, ha portata inclusiva come definizione europea di legalità, dal momento che la legalità CEDU gioca un ruolo cardine anche per l'Unione Europea per ragioni normative e interpretative.

L'art. 7 CEDU è una componente del *rule of law* e salvaguarda, implicitamente o esplicitamente, la legalità di reati e pene, la non retroattività, le c.d. qualità del diritto (accessibilità e prevedibilità), la retroattività della legge penale favorevole, non può essere applicato per impedire il giudizio e la condanna di crimini previsti dai principi generali del diritto riconosciuti dalle nazioni civili, il suo ambito applicativo è determinato dalla nozione autonoma di 'materia penale' e 'pena'.

Tra le caratteristiche di tale norma, la definizione autonoma di *law* è comune a diversi diritti sanciti nella Convenzione, include sia il diritto scritto che il diritto non scritto e si riferisce indistintamente ai paesi di *common law* e di *civil law*. Inoltre, l'art. 7 CEDU prevede che reati e pene possano essere stabiliti dal diritto internazionale, considerato solitamente un riferimento ai crimini internazionali. Inoltre, la c.d. clausola di Norimberga nell'art. 7(2) CEDU apparentemente prevede un'eccezione al principio in questione.

La definizione autonoma di *law* è controversa specialmente per i paesi di diritto continentale poiché potenzialmente in grado di causare antinomie con principi come la riserva di legge o con la gerarchia delle fonti. Una prima critica, che rileva il rischio di porre la giurisprudenza al livello delle fonti legislative nel diritto penale, può essere superata considerando la disposizione CEDU non come una disciplina delle fonti del diritto, ma piuttosto attribuendole valenza sostanziale che guarda in ottica *ex post* alle conseguenze della condotta statale nei confronti dell'individuo. Essa dunque non mira a compromettere i diritti costituzionali, dal momento le sue garanzie debbono essere interpretate solo come standard minimo potenzialmente innalzabile dagli Stati. Una seconda corrente interpretativa ha identificato l'attenzione della Corte EDU per la *law in action* con un riconoscimento della differenza tra 'disposizione' e 'norma' nella teoria generale del diritto o come avvalorante teorie antiformaliste. Nonostante l'attenzione della Corte EDU per la *law in action* sia innegabile, la sua *ratio* è da ricondursi a una logica di effettività, secondo cui la definizione di *law* è una definizione descrittiva, anziché una regola prescrittiva, che si concentra solo sul quadro giuridico in concreto in vista di una possibile violazione della Convenzione.

La definizione sostanziale di diritto rileva inoltre nella definizione degli altri sottoprincipi, che inevitabilmente sono riferiti sia alle fonti legislative che alle fonti giurisprudenziali. L'analisi si concentra sul ruolo della giurisprudenza sia nella valutazione dell'irretroattività che in quella delle qualità del diritto (accessibilità e prevedibilità). La CEDU proibisce l'applicazione retroattiva di un'interpretazione giurisprudenziale sfavorevole al reo (retroattività indiretta), sia per paesi di *civil law* che di *common law*, se l'interpretazione non era ragionevolmente prevedibile al tempo della commissione del reato. Una prima indagine superficiale della giurisprudenza della Corte EDU mostra infatti come la valutazione del rispetto del principio di legalità nell'interpretazione delle corti nazionali si distacchi in maniera sempre maggiore dai

paradigmi nazionali e si focalizzi sul test di prevedibilità, centrato sulla coerenza della prassi delle corti al fine di garantire all'individuo la prevedibilità delle conseguenze delle sue azioni. Di conseguenza, la valutazione dell'irretroattività si sovrappone con la prevedibilità poiché esse hanno in quest'ottica risultati comparabili. Con riferimento alle qualità del diritto, mentre l'accessibilità è un requisito minore, la prevedibilità è utile nella valutazione della calcolabilità della *regula iuris,* da formularsi con sufficiente precisione, ma comunque necessitante di interpretazione da parte delle corti.

Nel terzo capitolo il concetto di prevedibilità è stato analizzato sotto il profilo delle sue origini e *ratio*, delle classificazioni offerte dagli studiosi e attraverso un'analisi del materiale giurisprudenziale della Corte EDU.

La nozione di prevedibilità nella CEDU potrebbe derivare in alternativa dalla filosofia del diritto o dai Paesi di *common law*. Da un lato, la prevedibilità rileva in filosofia e teoria generale del diritto, rappresentando una possibile definizione comune del concetto di certezza del diritto. La certezza del diritto come prevedibilità è un portato del positivismo giuridico, che l'ha interpretata come una concretizzazione dell'ideale relativamente perseguibile della certezza del diritto o del *rule of law*. I punti in comune tra i positivisti sono l'identificazione della certezza del diritto o del *rule of law* con la prevedibilità/predicibilità delle decisioni giudiziarie, il collegamento tra libertà individuale e la relativizzazione del concetto stesso, dal momento che la certezza giuridica è solo concepibile in senso graduato. I realisti non riconoscono invece la possibilità di raggiungere la certezza del diritto e di identificare il diritto con la sua applicazione, ma collegano la prevedibilità alla validità del diritto. Nel panorama filosofico italiano, questi paradigmi sembrano in parte riproporsi, poiché i positivisti guardano alla prevedibilità come bisogno di controllo del diritto penale attraverso criteri razionali verificabili, mentre gli antiformalisti basano la definizione di certezza del diritto come prevedibilità sull'idea che il diritto sia un concetto più ampio, inclusivo sia del diritto scritto che dell'interpretazione giurisprudenziale.

Diversamente, la prevedibilità potrebbe essere una trasposizione del *fair notice* (o *fair warning*) negli Stati Uniti, uno dei fondamenti sia dell'irretroattività sia della *vagueness prohibition,* o del principio di *maximum certainty* nel Regno Unito. Nonostante il *fair warning* condivida la *ratio* della prevedibilità europea, l'analisi della dottrina e della giurisprudenza americana, così come di quella britannica, dimostrano come non vi sia

una diretta connessione con la Convenzione. È invece più convincente identificare il concetto di prevedibilità nella CEDU con il concetto filosofico di prevedibilità, come predicato della certezza del diritto, terreno comune di discussione tra diverse correnti filosofiche.

Per quanto attiene le classificazioni offerte dalla dottrina, si è evidenziata la doppia natura della prevedibilità sia in prospettiva diacronica (interpretazione c.d. storica), collegata all'irretroattività, e sincronica (interpretazione c.d. tecnica), collegata al principio di tassatività/determinatezza. La prevedibilità si compone altresì della precisione delle disposizioni giuridiche sia della prevedibilità dell'interpretazione giurisprudenziale, riflettendo così la definizione bipartita di *law*.

L'analisi della giurisprudenza della Corte EDU ha dimostrato che la prevedibilità consiste in una valutazione *relativa* e *in concreto*. La giurisprudenza è stata analizzata nel tentativo di identificare i *leading case* e di verificarne le modalità applicative. Particolare attenzione è stata dedicata all'alternativa tra valutazione oggettiva o soggettiva della prevedibilità. La struttura non formalistica di tale concetto e la sua potenziale ampiezza di significato sono stati sfruttati per concentrare problemi legati alla legalità all'interno di un unico criterio.

Dalla predetta analisi emerge come l'ambito applicativo della nozione di prevedibilità comprenda sia la definizione del reato che della pena, inclusi i profili esecutivi.

a) *Prevedibilità soggettiva*. La Corte applica la prevedibilità in modo *soggettivo* in due differenti prospettive. Da un lato, nei casi in cui viene applicato il precedente *Cantoni c. Francia*, elementi soggettivi rilevano (es. la qualificazione dei destinatari della norma, il loro status e numero, così come la loro attività professionale). L'applicazione di tali criteri è sempre avvenuta nei casi in cui le corti nazionali hanno esteso l'ambito applicativo di un reato a un nuovo gruppo di casi, specialmente in assenza di precedenti interpretazioni. Dall'altro, criteri soggettivi sono stati utilizzati in casi che seguivano i precedenti *S.W.* e *C.R. c. Regno Unito* e i casi delle guardie al muro di Berlino. In tali occasioni la prevedibilità soggettiva è stata valutata con uno standard al ribasso ed è stata messa in relazione con la possibilità del reo di conoscere il diritto vigente nel momento in cui ha posto in essere azioni palesemente contrarie al diritto, specialmente in casi di successione di Stati o di violazioni dei diritti umani particolarmente serie e manifeste.

b) *Prevedibilità oggettiva*. La *prevedibilità oggettiva* sembra tuttavia il criterio maggiormente utilizzato nella giurisprudenza più recente, smentendo dunque l'idea della prevedibilità CEDU come concetto meramente soggettivo. Include tutti gli standard utilizzati dalla Corte che considerano elementi concernenti la base giuridica in senso oggettivo (o, per utilizzare un concetto familiare al penalista, con i dovuti distinguo, la tipicità), e dunque potenzialmente applicabili ad altri soggetti nella medesima situazione. Tale accezione della prevedibilità sembra dunque preferibile. Seguendo il *leading case S.W.* e *C.R. c. Regno Unito*, la Corte applica i criteri di 'conformità all'essenza del reato' e 'ragionevole prevedibilità' per valutare i risultati dell'interpretazione giurisprudenziale.

Nonostante la Corte EDU sembri aver introdotto una presunzione di prevedibilità in casi di prima interpretazione grazie al criterio di 'conformità all'essenza del reato', che rischia di legittimare interpretazioni retroattive, la valutazione oggettiva di prevedibilità sincronica e diacronica è divenuta il fulcro del *nullum crimen* e la sua valutazione è ora concentrata su potenziali violazioni della legalità per interpretazioni confliggenti delle corti nazionali.

Con riferimento all'irretroattività e alla prevedibilità in senso diacronico, la Corte segue il *leading case Del Río Prada c. Spagna.* Tale valutazione verifica la presenza di precedenti, l'effetto *in malam partem* dell'*overruling*, conflitti giurisprudenziali sincronici preesistenti e il legittimo affidamento dell'individuo sulla precedente interpretazione. La ragionevolezza è dunque valutata oggettivamente alla luce dell'interpretazione del diritto al tempo in cui il reato fu commesso.

Per quanto riguarda la prevedibilità in senso sincronico e la determinatezza, i conflitti sincronici tra le alte corti sono tollerati, fintantoché il sistema sia in grado di trovare una composizione. Diversamente, un persistente conflitto interpretativo può dar luogo a una violazione della Convenzione. Specialmente quando un conflitto interpretativo è risolto successivamente *in malam partem* da una corte superiore ed è applicato retroattivamente, la Corte adotta un orientamento restrittivo. In quest'ottica il ruolo delle corti supreme nella risoluzione dei conflitti interpretativi e nell'interpretazione uniforme è determinante, anche alla luce dell'art. 6 CEDU.

L'analisi della giurisprudenza rivela altresì una relazione funzionale tra legalità e colpevolezza, specialmente quando la Corte considera elementi soggettivi. La prevedibilità delle conseguenze di una condotta non si limita a collegare l'individuo alla

disposizione, ma rende anche impellente la necessità di stabilire una relazione di tipo soggettivo tra il soggetto e il reato, come conseguenza del principio di autonomia individuale. La Corte nella sua giurisprudenza ha dunque riconosciuto la correlazione tra prevedibilità di una norma penale e la responsabilità personale del reo. Considerare la prevedibilità in relazione alla possibilità del ricorrente di essere a conoscenza del diritto penale in termini soggettivi crea inoltre un ragionamento circolare che conduce al riconoscimento del principio di colpevolezza in seno alla Convenzione, senza cadere nel discutibile utilizzo dei parametri soggettivi sopra citati.

Infine, l'analisi giurisprudenziale mette in discussione il dogma della portata assoluta, e dunque non derogabile, dell'art. 7 CEDU. L'osservazione dei 'casi difficili' su gravi violazioni dei diritti umani o sui crimini internazionali fa ipotizzare la presenza di un bilanciamento tra diritti confliggenti, che rende certezza del diritto e *rule of law* recessivi di fronte alla violazione di altri diritti fondamentali (es. la dignità umana, diritto alla vita). Questa interpretazione sembra essere supportata dalla c.d. 'clausola di conformità' dell'art. 17 CEDU e dalla crescente importanza dei diritti delle vittime, senza contare l'applicazione delle teorie di Dworkin sul bilanciamento tra i diritti-principio, cui il *nullum crimen* non farebbe eccezione. I casi difficili nella giurisprudenza CEDU sembrano svelare un atteggiamento differente nei confronti del *rule of law*, potenzialmente in violazione dei principi della tradizione giuridica continentale.

Il capitolo finale si concentra su una possibile applicazione del principio di prevedibilità al fine di mitigare gli effetti negativi del diritto giurisprudenziale sulla legalità penale. Il possibile ruolo della prevedibilità è preceduto da un'analisi delle attuali soluzioni ai conflitti giurisprudenziali diacronici e sincronici dal punto di vista della legalità e della colpevolezza alla luce del ruolo della giurisprudenza nel diritto penale e della 'crisi' del modello legicentrico e della componente 'storica' del principio di legalità. A questo proposito, le soluzioni adottate dall'ordinamento italiano e tedesco verranno poste a confronto.

L'analisi degli ordinamenti italiano e tedesco mostra simili soluzioni al ruolo della giurisprudenza nel diritto penale. a) Sia in Germania che in Italia le interpretazioni confliggenti che mettono a rischio la certezza del diritto e la prevedibilità sono state trattate in prospettiva soggettiva. L'incertezza interpretativa rappresenta infatti uno degli elementi per considerare un errore sul precetto inevitabile, escludendo pertanto la

colpevolezza. Tale assunto si basa sul terreno comune tra legalità, colpevolezza e la possibilità di prevedere quale sia il diritto applicabile. Tuttavia, i risultati nei due ordinamenti sono differenti. In Italia l'art. 5 c.p., come interpretato nella sentenza n. 364/88 della Corte Costituzionale, è stato raramente applicato *in favorem rei*, dal momento che i criteri misti oggettivi e soggettivi affermati dalla Consulta hanno raramente condotto all'esclusione di colpevolezza in caso di *overruling*. Al contrario, la giurisprudenza confliggente è considerata un elemento per affermare la colpevolezza, poiché lo stato di dubbio dell'accusato avrebbe dovuto farlo desistere dall'agire. In Germania il paragrafo 17 StGB viene applicato a (e la colpevolezza è esclusa per) i) *overruling* di un'interpretazione stabile delle alte corti; ii) interpretazioni confliggenti tra corti di diverso livello; iii) interpretazioni confliggenti tra corti dello stesso livello; iv) una singola interpretazione di una disposizione che non è mai stata interpretata. Il dibattito dottrinale sia in Germania che in Italia è diviso sull'adeguatezza dell'errore sul precetto come soluzione in caso di contrasti giurisprudenziali. Sebbene questa soluzione consenta di preservare la struttura dogmatica dei due sistemi, allo stesso tempo rischia di mettere a rischio il principio di uguaglianza, con una valutazione necessariamente caso per caso, 'pospone' la questione al livello della colpevolezza anziché della legalità e ha differenti risultati in termini di formule di proscioglimento.

b) Sia in Germania che in Italia la dottrina ha altresì suggerito soluzioni oggettive, cioè soluzioni riguardanti il piano di tipicità e legalità. Queste proposte solitamente estendono il principio di irretroattività o determinatezza anche alla giurisprudenza, al fine di far fronte a conflitti diacronici e sincronici. In entrambi gli ordinamenti l'interpretazione della Costituzione e del codice penale sembra escludere questa soluzione sulla base del rifiuto di una possibile equazione tra giurisprudenza e legge a livello delle fonti, per non minare il principio della riserva di legge e di separazione dei poteri.

b1) *Lex certa*. In entrambi gli ordinamenti le corti costituzionali ammettono che l'interpretazione giuridica contribuisca a determinare il significato della disposizione. Tuttavia, per quanto concerne l'Italia, il concetto di diritto vivente non è decisivo per escludere la conformità della previsione legislativa con la Costituzione per un'interpretazione non determinata, terreno su cui i giudici costituzionali sono tradizionalmente cauti. In Germania, il principio della *lex certa* (*Bestimmtheitsgebot*) viene similmente valutato con appropriati riferimenti all'interpretazione della disposizione scritta da parte delle corti, tanto che un'interpretazione costante contribuisce

a rendere determinate anche disposizioni vaghe. Tuttavia, il BVerfG ha recentemente attribuito ai giudici l'obbligo di specificare la legge (*Präzisierungsgebot*). Quando una giurisprudenza stabile costituisce un elemento affidabile per interpretare e applicare la norma, i giudici hanno l'obbligo di contribuire a rendere i requisiti della responsabilità penale riconoscibili. Inoltre, il legittimo affidamento può fondare simili obblighi anche per quanto riguarda gli *overruling*. Tali principi sono perciò considerati una potenziale base per un'interpretazione innovativa dell'art. 103 II GG.

b2) *Irretroattività*. Con riferimento al principio di irretroattività e la successione di leggi, sia in Italia che in Germania emergono due punti principali. In primo luogo, la dottrina ha suggerito l'introduzione del *prospective overruling*. Nel sistema italiano e tedesco il *prospective overruling* non è stato implementato ma il dibattito dottrinale guarda a questa soluzione come a una correzione interpretativa agli effetti sostanziali delle incongruenze in giurisprudenza. Sia in Italia che in Germania è stata dunque suggerita l'estensione del principio di irretroattività alla giurisprudenza. In Germania i favorevoli all'estensione dell'art. 103 II GG alla giurisprudenza si sono focalizzati o su una diretta applicazione o su un'interpretazione analogica dell'art. 103 II GG, evidenziandone la *ratio* di legittimo affidamento, certezza del diritto e colpevolezza. In Italia il dibattito è stato ispirato dall'interazione con la legalità europea e dall'applicazione dell'irretroattività o della prevedibilità alla giurisprudenza, attraverso l'interpretazione conforme alla CEDU. Il dibattito italiano si è concentrato sull'applicazione dell'art. 2 c.p. (successione di leggi penali) alla giurisprudenza. Questa soluzione soddisferebbe sia il caso dei conflitti diacronici (anche per la legge penale più favorevole), sia dei conflitti sincronici riassorbiti da un 'precedente qualificato' di una corte superiore, mentre i conflitti sincronici persistenti rimarrebbero irrisolti nell'ottica della legalità. Opinioni contrarie hanno rilevato come tale estensione dei principi costituzionali sia inaccettabile e ponga ostacoli procedurali e pratici. Inoltre, non sembra probabile un accoglimento di tale estensione da parte della Corte Costituzionale nel prossimo futuro, specialmente alla luce del principio di riserva di legge e di separazione dei poteri. Al contrario, la Corte di Cassazione sembra essere più incline a un'integrazione tra la legalità europea e la legalità nazionale. In primo luogo, in alcune sentenze equipara o giustappone il diritto scritto e il diritto giurisprudenziale. In secondo luogo, nella recente giurisprudenza ispirata alla legalità europea la Corte di Cassazione applica lo standard/principio di prevedibilità

europea in una differente prospettiva e in particolare come un possibile diritto a interpretazione stabile.

b3) Altra soluzione è costituita da rimedi operativi nei meccanismi regolanti le corti superiori e del diritto processuale. La possibile introduzione *de lege ferenda* del precedente vincolante, anche se solo come obbligo verticale relativo è proposta comune da parte della dottrina italiana e tedesca. I controargomenti sono identici alla precedente critica al *prospective overruling*: un'estensione inappropriata del *nullum crimen*, in aggiunta alla difficile sovrapposizione di un'impostazione di *common law* in un paese di *civil law*.

Inoltre, sia l'ordinamento italiano che quello tedesco prevedono meccanismi giudiziali che assicurano l'interpretazione uniforme e lo sviluppo del diritto in seno alle corti superiori, perseguendo la certezza del diritto in prospettiva diacronica e sincronica con riferimento alla stabilità e coerenza dell'interpretazione delle corti (Art. 618 c.p.p. e *Vorlagepflicht*). I risultati sono tuttavia opposti nei due Paesi. In Italia per ragioni al contempo pratiche e normative la Corte di Cassazione è sovraccarica di contenzioso e non è perciò in grado di assicurare la coerenza nella propria giurisprudenza. Recenti modifiche legislative sembrano andare nella direzione di un rinnovato ruolo delle Sezioni Unite, ma ragioni pratiche sembrano mantenere una compiuta funzione nomofilattica della Cassazione ancora lontana. Al contrario il *Vorlagepflicht* tra gli OLG e il BGH e tra le sezioni del BGH sembra assicurare un accettabile livello di stabilità nella giurisprudenza e soprattutto evitare i conflitti interpretativi. Le ragioni sono pratiche (ridotto ammontare di contenzioso) ma anche tecniche, specialmente per le procedure che scoraggiano i giudici a creare conflitti. Tuttavia, tali strumenti sembrano adatti a risolvere i conflitti sincronici di giurisprudenza, lasciando però irrisolti i conflitti diacronici.

Complessivamente, il sistema penale tedesco sembra offrire soluzioni soddisfacenti in termini di stabilità della giurisprudenza, in particolare grazie al paragrafo 17 StGB e ai meccanismi giudiziali che assicurano la certezza del diritto. Inoltre, la CEDU ha rango di legge ordinaria e potrebbe avere effetti limitati in questa prospettiva. In Italia al contrario, dal momento che i rimedi *de iure condito* sembrano offrire risultati insoddisfacenti, la dottrina e la giurisprudenza si sono concentrate su possibili rimedi basati sull'interpretazione conforme che dia ingresso alla legalità europea.

Il ruolo della legalità europea e la prevedibilità sono stati verificati altresì con riferimento all'Unione Europea in diverse prospettive, poiché la natura non formalistica dell'ordinamento dell'Unione Europea, la sua applicazione dei diritti fondamentali come interpretati dalla Corte EDU e il focus sul principio di effettività sono condizioni ottimali per testare un modello applicativo, seppur ancora limitato, della nozione di prevedibilità. *Nullum crimen* e prevedibilità si ritrovano applicati sia prima che dopo l'entrata in vigore del Trattato di Lisbona. La prevedibilità opera sia sotto l'ombrello del *nullum crimen* che con riferimento ai principi generali di certezza del diritto e di legittimo affidamento. Al di fuori del diritto penale, la prevedibilità e il principio di legalità in generale rilevano dove l'Unione Europea esercita poteri sanzionatori diretti o indiretti. Nel diritto della concorrenza, lo standard di prevedibilità è stato applicato dalla CGUE sia a conflitti diacronici che sincronici nella prassi della Commissione, grazie all'adozione della definizione autonoma di *law* e, in particolare, impiegando i criteri soggettivi del caso *Cantoni*. La regola introdotta dalla sentenza *Dansk Rørindustri* in prospettiva diacronica ammette che una *regula iuris* possa essere applicata retroattivamente a patto che i) l'applicazione sia ragionevolmente prevedibile; ii) sia necessario assicurare l'implementazione della *policy* della concorrenza europea. La prevedibilità sincronica è valutata con criteri soggettivi e con riferimento alla natura professionale dell'attività svolta. In altri casi in cui l'UE ha poteri sanzionatori (per es. l'adozione di misure restrittive nell'area della politica estera e di sicurezza comune) la Corte di Giustizia adotta lo stesso test *Dansk Rørindustri* (ragionevole prevedibilità ed effettività) e ammette la chiarificazione graduale delle norme giuridiche. In tale accezione la nozione di 'prevedibilità ragionevole' ha dunque risultati insoddisfacenti in termini di standard di protezione, specialmente per l'uso di criteri soggettivi e perché il principio di effettività (implementazione di una politica europea) è bilanciato con i diritti fondamentali. Di conseguenza, tale accezione della prevedibilità va rigettata come dimostrazione del potenziale negativo di tali criteri in termini di legalità e tutela degli individui.

In tema di competenze legislative dell'Unione Europea nell'armonizzazione nel diritto penale (Art. 83 TFUE), il principio di legalità ha un'influenza indiretta: dato che queste competenze vengono attuate attraverso le direttive, il *nullum crimen* riguarda la legislazione nazionale che le traspone. Solo nel caso dell'affermazione di una competenza ad introdurre legislazione direttamente applicabile nella materia penale l'Unione stessa

dovrebbe tener conto in maniera più consistente del principio *nullum crimen* a livello di formulazione legislativa.

Il potenziale positivo del principio di legalità e prevedibilità europea si esplica invece nella seguente prospettiva. Anche per direttive emanate in area non penale, la Corte di Giustizia ritiene che il principio di legalità e certezza del diritto rappresenti un limite per gli Stati Membri nell'obbligo di interpretazione conforme alla direttiva o nell'attribuzione di effetti diretti che determini o aggravi la responsabilità penale. Di conseguenza, possibili effetti *in malam partem* determinati dall'interpretazione giudiziale del diritto dell'Unione sono esclusi. Nell'ambito degli effetti diretti o dell'interpretazione conforme al diritto primario dell'Unione, la Corte di Giustizia ammette che una potenziale lesione dei principi di prevedibilità, precisione e irretroattività, previsti dall'art. 49 CDFUE e da interpretarsi nello stesso significato dell'art. 7 CEDU, escluda l'applicabilità di regole interpretative derivanti da effetti diretti o interpretazione conforme al diritto primario.

Le precedenti considerazioni consentono di tracciare future prospettive di integrazione tra legalità europea e legalità nazionale attraverso l'interpretazione conforme. Applicare il c.d. principio di prevedibilità nel sistema italiano potrebbe integrare i due livelli normativi e offrire una soluzione a problemi che, come dimostrato, non possono essere risolti positivamente con le categorie dogmatiche tradizionali.

i) La ratio principale è il principio di certezza del diritto composto da precisione e determinatezza, irretroattività, legittimo affidamento, sicurezza giuridica. Inoltre, sia la proposta del Corpus Juris 2000 sia il Manifesto sulla Politica Criminale Europea considerano la prevedibilità rispettivamente con riferimento a *overruling* ammissibili e come componente di *lex certa* e irretroattività.

ii) Il possibile fondamento costituzionale del principio potrebbe essere il combinato disposto tra art. 117 Cost. e artt. 6 e 7 CEDU. Alla luce del 'principio di vantaggiosità' (art. 53 CEDU), il principio dovrebbe rispettare i limiti imposti dagli artt. artt. 25 co. 2 Cost. e 101 co. 2 Cost. Tale principio potrebbe altresì essere sostenuto, a livello costituzionale, dal principio di colpevolezza (art. 27 co. 1 Cost.) e dal principio di eguaglianza (art. 3 Cost.) come anche il giusto processo (art. 111 Cost.). Un altro possibile fondamento sarebbe l'art. 49 CDFUE, nei limiti dell'ambito applicativo della relativa Carta.

iii) Per quanto riguarda l'ambito applicativo, le alternative in dottrina sono la prevedibilità della qualificazione giuridica del fatto o la prevedibilità delle decisioni giudiziali. In realtà, questi due concetti vanno nella stessa direzione, dal momento che entrambi si riferiscono all'illegittimità, alla corretta qualificazione giuridica e alla pena applicabile. Considerando l'art. 25 co. 2 Cost., l'ambito applicativo si potrebbe estendere ai requisiti oggettivi e soggettivi per l'affermazione della responsabilità penale (inclusivo degli elementi del reato) e alla pena, che dovrebbe essere considerata in senso sostanziale (tutti gli elementi non prevedibili che aggravano la pena).

Alla luce sia dell'analisi della c.d. prevedibilità europea che della applicazione in sede nazionale dell'errore sul precetto, la prevedibilità dell'interpretazione giudiziale deve essere limitata al concetto di prevedibilità oggettiva, applicando dunque gli standard CEDU in tal senso. Se applicata a un conflitto diacronico di giurisprudenza, potrebbe evitare l'applicazione retroattiva di un *overruling in malam partem* che non era prevedibile al tempo in cui il reato fu commesso. Se applicata a un conflitto sincronico, potrebbe risolvere sia un conflitto sincronico poi riassorbito dalle Sezioni Unite sia un conflitto sincronico irrisolto. Il vantaggio rispetto alle altre valide soluzioni sarebbe evitare la modifica delle fonti del diritto nell'ordinamento. La sua giustiziabilità sarebbe affidata alla Corte di Cassazione, con il rimedio *in extremis* del ricorso alla CEDU per l'interessato, o, in caso di ratifica da parte italiana, di un'*advisory opinion* a norma del Protocollo 16 CEDU.

APPENDIX III
ERGEBNIS

Der Zweck dieser Dissertation ist das *Nullum crimen sine lege*-Prinzip auf europäischer Ebene zu untersuchen. Wegen ihrer zentralen Rolle ist eine Analyse der Rechtsprechung des EGMR über Art. 7 EMRK erforderlich. Im Rahmen der Europäisierung des Strafrechts, im ersten Teil der Arbeit sind die autonome Definition von ‚*law*' und der Maßstab der „Vorhersehbarkeit' (*foreseeability*) beschrieben. Die Rolle des Richterrechts in der Auslegung des Art. 7 EMRK wird besonders beachtet. Der zweite Teil der Arbeit beschäftigt sich mit der Vorhersehbarkeit als Ausdruck des ‚europäischen' Nullum Crimen-Prinzips und beantwortet die Frage, ob sie eine Rolle in dem Verhältnis zwischen Gesetzlichkeit und Richterrecht spiele. In der Folge werden die Lösungen zum Problem des Richterrechts aus kontinentalrechtlicher Sicht untersucht. Außerdem, die Funktion der Vorhersehbarkeit und *Nullum crimen* in der EU wird als Beispiel einer nicht formalistischen, zum Effektivitätsprinzip orientierten Rechtsordnung entfaltet. Schließlich werden zukünftige Perspektiven der Durchsetzung des Prinzips der Vorhersehbarkeit in der italienischen Rechtsordnung erörtert.

Wie im ersten Kapitel erläutert, wirft eine solche Untersuchung die Frage nach den Eigenschaften und Herausforderungen einer ‚europäischen' Methode im Strafrecht auf. In erster Linie, die Dialektik zwischen Pluralismus und Relativismus, typisch für die Internationalisierung und Europäisierung des Strafrechts, hat die Notwendigkeit betont, verschiedene normative Ebene in Verbindung zu bringen. In zweiter Linie, eine Untersuchung der Rechtsprechung des EGMRs verlangt ihre spezifischen Auslegungskriterien und Prinzipien festzustellen: bzw. die evolutive Auslegung, die autonome Definitionen und das Günstigkeitsprinzip. Die EMRK spielt eine unterschiedliche Rolle abhängig davon, welcher Rang die EMRK im nationalen Recht hat. Darüber hinaus wird die EMRK (wie EU Recht) durch eine konforme Auslegung interpretiert und hat deswegen einen gewissen Einfluss im Strafrecht.

Wie im zweiten Kapitel erörtert, ist die Herkunft des Grundsatzes *nullum crimen sine lege* als Menschenrecht im 20. Jahrhundert konzentriert. Art. 7 EMRK ist gemäß Art. 11(2) der Allgemeinen Erklärung der Menschenrechte (AEMR) von 1948 verfasst worden. Die Untersuchung der *travaux préparatoires* der EMRK und AEMR führt zum

folgenden Ergebnis: Die Varianten des *Nullum crimen*- Grundsatzes auf nationaler Ebene wurden von den Verfassern fast ignoriert; die Debatte hat sich auf der Legitimierung der Prozesse gegen Kriegsverbrecher durch die sogenannte ‚Nürnberg-Klausel' beruht; die Rechtsquellen des Strafrechts (auch internationales Recht) wurden nicht in Frage gestellt.

Art. 7 EMRK, als Teil eines umfassenden internationalen rechtlichen Umfeld, hat einen inklusiven Umfang als Definition der europäischen *Nullum crimen*, zumal die EMRK-*Nullum crimen* auch für das Recht der EU aus normativen und interpretative Gründen eine entscheidende Rolle spielt.

Art. 7 EMRK ist ein Bestandteil der Rechtsstaatlichkeit (*rule of law*) und schützt, implizit oder explizit, die Gesetzlichkeit der Straftaten und Strafen, das Rückwirkungsverbot, die sogenannten Qualitäten des Rechts, die Rückwirkung des milderen Rechts und darf nicht angewendet werden, um Verurteilung und Bestrafung von Straftaten, die zur Zeit ihrer Begehung nach den von den zivilisierten Völkern anerkannten allgemeinen Rechtsgrundsätzen strafbar waren, zu verhindern; sein Anwendungsbereich ist von der autonomen Definition von ‚Strafe' eingegrenzt.

Verschiedene in der EMRK verankerte Menschenrechte weisen die autonome Definition von ‚*law*' auf, die sowohl geschriebenes Recht als auch ungeschriebenes Recht enthält und sich unterschiedslos auf *common law* und *civil law* Länder bezieht. Darüber hinaus schreibt Art. 7 EMRK vor, dass Straftaten und Strafen auch vom internationalen Recht bestimmt werden dürfen und die sogenannte ‚Nürnberg-Klausel' in Art. 7(2) EMRK sieht eine Ausnahme zu diesem umsonst unbeschränkten Grundsatz scheinbar vor.

Die autonome Definition von ‚*law*' ist für kontinentalrechtliche Länder besonders umstritten, da sie Antinomie mit dem Grundsatz des Gesetzesvorbehaltes oder mit der Normenhierarchie verursachen kann. Erstens, kann die häufige Kritik, die vor der Gefahr warnt, die Rechtsprechung auf der Ebene des Gesetzes im Strafrecht zu setzen, überwinden werden, wenn die Vorschrift der EMRK nicht als Regelung der Normenhierarchie verstanden wird, sondern wenn man ihr einen materiellen Ansatz erkennt, dass die Auswirkungen des staatlichen Handelns auf einen Menschen beachtet. Die dort enthaltenen Menschenrechte bieten nur einen Minimumstandard an, den die Mitgliedstaaten erhöhen können. Zweitens hat die Lehre oft die Berücksichtigung des EGMRs für die ‚*law in action*' als eine Anerkennung des Unterschieds zwischen

Rechtssatz und Rechtsnorm interpretiert. Der EGMR tatsächlich berücksichtigt das Richterrecht, weil er die Definition von ‚*law*' als eine beschreibende Definition behandelt, und der keinen normativen Charakter anerkennt, sodass Richterrecht als Quelle des Strafrechts nicht gefordert wird: Der EGMR befasst sich hauptsächlich mit dem konkreten rechtlichen Rahmen, um einen eventuellen Verstoß der EMRK *ex post* zu überprüfen.

Die materiellrechtliche Definition von ‚Recht' ist bedeutend in der Abgrenzung der anderen Grundsätze, die sich sowohl auf Gesetz als auch auf Richterrecht beziehen. Die Untersuchung konzentriert sich auf die Rolle der Rechtsprechung in der Einschätzung sowohl des Rückwirkungsverbots als auch der ‚Qualitäten' des Rechts (Zugänglichkeit und Vorhersehbarkeit). Die EMRK verbietet die rückwirkende Anwendung von täterbelastenden richterlichen Auslegungen, sowohl in *common law* als auch in *civil law* Staaten, wenn die Auslegung zur Zeit der Begehung nicht vernünftigerweise voraussehbar war. Eine einleitende Untersuchung der Rechtsprechung des EGMRs zeigt, dass die Auswertung der Verstöße des *Nullum crimen*-Grundsatzes in der EMRK sich von nationalen Auffassungen immer weiter entfernt und sich auf den Vorhersehbarkeit-Test konzentriert, der auf die Einheitlichkeit der richterlichen Auslegung ausgerichtet ist, damit der Einzelne die Konsequenzen seiner Handlung oder Unterlassung vorhersehen kann. Infolgedessen überschneidet sich die Prüfung des Rückwirkungsverbotes mit der Vorhersehbarkeit, da sie unter diesem Gesichtspunkt vergleichbar sind. Zwischen den ‚Qualitäten' des Rechts, die Bestimmtheit und Rechtssicherheit gewährleisten sollten, wird Vorhersehbarkeit angewendet, um die Berechenbarkeit der *regula iuris* zu prüfen, die auch mit Hilfe der richterlichen Auslegung hinreichend präzisiert werden muss.

Im dritten Kapitel werden die Herkunft und die Wurzeln des Begriffs der Vorhersehbarkeit, aber auch deren von der Lehre entwickelten Klassifizierung untersucht. Außerdem wird die Rechtsprechung des EGMRs analysiert und gemäß vorbestimmten Kriterien angeordnet.

Der Begriff der Vorhersehbarkeit kann sowohl aus der Rechtsphilosophie als auch aus *common law* Staaten entstehen. Einerseits ist die Vorhersehbarkeit eine gemeinsame Definition des Begriffes der Rechtssicherheit in der Rechtsphilosophie. Rechtssicherheit als Vorhersehbarkeit ist das Resultat des Rechtspositivismus, der sie als Konkretisierung des relativ erreichbaren Ideals der Rechtssicherheit oder der Rechtsstaatlichkeit

betrachtet. Positivisten teilen folgende Auffassung: die Identifizierung der Rechtssicherheit oder der Rechtsstaatlichkeit mit der Vorhersehbarkeit/Berechenbarkeit der gerichtlichen Entscheidungen; die Verbindung mit der individuellen Freiheit; die Relativierung des Begriffs, da Rechtssicherheit nur stufenweise angesehen werden soll. Rechtsrealismus erkennt nicht die Rechtssicherheit als ausführbare Idee an und identifiziert nicht das Recht mit seiner Anwendung; Realisten verbinden aber die Vorhersehbarkeit mit der Gültigkeit des Rechts.

Andererseits kann die Vorhersehbarkeit sich auf *fair notice* im US-amerikanischen Recht (einer der Wurzeln des Rückwirkungsverbots und der *vagueness prohibition*) oder auf *maximum certainty* im britischen Rechtberuhen. Obwohl *fair warning* dieselbe Grundlage der europäischen Vorhersehbarkeit hat, die Untersuchung der amerikanischen und britischen Rechtsprechung und Lehre zeigt, dass sie in keiner direkten Verbindung miteinander stehen. Deswegen ist es überzeugend, der Begriff der Vorhersehbarkeit in der EMRK mit dem philosophischen Begriff der Vorhersehbarkeit zu identifizieren, d. h. das Prädikat der Rechtssicherheit und eine gemeinsame Grundlage für verschiedene philosophische Strömungen.

Im Hinblick auf die Klassifizierung, die Lehre hat die Vorhersehbarkeit in der Rechtsprechung des EGMRs in einem zweifachen Sinne ausgelegt: In diachronischer Perspektive (in Verbindung mit dem Rückwirkungsverbot) und in synchronischer Perspektive (in Verbindung mit der Bestimmtheitsgebot). Die Vorhersehbarkeit ist außerdem sowohl mit der Präzisierung des Rechtssatzes als auch mit der Voraussehbarkeit der richterlichen Auslegung verknüpft. Sie spiegelt demnach die Definition von ‚*law*' wider.

Die Untersuchung der Rechtsprechung des EGMRs hat gezeigt, dass die Vorhersehbarkeit aus einer relativen und konkreten Bewertung besteht. Was die Rechtsprechung angeht, so ist es analysiert worden, dass die *Leading Cases* und ihre Entwicklungen verdeutlicht werden können. Besonders berücksichtigt wurde die Alternative zwischen objektiver und subjektiver Bewertung der Vorhersehbarkeit. Man profitiert von der non-formalistische Struktur des Begriffs und seines potenziellen Umfangs, um die Probleme der Gesetzlichkeit dank einem einheitlichen Kriterium zusammenzubringen.

Aus der bisherigen Untersuchung ergibt es sich, dass der Anwendungsbereich der Vorhersehbarkeit die Definition von Tatbestand und Strafe (und die Vollstreckung der Strafe) enthält.

a) *Subjektive Vorhersehbarkeit*. Der EGMR wendet die Vorhersehbarkeit in subjektiver Weise in zwei unterschiedlichen Perspektiven an. Erstens, wenn zum Präzedenzfall *Cantoni* zurückgegriffen wird, verweist der EGMR auf subjektive Elemente (Status und Anzahl der Normadressaten usw.). Es war immer der Fall, wenn nationale Gerichte den Anwendungsbereich eines Tatbestands zu einer neuen Fallkonstellation ausgedehnt haben, besonders bei fehlender vorheriger Auslegung. Zweitens, subjektive Kriterien wurden vom EGMR in Fällen verwendet, wo der Präzedenzfall *S.W. g. Vereinigter Königreich* oder die *Mauerschützenfälle* berufen worden wurden. Aus diesem Anlass wurde die subjektive Vorhersehbarkeit mit einem niedrigen Standard gemessen und mit der Gelegenheit des Normadressaten, vom geltenden Recht zur Zeit einer offensichtlichen unrechtmäßigen Tat bewusst zu sein, in Verbindung gesetzt, besonders wenn Staatennachfolge oder besonders schwere Menschenrechtsverletzungen zur Frage kamen.

b) *Objektive Vorhersehbarkeit*. Objektive Vorhersehbarkeit sieht jedoch als das am meisten angewendete Kriterium von der aktuellen Rechtsprechung aus. Sie umfasst alle Maßstäbe, die sich auf objektive Elemente der Rechtsgrundlage beziehen, und die infolgedessen potenziell auch auf andere Subjekte, die sich in derselben Rechtslage befinden, anwendbar sind. Solche Auslegung ist auch vorzuziehen. Der EGMR wendet die Kriterien der Vereinbarkeit mit dem Wesen des Delikts und der vernünftigen Vorhersehbarkeit an, um die Auswirkungen der richterlichen Auslegung zu prüfen. Der EGMR führe scheinbar in Fällen erster Auslegungen durch das Kriterium der Vereinbarkeit mit dem Wesen des Delikts eine Rechtsvermutung ein. Diese Rechtsvermutung ist nicht einheitlich angewendet und birgt das Risiko rückwirkender Auslegungen.

Die objektive Auswertung der synchronischen und diachronischen Vorhersehbarkeit ist zur Zeit der Kern von *Nullum crimen* geworden, deren Prüfung auf potenzielle Verstöße der Gesetzlichkeit wegen gegensätzlicher Auslegungen der nationalen Gerichte konzentriert ist.

In Bezug auf Rückwirkung und Vorhersehbarkeit im diachronischen Sinne, folgt der EGMR das *Leading Case Del Río Prada g. Spanien*. Er prüft die Präzedenzfälle, täterbelastende Auswirkungen der Rechtsprechungsänderung, anhaltende synchronische richterliche Konflikte und Vertrauensschutz des Einzelnen auf die bisherige Auslegung. Die vernünftige Vorhersehbarkeit ist demnach objektiv geprüft, im Hinblick auf die Auslegung zur Zeit der Begehung der Tat.

In Bezug auf die Bestimmtheit und die Vorhersehbarkeit im synchronischen Sinne, sind synchronische höchstrichterliche Konflikte zulässig, solange die Rechtsordnung letztinstanzlich eine Lösung schaffen kann. Anderenfalls würde ein anhaltender Auslegungskonflikt gegen die EMRK verstoßen. Besonders wenn ein Konflikt im Anschluss an einer täterbelastenden und rückwirkenden Auslegung eines obersten Gerichtshofes gelöst wird, verfolgt der EGMR einen restriktiven Ansatz. Auch im Hinblick auf Art. 6 EMRK spielen die obersten Gerichtshöfe eine schwerwiegende Rolle in der Lösung richterlicher Konflikte und in der einheitlichen Auslegung.

Die Untersuchung der Rechtsprechung zeigt auch eine funktionelle Verbindung zwischen *Nullum Crimen*-Grundsatz und Schuldprinzip, besonders wenn der EGMR subjektive Kriterien anwendet. Der EGMR hat in seiner Rechtsprechung die Verbindung zwischen Vorhersehbarkeit der Rechtsnorm und die persönliche Verantwortung des Täters anerkannt. Das Berücksichtigen der Vorhersehbarkeit im Zusammenhang mit der Gelegenheit des Täters, das Strafrecht in subjektiver Hinsicht zu erkennen, schafft einen Zirkelschluss, der zur Anerkennung des Schuldprinzips in der EMRK führt. Die Anerkennung des Schuldprinzips sollte aber das Beschränken der Vorhersehbarkeit zu täterbelastenden subjektiven Kriterien vermeiden.

Schließlich, die tatsächliche absolute Reichweite des Art. 7 EMRK ist umstritten. Die Untersuchung der *hard cases* über schwere Menschenrechtsverletzungen oder internationale Verbrechen hat einen möglichen Abwägung zwischen kollidierenden Rechten verdeutlicht: Rechtssicherheit und Rechtsstaatlichkeit vor der Verletzung anderer Grundrechte (z. B. Menschenwürde, Recht auf Leben) zurücktreten würden. Diese Interpretation beruht sich auf Art. 17 EMRK (Verbot des Missbrauchs der Rechte) und auf der steigenden Rolle der Opferschutzrechte, sowie auch auf Dworkins Theorie der Abwägung zwischen Rechte gestützt. Die *hard cases* in der Rechtsprechung des EGMRs verstoßen also potenziell mit den Grundsätzen der kontinentalrechtlichen

Tradition (absolute Reichweite von *Nullum crimen*) und decken ein neues Umgehen mit der Rechtsstaatlichkeit auf.

Das letzte Kapitel beschäftigt sich mit der möglichen Anwendung des Prinzips der Vorhersehbarkeit in der italienischen Rechtsordnung, um die täterbelastenden Auswirkungen des Richterrechts im Strafrecht zu mildern. Deswegen ist eine Untersuchung der aktuellen Lösungen zu den diachronischen und synchronischen höchstrichterlichen Konflikten unter dem Gesichtspunkt der Gesetzlichkeit und der Schuld vorangestellt, im Hinblick auf die Rolle der Rechtsprechung im Strafrecht und der Krise der zentralen Rolle des parlamentarischen Gesetzes. Diesbezüglich werden die Lösungen der italienischen und deutschen Rechtsordnung verglichen. Die Untersuchung führt zu folgenden Ergebnissen.

a) Sowohl in Deutschland als auch in Italien werden die gegensätzlichen Auslegungen, die die Rechtssicherheit gefährden, subjektiv behandelt. Der unvermeidbare Verbotsirrtum, der Schuld ausschließt, ist in dem Fall einer konkurrierenden Auslegung anwendbar und stellt einer der Elemente dar, um ein Verbotsirrtum unvermeidbar zu erklären. Ohnehin sind die Ergebnisse in den beiden Rechtsordnungen unterschiedlich. In Italien art. 5 c.p., wie es vom Urteil n. 364/88 der *Corte Costituzionale* ausgelegt wurde, ist selten zugunsten des Täters angewendet worden, da die gemischten subjektive-objektive Kriterien selten zur Unschuldsbehauptung des Täters geführt haben. Im Gegensatz sollte eine konkurrierende Rechtsprechung ein Element sein, um die Schuld zu behaupten, da der Täter wegen des Zweifels von der Tat zurückhalten sollen hätte. In Deutschland wird § 17 StGB angewendet (und die Schuld ausgeschlossen) zu: i) *overruling* einer gefestigten Auslegung der obersten Gerichte; ii) konkurrierende Auslegungen zwischen nicht gleichrangigen Gerichten; iii) konkurrierende Auslegungen zwischen gleichrangigen Gerichten; iv) eine einzige Auslegung einer noch nicht interpretierten Vorschrift. Die deutsche und italienische Lehre streitet darum, ob der Verbotsirrtum eine angemessene Lösung für richterliche Konflikte darstellt. Obwohl diese Lösung ermöglicht, die dogmatische Struktur der Rechtsordnungen zu bewähren, parallel dazu würde der Gleichheitsgrundsatz mit einer Einzelfallprüfung aufs Spiel gesetzt und würde das Problem auf der Ebene der Schuld statt der Gesetzlichkeit ‚verschieben'.

b) Sowohl in Italien als auch in Deutschland hat die Lehre objektive Lösungen vorgeschlagen, bzw. Gesetzlichkeit betreffende Lösungen. Das Ziel ist das Rückwirkungsverbot und das Bestimmtheitsgebot auch zur Rechtsprechung auszudehnen, um diachronische und synchronische Konflikte der Rechtsprechung anzugehen. In beiden Rechtsordnungen schließen die Verfassung und das Strafgesetzbuch diese Lösung aufgrund der Ablehnung der Gleichstellung zwischen Rechtsprechung und Gesetz auf der Ebene der Rechtsquellen aus, um der Gesetzesvorbehalt und die Gewaltentrennung nicht zu schwächen.

b1) *Lex certa*. In Italien stellt die *Corte Costituzionale* selten Verstöße gegen den Bestimmtheitsgrundsatz fest. Die Rechtsprechung spielt eine Rolle im Begriff des ‚lebenden Rechts', der aber nur als Maßstab benutzt wird, um die hinreichende Bestimmtheit der Vorschrift zu behaupten. In Deutschland wird das Bestimmtheitsgebot auch mit Bezug auf die Rechtsprechung angemessen, sodass Richterrecht zur Bestimmtheit der Norm mitwirkt. Der BVerfG hat aber den Richtern ein spezifisches Gebot, das Gesetz zu präzisieren, zugeschrieben: Wenn eine gefestigte Rechtsprechung sich als vertrauliches Element um die Norm auszulegen erweist, sind die Richter verpflichtet, die Voraussetzungen der strafrechtlichen Verantwortung deutlich zu machen.

b2) *Rückwirkungsverbot*. In Italien und Deutschland tauchen zwei Hauptgedanken über Rückwirkungsverbot und die zeitliche Geltung des Strafgesetzes auf. Einerseits hat die Lehre vorgeschlagen, *prospective overruling* einzuführen, das als eine Korrektur zu den materiellen Auswirkungen der Widersprüche der Rechtsprechung behandelt wurde. *Prospective overruling* wurde aber weder in Italien noch in Deutschland durchgesetzt. Andererseits wird in beiden Staaten vorgeschlagen, das Rückwirkungsverbot auf die Rechtsprechung auszudehnen. In Deutschland beruht sich eine solche Ausdehnung auf einer direkten oder analogischen Anwendung des Art. 103 II GG auch zum Richterrecht, aufgrund des Vertrauensschutz, der Rechtssicherheit und des Schuldprinzips. In Italien ist die Debatte auf das ‚europäische' *Nullum crimen* konzentriert und auf die Anwendung des Rückwirkungsverbots oder der Vorhersehbarkeit zur Rechtsprechung durch konforme Auslegung, damit art. 2 c.p. auch für die Rechtsprechung gelten kann. Im Gegenteil werden praktische und prozessuale Hindernisse entgegengesetzt. Obwohl es unwahrscheinlich ist, dass die *Corte Costituzionale* eine solche Auslegung annimmt, ist die *Corte di Cassazione* dazu geneigt. Erstens werden gesetzliches Recht und

Richterrecht in einigen Entscheidungen gleichgestellt. Zweitens, wendet die *Cassazione* in der aktuellsten Rechtsprechung, die vom europäischen *Nullum crimen*-Grundsatz inspiriert wurde, die Vorhersehbarkeit als Standard oder Prinzip in einer unterschiedlichen Perspektive an (besonders als Recht zu einer gefestigten Auslegung der Gerichte).

b3) Die dritte Möglichkeit ist zu den Mechanismen die die obersten Gerichte im Verfahrensrecht ausrichten, zu greifen. Erstens, die deutsche und italienische Lehre diskutiert über die Schaffung des Präzedenzfalls mit Bindungswirkung, aber nur als vertikale relatives Gebot. Ungeachtet dass es nur um eine *de lege ferenda* Perspektive geht, sind die Gegenargumente dieselben die auch für *prospective overruling* galten.

Zweitens, schreibt das Verfahrensrecht Mechanismen den obersten Gerichtshöfen vor, die die einheitliche Rechtsauslegung und die Entwicklung des Rechts und Rechtssicherheit in Bezug auf diachronische und synchronische Konflikte gewährleisten sollten (Art. 618 c.p.p. und Vorlagepflicht). Die Untersuchung deren Durchführung bietet aber gegensätzliche Ergebnisse an.

Insgesamt bietet das deutsche System adäquate Lösungen im Hinblick auf die Stabilität der Rechtsprechung an, in erster Linie mit der Anwendung des Verbotsirrtums (§ 17 StGB) und den Mechanismen die Rechtssicherheit innerhalb der obersten Gerichte garantieren. Die EMRK könnte in diesem Zusammenhang nur begrenzte Nachteile mitbringen, da sie in der deutschen Rechtsordnung nur den Rang eines einfachen Gesetzes genießt. Im italienischen System ist im Gegenteil die Debatte auf die europäische Gesetzlichkeit konzentriert, da die Rechtsmittel *de jure condito* unzureichende Ergebnisse leisten.

Die Rolle des europäischen *Nullum crimen*-Grundsatz wurde auch in Bezug auf die Rechtsordnung der EU untersucht: die non-formalistische Struktur der EU Rechtsordnung, die Anwendung der Grundrechte als sie vom EGMR interpretiert werden, die Berücksichtigung des Effektivitätsgrundsatz sind ideale Bedingungen um die Umsetzung der Vorhersehbarkeit zu untersuchen. *Nullum crimen* und Vorhersehbarkeit wurden sowohl vor dem Lissabon-Vertrag als auch danach vom EUGH angewendet. Vorhersehbarkeit gilt sowohl in Bezug auf *Nullum crimen* als auch auf allgemeine Rechtsgrundsätze der Rechtssicherheit und des Vertrauensschutzes. Außerhalb des Strafrechts spielen Vorhersehbarkeit und Gesetzlichkeit eine Rolle, wo die EU direkte

oder indirekte Sanktionsbefugnisse ausübt. Im Wettbewerbsrecht wurde der Maßstab der Vorhersehbarkeit in diachronischen und synchronischen Konflikten in der Praxis der Kommission angewendet, im Hinblick auf die autonome Definition vom Recht und die *Cantoni* Kriterien. Die von Fall *Dansk Rørindustri* eingeführte richterliche Regel gilt für diachronische Konflikte und erkennt, dass eine *regula juris* rückwirkend ausgelegt werden darf, wenn i) deren Anwendung vernünftigerweise vorhersehbar ist und ii) sie notwendig um die Durchsetzung der EU Politik (Effektivität/policy-Erwägungen) ist. Synchronische Vorhersehbarkeit wird mit subjektiven Kriterien wie der beruflichen Tätigkeit angewendet. In anderen Bereichen wo die EU Sanktionsbefugnisse ausübt (z. B. restriktive Maßnahmen in der Gemeinsame Außen- und Sicherheitspolitik), wendet der EuGH denselben *Dansk Rørindustri* Test (vernünftige Vorhersehbarkeit und Effektivität) an und räumt die schrittweise Verdeutlichung der Rechtsnormen ein. Eine solche Anwendung der Vorhersehbarkeit führt zu unbefriedigenden Ergebnissen, weil der Effektivitätsgrundsatz mit Grundrechten abzuwägen ist und der Grundrechtsschutz-Standard gesunken wird. Aus diesem Grund wäre solche subjektive und rezessive Auslegung der Vorhersehbarkeit abzulehnen, da sie das negative Potenzial dieser Kriterien verdeutlicht.

Im Bereich der strafrechtlichen Kompetenzen der EU zur Harmonisierung des Strafrechts (Art. 83 AEUV), hat das Gesetzlichkeitsprinzip einen indirekten Einfluss: Da die strafrechtsrelevanten Kompetenzen durch Richtlinien ausgeübt werden, betrifft die Einhaltung des *Nullum crimen* am meisten das innerstaatliche Umsetzungsrecht. Nur eine eventuelle direkte, in den Mitgliedstaaten direkt anwendbares Recht schaffende Strafgesetzgebungskompetenz der EU sollte das *Nullum crimen* in der Gesetzesformulierung grundsätzlich beachten.

In Bezug auf die Auslegung von (auch nicht strafrechtlichen) Richtlinien, legt der EUGH das Gesetzlichkeits- und Rechtssicherheitsprinzip so aus, dass sie eine Grenze für richtlinienkonforme Auslegung und direkte Auswirkungen der Richtlinien die zur strafrechtlichen Verantwortung führen oder verschärfen. Demzufolge sind täterbelastende Auswirkungen der Auslegung des EU-Rechts ausgeschlossen. Im Bereich der direkten Auswirkungen oder konforme Auslegung von EU-Primärrecht gibt der EUGH zu, dass die Verletzung im Art. 49 EUGRCh enthaltener und mit derselben Bedeutung des Art. 7 EMRK auszulegender Vorhersehbarkeit, Bestimmtheit und

Rückwirkungsverbot schränkt die direkte Anwendung vom EU-Primärrecht (Art. 325 AEUV) ein.

Im Hinblick auf die vorherige Untersuchung wurden zukünftige Perspektiven betrachtet. Die Anwendung des Vorhersehbarkeitsprinzips in der italienischen Rechtsordnung könnte eine mögliche Übernahme der europäischen Gesetzlichkeit darstellen und zur Lösung des Problems des Richterrechts im Strafrecht mitwirken.

i) Die Hauptgrundlage des Prinzips sei die Rechtssicherheit, die aus Bestimmtheit, Rückwirkungsverbot, Vertrauensschutz besteht. Darüber hinaus berücksichtigten sowohl das Corpus Juris 2000 als auch das ‚Manifest zur Europäischen Kriminalpolitik' die Vorhersehbarkeit jeweils mit Bezug auf zulässige Rechtsprechungsänderungen und als Bestandteil der *lex certa* und des Rückwirkungsverbots.

ii) Die verfassungsrechtliche Grundlage des Vorhersehbarkeitsprinzips sei die kombinierte Anwendung von Art. 117 Cost. und Art. 6-7 EMRK, innerhalb der Grenzen des Art. 25 co. 2 Cost. und 101 co. 2 Cost. Dieser Grundsatz könnte auch auf das Schuldprinzip (Art. 27 co. 1 Cost.), das Gleichheitsgrundsatz (Art. 3 Cost.) und das faire Verfahren (Art. 111 Cost.) gestützt werden. Eine weitere Grundlage innerhalb des Geltungsbereichs der Charta ist Art. 49 EUGRCh.

iii) Im Hinblick auf den Anwendungsbereich, die von der Lehre vorgeschlagene Varianten sind die ‚*Vorhersehbarkeit der rechtlichen Würdigung des Sachverhaltes*' oder die ‚*Vorhersehbarkeit der richterlichen Entscheidungen*'. Die zwei Begriffe zielen in der Tat in die gleiche Richtung, da beide sich auf das Unrecht, die genaue rechtliche Würdigung und die anwendbare Strafe beziehen. In Bezug auf Art. 25 *co*. 2 Cost., würde sich der Anwendungsbereich zu den objektiven und subjektiven Voraussetzungen der strafrechtlichen Verantwortung und der Strafe, die im materiellen Sinne (alle nicht vorhersehbare Elemente, die die Strafe verschärfen) berücksichtigt werden muss, ausdehnen.

Im Lichte der Untersuchung der europäischen Vorhersehbarkeit und der Anwendung des Verbotsirrtums auf nationaler Ebene, ist die Vorhersehbarkeit der richterlichen Auslegung auf den Begriff der objektiven, die höheren Maßstäbe des EGMRs umsetzenden Vorhersehbarkeit begrenzt. Wenn die Vorhersehbarkeit in einem diachronischen Konflikt angewendet wurde, könnte sie die rückwirkende Anwendung von einer täterbelastenden, zur Zeit der Tat nicht berechenbaren

Rechtsprechungsänderung vermeiden; wenn sie in einem synchronischen Konflikt angewendet wurde, könnte sie sowohl einen synchronischen, von den *Sezioni Unite* später gelösten Konflikt als auch einen nicht gelösten Konflikt schlichten. Der Vorteil im Vergleich zu den anderen vertretbaren Lösungen sei die Änderung der Rechtsquellen in der Rechtsordnung zu vermeiden. Die Einklagbarkeit wäre zur *Corte di Cassazione* überlassen, mit dem letztinstanzlichen Mittel der Individualbeschwerde zum EGMR oder, im Fall der italienischen Ratifizierung des 16. EMRK-Zusatzprotokolls, des Gutachtensantrags der obersten Gerichte.

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