Adán Nieto Martín
Marta Muñoz de Morales Romero
Editors

Towards a Rational Legislative Evaluation in Criminal Law

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Preface

The evaluation of any public policy, legislative policies included, should be an obligation for any government. To put it differently, evaluation should be considered as a rule that no lawmaking actor of the twenty-first century should overtook. Therefore, evaluation agencies, in the case of Spain the AEVAL, should be provided with the best appropriate means to carry out its functions. The misrule of educational policy and also of many other public policies would probably not exist if legislative amendments had been introduced bearing in mind evidence of what works and what does not. The same may be said in relation to criminal policy, where the governments' whim leads to criminalise or decriminalise offences or to introduce, without any empirical evidence, fundamental changes in the system of sanctions or penalties, which result in serious restrictions on the freedom of citizens as probation and, especially, life imprisonment with parole.

In the context of the EU criminal law, although there is, undoubtedly, a greater evaluation culture, it cannot be said that the situation is substantially better. Anyone who has consulted the impact assessments previous to the adoption of a European legal instrument after the *White Paper on European Governance* is able to notice that there is not a model neither a clear assessment methodology. Therefore, EU impact assessments are more a formality than a true exercise of legal motivation.

With the aim of launching a criminal debate on the need for evaluation of criminal policies and, what is more complex and ambitious, for developing an evaluation method, the Spanish Ministry of Economic Affairs approved in 2012 the funding of a research project titled "Towards a rational evaluation of European criminal laws" [*Hacia una evaluación racional de las leyes penales europeas*] (Ref. DER2011-28225). Soon after starting our journey, Professor José Luis Díez Ripollés, a pioneer in Spain in researching these issues, launched the Spanish Group on Criminal Legislative Policy. Within this framework, an opportunity arose to conduct a joint investigation. Collaboration took place during the course of two seminars held at the Faculty of Law and Social Sciences, on 17 December 2013 and on 30 June 2014.

The result is the book that is now presented and whose strength lies in its strong holistic approach. Accordingly, the book is translated into an attempt to address all

key aspects of the issue: from theoretical-practical analysis on how evaluation should be done (Chap. 1) to studies of a procedural or formal type in relation to the adoption of criminal laws at a national level (Chaps. 4 and 5), in Sweden (Chap. 6) or in the EU (Chap. 9), to questions of legislative technique (Chap. 7) and adjustment of criminal laws to the basic principles of the discipline (Chap. 10) and to the constitutional control of criminal laws (Chaps. 12 and 13). The book also deals with the importance of statistics in carrying out quality evaluations (Chap. 2) and with what may be one of the newest topics such as the use of costs, cost-effectiveness and cost-benefits in the evaluation of criminal policies (Chap. 3) and the contribution of economic studies in the configuration of criminal principles as the harmfulness principle (Chap. 10), as well as the possible criminal liability of members of Parliament for having voted a law whose consequences have not been fully evaluated (Chap. 8).

All these questions appear in the book grouped into five thematic parts. Under the heading "Fundamentals of Policy Evaluation", the first part pays attention to the methodology for public policy evaluation in general (Chap. 1), the preparation of criminal statistics (Chap. 2) and the analysis of costs, cost-effectiveness and cost-benefits (Chap. 3). From a methodological perspective, the two key ideas that are often overlooked, in the words of Alberto Muñoz, are the configuration of evaluation as a continuous and permanent process, which goes beyond the traditional ex ante and ex post dichotomy, and the necessity to establish evaluation criteria since the law is drafted: An act cannot be evaluated if the objectives that it seeks to achieve have not been foreseen in it.

As the majority of criminal policies are laid down in the EU, Ana Pérez's contribution in Chap. 2 reveals how difficult it is to prepare reliable criminal statistics in order to compare successfully crime rates in different EU member states. Nevertheless, the use of standard offence definitions in the databases, the compilation of data on new forms of crime and the enhancement of cooperation between the academia and political representatives would contribute to the use of statistics as a means of evaluation. Finally, Iñigo Ortiz de Urbina, in Chap. 3, rejects the idea that the inclusion of costs, cost-effectiveness and cost-benefits as criteria for the evaluable quality of a norm implies detachment from the axiological dimension of criminal law. On the contrary, this type of analysis is necessary and also mandatory according to Article 88 of the Spanish Constitution, to guarantee rational criminal policies. However, practice shows that they are rarely done and, when they do, they are of dubious quality.

The next part of contributions analyses the state of affairs in Spain. In Chap. 4, Samuel Rodríguez highlights the normative efforts to introduce an evaluative culture in Spain. In particular, he looks in detail at the memorandum on the regulatory impact analysis introduced by the *Royal Decree 1083/2009 of 3 July*. However, he also claims that the memorandum has received little attention in the context of the adoption of criminal acts. Sometimes no regulatory analysis is presented; sometimes they are presented but just as a formality as it happened with *Organic Law 5/2010* and more recently with *Organic Law 1/2015* amending

the criminal code. In other words, impact assessment reports only have cosmetic effects because they do not carry out an in-depth analysis of the relevant questions. Faced with the lack of an evaluation culture of criminal acts, José Becerra proposes in Chap. 5 specific institutional and conceptual reforms in the pre-legislative or governmental phase. Regarding the proposals for institutional redesign, the creation of a *Criminal Policy Division* in the Ministry of Justice is stressed. It would be composed of permanent staff, specialising in criminal matters, which would advise the government in the initial phases of the definition of the problem. With regard to the criteria of rationality, his starting point is José Luis Díez Ripollés' model of rationality, distinguishing five levels of rationality: ethical, teleological, pragmatic, formal-juridical and linguistic rationality.

Part II also concerns with other particular experiences. In Chap. 6, Manuel Maroto performs a detailed study on the legislative procedure in Sweden. The contribution shows the great importance in that country of relying on the opinion of experts when adopting a criminal act. Likewise, he underlines how the courts use the reports on evaluation to interpret and implement a criminal law. Despite the above, the author also notes a certain decline in the rationality of Swedish criminal norms. In Chap. 7, Marta Muñoz deals with the US situation to highlight the way in which the use of a defective legislative technique is one of the grounds of irrationality in the American criminal system. She concludes with proposals at national and European level, such as the resort to a grading scheme (a system that groups by grades all the crimes together depending on their seriousness and that attaches a common penalty to them), as well as the use of sunrise provisions which force the government to inform the Parliament on the legislation that has been adopted and to prepare periodic reports on the act. In Chap. 8, Andreas Hoyer takes a step forward to support the criminal liability of elected representatives who vote for a criminal norm under political and media pressure in the absence of a serious evaluation on the consequences of the legislative reform. This part finishes with a contribution from Fernando G. Sánchez-Lázaro. In Chap. 9, the author notes that the regulatory impact analyses completed in the EU are also defective, because of the very few times they are done and also of the lack of quantitative, clear and specific evaluation criteria. Afterwards, he proposes the possibility of quantifying weightings on proportionality and of evaluating the principle of legality understood as a mandate for determination, through the analysis of technical-legal semantic normativity.

Given the close relationship between legislative evaluation and criminal principles, Part III deals with some of these principles. In particular, Chaps. 10 and 11 reinterpret the principle of proportionality and harmfulness with a view to make them "evaluable". On this point, the contribution of Ana Prieto (Chap. 11) upholds the need to distinguish between the principle of proportionality in a broad sense at an external and internal level in which the principles of necessity and proportionality operate in a broad sense. In particular, she supports that the evaluation of the principle of *ultima ratio* or subsidiarity should focus on whether there are measures other than criminal ones that also have optimal or reasonable efficacy. In Chap. 10, a specific target of Pablo Rando is to verify to what extent the contributions from the economy can benefit the debate on criminal harmful (social damage) in crimes against intellectual

property. After a detailed analysis of numerous economic studies, the author shows that it is easier to ascertain that piracy reduces music sales than to argue the contrary. However, the author also indicates that "not all piracy behaviour contributes to that damage" and, in consequence, only particularly serious behaviours should be criminalised. The problem is that economic studies are not useful to determine the point from which criminal protection would have to be chosen.

Constitutional courts' control over a criminal act has been a controversial topic for a long time. The fourth thematic part is devoted to this issue. In Chap. 12, Juan Antonio Lascuraín supports a moderate control. The guiding criterion, which has also been followed by the Spanish Constitutional Court, is a deference criterion towards the legislator. Legislator has been chosen by the people and therefore it enjoys a direct legislative legitimacy which constitutional courts do not. Therefore, there is an *iuris tantum* presumption of constitutionality of the law that is much more difficult to rebut when the control over the law is based on principles. In Chap. 13, Luis Vélez argues in favour of the constitutional control over criminal laws. His starting point is also the greater democratic legitimacy of the legislator although he shows that such an attribute is not real. As a large number of authors have highlighted, decision-making procedures are not nowadays democratic enough. Hence, constitutional control plays a role at least to review whether a criminal act has been adopted in the framework of a process that has taken into account all potential stakeholders and that is based on reliable empirical data (e.g. on probability analysis). The above opens up the possibility that the results obtained through an evaluation may be used by constitutional courts to decide on the legitimacy or unconstitutionality of a norm.

The book closes with Chap. 14, in which, as a conclusion, Adán Nieto conducts a cross-cutting analysis of all of the above. Thus, the historical evolution of the crises of rationality and legitimacy with the different proposals of legislative science is presented. Among these proposals, he upholds control over the constitutionality of criminal laws in connection with the principles of matters reserved to law and proportionality and the use of experimental legislation to evaluate the efficacy of a law on the basis of empirical data.

Despite the praiseworthy attempt of the book to deal with the various profiles and consequences that evaluation implies for criminal policy, this publication is only a starting point, which will be largely achieved its objectives if, as previously pointed out, it seeks to put on the agenda an evaluation culture in criminal matters. Undoubtedly, Springer's help, accepting the publication of this work, will be an important step forward towards our goal.

2 March 2016

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Part I
Fundamentals of Policy Evaluation

Chapter 1
Theoretical and Procedural Aspects of the Evaluation of Public Policies

Alberto Muñoz Arenas

Contents

1.1 Introduction

Laws are the result of a political process, the purpose of which is to intervene in and to regulate areas of social life and activity. They are therefore, like any public policy, programme or action, open to evaluation.

The analysis of legislative policies is closely connected with the need to ascertain whether laws are useful, rational, coherent and effective; whether they serve the purpose for which they were passed. The introduction of evaluation into normative areas is, in itself, an indicator of improvements in legal and democratic quality, as well as a constitutional guarantee of the protection of the constitutional rights of the public (Montoro Chiner 2000–2001, p. 155 ff.).

However, such a purpose is usually found in political and technical cultures, in which the regulations are not designed to establish these fundamental questions. In many cases, the introduction of this tool of analysis in the regulatory area is limited

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to mere impact, or contents itself with an *ex ante* and *ex post* summary of events. However, evaluation should not be constrained by the perception that it is an isolated one-off activity to monitor results, but should be seen as a continuous and permanent *process* throughout the life of the norm, from the point at which it is designed. Only in this way may regulations be equipped with elements that make their evaluation possible.

In this short paper, I seek to illustrate some theoretical and procedural aspects of evaluation that make it a sound scientific tool for the analysis of public policy. To do so, I shall situate evaluation within the sequential analysis of public policies. Subsequently, I will approach the concept of evaluation and the different components that form it. I will continue with other descriptive elements such as the characteristics, the objectives and the different classes of evaluation. Finally, I will summarise the standard procedure for conducting an evaluation.

This perspective permits those with an interest to observe the contrast between the potential benefits of evaluation and the habitual practice of legislative evaluations. Lessons may be learnt from it to improve and to strengthen this specific area of work.

1.2 Evaluation in the Sequential Framework of Public Policies

An approach to evaluation begins with the preliminary need to establish some particular sort of framework for the study of a specific subject, such as public policy, in general, or legislative policy, in particular. Focusing on this subject implies defining its boundaries, structuring and organizing its study through criteria that simplify its complex reality, without losing the overall perspective (Meny and Thoenig 1992). Although different analytical frameworks exist, I shall use the most generalized in this field: the sequential framework of policies. It is in this framework that evaluation arises as an action and as a process that helps to give coherence and rationality to political action and to examine it and to judge it in a rigorous way.

This analytical approach contemplates public policies as a *process* divided into different phases or stages that constitute a cyclical sequence (Fig. 1.1).

In the first place, the problems likely to be tackled by the political action are identified. These problems are defined and detailed in the agenda of a political body. Different solutions are then sought out and decisions are taken to establish some plan of action in relation to the problem. Having prepared the plan, the necessary resources are allocated for its implementation. Finally, the whole process is evaluated to establish the extent to which the problem has been reduced or eliminated. The evaluation can restart the cycle once again, or lead to a new phase in which the policy that has been applied comes to an end.

Thus, this framework not only allows the analysis of policies and regulations, but their preparation, which gives it a clear theoretical and practical function. In the

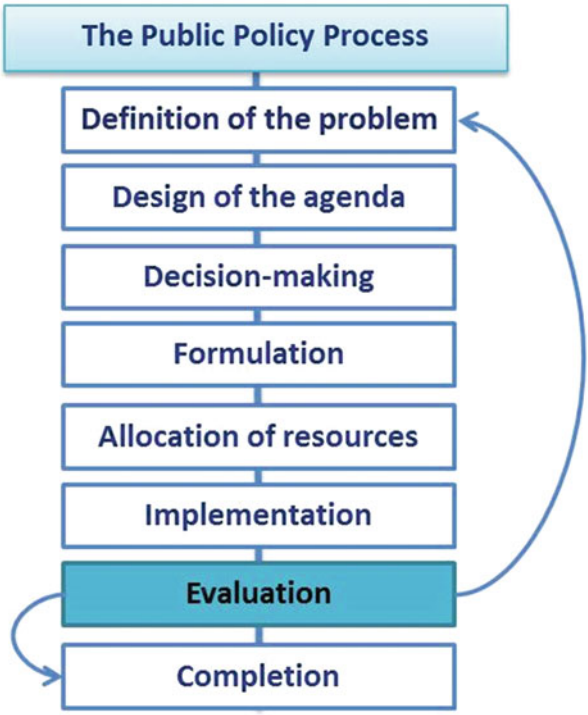

Fig. 1.1 Cycle of public policies

words of Roth (2008, p. 78), "this sequential perspective constitutes an excellent gateway to the study of public policies due to its didactic, heuristic and perhaps esthetic qualities, as well as its flexibility and adaptability." However, despite its generalization and effectiveness, it has received some criticism, probably because of its excessively reductionist view of reality. In effect, Parsons (2007, p. 114) feared that this approach would present an artificial and excessively rational vision of the formulation of public policies; it "imposes stages on an infinitely more complex, fluid and interactive reality". Nevertheless, this type of objection should be relativized if the general scheme proposed for the sequential framework is taken "more as a support in the search for meaning in the decisions that are taken in the public policy framework, than as something real and traceable" (Subirats et al. 2012, p. 44).

The utility of this framework appears reasonable in the regulatory framework that concerns us here, as in many cases it suffers from a degree of improvisation and merely declaratory definitions, such that a sequential framework helps to arrange and to formulate objectives and paths of action. In addition, regulatory activity not only confronts material realities, but others that are more difficult to objectivize, social and relational values, etc., for which analytical tools are advisable that help to order and to hierarchize elements with complex interrelations. But in addition, legislative policy will have consequences and will generate impacts on other policy

sectors, which will make it necessary to impose boundaries and to define the limits of its action, the resources that are committed and shared, the alliances with other administrative areas, etc. This work is facilitated by sequencing the stages of the process in great detail and by defining the possible links, at each stage, with other bodies and interventions.

1.3 The Evaluation of Public Policies

I refer to the works of Ballart (1992), Bustelo Ruesta (2001) and Martínez del Olmo (2006) in the development of this section, as they are considered to set out and to explain the most relevant theoretical and conceptual aspects of the evaluation of public policies.

1.3.1 Concept of Evaluation

Evaluation is presented as the last phase in the public policy process. Although neither designed nor treated as an essential element in the utopian scientific framework of public policies in general, it has provoked greater interest in the academic field and in certain areas of public life (above all in education and in social services). As a consequence of these efforts, we obtain a wide catalogue of definitions that help us set the boundaries of the term (Table 1.1), from which some common elements may be drawn on the basis of which to define the concept of evaluation.

From these definitions, we can draw some common elements of the concept of evaluation. These elements are the subject, the procedure and the role of evaluation (Bustelo Ruesta 2001) (Fig. 1.2).

The *object* refers back to the question of *what* to evaluate. In this sense, the evaluation has as its object "any social intervention that seeks to approach a public problem" (Bustelo Ruesta 2001, p. 30), whether of a general (*policies*) or a specific (*regulations, programmes, plans*, etc.) nature. And, among these interventions, the object of the evaluation has been changing over time. Thus, we have moved from a posteriori evaluations aimed at results and the impacts of public policies, to evaluations directed at the design of a public intervention and the specific intervention process. This greater diversity of objects has generated different classes of evaluations as will be seen further on.

Procedure, for its part, refers to how public evaluations are performed. Evaluation implies an intellectual and scientific process in which *awareness* of the objectives to achieve is implicit; these are, likewise, articulated around a *methodology* that structures the working process in a rigorous way following a *logical sequence* that compiles, interprets and values the information on the object (policies, regulations, programmes, results, processes, impacts, etc.) of the evaluation.

Table 1.1 Some definitions of the term 'Evaluation'[a]

Tyler (1950)	*The process of deciding to what extent the objectives of a programme have been reached*
Epstein and Tripodi (1977)	*Evaluation is the process by which the efficiency and the effectiveness of a programme are analyzed. This implies the collection, analysis and interpretation of information on the achievement of the objectives of the programme in relation to its forecast*
Joint Committee on Standards for Educational Evaluation (1981)	*Systematic investigation of the worth or merit of an object*
Cronbach (1980)	*Provision of information for decision-making in relation to an intervention*
Espinoza Vergara (1983)	*To evaluate is to compare at a given time what has been achieved through an action with what should have been achieved in accordance with the question*
Chelimsky (1985)	*The application of systematic research methods for the evaluation of design, implementation and effectiveness*
Patton (1987)	*Consists in the systematic compilation of information on the activities, the characteristics and the results of a programme for use by a specific group, in order to reduce uncertainty, improve effectiveness and to take decisions in accordance with what is being done with the programme and who it is affecting*
Rossi and Freeman (1989)	*Systematic application of the procedures of social research in order to value the conceptualization, the design, the execution and the usefulness of the programmes*
Monnier (1995)	*Pluralist initiative the core of which is the system of actors who are involved and the purpose of which lies in evaluating the foundation of a public intervention, based on the comparison of its effects with the current value systems*
Dye (1995)	*Objective scientific analysis of the short-term and the long-term effects of policies, both on social groups and in situations for which the policy is designed as well as on society at large, and the analysis of current and future cost ratios of any of the benefits that have been identified*
Vedung (1997)	*Careful retrospective valuation of the merits, importance and worth of the application, productivity and results of governmental interventions*
Gerston (2010)	*Evaluation assesses the efficiency of a public policy with regard to the perception of intentions and results*
Birkland (2011)	*Evaluation is a process of investigation aimed at determining whether a programme has achieved the desired outcomes*

[a]Author's own basing on Bustelo Ruesta (2001), Tyler (1950), Epstein and Tripodi (1977), Joint Committee on Standards for Educational Evaluation (1981), Espinoza Vergara (1983), Chelimsky (1985), Patton (1987), Rossi and Freeman (1989), Monnier (1995), Dye (1995), Gerston (2010) and Birkland (2011)

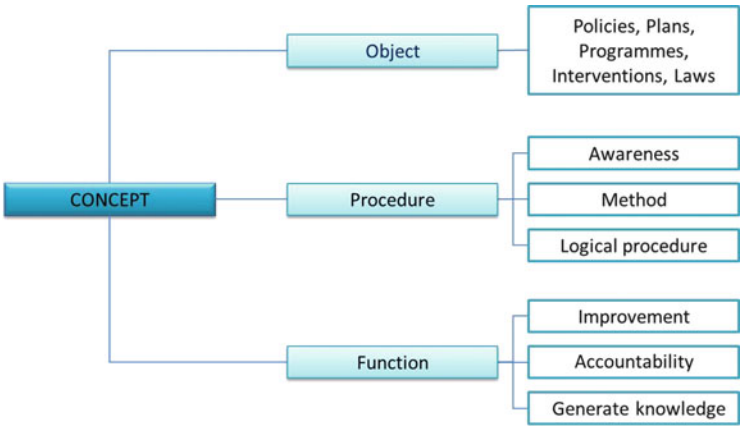

Fig. 1.2 Components of the evaluation concept

The last component of the evaluation concept, the why and wherefore of its completion, is its *function*: the reason for which the evaluation is done, or in other words, the use to which it will be put. In this sense, there is unanimity over assigning three essential functions to an evaluation, so that it may be considered as such: *to improve* the public action (policies, regulations, programmes) under evaluation; to *be accountable*; and/or *to generate knowledge* with a view to future evaluations.

In the first place, evaluation is done for the purpose of improvement. Thus, "evaluation aspires to guide improvement and mastery of the programme" (Vedung 1997, p. 139). It is, therefore, a function that assumes a service or its improvement (Stufflebeam and Shinkfield 1995), both in a strategic and a technical dimension. Authors such as Anderson and Ball (1978), have therefore considered that this function determines the educational nature of an evaluation, as it helps to modify and to improve programmes and public policies, based on what has been learnt in earlier cycles and processes. In consequence, so that this function is really effective, evaluations should be sufficiently flexible to incorporate rapid changes and adjustments in the programmes.

In second place, a function related to responsibility may be recognized in evaluation directed at *accountability*. This evaluation of responsibility serves to "facilitate information on those responsible for the programmes and policies for decision taking" (Martínez del Olmo 2006, p. 180). Hence, evaluation may be understood as a mechanism that guarantees responsible compliance with the principal contract/agent (Vargas Hernández 2008). And, following Martínez del Olmo (2006), the aforementioned function of responsibility may be understood in a twofold policy-making and administrative sense. From a political point of view, the evaluation of responsibility implies satisfaction with the democratic commitment established between the public and their political representatives. In this sense, evaluation determines the level of compliance of public responsibility, in

other words, the degree to which political representatives have achieved their set objectives and the rationality with which the resources entrusted to them within society have been used. There again, the evaluation of responsibility analyzes the degree and the way in which the bureaucratic apparatus of the State (the Administration) has understood its compliance with political objectives and resource management. Thus, we find that the evaluation of responsibility implies the existence of two levels of supervision. One that is bottom-up, of the technical-administrative level of the policy, which comes before another that is top-down, which is the political level of the individual citizen. The idea of Lispsky (2010, p. 160) is verified in this way: "responsibility is the link between bureaucracy and democracy. Modern democracy depends on the responsibility with which bureaucracies put policy measures into practice so as to administer certain governmental structures".

This double perspective represents a scaled-down version of the evaluation of responsibility. Some authors have looked at it in greater detail. Thus, Vedung (1997) considered four perspectives of responsibility:

- Political perspective: political representatives can test whether the Administration is really undertaking the allocated tasks.
- Management Perspective: directors can remain informed about the degree to which technicians are fulfilling their tasks.
- Public perspective: the public can evaluate the extent to which the elected representatives and public sector employees are performing their duties
- Client Perspective: clients can demand satisfactory, fair and quality services.

Rossi et al. (2004) drew up their own list of aspects that should be the object of a responsibility evaluation: legality, fiscality, service provision, impact and efficiency.

These efforts to detail different levels, elements and areas in which the evaluation of responsibility in public action may be demanded hardly hide a much more common reality that is difficult to combat. As Vedung (1997) recognized, there are reasons for which executives would wish to avoid the evaluation of responsibility. On the one hand, they might wish to avoid evaluation, because a negative responsibility evaluation of their subordinates might constitute, in an indirect way, a negative indicator of their own field of responsibility; on the other, because excessive emphasis on responsibility might pervert it to such a point that it is turned into complacent servility towards political authority rather than a truly rational and responsible act. The balance between both possibilities will depend on the level of commitment and the culture of evaluation of those who may be able to conduct it.

Finally, evaluations are understood to have the function of *knowledge generation*. So, the information that is generated, serves to "throw light" on future public *actions,* to illustrate the inventory function of public policies and to justify the need to adjust some budgets on public action in accordance with the accumulated theoretical-practical corpus of knowledge. This information not only increases and improves knowledge on processes that configure the specific programmes,

but contribute to broadening general knowledge on social problems and the way of approaching them from the public sector (Bustelo Ruesta, 2001). Stufflebeam and Shinkfield (1995, p. 24) called this evaluation function "exemplification" as it could serve as an example and a guide in specific programmes, as well as "illustrating theoretical investigations and questions". Nevertheless, it has also been suggested that this informative and knowledge-generation-based function does not represent a true evaluation function. And Vedung (1997) understood that this knowledge is a collateral and not a fundamental consequence of the evaluation that is subordinate to those that are its two fundamental functions: improvement and responsibility.

1.3.2 Characteristics of Evaluation

Having analysed the elements that constitute the concept of evaluation, we shall now briefly dwell on its principal characteristics (Fig. 1.3).

First of all, it may be pointed out that a characteristic of evaluation is its usefulness. It is appreciated in this way by Bustelo (2001), for whom evaluation is useful in two ways. On the one hand, it generates pertinent information, which is to say, useful for the purpose of the programme, norm or policy under evaluation. On the other, it generates practical information, insofar as it can provoke changes in public actions. This faculty endows evaluation, according to the same author, with a prospective nature or anticipating future actions.

Apart from this general characteristic, evaluation is distinguished by other forms of investigation and analysis by another set of specific characteristics.

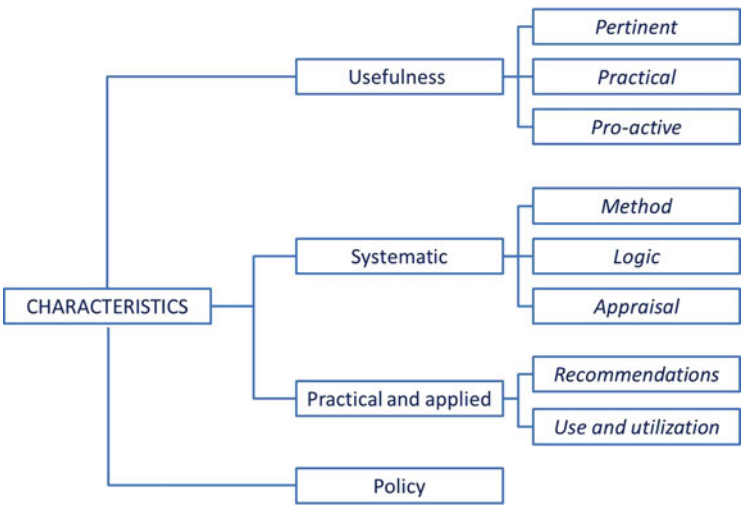

Fig. 1.3 Characteristics of evaluation

Evaluation is of a systematic nature insofar as it employs a logical procedure, as mentioned earlier, in its development. It begins with the prior definition of a purpose and it is articulated in an ordered sequence of steps: recovery and analysis of information; valuation and appraisal of that information; and finally the proposed recommendations. In other words, evaluation is not limited to issuing information but it is accompanied by an appraisal or *critical judgement*. For this reason, the *systematic nature* is not only due to the logical organization of the overall process, but to the need for critical appraisal of the information, also done in a systematic way.

In line with the utility of the evaluation, another specific feature is its practical or applied nature. The way in which the evaluation generates useful information for its practical application is through the proposal of recommendations for action. And in this last phase, the systematic nature of evaluation continues to stand out, as the recommendations are the logical consequence of earlier phases. This means that, on the basis of the appraisal of information that has previously been gathered, evaluations issue recommendations on the public work under evaluation (regulations, programmes, policies) in coherence with the functional aspects of the evaluation. In other words, recommendations aimed at improving the specific intervention under evaluation; to comply with public responsibility (accountability on that particular intervention); and to increase the quantity and quality of the knowledge that is generated in the intervention process.

A last specific element of the evaluation is the interest in its utilization. In other words, the effort to ensure that the results of the evaluation (information, recommendations, etc.) may effectively be put to good use in practice. And this effort means, on the one hand, determining who are or who will be the final users of the evaluation, and on the other, how to stimulate their interest in the results. On this point, Buselo (2002) drew a set of elements from the literature that could *facilitate the use* of evaluations and that are, in brief, the following: taking into account the *context* of the evaluation; encouraging the *implication of the participants* in the evaluation; raising the *frequency* of contacts with the participants; guaranteeing *adaptation to the needs* of participants; ensuring *fidelity* and *definition* of the findings of the evaluation; as well as the *opportunity* of the findings that are presented; and the *clarity* and *simplicity* of the language that is used.

Efforts to facilitate the use of evaluations are not sufficient to explain what their real uses could be. In this way, a relation may be established between the possible uses and the functions of the evaluation that were pointed out earlier (Fig. 1.4).

In the first place, evaluation may be used to *take decisions* directed at *improvements* or, if appropriate, to terminate a public intervention (policy, programme or regulation). It would coincide with what Weiss (1998) called instrumental use of the evaluation or what Torres et al. (2005) saw as decisions and actions to develop as a consequence of an evaluation. It would be directed at both internal users (politicians, managers, regulators, technicians etc.) to analyze the results of a specific intervention and to assess the opportunity of continuing with it, to adjust it to make improvements, or to end it. It would likewise serve so that the possible external users (beneficiaries or prejudiced by the intervention, clients, users and the

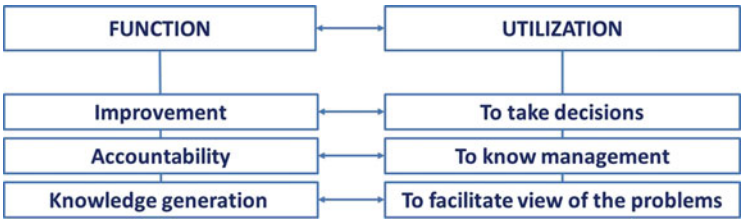

Fig. 1.4 Relation between functions and utilization of an evaluation

public in general) could take decisions to the extent that they are linked to the object under evaluation.

In second place, evaluation may be used to *know the details* of the management, application and development of a particular policy, regulation or programme; in other words, to call for responsibility and *accountability* associated with any public action. In this case, the use of evaluation can have a symbolic (Palumbo 1987) more than a real nature, and a more general rather than particular target group. In other words, it is not a question of satisfying the interest of particular users, but of responsible compliance with the duty to be accountable to society as a whole. The fact of providing this information and of making it available to society gives it a symbolic value that goes beyond whether the information generated by the evaluation will finally be used by someone. The concept of use would be reinterpreted in this way, moving from a utilization based on particular interests to another that would consider the general interests of society as more relevant (Chelimsky 1998, p. 35 ff.).

In third and final place, evaluation may be used to *add to the stock of knowledge* on the object under evaluation and, in general, on the administrative and political processes that surround it (Weiss 1998; Torres et al. 2005). But, in addition to this cumulative function, it generates a positive effect on participation in the evaluation, as it facilitates a broad overview of the problems, the framework and the conditions in which a public intervention takes place. It is therefore an integrative use, which can facilitate implication and identification with the problem under evaluation and interest in participating in its solution.

The last specific feature that is attributed to evaluation is its *political nature*. This peculiarity is recognized in as far as evaluation is done in a given political context, affected by political decisions and conditioned by processes of political negotiation between the different agents that are involved. This reality appears to have reduced the political nature of evaluation to a merely practical plane. However, various authors have tried to return politics to the field of normality. In this sense, works like those of Weiss (1998), Palumbo (1987), Monnier (1995), Vedung (1997) and Chelimsky (1998) have served to incorporate a political element in the theory of evaluation and to transcend its everyday technical and bureaucratic nature.

1.3.3 Evaluation Objectives

Although there may be a degree of confusion between *functions* and *objectives* of the evaluation, it is necessary to consider them as different elements. So, the function of an evaluation is more limited and is restricted, as has been seen, to three specific aspects that justify the sense (the *whys and wherefore*) of the evaluation (*improvement, accountability, knowledge generation*). Whereas, the objectives of the evaluation may be more diverse and can represent the practical and specific ends pursued by a particular evaluation. In such a way that it should be possible to determine which function an evaluation is fulfilling when it pursues a specific objective. In relation to this point, the following evaluation objectives may be listed:

- Facilitate the decision-making process. As Weiss (1998) has said, it is a question of generating information that allows decision making on some aspect of the programme or policy under evaluation (adjustment, correction, continuation, suspension, etc.). Or, like Chelimsky (1998), of taking decisions in the different phases of the political process (formulation, execution, accountability, etc.).
- Facilitate organizational learning. In this case, it is a question of using evaluation to generate information that serves to provide feedback to the organizational process itself, which leads to the development of the intervention that is under evaluation. So, this objective lends special interest to the process, structure, organization and other elements that constitute the programme under evaluation.
- Satisfy administrative requirements. In other words, to attend to the formal requirements of certain public administrative procedures (grants, subsidies, agreements, contracts etc.) which require an evaluation of the project or action that will be submitted.
- Reach certain strategic ends. These strategic ends may cover a set of questionable objectives that conceal certain spurious ends. The purpose of these objectives may be to avoid certain political responsibilities, to delay decisions, to review social commitments, to create an acceptable public image, etc. If so, it relates to an "evaluation of a ritual nature that is done solely to comply with legal provisions but is of no utility for the administrators of the programme" (Ballart 1992, p. 84).

1.3.4 Types of Evaluation

Following the literature, two fundamental criteria may be used to classify evaluations. One explains a *typology* of evaluations in which formal or procedural elements have a greater presence. The other is based on the theoretical-practical model that upholds evaluation as an activity that may be understood as the focus of the evaluation. In the two following sub-sections, we will present a summary of

both criteria on the basis of the works of Osuna and Márquez (2000), AEVAL (2010), Bustelo (2002), and Ballart (1992).

1.3.4.1 Evaluation by Typology

In this case, the most common classification considers the following *types* of evaluation:

According to Their Function Evaluations are considered here by when and how they are used. In other words, if the evaluation is used during the evaluation process to continue constructing the object under evaluation (policy, regulation or programme), we are dealing with a *formative evaluation*. If, on the contrary, the evaluation is used as a summary at the end of the public intervention, it is a summative evaluation, as it includes an overview and a final overall evaluation.

Both evaluations are complementary and can, although not necessarily, be respectively linked with the improvement and with the accountability function. In other words, a continuous evaluation such as the formative evaluation has a purpose that can be adjusted in line with the process and execution of the public intervention under evaluation, whereas a summative evaluation tends to describe the result of an intervention responsibly, although in some cases the contrary is also true.

According to the Element Under Evaluation In this case, the evaluation is classified in accordance with the element or phase that is to be evaluated.

So, we can find *design evaluation* that may be used to test the coherence of a regulation that is evaluated. This type of evaluation focuses its interest on the theoretical and methodological aspects of the regulation, in other words, on establishing that the conceptual and procedural structure is consistent with the reality to which it will be applied.

In second place, we have the *evaluation of the process*, the purpose of which is to test the effective functioning of the regulation in the context in which it is presently applied. An effort is made to understand the way in which the regulation is being applied, if problems arise with its application, if those responsible for applying the regulation are working in a satisfactory way, if the regulation is being effectively applied to the target group and, in short, any circumstance that is related to the regulation and its course of action.

Finally, the end purpose of the evaluation of the results is to verify the achievements of the public intervention, in this case, of a particular regulation. And these may be of two classes. On the one hand, the *product* of the regulation and, on the other, the *effects* that it has had may both be considered. Normally, the efforts are oriented towards the evaluation of the products more than the effects, as they are more difficult to measure. But, apart from the products that are obtained, the direct effects of the regulation on the target group may be evaluated, as well as the *indirect effects*, those that have greater protection and affect a sector of the population that is not directly linked to the regulation.

According to Who Evaluates An internal evaluation is conducted by the same administration or body that approved the regulation. In this case, the technical experts will be the ones to evaluate the application of the norm from within. This circumstance: (a) facilitates access to the necessary information; (b) favours assimilation of evaluation results; and, (c) eliminates the feelings of encroachment that are at times perceived in evaluations.

However, *external evaluations* may also be used to give the task greater credibility and objectivity. In this case, professionals with no links to the administration are those involved in the evaluation. This method may be more difficult for some of the people responsible for organizing the norm to accept, however, it offers better guarantees of independence with regard to society as a whole.

In any case, the minimum requirement is that the internal evaluation is guaranteed so that some of the recognized functions of the evaluation take place.

According to the Moment When It Is Evaluated Thus, the evaluation can be *ex ante* if it is done before the norm under evaluation comes into force. This type of evaluation analyzes the context, the conditions under which it will be applied, the precedents and trial projects that have taken place in relation to the problem that has to be solved and any interventions performed earlier. There again, the *ex post* evaluation is done once the norm has been applied and is, in general, the standard way of conducting public evaluations.

1.3.4.2 Focus-Based Evaluations

The classification by the *focus* of the evaluation shows the historic evolution that evaluation has followed. The first *focused evaluations* aiming to establish how public policies had changed reality have slowly given way to evaluations directed at provoking changes in social reality by themselves. This progression led Asensio (2006) to consider *classic models* of evaluation, centred more on the achievement of *objectives*, and some *pluralist models*, interested in evaluation as an open, flexible and participatory *process*. Beginning with the first proposals from Tyler (2010), the classic 'objectives' model has been improved. First, through the application of methodologies belonging to the experimental sciences; then through the incorporation of new critical agents and interest groups (clients and consumers) that sought useful information for decision-making from the evaluation. And the rigid and closed bureaucratic/administrative model that is interested in the fulfilment of set objectives through a top-down model has finally been transcended, by establishing, in a participative and democratic way, the priorities and the courses of action on social problems that have to be developed. This diversity of focuses is briefly developed below (Fig. 1.5).

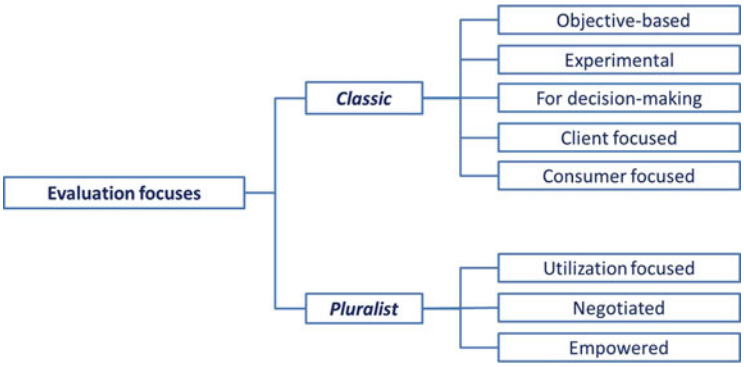

Fig. 1.5 Evaluation focuses

1.3.4.2.1 The Evolved Classic Focus

This focus places the centre of attention on awareness of the degree of compliance with previously defined objectives. These objectives may be found in a generic and specific form in policies, plans, programmes and regulations; or those that certain stakeholder groups expect, in a more particular way, for correct decision-making. From the above, the following list of evaluations that follow a more or less evolved classic approach may be drawn up.

Objective-Based Evaluation Based on a useful theoretical and analytical framework to verify whether the results achieved by the public intervention, through a particular regulation, are those foreseen in the prior objectives. However, this focus, developed by Tyler (2010), faces a more complex reality than it might wish. On the one hand, it is difficult to find regulatory interventions that have pre-defined objectives, beyond a mere declaration of political intent. On the other hand, it is uncommon to have formally expressed plans, and even if they exist, they are usually modified in the course of the action. Finally, the objective-based focus provides a partial view of the regulatory intervention as it is solely interested in its final results and not in the overall process.

Experimental Evaluations In this case, the approach employs an experimental research methodology. The objective of these experimental evaluations is to test the validity of certain previous hypotheses and to find cause and effect relations between the variables of the model. It is therefore a more suitable focus for the natural sciences than for the social sciences and especially for a field as difficult to control as processes related to public policies. In addition, it is an approach that shows greater interest in its methodological quality than in the use of the information that is generated.

Evaluation for Decision-Making This focus centres on evaluation as an integral process, in other words, not only methodological nor results oriented, but aimed at

generating useful information for decision-making. In a more or less broad sense, the proposals of different researchers consider it in this way. For example, Cronbach (1980) understands evaluation as a process, the essential function of which is to improve the programmes and to help public policies. And this function is possible because evaluation identifies, analyzes and interprets the value of information, making it available to those users who have to take decisions on programmes and policies. In an effort to give evaluation a more defined orientation, Stufflebeam (2000, p. 293 ff.) proposed a theoretical and analytical framework in which evaluation is seen as a mechanism that generates useful information for decision making. Finally, Weiss (1998) justified the contribution of evaluation to decision-making in so far as it is developed in a political context in which the public intervention is the consequence of political decisions that therefore require the possession of information that is useful for decision-making on public interventions.

Client-Oriented Evaluation In this case, the evaluation is focused on the technicians and professionals, as internal clients in charge of executing and overseeing a particular programme, service or regulation. It therefore represents a focus that permits the participation of managers and aims to help them to understand their work better, their progress in relation to the plans, as well as the repercussions that it has among the beneficiaries of the programme that was undertaken or the regulation that was applied.

Consumer-Oriented Evaluation Directed at satisfying the informational needs and expectations of the final consumers on certain goods and services. The results and recommendations of this evaluation may help the consumers to direct their consumer intent, but the work calls for the intervention of professional evaluators with very specific knowledge and qualifications which, in many cases, are not present in this type of evaluation.

1.3.4.2.2 Pluralist or Participative Focuses

These approaches show more interest in the interaction of multiple agents, plural values, flexibility and global reach of the process, than in the results of the evaluation. The participative evaluation models distinguish themselves because of the emphasis that they lay on each of these elements (Asensio Coto 2006) and on the multiplicity of participants that intervene.

The principal models of evaluation that follow the *participative focus* are briefly described below.

1.3.4.3 Utilization-Based Evaluation

It was previously mentioned that one of the specific characteristic of an evaluation is its interest in the effective use of the results that are obtained in its development.

This interest has led some authors to consider that evaluation should be oriented right from the design stage towards the final use that will be made of it. The most significant of these is that it is considered (Kellaghan and Stufflebeam 2003) that the major problem of evaluation is that the results obtained and the recommendations issued are hardly used. Hence, that author advanced a set of recommendations seeking to improve the situation and that, in general terms, may be summarised in three lines of action:

(a) the final use of the evaluation should be borne in mind throughout the evaluation process. In other words, the evaluation should be designed, organized and developed, bearing in mind who the users of the information that is generated will be and what their interest in the evaluation is;
(b) in the evaluation process, groups that have greater interest in the programme, policy or regulation under evaluation should be given greater weight. Their expectations should be known so as to fine tune the orientation of the evaluation;
(c) the evaluator should become a flexible and proactive agent who encourages the motivation of participants and the satisfaction of their expectations, in such a way that the use of the results is greater.

In conclusion, the utilization-based focus expresses special interest in incorporating a larger number of critical agents, as their interest in the evaluations of policies, programmes and regulations will depend on the utilization of the evaluation in the future.

1.3.4.3.1 Fourth Generation or Negotiated Evaluation

This type of evaluation seeks to involve all the stakeholders and is mainly directed at total quality evaluations of policies and programmes (Ibar Albiñana 2002). It is an evaluation that takes "the concerns, complaints and questions of the different critical agents in the programme under evaluation" as its reference point (Bustelo Ruesta 2001). Guba and Lincoln (1989) developed and systematized this focus, describing it as a model that accepts a wide set of values that represent the diversity of the critical agents that are involved. Hence, the result of negotiation should be an understanding of the reality to be evaluated, as consensus between such different values will be difficult. According to this proposal, evaluation becomes a more complex tool than in its classic form, as it is given a strong political character. In this way, reality is not assumed as something given, but as a social construct arising from the political negotiation of all stakeholders that will as a consequence produce an unpredictable set of results that will not necessarily have to satisfy the plurality of stakeholders.

1.3.4.3.2 Evaluation of Empowerment

This approach implies the radicalization of the participative dimension of evaluation, as it starts out with the idea that it is the stakeholders themselves who promote, direct and develop the evaluation on the basis of their own motivations and interest. Evaluation for empowerment was proposed by Fetterman et al. (1996, p. 4) who defined it as "the use of evaluation concepts, techniques and results aiming to encourage improvement and self-determination among people, organizations, societies and cultures, with special attention paid to programmes". The theoretical support for this focus is found, according to Fetterman, in the meaning that the concept of empowerment has in the works of psychology developed by Julian Rappaport. Thus, Rappaport considered that the community empowerment model came from the conflict between public intervention directed towards the satisfaction of needs (directive and paternalist) and public intervention directed at upholding people's rights (1984). Accordingly, the proposal of Fetterman would rest on the latter model. So, the evaluation of empowerment is, in the words of Asensio, "a type of evaluation with a focus that centres on rights" (2006, p. 115).

In summary, the different types of evaluation according to their particular focuses respond more to a debate between epistemological paradigms than to the function that the evaluation should have in the general framework of the analysis of public policies. In effect, as may be noted, the majority of the types of evaluation centre their attention on the relation that is established between what is evaluated and the agents that undertake the evaluation, a relation that is most obvious in the pluralist focus. These approaches display an orientation towards social constructivism "centred on the preparation of holistic analyses and the dominancy of qualitative methods" (Bouzas Lorenzo 2005, p. 75).

1.4 Stages of an Evaluation

Having presented the theoretical elements of the evaluation, the process by which they are conducted will be briefly described.

In the classic scheme evaluation comes at the end of the cycle of public policies (Fig. 1.1), however, the present conceptualization of evaluation means that it is present throughout the whole cycle. So, this integral approach to evaluation applied to the legislative field no longer centres exclusively on the final results of regulations, but it should be present at the start of the planning and subsequent application of the regulations. In addition, it incorporates other elements such as design, rationality, coherence, and the evaluative nature laws. In this way, legislative evaluation is turned into a public action in itself and is understood as an ongoing process in the cycle of legislative policy rather than a final isolated act (AEVAL 2010). This dynamic and continuous dimension of evaluation justifies the existence of multiple approaches and typologies, as seen in earlier sections (summative

evaluation, formative evaluation, design evaluation, process evaluation, results evaluation, *ex ante* evaluation, *ex post* evaluation, etc.).

As Osuna and Márquez (2000) have done, we may summarize the evaluation process into four fundamental stages: design of evaluation, collection of information, completion and follow-up and results of the evaluation.

In the first place, the design of the evaluation has the purpose of determining the justification of the evaluation and its organization. The design of the evaluation lends it conceptual rigour and should guarantee its rationality and coherence. To do so the *direction of the evaluation* has to be decided, which means expressing the reasons that justify it (support decision-making, improve management, promote participation, etc.). Subsequently, the *object of the evaluation* and its objectives should be set, together with identifying the stakeholders and setting up a steering committee. This phase is completed with an analysis of the evaluative nature of the particular policy or norm. In other words, a preliminary evaluation of the extent to which a norm (regulation) or law may be evaluated. In this way, the evaluative design has the purpose of facilitating and guaranteeing that a law may be evaluated. To do so, a prior diagnosis of the reality that justifies the public action (problematic issue or concrete need), the existence of an intervention strategy, the availability of information and resources to finance the evaluation will all be necessary, as well as knowledge of the sociopolitical context and of the main agents that are involved. The following step will be to *define the questions of the evaluation*, for which purpose certain criteria should be observed (membership, efficiency, effectiveness, impact, viability, coherence, participation, coverage). It will then be necessary *to choose the type of evaluation* that will be used (process, results, impact, *ex ante*, *ex post*, etc.) in accordance with the end that is pursued. Other aspects to take into account in the design are the *estimation of the deadlines for completion,* the *budget* for the work to be done, as well as the *choice of evaluation team*. All of this will be written in the terms and conditions agreed for the whole evaluation: the *Evaluation Terms of Reference*.

The second stage begins with the *choice of information collection techniques* on the basis of available sources and other information generation techniques (panel of experts, surveys, interviews, etc.). The treatment and *processing of information* so as to obtain, if necessary, the indicators that relate variables and that yield new sources of information. and finally, the *analysis* and appraisal of the information. The set of these sources, techniques, preliminary data and final information constitutes an authentic *information system for evaluation* that will be conditioned by the characteristics of the object under evaluation, the type of evaluation that is chosen and the context of the evaluation.

The third stage of the evaluation takes place in the course of the public policy or while the regulation on which interest is focused remains in force. The *evaluation of the management system*, which supports the application and the execution of the regulation in question, is of special interest in this phase. It is of interest to know the rationality of the management objectives, the division of labour and responsibilities, internal coordination and the sufficiency of means and resources. Additionally, the *evaluation of the follow up system* has an interest in establishing the degree of

progress and development of the regulation that has been approved, identifying the critical points of the process and guaranteeing the integral functioning of the system that is overseeing compliance with the law in question.

Finally, the results of the evaluation are varied. On the one hand, the *Evaluation Report*, where the characteristics of the evaluation are summarised, its development and, principally, the list of observed facts, conclusions drawn and recommendations offered. The *learning* that ensues from the evaluation is one of the results of the process and will yield information to improve and to readjust the cycle of the law under evaluation as well as the system of evaluation. The evaluation cycle closes with a *metaevaluation,* a sort of evaluation of an evaluation, in order to obtain further guarantees of this improvement. This phase is not always followed through, at times because it is unfeasible, due to insufficient resources, and at other times because there is no preliminary evaluation design that would make it possible.

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Chapter 2
Crime Statistics in the European Union

Ana Isabel Pérez Cepeda

Contents

2.1 Introduction

Quite recently, there have been calls for "an evidence-based policy" at a national and international level, or, in other words, the application of experience and scientific methods to decision-making at each phase of the preparation of norms. The starting point of evidence-based Criminal policy is, without a doubt, the existence of reliable data. Since the first half of the nineteenth century, a point at which the first crime statistics began to be recorded (Aebi and Linde 2012, p. 4), criminologists have used that instrument to measure crime rates. At present, the use of these types of statistics is more frequent than victimisation surveys and studies of self-confessed crime. However, the shortcomings of official statistics are widely acknowledged. Thus, by definition, the information that they offer only includes

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crimes that are reported and, subsequently, recorded by the police, and they overlook the so-called "hidden figures" of crime. In addition, there is a series of factors that determine the presentation of police statistics, to the point where a reliable comparison of crime levels between countries that are based on those statistics becomes a truly complicated task. All in all, that situation hardly means that police statistics are devoid of any validity, but merely that they are an inadequate means of measuring crime and they therefore need to be complemented with other instruments. This is the reason why alternative methods have been developed to measure crime, such as victimization surveys and studies on self-confessed crime.

Victimisation surveys ask the general public directly about their experience with crime. They are prepared by international organisations, especially the *International Crime Victims Survey,* and use uniform definitions of the types of crimes, as well as a standardized methodology, which allows researchers to carry out reliable comparisons of crime levels. Thus, victimisation surveys have at present been turned into the main source of information on crime levels, above all in developed countries (Van Dijk et al. 2007b, p. 11).

Studies on self-confessed crime ask individuals—in general, under the age of consent—if they have been involved in criminal activity. Since the first studies up until the present, their methodology has become much more sophisticated, and they are now much more reliable. Nevertheless, they focus on a particular segment of society and certain very specific crimes that are considered less serious. Conducted with the same questionnaire and the same methodology, these studies offer an alternative to official statistics on recorded crimes and allow comparisons between countries in a more reliable way. At present, the general consensus among criminologists is that a combination of officially recorded data and survey-based data (on victimisation and self-confessed crime) would be the best method to measure crime (Alvazzi del Frate 2010, p. 179).

The European Union has been working to develop a coherent global strategy to measure crime and criminal justice, with a view to improving the reliability of existing data and expanding its use in decision-making in criminal matters. In the following sections of this study, the most representative instruments that exist at present for the measurement of crime at a European level will be analyzed; some based on official statistics of recorded crimes and others based on victimization surveys and self-confessed crimes. Specifically, this work analyzes six European instruments. The study of these instruments centres on the analysis of their content and their practical relevance, at present, for the design of European criminal policy. The last section of this study offers a series of proposals to improve the data collection methods of European instruments for the measurement of crime and their necessary relevance in the preparation of Directives that have directly affected the drafting of Member State criminal regulations.

2.2 A Description of European Instruments to Measure Crime

The most important sources of data on criminal trends at a European level are analysed in this section (Table 2.1), lending attention to the following points: the body that prepares the information, frequency with which the studies are conducted, geographic coverage, types of crimes to which they refer, and practical relevance.

2.2.1 Official Statistics of Recorded Crimes

2.2.1.1 Eurostat Crime Statistics ("Statistics in Focus")[1]

Eurostat is the European Union statistics office. It was given its mandate in the framework of *the Hague Programme*[2] to prepare comparable statistics on crime and criminal justice.[3] To that end, a series of measures were planned under the title *Developing a comprehensive and coherent EU strategy to measure crime and criminal justice: an EU Action Plan 2006–2010*. Since the end of that Action Plan, the system has been improved and enlarged within the activities of the *Stockholm Programme*.[4]

The methodology used by Eurostat is based on that developed by *European Sourcebook of Crime and Criminal Justice Statistics* (*European Sourcebook*) and the surveys of the United Nations carried out by United Nations Office on Drugs and Crime (UNODC). The countries were asked to adhere to standard definitions for keeping statistics.

The collection of data by Eurostat covers not only the present-day 27 member States of the Union, but also the candidate countries (Croatia, Montenegro, the former Yugoslav Republic of Macedonia, Turkey), the potential candidate countries (Albania, Bosnia and Herzegovina, Kosovo, Serbia), countries of the European Free Trade Association (AELC/EEE) (Island, Liechtenstein, Norway and

[1] This section is based on the initial collaboration of Hasan Büker, Osman Dolu and Şener Uludağ (Ankara Strateji Enstitusu Dernegi, Turquía) with the FIDUCIA project, see Maffei and Markopoulou (2013).

[2] The Hague Programme: strengthening freedom, security and justice in the European Union, OJ EU C53 3 March 2005.

[3] Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee of 7 August 2006. Developing a comprehensive and coherent EU strategy to measure crime and criminal justice: an EU Action Plan 2006–2010 (COM (2006) 437 Final, 07.08. 2006).

[4] The Stockholm Programme—an open and secure Europe serving and protecting citizens, OJ EU C115 of 4 May 2010.

Table 2.1 Instruments that exist at a European level

Based on official statistics of recorded crimes	Eurostat statistics on crime ("Statistics in focus")[a] European sourcebook on crime and criminal justice statistics[b]
Based on surveys	European crime and safety survey[c] European social survey[d] European Union minorities and discrimination survey[e] Survey on gender-based violence against women[f]

[a]Eurostat Crime Statistics ("Statistics in Focus") http://ep.eurostat.ec.europa.eu/portal/page/portal/crime/introduction
[b]European Sourcebook of Crime and Criminal Justice Statistics http://europeansourcebook.org/
[c]European Crime and Safety Survey (EU ICS) http://www.unicri.it/services/library_documentation/publications/icvs/statistics/
[d]European Social Survey (ESS) http://www.europeansocialsurvey.org/
[e]European Union Minorities and Discrimination Survey (EE MIDIS) http://fra.europa.eu/fraWebsite/eu-midis/index_en.htm
[f]Survey on gender-based violence against women http://fra.europa.eu/en/project/2012/fra-survey-gender-based-violence-against-women

Switzerland), other European countries, such as the Russian Federation, and countries from the Organization for Economic Cooperation and Development such as Canada, Japan, New Zealand, United States and South Africa.

The survey results are presented in the "*statistics in focus*". Official police records from these countries are the source of information on the crime figures in these statistics. In addition, the data includes the size of the prison population and the number of law enforcement agents.

The most recent publications were in 2013: "Crime trends and criminal justice" Number 18/2013, covers the crimes recorded by the police over 2007–2010[5] and in 2012: "Crime and Criminal Justice—Statistics in Focus Number 6/2012" (Tavares et al. 2012), based on the number of crimes recorded by the police over the period 2006–2009.

It includes the following items: total crime, homicide, violent crimes, robbery with violence, domestic burglary, theft of a motor vehicle, drug trafficking, as well as the numbers of both police officers and the prison population.

[5] The figures for the majority of crimes recorded by the police in the European Union have fallen. While crimes related to drug trafficking, robbery and violent crimes fell by 3–6 % between 2007 and 2010, the number of thefts of motor vehicles was substantially lower over the same period (−23 %). In contrast, domestic burglary is a category on a rising trend in the European Union. In comparison with 2007, 7 % more cases of domestic burglary were reported in 2010. See http://ec.europa.eu/eurostat/en/web/products-statistics-in-focus/-/KS-SF-10-058.

2.2.1.2 The European Sourcebook of Crime and Criminal Justice Statistics[6]

The *European Sourcebook of Crime and Criminal Justice Statistics* has been published in four consecutive editions,[7] each of which was developed by a group of experts with the support of different institutions and national governments. This instrument only includes data on European countries.[8]

The European Sourcebook compiles the official statistics and data from sociological surveys conducted in the field of crime and criminal justice. The collection of information is done through a network of national contacts, the majority of which are public employees (representatives of judicial authorities, of national statistics offices, etc.) or researchers (who work for universities and research institutes of one sort or another). Each national contact collects the data on their own country and uses it to fill in the European Sourcebook questionnaire. Once collected, the data are then validated and recalculated in proportions for each 100,000 inhabitants.

This source of data is divided into five chapters: the data on the police (information on crimes and suspected criminals known by law enforcement agents in each country), the statistics from the public prosecutor (information on the number and the capacity of prisons and data on the "stock" and the "flow" of non-custodial sentences; the last edition includes a separate chapter on the work of supervised parole agencies and the application of works in benefit of the community and measures) and the data based on surveys (such as data taken from the International Crime Victim's Survey or ICVS with regard to crimes carried out and reported to the police, as well as data on attitudes towards the police and data from the International Self-Reported Delinquency or ISRD study).

The European Sourcebook offers information on various types of crimes providing a standard definition for each one of them. Likewise, it contains a list of countries that were unable to satisfy the standard definition completely, providing clarification on the definition of those items that could not be matched. With few exceptions, all the editions cover the following categories of crimes: total criminal offences, traffic offences, intentional homicide, physical injuries (aggression), serious physical injuries (assault) (a subcategory included for the first time in the fourth edition), rape, sexual assault (a category included for the first time in the fourth edition), sexual abuse of children (a category included for the first time in the fourth edition), violent crime, armed robbery (a subcategory that was only used in the first edition), theft, theft of a motor vehicle, theft of a bicycle (a subcategory that was only included in the first edition), burglary, fraud (a category that was

[6] This section is based on the initial collaboration of Dimitar Markov (Center for the Study of Democracy, Bulgaria) with the FIDUCIA project, see Maffei and Markopoulou (2013).

[7] The first edition was published in 1999 and the fifth and final edition in 2014, which refers to 2007–2011.

[8] Each one of the four editions has a slightly different geographic coverage, the latest edition covering 41 European countries.

introduced for the first time in the fourth edition), crimes against confidentiality, integrity and availability of data and computer systems, money laundering, corruption in the public sector, drugs-related crimes, drug trafficking and aggravated drug trafficking (a subcategory that was first introduced in the fourth edition).

Among its advantages, it is worth highlighting that, for example, the methodology for the compilation and presentation of the data (aimed at guaranteeing maximum accuracy of the information through the introduction of standard definitions of crimes and providing detailed explanations on a country-by-country basis of what is in reality reported), the opportunities for comparative analysis (although subject to important limitations) and the broad scope in terms of geographic cover and types of crimes (in particular, with the inclusion of the new categories of crimes in the most recent edition).

Although the objective of the European Sourcebook is to present comparable information on crime and criminal justice in Europe, the chronological comparison of a country, as well as the international comparison between countries is limited. According to the European Sourcebook, "National sources of information about crime show considerable differences in approach and coverage, which makes it necessary to exercise caution in making direct comparisons between countries." The European Sourcebook provides numerous notes and technical information that help explain the figures in each table, to avoid any mistaken interpretation of the data.

2.2.2 European Surveys to Measure Crime

2.2.2.1 The International Crime Victims Survey[9]

The International Crime Victims Survey (ICVS) is composed of a programme of surveys administered in many countries with a standardized sample that evaluates the experiences of individual offenders, police supervision, crime prevention and feelings of insecurity. The latest version of the ICVS was administered in some member States of the European Union with the financial support of the European Commission, under the title European Union International Crime and Safety Survey (EU ICS).[10]

[9] This section is based on the initial collaboration of Rita Haverkamp (Max Planck Gesellschaft zur Foerderung der Wissenschaften, Germany) with the FIDUCIA Project. See Maffei and Markopoulou (2013).

[10] The survey was completed by a European consortium led by Gallup Europe, including UNICRI (Italy), Gallup Hungary, the Max Planck Institute for Foreign and International Criminal Law (Germany), CEPS/INSTEAD (Luxemburg) and Geox (Hungary). The aforementioned consortium received funding from the Directorate General of Research (European Commission), to carry out the EU ICS in 2005 among the "older" 15 member States of the Union. The consortium committed itself to the inclusion at least three "new" member States (Poland, Estonia and Hungary).

The EUICS was conducted by Gallup Europe in the 15 "older" Member States of the EU in addition to Poland, Hungary and Estonia, using ICVS methodology. The collection of data in Estonia and Poland was independently organized in 2004/2005, but in close cooperation with the EU ICS consortium. Both countries used elements of the standardized ICVS methodology, including the questionnaire.

The interviews were conducted over landline telephones with the exception of Finland, where face-to-face interviews were held with an extra sub-sample,[11] which had no influence on the result as both mechanisms produced the same rates of prevalence.

The subjects of the study were residents of 16 years in age or over from the aforementioned countries. The number of real interviews envisaged for the majority of countries was 2000. No additional interviews were held in the capitals of Luxembourg, Poland and Estonia.

The same types of crime were included as in the earlier rounds of the ICVS, vehicle-related crime (car theft, theft of parts, theft of motorbikes, and theft of bicycles), burglary, theft, pick-pocketing and crimes involving contact (violent robbery, sexual crimes, assaults and threats). Through a series of special questions, the survey also collected information on non-conventional crimes, such as small-time corruption (bribery of public officials) and consumer fraud.

The most important changes in the ICVS questionnaire for the EU ICS of 2005 were as follows. In the first place, an additional question was introduced on so-called "hate crimes", which included those committed against immigrants. In second place, a question was included on exposure to drugs-related problems that had already been used in three Eurobarometer surveys. In third place, the question on car-related vandalism was removed as well as some other secondary questions with a view to reducing the length of the interview (Van Dijk et al. 2007b, p. 10).

Among its main strong-points, it may be said that the EU ICS overcomes the traditional shortcomings of official statistics on recorded crime, in relation to the hidden figures.

2.2.2.2 The European Social Survey[12]

A scientific research group led by Rory Fitzgerald, from the *Centre for Comparative Social Surveys* of the City University London (United Kingdom)[13] conducts

[11] See a detailed description of the EU ICS methodology in Van Dijk et al. (2007a), p. 12 ff.

[12] This section is based on the initial collaboration of Maria Doichinova and Maria Yordanova (Center for the Study of Democracy, Bulgaria) with the FIDUCIA project, Maffei and Markopoulou (2013).

[13] The other six institutions with representation are: NSD (Norway), GESIS (Germany), the Netherlands Institute for Social Research/SCP (Netherlands), the Universitat Pompeu Fabra (Spain), Universidad de Leuven (Belgium) and the University of Ljubljana (Slovenia). With the exception of these countries, each country in the survey has an associated organization or institution that conducts the survey in practice.

and manages the European Social Survey (ESS). The first round of this biannual survey was conducted in 2002. Round 6 took place in 2012. The geographic coverage has been enlarged since its beginnings, in such a way that 29 countries were included in round 6.

The ESS is a cross-cutting survey. The unit of analysis is the individual or any person over 15 years in age resident at a private home, regardless of their nationality, citizenship, mother tongue or legal status, who lives in the participating countries. The survey was carried out through strict random probabilistic sampling, with an objective minimum response rate of 70 % and rigorous translation protocols. The face-to-face interview lasted for one hour and included questions divided into "basic modules" which are relatively constant in each round, and two or three "rotating modules" that varied from one round to another. The 2010 round had two rotating modules—"Work, Family and Well-being: the implications of economic recession" and "Trust in criminal justice". Information was also collected on trust, legitimacy, cooperation and compliance in relation to criminal justice. It also tested the theories of institutional legitimacy.[14] In the latest round (2012), two modules were included on understanding democracy and on personal and social wellbeing.

The central module of all the rounds in the survey includes a question for those in the surveyees on levels of trust in the police and the justice system. The concept of trust is based on the valuations of interviewees, in terms of the most common and visible criminality indices, and the general effectiveness of the police and the justice system in the country.

The ESS also measures levels of tolerance towards people of a different sexual orientation, ethnic origin, race, religion, or social status. In the central module of round 6, there are questions on whether surveyees have suffered discrimination and, if so, they are asked whether they are aware of the motives for it.

All the rounds include questions on personal safety, such as whether the surveyee or a relative have been the victims of theft or physical assault over the last 5 years. Another question refers to the interviewee's perception of safety, such as: "how safe do you feel walking through your local neighbourhood?".

The questions that measure the perception of fear of crime were expanded in round 6 to include fear of burglary, as well as fear of falling victim to a violent

[14] This module was prepared as a direct result of the EURO-JUSTIS project, funded by the European Commission under the Seventh Framework Programme. See Hough and Sato (2011). One of the rotating modules of round 5, which provides an in-depth focus on a series of particular academic and political concerns refers to public confidence in the courts (how many times has the interviewee interacted with them? To what point is the interviewee satisfied with their work? The police and the courts treat the victims/accused equally? Are they successful at solving criminal cases? What are the levels of corruption? etc.). In addition, the survey measured the point to which the moral opinions of the interviewees coincide with those of the police and the laws, to what extent they tend to support the decisions of the police and the courts and to what extent are they willing to cooperate with the police and the courts through telephone calls, by testifying, etc.

crime. Likewise, it was asked whether these fears affected the quality of life of the interviewees in the survey.

Moreover, the ESS contains questions that measure the likelihood of surveyees committing a specific crime, such as for example, making an exaggerated or a false insurance claim, or committing traffic infractions, such as speeding or jumping a red light. Likewise, surveyees were asked questions on the likelihood of their being punished.

In general, the ESS covers far fewer crimes than the ICVS. Taking into account that the ESS is not designed to be a victimisation survey, it includes questions on robbery and physical assault, and likewise lays emphasis on the safety of the public in accordance with the crime rate in the country. In addition, the ESS suffers from an important problem which is that it does not record repeated crimes over the last 5 years.

Besides, it is worth pointing out that in round 6, the ESS not only measured the perceptions of the interviewees about the possibility of falling victim to a crime, but it also asked whether their moral convictions would allow them to commit a crime (insofar as the interviewee is willing to say as much in an interview).

The survey meant that it was possible to follow the prevalence of the types of crimes that form part of its central unit in around 30 countries in Europe, going beyond the frontiers of the European Union. Therefore, the ESS has shown itself to be a valuable source to be used together with other types of surveys on crime and, above all, as a source of contextual data on the conditions of life of the population and the relation with the evaluation of criminal tendencies in the country in question.

2.2.2.3 European Union Minorities and Discrimination Survey[15]

The *European Union Minorities and Discrimination Surveys* (EU-MIDIS)[16] constitutes the first study on the rights of minorities in Europe.

This study had the purpose of detecting discriminatory criminal procedures against minorities. The study is also an attempt to understand the victimisation of certain crimes experienced by minorities in EU member states since 2003. The problem is that it has the same limitations and weaknesses as those studies as it is a transversal study. It nevertheless provides a large amount of information on minorities in conflict with the law and the perceptions that minorities have of the police and law and order.

In general, the survey reflects the experiences of criminal victimisation in relation to the following types of crimes: crimes against property (motor vehicle

[15] This section is based on the initial collaboration of Hasan Büker, Osman Dolu and Şener Uludağ (Ankara Strateji Enstitusu Dernegi, Turquían) with the FIDUCIA project, Maffei and Markopoulou (2013).

[16] See on this—European Union Agency for Fundamental Rights (2009).

theft and theft of car parts, burglary and theft) and crimes against individual legal goods (experiences of assault, threats, and serious assault, including when these crimes were committed on the grounds of racism).

The survey was carried out by Gallup Europe under the supervision of staff from the EUAFR (European Union Agency of Fundamental Rights). In total, 23,500 immigrants or people belonging to ethnic and national minorities who represented 27 member States participated in face-to-face interviews during 2008. Interviewees were selected in 22 of the 27 member States through random sampling procedures. In each State, the sample of individuals interviewed was between 500 and 1000. In addition, 5000 people from the majority population living in the same areas as the minorities, in ten States, participated in the face-to-face interviews.

The people included in the sample were men and women of 16 years in age or over: (1) they identified themselves as belonging to one of the groups of immigrants, national, minorities or ethnic minorities selected for sampling in each member State; (2) in general they were residents from one of the cities included in the sample or in areas of the member State in which they were interviewed; (3) they had been residents of the member States for at least 1 year; and (4) they were sufficiently good at the language or one of the national languages of the member State in which they were interviewed, so as to participate in a simple conversation with the interviewer.

Among the weak points of this source of data, it should be mentioned that the questionnaire does not contain a sufficient number of questions (variables) to measure all the factors that can have an impact on victimization. In addition, the size of the sample is not sufficient to detect a possible correlation between the variables of victimization and other independent variables. With regard to its strong points, it is worth highlighting the use of a standard questionnaire and the survey procedures, facilitating the comparison between countries. Finally, its sample selection procedures, which were organised and detailed, improved the quality and the reliability of the results.

2.2.2.4 Survey on Gender Violence Against Women

In the conclusions of the Council on the Elimination of Violence against Women in the European Union (8 March 2010), the Council of the European Union highlighted the problem of the lack of comparable data on gender-based violence against women. In response to this problem, the European Parliament, in its Resolution of 25 November 2009, on the Stockholm Programme, requested that the AFR of the European Union prepare comparative data. A large-scale survey was administered throughout the EU, from March to September 2012 and its results were presented in March 2014.

The AFT survey interviewed a total of over 40,000 women (approximately 11,500 per country), aged between 18 and 74 years, in the 27 Member States of the European Union and Croatia. Data on the scope, the frequency and the seriousness of the violence—physical, sexual and psychological—against women in the

EU were collected, including data on the experience of women in access to police services, health and victim support. The survey did not measure all types of violence against women; for example, the less frequent forms of violence or those that principally affect specific groups of women—such as the trafficking of women and children and genital mutilation of women.

In particular, the survey asked women about the experiences of violence in different environments, such as the home or place of work, the frequency with which they experienced violence and the physical, emotional and psychological sequels of this violence. New technologies were taken into account, such as mobile telephones and/or the Internet, which may be used as tools for the commission of acts of violence. The women who had been victims of violence were also asked whether they contacted different services (for example, police, health and victim support services), and the way in which they experienced the support that they received.

The results of the survey provided the necessary information for politicians, professionals and non-governmental organisations in the EU and in the national context for the development of policies and other measures to combat violence against women. The results also allow comparisons of the magnitude of violence against women in the different Member States.

2.3 Scope and Use of the Existing Data

As previously pointed out, the starting point of evidence-based criminal policy is, without doubt, the existence of reliable data. With a view to improving the reliability of the existing information and encouraging its use for taking decisions in criminal matters, the European Union has given it special attention in the Stockholm Programme, which highlights the need to collect reliable data on crime as a prior requirement for evidence-based decisions on a series of matters such as the area of justice, freedom, and justice.

The Strategy of the European Union for the start of the new millennium is based on reliable and valid data on organised crime and criminals.[17] The regulations on the compilation of data at a European level are contained in Regulation (EC) N° 223/2009 of the European Parliament and the Council, of 11 March 2009.[18] The objective is to establish a legal framework for the development, the production and

[17] The Prevention and Control of Organised Crime: A European Union Strategy for the beginning of the New Millennium (Official Journal C124 of 3 May 2000).

[18] Regulation (EC) No. 223/2009 of the European Parliament and of the Council of 11 March 2009 on European statistics and repealing Regulation (EC, Euratom) No. 1101/2008 of the European Parliament and of the Council on the transmission of data subject to statistical confidentiality to the Statistical Office of the European Communities, Council Regulation (EC) No. 322/97 on Community Statistics, and Council Decision 89/382/EEC, Euratom establishing a Committee on the Statistical Programmes of the European Communities (Official Journal L87 of 31 March 2009).

the diffusion of European statistics (Art. 1). The community statistical body responsible for the implementation of this legal framework is Eurostat (Art. 6). The production of community statistics is also guided by the Community Statistical Programme 2008–2012.[19] In annex II under title IV, it establishes the need to implement statistics on crime and criminal justice so as to apply The Hague Programme, laying emphasis on the need to develop new sources of data on organised crime.

At present, the European Council has framed the new strategic objectives up until 2014 in the Stockholm Programme. An open and safe Europe serving and protecting the citizens.[20] The Stockholm Programme recognizes that "*adequate, reliable and comparable statistics (both over time and between Member States and regions) are a necessary prerequisite, inter alia, for evidence-based decisions on the need for action, on the implementation of decisions and on the effectiveness of action*". The European Council therefore invited the Commission to "continue developing statistical tools to measure crime and criminal activities and reflect on how to further develop, after 2010, the actions outlined and partly implemented in the EU Action plan 2006–2010 on developing a comprehensive and coherent EU strategy to measure crime and criminal justice, in view of the increased need for such statistics in a number of areas within the field of justice, freedom, and security". The Commission adopted a new Action Plan, in order to develop this task: the objective of the New Action Plan 2011–2015[21] is to carry forward the work begun in 2006, which centres on the delivery of results. The objectives presented in this action plan are based on the priorities established by the Interior Safety Strategy with regard to specific criminal areas and the recommendations of the Group of Experts on political needs. These objectives are divided into the following four areas:

1. Cooperation within the EU and at an international level. The objectives in this area refer back to the recommendations of the experts to improve the map of the needs of politicians, to improve communications with the stakeholders, to promote work on crime statistics and criminal justice between the institutions of the EU, and to improve collaboration within the EU and at an international level, with a view to avoiding the duplication of data collection exercises.
2. Data quality. In this field, the objective is to improve the comparative quality of the data that are produced. Special emphasis is placed on the development of an international classification system of crimes for statistical purposes, taking multilingual demands into account, given that the principal reasons for not

[19] Decision 1578/2007/EC of the European Parliament and the Council of 11 December 2007 on the Community Statistical Programme 2008–2012, which substitutes the Community Statistical Programme 2003–2007 (Community Statistical Programme, as adopted by Decision No. 2367/2002/EC of the European Parliament and the Council of 16 December 2002 (Official Journal L358 of 31 December 12 2002).

[20] OJ C 115 of 4 May 5 2010.

[21] COM (2011) 713 final, Brussels, 18 January 2012.

having comparable data are the differences in criminal codes and information systems.
3. Data analysis and dissemination of results. Due to differences in recording and reporting crime and its classification in the member States, comparisons of crime levels can be deceptive, above all if the absolute figures are not accompanied by additional information on their quality (metadata). Therefore, one of the Action Plans refers to the systematic compilation and publication of metadata and contextual information, following the example of Statistics in Focus.
4. The development of indicators and the complication of specific data. The following types of activities take place within this category: put the European survey on crime and safety into practice, the survey on victimization in firms and the survey on money laundering, make progress in the compilation of data on computer crime and develop indicators on corruption. The action plan also includes the reestablishment and enlargement of the Group of Experts.[22]

After having reviewed these instruments adopted by the European Union, we can arrive at the conclusion that they provide a sufficiently large framework to accommodate the advances in the collection of data on crime in the area of Europe. However, although at present there are many organizations at a European level and in the whole world that collect data on crime with different purposes in mind, such as for drawing comparisons on criminal trends between countries, the existing data have some limitations and are therefore not usually used when preparing criminal policies. In addition, the process of preparing policies has certain characteristics, such as the pressure exercised by interest groups (lobbies) that hinder the appropriate use of the data that is available on criminal activity.

The majority of the sources of data examined in this study were used principally in academic research within the field of criminal Law and Criminology. In fact, there are a large number of academic studies that are based on those sources of data. Listing all of those studies would be beyond the scope of this work, although some examples can be highlighted. Tseloni et al. (2010) and Van Dijk (2007a, b) may be mentioned in the more recent bibliography that the findings of the ICVS have highlighted. Harrendorf et al. (2010) used the results of the UN-CTS; Ceobanu (2011), Fitzgerald et al. (2012) and Kääriäinen and Sirén (2011) the results of the EES. Some of these academic studies are not only centred on one of the instruments under analysis, but compare the results of various instruments, such as the well-known work of Aebi et al. (2002).

The attention lent by researchers to the aforementioned instruments does not correspond to the attention given to it by politicians. In fact, the relevance of these tools—both the official statistics on recorded crime and the data based on surveys—is quite limited for politicians. This appears to be a consequence of the

[22] On this point, see Commission Decision of 14 February 2012 setting up the Commission expert group on policy needs for data on crime and repealing Decision 2006/581/EC. Official Journal C42 of 25 February 2012.

"disconnection" between researchers, who can read and interpret the data, and the politicians, who are those that have to use these data.

An attempt took place within the framework of the Fiducia project, to involve European politicians responsible for the development of criminal policy. For this purpose, a questionnaire was prepared to be sent to members of the Committee on Civil Liberties, Justice and Home Affairs, in charge of most legislation linked to the area of justice freedom, and security. In that questionnaire, they were asked their opinion on the shortcomings in current data on criminal trends. Although the questionnaire was sent out three times between March and June, 2012, regrettably, only one response was sent back.

In the development of criminal policy in the European field, various European instruments referred to the need to use impact evaluation studies for the development of better laws. For example, article 70 of the TFUE establishes that impartial objectivity and evaluation are important tools for legislative rationality (Nieto Martín 2010). In addition, the White Paper on European governance requires that legislative acts in the EU be preceded by impact evaluations. Impact evaluations should reflect the existing data on crime. However, it is plain to see that, in the first place, the use of impact evaluations in criminal matters is at present very limited: only five impact evaluations have been conducted in this sector at a European level. Moreover, the use of crime-related data in the existing impact evaluations appears to be limited: only three of the five impact evaluations on criminal matters mention data on criminal trends.

The influence that victimization surveys have on that decision-making process varies notably in different European countries, as the investigation carried out by Zauberman has shown (2008, p. 28 ff.). According to this study, in England and Wales, the *British Crime Survey* has become a common reference point to measure crime and is used as material in the evaluation of policies developed by the government. In Belgium, the *Security Monitor* is explicitly linked to local security contracts approved between the Federal State and cities, and the *Politiemonitor Bevolking* constitutes an integral part of the police organization. In Spain, victimisation surveys do not appear to have influenced criminal policy. In France, the results of national surveys are used by the *Observatoire national des zones urbaines sensibles* and the *Observatoire Nacional de la délinquance*. In Germany, victimisation surveys have no notable impact on public policies, despite the fact that many local surveys were commissioned by municipal authorities in support of prevention and safety programmes. In Italy, the surveys are not generally used by politicians with the exception of certain regions (Emilia-Romaña) and some municipalities (Modena, Bologna). Besides, the thematic surveys on specific groups of the population (for example, those that centre on violence against women and young people) appear to have had a notable impact, as has happened with surveys on violence against women in Spain and with the surveys on violence in German schools. Above all, the study by Zauberman refers principally to surveys on the victimisation of nationals, not to the surveys on international victimisation mentioned in this work. Even so, Zauberman highlighted that the ICVS was of limited utility, fundamentally because of the reduced size of the samples.

Therefore, following what has been said up until here, the reasons why the data available on criminal trends are of limited political relevance in the decision-making process may be divided into two large blocks: (1) reasons relating to the limitations on existing data; and, (2) reasons relating to the policy formulation process.

2.4 Shortcomings of the Existing Instruments in Obtaining Data

The official data on recorded crimes can be used to measure the criminal trends in a country over time. However, there are a series of factors that determine the result of police statistics to the point where drawing reliable comparisons between countries on crime rates is a truly complicated task. In fact, as Von Hofer (Von Hofer 2000, p. 78 ff.) noted, they may be grouped into three categories: statistical, legal and substantive factors. Accordingly, the statistical factors refer to: (a) The time at which the data is collected. On the basis of the time at which the data is collected, the countries can be categorised into three groups: countries that use the input statistics, countries that use intermediary statistics and countries that use output statistics. In countries that use the input statistics, the statistical data are recorded when the crime is reported to the police (or when the police observe or become aware of a crime). In countries that use the intermediary statistics, on the contrary, the data are registered when the police investigation is over. Finally, the output statistical data of some countries is at an intermediary stage of the process. So, the point at which the data are collected influences the statistics. For example, the countries that use the input statistics have higher crime rates that those that use the intermediary statistics, and the latter have higher rates than those that use the output statistics. (b) The way in which the crimes are counted. For example, when criminal behaviour infringes more than on criminal regulation or when more than one person participated in the crime. (c) The time to which the statistic refers. For example, statistics can refer to the year at which the crime was committed or the year when it was reported. (d) Changes in the routine preparation of statistics. If a country modifies its routine preparation of statistics, it will be difficult to know whether the subsequent changes to the statistics reflect a real change in its crime levels or whether those changes are simply a consequence of changes in the routine preparation of statistics. The legal factors include: (a) differences in the legal definitions. Although the definitions of some types of crime are relatively clear (for example, homicide), in other types of crimes (for example, computer crime, corruption), it is difficult to determine the type of behaviours that they cover. (b) The effect of the legal process. The statistics may be seen to be affected by the role attributed to the victim in the persecution of the crime. For example, there are crimes that are only prosecuted at the request of one of the parties, in other words, if the victim takes legal action. (c) The legality principle as opposed to the principle of opportunity. In

systems that are governed by the legality principle, the police and the legal authorities are obliged to prosecute all crimes of which they become aware. This can imply a higher number of recorded of crimes in comparison with the systems governed by the principle of opportunity, where prosecution is decided by prosecutors and the specification of the offences is negotiable. The substantive factors include: (a) The willingness of the local population to report a crime. This can depend on various factors, such as the level of public confidence in law enforcement and legal authorities, the taboos associated with some crimes that exist in some countries (for example, rape), having access to a telephone helpline or the seriousness of the crime. Such factors can mean that these countries have a higher rate of criminality, although in reality the people simply have a greater tendency to report crime. (b) The diligence of the police to record crimes. For example, at times political pressure can encourage the police to record all crimes, which leads to the publication of higher crime rates.

A new category is added to this list by Aebi (2010, p. 213) which he calls factors of criminal policy and that are related to policies on the prevention of crime and juvenile delinquency applied in a country and that can affect the three other aforementioned groups. For example, the application of a zero-tolerance policy should lead to an increase in the crimes recorded by the police, at least during the first months of its application, as if the police show greater interest in all crimes, the number of recorded crimes will increase.

There are also very many circumstances that influence crime. For example, Hunt et al. (2011, p. 21) highlighted three groups of contextual factors that should be taken into account when interpreting the data on criminal trends: (a) opportunities to commit crimes and to fall victim to a crime (population density, science, technology); (b) facilitating factors (social capital, social networks, indicators of social exclusion); and, (c) the participation of the private sector. However, the main collections of data on criminal activity, such as the European Sourcebook, provide no contextual information that can help politicians to understand the criminal trends and thereby to improve criminal policies.

These aforementioned factors, as pointed out, mean that it is difficult to draw reliable comparisons on crime levels between countries (and even within the same country in over lengthy time spans). Therefore, the following questions should be taken into account, among others, when the number of crimes in each country are evaluated: differences in the systems of legal and criminal justice, differences between societies with regard to the likelihood of reporting crimes to the authorities, differences with regard to police practices in the recording of reported crimes and the way in which multiple crimes are recorded and when there are various participants. But, even within the same country, the official data on recorded crime should be used with caution, as not only can the crimes in criminal trends refer to the rise or to the fall in the overall number of crimes, but also to changes in legislation or to modifications in the regulations on the collection and the presentation of statistics. In addition, the official data never include the hidden crime figures.

The following factors may also be considered when assessing the size of the prison population: the work load (number of cases covered) of the courts, the probability of receiving a custodial sentence, the differences between countries in the extension of prison terms imposed for a particular crime, relation to preventive prison and especially when pardons or parole are applied.

All in all, that does not mean that the police and prison statistics lack validity, but simply that they are an insufficient means of measuring criminal activity and therefore, they need other complementary instruments. This is the reason why alternative methods—victimisation surveys and studies on self-confessed crime—were developed to measure crime rates. The survey-based data do reflect the hidden crime rates and, if the surveys were carried out using standardised methodology and questionnaires, it would be possible to compare these tendencies at a European level.

Another of the reasons that helps to explain the limited political relevance of the data on criminal activity is its lack of accuracy and mistrust in the data that relates back to the capability (experience and knowledge) of those responsible for data validation (Hunt et al. 2011, p. 47). So, it may be noted that the data on criminal activity is produced in a way that the legislators can neither understand nor employ. A good example of this is the European Sourcebook, where the abundance of explanatory notes and comments makes its comprehension very difficult. There again, no Internet website brings together the most representative data on crime; useful information that would otherwise assist the understanding of such crimes as: information on national legal orders, the rules of counting and the contextual factors of each country that influence the crime rates.

Finally, one of the most important problems is that the majority of European data sources are exclusively centred on common crimes to which the general public are exposed (theft, burglary, assault, etc.), but they do not include the so-called "new" forms of criminality; especially, centring on the European Union. No account is taken of the criminal areas found under art. 83.1 of the Treaty on the Functioning of the European Union (TFUE), such as terrorism, human trafficking, the trafficking of women and children for sexual exploitation, the illegal trafficking of drugs, illegal arms trafficking, money laundering, corruption, the falsification of means of payment, computer crime and organized crime. Any analysis and understanding of the dimensions and the characteristics of these fields of criminal activity are complex tasks, as the availability of data on these crimes is particularly limited:

– The European Sourcebook contains detailed information on drug-trafficking-related crimes.[23] The Eurostat statistics on criminality ("Statistics in focus") also contain figures on drug trafficking. Particularly, the illegal possession, cultivation, production, supply, transport, importation and exportation of medicines and the funding of drug operations are all included. Finally, the European crime and

[23] The definition of the "crime of drug trafficking" is to a great extent uniform, due to international conventions. However, the line that separates personal consumption from trafficking is not clear and is defined in a different way in each country. See Aebi et al. (2010), p. 373.

safety survey (ICS UE) also inquires into perceptions regarding drugs-related problems.
- Only the European Sourcebook contains data on the crime of money laundering.
- Data on corruption in the public sector are also included in the European Sourcebook of Crime and Criminal Justice Statistics. Where possible, data are included on active and passive corruption, initial involvement in corruption, complicity, the corruption of national public sector employees, the corruption of foreign public sector employees, public sector employees involved in extortion and public sector employees who successfully or otherwise offer bribes in the form of benefits with no immediate interest. Corruption in the private sector, extortion (with the exception of civil servants), and bribery of the electorate are all excluded.
- Figures on computer crime are only available in the European Sourcebook, where the figures included illegal access (intentional and unauthorised access to a computer system), illegal interception of messages (interception, without any right, by technical means, of non-public transmissions of computer data), interference with data (for example, damaging, erasing, deteriorating, altering or deleting computer data without permission), interference in the system, malevolent use of devices (the production, sale, acquisition for own use, importation and distribution of a device or a computer password/access code), attempted and consummated computer fraud. However, illegal downloads of data and programmes are excluded.

In brief, despite some references to data on the types of crimes mentioned under Article 83.1 TFEU, these are insufficient and the majority of them are taken from official statistics on recorded crime, which share the previously mentioned shortcomings. As a consequence, European law-makers in the EU can not employ these sources of data for the development of their evidence-based criminal policy in relation to these "new" forms of criminality.

2.5 The Role of Evidence in the Preparation of an EU Criminal Policy

The principal Anglo-Saxon contribution to the decision-making process at a European level was the introduction of the use of impact evaluations as part of the theory of rational choice based on cost-benefit analysis (Renda 2006, p. 7 ff.). As pointed out, the White Paper on European governance requires that the legislative acts of the EU be preceded by impact evaluations. An impact evaluation of a policy directed at legislators is a process on the advantages and disadvantages of possible options when evaluating their *ex ante* impact on social, economic and environmental development. Impact evaluations in criminal matters should, in particular, reflect the cost-benefit analysis that is obtained through the balance between the privation of rights that implies the imposition of a sanction (costs)

and the final ends that are pursued by the imposition of a sanction (benefit), which is the prevention of the crime (Muñoz de Morales Romero 2011, p. 586).

The commentary in the 2009 Impact Evaluation Guidelines[24] refers to the necessary collection and consultation of data, laying emphasis on the quality of the data, which is a key part of any impact evaluation. The data on quality are necessary to define the problem and to identify the impact of the alternative options to face up to the problem. Therefore, the data on quality should be used in the impact evaluation process of a particular policy. However, it appears that the use of impact evaluations in the field of criminal law is quite scant. To date, five studies on impact evaluations of criminal matters have been conducted in criminal law in UE, in relation to intellectual property, environmental protection, employers of nationals from third countries without legal residency, terrorism and human trafficking.[25] In only three of these are the data on criminal trends included and, although they contain some references to those trends, they also underline the need for improvement.

In particular, the impact evaluation on criminal law protection of the environment acknowledged the existence of significant hidden figure in this field; it is known that the difference between levels of real criminality and levels of criminality known to the authorities can fluctuate between 20 and 40 %, and in some cases up to 90 %. Moreover, this impact evaluation pointed to the lack of similarity between the legal systems of the Member States that makes it difficult to measure these crimes, as the crimes as such are only recorded as company crimes in some Member States. Impact evaluations in relation to sanctions against employers of nationals from third countries outline the different direct and indirect methods used by investigators and non-governmental organisations to count the number of people without work permits, which complicates the definition of real figures on these types of crimes. However, this impact evaluation also refers to the Regulation of the Community on migration statistics and international protection,[26] which envisages

[24] European Commission: Impact Assessment Guidelines, SEC (2009) 92, 15 January 2009.

[25] Document de travail de la Commision Annexe à la Proposition de Décision Cadre du Conseil visant le renforcement du cadre pénal pour la répression des atteintes à la propriété intellectuelle [SEC (2005) 848]. Commission Staff Working Document accompanying document to the Proposal for a Directive on the protection of the environment through criminal law [SEC (2007)160]. Commission Staff Working Paper accompanying document to Proposal for a Directive of the EP and of the Council providing for sanctions against employers of illegally staying third-country nationals [SEC (2007) 596]. Commission Staff Working Document accompanying document to the Proposal for a Council Framework Decision amending Framework Decision 2002/475/JHA on combating terrorism [SEC (2007) 1424/2]. Commission Staff Working Document Accompanying document to the Proposal for a Council Framework Decision on preventing and combating trafficking in human beings, and protecting victims, repealing Framework Decision 2002/629/JHA [SEC (2009) 358].

[26] Regulation (EC) 862/2007 of the European Parliament and the Council of 11 July 2007 on Community statistics on migration and international protection and repealing Council Regulation (EEC) 311/76 on the compilation of statistics on foreign workers (Official Journal L199 of 31 July 2007).

the development of common regulations for the compilation of data on migration by members of the EU. Finally, the impact evaluation on the trafficking of human beings used data from the International Labour Organization (ILO) and the International Organization for Migrations (IOM). However, the data on these two bodies are not comparable, as the IOM figures refer to victims who have been helped by the IOM, while the ILO figures represent a global estimate of the number of victims.

In general, impact evaluations in criminal matters, as has been shown, use little data on criminality. One explanation for this may be the present lack of reliable data in the fields of criminality in the context of the European Union (Eurocrimes) competences, as well as the weak links between politicians and researchers. One key research role is to inform for the formulation of policies. However, the traditional disconnection that exists between politicians and researchers means that it is no easy task to manage research in such a way that it has a practical influence. Politicians are not involved in research projects. This means that researchers have to imagine what the legislators need to know for the preparation of policies and they conduct their research without knowing whether their findings will be of use to legislators. A good example of this disconnection, as pointed out, was the vain attempt by Fiducia to conduct a brief survey on shortcomings in the collection of data on criminality among members of the Committee on Civil Liberties, Justice and Home Affairs, which is in charge of preparing most of the legislation linked to the area of justice, freedom, and security in the EU.

In addition, the pace of policy formulation is clearly quicker than the pace of scientific research. Legislators, in general, have little time to study a problem and the results of scientific research may not be available until many years later. This is the case of some data collections on criminal trends, for example, the European Sourcebook, that is published every 3 or 4 years. The rapid pace of policy formulation is therefore an obstacle as it leaves the legislator with insufficient time to gain an understanding of the limitations of the research and of the data, in such a way that they may be used.

Moreover, legislators are in general under the pressure of stakeholder and lobby groups. Many of these stakeholder groups offer their own data to support their position. There is no reason for legislators to assume that researchers are impartial, that the data they offer is not biased and that they are not in the service of their own lobby group. Legislators have often heard that statistics can even be deceptive ("lies, damned lies, and statistics"), so they may even become sceptical and simply ignore them. Finally, legislators can also be under pressure from a sector of the general public who demand rapid and punitive responses on numerous occasions against especially serious crimes, even though the data show no increase in that particular crime.

2.6 Proposals

Over recent years, as has been reiterated, we have listened to repeated calls at a national and international level for evidence-based criminal policies. The starting point of these policies is, without a doubt, the existence of reliable data on criminality. However, the available data, above all the data from police statistics on recorded criminal activity, display certain weaknesses such as diverse statistical, legal and substantive factors that alter the quantity, structure and trends of criminality. This fact reduces their utility for politicians and researchers in the development of strategies for criminal policy.

The EU has also requested the adoption of measures to improve the compilation of data on criminality. For example, the Statistics Plan of Action 2011–2015 centres on four fundamental areas: cooperation within the EU and at an international level, quality data, data analysis and diffusion of the results, and development indictors and specific data collections. This instrument offers a framework that should facilitate progress in the compilation of reliable data on criminal activity.

With the aim of confronting those challenges a series of measures should be adopted which will first of all permit quality data to be collected; and, secondly, so that evidence-based policies in the field of criminality may be developed within the scope of the work of the European Union.

With regard to the first of these objectives, it should be pointed out that even though the collection of comparable data on recorded crime is a complicated task, there may still be room for cautious optimism. One of the most frequently repeated proposals to achieve the comparability of data on criminality is the adoption of standard definitions of the classes of crime for use in European databases (Aebi et al. 2002; Harrendorf 2012, p. 24; Jehle 2012, p. 135). A step in this direction has been taken, for example, by the authors of the European Sourcebook, in which standard definitions are established for the different types of crimes and the special crimes that should be excluded or included. Standard definitions are needed, not only of conventional crimes (robbery, rape, theft), but also of the new crimes, even though it is a much more complicated task, such as corruption, computer crime and organised transnational crime. In addition, the data and the counting rules should also be standardized, with a view to improving their comparability that vary from country to country.[27] Finally, there are other circumstances that can influence crime rates and that should be taken into account. Hunt et al. (2011, p. 52 f.) suggested collecting information on macro, mid-term and micro levels. Examples of factors at a macro level are the economic context and demographic characteristics such as age

[27] Once again, the European Sourcebook on crime statistics tries hard to face up to this challenge offering information that may be summarised in the following questions: 1. Are there norms that regulate the way in which written data are registered? When are the data collected for statistical purposes? 3. What is the counting unit used in statistics? 4. Is the norm of the principal crime applied? 5. How are multiple crimes counted? Finally, 6. How is a crime counted that is committed by more than one person?

and gender. Factors at a mid-way level include changes in the criminal justice system and other changes in infrastructure and practices such as changes in the prices and the availability of alcohol; and factors at a micro level that include affiliations, partners and close relations, attachment to moral codes, upbringing of children and social support.

Besides, it would be desirable for the working group of people with experience in the validation of data, which is the case of the European Sourcebook project, to supply information on the limitations of data and analysis to respond to the confidence of politicians and the public in general in the data (Hunt et al. 2011, p. 47). In fact, the European Sourcebook contains numerous footnotes and technical information that explain the figures with a view to avoiding erroneous interpretation of the data. However, although it is thought necessary to highlight the potential limitations of a data source, this information should be transmitted with caution because if it is not correctly communicated, users might think that the data are of poor quality and that it is not worth using them (Hunt et al. 2011, p. 12). Also, with a view to filling the gap arising from the existence of hidden crime figures, the use of victimization surveys is necessary such as the European Crimes and Safety Survey (ICS UE).

All of the above should not mean that we forget what is perhaps the principal problem that the majority of the existing data centres on conventional criminality and overlooks the new forms of criminality, such as terrorism, human trafficking and the sexual exploitation of women and children, illegal drug trafficking, illegal arms trafficking, money laundering, corruption, the falsification of means of payment, computer crime, and organized crime. Given the lack of exhaustive data on emerging crimes (including Eurocrimes), there is therefore a need to develop more and better indicators of these new forms of criminality. This is no easy task due to the lack of clear and widely accepted definitions in relation to the majority of these crimes and because the majority of them are crimes without victims. However, over recent years, efforts have been made to develop indicators of these new crimes (Malby 2012), and this trend has to continue to provide legislators with reliable data for the development of evidence-based policies in this field.

Finally, as actually exists in a large number of data collections on criminality, it would be useful to create a web that brings the data together so that it may be easily accessed, as Internet is currently the key medium for the presentation and exchange of information. So, it would be desirable to design a place on Internet through which the users can have access not only to data on criminality, but also to the rest of the important information, such as information of national legal orders and counting rules, and contextual factors of each country that influence the commission of a crime (Hunt et al. 2011, p. 71 ff.). It would be a data portal on criminality, to which the community of researchers may contribute and offer criticism and commentary on the data and the analyses that have been shared. Correctly organised, it could be turned into a trustworthy fielding source within a reasonable length of time, where national and international politicians could search for and find relevant data.

However, it is also necessary to encourage cooperation between the academic world and politicians, opening a way towards data-based policies, as requested in

the community context, for example, in the aforementioned *Stockholm Programme*. On the basis that criminal policy in a democratic society should not be based on the feelings that certain crimes might arouse in the public or on the pressure exerted by certain stakeholder groups, but on evidence confirmed in the course of a reliable research. It is necessary to encourage cooperation between politicians and researchers to achieve this objective and to improve knowledge transfer. Policy formulators should participate in research projects from the outset with the purpose of conveying to researchers what they need to know, when they need to know it. This early participation is essential, given that merely passive diffusion of research results is not sufficient to guarantee that the research will be used to improve the policy.[28] It is important, especially in the European framework, that the policies of the EU benefit from the knowledge that may be drawn from the research projects financed by the Commission. On the one hand, researchers should analyse the data with scientific methods, summarising and communicating with legislators in a way that makes the evidence understandable and accessible. The brut data does not have to be communicated to politicians, as neither are they in a position to understand it, nor do they need such in-depth information. For example, easily understood pieces of information with visual representation (graphs) that show the changes in the rates of criminality over a certain period of time would be useful to them (Hunt et al. 2011, p. 12), without forgetting that the simplification of data for presentation purposes can also give rise to erroneous interpretations. On the other hand, high-frequency statistics are necessary to make a rapid intervention possible for politicians in certain matters (De Wever 2011, p. 29). Obviously, this requires the allocation of sufficient funds. Moreover, politicians should not develop criminal policy with poor quality data. They should use the data from organizations that have experts in the validation of data in their work groups.

The preparation of European criminal policy through the Directives, along with the data contributed by empirical investigation implies making blind use of the Directives. The opposite would, however, not be a valid proposition: not all the conclusions reached by researchers in the interpretation of data have to be immediately incorporated into the Directives that set out European criminal policy in certain areas. That is because the data appear exclusively as material on the basis of which the political-criminal decisions are prepared, which have to be guided not only by criterion of utility, but also by the criterion of justice (Muñoz Conde and García Arán 2010), and those decisions may run contrary to consolidated criminal principles. The problem that arises when beginning with an exclusively criminological concept of criminal policy, in which the decision to criminalize a conduct operates exclusively in the area of effectiveness, is the risk that criminal Law will only have a symbolic function. This function implies the enlargement of the criminal threat, not only to satisfy social demands for punishment but also, as Terradillos made clear, with the objective of "the definition of a type of individual author, the legitimate reinforcement of power and the concealment of weaknesses

[28] National Audit Office – NAO (2003), p. 7; see also Tyden and Nordfors (2000).

in social policy, that they try to conceal by fleeing to criminal law" (Terradillos Basoco 1991, p. 9). The political-criminal strategies have by necessity to pass through the "filter" of the guarantee of these rights, without this criterion of justice being replaced on the grounds of pragmatic or utilitarian reasoning. In brief, it would be desirable that the impact evaluations that accompany each EU Directive on criminal matters should consider the evidence as it is the best tool for the development a criminal Policy that takes into account the real levels of criminality. However, criminal policy developed by European politicians should not be solely influenced by empirical data on real criminality. Therefore the data constitute the foundation of a Directive, but their legitimacy can only come from the hand of a criminal policy that takes the criteria of justice and equality into account and, in the last instance, should find its limits in the principles of the criminal justice system approved through the Resolution of the European Parliament of 22 May 2012, on an EU approach to criminal law.[29]

It should not be forgotten that a social policy should be developed in response to a social conflict that first and foremost leads to its prevention or to a solution or, as a last resort, but only as a last resort, that chooses to define it as criminal. Bearing in mind that the power to define criminal procedures in Europe should have others as its foundation and should have the objective of the full achievement of liberty, security and justice; in other words, liberty and equality, as the sole means of achieving security and justice The UE should seek to resolve the existence of inequalities in the criminal world, fighting for policies that decriminalise certain mischievous behaviours (a point that up until now has not been done) and subjecting them to another type of social control, as well as policies that criminalize those behaviours that are of great social relevance (essentially, transnational and financial crime) and that are carried out by privileged groups. Only in that way would a Directive be sufficiently well justified, providing reasons for the States to implement it with a view to it being obeyed by the public and applied by the judges through national criminal regulations.

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Chapter 3
Economics as a Tool in Legislative Evaluation: Cost-Analysis, Cost-Efficacy and Cost-Benefit

Íñigo Ortiz de Urbina Gimeno

Contents

3.1 Why Calculate the Costs (and the Benefits) of Crime Policy

> Indeed, we may well puzzle a bit if someone were to tell us 'This project has little benefit and much cost—let's do it!' We would think that we are entitled to ask 'why?' (or, more emphatically, 'why on earth?') (Sen 2000, p. 934).

As expressed in a nutshell in the above citation from the Nobel prize-winner in Economics and specialist in poverty and inequality, Amartya Sen, the common basis of the different cost-benefit modes of analysis coincides with a practical principle of rationality which is difficult to reject out of hand: if we really decide to do something (rather than pretend to do it), it clearly appears necessary to ascertain whether our actions will really achieve our objectives and to what extent will they do so. Additionally, in a world of scarce resources in which there are many

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desirable ends, it also makes perfect sense to find out whether the resources that we use to achieve our ends are in proportion with the success that is obtained (efficiency)[1] or whether, on the contrary, we should invest them in other efforts.

Given this basic principle of practical rationality and given, likewise, that in the case of public policies, we are talking about the employment of resources that do not really belong to those who employ them, but to the general public, it appears increasingly clear, now as a question of democratic quality, that the examination of costs and benefits is not only advisable, but also necessary. This understanding has meant cost-benefit evaluations have been developing for some decades in a few countries and over recent years in a growing number. Given the existence of this increasingly broader consensus on the link between the cost-benefit evaluation of public policies and democracy, it would appear that the justification for that evaluation in a particular area of public policies, such as crime policy, should not be problematic. However, as a matter of fact, crime policy is one of the branches of public policy in which less evaluation has taken place. This produces a significant deficit, even in countries in which the evaluation of other public policies is performed in a routine manner, which is particularly striking when we consider the (relatively) high costs of crime policy.[2] The peculiarity of the situation therefore deserves a final argumentative effort.

In times of economic difficulty in the public sector, two circumstances become more evident, which in reality occur all the time and regardless of the state of public finances:

– In the first place, the fact that, taking into account the limitations on public funds, those destined to crime policy compete with those that support other equally necessary or desirable public policies, which begs the decision of the amount of funding to apportion to crime policy and the amount to set aside for other sorts of public policies;
– In second place, and given the various political-criminal measures likely to be financed, as well as their great variety, it is necessary to decide on the distribution and the prioritization of expenditure, not only between crime policy and other branches of public policy, but likewise within crime policy itself (Højbjerg Jacobsen 2013, p. 3; McIntosh and Li 2012, p. 3 f.; Nagin et al. 2006, p. 312; Cohen 2000, p. 270).

[1] The conception of efficiency that has been informally defined and that will be used throughout the text coincides with efficiency in an instrumental sense (means-ends). For a more technical definition and its differentiation of the notions of Pareto efficiency and Kaldor-Hicks efficiency, see Ortiz de Urbina (2004a), p. 44 ff.

[2] This is highlighted in practically all the contributions on the subject. See, for example, Henrichson and Rinaldi (2014), p. 2; McIntosh and Li (2012), p. 4; Sansfaçon (2004), p. 2; McDougall et al. (2003), p. 174; Aos (2003), p. 413; Welsh and Farrington (2001), p. 4; Cohen (2000), p. 265 f.

3.1.1 *Crime Policy Is Not Alone and Competes for Funding Alongside Other Public Policies*

To affirm that crime policy has to compete for funds with other public policies is obvious, as much as it is to say that this implies an objective limit, of a non-scientific nature, for the possibilities of its development. Something less obvious, but equally true, is that this makes it necessary to determine the costs and benefits of crime policy, so as to be able to compare them with those of other policies and to decide how much funding to apportion to each one. It is hardly obvious, in the end, that over recent years what is in principle a limiting circumstance, the restrictions on public funds in numerous countries, has had a healthy effect on crime policy, helping to slow down what appeared to be at the time an unstoppable tendency to increase punitive pressure and the growth of the prison population.

In his important work on "Overcriminalization", Husak contended that: "Still, no one should underestimate the importance of economic factors in shaping—and ultimately in changing—our policies. Legal philosophers may join me in protesting against injustice, but I predict that the exorbitant costs of our punitive practices will prove to be the more decisive factor in eventually reforming our criminal justice system. It is surprising that more of these changes have not already taken place. Remarkably, our penal policies seem to be immune from the cost-benefit scrutiny that is routinely applied to many other state institutions. Perhaps we must suffer from a major economic recession before we make significant improvements in our criminal justice system" (Husak 2013, p. 47).

Husak originally wrote these words in 2008, just before that "major economic recession" took hold that he had hypothesised might be necessary for important reforms to be carried out in our criminal justice systems. Five years afterwards, in the introduction to the translation of his work into Spanish, Husak understood that the wave of overcriminalization appeared to have reached its maximum heights and was on the decrease. With regard to the reason:

> The most plausible explanation for these tendencies is the economic recession from which countries across the world are recently beginning to recover. The punishment meted out to criminal offences is expensive and economic realities have obliged States to use it more sparingly (Husak 2013, p. 30).

There is no dearth of historic experiences that endorse the importance of the costs of punishment when explaining the recourse to criminal policies of less intensity, both in moments of economic crisis as well as in more buoyant times: in both cases cost considerations have gone before even the most punitive political-criminal ideologies. A couple of examples will illustrate the point:

– Think, first of all, of the events in the United Kingdom during the 11 years of the three legislatures led by the government of Margaret Thatcher (1979–1990). As opposed to the hard-line attitudes on "Law and Order" of Thatcher and her various ministers of justice, which included their defence of the reintroduction of the death penalty, and despite the effective intensification of police activity in

the persecution of crime, over the 11 years of the government of the *Iron Maiden*, prison policy went down another path. Due to considerations over efficiency in the allocation of resources, (very expensive) long-term confinement in prison was reserved for the most dangerous criminals and prison terms were reduced by shortening the periods within which to apply for parole.[3]

– The same has happened even more recently in the case of the United States of America. Given its gigantic prison population of well over two million inmates, each year over 500,000 people leave prison in the United States, approximately 40 % of whom to return to it after a period of only 3 years. The high costs of this vicious circle of imprisonment, together with the fiscal crisis experienced by the states, has meant that after 20 years of increased punitive intensity, in the early years of the twenty-first Century, many states approved recidivism reduction measures (which, in the face of the contemporary discredit of the rehabilitative ideal, on many occasions have strategically been called "prisoner re-entry") (Wool and Stemen 2004; Spelman 2009).

It is not meant, in paleo-marxism fashion, that the economy dictates the evolution of reality; but it does condition it in a very significant way.[4] The costs (and the benefits) of crime policy are therefore a factor of primary relevance, on the majority of occasions with greater influence on positive crime policy (that which is effectively carried out) than any academic considerations on normative crime policy (proposals as to what crime policy should be put forward). Ignorance of this fact means condemning oneself to practical irrelevance.

3.1.2 "Crime Policy" Is Written in Plural

Whereas the first factor is common to any public policy (all of them compete with each other over scarce resources), this second one is more idiosyncratic.

It is well known that there are numerous definitions of "crime policy", some of which are incompatible with each other and many of which are excessively centred

[3] On this point, see Matthews (1999), p. 117 f. and 135 ff. and Gottschalk (2006), p. 105 ff., who show the differences in crime prevention and prison policy matters of the Thatcher government and that of Ronald Reagan in the USA, despite the similarities in their discourse, and recall the explosion in the number of inmates that took place in the United Kingdom under John Major: from 40,000 in 1993 to 60,000 in 1997 (op. cit., p. 112). The above does not mean that Thatcher found no space for her neo-liberal economic programme, in the form of private institutions and the privatization of some prison services.

[4] As Gottschalk (2009), p. 97 recalls, over the almost 30 years of uninterrupted growth of the prison population, the USA underwent another three recessions, without them "making the slightest scratch" on the crime policy of expansion of the prison system. However, the economic determinants figure prominently in the explanations of the present-day situation. See Petersilia and Cullen (2014), passim, especially pp. 5–9, explaining the "perfect storm" of factors that have stopped the expansion of the prison system in the USA and have reversed it in certain places).

on criminal Law.[5] In what follows, "crime policy" will be understood as the study (or the implementation) of measures relating to three activities: the definition of certain behaviours as crimes, the attempt to prevent such conduct, and the response when the preventive efforts fail and criminal behaviour takes place.[6] A definition of this breadth allows the inclusion of the Theory of (criminal) legislation, traditionally set aside, as well as underlining that, if crime policy as an activity can usefully be seen as a toolbox, then criminal Law is only one of the tools in it.[7]

The question in crime policy is, precisely, that there is an extremely broad array of preventive tools. To a great extent, that array has something to do with the multiparadigmatic nature of the discipline that serves as the principal supplier of preventive measures, which is criminology; a discipline in which academics from very different disciplinary lines (biology, psychiatry, psychology, economics, Law, sociology, anthropology, etc.) share their knowledge about crime.[8]

In particular, once a specific hypothesis on the causes of the crime has been formed, it is possible to extract a prevention measure from it. So, if it is affirmed that criminal conduct occurs because of a weak capability for self-control, as Gottfredson and Hirschi (1990, *passim*)[9] sustain, then the preventive measures

[5] Which is problematic, because criminal Law, and principally theoretical criminal Law, takes care of the "case" once this exists as an entity with legal relevance, and only responds in a partial way to the causes that explain its existence, exposing itself to the danger of ignoring or at least undervaluing alternative policies that are directed at resolving these causes (Amelung 1980, p. 40). On the plurality of definitions, showing how some of these definitions are dysfunctional in securing a more prominent role for the principle of ultima ratio (last resort) see Ortiz de Urbina (2004b), passim, especially notes 23–25 and related text).

[6] The definition is close to what some years ago was offered on the purpose of criminology: "the process of creating laws, violating laws, and reacting to those violations" (Sutherland 1947, p. 3). The difference is found in the second element and is principally due to the different emphasis (scientific in criminology, practical—or technical—in crime policy): whereas criminology shows more interest in aetiological questions (why do people offend), crime policy is more interested in preventive measures (how to prevent criminal behaviour). The idea (shared here) that it is not always necessary to understand aetiology to be able to prevent crime is precisely one of the defining points of the "opportunity theories". A short statement on this point in Felson and Clarke (2008), pp. 193–194.

[7] In this sense, Noll (1980, p. 73 f.) affirmed that "although criminal Law has a lot to do with crime policy, crime policy has little to do with criminal Law". Or what amounts to the same thing: all criminal Law is crime policy, but there are extensive parts of crime policy that have nothing to do with criminal law.

[8] What, in the famous expression by Downes published by Rock and Holdaway (1988, p. 3), makes it a Rendezvous subject for other disciplines. The result of the important methodological differences between the different contributing disciplines is that criminology presents a very unusual appearance of "civil war" as compared with other disciplines, in which significant theoretical controversies around methodological foundations can without a doubt arise, but to a much lesser extent. On this, see Ortiz de Urbina (2014), p. 496 ff., especially, p. 509 f.

[9] A compact summary in Gottfredson (2006), passim.

will have to be directed at the factors that affect such a capability. However, criminology also offers very different explanations, which affirm, for instance, that criminal behaviour is due principally to poor social learning[10]; or to the existence of disparities between socially hegemonic ends and the means to achieve those ends, together with the relaxation of the norms on procedures to reach those ends[11]; or that it has to do, at least partially, with circumstances of a biological nature.[12] According to these proposals, preventive measures should be directed at these other factors, all of which vary greatly between each other.

As a consequence of this disciplinary plurality and of theories on the factors that are causally associated with crime (on which we must take action if we wish to prevent them), in crime policy we find ourselves with prevention measures that assume very different forms, ranging from clearly promotional programmes, such as nursery education,[13] to others that are fully punitive, such as the imposition of high prison sentences.[14] Under these conditions, with many measures promoted from very different stances, all of which stress their conceptual superiority, it is not surprising that whoever has to decide on the adoption of one or another measure

[10] As the theory with the same name maintains. In this respect, see the description by its maximum exponent, Ronald Akers, in Akers and Sellers (2012, chapter 5).

[11] This is the core of Anomy theory, the criminological version of which was initially presented by Merton (1938), passim. Agnew (1997, p. 37) clearly explains how, while the strictly sociological version of Durkheim emphasised anomy in terms of the norms that define the ends, Merton's theory centered on those that regulate the means to achieve it.

[12] Despite the ostracism (if not outright hostility) to which biological theories of criminology has been subjected by the majority of criminologists, influenced by sociology, significant developments have occurred in recent times in the field. On this question, stressing that today there are no purely biological theories, but rather "bio-social" ones, which accept the inadequacy of attempts to explain the crime through variables that are exclusively biological, but insist on the existence of factors of such a type that influence the tendency (not predetermination) to offend, see Delisi (2013).

[13] Although its objective is not priomordially political-criminal, in some cases these programmes obtain the greater part of their social benefits precisely through the reduction of costs for the criminal justice system/victims. This is the case of what perhaps might be the most evaluated role of nursery education in the social sciences: the "Perry Pre-School" programme, developed in Michigan in 1962, which became the object of successive evaluations that have found in the long run that the benefits arising from crime reduction among the participants implies 88 % of the total (Dossetor 2011, p. 3).

[14] Additionally, they may be based on different theoretical proposals, at times incompatible with the discipline from which they spring. Think of psychology-based correctional treatment: despite the fact that nowadays the majority (and the most successful) programs are those based on cognitive-behavioural therapy (Cullen and Jonson 2011, p. 305 f.), treatments are still found which are based on psychoanalysis and behaviouralism; two movements the methodological assumptions of which are directly incompatible.

may suffer from vertigo when taking the decision. In the face of this situation, a cost-benefit analysis of the different interventions can be of essential assistance.[15]

In summary, the evaluation of costs and benefits is essential both to be able to decide on the resources to dedicate to crime policy as against other public policies, as well as to choose between the multiple preventive measures within the scope of crime policy. Another question (the devil is always in the details) is how such an evaluation should proceed. In the following section, the three standard instruments from the standpoint of economic analysis are described: cost analysis, cost-efficacy analysis (CEA) and cost-benefit analysis (CBA).

3.2 The Tools: Cost Analysis, Cost-Efficacy Analysis and Cost-Benefit Analysis

3.2.1 Cost Analysis

Almost all the literature on economic tools and their application to crime policy has been produced in the USA, England and some other countries that share their cultural background (Australia and Canada).[16] This literature usually states that cost analysis, given its simplicity, does not deserve special attention, then begin straight away with an explanation of what CEA and CBA involve (McIntosh and Li 2012, p. 34, n. 3). This is logical, since in these countries it appears unthinkable not to know the costs of a public policy supported by the State or another public body. However, in some States, among which Spain, the opacity with which certain costs are managed advises against any assumption that they are easy to estimate.

Developing art. 88 of the Constitution and its requirement that draft Bills of Law submitted to Parliament by the Government be "accompanied by an explanatory statement and the necessary background to deliver an opinion on them", Art. 22 of Law 50/1997 of 27 November, "On the Government", regulates the Government's legislative initiative. And, in what interests us here, it lays down that the draft bill of law "will be accompanied by a memo and the studies or reports on the need or the advisability of the law, a report on the gender implications of the measures that it establishes, as well as an economic report that contains the estimation of the cost that it involves." (Art. 22.2). The investigation of costs, therefore, in the Spanish legal system is not only a question of material adequacy, but an obligation imposed

[15] It can never be stressed enough that cost-benefit analysis does not allow a direct decision between programmes. On the contrary, economically evaluated costs and benefits are just an element in the evaluation (although an important one). On this point, see Welsh (2004), p. 9.

[16] In the meta-study by Welsh (2004, p. 10), 12 of the 14 studies under analysis had been conducted in the USA, the other 2 in England. The proportion is somewhat less overwhelming in Dossetor (2011): 6 studies from the USA, 2 from England, one Australian.

on the Government by the legal system. However, the praxis could hardly be any more disappointing.

One of the authors who has dedicated more effort to the Theory of legislation in Spain has stated that in the majority of cases the Economic Report "is usually a mere presentation of the consequences that are foreseen in the evolution of public income and in the budgetary adjustments that arise from it" (García-Escudero 2000, p. 188). In a similar way, another author has criticized that they are usually limited to evaluating the impact of the new regulation on the public treasury and not also on other sectors of the economy, criticizing the report as "excessively stereotyped" (Dorrego de Carlos 1998, pp. 347–348).

Without any doubt, these are instances of justified criticism when directed at the general legislative practice. In the case of crime policy, they would fall short of the mark: in criminal matters one can find economic reports with no figures whatsoever,[17] as well as others in which figures appear *Deus ex machina* to justify the affirmation that the draft bill will hardly have any costs.[18] In addition to this, in spite of the fact that Spain has more than doubled its prison population over 20 years (something which, it is reasonable to think, has something to do with criminal legislation), not one economic report on crime legislation even reflects the cost that would appear the most obvious to calculate: how much does a prison inmate cost per year? In fact, cost analysis in crime policy is in such a sorry state in Spain that even the mere presentation of the necessary budgetary adjustments (even stereotyped), would mean an important improvement.

An honest cost analysis would necessarily have to include the administrative costs of the implementation of the programme, such as salaries, programmed activities, subsidies, health costs, upkeep, control and monitoring, etc., as well as the capital costs of the programme in question (for example, how many prison cells

[17] As an example, the 23 July 2009 Economic Report that accompanied the preliminary Draft Bill that would become Organic Law (LO) 5/2010, of 22 June, the most ambitious reform of the current Penal Code, which affected over 100 provisions. After a ridiculous "analysis" that was less than two pages long and contained no figures at all, it gravely concluded that "In conclusion, it may be affirmed that the introduction of the draft bill will neither impose an increase in expenditure, nor a reduction in income, resulting, from an economic point of view, in neutral consequences for public resources" (p. 2).

[18] For instance, the 20 July 1994 Economic Report that accompanied the Draft Project on the Penal Code that would give rise to Organic Law 10/1995, of 23 November (the Penal Code in force in Spain), prepared by the Ministry of Justice and the Interior. It affirms that the total cost would ascend to nothing more than 2,959,000,000 pesetas (17.78 million Euros, 30 million when adjusted in accordance with the rise in the cost of life in Spain between July 1994 and July 2014). In view of this figure, the Report affirmed that "We are facing a very low cost given the importance of the law" (p. 11). And they would be right, if the figure were believable. However, no information at all is given to allow one to think so. On the contrary, numerous costs are drastically rounded down, and in some cases are not even computed with the argument that they are difficult to estimate (which would amount to saying that, faced with the impossibility of estimating how tall the reader of this article actually is, I will go on and estimate a height of zero centimetres).

or police cars will be needed), including their adjustment to present-day values[19] and the amortization calculations (which will not be the same in the case of a prison and a police car). In the case of costs that are not directly expressed in monetary value, these will have to be monetized; if a measure implies an increase in working hours for certain public employees, for example, then those hours are an effective cost, which will have to be translated into monetary units. Only when that information is available will it be possible to take the following step and attempt to conduct a cost-efficacy analysis.

3.2.2 Cost-Efficacy Analysis

CEA investigates and monetizes the costs of a given measure (in other words: a cost analysis is performed), so as to compare those costs with the results that are obtained (their efficacy). In a broad sense, therefore, CEA is an analysis of costs and benefits, although the latter expression, in capitals, (Cost-benefit analysis or CBA) is usually reserved for the analysis that monetizes both the costs and the benefits (which is not what CEA does, as it only monetizes the costs).

Turning once again to Sen (2000, p. 932), cost-benefit analysis is in a broad sense characterized by following a few general principles, to which additional requirements and specifications are added that make it more specific (and that do not have to be shared). There are three basic principles, which are anchored in the even more general notion that actions should not be carried out that imply more costs than benefits: (a) explicit valuation, (b) broadly consequential evaluation and (c) additive accounting. The first two principles make it necessary to evaluate all costs and benefits explicitly,[20] including those that are not directly sought out, and even those that are the consequence of non-desired effects (an idea to which we will return later on). The principle of additive accounting implies that the costs and the benefits have to be added for all those involved, without lending greater weight to some rather than to others (at least at the first stage: one of the great topics of discussion at present on the matter is precisely the way in which distributive considerations can lead to attach more weight to some benefits than to others).[21]

[19] Time adjustment essentially implies discounting future effects (both costs and benefits). In CBA, it is usual to use an annual discount rate of 3 %. On discount rates see Henrichson and Rinaldi (2014, p. 24).

[20] Whether one wishes or not, the decision to assign resources to one programme and not to another (or to assign only some resources to a programme, and no more), implies an implicit evaluation in fact of the costs and benefits relating to each programme. On this point, see Cohen (2000), p. 271.

[21] A presentation of the terms of the problem, in Sinden et al. (2009), pp. 59–60. For an informative review of the literature on this point, see Adler (2013), passim.

CEA is developed in three steps:

1. Calculation of costs
2. Determination of the effects of the programme
3. Comparison of costs and benefits

Given that "1", the calculation of costs, follows the procedure described supra, sec. II.A, we shall centre on steps 2 (Sect. 3.2.2.1) and 3 (Sect. 3.2.2.2).

3.2.2.1 Determination of the Effects

It is usual and accurate to underline that both CEA and CBA are essentially an extension of outcome evaluation, so that their quality depends crucially on the quality of such an evaluation (Welsh and Farrington 2001, p. 6 f.).[22] As is well known, in criminology, mainly due to the evidence-based crime prevention movement (Sherman et al. 2002), a strong increase has been brought about in the interest in distinguishing between outcome evaluations according to the rigour of the empirical method they use. To that effect, a rising scale was developed that describes five methodological levels.[23] It is sufficient to recall that for the purposes of CEA and CBA, it is recommended that the outcome should be determined by a study that scores at least 3 (controlled experimental design, with treatment group and comparable control group) out of a possible 5 (Dossetor 2011, p. 13).[24]

The above, however, refers to the way of determining the effects (*how*). A different question is that relative to *which* effects to investigate.

The first economic analyses of crime policy measures centred exclusively on their effects on the reduction of crime and investigated the costs of crime, on the understanding that, given the inverse relation between costs and benefits, the prevention of crime and its attendant costs implies a benefit: the benefit of a programme that prevents ten robberies is the cost (not produced and therefore saved) that those robberies would have had.[25] In this first period, it was likewise common to concentrate on the tangible costs of the crime (for example, costs

[22] Due to this dependence of CBA on the quality of other evaluations, Henrichson and Rinaldi (2014), p. 13 affirmed that it is a "second generation" analytical tool (although perhaps it would be better to call it a "second tier" tool).

[23] This scale, officially called "Maryland Scientific Methods Scale" and informally known as the "Sherman Scale", can, for example, be found in McDougall et al. (2008), p. 14.

[24] This type of study is unusual in countries with a weak criminological tradition and in general a weak tradition in the evaluation of public policies, such as Spain, which makes CEA and CBA especially difficult. This sad reality is yet another reason to demand improvements.

[25] On occasions, therefore, in the analysis of the benefits of an intervention, reference is made to the costs of crime. It is worth recalling that, in terms of CEA and CBA, the reference to costs is to the costs of the intervention. The costs that are involved in the crime are calculated under the budget heading for benefits: if the programme prevents crime, as benefits, if the programme does not prevent them or even increases them, as costs to subtract from other possible benefits.

incurred by the State, the police, the judiciary and the prison service and those incurred by the victims, the value of the stolen item and the cost of medical attention, in so far as it is not covered by the State). At present, however, the perspective that includes not only tangible costs but also other intangible ones, such as psychological damage suffered by the victim, is increasingly widespread. As has been argued, only this latter perspective makes sense, as in the case of limiting the assessment to tangible costs, there is a risk of having to affirm that a robbery has on occasions more costs than a rape (McIntosh and Li 2012, p. 15). The fact that up until very recently in crime policy the majority of outcome evaluations (including CEA and CBA) have not included these types of effects, means that they have undervalued in a very relevant way the benefits of the intervention (McDougall et al. 2003, p. 171 f.; Cohen 2000, p. 281 ff.).

In an even more recent move, there have been proposals to broaden the perspective of the analysis to include the results of the programme that imply benefits other than crime prevention, such as for example improvements in health and in employment prospects, which translate into lower welfare payments. As will be seen *infra*, sec. III, when this type of benefit has been estimated, it has turned out to be higher than expected.

A subsequent question relates to the individuals involved: the effects *for whom*. Once again, economic analysis started on a low note, investigating only the (tangible) costs for the State, leaving to one side for example the costs incurred by the victim, such as the costs of replacing lost goods or, if applicable, those of medical treatment. This perspective was overcome and the analyses began to include the costs to the victims (tangible, first, and also intangible, afterwards).

Additionally, over recent years, the circle of beneficiaries has been widened to include the effects that the programmes can have, not only for the State and the victim, but also for the criminals themselves and their entourage (Henrichson and Rinaldi 2014, pp. 7, 10–11; Dossetor 2011, p. 8). From a normative point of view, it makes all the sense in the world to include these costs and benefits in the analysis, given that they are the direct consequence of crime prevention policies and criminals and their families of course continue to be members of the public, and thus it would make little sense if the analysis were not to include them. From the point of view of the cost-benefit analysis method, such a decision is in agreement with its demand for a broadly consequential evaluation[26]: if these benefits are not included, relevant policy impacts are left aside.[27]

Thus, today, the state of the art of these analyses recommends investigation of all benefits; (a) those that are not directly sought; as well as (b) those that are not even indirectly sought, including those rejected for axiological reasons.

[26] The non-inclusion of benefits for victims and their entourage in the CBA up until recently is commented on with surprise and criticized in Tonry (2004, p. 171 f., 189 ff.).

[27] For instance, Nagin (2001), p. 257 f. and Brown (2004), p. 345 ff., who refer to the effects on work, the possibility of finding a stable partner, on families and communities.

(a) An example of benefits that are not sought directly would be the impact of a crime prevention program on variables that can have an impact on reoffending but are distinct from it (e.g. job skills), or even on non-related variables (e.g. improvements in the life of the family of the person that participates in the program).[28]
(b) An example of benefits that arise from undesired effects would be accounting for the incapacitating effect of custodial sentences. The great majority of (at least European) criminal lawyers oppose incapacitation as a purpose in itself in criminal Law, to the point at which it is difficult to even find clear pronouncements on this: it simply forms no part of the normal discourse on the purposes of punishment. However, a prison sentence involves, almost always necessarily, an incapacitating effect[29] (also when the punishment is strictly proportional to the culpability). In so far as the incapacitating effect implies a reduction in the number of crimes, it is a social benefit that should be included in a CBA.[30]

3.2.2.2 The Relation Between Cost and Effects

Given that in CEA benefits are not monetized, its principal utility is in the comparison between programmes with similar effects (Henrichson and Rinaldi 2014, p. 7; McIntosh and Li 2012, p. 8). In this way, and in so far as we are centring on their effects on crime prevention, we may, for example, compare the CEA of a detoxification programme for drug addicts with the CEA of a measure to intensify police patrols. Let us suppose that an amount of one million Euros has been invested in the first programme and the same amount in the second one. If the first programme is successful at reducing crime rates (through a reduction in recidivism) by 5 %, while the second achieves a reduction of 3 % (through increased deterrence due to the greater probability of detection), we may therefore say that the detoxification programme presents a better CEA: it achieves more effects for the same cost.

[28] While the increase in the possibilities of finding work is related to the avoidance of recidivism, since the availability of income from legal work makes the option of illegal work less tempting, improvement of family life and avoidance of recidivism would be both the product of the improvement in personal resources (the "human capital") that the program is able to provide.

[29] From which crimes committed inside prison would have to be discounted, which could be decisive. On the problems that geographic displacement (crimes committed outside prison that are committed inside prison) implies for incapacitation as a justifying theory of punishment, see Weisberg (2012), p. 1244 f.

[30] For other problems of incapacitation (other than those referred to in the preceding footnote), both empirical and normative, see Kleiman (2009), pp. 89–92. Given all these problems, in no way is incapacitation proposed as the end-purpose of punishment: it is only pointed out that imprisonment, even that imposed within the margins of what is deserved, has this effect. This is not to say that disproportionate punishments should be sought, and much less so that they should (or constitutionally could) be imposed.

Of course, prevention measures will not usually cost the same, as occurred in our stylized example. For this reason, when we have to compare programmes with different costs, we will need to calculate the magnitudes of both CEA, for which we have to relate the cost of the programme with "production units" or "units of effect", that is, with the results that are achieved.

In many circumstances relating to crime policy it may be useful to consider a 1 % crime reduction as the unit of production/effect. Returning to the proposed example: given that the detoxification programme achieves a reduction in crime by 5 % (five production units) at a cost of one million, each production unit costs 200,000 Euros. There again, the increase in police activity achieved a reduction of 3 % (three production units) at the same cost of one million, in such a way that each unit of effect would cost 333,333.3 Euros (Table 3.1). Calculation of the production unit cost now allows us to compare programmes even when these have different budgets: we merely need to compare the cost to each programme of each unit of effect.

Table 3.1 Cost-efficacy analysis of two prevention measures with the same cost

Measure	Cost	Efficacy	Cost-efficacy
Detoxification	1,000,000 €	5 %	200,000 €
Patrols	1,000,000 €	3 %	333,333.3 €

Given that, as has been said, prevention measures do not normally have the same costs, we shall modify only one point in the example: the patrol programme will cost 800,000 Euros, instead of one million. The cost of each production unit of such a measure would therefore be 266,666.6 Euros. As shown in Table 3.2, cost-efficacy calculation in terms of the cost of each unit of effect allows an easy comparison between these programmes.

Table 3.2 Cost-efficacy analysis of two crime prevention measures with different costs

Measure	Cost	Efficacy	Cost-efficacy
Detoxification	1,000,000 €	5 %	200,000 €
Patrol	800,000 €	3 %	266,666.6 €

As mentioned earlier, it is usually affirmed that the big limitation of CEA is that it does not allow the comparison of programmes with different effects. In reality, it leaves some room for comparison, but it is quite limited. Suppose that the investment of the same one million Euros in vaccinations prevents 5,000 cases of influenza. If we wish to compare the CEA of this measure with the CEA of the detoxification programme from the earlier example, we find that the same one million Euros can provide us with, either the avoidance of 5,000 cases of influenza, or a 5 % reduction in crime rates. Certainly, whoever has to decide between both possibilities is offered some information, since the final decision will not have to be between health in the abstract and crime prevention, also in the abstract: the decision-maker will now know which outcomes both in terms of health and in terms of crime prevention are at play. However, and even though we can carry out

comparisons such as those seen above, given that the effects are presented without having been monetized, CEA cannot establish whether the benefits are greater than the costs of the resources deployed.[31] We need a CBA to respond to such a question.

3.2.3 Cost-Benefit Analysis

Following the progressive scope and complexity around the cost analysis of CEA, CBA is supported by CEA and takes a step further: not only are the costs monetized and the benefits (results) estimated, but the benefits are in addition monetized.

It is usually understood that a CBA will include the following steps[32]:

1. Definition of the scope of the analysis
2. Identification and monetization of the resources employed
3. Identification of the effects of the programme
4. Comparison of the resources used and the effects that are achieved
5. Monetization of the social benefits
6. Comparison of the social benefits with resource expenditure
7. Description of the distribution of costs and benefits
8. Sensitivity analysis of the results

3.2.3.1 1, 2, 3 and 4: Cost-Efficacy Analysis

Steps one to four (identification and monetization of the programme costs, identification of the effects of the programme and comparison of the resources used and the effects achieved), are what a CEA is all about (see *supra*, sec. II.B). Two clarifications are needed:

– In step "1", specification of the object of analysis usually discusses the questions relating to the type of costs/benefits to include (the "which") and the individuals whose costs and benefits are included (the "who"). Both questions have been studied *supra* as part of the determination of the benefits.
– Although with the objective of showing continuity between CEA and CBA it is standard practice to include step 4 in the description, in reality this step, in which the cost of each unit of effect is calculated, is not needed for CBA, provided that the following step (5) consists precisely in the monetization of such effects, the comparison of which is completed in step 6.

[31] Returning to the example; we know that the programme of detoxification achieves a better CEA than the increase in police resources, but we do not know whether the effect that is achieved (a 5 % reduction in crime rates) has a value above or below the cost (one million Euros).

[32] Similar descriptions in McIntosh and Li (2012), p. 6; Dossetor (2011), p. 6 and Welsh and Farrington (2001), p. 5.

3.2.3.2 Monetization of Social Benefits

Monetization of the social benefits is at the same time the most defining and the most controversial feature of CBA, which on occasions is accused of seeking to give everything a price tag, even to things which cannot be economically evaluated.[33] Before agreeing to a proposition such as the latter, which without a doubt appears reasonable, it must be taken into account that attaching an economic value to all types of damage is exactly what many legal systems demand when they establish the obligation to set *ex delicto* civil compensation that wholly compensates the victim. It happens in CBA as well as in setting an obligation to compensate *ex delicto*, that the failure to attach a value to something,[34] even an estimated one, implies in practical terms assigning it a value equal to zero; which is without doubt the worst alternative.

On occasions, a misunderstanding underlies the discussion which brings to memory a related misunderstanding occurred on the first years of the economic analysis of criminal Law. The misunderstanding came about because of the idea that punishments are negative incentives that place a "price" on the conduct that they cover. Proponents of economic analysis of Law had to explain that this does not amount to say that, *ex ante facto,* everybody who is prepared to pay the price can carry out the conduct.[35] On the contrary, in the case of criminal Law, the behaviour in question will continue to be prohibited *ex ante facto*, which is crucial to be able to allow the intervention of the police or third parties (the would-be criminal cannot demand that they consent to the perpetration of the crime while assuring them that he is subsequently prepared to pay the "price").

There are cases in which, although facing conduct that may presumably cause harm, the State allows it to go ahead, imposing a duty to pay compensation (think of road traffic). These are situations governed by what in economic Analysis and in the classic article by Calabresi and Melamed (1972) are called "liability rules", characterized by the binomial freedom of action (*ex ante*) + obligation to pay compensation for eventual damage caused (*ex post*). On the contrary, in the case of criminal Law, the State does not permit the behaviour and waits to see whether it causes damage, but it prohibits *ex ante* the action and adds that, in the case that it occurs,

[33] The best criticism on this point is contained in the book by Ackermann and Heinzerling (2004), the title of which already says everything: "Priceless. On Knowing the Price of Everything and the Value of Nothing". Ackerman and Heinzerling's work is too heavily mediatized by the undoubtedly ideological use made of CBA in environmental matters, which has been used to oppose numerous regulations in that matter (also in the field of health and safety) by entrepreneurs who would have been damaged by the approval of a regulation. In this respect, see Farber (2009), p. 1366 ff. As we shall see infra, CBA has been used in crime policy to support policies that are considered progressive.

[34] In what follows, and even knowing the opinion of Spanish poet Manuel Machado on the point ("Every fool mistakes value with price"), for explanatory efficiently I will also use "value" when the valuation is monetary, that is, when it consists in setting a price.

[35] On this point, see Cooter (1984), passim, among others.

the State will impose a penalty. Returning to the example of road traffic, if driving is generally permitted (having passed a driving test), it is then prohibited as soon as the requirements laid down by the State are no longer fulfilled (acceptable condition of both car and driver, speed, attention, etc.). In summary, that punishments may be conceived as negative incentives and "*ex post*" costs does not mean that the conducts subject to punishment are facultative for the eventual offender; it is the State and not the offender who decides on the deontic status of the behaviour.

In the same way, the fact that in the process of calculating the benefits of public policies a price to a good is assigned (even to life) does not mean that any person that wishes to and could pay such a price could do as they liked with the good in question. On the contrary, what can be done with that good and its regime of protection is a decision that corresponds to the State. Assigning numerical values even to the most important goods is merely to acknowledge what is an open secret: not even in the case of the most important goods are we willing to use any resources to protect them. And, even if we were, it would not be possible to do so for the simple reason that, despite common language usage, no good is unitary (rather than a "life", there are "lives", one for each person born and as yet not deceased)[36] and neither is it unique (as well as life there are numerous other interests the protection of which is important to us: the catalogue of crimes included in any criminal Code illustrates the latter). In a world of limited resources, to protect a good implies leaving another/others unprotected.

With regard to the specific ways in which monetization takes place, there are two main (and rival) approaches.[37]

According to the first, the "bottom-up approach", which is the predominant view today, a three-stage approach is followed:

In the first place, the average monetary value of the cost of each offence is calculated, which can be done in various ways[38]: in the case of the costs of the criminal justice system, the most obvious procedure is to examine the budgets, making the necessary adjustments when these are not sufficiently detailed (for example because the quantity assigned to the criminal courts is not specified, with regard to the other courts, or in the case of police work, because it is not only concerned with crime prevention and prosecution)[39]; in the case of costs for

[36] For a development of the idea and its importance for the vexata quaestio of life-to-life conflict in the necessity defense, see Ortiz de Urbina (2011).

[37] On what follows, see Henrichson and Rinaldi (2014), p. 17 ff.; McIntosh and Li (2012), p. 12 f.

[38] An excellent panorama on the question, in Cohen (2000), p. 281 ff.

[39] On this point, see the instructive analysis of the Dutch experience in Moolenaar (2009).

victims, in Spain and the countries in which criminal courts also decide on civil liability *ex delicto*, these costs may be calculated by referral to the compensation awarded in judicial decisions; in other countries, looking at the compensation given by the juries (Cohen 1988)[40]; and, in any event, by carrying out an investigation, whether *ad hoc* or based on victimization surveys.[41]

Afterwards, and for each crime, the value found in the first step is multiplied by the incidence of each type of crime (for which the dark figure has to be taken into account, which may be estimated on the basis of victimization surveys, in those countries where they are carried out).

Finally, the figures for all the crimes are added up.

In the second "top-down" approach, a representative sample of citizens is asked how much they would be willing to pay for certain prevention measures[42] or to achieve a certain result (e.g. a reduction of 10 % in the probability of being a victim of crime or of a certain crime) (Cohen et al. 2004).[43] This strategy, called "contingent evaluation", is used in other fields in which CBA is applied, even when (not surprisingly) there is an important controversy over its methodological soundness.[44]

In a general way, the "bottom-up" approach produces more modest results than those obtained through the "top-down" approach.[45] The differences are principally attributed to the fact that the "top-down" approach obtains information on certain costs (fear of crime, behaviour to avoid crime—purchase of alarms and locks, but also avoidance of situations considered dangerous, such as walking through a park

[40] As Cohen himself recognizes (2000, p. 285 f.), this approach has the problem that an injury that occurs in a traffic accident and one that is a consequence of an aggression are given equal "value". For this reason, in Miller et al. (1996) the investigation was limited to jury compensation for damage caused by crime.

[41] Miller et al. (1996) gave an important push to this line of research by combining the information on the survey of victimization in the USA (National Crime Victimization Survey) with data on hospital costs and payments because of time off work. In doing so, they found that costs were much higher than had been calculated: 4 times more in the case of robbery, over 10 times more for physical assault and 20 times more in the case of rape (Miller et al. 1996, p. 24, Table 9). Subsequently, the most complete investigation was that of Dubourg et al. (2005), who combined the information from the British Crime Survey with specific studies and budgetary information to calculate the price of crimes against people and households in England.

[42] Nagin et al. (2006), a study comparing the willingness to pay for rehabilitation programmes as against imprisonment in the case of juvenile delinquents (response: more or less the same... at least in USA). On pp. 316–317, the authors offer an honest discussion on the limitations of the approach.

[43] An early example, based on willingness to pay more for houses in neighbourhoods with less crime, in Thaler (1978). As Cohen (2000, p. 284 f.) recalls, all estimates of "willingness to pay" have the problem that it is strongly influenced by the capacity to pay.

[44] For a defense of its use in crime policy, see Cohen and Bowles (2010). For a caustic and accessible general criticism, see Hausman (2012).

[45] So, for example, in an as yet unpublished study, Mark Cohen calculated the cost of rape from both approaches and found a figure of $113,000 dollars following the "bottom-up" approach and 237,000 in accordance with the "top-down" approach. See Henrichson and Rinaldi (2014) p. 20.

alone) which pass by unseen, however, in the majority of "bottom-up" approaches.[46]

3.2.3.3 Comparison of Social Benefits with Resource Expenditure

Having obtained the monetized value of social benefits, it is compared with the cost of the invested resources (previously monetized in step 2), obtaining a cost-benefit ratio (which can also be presented as a benefit-cost ratio). This analysis indicates how much social benefit has been achieved for each monetary unit invested. If, for example, each Euro invested in a detoxification programme produces 1.34 Euros of benefit, the ratio will be described as 1.34/1.

3.2.3.4 Description of the Cost-Benefit Distribution

As made clear, the costs and the benefits of the prevention measures can be assessed from very different perspectives (State/contributor, crime victims, criminals). On occasions, above all from the point of view of the public sector and for tax purposes, it may be useful to know who benefits from the policy and to what extent, not only to decide whether the programme should continue (a decision in which other criteria should also be taken into account), but also to decide under which budgetary heading to assign the costs. So, for example, if 80 % of the benefits of a programme come from the reduction of costs for the criminal justice system, it makes sense that the cost of the programme should be principally supported (or even in that proportion) by the budgetary entry that is dedicated to it.

This last point might appear a detail, but it does have great practical importance, given that in reality there are numerous public policies that achieve benefits in various fields (for example, for the system of criminal justice in the form of a reduction in reoffending and for the health system, in the form of a reduction in health care costs) (Henrichson and Rinaldi 2014, p. 16). When this situation arises, we can find ourselves up against the problem that, although the measure or the programme in question achieves social benefits that are in excess of their social costs, the benefits in each particular sector may not be above the costs in that sector; in those situations, the institutions that are involved have no incentives to adopt the programme themselves, given that no single one of them will be able to make all the benefits "their own" (Kleiman 2009, *passim*, especially, p. 169 ff.). It is for example possible that a recidivism prevention programme that costs a million Euros achieves a saving of 800,000 Euros in costs to the criminal justice system and another 400,000 Euros of savings in expenditure on assistance/social services.

[46] But not in all of them. For two "bottom up" investigations based on the QALY (Quality Adjusted Life Years) method, see Dolan et al. (2005) and Dolan and Peasgood (2007). The latter study attempts to measure the costs of fear of crime.

Although the social benefits will broadly be in excess of the costs (the cost-benefit ratio is 1.2/1), from the exclusive point of view of the criminal justice system, the benefits are less than the costs (0.8/1), as also happens from the exclusive point of view of the social services (0.4/1). This is precisely one of the greatest advantages of the CBA and its emphasis on comprehensive evaluation: showing the social costs and social benefits regardless of the formal assignment of competence over them to a body or institution of one sort or another.

3.2.3.5 Sensitivity Analysis of the Results

Despite the innate rhetorical forcefulness of numbers in which the relation between the costs and the benefits of a particular measure are expressed, CBA contributes no certainty, but an estimation. For this reason, faced with the preparation of public policies, it is important to have some idea about the probability that the shown cost-benefit ratio really obtains.

It has already been seen that the CBA is constructed as a second-level evaluation on the basis of data obtained in the outcome evaluation. The sensitivity analysis basically consists of investigating how much the results of the CBA would change in the case of modifying one (or some) of its supporting data. So, for example, if the evaluation that serves as the basis for the CBA predicts that the programme in question will achieve a 5 % reduction in crime rates and, on the basis of this figure, it assigns a cost-benefit ratio of 1.4/1 (1.4 Euros saved for each Euro invested), it would be interesting to test what would happen if the reduction were not 5 % but 4 % or 3 %. Would the programme continue to have benefits that outweigh its costs? Up to what point would a modification of the effects (or of the costs) change the sign of the cost-benefit ratio, so that the costs would surpass the benefits?[47]

3.3 The Approach in Action: Rescuing Rehabilitation

The reader will already have noticed that the greater part of the examples that have been put forward up until now were to do with rehabilitation measures. Such a choice has two motives: in the first place, a majority of CBA studies in the crime policy arena have studied these types of measures, while fewer have concerned themselves with the effects of imprisonment (without rehabilitation measures),[48]

[47] From this point, the question becomes purely technical. For an accessible explanation, see Henrichson and Rinaldi (2014), p. 26 f. For a more complex analysis, see Washington State Institute for Public Policy 2014, p. 167 ff.

[48] On the costs and benefits of incapacitation through prison, see Spelman (2000). The main problem of this type of research is to separate satisfactorily the effects associated with incapacitation from those with their origin in deterrence. In an analysis that included both factors, Donohue (2005), p. 48 concluded that, considering only the costs and benefits of prison (without comparing it with other measures), the prison population of the USA should be reduced by 300,000 prisoners (at the time of the study, 15 % of the total).

quantitative and qualitative modifications in police activity (Aos and Drake 2013, especially Table 1, p. 5, 7) or measures of situational prevention (Welsh and Farrington 2001, pp. 98–107; Sansfaçon 2004, p. 4 f.); in the second place, from the point of view of public policies of crime prevention, the results obtained can reverse the pessimistic consensus over the allegedly numerous limitations of the rehabilitative ideal.

The history of rehabilitation over the last 200 years is well known: after a century and a half in which virtually nobody contested its inclusion among the purposes of the punishment (in solitary or, more usually, together with deterrence and/or retribution), from about the mid-seventies, a veritable storm was whipped up against it[49]:

From the axiological point of view, conservatives, liberals, and critical criminologists attacked it as illegitimate. However, given that each sector saw the injustice in a particular aspect of the rehabilitation ideal, the candidates to substitute it were very different (anything but penal Law, for the critical criminologists, and penal Law based on just punishment, but with different degrees of harshness, in the case of both critical liberals and conservatives).

From the empirical point of view, the usual account[50] recalls how the idea that rehabilitation simply "did not work" spread in the mid-seventies. And, it is not seldom added, nobody was so influential in this development as Robert Martinson.

In 1974, under the title "What Works in Prison Reform?", Martinson published an article in *The Public Interest*, a non-specialized publication of conservative ideology. The conclusion of this article, based on an analysis by Martinson and other authors of 231 evaluations of rehabilitation programmes completed between 1945 and 1967, was condensed in its final phrase: "With a few isolated exceptions, the rehabilitative efforts reported so far have had no appreciable effect on reoffending" (Martinson 1974, p. 25).[51]

This conclusion achieved such a rapid success, and of such dimension that, together with Garland, it has to be thought that it was only due secondarily to the influence of the study that has been cited and others like it and, principally, because they fell on fertile ground.[52] In fact, studies were not long in appearing that criticized the conclusions that Martinson had reached or, at the very least, strongly

[49] A good presentation and analysis can be found in Garland (2001, p. 55 ff.).

[50] So widely disseminated that Garland (2001), p. 63 had no doubts over calling it a "standard version".

[51] For an analysis of the errors and limitations of the study co-authored by Martinson on which he based his article, see Cullen and Jonson (2011), p. 296 ff.

[52] The reasons for doubting the "standard version" (as well as other accounts of changes in practice that lead back to the supposed influence of academics) are categorically summed up by Garland: "Can critical evaluations really be so effective when they appear to have such a small effect in other areas?" (Garland 2001, p. 63).

qualified them.[53] And at no time did a sector of academic criminology doctrine stop stressing the existence of rehabilitation programmes that achieved important results.[54]

Forty years later many academics suffer from "Martinson's syndrome" and have an excessively pessimistic view of the possibilities of rehabilitation. There is certainly a large body of empirical literature today that describes a good number of rehabilitation programmes that do work.[55] The additional point that economic analysis contributes to this already hopeful conclusion, is that, as well as achieving results, these programmes do so with a good relation between costs and benefits, which is a powerful argument to request their implementation (or to ask for an explanation of why they are not carried out).

One of the most complete works on the matter is the meta-study carried out by Welsh,[56] who managed to identify 14 studies on rehabilitation that, either performed their own CBA (13), or presented their results in such a way that Welsh was able to perform the CBA (1) (Welsh 2004, p. 10).[57]

A total of 13 of these 14 studies delivered a positive cost-benefit ratio,[58] in other words: the (monetized) benefits they obtained were superior to the costs of the programme, the ratios ranging between a spectacular 270/1 and a much more modest 1.13/1.

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[53] Ironically, Martinson himself may be numbered among them. Only 5 years afterwards he reconsidered his approach and acknowledged the existence of successful programmes together with failing ones: "Contrary to common belief, the rate of reoffending (reprocessing rate) in this country [the USA] is not high, it is quite low. And, contrary to my previous position, some treatment programs do have an appreciable effect on reoffending. Some programs are indeed beneficial; of equal or greater significance, some programs are harmful." (Martinson 1979, p. 244). In view of this, he quite reasonably concluded: "Those treatments that are helpful must be carefully discerned and increased; those that are harmful or impotent eliminated." (p. 258). As Garland (2001, p. 64) recalls, this retraction had an incomparably weaker echo than the initial diatribe.

[54] Of special influence during the thirty years of wandering in the desert, see the work of "The Canadians", led by Andrews and Bonta. See Cullen and Jonson (2011), p. 295, 318 ff.

[55] For an excellent review, see Cullen and Jonson (2011, passim). For over a decade now the earlier conclusion may be considered proven. See MacKenzie (2002, p. 348 ff.) and Lipsey et al. (2003, p. 224), concluding that: "In a nutshell, 'rehabilitation works', and the best rehabilitation programmes function quite well".

[56] Welsh (2004), who employed and updated the data from Welsh and Farrington 2001. For two more recent meta-studies, see McDougall et al. (2008), passim and Dossetor (2011), p. 15 ff.

[57] The small amount of these numbers is in itself significant, in two senses: in the first place, it shows how unusual CBA is in this field; in the second place, and perhaps more importantly, it shows the limitations of the usual outcome analysis, that provide insufficient information to proceed to their monetization. In their own study, McDougall et al. (2008), p. 4, 14 f. found themselves in a very similar situation.

[58] The one that did not was one of the two programmes evaluated by Farrington et al. (2002). These were programs for the prevention of reoffending among juvenile delinquents, one of which exclusively incorporated military elements (negative cost-benefit relation), whereas the other also included them but added elements of rehabilitative treatment (a high positive cost-benefit relation of 5/1; however, the modification of some circumstances lowered the figure to 1.02/1; on this evaluation, see Dossetor 2011, pp. 32–35).

The earlier result is more relevant when the following is considered:

- Of the 14 studies, 4 only evaluated the results for the criminal justice system (excluding even the effects on the victims)
- Among the 10 studies that did take into account the costs for the victims, the majority were centred on tangible costs, discarding or introducing important restrictions on the intangible costs under consideration.
- Of the 14 studies, only half (7) quantified results other than the reduction of reoffending, such as the effects on such variables as education, the possibilities of employment, health, the use of social services and reductions in the use of illegal drugs.
- In 5 of the 7 "broader" studies, the benefits, obtained due to the improvements in these other variables, surpassed those achieved through the reduction of reoffending rates, which once again points to the relevance of considering this type of results.[59]

As may be seen from the studies under analysis, the benefits of the programmes were rounded down (in some studies by quite a lot), while the costs were computed in their totality.[60] This means that the positive results, in reality, imply an important underestimation of the true benefits and therefore that the ratio between benefits and costs would still be more pronounced in the case of including both the intangible benefits as well as those that affect the participants in these programmes and their social environment.

It is highly likely that the studies under analysis are not representative of the general situation and, in particular, that they are "positively" biased towards measures that obtain results. In other words, the studies in question may refer to programmes or measures that are better than the average program and achieve results that are equally above average. That is so because the fact that a study from the outset foresees the completion of an outcome analysis and even a CBA of a certain quality, indicates a high degree of methodological sophistication (as well as confidence that the results will be positive). However, even if it is true that these studies refer to measures or programmes that are not representative, this would not really imply an objection, provided that the following question is asked (and it appears that it should be asked): how is it possible that a majority of programmes do not envisage an evaluation of their results, and, why is it that we do not dedicate ourselves to setting up more programmes that are similar to those existing programmes that have demonstrated their effectiveness and a stable cost-benefit relation?

[59] On this point, Welsh (2004, p. 12), who however warns that the low number of studies will not allow conclusive affirmations.

[60] This is very common in CBA studies on this topic Welsh et al. (2001), p. 271.

3.4 Closing Remarks: Economic Analysis and Legislative Policy

As was clearly stated, the interplay between article 88 of the Constitution and its partial development in article 22.2 of the Law 50/1997 of 27 November, "On the Government", allows us to affirm that, in Spain, the evaluation of the (foreseeable) costs and benefits of laws constitutes not only a desirable good practice, but also a legal obligation. In practice, however, this obligation is often not met. Of the three economic tools for the evaluation of consequences that have been presented here (cost analysis, CEA and CBA), only the first one, or better said a sad imitation, has been attempted. The legislator, especially when concerned with political-criminal matters, feels no onus to undertake cost-benefit analyses.

It appears to be thought that crime policy is principally a question of values. And these are, without doubt, decisive. However, it was some years ago now that it was correctly observed that the jurist who acts without sufficient information on the factual situation is similar to the surgeon who operates without a diagnosis (Noll 1973, p. 66). Economic analysis is not intended to substitute or to diminish the role of axiology in the crime policy discourse, but to show the true consequences of the passing of norms and their application, as well as the lost opportunities for not having approved and applied other alternatives. A secondary contribution in comparison with other types of considerations, which is, nevertheless, essential to achieve a rational crime policy.

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Part II
Comparative Experiences

Chapter 4
Legislative Evaluation in Spain: Its Necessary Application in the Approval of Criminal Law Reforms

Samuel Rodríguez Ferrández

Contents

4.1 Introduction

The evaluation of norms (or legislative policy) and of their ("*ex ante*" or "*ex post*") consequences is progressively turning into an increasingly well-known and acknowledged field of investigative research within legal scholarship and, over recent times, in juridical-penal scholarship.[1]

[1] Simply to note the launch of the "Working Group on Criminal Policy and Legislation" (at the initiative of Professors Díez Ripollés and Becerra Muñoz and the unconditional subsequent support in organizational tasks from Professors Nieto Martín and Muñoz de Morales Romero),

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We are examining a matter that forms part of the discipline of "Legislative Science", which has the task of *"studying the process or activity pursued by the drafting of legal norms"*, with the objective of *"improving the quality of laws"* (Menéndez Menéndez 2004, p. 20 f.), facilitating "the guidelines to draft 'well designed'" laws (Montoro Chiner 2001, p. 122), which form part of 'rational' "legislation" (Galiana Saura 2008, p. 17).

In fact, without going into additional considerations on the content of these matters, what is clear is that, on the basis of that definition, the evaluation of legislation is related to the objective of achieving rational legislation; legislative rationality, to which Professor Atienza Rodríguez (1997) first referred, as well as Professor Díez Ripollés (2003) later on, adapting it to the criminal context.

Having clarified this starting point, we will set forth an examination in the following pages of the parameters related to the process of drafting legal norms in Spain and the tools that are available to do so. In particular, we shall approach, step by step, the criminal legislative process. In consequence, we shall attempt to detect failings in the processes of drafting criminal legislation and its reform in Spain (on the basis of the examples of the great (pen)ultimate punitive reform of 2010 and the reform that has been underway since 2013, and finally approved in 2015). Fundamentally, and I will say it now, due to a poorly rooted culture of evaluation in general terms and, in particular, due to a weak political will to apply scant (incipient) evaluative instruments that are now available to our legal Order.

4.2 Presentation and Analysis of Legislative Evaluation in Spain

4.2.1 The Pre-legislative Phase: The Predominance of the Legislative Initiative Sponsored by the Government in Spain

An in-depth examination of legislative process in Spain,[2] for Soto Navarro, allows us to reach an important conclusion (more than well-known in the juridical-public doctrine) on the topic that concerns us here: "the Executive exercises firm control over Parliamentary legislative activity". In fact, it happens that in our legislative

within which the present collective work has been prepared. The Group held its foundational session on 21 June 2013, at the headquarters of the Instituto Andaluz Interuniversitario de Criminología [Andalusian Inter-University Institute of Criminology] at the University of Malaga, and has continued as a "working group" with a presentation (under the title of "Criminal Law Making Policy") at the "European Society of Criminology" during the recent Conference at Budapest (4–7 September 2013), and with the organisation of two multidisciplinary Seminars on Legislative Evaluation in Ciudad Real on 17 December 2013 and 30 June 2014.

[2] The same happens in Germany, as may be understood from the empirical research conducted by Floerecke 1992, pp. 48–51, as well as p. 53 ff.

system, bills of law (at the initiative of the government) "represent the largest percentage of legislative initiatives and have a far greater likelihood of becoming law than legislative proposals", while, on the contrary, "the power of amendments and the work of the committees represent a weak counterbalance, if above all the Government holds an absolute majority in Parliament" (Soto Navarro 2003, p. 130).

4.2.1.1 The "Should Be" of the Pre-legislative Phase: The Expression of Consensus on the Social Interests That Are Affected

So, in the opinion of the above legal scholar, "the different social interests that it [the Bill] affects" should be prepared in the initial phase of the Bill "as, once this is put before Congress, the possibilities of negotiation with parliamentary groups that are representative of different options are very limited", because the passage of a legislative proposal through Parliament has been converted into a mere procedure that is simply conducted to invest the legislative decisions of Governance with formal legitimacy (Soto Navarro 2003, p. 130). On the basis of these arguments, therefore, it is said, and quite rightly too, that the objective of this phase should be "the construction of consensus over what is expected from the juridical norm" (Rodríguez 2000, p. 198).

That phase, the so-called "pre-legislative" phase (also referred to as the "internal legislative procedure" or the "internal procedure for the drafting of legislation"[3]), should begin as soon as "a weak relation between a social or economic reality and its corresponding legal response" manifests itself as a social problem, ending in the "presentation of a Bill or a legislative proposal to the *Spanish Legislative Chambers*" (Díez Ripollés 2003, p. 18 f.).

In the first part of that process, the "contextualization of the social problem" would begin with a "dysfunctional social situation" (Díez Ripollés 2003, p. 21),[4] which would be considered a "social problem" through the "communicative

[3] Looking briefly at the theoretical perspective, it has been affirmed that "the iter of internal legislative processes does not follow a lineal process, as its phases take effect and are produced in accordance with political momentum itself; hence neither is the doctrine in agreement when setting the phases of such a process in terms of more or less fixed classifications" (Montoro Chiner 1989, p. 90). Thus, for example, for Kindermann (1976, p. 299), inspired in the model of Noll (1973, p. 72 ff.), this process would be composed of the following phases: impulse; definition of the problem; plan of the objectives to achieve; plan of the various regulatory alternatives; reduction of alternatives; and "ex-post" monitoring.

As may be seen, an operation pertaining to what we might call the "post-legislative phase" is included here, such as "ex-post" monitoring of the new regulation; but it is not the only model that it contemplates, as Hassemer et al. (1978, p. 13) include in their proposal for the criminal field, in addition to the earlier ones, the planning phases of execution, verification and control of the success of the regulation.

[4] Díez Ripollés points out that it should be an acknowledged social failing, which implies the rejection of apparent dysfunctional social situations, that is, situations that are not empirically-socially proven.

process of exchange of opinions and impressions", in which the "essential instruments" are the mass communications media (Díez Ripollés 2003, p. 27).

All of that would lead to the launch of a programme of action to respond to such a social problem, in the creation of which "media pressure groups" instead of "expert lobby groups" (Díez Ripollés 2003, p. 34) would intervene. This process, nevertheless, ends in a simple approximation to reality and in the loss of possibilities for reflexive restructuring and sharing of the analyses that should be made available in the process (Díez Ripollés 2003, p. 36 and earlier), by restricting "the spectrum of social actors intervening in the achievement of [or the attempt to achieve] legislative rationality" (Díez Ripollés 2003, p. 40) that might be expected in the process of drafting criminal law.

Finally, the corresponding "legal response" (Galiana Saura 2008, p. 162 f.)[5] would be arrived at through the preparation of the pertinent bill or legislative proposal, a stage at which a new social agent would come into play: governmental or partisan bureaucracies (Díez Ripollés 2003, p. 43). We see in this phase, as Soto Navarro (2003, p. 130) has pointed out, an unquestionable pre-eminence of government bureaucracy and, therefore, of bills of law.[6]

So, in the light of these successive phases with this point as the objective, and as we have explained at the start of this section on the content of the pre-legislative phase, in which the specific weight of the legislative initiatives sponsored by the Government predominates, we shall now centre on the study of how the preparation of bills of law actually occurs in Spain.

4.2.1.2 The "Reality" of the Pre-legislative Phase in Spain

Having begun, the first thing we see is that the material drafting of all Bills of law corresponds in general to the respective ministries with competence in the matter. In particular, if we are talking about criminal matters, competence corresponds to the Ministry of Justice, in accordance with article 22 of Law 50/1997, of 27 November, of the Government, a norm developed by some Agreements of the Council of Ministers—26 January 1990[7] and 22 July 2005, which repeals the former one of 18 October 1991 (on the need for bills of law to adjust to certain formal linguistic and legal requirements).

This regulation is grounded in article 88 EC 1978, according to which:

[5] Quoting Mader (1995, p. 66 f.), Galiana Saura has point out: "with regard to the decision over regulatory intervention, the legislator has to determine whether a 'necessity' or social problem exists or not that should be regulated. A regulatory problem exists when certain social actors perceive stress between an existing situation and when they call on the legislator to resolve that stress".

[6] In the same sense, Díez Ripollés (2003, p. 45) notes that "over two thirds of legislative decisions emanate from bills of law".

[7] Which we shall examine infra.

> Bills of law will be approved by the Council of Ministers that will submit them to Congress accompanied by an explanatory statement of the necessary background to deliver an opinion on them.

This constitutional provision that regulatory draft bills of Government are accompanied by "the necessary background to deliver an opinion on them" is a novelty in our constitutional history and in comparative Law (with the sole exception, of the Constitution of Greece, of 9 June 1975, article 74 of which states that "all bills and legislative proposals will by obligation be accompanied by an explanatory statement") (Sainz Moreno 1989, p. 25).

In the opinion of Sainz Moreno (1989, p. 26), that novelty was introduced "without doubt, with the purpose of breaking the old tradition of submitting bills of law accompanied by a 'statement', in which the Government presented the reasons for the changes proposed in its introduction to the Chamber, without contributing objective data (surveys, reports from experts, statistics, consultations, etc.), which would neither allow them to judge the veracity of the facts nor the feasibility of the reform". And, the fact is that some "explanatory statements", considered individually, even though these have had, as is frequently acknowledged, "a high dogmatic value" and have thereafter served to interpret the laws,[8] "have not contributed or completed the evidence of what is said in them" unfortunately, "in such a way that the Chambers discuss the reforms with very poor knowledge of the reality on which they are acting".

In any case, such an obligation to contribute background information established in the constitution was, later on, incorporated in the Rules of Congress (articles 109 and 124) and of the Senate (article 108) as well as in the Rules of the Parliaments of the Autonomous Regions. All these Rules "have been pronounced with a view to exacting an obligation to contribute background not only in relation to bills of law, but also, in relation to legislative proposals" (Sainz Moreno 1989, pp. 29–31).

Nevertheless, as Sainz Moreno (1989, p. 27) criticized, "despite the great influence that the correct application of this precept might have had on parliamentary life and, especially, on the quality of laws, the fact is that a series of factors have, in general, reduced it to a norm without any real, appreciable efficacy". Legal academia together with the jurisprudence of the Constitutional Court has not contributed to improving this situation.[9] Indeed, in the Judgment of the Constitutional Court (STC) 198/1986, of 26 July, "it appears to follow that lack of background information or its inconsistency is a failing that should be reported by Parliament before approving the bill, without the Constitutional Court" "being able to interfere in the assessment of the relevance that an aspect of judgment had

[8] On the value of "explanatory statement", see, for example Ezquiaga Ganuzas 1988 and its accompanying bibliography.

[9] In fact, "unfortunately, the Constitutional Court has not attached the value to article 88 of the Constitution that it undoubtedly has so that lawmakers may inform themselves sufficiently well of the matter with which they are dealing" (Sainz Moreno 2006, p. 27).

for parliamentarians' (FJ 3)". Or, more properly, it implies "that the absence of particular background information will only assume importance if the failing had been reported to the Chambers by parliamentarians, during the processing of the law or proposition".

The situation is that Law 50/1997, of 27 November, promoted by the Government, covered the constitutional provision of article 88, although additionally establishing the prior preparation of a draft bill by the corresponding Ministry, to present to the Council of Ministers, as stated in arts. 22.2 and 3:

> 2. The procedure for the preparation of bills of law to which the preceding section refers will begin in the competent ministry or ministries through the preparation of the corresponding preliminary draft bill of law, which will be accompanied by the statement, the studies or needs assessment and advisability reports on it, a report on the gender implications of the measures that it establishes, as well as an economic report that contains the estimation of the cost that it involves. In any case the draft bills are subject to reports from the General Technical Secretariat.
>
> 3. The proposing Department will submit the draft bill to the Council of Ministers for it to decide on the subsequent procedures and, in particular, on the *consultations, opinions and reports* that it considers advisable, as well as on the terms of their completion, notwithstanding those that are legally binding.

Having completed the procedures that are transcribed above, and as a consequence of article 22.4 of the Law on Government, "the representative of the proposing Department will submit the Draft Bill, once again, to the Council of Ministers for its approval as a Bill of Law and referral to the *Spanish Legislative Chambers* or, if applicable, to the Senate, accompanied by an Explanatory Statement and a Report and other background information that may be necessary to deliver an opinion on it".

Note that when it speaks about a Draft Bill of Law, the Law on Government is referring to the statement, the studies and needs assessment advisability reports, the report on gender implications and the economic statement (plus the corresponding report from the General Technical Secretariat for internal use); on the contrary, when it speaks of the Bill, it only refers to (the use of capital letters is literal) an Explanatory Statement, the Report and the other necessary background information.

In this way, it is hardly surprising that Becerra Muñoz (2013, p. 385) has qualified this provision as "chaotic", which had supposedly been "conceived to enlighten and to develop the content of the constitutional clause", and from a reading of which "the impression arises that the legislator has decided to include all the reports that may have occurred to him, using in addition any synonym and analogous expression that may have been available", such that it eventually becomes "extremely complicated [. . .] to distinguish between all these types of documents, referred to in an indistinct and generic way, except in some cases". In addition, the confusion is increased if we refer to the content of the Instructions for the processing of matters in collegiate bodies of the Government, approved by Agreement of the Council of Ministers of 26 July 1996 (2013, p. 393 f.).

The author therefore seeks to throw light on the question by classifying all the controversial documents in declaratory (explanatory statement, reports and

necessary background information[10]) and justificatory statements (studies and reports on the need and advisability of the Draft bill, gender implication studies—in particular gender, which is the sole obligation in our legal Order, although the author would also include the economic statement here-, report from the General Technical Secretariat, subsequent procedures[11] and legally binding measures[12]).

In any case, the key with regard to all those documents, and we are totally in agreement with Becerra Muñoz (2013, p. 386), in reality resides "in the level of requirements of their content and the availability of sufficient means for their preparation".

However, to all of this has to be added the approval of Royal Decree 1083/2009, of 3 July, in regulation of the impact assessment report on legislative initiatives,[13] a

[10] In the opinion of the author (Becerra Muñoz 2013, p. 394 f.), "for greater transparency in the decision-making process, the references to 'necessary background' should be removed and exclusive reference should be made to the 'report, a document that would have to comprise:

- an account of the events that motivate the drafting of the bill. It would not be a question of repeating the list of factual background information and points of Law that were set established in the explanatory statement, but to refer to whoever promoted the initiative to sponsor the draft bill (a ministerial order, an electoral commitment of the Government, a request from a specific ministry, etc.);
- an explanation of the measures that are instituted since the identification of such a need, which would include the request for reports from public and private bodies, as well as individuals and collectives within and outside the administration, meetings held, research carried out and requested;
- a chronogram of measures in which the measures that are taken over time are listed, since the works on the matter began".

According to the author, "an arrangement such as the one pointed out assists a documentary map in which, including the explanatory statement, all the elements have a particular space and an intrinsic value for the information that they contain. At the same time, we avoid the apathy of the legislator, destined to filling in documents the content of which is superimposed and the vagueness of which in the regulation allow him, moreover, to shirk his responsibility when preparing norms supported by a satisfactorily constructed decision-making process.

[11] These are the "consultations, opinions and reports" referred to in particular under article 22.3 of the Law of Government, "which could be requested from scientists, experts, public organisms, administrations, consultative bodies of the central and regional Administrations, public and private associations, collectives, professional colleges and, even, the general population through questionnaires, surveys, and referenda. All of these fit perfectly in the aforementioned expression". In particular, the author refers to the convenience of including "studies of Comparative Law" here (Becerra Muñoz 2013, p. 406 f.).

[12] "With reference to the criminal material, it is a question of reports prepared by constitutional bodies, such as the General Council of Judicial Power and the Council of State" (Becerra Muñoz 2013, p. 409).

[13] The norm in question also introduces a change in responsibilities, which is to attribute the competences corresponding to the analysis of the normative impact to the General Directorate of Administrative Organization and Procedures of the Secretary of State for the Public Function of the Ministry of the Presidency, removing those competences from the State Agency of Public Policies and Service Quality. In short, the responsibility of driving and encouraging the completion of impact analyses of the new draft bills is passed on to the General Directorate, and that is without prejudice to the collaboration that may be requested from the Agency in matters concerning the encouragement of quality and the improvement of public services.

regulation inspired without doubt by the "Regulatory Impact Analysis" (RIA).[14] Through this regulation, it was intended to follow what was established in the Communication from the Commission to the Council and the European Parliament Better Regulation for Growth and Jobs in the European Union, in which the Commission recommended that all member States establish strategies for better legislation. In particular, national impact assessment systems that would determine the economic, social and environmental consequences of a regulation, as well as the supporting structures adapted to their national circumstances. Although, in reality, what has in fact been done, is not to introduce the requirement for different and additional documents when preparing the Draft Bills and Bills of Law, as we have just seen, that are contained in the Law of Government (except with regard to the sections on "Objectives" and "Alternatives" to which I will subsequently refer). Instead, all that been intended is, on the one hand, to specify and to detail "the content of the memoranda, studies and reports on the need and advisability of the planned regulations, the economic statement and the report on gender implications"[15] and, on the other hand, to group all that documentation in a single document, under the title "Legislative Impact Assessment Report". To do so, a Methodological Guide was prepared, which outlined the way in which the Report in question should be structured, in accordance with the following index:

I. INTRODUCTION
II. ADVISABILITY OF THE PROPOSAL
1) Motivation
2) Objectives
3) Alternatives
III. CONTENT, LEGAL ANALYSIS AND DESCRIPTION OF THE ADMINISTRATIVE PROCEDURE
1) Content[16]
2) Legal analysis[17]
3) Description of the administrative procedure
IV. IMPACT ASSESSMENT
1) General considerations

[14] That is, "a method used to evaluate the costs and consequences of the promulgation of each law and to evaluate the draft bills of new laws that apply organisms and institutions from all member states of the EU" (Karpen 2006, p. 57).

[15] With the aim of "guaranteeing and approving a draft law, the information needed to estimate the impact of the norm on its recipients and agents is used. To do so, it is essential to justify the need and the advisability of the planned regulation, to assess the different alternatives that exist for the achievement of the ends that are sought and to analyze in detail the legal and economic consequences, especially on competences that will be passed to the agents in question, as well as their impact from a budgetary point of view, their gender implications, and in the constitutional order of the distribution of powers" (Exposición de Motivos del Real Decreto 1083/2009, de 3 de julio).

[16] The drafted text of the relevant Bill of Law is included here.

[17] Which will include the detailed list of the regulations that would be repealed as a consequence of the entry into force of the regulation.

2) Preparation of the legislation with regard to the distribution of powers
3) Economic and budgetary impact[18]
4) Gender impact[19]
5) Other impacts
V. THE ABBREVIATED REPORT[20]
ANNEXES
I. Executive summary
II. Indicators
III. European Union Law
IV. Identification of effects on competence
V. Simplified method of measuring administrative burden
VI. Analysis of personnel costs
VII. Budgetary impact on the Autonomous Communities and/or Local Entities

Within section II, sub-sections 1 and 2 correspond to the content of the so-called "Explanatory Statement". There is a new item in subsection 3, dedicated to "Alternatives".

With regard to section III, under sub-section 1, the body of the text is usually simply transcribed from the Bill; under 2, reference is made to the legislation that the Bill will affect, and under 3 the "iter" is listed followed by the Bill of Law until it is approved as such, with an indication of the bodies that produced reports on it (although not the full contents of those reports), as well as the Council of State.

It is section IV that appears to propose the largest number of novelties with regard to the form in which Bills of Law are prepared in Spain. However, in reality, as Becerra Muñoz pointed out, the only novelty is the "requirement for the adaption of the norm to the distribution of powers", as the rest of the reports included in that section "continue with the line currently in force", including the legally mandatory report on gender implications, as well as the other of an economic-budgetary nature (what up until now was called the "economic memorandum") (Becerra Muñoz 2013, p. 416).

In short, it may be said that the regulation of the regulatory legislative impact assessment report contributes "greater precision [...] in the description of many associated documents, the requirement of some that were not expressly included before and the compilation of all those in a dossier, creating a single instrument,

[18] Which will include the impact on sectors, collectives, and agents affected by the norm, including the effect on competence, as well as the detection and measurement of administrative loads.

[19] Where the results that may be followed after the approval of the bill are analysed and assessed from the perspective of equal opportunities and their contribution to the achievement of the objectives of equal opportunities and equal treatment between men and women, on the basis of the baseline indicators, the forecasted results and the impact assessment covered in the Methodological Guide.

[20] When it is considered that the normative proposal will not have appreciable impacts on any of the fields, so that the presentation of a complete report is not needed, an abbreviated report will be prepared that should include, at least, the following sections: appropriateness of the regulation, list of the norms that are repealed, budgetary impact and gender implications.

which will without doubt have a psychological effect, as it is no longer a bundle of loose documents that may be successively incorporated in the parliamentary business" (Becerra Muñoz 2013, p. 417). However, it is also true that doubts arise with regard to its binding nature (Becerra Muñoz 2013, p. 417), all the more so if we take into account the Bills of Law for the reform of the Penal Code that were processed under Royal Decree 1083/2009, although this will be examined a little later on.

4.2.1.3 Interim Conclusion

In conclusion, in seeking to clarify the focus of the question, by explaining why we have gone through all of these normative references up until now within the so-called pre-legislative phase, our real interest is to highlight reality. Working practice, demonstrates that the requirements for the documentation listed in the Law of Government as compulsory annexes to a Draft Bill on criminal reform—our essential interest in this work—are compiled by the competent organs in a "formal or superficial" manner (Díez Ripollés 2003, p. 64). So much so that not even this new norm on normative impact introduced through Royal Decree 1083/2009 has had an effect, as previously advanced, on the most recent criminal reforms, even though it was in force (although this, I repeat, will be corroborated later on).

Thus, it may be said, as affirmed by Becerra Muñoz (2013, p. 418), that "the key to greater rationality and quality in our legislation is not in the number of documents that by obligation have to be prepared when submitting a Draft Law, but in the political will that exists for its real accomplishment and in the establishment of satisfactory control mechanisms to apply the sanction in the face of incompliance with the regulations". We shall soon see that this affirmation could not be closer to the truth.

4.2.1.4 Brief Critical Note on the Legislative Phase in Spain

Following the earlier phase, the "legislative" phase (or, in other terminology, "the external legislative process") commences, that "would begin with the reception in the *Spanish Legislative Chambers* of the legal proposal, and would end with the approval and publication of the law" (Díez Ripollés 2003, p. 19), following the constitutional procedure established for the approval of laws. At this point of the legislative "iter", Díez Ripollés (2003, p. 55) pointed to a lack of reinforcement or strengthening of the procedure that the Draft Law has to follow in the Parliamentary Committee phase, as in the opinion of this author, "the period of work of the Committee and its report constitute the decisive procedural moment of all the legislative phase, in which, as a consequence, efforts should be centred on adding the components of rationality". As a result, he considered that it should "look deeper into the furtherance of full legislative competence in certain criminal laws or the development of criminal law", setting aside "a good number of decisions for the committees, such as the formulation of especially complex criminal definitions,

the configuration of the most technical aspects of the system of responsibility and a good part of the system for the enforcement of penalties".[21] This proposal for the distribution of the tasks so as to draft criminal norms certainly follows a very logical reasoning with which I totally agree.

4.2.2 The Post-legislative Phase in Spain

4.2.2.1 What Should It Comprise?

Finally, the process concludes with the "post-legislative" phase, which "begins with the publication of the law and finishes, closing the circle, with scrutiny by society in general, and by relevant groups within it, to establish whether the law has an acceptable relation with the social and the economic realities that it is meant to regulate" (Díez Ripollés 2003, p. 19). This phase would comprise "the set of evaluation activities of the various effects of the legal decision following its entry into force, and would last up until the point at which its adaptation to the social and economic realities that it seeks to regulate is questioned in a socially credible way". At that time, "a new pre-legislative phase begins" (Díez Ripollés 2003, p. 58). But are these activities done in our legal order?

4.2.2.2 What It Really Comprises and What Instruments Are Available to It?

From an external and quite an optimist focus, Karpen (2006, p. 71) affirmed that "the evaluation of law in Spain is profoundly influenced by the Latin tradition and the culture and legal experiences of German speaking countries. However, the country follows the way in which draft laws and legislation is presented in England and the USA with great interest".

This author describes the Spanish system of legislative evaluation, underlining that "there is no central parliamentary office of the Committee such as the one that exists in the British Parliament, and the bureaucracies of the Ministries prepare the draft bills, which the cabinet finally approves and sends on to the Spanish parliament" (Karpen 2006, p. 71).[22] In particular, "the Spanish Minister of Justice is, in

[21] That is, without "taking away from the Plenary Committee the establishment of the catalogue of offenses and their corresponding penalties, the definition of the basic system of responsibility or the system of crimes".

[22] It has also to be taken into account that "in the institutional field, there are procedures which, in some way, refer back to Parliament certain information on the degree of efficacy of the decisions that are taken. Without any attempt at drawing up an exhaustive list, the following may be pointed out: the submission of accounts to Parliament on the degree of formal compliance of budgetary laws by the bodies (a type of Court of Auditors), specifically foreseen for that purpose; reports to

the end, the Minister of legislation (and has always been so), because of the fact that the Minister is in charge of drafting and modifying the principal legal codes that exist" (Karpen 2006, p. 72).

This author from Germany, in addition, makes the point that the Technical Legislative Guidelines on the form and the structure of draft bills, prior to 1991, and amended by those approved in the Agreement of the Council of Ministers, of 22 July 2005, "solely cover the formal and conceptual aspects of legislation". But they also refer to the start of the 90s, when the Spanish Government, "with the support of Catalan legislators [sic], approved a questionnaire that was practically a checklist inspired by the German 'Blaue Prüffragen' (1986)" (Karpen 2006, p. 71 f.), containing, as Fernández Carnicero (2006, p. 163) said, "criteria relating to patterns of necessity, which fundamentally seek to avoid purposeless legislation", and that act as a complement to those Technical Legislative Guidelines.

We are referring to "the Questionnaire on Evaluation that should accompany draft legislation for submission to the Council of Ministers" (approved through two Agreements of the Council of Ministers of 297 December, 1989, and of 26 January 1990) (Montoro Chiner 1989, p. 16)[23] which, more than an instrument of evaluation in the post-legislative phase, is designed as an "*ex ante*" evaluation tool, in the pre-legislative phase. In any case, the content of the Agreement of the Council of Ministers of 26 January 1990, under the aforementioned title, was as follows:

> Within the scope of what is known as 'Legislative Technique', various European countries have prepared and applied questionnaires or sets of questions aimed at monitoring the need and the formal and material qualities of the legislative proposals. In this regard, it is worth highlighting that the Federal Republic of Germany is the country that has developed this technique (Checklisten or Prüffragen) to the greatest extent, both at a Federal level and in the various Länder; a technique that is also used in countries like Switzerland, Austria and Italy and that, with other modalities, is likewise applied in the United Kingdom and in the United States of America.
>
> The work of designing an evaluative questionnaire on the legislative proposals that are submitted to the Council of Ministers responds to an increasing awareness to seek out, to analyze and to study systems for the verification and the evaluation of legislative norms, if possible before they enter into force, so as to introduce a technique in our country that brings benefits to the quality and efficacy of legislative production.

Parliament by the Parliamentary committees (a type of Ombudsman), in which the problems that some members of the public reported in relation to regulatory incompliance or administrative barriers were analysed; the parliamentarians (basically from opposition groups), who channelled, through questions and participation in Parliamentary debates, those aspects that, in their opinion, represented a lack of accommodation between the legislative programme of the Government and that which really took place; as well as the requests submitted to the Chambers that arose from collective initiatives or from individual members of the public" (Galiana Saura 2008, p. 288).

[23] According to Karpen (2006, p. 72) "the person responsible for preparing these two directives were the Minister of the Presidency". A situation that led the author to affirm that "the present-day situation is that Spain has two administrative centres responsible for controlling the decentralized system of drafting pre-legislative texts and other general legislation", referring both to the Ministry of the Presidency and to the Ministry of Justice, which may only be said in relation to the latter since 2014.

With this objective in mind, a questionnaire has been designed, above all, in accordance with its application to legislative bills, as these constitute a more appropriate field of reference. With this end in sight, the set of questions that appear as an annex are designed for the evaluation of proposed statutory instruments with legislative status and those regulatory provisions that are proposed and issued in the development of legislative texts.

In the initial phase, this limitation on draft bills of law and proposed Regulatory orders in the development of the Laws would appear advisable. These are the norms that have the greatest importance in our legal order and, in that framework, they are the ones that require the greatest internal coherence, in order to ensure the highest respect for the constitutional system of sources.

In view of all the above points, the following agreement is submitted to the Council of Ministers

First

Draft Bills of Law and proposals for Regulations that have to be delivered pursuant to regulations with the status of Law will be submitted for consideration to the Council of Ministers, accompanied by the corresponding 'Questionnaire on the evaluation of legislative proposals that are submitted to the Council of Ministers'. This questionnaire should be filled in by the Department or Departmental authors responsible for the proposal.

Second

If the draft Bill of Law or proposal for a Royal Decree were to share the same character, a single questionnaire should be prepared, which would also have to be jointly prepared by the Departments responsible for its proposal.

ANNEX

EVALUATION QUESTIONNAIRE ON LEGISLATIVE PROPOSALS SUBMITTED TO THE COUNCIL OF MINISTERS

1. Necessity

1.1 Does the proposal respond to a legal requirement such as...?

a) A constitutional and / or legislative mandate?
b) The need to develop Community law? Your approval is subject to a specific term?
c) The absence of specific regulations?
d) The advisability of amending an earlier provision?
e) A regulatory vacuum arising from the repeal of another regulation by the courts?

1.2 Are there provisions in the Government Programme on the matter?

1.3 What basic aims does the draft bill seek to achieve?

2. Legal and institutional implications

2.1. With regard to the European Communities:

a) Does the proposal affect another from the EC?
b) Has notification of the draft bill previously been sent to the Commission of the European Communities, when required by Community law?
c) What was the outcome of the consultation?

2.2. In relation to the Autonomous Communities

a) Which areas of competence form the basis of the competence of the state?
b) Is a jurisdictional conflict foreseeable?

2.3. In relation to the organs of the State Administration

a) Will the draft bill attribute new powers to the Council of Ministers?
b) Does it modify the current distribution of powers between the various ministerial departments?

2.4. In relation to the existing law

a) Which legislation is wholly or partly repealed by the proposal?
b) What mandatory reports are required? Have they all been completed?
c) For the full effectiveness of the proposal, will further regulations be needed to develop its contents?

3. Social and Economic Consequences

3.1. What are the main economic and budgetary implications of the proposal? (Financial Report).
3.2. Can the measures in the draft bill be undertaken with the levels of staffing currently available? If not, what measures are planned to address the identified weaknesses?
3.3. If the current draft bill is approved, what will its consequences be in terms of their acceptance or rejection by the stakeholders and their representative organizations?

Karpen (2006, p. 72) considered that "this checklist has been very useful for Spanish politicians and public sector employees to be more aware of the need to control the flow of new regulations", although I personally consider that he is, as said before, quite optimistic in his appraisal. Why is this so? Simply because (leaving to one side other legislative areas that we have not examined), I have not found, at least with regard to criminal matters, any trace of the use of this Questionnaire in the reforms carried out in Spain since its approval back in 1989 and 1990.

Of course, what is clear is that, because of its content, the interpretation can be reached, without any problems, that following the approval of Royal Decree 1083/2009, the Report on the analysis of regulatory impact can fulfil the function that this Questionnaire was intended to fulfil very well. In reality, the aforementioned Report sought a review of the current legislation from the Government before it approved a new piece of legislation. Hence, it would have mixed the retrospective and the prospective point of view (and they are in practice mixed), the "*ex-post*" evaluation of the existing regulation and the "*ex-ante*" evaluation of the new regulation. These evaluative assessments would be mixed, because one assessment in the post-legislative phase would follow on after another in the pre-legislative phase of the new draft legislation, in the majority of cases, to complete the circle of the lawmaking process.

4.3 Conclusions on the Evaluation of the Effects of Legislation in Spain

4.3.1 A Discredited Legislative Process in a Real Evaluation of the Consequences of the Laws

So, in reality, it may be said that the "institutionalization of an evaluative phase of the legislative decisions" is "limited" (perhaps not so much as even "inexistent")

(Díez Ripollés 2003, p. 58 f.) in Spain, and we haven't "sociological analysis on its development in practice" (Soto Navarro, p. 146 ff.), even though the evaluation is recommended of "the social effects of a new law as well as the aspects relating to its potential application by the courts and tribunals" (Soto Navarro, p. 163). So, without going any further, for example, "the *ex-post* evaluation of a criminal law would serve to correct failings that should be detected in the initial preparatory phase of a draft law or legislative proposal or during their parliamentary business" (Soto Navarro, p. 165).

"[T]he contribution of criminology, together with other disciplines such as psychology, sociology, the economic analysis of Law, etc." would be fundamental for this type of analysis and monitoring of the efficacy of the laws. Thus, the resulting empirical studies would allow us "to analyse such factors as the degree of knowledge and acceptance of a criminal law; its dissuasive effect; the success and failure indicators of its intended aims; the collateral effects of the new criminal law; the infrastructure and both economic and human resources that are necessary for its correct application, etc." (Soto Navarro, p. 163 f.).

In effect, I agree with Barberet (2001, p. 108), in that scientific evaluation of the proposed legislation would be of interest in the area of criminal legislation, and in particular with the support of Criminology, for the following reasons:

- In the first place, because the scientific process is rigorous, systematic and objective. In this sense, we may say that, in as much as Criminology forms part of the social Sciences, it aims to follow rigorous evaluation policies, in harmony with the scientific objectives, unlike the normal practice at the level of governmental programmes.
- In second place, scientific evaluation serves to ascertain whether what is done is really effective. So, in our case, where criminal legislation complies with the exacting scientific requirements from a criminological point of view, then that will allow us to affirm whether a criminal reform, a crime prevention programme or a victim prevention programme, for instance, really has the results that were intended when it was designed.
- Finally, in third place, scientific evaluation also serves to modify and to improve a programme of intervention. In other words, the criminological-scientific evaluation would serve to introduce improvements in a programme that is already underway (and, as the author pointed out, it is especially important, in these times of austerity that we are living through, to justify public expenditure in a scientific way).

However, it is necessary to possess enough personal, material and methodological resources, in order to conduct a legislative evaluation in the criminal field. And, as Díez Ripollés took it upon himself to highlight, neither the first, nor the second, nor the third are available in the Spanish Order.

With regard to the first, the professionals who should be in charge of analyzing whether laws are effective and whether they achieve their ends, "are disconnected or only slightly connected to the problem of criminal legislative interventions" (Díez Ripollés 2003, p. 62), principally because of, or owing to "the inexistence of

autonomous disciplines that focus their expert knowledge directly on the manifestations of crime -the scant social and economic recognition of the criminologist is also a paradigmatic example-", or because of "the scarce openings to non-jurist professionals in social institutions that are busy with the drafting and application of Law" (Díez Ripollés 2003, p. 62). At a complementary level, we may note the inexistence of services related to crime and criminal legislation that allow well coordinated and structured interdisciplinary action from professionals with useful contributions to make. Likewise, the inexistence of "professional *action in accordance with external objectives*" is regrettable, (for the reasons pointed out elsewhere on what the strategy of the criminal doctrine should be to confront the present-day political-criminal situation (Rodríguez Ferrández 2009, p. 153 ff.). This is "especially significant in the university field, where the choice of expert activities to pursue is substantially governed by the perspectives of progress in the academic career, and not by the social demand that has to be satisfied with the skill that is learnt" (Díez Ripollés 2003, p. 62 f.).

In second place, as I have mentioned, in agreement with Díez Ripollés (2003, p. 63), there is the conspicuous absence of material resources, in so far as "there is little tradition of allocating *budgetary entries* for the evaluation of criminal legislative and non-legislative interventions, and there are neither precedents for a criminal law that incorporates a budgetary entry to conduct its evaluation, nor final budgetary entries in the Ministry of Justice, the General Council of Judicial Power or other similar bodies set aside for that purpose". In addition, in parallel to that shortcoming pointed out earlier, of well coordinated and structured services that permit interdisciplinary action, there is a logical consequence, in so far as "*premises* designed and used for the development of studies on the assessment of legislation" do not exist in Spain, which makes "the accumulation of experience, materials, dedicated databases, etc. with the corresponding optimization of resources impossible" (Díez Ripollés 2003, p. 63).

Finally, in third place, we lack what Díez Ripollés (2003, p. 63) has called, in general, a "*non-programmed experimental substrate* on which to build concrete evaluations". As specific points in this shortcoming, the author lists "poor police and judicial statistics on crime". Nevertheless, there are those who tone down this argument and consider that, at least with regard to the judicial statistics, we have "much more information than is exploited", the problem really being that "the available statistical information [...] is hardly exploited and rarely used" (De Benito and Pastor Prieto 2001, p. 57).

Among other concrete aspects, Díez Ripollés (2003, p. 63) also points to the inexistence of quantitative instruments of social research structured in series (as, if such instruments or techniques are applied, it is merely done in an isolated way, such that their contents are not usually comparable and hinder the search for reliable conclusions), and the inexistence of "indicators that are not strictly criminal but have direct political-criminal applications", and, of course, "*experimental references* on specific legislative decisions", etc.

In short, the lack of some necessary minimum standards in the Spanish legal order to conduct a real legislative evaluation, prior to the implementation of any

criminal reform that would find its material and empirical justification in the results obtained from the reform, is flagrant and plain to see. The last two criminal reforms undertaken in Spain demonstrate as much, as I will seek to make clear in the following sub-sections.

4.3.2 For Example, the Case of Criminal Reform Instituted by Organic Law 5/2010, of 22 June

This recent criminal reform, the 27th since the Criminal Code was approved in 1995, was introduced in a Bill of January 2007, which was set aside before the general elections of 2008, and redrafted in November of that same year as a preliminary draft law, only to emerge as a new Bill in December 2009. It is worth highlighting that, between one Draft Bill and another, as Serrano Gómez (2010, p. 3 ff.) has demonstrated (in relation to those of 2007 and 2009), there are innumerable changes to which, in turn, innumerable amendments are added in legislative proceedings; a process which impacted (or otherwise) on the final text of Organic Law 5/2010, of 22 June.

That said, we shall now focus on examining the content of the documentation that was added to that criminal reform[24] when the Bill of Law was referred to the Government of the Spanish lower chamber (and published in the Official Gazette of 27 November 2009).

The first thing we find is that the criminal reform of 2010 was not infused with that same spirit, despite the great opportunity in the European initiative (which inspired the approval of Royal Decree 1083/2009, of 3 July, in regulation of the report on the analysis of regulatory impact) to establish national impact assessment systems, which would help determine the economic, social, and environmental consequences of legislation, as well as the creation of a global strategy to evaluate crime and criminal justice.

And that was in spite of the aforementioned Royal Decree that was in force, although it is also true that the Methodological Guide, promoted by the aforementioned Decree, had been approved by the Council of Ministers on 11 December 2009 (in other words, some 2 weeks after the referral of the Bill to the Spanish parliament). Even though the latter might constitute a justifiable excuse, it is also true that the Bill of Law on Sustainable Economy, prepared at that same time, made clear at the start of its text, that its preliminary Draft Bill had been prepared prior to the Royal Decree of July 2009, despite which the Bill in question was finally approved in the form of an Impact Assessment Report on legislative initiatives. Precisely for that reason, it is my opinion that the validity of that norm in some way

[24] That documentation was obtained through the Documentation Department of the Congress of Deputies [Spanish Lower Chamber].

imposed a will to comply with it, the absence of which shone out in the case of the Draft Organic Law on the reform of the Penal Code.

As things are, the documentation that was submitted to Congress along with the Draft Organic Law (with its Explanatory Statement and the articles of its text) was the "Explanatory Statement", and (to describe them in the same way as under their respective headings), the "Economic Memorandum" and the "Memorandum on Gender Implications".[25]

4.3.2.1 Explanatory Statement

This document, with an extension of 11 pages, contained two basic sections: the first, dedicated to a summary on the "purpose of the reform" and, the second, dedicated to some brief "comments" on each of the novelties that would form part of the text in Books I and II of the Criminal code.

So, reference was made in that Report to "experience of the application of the Code [that. . .] has been revealing evidence of some shortcomings or deficiencies that are necessary to correct". From the references subsequently made in the Report, in its explanatory notes, it appears that the Government made a particular reference, on that point, to the criminal definition of real estate harassment, with which it "sought to protect the right of enjoyment and use of the home by home-owners and renters against the efforts directed at obliging either one or the other to abandon the home, so as to achieve, in the majority of cases, speculative objectives", to which it added that "different legal statements had been highlighting the difficulties that in relation to the repression of these behaviours arose from the absence, up until now, of a specific criminal regulation of such occurrences", but without a summary of what their particular content might have been.

Likewise, the actions of the Government could be placed in the same category, which undertook the restructuring of the offences of human trafficking and clandestine immigration with "shortcomings and irregular applications of the Penal Code". Hence, it was decided in the proposed reform, to separate "the criminal regulation of these two criminological realities", under the argument that "unified criminal treatment of the crimes of human trafficking and clandestine immigration contained under article 318 bis was in any event, unsatisfactory, in view of the great differences that exist between both criminal conducts". Nevertheless, no study at all was appended to justify that affirmation, which is not to say that I consider it false. I am simply remarking on its lack of any proper and opportune justification of the affirmation.

[25] Together with the opinions and reports of, first of all the General Council of Judicial Power (156 pages), with the Audit Committee in second place (248 pages) and, finally, the only mandatory report, from the Council of State (219 pages), which had to report on the presence of modifications in the Bill related to the transposition of community Law.

In the first place, the Government announced that it had covered reforms "in areas such as the falsification of certificates, to which has to be added in all of its modalities, the falsification of identity documents that has been converted into an intolerably widespread practice", but once again, not even one document in support of such a categorical affirmation could be found in all of the documentation appended by the Government to the draft Bill.

In addition, reference was made to the reform that sought to "resolve the inevitable problems of interpretation that have been raised by the doctrine and jurisprudence and which is a task that corresponds to the legislator". Perhaps here, once again through the references of the Government in the second section of the Report, it is specifically referring to the following modifications:

- In the first place, with regard to the measure on the deportation of foreigners, the Government explained its decision as, "moving away from the current automatism in its application, because the courts, mindful of the concurrent circumstances, can assess the advisability of ordering it [deportation], which has repeatedly been highlighted by the Supreme Court"; although the origin of the jurisprudence was at least identified, which was intended to justify the modification, in my opinion, those "repeatedly" delivered opinions should have been summarised as explanatory material for the reform of this measure;
- In second place, it was pointed out in the Report (and the corresponding paragraphs are reproduced here) that "in setting the penalty to impose on the basic offence of fraud, the Courts have to have a sufficient margin of discretion to take into consideration aspects of the fact such as the economic upheaval caused to the prejudiced party, previous relations between the prejudiced party and the offending party, the means employed by the latter, the place where the instruments of exchange would supposedly have eventually taken place, and as many other circumstances that may have to do with the case. All of these may or may not involve aggravating circumstances, which the courts may only determine in each particular case. The system of specific qualifying or aggravating circumstances of the fraud has been posing problems of interpretation in practice. It gives rise to the superimposition of dual legal evaluations of the same elements, something which is particularly evident when it applies to the use of a cheque, IOU, open letter of exchange or fictitious business exchange –which, in addition, can get caught up and confused with some form of falsified documentationthat is, in turn, the means and the material presence of the deception, and not something that is added to the fraudulent stratagem, for which reason its separate evaluation is unnecessary". Although those "interpretative problems in working practice" relating to fraud were very correctly explained from the technical point of view, a summary of the jurisprudential (and even doctrinal) decisions and opinions where they may have been identified, was lacking.
- Finally, in the field of drug trafficking, the Government affirmed that it had included in the text presented to Parliament for its approval "the provision contained in the Non-Jurisdictional Plenary Agreement of the 2nd Chamber of

the Supreme Court, of 25 October 2005, in relation to the possibility of reducing the punishment with respect to those circumstance of minor importance and provided there is no concurrency with the circumstances referred to in articles 369, 369 bis and 370 and following". Here indeed, unlike in earlier cases, we might perhaps find ourselves with sufficient justification for this modification in matters of drug trafficking, as the problem is very clearly identified and a very clear and specific guideline from the Supreme Court is incorporated to solve it.

Finally, the Government or rather the Ministry of Justice also pointed out that the aim of the reform was "to respond to the social pressure for an individualized treatment of criminals responsible for sexual crimes and terrorism". With regard to this, it was affirmed in the explanatory section of the Report that "our criminal order foresees no mechanism to approach the assumptions of endangerment consistent with a criminal sentence in the case of offenders with criminological profiles resistant to the effects of rehabilitation, as usually happens in the case of crimes against freedom and sexual or terrorist indemnity. Therefore, the present law introduces a new safety measure called supervised parole". Nevertheless, references to empirical studies were missing throughout the documentation attached to the Draft bill, which certainly exist on the specific percentage of rehabilitated offenders that may be documented in this category of offence through specific treatment, so that it might be decided in a reasoned way if those sorts of criminals presented or present such resistant profiles that would justify such a reform. Without it, it might appear that, in reality, the Government was basing its reform on perceptions that had not been empirically tested.

In addition, there was an additional point in the Report on sex offenders, which refers to the proposal to reform article 36 for effective compliance with the sentences imposed on them, in accordance with what is requested by the non-legislative Proposal approved by the Congress of Deputies on 3 June 2008, which, we recall, was formulated at the end of the "Mari Luz" case. Thus precisely for that reason it is not unlikely that we will find ourselves at this point awaiting a new reform in the "media spotlight", such as the proposal that I think could be considered on this point to criminalize the offence of piracy. The fact is that, despite the certainty of the assurances in the Report that the above offence of piracy was defined in the reform "covering the premises of the Convention of Montego Bay of 10th December 1982 on the Law of the Sea and the Convention on maritime navigation signed in Rome on 10 March 1988", it is no less certain that the "Alakrana case" (still hot on the media agenda in the months leading up to the referral of the Bill to Congress) was of greater importance in driving that proposal than the two international Conventions approved over 20 years ago.

4.3.2.2 Economic Report

We said earlier that we called one of the documents appended to the Bill of an Organic Law on one of the most recent modification of the Criminal Code, an

Economic Memorandum, because those two words appeared in its heading, without an argument in its text that could justify such a name. In fact, this document could under no circumstances be considered an "economic memorandum", nor much less so "an economic and budgetary report" (in the new nomenclature employed by the Methodological Guidelines of the Impact Assessment Report on legislative initiatives). According to the aforementioned Methodological Guide, any Draft Law for submission to the Spanish Parliament should include the following aspects:

- general economic impact: in such a way that "together with the consequences of a general nature, the effects on agents and groups directly affected by the proposal should especially be taken into account"; no reference of this kind was included;
- analysis of the administrative loads: understanding them to be "all those tasks of an administrative nature that should lead firms and the general public to comply with the obligations arising from the regulation". Thus, it says that "the administrative loads that the regulation introduces and/or that have been suppressed or reduced with regard to the earlier regulation" should be indicated. "The administrative loads that may have been maintained or introduced will be justified in relation to the objectives of the norm and will be quantified wherever possible". In addition, it is pointed out that Annex V of the Guide (pp. 68–79) "covers the measurement method approved for Spain and that will be applied to identify the loads and to determine the aforementioned economic assessment". Given what has been explained, it is very difficult to understand how a legislative proposal, such as the one in 2010, which set up a new system to introduce the so-called criminal liability of legal persons, and that has in fact obliged firms to contract and to pay for the preparation of compliance plans, failed to contemplate the most minimum level of analysis or estimation with regard to the administrative loads that it was clearly imposing. Neither does the reform currently under consideration, which will be analysed below, maintain in the text of art. 31 bis the consideration of compliance programmes as an attenuating circumstance;
- budgetary impact, which "measures the effect that the legislative proposal might foreseeably have on public income and expenditure, both financial and non-financial" (on the General Budgets of the State, of the Autonomous Communities and Local Bodies), and which should adhere to the following steps, among others:
  - Quantification and identification of income and expenditure: "the costs arising from the legislative proposal will be quantified, identifying the budgetary headings that may be affected, in view of the current classification in the General Budgetary Law, as specified in the Annual Law on General Budgets of the State. It will allow us to identify the bodies that are affected, the economic nature of the income and expenditure and the objective that is pursued, among other points".
  - It is also considered that "in case the application of the proposed legislation has no budgetary impact, it will be indicated and must be suitably justified as such in the Report". This provision left it plain to see that the mention, in the

Economic Report of the Penal Code reform bill, to the fact that the "incorporation of new offences," did not imply "any economic impact", was insufficient in every way, as no justification on that point was included.

- In addition, it was indicated that "in case the application of the proposed legislation should have a budgetary impact and it is considered that the cost may be covered by the available credit, without any need for budgetary modification, words to that effect will be noted in the Report, identifying the budgetary entries that are affected and specifying the respective monetary valuation. The maximum amount that it could represent will at least be specified"; when reference appeared in the Economic Report on the Penal Code Bill to the introduction of "supervised parole" that would permit "from the economic point of view, exploitation of the technological advances, as well as other means already available to the Administration", perhaps the necessary identification of the affected budgetary entries or, in any case, as indicated in the Guidelines, a monetary assessment should have been estimated.
- Finally, the provision is also included that "when the budgetary impact may not be quantified, the reasons that prevent it will be noted as well the reasons for which, in spite of anything else, the budgetary impact may be absorbed without any need for budgetary modifications".

In short, and this is especially reprehensible, it should finally be affirmed, as was done in the Memorandum, that the application of the Bill "would not require the Justice Administration to assume additional obligations for expenditure" and that it "will neither impose an increase in expenditure, nor a reduction in income, resulting, from an economic point of view, in neutral consequences for public resources"(!!!), without advancing the slightest calculation or, where applicable, without giving a reasoned justification as to why it could not be done (how to secure the provision set out above in the last place), meant that this "economic" Report lacked the most minimal or elemental rigour.

4.3.2.3 Report on Gender Implications

The completion of the Memorandum (or "Report", as this document was titled when submitted to the *Spanish Legislative Chambers*) on gender implications, also with a length of two pages, but some four paragraphs shorter, was ticked off the list, once again superficially, by the Government.[26] In fact, one need does no more than

[26] This was the full text: "In accordance with the second paragraph of section 2 of article 22 of Law 50/1997, of 27 November, from the Government, introduced by Law 30/2003, of 13 October, Bills of Law should be submitted with a report on the gender implications of the measures that they establish.

In this respect, it is necessary to highlight that the reform of the penal Code, at present at the committee stage, reinforces the criminal protection of women and girls. This circumstance is evident through the numerous measures that are now pointed out as follows.

go over the corresponding section of the Methodological Guidelines for the preparation of the Impact Assessment Report on legislative initiatives (pp. 30–33, even lengthier than the document that we are discussing here) to realize that the Report submitted on gender implications was completely inadequate.

4.3.3 A New Example: The Draft Bill Submitted to the Spanish Legislative Chambers *in September 2013 and Finally Approved as Organic Law 1/2015, of 30 March*

On 24 September 2013 (published in the State Gazette of 4 October 2013) a new Draft Bill was submitted from the Government to the Parliament for the reform of the Penal Code (on the basis of a preliminary legislative proposal prepared in 2012). Despite that text having languished for some months, with continuous extensions to the weekly deadline for the presentation of amendments to the Justice Committee of the Congress of Deputies (or Spanish Lower Chamber), at the end of November 2014, this phase was drawn to a close, and the parliamentary business resumed, with the initial drafting of the corresponding final Report from the legislative Committee. The final text was approved and published on March 30, 2015.

The fact is that, with regard to what interests us here, the empirical foundation of this draft bill, when it had been presented for approval to the *Spanish Legislative Chambers*, had once again proved to be inexistent, in view of the documentation that the Government annexed to the legislative text,[27] due to lax compliance with Royal Decree 1083/2009 (at least not overlooked this time, as in 2010) when

Although it is true that the passive subject of offences against sexual orientation and gender identity can be a man as much as a woman, it is undoubtable that women are affected to a greater extent by these sorts of conduct. Therefore, the amplification of penalties and the definition of new behaviours that threaten sexual orientation and gender identity, action on which is pursued by this reform, impacts directly on greater protection of women in the Penal Code. This situation is repeated with the specific criminal definition of the crime of human trafficking.

It is also necessary to underline the special criminal protection afforded to women and children on the basis of the modifications introduced to offences that are committed during armed conflict, such as those who commit offences against the sexual orientation of a protected person through acts of rape, sexual slavery, forced or involuntary prostitution, forced pregnancy, forced sterilization or any other form of sexual aggression, as well as those that recruit or enlist children of under 18 years in age or use them to participate directly in those conflicts.

It should also be highlighted that the criminalization of the behaviour of clients involved in the prostitution of children will lead to greater protection of girls and young women under the age of consent, given that the percentage of the population that is sexually exploited in networks is far greater among the female than it is among the male population.

In conclusion, the proposed legislation has a positive impact, given that it will contribute to greater protection of women and girls".

[27] The aforementioned documentation may be obtained through the "Documentation Department" of the Congress of Deputies or Spanish Lower Chamber.

preparing the documentation in question. In fact, this is what I have been able to confirm after consulting the memorandum, prepared, at least this time, by following the guidelines of the Methodological Guide of the report on legislative impact, although, as expected, in an excessively superficial or shallow manner.

In concrete, comparing the documentation prepared by the Government[28] that was attached to the Penal Reform Bill of 2010, and that attached to the new Bill at the end of 2013, we may in the first place affirm that there is a significant difference in quantitative terms. Whereas in 2010 (as we have seen earlier on) the Explanatory Statement, the Economic Report, and the Report on gender implications hardly amounted to 15 pages in length all told, the Impact Assessment Report of the reform launched in 2013 had a length of 99 pages. Nevertheless, it should be taken into account that 42 of them were dedicated to presenting the main objections raised by the General Council of Judicial Power, the Audit Committee, and the Council of State in their respective reports and opinions.

However, in second place and as we have been warning, in qualitative terms, the dossier under analysis is no more profound, from an empirical point of view, than the dossier analyzed in the preceding sub-section, that was presented in 2010. The Government has complied with the formal aspects of its preparation, but it is as incomplete as before from the point of view of its material content. As much is demonstrated when reading the first pages containing the identifying data and basic information on the Bill: the "Alternative principles considered" were "None", and its "Economic Impact" was or is "Not quantifiable". In fact, in the first part, the scant content of the alternatives that are considered when filling in the obligatory section on the analysis of possible alternatives to the new regulation that they wish to propose, in blatant disregard for compliance with the principle of minimum intervention (specific reference to which is made, as we shall see, as an explanatory argument for the suppression of Book III), is as follows: "In view of the matter relating to the regulation that is modified, there are no alternatives other than the modification of the Penal Code." With regard to its economic impact, it is explained in the corresponding section that "The economic impact of this reform is difficult to quantify and to measure, such that the study will centre on the impact of this reform on the Administration of Justice, the Prison Administration and the specific legal agents affected by the reform", a very similar formula to that used to tiptoe around compliance with an economic estimation (whether difficult to complete or otherwise) which appears as an obligation in Royal Decree 1083/2009.

Contemplating some of these substantive aspects of the reform (we cannot do so in all cases due to limitations on space), I have chosen the one relating to the suppression of Book III of the Penal Code, on the subject of minor offences. It appears to be one of its strong points, in the sense that it presents the appearance of an empirically justified reform, undertaken on the basis of arguments revolving

[28] I therefore once again exclude from this consideration the Report from the Council of State (this time with a length of 138 pages), the Report from the General Council of Judicial Power (also with a length of 174 pages).

around rationality. And I say "appears" because, no sooner than beginning to look into the specific proposal for reform on this question, do we once again find shortcomings and incoherencies. The Explanatory Statement of the Draft Organic Bill (certainly, quite a lot more exhaustive when explaining the content of the reform than the Impact Assessment Report on legislative initiatives) gives us the arguments used by the Government to propose the suppression of Book III. On the one hand, there is "the notorious disproportion that exists between the legal goods that they protect and the investment in time and resources that are required by their trials". In relation to that, on the other hand, there is "the doubtful necessity that behaviours lacking sufficient seriousness in many cases, should be subjected to a criminal sanction". With regard to the first argument, the Report says that the aim is to "reduce the number of matters of petty importance that at present absorb a great part of the available material and personal means",[29] in order to achieve a "rationalization in the use of the public service of the Administration of Justice, through the suppression of criminal infringements that constitute petty crimes for their processing through other channels for conflict resolution". However, there is no trace in the reform of a regulation on criminal mediation, which would be a satisfactory alternative route for the solution of conflicts that arise with present-day petty crime (not those that are incorporated as minor offences in Book II, of course), so that these offences "can find a response through the system of administrative and civil sanctions". Nevertheless, it is fair to recognize that this is neither incorrect nor inappropriate. On the other hand, with regard to the second argument, that relates to the principle of minimum intervention with the desired lightening of the workload of the overburdened Courts of the First Instance, the Report perseveres in that line. It affirms, after explaining the economic and legislative impact that the suppression of Book III would have, that not only "no procedural innovation nor need for new resources is foreseen", but that "a reduction in the present workload" will even be achieved, and they will allow "better exploitation of the available resources". So, it is true that there are petty crimes that are "decriminalized", but only a few that are applied least of all. The majority of the most important infringements are recategorized as minor offences. The aforementioned process implies, of course, that the instruction of procedures for these infringements will have to continue, now as minor offences, in the Courts of First

[29] In the chapter dedicated to economic and budgetary impact, empirical data are presented to give us an idea of the scope of this "overload" involved in the processing of these petty offences: "the suppression of petty crimes is, in itself, a reform from which a positive economic impact will be likely. Recently, the General Council of Judicial Power proposed the decriminalization of petty crimes as one of the paths that should be explored to reduce litigation and thereby to unlock resources tied up in the courts of justice. According to the available statistics, almost 71 % of the total number of cases admitted in 2010 in all the jurisdictions were of a criminal nature and, in turn, the Courts of First Instance –which try the majority of petty crimeshad taken cognizance of 3,448,548 of the 6,639,356 cases (almost 52 %) that were processed under criminal law in 2010".

Instance.[30] In brief, is it certain that there would be "a reduction in the current workload"?

The finishing touch to the deficient material compliance with Royal decree 083/2009 and hence, to the directives on the acceptable content that the "Impact assessment report on legislative initiatives" should have, is made patently clear at the start of the chapter dedicated to "Impact Assessment" in the following words: "This reform of the Penal Code will have an important impact on Spanish society", accompanied in the following paragraph by an "In consequence, it will be society as a whole that will see the safety of its daily routines improved, from both a legal and a sociological point of view, as it is a reform that is especially directed at preventing crimes perceived as particularly serious that affect coexistence". An affirmation that is finally followed by a "Likewise, the reform brings technical improvements to the code and its efficacy is augmented, which amounts to benefits for legal professionals" ... One question after another is raised by this wording: perhaps the Government defines what it understands by efficacy? How is efficacy measured to say what is augmented by the reform? How has it managed to determine which "crimes" are "perceived as particularly serious" by society on an empirical basis? How "important" will the impact of the reform be on Spanish society? Is it true that the only impact will be from the point of view of the safety of its daily routines? What about the impact on the liberty of the general public? Does it exist? Is it difficult to quantify? As much as the impact that affects safety, or even more? And, on the other hand, returning to what has been described above: in what sense are there no alternatives to the modification of the Penal Code in matters that the Bill regulates? What of the Criminal Law dimension of "*ultima ratio*" in relation to the principle of minimum intervention?

4.4 Conclusions and Final Remarks

In short, all these questions without a response, along with the analysis of the preceding pages, brings us to a preliminary and important conclusion. It is that, in spite of the current regulatory framework in Spain for legislative evaluation (for over 20 or 30 years of course), as we said at the start of this work, there is no deep-seated culture of legislative evaluation in general terms. Not for nothing has it been accurately affirmed that Spain has traditionally been "resistant to the culture of evaluation" that exists in other countries and that it is a country in which resources are neither set aside nor granted "for the preparation of evaluations of reforms

[30] Although the introduction of "criteria for opportunities that allows the Courts and Tribunals, at the request of the Office of the State Prosecutor, to renounce the prosecution of behaviours that, even though they may be offences, are however of minor consequence in relation to which their prosecution is not in the public interest".

introduced according to criteria of independence and scientific seriousness" (Tamarit Sumalla 2007, p. 3 f.).

Of course, it is equally possible to speak about a legislative tradition distanced from evaluative culture in the field of criminal legislation, but also, more recently, of a weak political will to apply the incipient evaluative instruments which our Legal Order has at present. With regard to the first point, in effect, in the preparation of all the pre-legislative documents that have been attached to the successive criminal reforms carried out since the Penal Code of 1995 up until today (right now more than 30), not even one "preliminary study on the identification of problems and the proposal of strategies"[31] has been carried out (I have already stated that we have found no trace of the Questionnaire since 1989–1990 in the reforms that have been approved up until 2009), nor have the texts been subjected to "a transparent and public procedure of consultation with the scientific community and the professional sectors related to the criminal system" (Tamarit Sumalla 2007, p. 4), as does happen in other States. With regard to the second point, the weak political will to apply the incipient evaluative instruments now available to the present-day Spanish legal Order, which was set forth as a partial conclusion in the analysis of the so-called pre-legislative phase in Spain, has been upheld in this study: working practice demonstrates that, in the recent criminal reforms, the demand for documentation that by obligation has to be attached to a Draft Bill of Law is only complied with by the competent organs in a "formal or superficial" way, so that not even the new regulation on legislative assessment introduced by Royal Decree 1083/2009 has had an impact on the past two greatest criminal reforms undertaken. Or, to be more rigorous in the description of the situation, we can speak of evident and outright incompliance with these requirements in the 2010 reform, and of negligent incompliance in the reform submitted for approval to the *Spanish Legislative Chambers* at the end of 2013, which has been finally approved in 2015. A strong will is therefore missing on the part of the executive powers (as well as the legislative powers, which does not excuse the attitude of the Government) to evaluate its legislation and their effects on society. This weakness is especially serious in the case of criminal norms; all the more so if we take into account that they impact more severely and more seriously on individual freedom, by restricting it.

As things stand, the search to find ways to inculcate that political will for satisfactory compliance with the existing evaluative instruments has to be the main priority, in order to undertake successive criminal reforms (I am afraid that within no less than a few years we will have more than surpassed the 35 of so of them since the approval of the original text of the present Code in 1995). One of

[31] In reality only one of the multiple criminal reforms pointed to "an evaluation standard" in one of its Additional Provisions: Organic Law 7/2000, of 22 December, in reform of Organic Law 5/2000, of 12 January, on the criminal liability of children. Legislation that Tamarit Sumalla rightly brands as a "sarcastic anecdote", as it contains "a surreal mandate to the future legislator to penalize certain crimes with greater vigour, leaving it understood that the results of the evaluation are known beforehand". (Tamarit Sumalla 2007, p. 4).

these ways forward could, without a doubt, be the one embodied in the "Working Group of Criminal Legislative Policy" which is collectively presented to the scientific community with the publication of this work, which contains very many different proposals for the strengthening and improvement of evaluative activity in relation to Spanish criminal norms. The leading ones will be made public over the coming years. We hope that at least some of them may be taken on board, sooner rather than later, by those responsible for the administration and the drafting of criminal reforms in Spain.

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Chapter 5
Institutional Redesign Proposals for the Preparation of Criminal Policy by the Government. The Focus on *Ex Ante* Evaluations

José Becerra

Contents

5.1 Introduction

It could be said that in recent years practically no one has placed a criminal-law proposal on a justice minister's desk that has not focused on harsher legal measures.[1]

[1] For a qualitative detailed analysis of criminal law reforms since 1996 up until 2011, see Díez Ripollés (2013b, c, p. 4) from which he concludes that "[...] one of the qualities that best characterizes the relentless criminal legislative events over the last 16 years is the increasingly accentuated tendency towards the expansion and hardening of the Spanish criminal system".

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Having already reached the limits of life imprisonment,[2] it might be thought that this dynamic is arriving at a cul-de-sac from which there is at present no way out for our governments. But there is still some way to go along present lines: post-crime security measures, ignominious punishment, physical punishments, etc., and, in addition, the evolution of comparative Criminal Policy provides us with examples from other areas to employ in the search for new forms of punishment.[3]

Nevertheless, criminal and criminological scholars have not been able to offer convincing alternatives for political authorities in this recent punitivist era that culminate in the express reintroduction of life imprisonment in Spain. Perhaps this indicates the need for a different strategy with which to confront the future.

With regard to academics and professionals associated with Criminal Policy, indications of this new strategy are already starting to show, such as the role recently played by some of them on an expert lobby group.[4] Other works must be added to these labours of external control with the aim to impact not only on the rather fundamental *contents* of Criminal Policy, but also on its *processes*. These are the premises on which this work is founded, in which I intend to discuss in part how Criminal Policy is approached in Spain but, above all, how it could be done in such a way that it could, presumably, yield better results. My objective is to arrive at that purpose with a certain level of detail, proposing who should do what, when and in what way.

I will defend the suitability, in my opinion, of evaluation knowledge for the improvement of Criminal Policy (Mears 2010, p. 44 f.). It is increasingly evident that legal aspects of Criminal Policy can benefit from other fields of knowledge in a profound way[5] and it is not by chance that, in Spain, some of the scholars interested in this subject matter, have taken firm steps to inquire into disciplines more or less distant from Law, such as Economics, Criminology, and Political Science.

In effect, the study of public decisions that govern the creation of criminal policies requires a holistic approach, the only way to understand the dynamics

[2] I am assuming as a fact that revocable life imprisonment will be finally incorporated in the reform of the Criminal Code that was under debate in the Senate at the time of writing these lines.

[3] In relation to the limitations of political, civil and social rights, unrelated or only slightly so, with the crime that was committed, see an analysis of the situation in the USA and the European Nordic countries in Díez Ripollés (2014), p. 5.

[4] Although it is not something completely new, the lobbying recently led by the Criminal Policy Studies Group does appear to me to be of special intensity. In relation to the reform of the Criminal Code put before the Spanish Parliament in September 2013, this Group has articulated a combined strategy of presence in the media, meetings with parliamentary groups, appearances at the Justice Committee of the Congress of Deputies [Spanish Lower Chamber] (muy bien esto), preparation of documents as well as the organization of simultaneous events at various universities reading a manifesto and explaining its point of view on the reform. See as an example, the news item "Juristas contra el Código Penal [Jurists against the Criminal Code]" (http://cadenaser.com/ser/2015/03/04/tribunales/1425425154_088827.html), last visited 22 March 2015.

[5] See the report of the Commission for The Study And Creation Of A National Agency For The Evaluation Of Public Policy (p. 21). Available at: http://www.aeval.es/export/sites/aeval/comun/pdf/agencia/Informe_comision_expertos_esp.pdf.

that shape those policies. One alternative is to pay attention to specific aspects, such as the study of the actors that participate in Criminal Policy making, for example. However, the correct interpretation of the findings will be difficult without the knowledge of other previous or subsequent phases, or the legal powers of different public bodies and institutions that participate in the process.[6]

This work seeks to contribute to completing the map that will allow us a better understanding and management of the dynamics that govern Spanish Criminal Policy.

5.2 Proposals for Institutional Redesign

My intention over subsequent pages is to propose specific reforms thanks to which Spanish institutions would be in a better position to confront the challenges of Criminal Policy nature. These reforms will focus on the bodies that configure Criminal Policy and on the contributions that may be made to them from various disciplines, especially *from a public policy evaluation perceptive*.

In the Criminal Policy context, the evaluation of programmes in Spain finds itself in a situation of absolute abandonment. Together with that, the interesting initiatives that have been developed over recent years on policy evaluation have yet to reach measures of a criminal nature.

As Medina Ariza made clear in relation to the introduction of situational crime prevention policies in Spain:

> Our society, in general, does not evaluate or evaluates little. The greater part of political actions and reforms that are carried out are inspired by comparative experiences, by criteria of an ideological sort, or by popular theories of social reality (Medina Ariza 2011, p. 372).[7]

This is why my proposals will centre on trying to provide institutional spaces for evaluation tasks in those bodies that should take charge of it. Due precisely to my focus on institutions, I will make proposals for the governmental or pre-legislative phase; in other words, in relation to the preparatory tasks of public policy proposals by Government, something which normally but not always takes the form of a bill.

I will therefore give no consideration in this work to both the sociological process prior to Government actions in which the mass media, the general public and different actors reflect a concern related to criminality[8]; as well as to the subsequent introduction of the proposal in Parliament for debate in both chambers.

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[6] Ibidem, p. 24.

[7] The work of Medina Ariza is filled with concrete references to significant shortcomings in the evaluation of different crime prevention models, an especially serious situation in Spain.

[8] See the analysis of this sociological process prior to placing social problems on the public agenda in Díez Ripollés (2003), pp. 20–49; and in Ruiz Seisdedos and Ortega Pérez (2005), p. 127 f.

In this context, therefore, a first question in relation to the preparation of public policies of a criminal nature by the Government may be formulated: is our governmental structure prepared to approach the drafting of Criminal Policy with a certain expectation of success? Anticipating my response to this question, another one is raised: what may we do to improve the situation?

I seek to provide a response to both questions in the following pages.

5.2.1 The Pre-legislative or Governmental Phase

Despite the multiple actors that can intervene in the preparation of a legislative proposal to be put before Parliament, it is well known that Government usually assumes a leading role which will allow it to direct all of this phase practically at will. In one way, this situation is logical, as legislative activity is the principal tool that Government has for the development of the political programme for which it was voted.[9]

Therefore, this governmental leadership is reasonable from the perspective of the stability of political institutions and their capability for action.[10] However, if we analyze it from the perspective of democratic plurality or checks and balances in the distribution of powers in our country, such a concentration can be turned into an overbearing capability to place government criteria over and above any other political or social actor.

Precisely as a consequence of this second argument, in which the preparation of more pluralist legislative proposals would be missing, I think it is open to criticism the fact that Government is allowed to present its proposals before Parliament without even hearing any other opinion apart from its own. The intervention of other actors that could contribute with relevant information and criteria on Criminal Policy decision-making appears rather convenient. This does not refer so much to political consensus but to *technical and/or scientific consensus*.

With such an objective in mind, I will defend a sort of distribution of tasks between Government and Parliament. Thus, the activity of the former would have to concentrate its attention on fields of expertise when constructing Criminal Policy

[9] See for a quantitative and comparative analysis of the proportion of legislative initiatives from government among the norms finally approved since 1989 up until 2008 in Becerra Muñoz (2013), pp. 436–441.

[10] And even recommendable, taking account of the serious consequences that the balance of parliamentary majorities may have in systems such as the United States. In that country, following the 2014 midterm elections, the Republican Party controlled the House of Representatives and the Democratic Party, the Federal Government. Governability was therefore very difficult since President Obama held the power to veto parliamentary initiatives and the House of Representatives can overturn legislative proposals from the Government. This situation does not however apply to Spain where national elections are single events, the results of which return a parliamentary majority that chooses the President.

(especially in those within its own Administration), while legislative power, in turn, should occupy itself with the conflicting arguments between political groups and the various stakeholder organizations and associations outside the Administration.

This separation of roles seeks to be a juridical-political *orientation* for the actions of Government and Parliament, and in no case into an obligation that would restrict the independence of these fundamental powers. In this sense, I am not defending that Government should deny a hearing to a professional association because a proposal is still in a pre-legislative phase. Such intention would be, not only out of place, but also totally illusory. What I seek to do with this specific separation of tasks is to ensure that social participation and ideological debate do not work to the detriment of the necessary expert's debate on Criminal Policy. This expertise, although still far from offering absolute solutions, is available to provide context, as well as calm and in-depth analysis to the deliberation.

The objective of all this is to be able to have not only a political but also a technically powerful government. A government that is especially capable of undertaking ex-ante evaluations, as we shall see, with the knowledge and the means that allow it to direct a complex process in which political will related to the available alternatives may be integrated from an ideological but also an expert standpoint.

My proposal will maintain Government as the executive centre of decision-making and in control of the whole process. In my opinion, it is a matter of grounding its leading role in something more than political power, thereby consolidating a preeminent position that is also based on an organizational structure as well as on professionalized and stable procedures.

This new distribution of roles that I propose requires various steps: in the first place, we should identify the governmental agency that will drive and lead the pre-legislative phase in criminal matters; it is also necessary to define who will take part in the aforementioned internal network involved with the Government in that task (and who will inevitably be left out); and, finally, I will make some proposals pertaining to the processes that should be available to carry it all out.

5.2.2 The Criminal Policy Division

In the first place, therefore, I believe it is central to identify an agent that is capable of managing the preparation of Criminal Policy proposals within Government. Something that involves, I believe, the formation of a new body within the Ministry of Justice: a Criminal Policy Division.[11] The fundamental role of this Ministry in

[11] The present configuration of the Spanish Ministry of Justice contrasts with the general pattern in other western democracies in which bodies with specific duties in criminal matters exist. These are units that in various ways combine two fields of knowledge: criminal matters expertise on one side and specific skills on legislative technique on the other. All of this is lacking in Spain. For a more detailed comparative analysis, see Becerra Muñoz (2013), pp. 356–360.

matters concerning Criminal Policy within Government bodies makes it, I believe, into the ideal place in which to apply these reforms.[12]

The staff of this new Division should be stable and specialized in Criminal-Policy matters; in other words, they should combine legal and criminological knowledge, although other relevant professional profiles should not be discarded (Díez Ripollés 2003, p. 46). For example, knowledge related to the way public administrations work, or to public policies management should be highly appreciated.

A good example of such model is the Office of Policy and Legislation in the United States, in which law scholars and policy analysts exercise different and complementary abilities. The former is in charge of the preparation of legislative proposals and the subrnission of comments with regard to legislation that is underway, while the latter studies criminal legislation that is put into practice, as well as the criminal justice system, from the standpoint of public policy and management. In addition, they work on the identification of problems and tendencies in relation to these matters, they analyse federal data and statistics, define alternative measures and prepare recommendations.[13]

Such tasks distribution shows us another way of approaching Criminal Policy: from a broad perspective, capable of using instruments of intervention that are not always fixed on the limited horizons of the Criminal Code.

Such a body, with the features I will specify, would be in an unrivalled position to perform an authentic assessment in the purest political and criminal terms, with capacity for feedback and growth through its experience with successive interventions. It would differentiate itself from bodies with a much closer relation to the political strategy of the Ministry, like the Minister's Cabinet Office, with which it would have to establish close working relations.

5.2.3 The Role of the Criminal Policy Division in the Definition of Problems and Agenda Setting

Looking at the tasks undertaken by this Division during the process of drafting Criminal Policy in a little more depth, it would already have an important advisory role with Government in the first moments of the *definition of the problem*. It is still a question of the first stages of the pre-legislative phase, informal spaces in which social demands continue to gain ground, but in which a certain sort of analysis of the emerging situation is crucial.

[12] For a quantitative analysis of the participation of the Spanish Ministry of Justice in legislative drafts on criminal matters from 2004 to 2010, see Becerra Muñoz (2013), pp. 529–531.

[13] See the webpage of the Office of Policy and Legislation at: http://www.justice.gov/criminal/about/opl.html. Last accessed 22 March 2015.

Precisely because we find ourselves in an early phase, this initial work centres on ordering what will probably be an amalgam of various problems difficult to identify and distinguish among each other (Quade 1989, p. 99). This is probably the stage at which the Government should react with greater speed in the face of successive events around it. Typically, it will be a matter of temporary but intense attention from the mass media surrounding a tragic criminal event that monopolizes their attention for different reasons.

Anybody who follows daily news knows that there will be no time to carry out complex studies or evaluations before the Government receives a telephone call requesting it to state its position on the matter. Moreover, there are chances for the issue to be placed on the public agenda if it has the right characteristics, which would mean we would be facing crucial moments for the future Criminal Policy. In such situation the initial response can seriously influence subsequent decisions on the matter, being even able to influence the features of the problem itself (Parsons 2007, p. 120).

In such situations, the value of a stable body, able to accumulate experience and knowledge on Criminal Policy issues becomes of great importance due to the recurring nature of public policies, which ensures continual reopening of debates on matters to which responses have been sought on earlier occasions.[14] It is highly likely, therefore, that the specific criminal problem can be tacked with existing information on possible strategies, but for which experience and management skills are needed to deliver a fast response both politically and technically appropriate.

It is reasonable to think that we find ourselves up against a constant and tiring return of Criminal Law reforms at least partly because of the difficulties that governmental agencies face to respond quickly and accurately to these types of demands. An amendment to a criminal piece of legislation is a cheap alternative (Pérez Cepeda 2007, p. 382) and it guarantees an advantageous position in the two possible scenarios: on the one hand, if the Government finally decides to intervene on the subject, it will introduce a bill in Parliament, which will have every possibility to be passed. In case it finds no support, it could always be claimed that action was taken and blame it on other parliamentary groups, especially the opposition, that made it impossible to reach consensus over the proposal.

On the contrary, there may be no real intention whatsoever of amending the legislation, but simply of managing the crisis in the best possible way until another matter captivates public attention. In such case using a statement similar to this: "the Government is working on a legislative proposal to bring to Parliament" will buy time. This technique is also useful to water down public demands in potentially everlasting and opaque parliamentary procedures.

There will therefore be cases in which the Government will not really have a great interest in approving a quality policy in criminal matters, but it will in others.

[14] Such recurring nature of policies is an unquestioned idea in Political Science. See Quade (1989), p. 74.

In this second case, both the risks and the opportunities differ from those pointed out earlier.

Various authors have worked on the underlying motives for the selection of certain matters worthy of attention from political leaders, especially in criminal matters. Although this is not the place to go into them, I will mention an interesting argument according to which public authorities, especially the Government, have a reduced margin of real influence in criminality related problems. We frequently speak of criminality as the last link in a chain that has its beginnings in matters in which intervention is either not desired or not possible ata given moment: poverty, social marginalisation, unequal distribution of wealth, etc. All of it contributes to a superficial problem definition when it comes to criminality and to a search for direct connections with most evident social concerns. As a consequence, problems of enormous complexity are interpreted and approached, that is, defined, in very simple and partial terms, something that in most cases turns into the amendment of criminal legislation under the argument that problems of this nature are exclusively normative or related to a proper adjustment between the law and social reality (a reality that will be radically modified as soon as there are changes on its regulation).[15]

As Redondo Illescas and Garrido Genovés argue: "Criminal policies work in an unscientific manner, in general, in other words with total ignorance of the available knowledge or, even worse, in an counter-scientific way, doing exactly the opposite to what criminological knowledge prescribes" (Redondo Illesca and Garrido Genovés 2013, p. 126).

This being the situation, my proposal intends to contribute to change the situation, but instead of doing so through direct confrontation with its premises and consequences, and using Criminal Law principles as benchmarks (legal certainty, *ultima ratio*, division of powers, equality, etc.; something necessary and I have done on other occasions), I will seek to promote an alternative course of action.

That is why from the first stages in the definition of the problem, the objective of the Criminal Policy Division will be to foster a more technical organizational culture in the Ministry of Justice and the Government to supervise the passage of matters from the *systemic agenda*, where demands from society are picked up, to the *institutional agenda*, where matters on which authorities decide to take action are placed.[16] In other words, it is a question of interposing a barrier based on Criminal Policy deep knowledge to provide an appropriate response to the pressures that every decision-making body faces when drawing up its institutional agenda (pressures not only coming from the general public, but also from various

[15] For all, see Brandariz García (2014), pp. 99–104. "Civil servants may design security policies that operate, above all, at a communicative level (...) the fundamental objective of which is to mitigate indignation and collective fear, as means of restoring credibility in institutional capacity to control crime".

[16] On both concepts, see Ruiz Seisdedos and Ortega Pérez (2005), p. 120 f.

stakeholders calling for their interests to be considered[17]). What doubt is there that the Government should have a series of instruments available for better decision making in the interlude between both points in time.

5.2.4 The Increase of Criminal-Policy Options

The definition of problems and agenda setting are activities that determine the following task in which the Criminal Policy Division should play a relevant role: *the description and selection of possible alternatives*.

Solutions focused on legislative reform should no longer be the usual procedure of the Spanish legislator, for which an assessment capable of offering realistic non-legislative alternatives is fundamental: management reforms such as checking whether the material resources and staff assigned to the implementation of a measure are sufficient; the request for research about the characteristics of certain criminal issues, or of evaluations of policies related to them; the use of communication campaigns to raise community awareness about certain matters; the increase of coordination with other ministries and administrations in a joined response to an identified problem; the support of implemented and trustworthy measures; or, simply, the conviction that a rare event has occurred and the trust on the instruments already in force. All these are generic non-legislative alternatives, or at least not exclusively legislative, which consider public criminal politics as a much broader and complex system than those exclusively related to legal rules.

To diversify the alternatives that are usually contemplated, Criminal Policy Division staff will have to intercede in a very much consolidated dynamic in Spain, which provides significant benefits to their users: the communicative relationship that exists between political power, the mass media and a society terrified by crime (Brandariz García 2014, p. 102; Pérez Cepeda 2007, p. 379 f.).

It will obviously not be an easy task and neither am I defending the creation of an body with which I ingenuously seek to introduce a sort of Trojan horse into our executive power. We should not forget that the Criminal Policy Division will be part of the Ministry of Justice and will, therefore, be under the ministry's command.

I believe that if my proposal aims to be reasonable and realistic, it should focus, rather than in an improbable change in policy orientation, in two questions of a pragmatic order, which could constitute a good foundation: the training of its staff and the information that it should manage.

[17] An example of such pressures is the frequent reference to international commitments. See, on this, "Código Penal: ¿dónde están los crímenes más graves?", El País newspaper, 20/03/2010, where the president of Amnesty International Spain criticized the Criminal Code reform that began in 2009 because of certain "omissions" in matters contemplated in such norms as the Rome Statute of the International Criminal Court, the Convention Against Torture and the UN International Convention for the Protection of All Persons from Enforced Disappearance.

With regard to the first question, *the training of its staff*, the hard core of this Division would be composed of expert staff in criminal matters: criminal lawyers and criminologists. However, other professional profiles could be of great help such as, for example, I.T. experts for the construction of new communication networks, databases and records; economists to carry out cost-benefit and cost-efficiency evaluations of the different policy alternatives; engineers for the evaluation and improvement of processes; etc.

To support the idea of professional diversification I will refer, for example, to the terrible conditions of the economic reports in our criminal legislation. If there is something that could help to refine the available alternatives in public policy adding realism to proposals, that is the economic and budgetary situation at the time the policy is drafted. Unfortunately, our legislator does not consider this a fundamental matter or, most probably, does not have professionals among its staff who are able to give it the importance that it deserves.[18]

In the Criminal Code reform that took place in 2010, for example, the economic report is an easy way to show what happens when a team without economic expertise drafts such a document. Conclusions like: "This reform is absolutely neutral in relation to the material resources and personnel of Criminal Courts", which are declared without showing any calculations or reference to a budgetary chapter whatsoever, are simply out of place.[19]

With regard to the second topic, *the information that the Criminal Policy Division staff should manage*, though it is an issue closely connected with the staff training, I would say there are some important things to mention.

We certainly have a high-level scientific production regarding criminal-law studies, whether dogmatic or of a comparative nature. However, Spain is failing on two fronts: first, in studies of an empirical nature about the Spanish Criminal Policy reality and, second, in the incorporation of information from non-legal sources to the decision-making process, among which I would highlight once again the contributions of Criminology.

Despite all this, there are already enough studies and sources of data of such nature for the Division to be able to carry out an important work of compilation,

[18] In an opposite way, see Brandariz García (2014, p. 115), who argues that "the new Criminal Policy purpose is the efficient management of criminality, seeking the—most economically possible—minimization of its effects". In my opinion, the author reflects in this argument the situation in societies that are not the Spanish. I think we could still benefit from an actuarial approach in a Criminal Policy drafted intuitively by people without expert knowledge. His argument warns, however, of the excesses of this perspective which, I insist, is still far from being a danger to the Spanish situation.

[19] And all of this in an economic impact report of two pages in a reform that affects roughly 25 % of the existing Criminal Code. In the same sense, see Rodríguez Ferrández (2013), p. 32. This author offers an interesting and careful analysis of the different reports that were annexed to the bill that was finally passed in Jun 22nd 2010.

processing and interpretation to provide assessment to the Government from scientific standards that up until now have rarely been available.[20]

In addition, the Division could work with the reports and documentation that is already periodically produced by different institutions, such as the National Prosecution Service, the Judiciary, the Office of National Statistics in their legal reports, the statistics on crime rates from the Ministry of Internal Affairs, the information regarding prison population from the different authorities that manage the prison system in Spain, etc. (García España and Pérez Jiménez 2004, p. 13 ff.).[21]

Together with this, the Division itself could promote the delivery of annual reports and periodic studies by sponsoring all or part of it, it could also request information from the corresponding authorities or fostering the study and analysis of information on Criminal Policy matters, as well as the systematic collection of empirical data.[22]

We should not forget that, as it happened when studying the definition of the problem, we face fundamental aspects for more rational decision-making in the preparation of alternatives. The steps taken in this area will determine deeply the final features of the policy.

5.2.5 Actors in the Pre-legislative Phase: The Creation of a Network Coordinated by the Ministry of Justice

Up until this point, I have discussed the potential of this Criminal Policy Division at very early moments in the drafting of Criminal Policy measures. There is no doubt that, from the beginning of the process, the Ministry of Justice will be subject to the most diverse collective and individual pressures so that the decisions consider specific interests. This is the reason why another field in which my proposal seeks to ease the task of our authorities is related to the management of such pressures.

From an early moment, the Ministry of Justice must start to coordinate two activities: decisions relating to the problem and decisions relating to the actors around the problem. Political entities usually face both scenarios simultaneously, foreseeing the reaction of individuals and groups of relevance to the decision maker at each step of the public policy. I suggest reorganizing the situation, not calling for a radical turn in the reality of what currently happens, but proposing certain

[20] As Redondo Illescas and Garrido Genovés (2013, p. 126) assert, "nowadays there is a lot of criminological knowledge that could have practical implications, but such knowledge is very scarcely used (...) in the preparation of criminal reforms".

[21] For an overview of information sources for the study of criminality, see Redondo Illescas and Garrido Genovés (2013), p. 179 ff.

[22] For example, sponsoring particular or periodic projects, or promoting agreements with universities.

adjustments and standards that, I think, could positively affect the activities that are usually carried out.

Although the previous problem-definition phase will normally be marked by swift action and the Criminal Policy Division will have to respond rapidly by using its own resources, once the minister decides to take action and study the existing alternatives, we enter a phase in which, in my opinion, the Division should change its approach, from a work predominantly oriented towards the inside of the Ministry of Justice, to act as an authentic *facilitator* of public policies of a criminal nature.

So, we find ourselves at a point at which the decision to create a new policy has been taken or, more probably, to reform an existing one. The real creative work starts, therefore, which steps will determine the impact of the policy on society.[23]

It is essential to organise the Division as a liaison body inside a much broader, diverse and complex organisational structure than the one usually considered when drafting policies. The common reference to only a few agents as those responsible for all Criminal Policy governmental measures is built on the fiction that criminal legislation, as a central, federal or state power, does not involve any other level of the Administration in our country. According to this weberian or legal-rationalist vision of public policies, Government would monopolize the capability to innovate and to prepare every command and, as a consequence of the hierarchy of the system, every precept contained in such command would be accurately followed (Weber et al. 1946, p. 51). In such an ideal model, the policy decided by the Ministry as the dominant executive body is applied in the same way across the territory and the system itself as well as the individuals that participate in it are not considered variables to be taken into account. This is known as a *top-down model* from the perspective of policy implementation (Birkland 2001, p. 179; Blázquez Vilaplana and Morata García de la Puerta 2005, p. 156; Becerra Muñoz 2013, p. 314 ff.).

Organizational as well as public administration studies agree on the limitations of any analysis that does not take into consideration the difficulties that public policies face during implementation stages.[24] Although possible courses of action are still being thought through and implementation is a long way off, the need to anticipate future difficulties is essential for the correct development of the policy.

The case of Criminal Policy in our country is paradigmatic in this sense, as it is created by authorities which will not have the power to implement it. Such situation is a failing in the theoretical weberian command structure that should not be overlooked. From this perspective the risk lies in the possibility that the variety of bodies and individuals that manage the policy add their own rationality to it, increasing the gap between the actual implementation of the policy and the initial plan.

[23] Let us remember that, as public policy analysis literature claims, the decision of doing nothing should be an alternative taken into account, either because the situation is not serious enough for Criminal Policy measures, or because other forms of intervention outside of the criminal context might alleviate the problem sufficiently, etc. (see Mondragón Ruiz de Lezana 2005, p. 134).

[24] Criticising an exclusively top-down approach, see Birkland (2001), p. 181 and Meny and Thoenig (1992), p. 161.

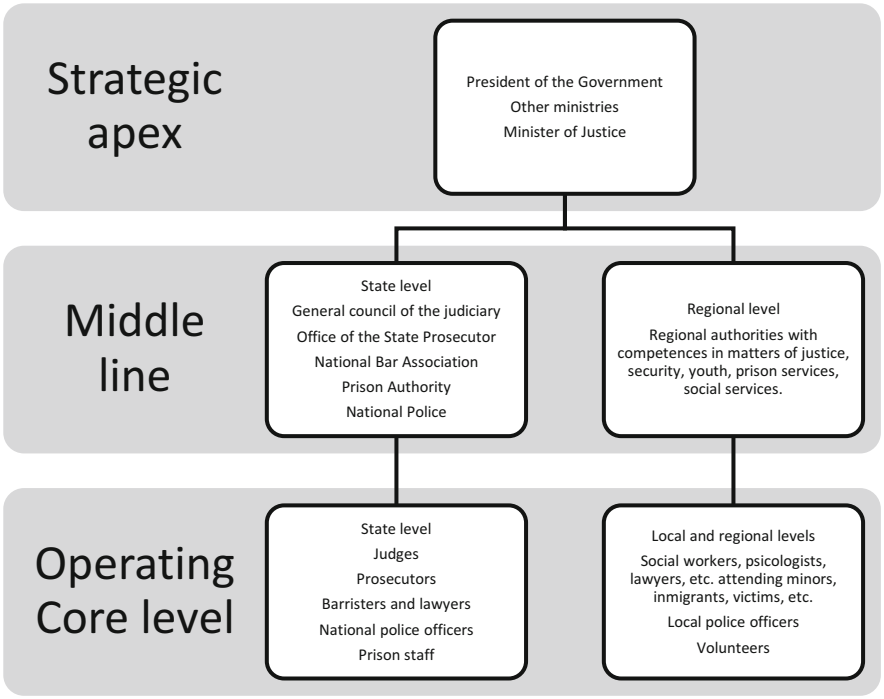

Fig. 5.1 Structure of the internal coalition for the drafting of criminal policies

It has to be assumed that at a certain point, the interpretation of a Criminal Policy will depend entirely on those bodies and individuals, which is why the combination of this *top-down* scheme with the *bottom-up model*, already at this early stage of planning, is essential.[25]

Therefore, the need for a balance between both perspectives is greater in Criminal Policy matters than in other fields. The *top-down* perspective should play, no doubt, a leading role, as we are talking about an area of centralized power in our country which implementation is subject to strict principles. As a consequence of this, coordination and homogeneity of policies by the Government is key. We are not facing an area of policy in which the adaptation to particular cases is a priority but, on the contrary, such adaptation to reality should guarantee a certain level of uniformity.

Together with that approach, the *bottom-up model* highlights the reality of Criminal Policy, in other words, the involvement of a large number of institutions at various administrative levels to deliver it.

An organisational structure that takes this combined perspective into consideration and, therefore, seeks to reflect with greater consistency the reality of implementing policies of a criminal nature, could be represented like in Fig. 5.1.

[25] On this second model, see Ballart and Ramió (2000), p. 520.

As Fig. 5.1 shows, individuals who traditionally prepare Criminal Policy apparently on their own constitute the strategic apex, running criminal policies above all of the other actors.

All the institutions and individuals who are found below them are splitted up in two different ways: *vertically* they constitute the middle line and the operating core. The first of them is formed of authorities and institutions that act as large-scale intermediaries of Criminal Policy, with the capability to direct the material resources and personnel in during its implementation as well as to interpret the content of policies. The second is formed of workers who directly execute the commands from higher entities in front of those that are the target population of criminal policies. *Horizontally* they are divided between those that carry out their activities across national territory from those that do so within smaller areas.[26]

According to Mintzberg's terminology, such an organisational structure classifies the so-called *internal coalition*, that is, actors who find themselves inside the organisation, making substantial contributions to the decision-making process. On the other hand, the *external coalition* exists outside that circuit and its actors require an intermediary within the inner coalition to be able to influence the process (Mintzberg 1992, p. 37 ff.).[27] From a contingency theory viewpoint, the organisation that we have defined as an internal coalition would be made up of the Criminal Policy subsystem, while a series of external subsystems or "contingencies" would be found around them, as shown in Fig. 5.2.[28]

Information access from contingencies to the Criminal Policy subsystem, in other words, to the internal coalition, will be easier in some situations than others. For example, even though parliamentary groups will be on hold during the pre-legislative phase, in Spain, the parliamentary group of the majority will have a privileged channel to that phase through the Ministry of the Presidency, a department that serves as a link between the different ministries, the parliament and the president. Thanks to this special communication channel, the opinions of the parliamentary group could be incorporated into the policy strategy at the highest level. We should also remind how bureaucracy presents very special characteristics as it is part of the internal coalition, but it can also appear as an external lobby in certain matters, in which case it will also have special mechanisms to influence policies that might be of specific interest for them.[29] Besides that, other actors of the external coalition will have to select the most suitable pressure strategies to impact on policy.

The definition of internal and external coalitions in the last two explanations contains both *descriptive* and *normative* elements. As I argued earlier, in many cases this scheme reflects reality better than a more traditional view, according to

[26] For a complete explanation of the organization chart, see Becerra Muñoz (2013), p. 549 ff.

[27] Using a similar terminology, Krieger (2001, p. 372 ff.).

[28] About theory of contingencies and organizations, see Lucas Marín and García Ruiz (2002), p. 172; Ballart and Ramió (1993), p. 47.

[29] Think, for example, of a reform of the working conditions of prison staff.

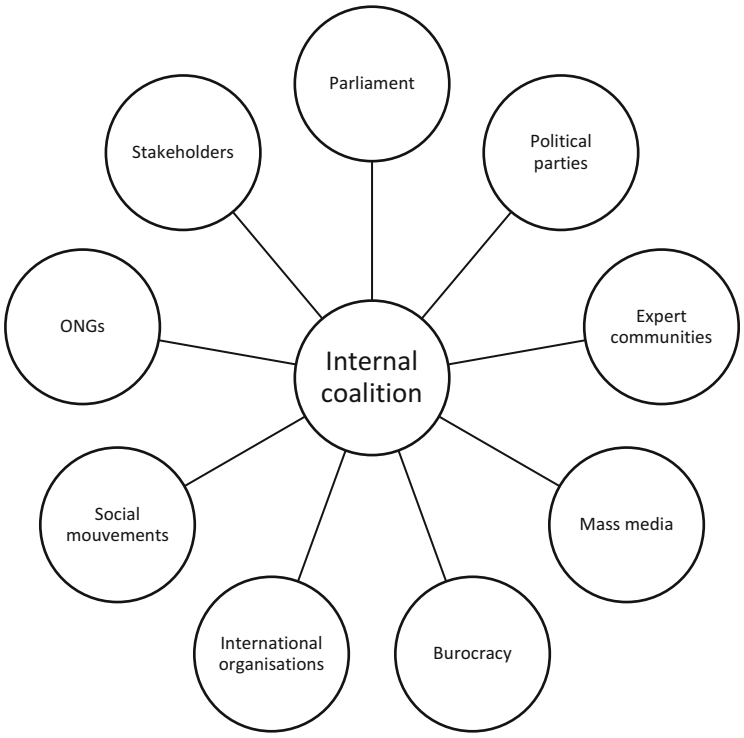

Fig. 5.2 Internal coalition and its external contingencies

which the power to decide would rest exclusively in the ministerial level.[30] But, in addition to that, I think that efforts should be made to maintain this scheme as it has been presented.

As pointed out earlier, a relative *division of tasks* between the executive and the legislative branches would be extremely useful. The pre-legislative or governmental phase should be the natural setting in which to focus on the internal coalition. It would be the time to ensure the participation of its various actors through communication channels that are almost obvious, as long as a public policy that may be implemented with a certain guarantee of success is the objective. The legislative phase, on the other hand, is the ideal setting, in my opinion, to incorporate the perspectives of those actors that were kept in the external coalition.

As I also pointed out, this division does not intend to be absolute (Government will indeed host any victim's associations or NGOs it wishes during the drafting of a policy) but an indicative one in the management of the process. The aim is that the phase-specific tasks in which we find ourselves are given priority in such a way that,

[30] For example, the role of the media in Criminal Policy is beyond discussion and shows the obsolescence of such traditional view. See Becerra Muñoz (2013), pp. 94–101; Brandariz García (2014), p. 92 ff.

although they may be complemented by others, their results should necessarily be incorporated in the drafting of any policy of a criminal nature.[31]

5.3 The Contribution of Institutional Reforms to a Better Evaluation of Criminal Policies

The analytical perspective I have used up until this moment, which could be called institutional, organizational or governmental, may be enhanced by contributions from a discipline that uses a complementary focus: the evaluation of programmes and policies.

It is a traditional field of work for criminologists,[32] although we face a subject that been worked in very different fields, like Political Science or Economy. Precisely because of that, multiple disagreements over basic questions are frequently found such as, for example, the very definition of what policy evaluation is and what it is not. Despite all these disagreements there is a well-grounded theoretical body of knowledge that understands evaluation activity as a specific field of applied investigation, in which theory and methodology merge to assess the performance of public administrations.

It is an area, however, practically unknown to legal disciplines, which conduct analyses that are similar to evaluations (consider the dogmatic study of criminal law which is similar to theory-based evaluations), but with their own methodology and criteria that differ from those used in the other social sciences.

From what might be considered as a more limited perspective of evaluation, this is conceived as an activity that is done at the end of the policy cycle (Subirats 1989, p. 40). However, the most advanced proposals describe two parallel processes: creation and application of policies, what in the evaluative literature is referred to as intervention, and evaluation itself. This is called the *combined intervention-evaluation process* as a public policy model that offers better results at both ends of the equation.[33]

[31] For reasons of space, I am leaving the discussion of the General Codification Committee out of this paper, a body that has an important specific role in all of this new dynamic. In my proposal, I suggest its attachment to the Ministry of the Presidency and its policy analysis to be focused on a medium to long-term view. See the comparative analysis on this matter and the proposals arising from it in Becerra Muñoz (2013), p. 378 ff., 541 ff.

[32] The Kansas City Preventive Patrol Experiment constitutes a classic evaluation of police action, conducted at the start of the 70s of the Twentieth Century (Kelling et al. 1974). See, likewise, references to the problem oriented police and situational prevention models as areas in which evaluation of results has been crucial for the development of the models from their beginnings (Maxfield 2001, p. 4).

[33] See a more careful justification of it in Rebolloso et al. (2008), p. 50. The original model proposed by those authors is found in Rebolloso Pacheco et al. (2003).

Among the multiple functions that may be attributed to evaluation activities (public accountability, transparency, participation, etc.) (Bustelo Ruesta 2006, p. 14 ff.; AEVAL 2010, p. 19 ff.), this model places the emphasis on evaluation as an activity that complements the intervention process, concentrated on an incessant improvement of all its aspects rather than on a sole confirmation of achievements (something that is also done at the right moment).

From this perspective, the role of the Criminal Policy Division in the creation of Criminal Policy is framed in the so-called *ex-ante evaluation*, in other words, evaluation activities performed before the policy is designed and implementation commences (AEVAL 2010, p. 47). In this kind of evaluation, various concepts are mixed together, sometimes referred to in a disordered way: contextual, conceptualization, needs, diagnosis and design evaluation.

Each one of these names give insight into their content, but there's a certain degree of overlapping among them that complicates a clear presentation. In addition, very frequently the evaluation literature just defines these concepts and gives them some content. However, in most cases, it does not propose specific strategies that go beyond a generic description of the appropriate research methods to be used at each time.

Besides all this, there is possibility of performing regulatory impact assessments. This is a new category which is rarely referred to in the evaluation literature but that has acquired renown among academics and professionals working in the drafting stages of legislation (especially in international contexts such as the OECD, the Council of Europe and the European Commission[34]). Actually, these type of regulatory assessment refer to issues that have traditionally been resolved in the *ex-ante* evaluation, without the need to use such a specific label. These are different techniques that constitute the so-called "planning studies" (Osuna and Márquez 2000, p. 36 ff.).

In this *ex-ante* context, the first evaluation that may be undertaken refers to the context. There are some authors who deny that context evaluation is authentic evaluation work, as no intervention programme at all is evaluated, but only the pre-existing conditions that incite the public administration to plan an intervention.[35] Despite all this, it is an indispensable analysis, in my opinion, for Criminal Policy making issues, and such analysis would be greatly enhanced if we place it in the area of evaluation, extending the work of evaluators to initial phases where their abilities are of great utility.[36]

[34] See, for example, the illustration in AEVAL (2010), p. 48 in which the regulatory impact assessment is placed among ex-ante evaluations, together with the valuation of problems, needs, diagnosis and design. See an analysis of the situation in France and the United Kingdom in Becerra Muñoz (2013), p. 399 f.

[35] Certainly, the programme does not exist yet at this early stage. In that sense, Fernández-Ballesteros (2001), p. 51; and, partially, AEVAL (2010), p. 91. See a discussion on this point in Vedung (1997), p. 24 ff., who also places himself among those who do not consider this type of evaluation (in fact all ex ante evaluations) proper evaluation activities.

[36] In the same sense, among others, Alvira Martín (1991), p. 37; Rebolloso Pacheco et al. (2008), p. 56 ff.

In any case, doubts are slowly dissipated as we stop considering context evaluation in an isolated manner and integrate this work in a more complex evaluation of a public action plan.[37] Such plan may contain a conceptualization, a study of the problems that should be confronted, a debate over the needs, a diagnosis of the situation and an intervention design, albeit probably very rudimentary. Regarding criminal policies, this type of information may be found in the foreword or introduction of a criminal law, if there were one, while the design will be contained in the body of the text itself. Nevertheless, these instruments are most of the times insufficient to allow an evaluation, as these introductory parts of legislation usually contain vague, even contradictory statements, as a proof of the political difficulties to reach agreements over the text that is finally approved.[38]

Another source of documentation suitable for evaluation of the criminal-policy decision-making process could come from pre-legislative phase proceedings, which include mandatory reports from different institutions. However, a deep level of evaluation may not be reached with this information.[39]

These deficiencies in the existing documentation and, therefore, in the real possibilities for evaluating the design of Criminal Policy, confirm the need to adopt this position that combines intervention and evaluation and that conceives of the two actions as two sides of the same coin.

5.3.1 Ex-Ante Evaluation in Criminal Policy Matters

I will now develop my proposal on *ex-ante* evaluation for the drafting of policy in criminal matters. The scheme, originally designed for the exclusive drafting of criminal legislation (Becerra Muñoz 2013, p. 560 ff.), which I think is totally transferrable (with some precisions that we shall see) to the field of public policies,

[37] In the words of AEVAL: "Ex-ante evaluation is the ideal of a culture that has successfully introduced the evaluation in the analysis of public policies with a holistic sense from the start of the planning process and not only at the end, when the programme or the policy is bearing its fruit". AEVAL (2010), p. 88.

[38] Santamaría Pastor (2001), p. 1402. See a deeper analysis of the introductory parts of a criminal law and how they should be considered in Becerra Muñoz (2013), p. 386 ff.

[39] With regard to the rest of the documentation, if there were any, that the Ministry of Justice could manage, the following words of Díez Ripollés are useful in relation to the Criminal Code reform sent for approval at the start of 2015: "during many months there was no way of knowing who, in the Ministry of Justice, had drafted the bill. And when you called the director general or an advisor they responded that they could not say. Some of those who we know that have participated continue saying that have not. That says a lot of a reform: the very people who drafted it do not wish to say that they were involved in it". Interview with El Diario published 24 February 2015. Available at: http://www.eldiario.es/andalucia/Jose-Luis-Ripolles-Derecho-Penal_0_360114085.html. Last accessed March 2015.

See, also, a sceptical analysis with the fruits (confirmed by the earlier news item) of the legislative impact report approved in 2009 in Becerra Muñoz (2013), p. 413 ff.

uses a legal norm or any other instrument of social intervention as its instrument (Vedung 1997, p. 155).[40]

In addition, the regulation with which this proposal is coordinated permits a body such as the Criminal Policy Division to take charge of the whole process.[41]

5.3.2 The Criteria of Rationality

In the first place, it is essential to explain the rationality model I will use as a normative anchoring. It is a model of criminal legislation rationality developed by Díez Ripollés, an instrument that can be used to plan an intervention but also to evaluate it. It is organized into five levels of rationality (Díez Ripollés 2003, p. 67).

In summary, these five levels correspond to the following areas of evaluation (Becerra Muñoz 2013, p. 486 ff.):

1. The *ethical rationality*, seeks to define "the system of beliefs, culturally and historically conditioned, which sustain a particular collective" (Díez Ripollés 2003, p. 92). To be ethically rational, decisions that are taken in the construction of policies should ensure that both the means that are used and the purposes that are sought with those means, will have to be ethically justifiable. When performing the ethical evaluation of a particular policy, it will have to be confronted to "regulatory principles of behaviour" that are "shared in a generalized way" and are not normally a source of public debate (Díez Ripollés 2003, p. 92).[42]
2. *Teleological rationality* evaluates aspects on which the generalized consensus of the previous level is not found. Being the ethical rationality the generic framework, an "ethical-political" discourse will be used here, to confront ideologies, values and interests defended by the different lobby groups and social sectors that co-exist in society. In this rationality, more specific objectives of the policy

[40] Vedung made an interesting classification of such instruments. In his opinion, there are only three types: the stick (the regulations), the carrot (the economic means) and the sermon (the information). He argued that governments, either oblige us to do something or they reward us materially for doing so or they tell us that we should do so.

[41] I am referring to the Real Decreto (RD) 1083/2009, of July the 3rd, prepared by the Ministry of the Presidency, which regulates the preparation of a "regulatory impact analysis report" as well as the methodological guide for the preparation of the regulatory impact analysis report, prepared by the Ministries of the Presidency, Economy and the Treasury, Territorial Policy and Equality, and with the surprising absence of the Ministry of Justice, traditionally in charge of the preparation of practically all the legal norms of national competency. It is specifically art. 1.2. of the aforementioned RD which makes it possible for the Criminal Policy Division to be the central organ in this ex-ante evaluation.

[42] The author refers to principles such as harmfulness, legal certainty, responsibility for the act, humanity of punishments, etc.; see also Gascón Abellán (2001), p. 46.

should be evaluated to study which of them have finally been added to the policy and which have been left out.

3. *Pragmatic rationality* informs us about the real possibilities of the policy to successfully achieve the previously proposed objectives, both in generic (ethical) terms and specific (teleological) terms. To do so, the effectiveness and efficacy of the policy will be analysed. A policy will be considered effective or feasible, it its provisions may be fulfilled. A policy will be effective if there are, in case of incompliance with the provisions contained in it, correction mechanisms.
4. *Juridical-formal rationality* seeks to offer a response to one of the great concerns in legislation matters, such as the creation of a coherent legal system. In the broadest field of Criminal Policy, however, such terms are out of place and, instead, we will speak of *systemic rationality*.[43] Other authors also use the term *coherence* of the policy.[44] In this rationality, the evaluation consists in the search for contradictions with other policies already in force, as well as those the existence of unresolved situations that should be satisfied by the current proposal. Irrationality in this sense may be external (between different policies) and also internal (between various aspects or proposals of the policy itself).
5. *Linguistic rationality* seeks to ensure the most obvious aspirations of every policy: to constitute a good instrument of social communication. Although it is reasonable to think that we find ourselves facing the easiest rationality with which to comply, it would undoubtedly be adventurous to say that it is a rationality generally satisfied. This rationality, in addition, is directly related with communicative tools to be used by the policy in question, which could be a law, a social awareness campaign or any other instrument.

The model of the five levels of rationality therefore offers quite a complete proposal that encompasses a large number of aspects. Precisely because of that, faced with the possibility that not all the contents of the model may be simultaneously satisfied, the rationality model incorporates a helpful tool for decision known as the *efficiency judgment*.

This judgment seeks to help in choosing between various policy alternatives at any time and at the lowest possible cost, in our case, the minimum possible social cost. It has two aspects: external and internal: in its *external* aspect, it is configured as a transversal criterion, applicable to mutual relations among rationalities. Through this type of analysis, the objective will be to achieve a balance between two opposing poles: at one extreme, simultaneous and absolute compliance with all rationalities and, on the other, the concentration in a single rationality to achieve the objectives of the policy. On the contrary, its *internal* aspect involves a progressive selection or rejection of certain aspects within each level of rationality to the

[43] Gascón Abellán (2001, p. 45) uses this terminology in the legal environment. On systematicity, see Atienza Rodríguez (1997), p. 32.

[44] In the legal context, Ruíz Sanz (2006), p. 30 does so; while in policy evaluation speak of coherence, for example, Osuna and Márquez (2000), p. 31.

detriment of others, definitively filtering the decision-making arguments that gradually outline the content of them all.

5.3.3 The Procedure to Complete the Ex-Ante Evaluation

The earlier analysis, which is usually called *static* (Atienza Rodríguez 1997, p. 58), allows us to distinguish between the different concepts that should be taken into account and to debate each one in an isolated way. Although this form of examination is especially useful for the theoretical discussion of concepts, it bypasses an essential aspect of public policy analysis: the fact that policies are generated in a dynamic context.

In what follows, therefore, I will describe the procedure that the Criminal Policy Division could follow in its *ex-ante* evaluation, fusing the proposal that I have done elsewhere (Becerra Muñoz 2013, p. 560 and ff) with elements specific to the field of policy evaluation.

5.3.3.1 The Initial Meeting

In the first place, when starting the preparation of the policy, in other words, once the Government decides to respond to a social problem, a first informative meeting will very likely be held at which the strategic apex will communicate to the Division which basic aspects of the policy they wish to prepare. In such meeting, the members of the Division gather very relevant information with which to build ethical and teleological rationalities. In other words, information on the principles and objectives that influence the policy in question, those that will be generally accepted as well as those that will create greater debate.

In a similar way to what we have called ethical rationality, the evaluative literature proposes the use of a set of basic principles as a general evaluative framework. The Spanish Policy Evaluation Agency extracts such principles from the Governance White Paper, in which the following principles may be identified (AEVAL 2010, p. 16 ff.; European Governance 2001, p. 7 f.):

- Openness
- Participation
- Accountability
- Effectiveness
- Coherence
- Democratic Legitimacy
- Subsidiarity

It is a generic formulation of the European Commission, applicable to all public actions at any level of the Administration. The contents of the ethical rationality as they have been defined here offer, in my opinion, a much more convenient

evaluatory framework for Criminal Policy, although there would be no reason to discard these *governance*-related principles as part of ethical rationality.[45]

On this initial meeting we would probably find the minister of justice, other high authorities related to bill's drafting (the *secretario general técnico*), as well as representatives from other ministers and departments if it were considered necessary. If the policy is of a certain importance, it would probably have gone through a preliminary stage at the Council of Ministers, from which the Division should take the necessary information, probably through the minister of justice, to draft what I have called the *Framework Document* (FD). This document contains the following information:

FD1: Context evaluation:
FD 1.1: Factual background
FD 1.2: Legal background
FD 1.3: Powers under which the policy is faced.
FD2: Diagnosis:
FD 2.1: Problem analysis: the problem or problems will be identified, ensuring that, in their description, they are (Osuna and Márquez 2000, p. 32 ff.):

A. Explicit. A generic description that alludes to various possible problems in indirect terms should be avoided.
B. Conceptually clear. Avoiding ambiguities in its description and analysis.
C. Rigorous. The reality of the matter should be reflected as much as possible.
D. Comprehensive. The problem should be tacked in a complete way.
E. Measurable. The reality to which the problem refers should be quantified in the most precise way possible.
F. Cause and effect relations. Problems should be unpacked in the search for explanations concerning their causes. Useful tools in this sense are the problem trees or flow diagrams, in which both the causes and the effects of the problems are graphically represented with the objective of analysing them in detail.

FD 2.2: Analysis of the target population: such population is formed by the "individuals or groups that possess a common attribute, limitation or potential that the [policy] seeks to cover or to develop" (Cohen and Franco 1993, p. 91). They may be defined in personal terms, for example, those sentenced for acts of terrorism, or any other way, like in geographic terms.[46] A distinction should be made between:

A. Direct beneficiaries: those whom the policy is intended to target.
B. Indirect beneficiaries: those that receive the positive impacts of the policy but whose situation has not been contemplated to prepare the policy. These indirect beneficiaries will, in turn, be legitimate or illegitimate, in so far as their benefits are or are not in concordance with the general intentions of the policy.

[45] On standards-based evaluation, see Stake (2006), p. 47, 107 f.

[46] Target population can also involve a community setting, an organisation, a procedure, a service, an institutional setting, or a combination of various criteria.

If we think of the prison program recently implemented in Spanish prisons and called "respect units" (*módulos de respeto*), an example of this classification of beneficiaries could be as follows: the direct beneficiaries would be inmates who feel motivated to participate in the project and thanks to which, they show an acceptable behaviour, participate in the activities of the prison and act as a positive role model among other inmates in their unit. The indirect legitimate beneficiaries could be those who, even though they are not participants in the experience personally, assume positive attitudes to be able to be chosen in case of vacancies. The illegitimate indirect beneficiaries, on the contrary, would be those inmates with a fully socialized profile, the white-collar offenders for example, who participate in these respect units without generating any motivation in them to adopt a different behaviour from that which they would have in an ordinary module.

It is essential that the target population is defined and quantified with the greatest possible precision, due to its decisive impact, for example, on the need for economic resources for the programme.

FD 2.3: A study of the needs: the needs analysis seeks to link the two earlier points in such a way that it justifies the relationship of problems identified and target population (Osuna and Márquez 2000, p. 35; Rebolloso Pacheco et al. 2008, p. 66 f.). Needs evaluation allows the assessment of the gap between the real and the desired situation, between what *is* and what *should be* (Alvira Martín 1991, p. 36).

Problem analysis as well as target population and needs assessment depend entirely on the evaluator's capacity to collect valid and reliable information about social reality. To do so, multiple techniques may be applied, for example interviews with key informants, the organization of community forums, the collection of information from target populations involved in similar programs, the study of social indicators, carrying out surveys, the study of official data (i. e. police reports) as well as analyzing the census or using the Delphi method (Rebolloso Pacheco et al. 2008, p. 73; Alvira Martín 1991, p. 37).

FD3: Description of policy objectives: although it is a more than well-known term, it will be helpful to establish a definition of what is considered an objective. According to Cohen and Franco (1993, p. 88), it is "the situation that we desire to obtain at the end of the project duration, through the application of resources and the achievement of the foreseen actions".

The objectives of the policy should be clear, specific, measurable, realist and should incorporate a delivery time for their completion. Due to the difficulties of translating the political objectives into valid objectives for intervention and evaluation, there is a need to operationalise the objectives, in the first case, and to a review such operationalization, in the second (Rebolloso Pacheco et al. 2008, p. 91).

The objectives should reflect ethical and teleological rationalities. Its description could distinguish, respectively, between primary objectives, normally with a high degree of abstraction and generality—also called "goals" by some authors (Cohen and Franco 1993, p. 90 f.)—and a low level of debate; and secondary objectives, which will be the main topics of policy negotiation and debate. The description of these objectives should be interconnected, in other words, any secondary objective

would have to base itself on a previous primary objective (Primary objective 1; secondary objective 1.1, secondary objective 1.2, secondary objective 1.3. Primary Objective 2; secondary objective 2.1, secondary objective 2.2, secondary objective 2.3).

5.3.3.2 Preparation of the Working Dossier

Having prepared the framework document with the strategic apex, the Division will have to complete an important task consisting of the drafting of a *working dossier* that will constitute the basic reference document of the whole process. It is a document in which all aspects of the process will be organized.

This dossier should contain the following documents:

1. Executive summary (ES)
2. Framework document (FD)
3. Chronogram of completed actions (CA)
4. Policy design and implementation plan (DI)
5. Analysis of external coherence (CH)
6. Annexes

First, an executive summary will be incorporated in this dossier that should be carefully prepared, as various actors that will contact the plan will begin with this document or it will be the only one that they read (Fernández-Ballesteros 2001, p. 104). Second, the framework documents will have to be incorporated to contextualize the proposal. Third, a chronogram will be prepared showing the actions carried out (requests for reports to public and private bodies, as well as to subjects or groups belonging to both the external and the internal coalition, investigations and reports requested and completed, etc.). One example is provided for in Table 5.1 showing the chronogram of the legislative phase of the Sexual and Reproductive Health and the Voluntary Interruption of Pregnancy Act:

Fourth, the presentation of the proposed measures takes place, in separated blocks and including a discussion, in each of them, of the alternatives that have been contemplated and the reasons for their rejection or selection. The implementation plan will identify the different measures that are intended in the policy, which will have to remain consistent with the description of the problems, the objective population and the needs analysis (Fernández-Ballesteros 2001, p. 62 f.). These measures should be calibrated, in other words, described in terms that allow an estimation of "the amount of intervention" that will be carried out (García Herrero and Ramírez Navarro 2002, p. 140 ff.).

In this document, the decisions should show that they are the consequence of a rational process in which different alternatives have been considered. It should be possible to follow the logical sequence of arguments and to find a motivation depth in proportion to the importance of the decision in the context of the proposal.

The fifth aspect that the working dossier reflects is the analysis of external coherence which we have connected with systemic rationality. The document

Table 5.1 Chronogram of the Sexual and Reproductive Health and the Voluntary Interruption of Pregnancy Act

	Sept.	Oct.	Nov.	Dec.	Jan.	Feb.	Mar.	...
Congress entrance	x							
Equality Congress Committee	x	x	x					
Plenary session of Congress			x					
Senate entrance			x	x				
Equality Senate Committee				x				
Plenary session of Senate				x				
Publication of the Act in the Official Journal (BOE)					x			

discussed here, refers to the comparison of the draft programme with other policies and other similar measures with which it might collide. This should consider the existence of laws that might present contradictions with the proposed policy but also other programmes that are being applied at the same time and in the same geographical area. Finally, policies that might generate effects in the same way as the measure that is planned should be also located. This coincidence could alter the implementation process, albeit by intensifying its positive effects and the final results of the policy that is under preparation. To do so, the problems, the objectives and the strategies contemplated in those programmes that could converge with the present one should be compared (Osuna and Márquez 2000, p. 46 f.).

In sixth place, this dossier will at some point compile every sources of knowledge used: reports from public or private bodies, from scientific experts on the matter, surveys taken into account, information from the mass media, official declarations, etc. All of this should be incorporated in the annexes and with clear and precise references to its location on the report (if it exists in an electronic format, it should be attached as such to avoid a very voluminous file).

The evaluation literature is clamorous about the need to quote every source of information used. It is an essential feature of ex-ante evaluation: to be able to distinguish whether the information used for the diagnosis and planning comes from interviews, official data, external reports, etc. (Osuna and Márquez 2000, p. 33).

5.3.3.3 Relation with the Middle Line

In the same way that I defended the need to rely on certain actors at an intermediate level when defining the internal coalition, in evaluative terms, these key actors play a fundamental role.[47] The decision to include them implies considerable difficulties, like the existence of multiple conflicting objectives and interests from different

[47] Through the so-called participative evaluation. See Stake 2006, p. 271 ff.

agents, but it also offers considerable benefits in the achievement of a quality *ex-ante* evaluation.[48]

As a consequence of all this, the following phase that the Division will activate will be the circulation of the dossier among agents found at the middle line, so they can contribute with their perspective to the process from an expert, professional and political point of view.

Being the middle line divided between those who belong to the national level, on one side, and those who act at a regional and local level, on the other, two subprocesses come into play.

In the first subprocess, at a *national level*, some mandatory reports may be requested along with many others that may be of great interest: reports from the General council of the judiciary, the Office of the State Prosecutor, the National Bar Association, Prison Authorities, the National Police, as well as professional associations related with the policy such as the Psychologists, Doctors, Social Workers, etc. associations.

Regarding the delivery of the dossier to the *regional commissions* (without forgetting the participation of local authorities), the processes that opens here is extremely interesting, because of these authorities' ability to take the debate to a level of reality and pragmatism of great value.

Without a doubt, the information incorporated by these all these national, regional and local groups of actors will be very relevant to all levels of rationality. In the first place, *ethical rationality,* which will have been prepared, at least provisionally, at very early phases should have its content more precisely shaped. The principles and values that the policy contains should have a very low or a zero opposition among the actors who have debated the policy. In turn, the intense debate will be at the *teleological rationality,* and these agent's participation should help the objectives elaboration providing arguments and criteria to reject arguments or to give some of them priority over the others.[49] There will also be plentiful benefits for *pragmatic rationality*, for example in relation to both material and personal resources, available and necessary for the correct implementation of the policy, something of which many of these actors have direct knowledge. The participation of such numerous institutions is an ideal methodology to incorporate questions of *systemic rationality* into the process, by permitting a considerable scan to find public actions that could converge with the one in the project and that were underway in some place within national territory and in the framework of diverse competences (sanitary, social, educational, etc.). Finally, the questions of *linguistic rationality* will also be covered in this phase of the process, especially as a consequence of the incorporation of such varied panel of professionals in it, as

[48] These actors with an interest in the policy are also called stakeholders and their participation in policy creation and evaluation is generally considered essential in the field of evaluation. Among others, see Rebolloso Pacheco et al. (2008), p. 79 f.

[49] See Sánchez-Ostiz (2012), for an interesting and recent development of three criminal principles intended to serve as a shining example in the creation of Criminal Policy: the principle of security in social life, of legality and respect for dignity.

well as their own technical language that has to be "translated" into an understandable policy for everybody.

In addition, this process is an opportunity to explain the different aspects of the policy and achieve political and social support around it. Without a doubt, a planned policy with the participation of many implicated actors has the following advantages: it will benefit from greater legitimacy, it will facilitate the responses to various interests that are compatible, it will increase the quality of the proposals and it will help avoiding surprises in the application phase.

In short, a forum for interaction will be provided in which, among other things, matters that only reach the strategic apex in an accidental way may be debated, such as, for example, the specific problems of rural or insular areas in which to implement certain policies; the questions of administrative coordination, of great importance in policies that are applied by the social services, the police, the courts, prison authorities, etc.; criminal problems, on which there is no available information either because of their relative novelty, or because of their specificity, and the only information available is confined in areas very closely connected to criminal investigations (police, or certain courts, for example); etc.[50]

5.3.3.4 Re-Edition of the Policy by the Division and Presentation of the Proposal to the Bodies of Governance

Having responded to all the questions contained in the dossier by the different actors and referred to the Division, this body will once again have to reedit the contents of the proposal in the light of the information that is received.

Subsequently, the Division will have to continue with the regulated processes in the pre-legislative phase,[51] some of which will already have been advanced in earlier actions.[52] The documentation will be referred to the Committee of Subsecretaries and Secretaries of State and subsequently to the Council of Ministers, at which point it will be leaving the initial phases in which we have focused

[50] Stake speaks, in addition, of other benefits of this participative evaluation: detection of a larger number of appropriate study questions and development of skills in the participants for their daily activities and the resolution of new problems as they emerge (Stake 2006, p. 271).

[51] First and foremost, article 88 of the Spanish Constitution and article 22 of the Law of the Government, 50/1997, of November 27th.

[52] An analysis of the preceptive processes that can be speeded up by the procedure that I propose may be seen in Becerra Muñoz (2013), p. 575 ff. The sole documentation needed to culminate the pre-legislative will be those related to the impact studies. In reality, the terminology "impact studies", as used in the pre-legislative phase, makes reference to any analysis that is done from an ex-ante or prospective perspective; in other words, everything covered here could come under such a heading. In spite of the enormous popularity acquired by this terminology in recent years, it is only marginally attended within the scope of ex-ante evaluation, that is the reason why they have not received any attention in this article. Evidently, where the impact analysis acquires all of its potential is in the evaluation after the introduction of the policy.

(description of the problem, agenda setting and preparation of alternatives) to move into the field of decision-making.[53]

It will be in these administrative processes that the aforementioned internal and external efficiency judgements will assume great relevance, helping to take decisions and justifying the need to choose some contents instead of others at each level of rationality, or to prioritize some rationalities over others.

It should not, however, be forgotten that the dossier should continue to be completed until the initiative is sent to Parliament. Only in this way will a dossier be available with the whole decision-making process, of great utility for continuous evaluation to which Criminal Policy should be subjected, both by the Division itself and by other external actors.

5.4 Conclusions

Despite the long way we still have to travel in the rationalization of Criminal Policy in Spain, I think that this contribution points in a direction that can yield interesting fruits.

The promising contributions from a field such as the evaluation of public policies broadens the range of options, permitting us to move from a focus on criminal legislation, to more acceptable boundaries within which to consider our subject, Criminal Policy in its proper dimension.

The ex-ante evaluation model that I have described here is probably the most advanced one that currently exists in Criminal Policy matters. Something that is not to the merit of the person writing these lines, but to each of the contributions that from Public Policy Analysis, Legal Philosophy, Criminal Law and Criminology, have been done over recent decades. My work seeks nothing more than the fusion of this knowledge in a single model that is useful and understandable for those who ultimately have to be the target population of these sorts of scientific works: the authorities in charge of drafting Criminal Policy.

The model of rationality that has been presented is of singular value. The arrangement of its content and the depth of its different levels offers, in my opinion, better attributes than many of the proposals analysed in the field of the evaluation (Cohen and Franco 1993, p. 85 ff.; Osuna and Márquez 2000, p. 30 ff.; Stake 2006, p. 103 ff.; Rebolloso Pacheco et al. 2008, p. 55 ff.; Mears 2010, p. 51 ff.). Without a doubt, its legal-philosophical roots have contributed to the construction of a firmly structured model. The challenge with which we are now presented is to turn it into

[53] Despite the confusion attached to the division between the aforementioned stages, I think that the intervention of the General Committee of Secretaries and Sub-secretaries of State marks a clear distinction point. From that moment, the proposal should be relatively well outlined and the role of the Division will be more of a secondary one. See, on this point, Becerra Muñoz (2013), p. 574.

an operational instrument capable of solving specific problems and, what is probably even more difficult, its clear presentation in the field of practical policy.

In such political practice, it appears increasingly evident to me that the extensive reforms of our Criminal Code, already a traditional in this field of law, raise a series of difficulties to approach Criminal Policy in a rational way. The benefits of the *vis atractiva* that the Spanish Criminal Code still has are undoubtable and the fragmentation of criminal legislation would do nothing to improve its quality (Rodríguez Mourullo 2004, pp. 566–567). However, I think that our Criminal Policy is loudly calling for an approach to criminal problems in a thematically coherent manner.

The reforms cannot be debated, justified, managed and, of course, evaluated, if the aim is to approach questions in detail, such as the adjustment of certain offences to international directives, at the same time as profound reforms in the punishment system, such as the removal of minor offences that is at present underway, or the generalized aggravation of punishments for heterogeneous crimes.

This technique prevents a calm and detailed debate of the content of the proposals and obliges both politicians and experts to choose the questions on which they will comment in debates, in the mass media, in parliamentary appearances, in various meetings, etc., (the most relevant? the most striking?). Without forgetting that such a selection is done to the detriment of aspects that move from the desk of the Minister of Justice to the Official Bulletin of State without further discussion.

If the preceding lines highlight something, it is that an acceptable treatment of public policies requires a large quantity of material and personal resources. It is very probable that our public powers will never accept such an investment to draft a Criminal Policy that every few years reforms over 200 articles of the Criminal Code.[54]

Criminal matters should be reformed once they have demonstrated the need to be changed and are grouped in accordance to their characteristics and the social behaviours they regulate. Only in this way will it be possible to centre the attention of Criminal Policy in the field of terrorism, drugs, corruption, sexual offences, offences against property and other matters, already complex enough studied individually. A strategy such as this will be the only way to allow the members of our government to propose more complete policies, rather than strictly legislative changes, for which they have to be able to cover topics with relatively clear limits.

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[54] See Díez Ripollés, La reforma penal y el sueño de la razón, Newspaper El País (2013a). Available at http://elpais.com/elpais/2013/04/10/opinion/1365599490_607254.html. Last accessed March 2015.

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Chapter 6
Criminal Policy Evaluation and Rationality in Legislative Procedure: The Example of Sweden

Manuel Maroto Calatayud

Contents

6.1 Introduction: Sweden—The Paradise Lost of Penal Welfarism

Sweden is not the same country as it was in 1974, a time when its Justice Minister predicted there would only be 600 people in prison by the 1980s (Pratt 2008a, p. 132). The expansion of the American approach to crime control also affected Scandinavia, which despite all else is still a point of reference when considering criminal policy alternatives to the "global firestorm of law and order" (Wacquant

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2014; Brandariz García 2014). The *Scandinavian exception* has been extensively analysed by criminologists. Among the most pertinent analyses was a study by John Pratt (2008b) in 2008, in which he highlighted its historical, economic, cultural and political background, pointing out its downturn and the precarious nature of its future existence within a context which is openly hostile to penal welfarism and, in general, to all policies associated with post-war social democracy. Drug and immigration policy and the emergence of the crime victim as a central political narrative over the past decades have eroded Scandinavian anti-punitive hegemony, with the building of jails, an increase in the prisoner population and harsher sentences now becoming politically attractive. Nevertheless, the Scandinavian attitude to criminal punishment has not shown a linear decline, and the residue of habits and practices from past decades continues to produce differing results and views that invite a certain optimism.[1]

Most analysis of the Scandinavian exception in terms of criminal policy has focused less on the role of political-legislative processes. This lesser interest is perhaps justified from a scientific standpoint, as any attempt to understand the peculiarities of the Nordic concept of punishment from an exclusively legal perspective is inevitably misguided. It is nevertheless especially interesting to analyse the formal process of drafting penal regulations, not only as a judicial-legislative representation of a social and political context, a sort of "nature reserve" for a progressive draft criminal code, but also as a system capable of protecting and providing feedback on these peculiarities.

In this article we will be considering this aspect with regard to Sweden—the way in which the Swedish (pre-) legislative process helps to guarantee certain standards of scientific and political deliberation, transparency and coherence with regard to the results, hindering punitive expansion as a consequence. These functions are undertaken via the procedural imposition of a certain concept of rationality which is very closely associated with the idea of "how things should be done", in which the notion that regulations—including penal regulations—should be "assessable" in the widest sense of the word and not merely performative responses to political issues is implicit.

6.2 A Modest Concept of Evaluation

In this article we shall be taking "evaluation" to mean the systematic gathering of information concerning the activities, characteristics and results of programmes, in order to better judge these programmes, to improve their effectiveness and/or to provide information on the decisions to be made when drawing up new programmes or modifying earlier ones (Muñoz de Morales 2010, p. 8).

[1] See the interesting conference given by the current director of Swedish prisons, Öberg (2014).

As to what "effectiveness" means in terms of criminal policy, economic-budgetary considerations have been one of the major driving forces behind current concerns over legislative evaluation. From this perspective, any legislative proposal should be subjected to cost-benefit analysis, in order to guarantee its budgetary logic and economic functionality.[2] The complex machinery of legislative production that is the European Union has prioritised the extension of this notion of evaluation, although not in a clear way. The various regulatory evaluation practices also serve to control the national implementation of European laws, while attempting to compensate the well-known deficit concerning the democratic legitimacy of European law through the appeal to expert judgement and technical legitimacy, as well as by reducing the administrative burden of new regulations, avoiding "over-regulation" (see the "Standard Cost Model", "Better Regulation" etc. proposals).[3]

This renewed interest in evaluating criminal policy is also related to concerns on the development of punitive populism as a political narrative that is central to post-industrial societies, as well as what some have called the "pathological politicisation" of criminal law (Stuntz 2001). A large part of the "escape scenarios" regarding this situation seem to suggest either a certain "depoliticisation" of the mechanisms of criminal policy law-making or else their "re-politicisation" into concepts that are more "deliberative" as far as democracy is concerned. In both cases, the institutionalisation of approaches to evaluation could prove useful, with the Swedish case appearing to be especially representative of a methodology that is clearly different to the American approach.[4]

6.3 The Traditional Swedish Emphasis on Criminal-Policy Rationality

6.3.1 The Political Culture of Consensus

Swedish political culture has often attracted interest due to its difference to other leading systems, such as the American model. In the late 1960s, Swedish institutionalism could be described as being based on an assignment of highly specialised roles within a corporatist organisation of society (Anton 1969). On the one hand, there was a governmental structure with a long tradition of centralisation present at all administrative levels, including the Council of Ministers, while on the other,

[2]See Ortiz de Urbina Gimeno, I., "Economics as a Tool in Legislative Evaluation: Cost-analysis, Cost-efficacy and Cost-benefit", in this volume.

[3]OECD, "Government capacity to assure high quality regulation in Sweden, OECD reviews of regulatory reform", 2007, available at: http://www.oecd.org/gov/regulatory-policy/38286959.pdf.

[4]See Muñoz de Morales Romero, "Codification and Legislative Technique in the United States of America", in this volume.

"the best-organised structure of interest groups to be found in any nation of the world" (Anton 1969, p. 92), in which all social groups of any importance ("from industrial workers to tennis enthusiasts") were organised into local, regional and national associations, with trade union and industrial organisations similarly very centralised into higher bodies.

Within this corporatist operation schema, reform initiatives were launched by experts designated by the government or by interest groups, as a response to difficulties experienced in putting into practice an specific public policy. This was possible, among other things, due to the fact that Sweden at that time had one of the best statistical systems in the world. Once the question was asked, the relevant minister could set up an expert commission, created to analyse the problem and propose alternative solutions to the government and the *Riksdag*—the country's supreme decision-making body. Every year, over a hundred such committees might be set up, each with its assigned staff and budget. As a result, relatively few problems requiring attention are left untackled (Anton 1969, p. 92). In a subsequent section we see in more detail how these Committees of Inquiry work, institutions with a long tradition (there existence apparently dates back to the seventeenth century), which seek to channel political action through mechanisms which focus on deliberation and the importance of technical roles.

The relevance of *social corporatism* in Swedish political culture, an element that is still important today, must not be overlooked. Swedish neo-corporatism, graphically defined as "a method to pacify intense minorities by giving them another opportunity to influence politics when they have no chance in parliament" (Lewin 1994), was in it its day the international prototype of how a social democratic state operates. It was undoubtedly a powerful generator of political integration that left its mark on a respectful attitude toward the participation of experts in the legislative process and the idea that public policy should be the fruit of processes of collective negotiation with the affected social actors.

With the rise of US-style neoliberalism since the 1970s, de-corporatisation in Sweden would seem to have been more intense than in neighbouring countries such as Denmark. By the late 1980s, the corporative tradition of negotiating political decisions with the most important organised social actors had undergone fundamental changes. In 1991, the Swedish Employers Association officially retired from governmental committees in which it had been taking part, with the explicit aim of putting an end to corporatism in the country once and for all (Lindvall and Sebring 2005, p. 4).

In spite of everything, many aspects of social democratic corporatism still prevail. These include a culture of negotiation which is also apparently associated with a typically Swedish aversion to open conflict, in favour of a "highly pragmatic intellectual style" (Anton 1969, p. 99) which prefers to look for avenues of cooperation, sometimes at the expense of denying or minimising the very existence of conflict. In an apparently paradoxical claim, Anton says that the expectations of the Swedish elite of being able to work without suffering direct pressure from the public (whose demands were already being expressed by corporatist institutionalism), as well as its pragmatic orientation and its focus on action, explain the

deliberative, rationalist and consultative models that were so characteristic of political decision making in Sweden (Anton 1969, pp. 99–100).

6.3.2 *Institutional Trust and Low Social Pressure on Politics*

However, in the 1980s and especially in the 1990s the situation shifted ground significantly (Pratt 2008b; Tham 2001; Demker et al. 2009). Traditionally, the Swedish have high levels of confidence in their institutions. As PRATT (Pratt 2008a, p. 129) suggests, collaboration between the State and social actors during the years of corporatism in the preparation and implementation of public policy encouraged public confidence in public powers and in society's capacity to self-regulate (adding that curiously, Sweden, Norway and Finland are countries with a traditionally low number of lawyers). These high levels of confidence in public institutions also reinforce the dominance of "experts" in the drawing up of public policy, as has clearly happened in the case of committees of inquiry.

6.3.3 *The Role of Experts and the Traditional "Depolitisation" of the Criminal Issue in Social Democratic Thought*

This "depolitisation" could be seen as one of the most characteristic features of Swedish criminal policy. The role of experts in the drawing up of public policy is comparatively significant: they may dominate committees of inquiry, to such an extent that in the last instance, parliament's role is normally residual, reduced to the confirmation of preparatory work. While de-parliamentarisation and depolitisation can be interpreted as anti-democratic processes which seek to exclude politics from decision making, it should be pointed out that this is only depolitisation in a certain political sense essentially associated with the rise in punitivism and the instrumentalisation of public concerns concerning crime, with chiefly electoral objectives.

Depolitisation is not only related to confidence in experts and a political culture with a tendency toward consensus, but also to welfarist public policy with regard to crime. The way that Scandinavian countries have treated victims, for example, seems to play an important role. Since 1973, with the passing of Finland's Compensation for Criminal Damage Act, the mechanisms put in place by the state for compensating victims of crime have been extended. Whereas at first they were only applied to personal injuries, they have become applicable to crimes against property and others, at the discretion of the authorities (Pratt 2008a, p. 134). In recent years, this has not prevented crime victims in Sweden from becoming an element with a special symbolic value, politically speaking (Demker and Duus-Otterström 2009), a

process which is clearly tied in with the transformation of the "law and order" discourse into a project partly assumed by the political left (Tham 2001).

The Swedish penal model, infused with the ideal of special prevention and rehabilitation, met its first challenges in the 1960s, a decade which saw a significant increase in the crime rate. Nevertheless, during the 1960s there was still a consensus within the main political parties regarding a social approach to criminal policy—curiously, in a period in which Swedish parties maintained political positions which were more divergent than at present, discussion of crime was omitted from their electoral programmes and manifestos. In a 1972 report, the Social Democrats quoted Olof Palme who said: "In my mind, the only sustainable solution [to crime] is a policy which eradicates insufficiencies and injustices, and which evens out economic, social, and cultural differences in society" (Demker and Duus-Otterström 2009, p. 279). The report, which rejected the retributionist idea of punishment in favour of rehabilitation, surprisingly did not differ much from the positions of the parties to the right of the social democrats—the liberals, for example, in their manifestos in the late 1960s, set out their commitment to humanitarianism in penal matters, while the centrists claimed that punishment might lead to greater criminality, opting instead for the reintegration of the criminal in society (Demker and Duus-Otterström 2009, p. 279). The depolitisation of the problem of criminality was therefore rather a "social democratic politisation", in the sense that an understanding of crime as a social and political problem was hegemonic as opposed to it being an individual and moral matter.

The period from 1976 to 1990 saw major changes in Swedish politics. In 1976 a government was elected that, for the first time in 30 years, did not include the social democrats, and which, at the start of the decade, began to suffer the consequences of the crisis of post-war Keynesian models. This was also a period of transformation in terms of penal practices and discourse, a transition toward current post-welfarism, a tendency that was already identifiable in the early 1990s (Demker and Duus-Otterström 2009, p. 279). During this time, the discourse of Swedish political parties on criminal matters moved away from the ideas inherited from the social democrats toward a defence of notions related to proportionality, personal merit and the centrality of the right of the victims to see punishment served, as opposed to more social concept of the crime—"If Swedish criminal policy was once a 'depoliticised' topic, on which experts were to solve the problems of recidivism by paying attentions to the offenders, it today seems politically 'impossible' to offer views on crime and the crime problem without including a separate section on victims and their rights" (Demker and Duus-Otterström 2009, p. 279). In Tham's view (2001, p. 422), traditional social democratic criminal policy based on valuing expert opinion and a Weberian understanding of a rational relationship between means and ends was, at the start of the twenty-first century, already moving toward a policy based on populism and a Durkheimian concept of the problem of order.

6.4 The Institutionalisation of the Legislative Rationality Through Procedural Measures

Within the current context, it might be easy to assess the Swedish legislative system only for its defensive value against the common irrational tendencies in the drawing up of public policy. As the outcome of a particular political history and culture, the Swedish law-making system seems to be full of procedural and political obstacles to those who would seek to promote legislation that is merely symbolic or which attempts to exploit punitive populism. The first of these obstacles which we will be looking at here are:

(a) Committees of inquiry and ministerial committees, technical-political organisations responsible for evaluating and justifying the need for reform
(b) Obligatory consultation mandated by the Swedish Instrument of Government (a fundamental part of the country's constitution), which requires that the public authorities initiate a consultation process open to experts and civil society during the introduction of important reforms
(c) The existence of a *National Council for Crime Prevention*, an organisation dedicated to the analysis and evaluation of penal policy

Together with these three central elements, certain other peculiarities of the Swedish system should also be mentioned, such as the seemingly counter-intuitive notion that criminal law should be subject to a constant process of review, the value of preparatory work as a guarantee both of technical quality and of the constitutional nature of the regulations and the particular constitutional legal control system in Sweden, chiefly pre-legislative. Figure 6.1 shows a summary of the Swedish law-making system.

6.4.1 The Committee of Inquiry (Statliga Kommittéväsendet) Tradition

The first step toward a reform of the Swedish penal system is the creation of a committee of inquiry to look at the problem, normally at the request of the government, which approves a mandate that defines the committee's make-up, role and objectives. These committees, institutions with a long tradition in Swedish politics, have generally been formed by representatives of political parties, interest groups, civil servants from governmental agencies and by researchers. Representatives from a wide range of sectors of Swedish society also take part in earliest phase in the drawing up of public policy. As well as channelling reform initiatives, the formation of a committee may also be an institutionalised way of reducing the role of the media agenda focusing on problem areas and a way of demonstrating political initiative. Although Granström (2009, p. 327) seems to consider these latent functions as negative factors, compared to that of being "a long-term

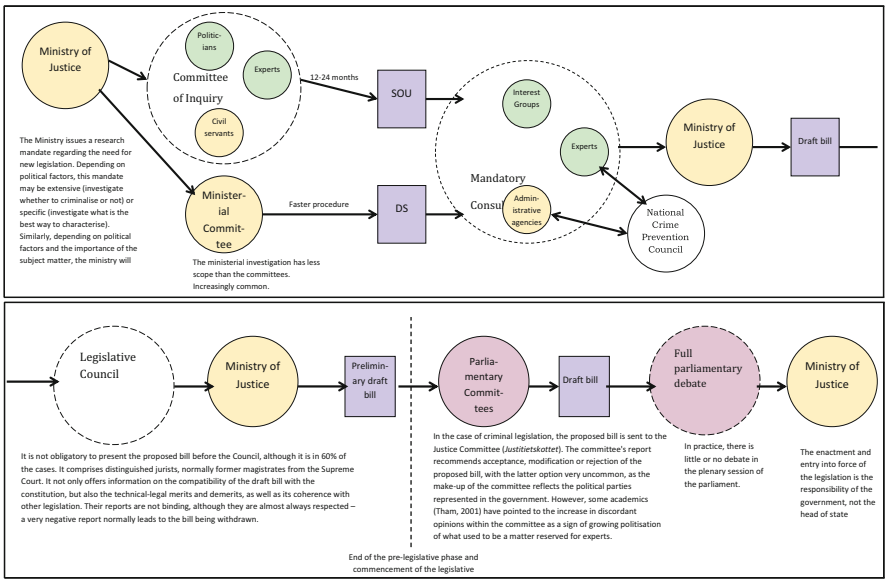

Fig. 6.1 Approximate schema of the Swedish legislative process

planning element for relevant political action", the setting up of such a committee could be seen as a reasonable—and probably a recommendable—political reaction to the outcry for punitive measures.

Practically all reform of any importance will be processed by the setting up of a committee of inquiry or a ministerial committee, depending on its foreseeable relevance. More people sit on the former, they have a chairperson (normally a politician or civil servant) who directs business, outside experts play a greater role and they work with longer timeframes. The latter on the other hand are smaller and have fewer responsibilities. They are presided over by a "special researcher" who is normally a civil servant designated by the Ministry of Justice, when the committee is dealing with criminal matters. While a committee of inquiry may take 12–24 months to publish their report and refer it to consultation, departmental committees work considerably faster (Granström 2009, p. 327).

The committees carried out both *ex-post* evaluations of current legislation and *ex-ante* evaluations of the reforms to be considered, to be set out in a report. The format of this report depends on the procedure that has been followed, taking the form of an Official Swedish Government Report (*Statens offentliga utredningar* or SOU) when it is the result of the work undertaken by a committee of inquiry and of a Departmental Report (*Departementsserien* or DS) when it is the work of a ministerial committee. The reports are published by the Ministry of Justice as volumes in which the pre-legislative steps of the reform are collated, in a very similar way to in any academic treatise. In fact, they are seen as being of high technical and scientific quality in the university world. It is also true that the Departmental Reports prepared from the work done by ministerial committees

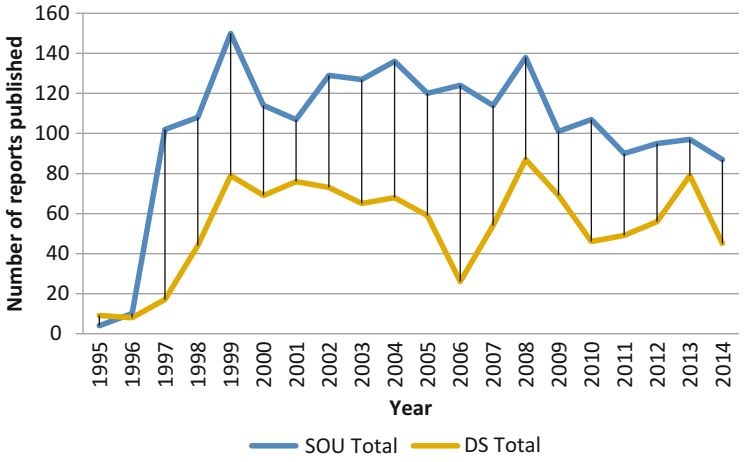

Fig. 6.2 Official Swedish Government Reports (SOU) and Ministerial Reports (DS), total figures

are shorter and carry less scientific-academic weight, which, together with the fact that this process is faster than the SOU, would seem to favour the involvement of departmental committees as opposed to committees of inquiry. An analysis of the data concerning the number of both report types published on the Swedish government website appears to confirm a slight tendency in this regard, at least in matters of justice (see Figs. 6.2 and 6.3). This should be seen in the context of a further piece of information: since the recession of the 1970s, there has been a trend towards a reduction in the role of committees in an attempt to cut public spending, as well as a move to grant them less time and a smaller budget with which to carry out their work, in detriment to the previously unchallenged dominion of the experts (Granström 2009, p. 327). The European Union's very different legislative procedures have also created certain resentment in Sweden, in the sense that the EU's timeframes and processes pay little heed to the country's complex legislative tradition.[5] Far from being seen as perfect organisations, the committees are subject to criticism in the way that they give the appearance of objectivity to what in reality some see as processes that are in fact increasingly politicised, with experts reduced to a role where they are "hostages" to the committees and the political agenda of the moment (Granström 2009, p. 330).[6]

[5]Some of the people interviewed for this article expressed this opinion, as well as the view that, in general, the quality of European Union legislation was poor, especially when compared to Swedish law.

[6]Also see David Arter critique of Scandinavian parliamentary committees (2004, p. 593): "Ironically, despite the Scandinavian reputation for openness and transparency in government, the standing committees of the Nordic parliaments are neither open nor demonstrably responsive when viewed in comparative perspective. Their deliberations on bills are not open to the public and no transcript of proceedings is subsequently posted on the parliament's website."

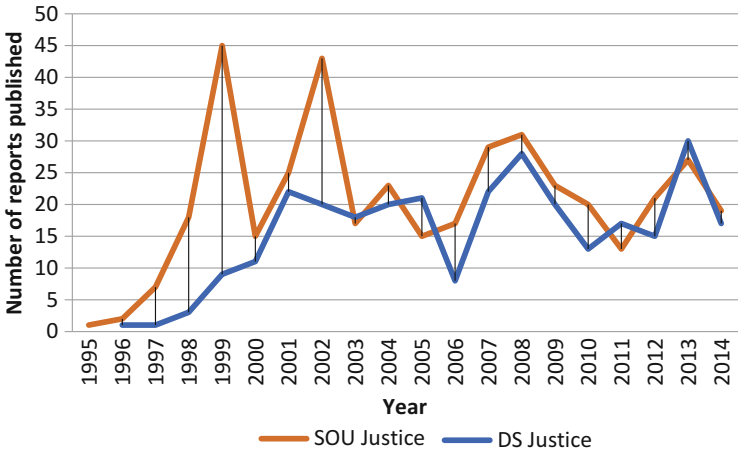

Fig. 6.3 Official Swedish Government Reports (SOU) and Ministerial Reports (DS), in justice-related matters. *Source* of Figs. 6.2 and 6.3: Prepared by author, based on reports published in: http://www.regeringen.se. NB. These figures are for all justice-related publications, not only penal matters, although these represent a considerable percentage. Note that figures only represent the number of reports published in the official website of the Swedish government, and not the total number of reports produced (which explains the lower numbers in the first years represented)

The Ministry of Justice publishes the DOU and DS reports separately, in collections that are clearly distinguishable, with each report type given a different value (Figs. 6.2 and 6.3). We should stress the central importance of these publications to the deliberation and documentation process, as well as the emphasis that is placed on their quality, in order that they might be an effective instrument, not only in the drawing up of new legislation but also in its interpretation and application (serving as an example of what is sometimes called "legisprudence").

6.4.2 The Obligatory Consultation Phase (Remiss)

The committee's findings are presented to the government, before being subjected to an mandatory consultation process involving the various actors from civil society and the administrative field.[7] The Executive may accept or reject these proposals and opinions when drawing up the draft bill. The organisations consulted may include public administration bodies, authorities or non-governmental organisations that may be affected by the reform. Draft bills are often amended and even

[7]In 1977 alone, for example, the University of Uppsala Faculty of Law provided 40 opinions on a number of draft bills (Strömholm 1981). The majority of criminal law academics have chaired or taken part in committees of inquiry and/or participated during the consultation phase, partly due, of course, to their reduced number (the Swedish population is under 10 million people).

rejected when they receive strong criticism from the parties that are consulted (Granström 2009, p. 334).

The government is free to decide to what extent it wishes to accept the suggestions put forward during the consultation phase, although it must set them out in the procedural documentation. The consultation phase is mandatory, pursuant to the Swedish Constitution Instrument of Government, Chapter VII, Section 2, covering all draft bills. Although the consultation phase is seen as a further example of the Swedish desire to negotiate and find consensus, as we have said, it frequently results in relevant criticism—in the specific case of the reform of legislation concerning gender violence in the 1990s, half of those consulted (in the main people working in the justice system) were in favour, the other half against (Granström 2009, p. 334).

6.4.3 The Swedish National Council for Crime Prevention (BRÅ, Brottsförebyggande rådet) as an Evaluation and Support Body

The Swedish National Council for Crime Prevention, created in 1974 to tackle the growing public concern over crime matters, is an organisation that is answerable to the Ministry of Justice, set up as a research centre the aim of which is to offer support, improve the scientific and methodological aspects of analysis and intervention in political-criminal affairs. The BRÅ is governed by a council comprising ten members, among them two staff representatives. Its board is appointed by the government, led by a Director General, with a permanent staff of around 60 people, the majority of whom are sociologists and criminologists, although some staff members come from a legal background. There are also scientific and advisory councils, as well as a special secretariat dedicated to the study of financial and organised crime and a number of specialist divisions—one for example is dedicated to publicising the results of studies and analysing whether or not they are of use. Analysis from the centre is used in the judiciary, the executive and the legislature: it plays a key role in the analysis of crime trends, including the identification and study of phenomena that may require special measures (Andersson 2005).

The centre covers four key areas:

(a) The promotion of knowledge in the field of criminal policy, based on national and comparative research (the Research and Development Division).
(b) Evaluate the effects of especially important reforms (the Reform Evaluation Division).
(c) Maintain and develop the statistics system and ensure its quality (the Statistical Division).
(d) Support local crime prevention organisations and improve their knowledge and the methods they use (the Local Crime Prevention Division).

Many of the BRÅ's activities tend to result from initiatives coming from government-promoted committees of inquiry, much of which, as we have seen, are active for some years, especially the committees responsible for the evaluation of key reforms and major changes to the justice system. Many of these committees work within the prison and probationary services. The BRÅ therefore represents an organisation offering expert assessment within the justice system (Granström 2009, p. 75) which is also empowered to act on its own initiative, especially when compiling the available data on specific issues and in adding to existing political-criminal knowledge which may be of use to other institutions. The projects which begin as Council initiatives are subject to consultation with other agencies to ensure that they respond to a real a need in terms of methodological development or improvements to knowledge of political-criminal matters.

One of the main ways to fulfil this role of creating knowledge and improving existing approaches through evaluation.[8] For example, in 2004 the BRÅ undertook eight evaluation projects, five of which were commissioned by the Government, concerning issues such as the effectiveness of the probation system, restraining orders or the treatment of drug addicts in prison, or ways to monitor recidivism (which allows researchers to estimate recidivist behaviour in different risk groups. This monitoring of re-offenders is then compared with previous estimates). They have also researched the effectiveness of crime prevention programmes and the police's perception thereof, groups that suffer repeat victimisation and the prediction of prison population levels together with the National Prison and Probation Administration. Between 1998 and 2002, the government invested 2.8 million euros in research into the field of financial and organised crime, undertaking 30 research projects in Swedish universities and other higher education institutions, as well as at the Council itself. The results from the BRÅ research were translated into English in their entirety, as is common in Sweden (Andersson 2005, p. 79).

The BRÅ works with the police and judicial bodies to improve political-criminal statistics, which the agency publishes on its website, as well as an annual report since 1976. The statistics not only relate to crimes committed—the BRÅ also draws up a wide-range of surveys, such as the exposure to and participation in juvenile crime (Andersson 2005, p. 81). The centre and the Swedish government also placed great importance on local crime prevention programmes. Local Crime Prevention Councils were set up which allowed for cooperation between various municipal bodies and the BRÅ, drawing up guides to contribute to the development of knowledge and approaches in these local councils.

The centre therefore plays an explicit role in managing concerns regarding crime in a politically non-pathological fashion. Andersson (2005, p. 85), former director

[8]El BRÅ does not use its own evaluation methodology, but rather flexibly employs quantitative and qualitative methods which are habitually used in criminological. The council has occasionally worked with some of the proponents of quasi-experiment crime prevention and policy models, such as David Farrington's "evidence-based crime prevention" without that meaning a wholesale acceptance of quantitative evaluation.

of the Council, highlights the institution's role in resisting public pressure: "There may be increased pressure on politicians and public sector agencies to act and show efficacy. The media continue to exert pressure, and various interest groups, 'moral entrepreneurs', or lobbyists, will promote the issues of relevance to themselves without having the responsibility for a coherent and rational crime policy. This will encourage a focus on crime that lends itself to easy description, that has dramatic overtones and that is appropriate for presentation in the media. There is therefore a risk of 'quick fixes' and the introduction of symbolic measures". He stresses the growing importance of criminal policy: "The media attention focused on crime-related issues is intense. Crime policy has today become one of the most important questions for all of the Swedish parliamentary political parties" (Andersson 2005, p. 83). This importance is also highlighted by a wide range of institutional administration bodies, from the European Union to local government. Nevertheless, its origin does not lie in a variation in crime trends but in political and cultural changes: crime is one of the few things that seem to unite a society with ever fewer values in common (Andersson 2005, p. 83).

The Council's role is therefore to turn neutral, reliable information into a viable political response in cases where there is a social over-reaction to a crime—by channelling these social demands toward the need to be duly informed on crime-related matters, an evaluation of criminality, the damage it causes, legislative alternatives and their viability from a cost-benefit analysis perspective. "Crime policy used to be an issue addressed by a small number of experts whereas questions relating to prevention were primarily dealt with by the police". As a result of general social change, the BRÅ offers a comprehensive vision which includes actors such as schools, social services, companies, local communities and other sectors. The inspirational idea therefore seems to be one of promoting social democratically focused participation in the drawing up of criminal policy. In fact, one of the BRÅ's roles is to identify those actors who might play a part in crime prevention duties, coordinating and facilitating their participation with other similar bodies. The deliberative focus is evident in the emphasis on approaching criminal policy from a broad perspective that recognises that segregation and social exclusion are key factors in criminogenic development, as well as the importance that needs to be given to integration and democracy as an integral part of criminal policy (Andersson 2005, p. 87).

6.4.4 The Legislative Council (Lagrådet) as a Legal Evaluation Institution

The BRÅ's main role is to offer a criminological and sociological vision and not to make legal appraisals of reform projects. This function is provided by the *Lagrådet* (Legislative Council), a pre-legislative body overseeing matters of constitutionality (Chapter 8, Sections 20–22 of the Swedish Constitution—Instrument of

Government) entrusted with examining draft bills, offering expert opinions on specific matters at the request of the government or the corresponding committee of inquiry. The Legislative Council is consulted on any draft bill that might affect freedom of the press, freedom of expression or individual rights and freedoms, except where the government deems that there is sufficient cause to not do so (where the expert opinion in question will not prove useful, or where a delay in the legislative procedure would have serious consequences). The Council's advice is therefore not binding, although it is frequently taken into account.

The Council comprises Supreme Court and Administrative Supreme Court judges, both active and retired, as well as other respected jurists. Its role is structured, with departments that correspond to workload. *Lagrådet*'s analysis generally consists of[9]:

(a) Evaluating whether or not the draft legislation is compatible with constitutional provisions and Swedish law in general, as well as with European law and the European Convention on Human Rights.
(b) Evaluating the internal coherence of the draft bill.
(c) Evaluating whether or not the proposed legislation respects the minimum requirements in terms of legal certainty.
(d) Ensuring that the draft bill is designed in such a way that the law serves the purpose for which it was introduced
(e) Anticipating the problems which may arise in its application

The Council's findings are public[10] and are included in the government's proposals or in the report from the corresponding committee. As we can see, control over matters of constitutionality in Sweden is private, and mainly takes place in the pre-legislative phase. Although ordinary courts can rule that the application of a law is unconstitutional, in practice this hardly ever happens, and in any event would only affect the specific case and not the disputed provision. It should be remembered that Sweden does not have a Constitutional Court and that Supreme Court jurisprudence is not binding on lower courts.

6.4.5 The Legislative Phase: The Parliamentary Debate

When the pre-legislative process has concluded, the full debate in the Swedish parliament (the *Riksdag*) has traditionally played a secondary role, normally reduced to that of ratifying the consensus reached during the previous phase. Only recently, the greater politicisation of the legislative process seems to have moderated the Swedish aversion to open parliamentary disaccord. After the 1970s

[9]OCDE, "Government capacity to assure high quality regulation in Sweden, OECD reviews of regulatory reform", op. cit., p. 18.
[10]http://www.lagradet.se/.

changeover to a single-chamber system in a process of constitutional modernisation, the parliamentary law-making procedure in Sweden was one of the swiftest in Western Europe. Having sent the draft bill to the corresponding parliamentary committee,[11] just one debate is required for the draft bill to become law (Arter 1990, p. 125). However, although it might seem a widespread opinion, it is an oversimplification to claim that the Swedish Parliament has little real influence on the drawing up of public policy. While it is true to say that there is no key institution in which the proposed reform formally originated—something which, incidentally, is perfectly normal in other countries—the day-to-day participation of members of parliament in the extensive network of committees that carry out the pre-legislative work gives the *Riskdag* a special influence: Swedish politicians take part in the drawing up of public policy much earlier than their European colleagues, as well as doing it in the three phases of the process: drawing up of the draft bill, deliberation and implementation (Arter 1990, p. 125).

6.5 Prelegislative Procedures as Obstacles to Punitive Populism

In this article, I have given a brief description of the Swedish legislative system as representative of a design capable of preventing punitive inflation and the pathological political instrumentalisation of penal reform. I have intentionally omitted a more extensive discussion of the rationality of criminal laws (Díez Ripollés 2003), a more complex question that begs philosophical and political questions that far exceed the aims of this research. From a purely pragmatic perspective, I have sought to highlight the fact that Sweden has not been immune to the advance of punitivism. Its legislative system is obviously not perfect nor impermeable to undesirable political manoeuvring or to having authoritarian and repressive demands made of it. Neither can the Swedish model be simply exported, without taking into consideration the historical, political, cultural and economic context in which the matters set out herein originate and are further developed.

However, the way in which laws are enacted in Sweden is a rare yet fine example of how legislative procedures can be re-orientated, in order to extend the political panorama toward options that go beyond the purely punitive. An institutional scenario such as that in Sweden allows political opportunities to be created for a "legislator" whose hands are often tied due to a lack of information, imagination and communicative resources.

If we compare the Swedish model with a simple approach for an "honest politician" who wishes to turn away from the punitivist path (Roberts et al. 2003), we find that some protective barriers to punitiveness are evidently present, if not deeply rooted in Scandinavian political culture. Many of these

[11]For more on parliamentary committees, see Arter (2008), pp. 122–143.

mechanisms are directly related to elements considered to be central to almost any notion of legislative evaluation[12] and rationality, including the creation of "policy buffers" [13] between politicians and the criminal justice system.

The following are some of these characteristics, as we have seen:

(a) The Committee of Inquiry system, through which all important reforms are channelled, gives a voice to "experts" in the area, allowing them to interact with politicians, civil servants and other social actors from an early phase of the procedure. The Swedish tradition also highlights the value of the time factor, setting aside the minimum period necessary for deliberation, as a requisite that ensures the quality of the legislation and as an obstacle to current political urgencies. The publication of committee reports contributes to public deliberation of these matters, limiting media control of the agenda and extending the discussion beyond the scope of political and scientific elites.
(b) The obligatory consultancy phase allows for articulate input from interest groups and civil society regarding the matter to be regulated. This not only has a politically integrational effect on society, making procedures more inclusive, but also helps to improve the technical quality of the laws in question, promoting deliberative concepts of the legislation and the institutional political action, obliging a certain time to be set aside for measured debate (the consultancy phase normally takes at least 3 months)
(c) The Swedish National Council for Crime Prevention promotes the availability of reliable crime data, as well ensuring it is disseminated among social actors and institutions. Its independent character is clearly close to the government, setting up this institutional "buffer" or "safety cushion" between the penal system and political decision makers who can mitigate social and media pressure. The make-up of the Council, in which the domain of non-legal social disciplines is clear, allows elements to be introduced into the debate which transcend the legal-moral dimension and which are susceptible to certain empirical verification.
(d) Sweden's particular constitutional control system mainly focuses on the pre-legislative phase, not only the work undertaken by the Legislative Council, but also that of ensuring the rationality and quality of the legislation throughout the preparatory stages. Although Swedish courts do not carry out *ex-post* constitutionality controls in the way constitutional courts in other countries do, the value of the preparatory work as legisprudence through which laws are interpreted and applied creates an interesting constitutional control and legality

[12]In reference to evaluation as a way of containing punitivism, the authors say that this strategy is the foundation for one of the pillars of neo-liberalism, in the special attention it pays to control and accountability. See O'Malley (1994); Roberts et al. (2003), p. 178.

[13]For more on the setting up of institutions (political buffers) such as codification commissions which cushion the direct pressure on political representatives, see Roberts et al. (2003), p. 180. In Sweden, the National Council for Crime Prevention would seem to fulfil this role efficiently.

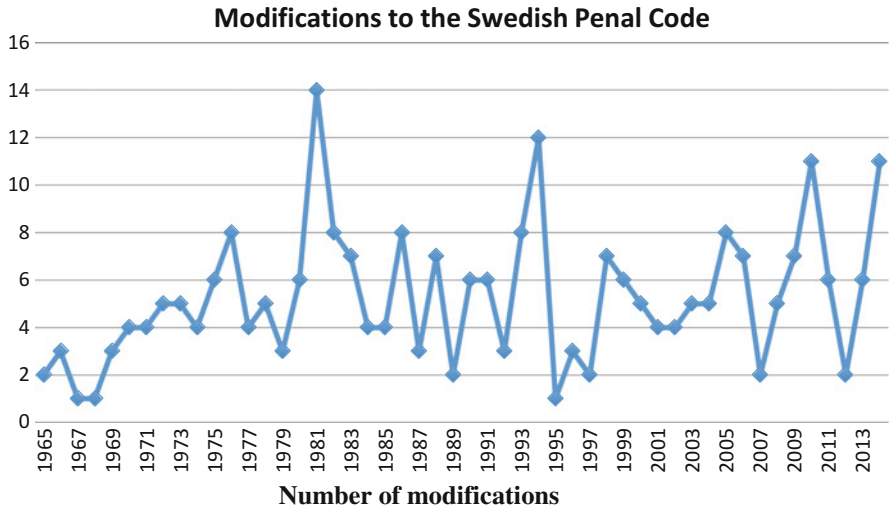

Fig. 6.4 Modifications to the Swedish Penal Code. *Source*: Prepared by author based on official *Riksdag* data (The list of reforms can be seen on the parliament's website: http://www.riksdagen.se/sv/Dokument-Lagar/Lagar/Svenskforfattningssamling/Brottsbalk-1962700_sfs-1962-700/. A link to the texts: http://www.notisum.se/rnp/sls/fakta/a9620700.htm.)

mechanism which is the fruit of relatively inclusive, participatory and integrational procedures.

(e) In a first analysis, and from the perspective of traditional parliamentarianism, the Swedish system of committees, consultation and assessment may seem complex and slow. It may seem tempting to underscore this slowness, in the hope that systems like the Swedish one are allowed to reduce the number of penal reforms to an absolute minimum and maintain a Penal Code that is somehow suspended in time, or at least protected from the worst of political urgency. However, the number of reforms introduced into the Swedish Penal Code is surprisingly high, as can be seen in Fig. 6.4.

In the absence of a more detailed analysis of the scope and content of each of these reforms, the high number of changes implemented each year in the Swedish Penal Code certainly appear very surprising. The almost 30 changes made, for example, to the Spanish Penal Code since it was introduced in 1995 pale into insignificance compared to the over 100 changes introduced in Sweden in the same period. These figures may indicate that the implementation of a pre-legislative system like the Swedish, based on the deliberation and cooperation of experts, civil servants and social actors, is not incompatible with flexibility in the implementation of new legislative developments. On the contrary, the graph can be interpreted as showing a kind of constant updating of the Penal Code, rather than a series of one-off large-scale reforms. Future research may want to investigate the question of whether or not this apparent regularity in the implementation of small reforms is in any way related to its lesser political significance, in comparison to the

situation in Spain, for example, where large-scale penal code reform programmes are seen as real markers of party-political identity.

6.6 Conclusion

It remains to be seen to what extent the disappearance of a large part of the material political basis of the Scandinavian exception (social-democratic welfarism and especially post-war social corporatism) will erode Swedish legal and legislative traditions. These traditions currently have a special significance beyond their original political context. Factors such as the negative influence of the very different law-making system in the European Union would not seem to promise good times ahead in this regard. From a political-criminal point of view, the certain fatalism present in the analysis of the Swedish situation in the first decade of the twenty-first century has to be seen in the context of trends over recent years, which suggest some positive indicators, such as the reduction in the prison population which has allowed a number of jails to be closed recently. Sweden is no longer the country where the average life-term prison sentence served was 8 years, as it was in the 1980. That average today is approximately 17 years, which is still a lot less than in countries such as Spain (Von Hofer and Tham 2013, p. 37). In order to take the greatest transformational potential from the Swedish example, we need to ensure we do not fall into a naive mythification of the Scandinavian model or the demoralising temptation to consider the forward march of penal dystopias to be unstoppable (Zedner 2002).

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Chapter 7
Codification and Legislative Technique in the United States of America

Marta Muñoz de Morales Romero

Contents

7.1 Contextualization of the Situation in the USA and Justification of Its Choice

The U.S. experience has two fundamental aspects that make it "special" for a European jurist: on the one hand, the classic failings that are "blamed" on European continental criminal Law arise with greater intensity on the other side of the ocean. Therefore, in an examination of the proposed remedies, interesting failed practices in a context of complete irrationality may turn out to be fruitful in another less problematic context. On the one hand, we find ourselves in a Federal State in which each state generally has the authority to legislate on criminal matters with the peculiarity that a great majority of them take the *soft-law* option of implementing the Model Penal Code (MPC). In other words: we find ourselves in a "similar" situation to the European Union (EU) in which the directives are a sort of "federal law" and the national Penal Codes (PC) amount to a sort of "state law".

In almost all countries across the world, the dominant criminal-policy discourse is repressive, but its clear tendency in the U.S.A. towards the politicisation of crime,

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over-criminalization (Stunz 2001, pp. 505, 509, 547; Beale 2005, pp. 747, 773; King 2005, pp. 293, 301; Luna 2005, pp. 703, 719; Healdy et al. 2004; Husak 2003, pp. 755, 769) or, in the *made-in-Spain* terminology, the "expansion of criminal Law" (Silva Sánchez 2006) is greater. The legislator has in this way been converted into a "crime factory" (Robinson and Cahill 2005, p. 634) managed under the premise of being (more) repressive improves the image and the popularity of the policy (Luna 2004, pp. 1, 5)[1] and helps you to win votes (Richman 1999, pp. 757, 772; Mitchell 2005, p. 1683; Kieran 2009, p. 302; Barkow 2005, p. 1276 ff.; Lemos 2006, p. 1203; Stunz 2001, p. 509). Or put in other terms: if you are not hard on crime, you may lose the elections (Robinson 2011, p. 16, Chernoff 1996, p. 577). And any sign of less repressive reform is considered a benefit for the "bad guys" (Broughton 2012, p. 17).

Linked to the latter, it escapes nobody's attention that legislation emerges "on the back of events", in other words, what the Americans like to call "normal news-story/political-response cycle crimes" or "crimes of the day" (Robinson 2003). In this sense, "the bad cases result in bad policies" and, in our particular case, "in bad laws" as well (Mears 2010, p. 24 ff.). In other words: policies in reaction to extremely disturbing events, which are neither on the majority of occasions the most representative nor the most frequent, need to satisfy the desires of society (Dawson 1988, p. 882; Remington 1987, p. 882) and show citizens their energetic and, even at times pioneering, reaction (Mears 2010, p. 163), in the form of a *silver bullet* to prevent cases like that from repeating in the future. In this sense, miracles are promised by the executive that evidently do not exist; all the less so in the case of criminal policies (Mears 2010, p. 163). Criminal law is therefore used with a symbolic nature (Díez Ripollés 2003, p. 147 ff.) to reinforce the norms of good conduct and to censure bad behaviour (Kahan 1999, p. 413; Kahan 1996, p. 591; Harcourt 2000, p. 179; Feinberg 1970, p. 95).

The mass media play a decisive role here. At all times ready to lend an exaggerated attention to sensationalist cases and to supply a sectarian public opinion to politicians based on the opinions of the central characters, family, friends, etc., in the lives of the victims, who evidently defend more repressive postures (Beale 1997, p. 47). In almost all countries, there are many examples of legislation in the wake of shocking headlines: the *Lindbergh*[2] law, and the *Megan* Law in the USA[3] and its English version, *Sarah's laws,*[4] are famous in the case of sexual crimes and crimes involving paedophiles.

[1] See also ABA, The Federalization of Criminal Law (1997), p. 16.

[2] This law criminalized kidnapping as a federal offence after the disappearance of a child, in the case of a famous American pilot. On this point, see Scott (2003).

[3] The first modern register of sexual offenders was introduced through this law. For a general view, see Young (2009), pp. 369, 372.

[4] For a comparative perspective of both, see Dugan (2001) and Griffin and Blacker (2010).

These are sensationalist cases that occur everywhere in the world, which lead the legislator to enact laws "flat out" without taking expert opinion into account (apart from exceptions like Sweden[5]) and without an overall evaluation of the appropriateness or otherwise of the adoption of new laws. This disinterest is due, among others, to two fundamental reasons. The first is the deep-rooted belief that the whole world is expert in crime-related questions (Pillsbury 1995, p. 306), including the victims, to the point that all and everybody may take part of an assessment committee.[6] The second refers to the fact that in criminal matters the opinions of experts may be taken into account but cannot be the guiding light of the legislation.[7] In this respect, it is not a question of whether the experts have the last word[8] but at least the first (Muñoz de Morales Romero 2011, p. 494). In addition, in comparative terms, recourse to experts to decide on criminal-policy-related matters is less frequent than in other decades.[9] And note that the guilt is not only found in the system (politicisation and/or sensationalist nature of the crime, few institutionalized channels to intervene, etc.). It is also borne by the experts themselves. As Stunzt (2001, p. 508) sarcastically pointed out, experts in criminal law appear to be

[5] See, Maroto Calatayud, "Criminal policy assessment and rationality in legislative procedure: the example of Sweden", in this volume.

[6] Let us not forget that in Spain there are also relatively recent examples of crime victims who have become consultants to political parties on questions of justice. This is the case of Juan José Cortés, father of the little Mari Luz, raped and assassinated by a reoffender who was freed by a miscarriage of justice.

[7] In USA, see Beale (1997), p. 65. We have also seen it with the most recent reform of the Spanish Penal Code that the Partido Popular [Popular Party] had approved despite its rejection by practically all university chairs of criminal Law. See, Manifiesto against the new Criminal Code, signed by 60 Professors of Criminal Law, among others by José Luis Díez-Ripollés, Adán Nieto and Nicolás García Rivas.

[8] The position advocated here is to rely in general on experts in decision-making processes and, in particular, because of their importance, in criminal matters, but it should not be confused with the technocratic systems vaguely outlined by democratic standards and that by no means always guarantee a rational policy. In this regard, the study by Baker (2009, pp. 124 ff., 175) is very interesting on the State of New York concluding that a merely pragmatic approach that enjoys the support of criminal policy experts does not always institute less repressive criminal policies.

[9] In the decade of the 1960s and the early 1970s, the proliferation of commissions and increased federal funding in the U.S.A. to investigate matters of criminal justice was quite frequent. It was not so much that the opinion of the experts was finally taken into account, but at least they could express it through institutional channels. See, National Advisory Commission on Criminal Justice Standards and Goals, Courts (1973); The President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society (1968); US Kerner Common, Report of the National Advisory Commission on Civil Disorders (1968) (cit. by Pillsbury 1995, p. 313). At the level of the state, the evaluation was also a must issue. Thus, for example, at the end of the 1960s, the Assembly Office of Research of California started to be very active with reports on the dissuasive effect of punishments (see, Assembly Committee on Criminal Procedure, "Crime and Penalties in California", March 1968), on the predictability of sanctions among the general public (see Procedure Progress Report, "Survey of Knowledge of Criminal Penalties", 1968). On both reports, see Biddle 1969).

speaking with each other (without their voices reaching as far as they should[10] and without being understood by the majority of the population). Can a lay person understand the dogmatic terms of criminal theory? Why does an expert not use simple terms when giving an opinion and start to talk in "embellished" dogmatic terms?[11] Is the expert more interested in searching for recognition among his peers than in communicating the importance of approaching crime-related problems calmly and taking measures after reflecting on the possible courses of action not only in the short term but also—and more importantly—in the long term? Is it not the case that the experts always offer the public a very pessimistic view of the situation without really contributing solutions that make it clear that things can really improve? (Pillsbury 1995, p. 330 ff.).

Moreover, apart from the exceptions,[12] the little that is researched in matters of evaluation (Mears 2010, p. 163), is no less important: there is no institutionalized network of academics dedicated to the matter; no funds are dedicated to these needs; with any luck descriptive reports are completed that say little about the implementation, effectiveness or efficiency of the policies; few people are interested in evaluation in universities and those who investigate this type of matter are unable to pass on their results to politicians in a clear way that is of use in their decision-making processes; evaluations take years and politicians have insufficient time (Stunz 2001, p. 509) because the elections are just around the corner, which might mean that they disappear off the map; etc.

Besides, the poor quality of the debates at a parliamentary level is remarkable, above all when there are two political parties delivering the speeches. The fact that the solution to a given problem fluctuates between two radically opposing extremes (the most conservative solution is defended by the most conservative party, while the defence of rehabilitation and the search for less repressive systems is attributed to the most progressive party) should be nuanced as "not everything is black and white".

Finally, we are talking about a country with in force criminal laws written since time immemorial, which have rarely or never been used in past decades and which

[10] Concrete examples of paying no heed to the experts when facing important criminal reforms in U.S.A. are narrated in Beale (1997), p. 24 ff. On the law of three strikes and you are out, see, Pillsbury (1995), p. 307 ff.

[11] To know how to communicate ideas to lay people is fundamental to have a presence in the press. In this sense, Pillsbury pointed out that the communications media look for experts who know how to explain what the problem is to the lay public with no knowledgeable of the matter, what the problem is that is presented with words and phrases that everybody understands. The dangers, nevertheless, of falling into banalities by using simplistic language can also be a problema (see Pillsbury 1995, p. 334 f.).

[12] For example, The Cambell Collaboration, see, http://www.campbellcollaboration.org/ (last accessed 22/01/2016).

are far removed from the social reality of that time and the place.[13] It is a country with disturbing crime rates[14] and with an inmate population[15] that is way above all the comparative rankings of European states (Raphael and Stoll 2009, p. 1).[16] A country that gives crime victims an undeniable leading role[17] that has a lot to do with (repressive) policies that result in scenarios such as those that I have mentioned.

The reader is at the very least left flabbergasted, as the U.S.A. is precisely a country that has (both at a federal and at a state level) penal codes of hundreds of pages, drafted using defective legislative techniques, which punish with disproportionate sanctions. In many cases, these penalties include the death penalty as a punitive option[18] and, as if that were not enough, are linked into "bundles" of accessory laws that regulate the same crime twice or even three times (Stunz 2001, p. 507). It is therefore of interest to take the process of American codification as the starting point of this restricted study.[19] In the same way as in eighteenth century

[13] For example, in section 18 of the Federal criminal Code (§ 2279), a norm drafted in 1872 criminalized boarding a ship prior to its arrival in port. The purpose of this crime in its day was to deter prostitutes from boarding boats "in search" of sailors. In 2003, Greenpeace was convicted of this offence when it boarded a ship carrying mahogany. To date, this provision had only been invoked twice in 1890. See, Mitchell (2005), p. 1684.

[14] As an example, the homicide rate was 4.7 per 100,000 inhabitants in the U.S.A. in 2012 (source: Uniform Crime Report: Crime in the United States, by Volume and Rate per 100,000 Inhabitants, 1994–2013, available at http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/tables/1tabledatadecoverviewpdf/table_1_crime_in_the_united_states_by_volume_and_rate_per_100000_inhabitants_1994-2013.xls, last accessed 07.04.2015), while the average in the EU (of 15 states) was 1 (0.6 in Spain). Source: Eurostat and Balance de la Criminalidad del Ministerio de Interior 2013, available at http://ec.europa.eu/eurostat/statistics-explained/index.php/Crime_trends_in_detail and http://www.interior.gob.es/documents/10180/1207668/balance_2013_criminalidad.pdf/562cc539-4a36-470f-8976-7dd305483e5b, last accessed 07.04.2015).

[15] U.S.A. was ranked first in the world in so far as it had the highest inmate population. The ratio of inmates per 100,000 inhabitants was 707. In Europe, not even the country in first position, the United Kingdom, with a rate of 149 per 1000 is close to that figure. Spain: 141; France, 102, Germany: 24. Source: International Center of Prison Studies (http://www.prisonstudies.org, last accessed 30.01.2015).

[16] "The United States currently incarcerates its residents at a rate that is greater than every other country in the world". At a state level, the case of California is interesting and the way its governor, Ronald Reagan, at the time, made criminal policies more severe "in the name of the victims". The Constitution of that same State has since 1982 recognized the right of victims to having the perpetrators of the crime arrested, put on trial and punished in a "sufficient" way to protect and to safeguard public security. See also Baker (2009), pp. 67, 70.

[17] On the question, with a appeal on the influx of victims in American (material and procedural) criminal Law), see, Dubber (1999).

[18] See, "Facts about Death Penalty", in Death Penalty Information Center, updated in September 2014, available at http://www.deathpenaltyinfo.org/documents/FactSheetEspanol.pdf (last accessed 22/01/2016). In the most recent Spanish literature, see Norberg (2010), p. 265 ff.; and Ragues y Vallés (2012), p. 233 ff.

[19] Another approach—left aside at this time by the author of this article—would take criminal policies as its focus and would seek to answer the question "how can criminal laws be correctly

Europe, codification comes to solve a part of the pre-existing American irrationality a century and a half afterwards. So the need to systematise *common law* and to have compact legislative corpora providing better access for legal agents and the public was the habitual trend up until the 1980s. From that moment, irrationality once again erupted for a series of reasons that will be explained further on. In the mean time, a Model Penal Code (MPC) had a tremendous harmonizing effect similar to the processes of normative harmonisation via EU framework decisions and now directives, and some codification committees that took aspects into account which from the point of view of formal and procedural evaluation were considered appropriate (discussion and deliberation, taking into consideration the opinions of experts belonging to different disciplines, etc.).

7.2 Penal Codification

In Anglo-Saxon Law, the technique of codification, regardless of the matter, was introduced by thinkers such as Bentham, Livingston and Babbington Macaulay.[20] In the specific case of the U.S.A., codification activities were managed for two reasons: the idea of public participation in public life and the possibility of moving away from English Law and from the motherland. Codification was seen as a means to revindicate American nationalism and to end the power of judges as lawmakers without relying on the democratic participation of the public. Codification was conceived in turn as a mechanism that would make a legislative corpus accessible to

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and effectively evaluated taking into account the criminal policy in which they are set?". It is here where the evaluation methods proposed by the doctrine may be studied from a theoretical point of view. In the American case, the Mears method (Mears 2010) is prominent, which with such crushing affirmations as "a large majority of the criminal justice policies are badly grounded, are ineffective, inefficient or do not have a good enough empirical grounding", proposes a hierarchical evaluation organised into five "steps": (1) Identification of the problem and the type of response that is indicated (needs evaluation); (2) the response that is indicated has a theoretical, logical and coherent basis and an empirical grounding (theory evaluation); (3) the policy has been correctly implemented (implementation or process evaluation); the policy has produced the desired results (outcome of the evaluation); and, (5) the benefits of imposing such a policy are greater than its costs (cost-efficiency evaluation). Another broader approach would cover the study of the setting of the criminal (for example, prevention programmes, laws on tools for the programmes of action) and even the broad evaluation reports completed by evaluation offices (for example, reports from the Government Accountability Office—GAO).

A restricted approach, much more modest but at the same time more feasible, would consist of a study of the decision-making process (which is more of a question, according to continental terminology, of parliamentary law), the codification process in the States (which has a double edge: procedural and legislative technique) and the solutions proposed to the problems that codification was unable to solve. These last two points are covered in the present contribution.

[20] On his ideas and proposals in relation to codification in general and, in particular, in criminal matters, see Kadish (1987), pp. 522–530.

the public that would put an end to the artfulness and technicalities of legal agents (Kadish 1987, p. 534).

One of the most prominent figures in the American codification process was the New York lawyer, David Dudley Field. Without a doubt his great merit was the introduction of a provision in the Constitutional Convention of New York of 1846 to create a committee with the purpose of "adopting a written and systematic code of the legislative corpus of the State". Field himself was a member of the aforementioned committee and of others that followed on to culminate, in 1864, in the famous Field Codes, in concrete three: the political Code, the Civil Code and the Penal Code, although he played a lesser role in the last mentioned one. This PC did nothing to break with the criminal thinking of the era. It was very repressive and was dedicated to punishing mere infractions of laws that had little to do with the concept of crime and, in relation to the hard core of criminal Law (crimes against life, against property, etc.). It limited itself to reproducing almost literally the content of the pre-existing laws. Its finality was none other than to reform without systematizing: relying on one single legislative corpus in the matter, not only removing the crimes based on common law, but also the terms in which such crimes were couched (Kadish 1987, p. 536). A sort of commentary (*the Note*) served at times as an "authentic interpretation", with references to jurisprudence (from the U.S.A. and English), for example, so as not to over-legislate. Thus, in the case of robbery, it indicated what type of goods could be the object of robbery and what should be understood as possession of the property of another person without intent to appropriate it. The PC was finally adopted in 1881, but the idea of codifying, despite its implementation in one or another State, for example, in California or Louisiana in 1942 (Wilson 1942, p. 53 ff.), went no further until the adoption of the MPC.[21] In fact, the situation of state penal codes earlier than 1962 was lamentable (Dressler 2003, p. 157): there were no codes in the strict sense of the term, as the crimes appeared in an alphabetic form in the best of cases, they overlapped and contradicted each other, and provided no system for the determination of a deserving punishment (Wechsler 1955, pp. 524, 526). In short, what existed at that time was "an archaic, inconsistent, unfair substantive criminal law and without reference principles" (Kadish 1999, pp. 943, 947).

The MPC was not the outcome of the tension between *common law* and "positivized law". Criminal Law already had at that time the law as its source, in other words, it was a statutory type of law. Its adoption was due, on the contrary, to the need to reform—rather than to harmonize or to unify[22]—the foundations of

[21] It is true, nevertheless, that important criminal reforms were instituted in many States at the start of the twentieth century, but were never sufficient to endow the State with a consistent legislative body in the sense of a penal code. Thus, for example, what happened in Minnesota. See Colbert and Kern (2012), p. 1445.

[22] It was highlighted in that way by one its drafters: "(. . .) it was not the purpose of the Institute to achieve uniformity in penal law throughout the nation, since it was deemed inevitable that substantial differences of social situation or of point of view among the states should be reflected in substantial variation in their penal laws. The hope was rather that the model would stimulate and

American criminal Law (Dubber 2011, pp. 11–13), at the same time as eliminating unnecessary repetition and to give criminal law greater coherence, conceptual clarity and legality.

The MPC is already quite interesting from the point of view of its preparation by the *American Law Institute* (ALI).[23] Its conceptual design began in 1952 (Wechsler 1953, p. 1097 ff.). From that point, various meetings were held over 10 years with committee members in which the most controversial questions were discussed and debated, with studies and drafts prepared by speakers and consultants; the earlier drafts of the law were criticized and revised, as well as the complete work that eventually underwent a final discussion. With the approval of the Council, the text and its respective commentaries were discussed and debated again at successive meetings until the basis for a proposal was reached in 1961, and adopted as a final draft in 1962. This evaluation completed in the Institute was complemented with a broad examination of the provisional drafts published by group and individual stakeholders with an interest, whose opinions were taken into account in the review. Although everybody was not always happy with the topics covered at those meetings, it may be said that the criticisms had an impact on some areas, such as the case of prison rules (Wechsler 1968, p. 1426). As things were, it is fair to say that the MPC was adopted with a high degree of consensus (Wechsler 1968, p. 1427),[24] with great deliberation and with the participation of many experts.

In relation to its content,[25] the MPC was divided into four large parts; general provisions (General Part); Definitions of particular crimes (Special Part); Treatment and correction (complement to punishability) and Organization of the prison system. Each part moreover follows a format divided into articles, sections and subsections. Among its main contributions, the prohibition on the legal definition of a crime created by a judge, the introduction of a General Part, the establishment of its objectives with a great degree of detail, the obligation imposed on judges to interpret its provisions by following those guidelines and the fusion in four of the different mental states (intention, knowledge, imprudence and contempt) as opposed to the 80 concepts or so, which circulated earlier in the former criminal codes and in *common law* terminology (Robinson and Grall 1983, pp. 681–762):

facilitate the systematic re-examination of the subject needed to assure that the prevailing law does truly represent the mature sentiment of our respective jurisdictions, sentiment formed after a fresh appraisal of the problems and their possible solutions". See Wechsler (1968), p. 1427 and Dubber (2011), p. 13.

[23] El ALI is an independent American organization whose work centres on the modernization and improvement of Law (http://www.ali.org/).

[24] In fact, the consensus that was achieved at that time has "evaporated", according to some, which makes it very difficult to propose a revision of the MPC. Thus, Dubber (2000), pp. 79–80.

[25] For an initial, rapid introduction, see Robinson and Dubber (2007), p. 319 ff. More recently, Tharman (2014), p. 165 ff. In greater detail, Dubber (2015).

carelessly, wantonly, heedlessly, wilfully, intentionally, maliciously, recklessly, corruptly, negligently, deliberately, accidentally, knowingly, premeditatedly, consciously, methodically, purposely, etc.[26]

The MPC was the source of inspiration of the majority of state penal codes[27] as well as those of other countries[28] and influenced on judicial decisions (Kadish 1999, p. 949). Despite the search for uniformity not being its primordial end, this text is one of the most successful *soft-law* harmonizing experiences. It has been catalogued as the most important work of criminal codification in the history of Anglo-Saxon Law. Its influence is also notable at a jurisprudential level, as the courts have cited the MPC hundreds of times, even in the case of official commentary on criminal legislation. Many U.S. States had very little legislative history available for their courts to be able to interpret a provision of their respective codes. In addition, where the state penal code took the MPC as a reference, the code played a fundamental role of interpretation in the commentaries on those state criminal codes. The same may be said of academic research that always occupied itself in detail with the MPC and with debating its strong and weak points (Wechsler 1968, p. 1428). However, it did not manage to guide the States on all points. For example, it did not manage to convince the majority of states to punish attempted crimes in a different way from crimes successfully committed (Robinson and Dubber 2007, p. 320).

During the emergence of the MPC, many of the States "set to work" and prepared their respective projects for codification.[29] Without a doubt, what is of most interest is the importance that certain aspects had, which already in the science of legislation, and in a broad sense in matters of evaluation, were considered *best practice* in procedural questions and the preparation and follow up of a code or a reform (1); in aspects of form or legislative technique (2) and in material or criminal questions *strictu sensu* (3).

[26] However, the fact that it improved the system did not mean that it was right about everything. Its defects are described in Robinson (1997), p. 234 ff. For example, it brings together the crimes in five categories, for the purposes of punishment, producing problems of proportionality; it presents problems of objective prosecution, etc.

[27] Wisconsin (1956), Illinois (1961), Minnesota and New Mexico (1963), New York (1967); Georgia (1969); Kansas (1970); Connecticut (1971); Colorado and Oregon (1972); Delaware, Hawaii, New Hampshire, Pennsylvania and Utah (1973); Montana, Ohio and Texas (1974); Florida, Kentucky, North Dakota and Virginia (1975); Alabama and Alaska (1980). See Robinson and Dubber (2007), p. 326.

[28] See Law Commission. A Criminal Code for England and Wales (Rep. n. 177, 1989); The Law Reform Commission of Canada, Report 30: Recodifying Criminal Law (1986); The Law Reform Commission of Canada, Report 31: Recodifying Criminal Law (1988).

[29] In a schematic form on criminal reform in many States, see Wilson (1964), p. 198 ff.

An examination of some of these proposals shows how the States opted for codification committees or commissions whose characteristic features were as follows (1):

– A composition[30] that sought to rely on experts in the matter, normally legal operators (judges, prosecutors, lawyers), professors of criminal Law,[31] politicians,[32] prison officials,[33] drafters of the MPC, such as the case of Prof. Weschler on the codification committee of New York,[34] and members of law enforcement agencies and security forces.[35] In some cases, consultation with experts of quite uncommon disciplines in present-day reform committees (criminologists, psychiatrists,[36] etc.) and even representatives of civil society.[37] In others, the most relevant legal organizations were called so that they would name their own representatives on the Commission.[38] Of special interest was the search for impartiality that was sought in some committees, selecting members from different political currents[39] and/or highlighting at all times the danger of mixing politics with the reform of criminal Law.[40] Of course, that line did nothing to avoid certain dimensions, due to the strong pressures that sought to push the PC in a more repressive direction.[41] Impartiality was also sought in

[30] It is striking that no reference is made to the committee members in some reports from the codification Committees. Thus, for example, Final Draft, Proposed revision of the Nebraska Criminal Code. Chapter 28, Reissue Revised Statutes of Nebraska, October 1972; Joint Legislative Committee for Revision of the Penal Code, California, 1969.

[31] Final Report of the New Jersey Criminal Law Revision Commission, Vol. I: Report and Penal Code, October, 1971; Indiana Penal Code—Proposed Final Draft, October 1974—State of Indiana, Criminal Law Study Commission, p. v.

[32] In some cases in a clear majority, for example, Report of the Criminal Code Revision Study Committee, Submitted to the 1985 General Assembly of North Carolina, Part 1, 1985. The codification committee of this State consisted of 12 members. Of who, 4 were senators, 4 deputies, 2 teachers of law, 1 district lawyer, 1 defence lawyer.

[33] Proposed Criminal Code of Massachusetts with Revision Commission Notes, Published as a Public Service in cooperation with the Massachusetts Criminal Law Revision Commission, 1972.

[34] Proposed New York Penal Law, Drafted and Recommended by the Temporary State Commission on Revision of the Penal Law and Criminal Code, 1964.

[35] Proposed Criminal Code of Massachusetts, op., cit.

[36] Indiana Penal Code, op., cit., p. vii.

[37] Proposed Criminal Code of Massachusetts, op., cit., although this was not normal.

[38] Advisory Commission on Revision of the Criminal Law, Proposed Minnesota Criminal Code 9, p. 6.

[39] Indiana Penal Code, op., cit., p. vii.

[40] Final Report of the New Jersey Criminal Law Revision Commission, op., cit., p. xvii: "(. . .) If we are to develop a new Federal Code, codifying, reforming and revising our laws, we ought, however, to put aside politics or at least minimize its impact on our work product to whatever degree possible (. . .)".

[41] State of Maryland, Commission on Criminal Law, Report and Part I of Proposed Criminal Code, June 1, 1972.

other States through private financing,[42] although that may be seen, for lobbying purposes, as a "two-edged sword".

- The creation of sub-committees and sub-commissions in charge of analyzing specific questions, with speakers at each of them who performed investigative and drafting tasks.[43]
- Taking the "pre-existing" situation in the State as a starting point without adding new crimes,[44] the MPC[45] or, if applicable, other previously adopted State Penal Codes[46] or at the proposal stage[47] or failed draft laws.[48] It may therefore be said that comparative law was applied.
- The introduction of more or less broad channels for public consultation.[49] Thus, for example, the Maryland Commission encouraged the sharing of commentaries and suggestions by public officials, judges, lawyers and all citizens in the State with an interest. There were five public hearings in the Criminal Law Commission of New York that were held and not all were in the same city, so that access to the content of the proposed Penal Code was much broader. In some committees, the mention of background to the need to debate the proposed text attracted attention because "nobody has the monopoly over the truth".[50]
- The assertion of the need to establish training programmes for judges, lawyers and court officials, although not so extensive, was without a doubt relevant from the perspective of the application of the norm, so that they might familiarize themselves with the new aspects of the code.[51]
- Finally, the identification, with some exceptions,[52] of the problem/problems that would be resolved with the new PC through different approaches with the

[42] Proposed Criminal Code of Massachusetts, op., cit., p. vii.

[43] State of Maryland, Commission on Criminal Law, op., cit.; Indiana Penal Code, op., cit., p. v.; Proposed Criminal Code of Vermont, August 1970.

[44] Advisory Commission on Revision of the Criminal Law, Proposed Minnesota Criminal Code 9, p. 9.

[45] Final Report of the New Jersey Criminal Law Revision Commission, op., cit.; Proposed Criminal Code of Vermont, op., cit.; Alaska Criminal Code Revision, Tentative Draft, Part 1, General Principles of Criminal Liability, parties to a crime; attempt; solicitation; justification; robbery; bribery; perjury, Criminal Code Revision Sub-commission honourable Terry Gardiner, Chairman, February 1977; State of Maryland, Commission on Criminal Law, op., cit.

[46] Proposed New York Penal Law, op., cit.; State of Maryland, Commission on Criminal Law, op., cit.; Advisory Commission on Revision of the Criminal Law, Proposed Minnesota Criminal Code 9, p. 7.

[47] In some cases federal criminal law was also taken into account. Thus, for example, Indiana Penal Code, op., cit., p. v.

[48] Report of the Criminal Code Revision Study Committee, North Carolina, op., cit.

[49] State of Maryland, op., cit., p. xii; Report of the Criminal Code Revision Study Committee, North Carolina, op., cit.; Joint Legislative Committee for Revision of the Penal Code, op., cit.

[50] Final Report of the New Jersey Criminal Law Revision Commission, op., cit., p. xviii.

[51] Alaska Criminal Code Revision, p. 5.

[52] Final Draft, Proposed revision of the Nebraska Criminal Code; Joint Legislative Committee for Revision of the Penal Code, California, 1969.

consequent evaluation of the PC once adopted and its follow up, to establish whether they have effectively been solved.[53]

For its part, the technical legislative questions (2) centred on:

– The codification of a general Part. In many States, the general part (for example, the causes of justification (defences), the definition of conspiracy, the rules of *ne bis in idem*, etc.) was based on jurisprudence (Robinson 1993, p. 313). However, when covering such decisive questions in the deliberation of a punishment, the codification Committees saw that Congress had a duty to deliver an opinion on them, in an effort to claim its role in representation of society.[54]
– The search for simplification: In almost all cases there were too many crimes in certain criminal areas (robbery, theft), in other words, the legislative technique was of a casuistic type. It raised doubts among legal operators, who were uncertain over which provision to apply[55] and/or problems in the determination of the penalty. Thus, for example, in Alaska, robbery in an inhabited dwelling place was punished with a lesser punishment than the minimum punishment in the case of robbery not committed in an inhabited dwelling.[56] In other cases, the tasks of simplification were centred on the derogation of special laws,[57] the avoidance of grouping crimes in alphabetic order,[58] expulsing the normative body of non-criminal infractions[59] and simplifying the language employed by eliminating archaic and ambiguous terminology.[60]

[53] State of Maryland, op., cit., p. X; Advisory Commission on Revision of the Criminal Law, Proposed Minnesota Criminal Code 9, p. 9.

[54] Final Report of the New Jersey Criminal Law Revision Commission, op., cit., p. ix.

[55] In Arkansas, for example, the crime of robbery had 88 sections in accordance with the identity of the criminal, the victim and the interest that had been damaged. With the reform of the offences of robbery they were reduced to seven (see The Arkansas Criminal Code Revision Commission, op., cit.). A similar situation occurred in the State of Maryland (see State of Maryland, op., cit., p. ix) or in Alaska with 12 crimes of robbery in accordance with the place of its commission, the value of the stolen property, the time at which it was stolen, the active subject and the method that was used (see Alaska Criminal Code Revision).

[56] The Arkansas Criminal Code Revision Commission, op., cit.

[57] Michigan Revised Criminal Code, Final Draft—September 1967, Special Committee of the Michigan State Bar for the Revision of the Criminal Code and Committee on Criminal Jurisprudence, State Bar of Michigan.

[58] Proposed New York Penal Law, op., cit.; Final Report of the New Jersey Criminal Law Revision Commission, op., cit.; Michigan Revised Criminal Code, op., cit.

[59] Proposed New York Penal Law, op., cit.

[60] The Arkansas Criminal Code Revision Commission, April, 21 1976; Michigan Revised Criminal Code, op., cit.

- The use of clear, simple and understandable terms[61] and the opening of channels that facilitate their interpretation, to which end it was decided to use explanatory commentary on each of the precepts[62] and authentic interpretations.[63]
- The preference, apart from exceptions (for example, homicide), to group the different offences by their level of seriousness alongside the respective punishments[64] (instead of turning to the technique of attributing a punishment to each specific crime, which is used in the continental penal codes). We will return to this question later.[65]
- The reduction of subjective criminal definitions normally to four (Robinson 1993, p. 314). If continental penal codes only recognise criminal intent and negligence in its different forms, in the U.S.A. the subjective part of the offence (*mens rea*) offers a much broader range. The problem prior to codification was that there could be more than a dozen subjective offences, attached to very varied punishments, without offering patterns of differentiation between them beyond their denomination.[66]

Finally, the questions of criminal law (3) were reflected in the following points:

- The presentation of criminal law as *ultima ratio* in relation to other branches of the legal system.[67]
- The establishment of a *grading-scheme* for crimes[68] responding to the principle of proportionality.[69] Thus, for example, in the State of Maryland a person who

[61] Advisory Commission on Revision of the Criminal Law, Proposed Minnesota Criminal Code 9, p. 10.

[62] Proposed New York Penal Law, op., cit.

[63] The Arkansas Criminal Code Revision Commission, op., cit. See also Robinson (1993), p. 314.

[64] Thus, for example, in New Jersey (see, Final Report of the New Jersey Criminal Law Revision Commission, op., cit.); The Arkansas Criminal Code Revision Commission, op., cit.; Indiana Penal Code, op., cit., p. xiv.

[65] See Sect. 7.4 in this chapter.

[66] As an example, in Alaska, there were seven ("knowingly", "surreptitiously", "maliciously", "purposely and deliberately", "wilfully and wrongfully", "maliciously or wantonly" and "wilfully and deliberately") however they were reduced to four with the new Penal Code: the proposal consisted in only four mental states: intentionally, knowingly, recklessly and with criminal negligence. See, Alaska Criminal Code Revision.

[67] Here, the State of New Jersey stands out, as it made it very clear that civil, administrative or mercantile liability, and even informal means of social control such as the family can be more effective than recourse to criminal Law (see, Task force Report, The Courts, p. 98 in the Final Report of the New Jersey Criminal Law Revision Commission, op., cit., p. xiii. No less important is the rejection of the symbolic effect of criminal Law, leaving it clear that to opt for a less restrictive means of social control does not mean that legislative power does not take the infraction seriously (see, Final Report of the New Jersey Criminal Law Revision Commission, op., cit., p. xii).

[68] See Sect. 7.4 in this chapter.

[69] Proposed New York Penal Law, op., cit.; State of Maryland, op., cit.; The Arkansas Criminal Code Revision Commission, op., cit; Final Report of the New Jersey Criminal Law Revision

defrauded $50 could be punished with a prison term of 15 years, while the maximum punishment that could be imposed on another person who committed a theft was 1 year.
- Social and temporal adjustment.[70] So, for example, the theft of turkeys in Arkansas was punishable by a prison term of 1–5 years, and the crime of involuntary homicide by a maximum prison term of 3 years.[71]
- The rationale of the punishment that guided the system of grading the sanctions sought to find a balance between both: protection of the public and confinement (due to the dangerous nature of the criminal) through minimum prison terms (for example, in the case of homicide), *extended sentences*, normally establishing a safety period having complied with the sentence and indeterminate sanctions of a duration to be agreed in the prison, in accordance with the conduct and progress of the criminal; and, finally, rehabilitation[72] through recourse to substitutive punishments,[73] systems of conditional freedom and early parole.[74]
- The attempt to criminalise only socially damaging behaviours[75] reducing less serious conducts, filtering out the *strict liability offences,*[76] decriminalizing essentially moral conduct (for example, consenting homosexual relations between adults)[77] and setting guidelines to differentiate between non-punishable preparatory acts and the attempted crime.[78]

If, as we have indicated, codification was a reality at the level of the state, it was a resounding failure at a federal level. It is true that there were codification attempts after the enactment of the MPC in 1962.[79] In 1966, the Congress formed a commission[80] that presented a draft in 1971.[81] Some years later, in 1978, the Senate approved it as a draft bill of law, although all efforts were in vain[82]: The creation of new crimes in a random and accumulative manner was of far greater interest than equipping the material criminal corpus with a better structure, better understanding

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Commission, op., cit., p. xiv; Advisory Commission on Revision of the Criminal Law, Proposed Minnesota Criminal Code 9, p. 9.

[70] See Alaska Criminal Code Revision.

[71] The Arkansas Criminal Code Revision Commission, op., cit.

[72] Michigan Revised Criminal Code, op., cit.

[73] State of Maryland, op., cit.

[74] State of Maryland, op., cit.

[75] The Arkansas Criminal Code Revision Commission, op., cit.; State of Maryland, op., cit.

[76] Final Report of the New Jersey Criminal Law Revision Commission, op., cit.

[77] Final Report of the New Jersey Criminal Law Revision Commission, op., cit.

[78] Final Report of the New Jersey Criminal Law Revision Commission, op., cit.

[79] See Act of Nov. 8, 1966, Pub. L. N. 89-801, 80 Stat. 1516 (1966).

[80] Act of Nov. 8, 1966, Pub. L. N. 89-801, 80 Stat. 1516 (1966).

[81] See, National Common on Reform of Federal Criminal Laws, Final Report of the National Common on Reform of Federal Criminal Laws, S. Doc. N. 1042, 92d Cong. 1st Sess. 129-514 (1971).

[82] See, S.1437, 95th Cong., 2d Session (1978). 72 votes for and 15 against in the senate.

and rationality (Robinson 1997, p. 226). This is the reason why the federal penal Code, to give it a name of some sort (Robinson 1997, p. 228; O'Sullivan 2014, p. 57), virtually continues to be plagued with the same shortcomings of bygone days. Basically, it has no General Part as its general provisions refer to questions of complicity, the excuse of mental illness and little more (Robinson 1997, p. 228). Crimes incorporated over the last 100 year or so continue to accumulate in the Special Part, without establishing groups of crimes by virtue of their seriousness, it gives no clear definitions and it provokes serious problems of interpretation (Robinson 1997, p. 233).

7.3 The Powerful Tentacles of Irrationality

The situation improved, following the adoption of the new state Penal Codes, although in a relatively short time it went "into reverse". The expansion of criminal Law in quantitative terms (many crimes) and qualitative (broad definitions of the offence) was the habitual trend in the case of both federal and state criminal law. This has meant that the Penal Codes of US States and the special laws contain criminal definitions that punish the same conduct various times over (Stunz 2001, pp. 505, 507; Minser 1996, pp. 717, 736) and that criminalise behaviours that nobody really wishes to criminalise (Stunz 2001, p. 511).

The "deterioration" of the already flawed situation at a federal level was brutal: a total of 183 crimes in 1873 rose to a hair-raising figure of 643 in 2000 (Stunz 2001, p. 514; Mitchell 2005, p. 1672)[83] with an excessiveness of criminal definitions.[84] Neither was the balance positive from a qualitative point of view[85]: descriptions that were hardly clear in the subjective criminal definitions (*mens rea*) (Baker 2004, p. 23) and broad criminal definitions were the general rule for the legislative corpus. As an anecdote, the federal PC defined an offence of unauthorized use of image rights, in the context of "Woodsy the owl" and "Smokey the bear".[86] Beyond its comic aspects, U.S. criminal regulation of fraud and deceitfulness leaves nobody indifferent: the federal PC punishes attacks on the "intangible right to honest services", there being no need to prove deceit. In this way, for example, a university professor was convicted

[83] See also ABA, The Federalization of. . ., op., cit., pp. 7–11. According to this study, over 40 % of federal criminal laws were adopted in the 2 decades of the 1970s and 1980s.

[84] Such as, for example, robbery with violence of motor vehicles that was punished in all States. See Beale (2005), pp. 755–756; Luna (2005), p. 708.

[85] It is precisely the quantitative and qualitative deterioration of the federal PC that has led it to be considered an overly unsystematic code, incomplete from the theoretical point of view and too irrelevant in practice to function as a national code. The criticism is from Robinson and Dubber (2007), p. 320.

[86] Woodsy the Owl and Smokey the Bear are the mascots of the US Forest Service, used to transmit the message of caring for the environment to children. More examples in O'Sullivan (2006), p. 652; Joost (1997), p. 206.

who granted postgraduate certificates to students whose work was of a doubtful nature and on some occasions even plagiarized.[87] The protected legal interest that appears to be safeguarded in this criminal definition is the fiduciary duties. The U.S. obsession with honesty led to the inclusion of 100 crimes (Kadish 1967, p. 157 f.) of "distortion of the truth" and "misrepresentation", some of which came to punish the lie (understanding this to be the mere suppression, concealment, or inducement to error in cases of scarce relevance). In this way, some lies before a federal agency are considered criminal offences (for example, giving a false address so that your offspring can attend a particular college).[88]

The showcase at a state level exhibited more of the same: in 1856, the PC of Illinois[89] defined 131 crimes. By 1874, the number had risen to 220. By 1899, there were 305 and the number reached the figure of 460 by 1951. The influence of the MPC calmed this expansive tendency of criminal law for some years, even reducing the number of crimes (to 263) (Stunz 2001, p. 516). But it was merely a fleeting moment (in 2001, the number raised again to 421). Another example is provided by Robinson et al. (2000, p. 36) in relation to the PC of Mississippi. This code criminalised different types of homicide, on the basis of the legislative technique of the case: homicide by ramming a boat, homicide as a result of a doctor who exercises his duties under the effects of alcohol and in a negligent manner causes the death of one of his patients; homicide as a result of negligent navigation of a steamship. These behaviours would all come under the simple crime of negligent homicide.

Qualitative shortcomings are appreciated in the criminal definitions of a considerable number of States referring to the mere possession of instruments of use to commit burglary. In this sense, the mere possession of a screwdriver or even a radiography that are useful to open doors could be considered a crime. The same breadth is observed in the criminalization of the possession of tools for the manufacture and treatment of drugs such as large cups, sponges, etc. (Stunz 2001, p. 516). And the list is endless (Stunz 2001, p. 518). Out-dated crimes of a moral nature punishing homosexuality, fornication, sodomy, etc. as well as figures that seek to solve very concrete problems (crossing railway lines) continue to have a presence in some American penal codes (Stunz 2001, p. 556).

The inconsistencies in the determination of the punishment are also of a qualitative type. This type of inconsistency is translated using a more continental terminology into violations of the principle of proportionality. Following Robinson and others (Robinson et al. 2010, p. 709; Robinson et al. 2011), it is a question of problems of horizontal coherence (*improper grade problem* and *the problem of inconsistent grades between similar offences*); problems related to minimum fixed

[87] United States v. Frost, 125 F3d 346 (6th Cir. 1997).

[88] Critical of the criminal regulation of fraud, see Coffee (1991), pp. 193, 198; Coffee (1995), pp. 427 and 428.

[89] But this is not the only case: the PC of Virginia grew from 170 to 495 crimes in 50 years. The PC of Massachusetts with 214 crimes in 1860 had over 535 in 1998.

numbers in the abstract (*the mandatory minimum problem*); problems linked to the criminalisation of conducts in very broad terms (*the problem of mailing to distinguish conduct of significantly different seriousness contained within a single offense grade*); problems connected with the use of quantitative limits (*inconsistent use of grading factors among analogous offences*) to distinguish between crimes and misdemeanours and between crimes and administrative infractions; problems caused by insufficient grading categories (serious, slight crimes, misdemeanours), etc.; and problems associated with the abuse of special laws or the problem of codifying criminal offences outside of the criminal code.

The first type of problem related to horizontal coherence happens when the commission of the behaviour is linked to a very serious punishment in comparison with the punishment (much less) imposed on another behaviour of similar seriousness. For example,[90] the crime of receiving stolen goods in the PC of Pennsylvania: the owner of a home appliances shop who knowingly sold a stolen video may be given a prison term of 20 years.[91] If it is compared with the 2-year prison term foreseen for the theft of goods valued between $50 and $200 dollars,[92] then the inconsistency and disproportion is clear.[93] Another example is the crime of robbery with violence of a motor vehicle. Here, a behaviour consistent with dragging a driver from a stationary vehicle in front of a red light (violent robbery of a motor vehicle) could in theory be punished in the State of New Jersey with a term of imprisonment of up to 30 years,[94] while crimes of similar seriousness (for example, cutting the shoulder of a person) are punishable by no more than 5 years of prison.

The horizontal incoherence not only occurs in the management of the PC, but also—above all—when crimes are introduced without taking into account the punishments assigned to other very similar behaviours. For example, the PC of Pennsylvania punishes failure to attend to the needs of a newly born child with nothing less than a prison term of up to 7 years,[95] while failing to fulfil the inherent duties of a parent or guardian after birth is punishable with a prison term of up to 5 years.[96] Selling the skin of a cat or dog in the State of Illinois is punishable by a prison term of up to 18 months[97]; although if the purpose is to sell the meat of the

[90] All the examples that will be cited with regard to US codes were taken from Robinson et al. (2010, 2011).

[91] 18 PA. CONS. STAT. ANN. § 5111(a).

[92] 18 PA. CONS. STAT. ANN. § 3903(b)(1).

[93] Incidentally, the Spanish PC punishes the crime of receiving stolen goods with a prison term of between 6 months to 2 years and from 1 year and 3 months to 2 years if the reception of the goods is committed for further sale (art. 298,2 PC); the theft of movable goods belonging to another person of a value over 400 Euros is punished by a prison sentence of 6–18 months (art. 234 PC). The punishments are quite similar in this sense.

[94] NJ Stat. Ann. §2C:15-2a.

[95] 18 PA. CONS. STAT. ANN. § 3212(b).

[96] 18 PA. CONS. STAT. ANN. § 4304(a)-(b).

[97] NJ Stat. Ann. §4:22-25.3 and §2C:43-6a(4).

animal, the conduct is punishable with a fine of $100 and with imprisonment of no more than 30 days.[98]

On the other hand, setting the mandatory minimum limits[99] produces inconsistencies when unable to take factors into account that are related to the culpability of the perpetrator or with aggravating or mitigating factors (Robinson et al. 2010, p. 721; Robinson et al. 2011, p. 5; Kieran 2009, p. 302). The American Penal Codes usually include minimum limits to curtail judicial discretion in the determination of the penalty, which some authors consider unconstitutional because they work against the separation of powers (Kieran 2009, p. 302),[100] and unnecessary (Robinson et al. 2010, p. 721; Robinson et al. 2011, p. 5), as minimum limits do nothing to achieve any of the dissuasive ends of the punishment.[101] They also overlook the solution to judicial discretion that can be achieved through a coherent system of *sentencing* (Robinson 2014, p. 6). In other words, through sound rules for the determination of the punishment in view of the concurrent aggravating and mitigating factors of the crime and its perpetration.[102] Likewise, the imposition of strict minimum limits is considered an ineffective measure, as judicial discretion is reduced, but not that of the prosecutors who have maximum freedom to select the crime with which to charge the accused from among a wide variety. By this way, the crime selected may not be subject to a minimum punishment (Ulmer et al. 2007, p. 427 ff.).

The use of a broad range of meanings to describe offences provokes inconsistencies when grouping behaviours of differing degrees of seriousness around the core of the prohibition to which, nevertheless, the same punishment is applied. For

[98] NJ Stat. Ann. §4:22-25.4.

[99] And there are more than a few criminal sanctions that contemplate these types of minimum obligatory limits. At a federal level, for example, there are over 171. See House Hearing Looks at Mandatory Minimum Sentencing Issues, The Third Branch, Julio 2007, available at http://www.uscourts.gov/News/TheThirdBranch/07-07-01/House_Hearing_Looks_at_Mandatory_Minimum_Sentencing_Issues.aspx (last accessed 13.04.2015).

[100] The consequence of the imposition of mandatory minimum limits means that the legislator and, indirectly, the prosecutor, is the one who punishes, taking the most vital function away from the judge: that of judging. The law is general and abstract, but the judgment is limited to the case and each case has its own particular details that the judges should value at when determining the punishment.

[101] In this sense, some authors have managed to demonstrate that they have no preventive-general nor special purpose. Thus, Vincent and Hofer (1994).

[102] By the middle of the twentieth century the majority of States and the Federation itself had a system of fixing indeterminate punishments by establishing maximum penalties and leaving a large margin of discretion to the judges when establishing and enforcing the punishment. However, as from the 1980s it was decided to set limits through sentencing guidelines. The USA Sentencing Guidelines were adopted in 1987, although many States employed similar systems (Utah, Minnesota, Michigan, Delaware and Washington). Over time, the idea of limiting judicial discretion was introduced and it is rare for a State to have no guidelines that introduce periods of greater legal certainty, truth in sentencing and/or "three strikes and you are out". See Knapp and Hauptly (1991), p. 679; Frase (1997), p. 46 ff.; Reitz (1996), p. 1441 ff.; Frase (1995), p. 173 ff.; Driessen and Durham (2002), p. 623 ff.

example, the crime of supplying supporting material or resources to terrorist organisations is punishable by a term of imprisonment of up to 10 years in New Jersey.[103] The same punishment is meted out to a person who believes a donation is going to an NGO, although it is, nonetheless, an organization that supports Al-Qaeda. *Mens rea* plays no role here for the purposes of the punishment. In the case of the PC of Pennsylvania, the crime of illegal detention of a child is drafted in such a way that it could result in a similar punishment (a maximum of 10 years imprisonment) for whoever chains a child to a wall for 1 month as much as whoever punishes the child by confinement in a room for half an hour.[104]

The enforcement of different penalties in the abstract attending to different factors in the case of similar crimes is also, as Robinson indicated, a cause of inconsistencies. For example, the PC of Pennsylvania in the case of the crime of theft foresees different penalties in accordance with the value of the stolen goods. It thereby distinguishes between the theft of objects with a value of under $50; the theft of objects worth between $50 and $199.99; thefts valued at between $200 and $1999 and thefts with a value equal to or over $2000.[105] However, fixing punishments in the case of theft from a museum or a library relates to other monetary values; the theft of objects with a value of between $0 and $149.99 and the theft of objects with a value equal to or over $150.[106] As a result, the robbery of an object with a value of $40 is punishable by a prison term of up to 1 year; but if the theft is from a library or museum, it is punishable by a maximum prison term of 9 days. But, what is more: if a rare book worth $3000 is stolen from a person in the street, the criminal may receive a prison sentence of up to 7 years, while if the book belongs to a library, the applicable penalty is 1 year.

Another of the problems mentioned by Robinson and colleagues occurs when a PC does not distinguish between a wide variety of criminal infringements. In reality, it is once again a problem of legislative technique specific to the U.S.A. that has drawbacks as well as advantages. The U.S. PCs usually establish a list of the "felonies" and "misdemeanours". In some cases, it is quite a detailed list[107]; in others less so.[108] The difference between the Spanish PC and an American one is that in the latter a penalty is directly attributed when the distinction is drawn. This is not what happens in the majority of continental PCs that distinguish between

[103] N.J. Stat. Ann. §2C:38-5b.

[104] 18 PA. CONS. STAT. ANN. §2903.

[105] 18 PA. CONS. STAT. ANN. §3902; §3903.

[106] 18 PA. CONS. STAT. ANN. §3929,1(b).

[107] See, for example, ARIZ. REV. STAT. § 13-601 (1989) (10 grades); COLO. REV. STAT. §§ 18-1-105, 18-1-106, 18-1-107 (1986) (10 grades); DEL. CODE ANN. tit. 11, §§ 4201, 4202, 4203 (1994) (10 grades); 730 ILL. COMP. STAT. ANN. 5/5-5-1 (11 grades); NEB. REV. STAT. §§ 28-105, 28-106 (1995) (15 grades); N.Y. PENAL LAW §§ 55.05, 55.10(3) (10 grades); OHIO REV. CODE ANN. § 2901.02 (12 grades); S.D. CODIFIED LAWS §§ 22-6-1, 22-6-2, 22-6-7 (10 grades); VA. CODE ANN. § 18.2-9 (10 grades).

[108] The MPC includes very few categories (only five: first-degree felony, second-degree felony, third-degree felony, misdemeanour and petty-misdemeanour), for which reason it has been highly criticised. See Robinson (1997), p. 247; Cahill (2004), p. 602.

more and less serious crimes in accordance with the penalty that is attached to them (for example, article 33 of the Spanish Penal Code considers serious punishments and, in consequence, serious crimes as those that are punishable with a term of imprisonment of over 5 years, with an absolute disqualification for a period of over 5 years, etc.), but then describes each behaviour and attaches its specific sanction. The U.S. PCs do not use the same legislative technique. At first they list the different types of crimes (*felony of the first degree, felony of the second degree, felony of the third degree, misdemeanour of the first degree, misdemeanour of the second degree, misdemeanour of the third degree,*[109] etc.), and they then indicate the punishment that is attached to each sort of crime in the same or in another section[110] (for example, a first degree *felony* in the PC of Pennsylvania is punishable by a term of imprisonment of up to 20 years; a second-degree *felony* with a term of imprisonment of no more than 10 years, etc.[111]). The Special Part of each PC only then establishes the type of crime in question (for example, in the PC of Pennsylvania, imprudent homicide is considered a first-degree *misdemeanour* (§2504) and as such is punishable by a prison sentence of up to 5 years (§1104). Some crimes are not subject to this general rule in such a way that they have their own punishment. This legislative technique fails when the category of crimes is very reduced, as it overly restricts the possibilities of *grading* (determination of the punishment) and, therefore, does not permit the application of the most appropriate and proportional sanction to each behaviour in accordance with the extenuating or mitigating circumstances of the act and its result and the state of culpability (Cahill 2004, p. 602).[112] One alternative would be to dispense with the *general grading scheme* and attach the punishment to each crime in some cases. This solution does not appear to convince (Robinson et al. 2011, p. 11) many who prefer the *pre-grading scheme*. They prefer it because it facilitates the task of the legislator when describing new crimes or in future modifications of those that already exist, and because it reduces judicial discretion in the determination of the sentence (Robinson and Dubber 2007, p. 327), although that is something that is already achieved with the *sentencing guidelines*.

Finally, recourse to accessory laws as a means of defining crimes is counterproductive for various reasons (Robinson et al. 2011, p. 602). In the first place, because it favours the gaps and redundancies in the definition of the crimes. In second place, because it aggravates the inconsistencies in the determination of the punishment. And in third place, because it complicates the possibility of access to the law by the public and complicates its application by the legal operators. Thus, for example, to sue the company that insures your car on false grounds is a special crime that overlaps with the more general one of defrauding an insurance company. It is true that there are similar rules to Article 8 of the Spanish PC (principle of *lex specialis derogat lex generali*, principle of subsidiarity, principle of consumption and alternativeness), but the

[109] 18 PA. CONS. STAT. ANN. §106.

[110] 18 PA. CONS. STAT. ANN. §1103.

[111] Ibidem.

[112] And the fewer the categories of crimes, the greater the possibility of crimes of different severity winding up in the same "bag".

American prosecutors are very skilful and usually do more than prosecute on the grounds of the most serious charges overlooking any reference to any remaining charges that are applicable, so as to "confuse" the judges (Brown 2007, p. 230). In consequence, the charges carrying the most significant penalty are usually applied in these cases.[113]

As if all of the above referring to a particular territorial area were not enough, the superposition of state PCs and their federal homologue complicates the situation even further. In fact, the prosecutors have the choice of jurisdiction that in procedural terms (for example, for lack of evidence) is the easiest in which to prosecute the crime. And not only that: they can decide on the cases in which either more or less punishment is advisable and it is therefore "better" to base the accusation on a federal or a state crime; in which it is advisable to lay all the charges to force the subject to negotiate (Mitchell 2005, p. 1687; Stunz 1997, p. 107 ff.); and worse still, it is "pertinent" to punish twice for the same act (at a state or a federal level).

7.4 In Search of Rationality: An Impossible Mission?

Legislative chaos and the inconsistencies referred to in the preceding section have led a sector of the doctrine to demand a process of criminal recodification with a legislative technique that is more coherent and receptive to those used in continental penal codes (Robinson et al. 2010, p. 738; Robinson et al. 2011, p. 25). The other—much more feasible—means of action has centred on the introduction of procedural and institutional channels that permit the participation of experts and greater reflection on the criminal acts to be adopted. In this sense, Robinson and others proposed, in the first place, that the criminal legislative proposals be accompanied by a comparative report on pre-existing crimes and their respective penalties, to establish whether the present criminal definitions could apply to the newly proposed conducts and to prevent the proposed crimes from entering into conflict with the system by which the existing sanction is determined (Robinson et al. 2011, p. 26). In addition, in view of normal American legislative practice, new offences would have to be written into the PC itself and not in the form of special laws (Robinson et al. 2011, p. 26). In second place, these authors indicated that a counter-criticism should be required in response to those reports (in other words, a counter-report on the first report) through parliamentary committees or of another sort.

[113] For example, in United States v. Batchelder [442 U.S. 114 (1979).52], a subject could be punished for the possession of arms on the basis of two provisions from one and the same norm (the Omnibus Crime Control and Safe Streets Act de 1968). Both crimes refer exactly to the same conduct, but punish it in different ways. The Court chose the most repressive option. However, in other cases, the courts opted for the crime punished with a greater sanction or for applying the rule of "the special crime prevails over the more general one", See Dixon v. State, 596, S.E.2 147, pp. 148–150.

In third place, it is necessary to establish a standing committee to review criminal legislation (what these authors called a *Standing Criminal Law Revision Commission*) which should pronounce an opinion before any law is voted.[114] By doing so the politicisation of the law would be avoided as well as the introduction of criminal definitions (on the *crimes du jour*) for the sole purpose of satisfying popular demand. Lastly, it is also recommended that the PC have up-to-date official explanatory notes. In this way, the problems of interpretation that might arise in relation to a particular criminal definition would not have to be solved through the introduction of a new crime, but it would be enough to point out that the crime in question also involves a particular behaviour in the official explanatory notes.

Other very interesting proposals in the U.S. doctrine are those from the experimental legislative techniques, in particular, from the so-called *sunset* and *sunrise provisions* or *laws*.[115] It is a question of legal clauses that imply in one way or another the evaluation of an act once a particular period of time has passed. When a *sunset provision*[116] is introduced, the regulation ceases to have effect unless it is approved again by Parliament (Mooney 2004). In this context, some authors have proposed the inclusion of amendments in the American Constitution so that criminal norms are not in force for more than a certain number of years (Myers 2008, p. 1328 ff.).[117] The following points are mentioned, from among the advantages of having a constitutional mandate of this type: verification of the principle of subsidiarity, in other words, if the means of social control can be more effective than criminal Law; adaptation of the criminal matter to the social reality of the time, leaving laws obsolete that were adopted after serious criminal events that provoked deep social alarm and that after some years are no longer seen to be necessary. But perhaps two of their most important virtues would be that they oblige an analysis of the degree of application of the norm and, therefore, to observe whether it has only had a symbolic effect. In addition, its democratic contribution is assessed, leaving to one side the intrigue and counter-intrigue of the political majorities that adopted the norm in the past. In this way, the new majority of representatives, still belonging to the same party that voted in the law in the past, would have to justify the grounds for the continuation of the regulation in the domestic legal order.

The *sunset provisions* may be organised in three different ways (Mitchell 2005, p. 1698): (1) indicating that once a number of years have elapsed, the regulation will no longer be valid; (2) establishing a series of criteria that once verified will bring the validity of the regulation to an end; and, (3) beginning with one or another approach, but contributing other reasons that justify the continued inclusion of the

[114] Proposals of this type in the case of private Law have also been common for a long time. In this sense, see Herbert (1952), p. 942 ff.

[115] On the general origins of the sunset provisions in the U.S.A., see Price 1978, p. 30 ff. More recently, see Gersen (2007), p. 249 ff., and Katyal (2004), p. 1237 ff.

[116] In favour of this type of provision in criminal law, see Mitchell (2005), p. 1696.

[117] "No criminal law passed by the United States or any of the several states may remain in effect for more than 25 years from its date of passage".

regulation in the legal order. This last point appears to be the most appropriate technique with which to implement a *sunset provision*, because it allows an examination of the reasons for and against the repeal of the norm in question and that implies discussion and deliberation in Parliament, which is very important for the purposes of legislative rationality. The conditions foreseen in a *sunset provision* do not have to be the same in each act. One of these conditions to leave the law without effect would be the observation it had not been the cause of a particular number of criminal proceedings. A figure below that number would mean that the norm was failing to satisfy the parameters of empirical validity.[118] Those in favour of maintaining the norm in force could allege other reasons "of weight" so as not to annul it (symbolic effects) and if those in favour of maintaining the norm in the legal order held a majority in Congress, they would not have many problems to achieve their purpose. The advantage is that even in these cases they will have to give "explanations".

The main problem associated with the *sunset laws* is the legal uncertainty which they can generate ending in a legal vacuum, if no agreement is reached in Parliament, which could also imply that the legislators take their work less seriously, because they would know beforehand that their laws would not be of a permanent nature and it would be more difficult in the end to adopt them (Vemeule 2005, pp. 871, 887). However, at least three objections could be raised against this argument. First: the *sunset provisions* could be limited to new crimes unlike the hard core of Criminal Law. In other words, they should not be foreseen in the case of classic crimes against life, property, etc. (Myers 2008, p. 1369; Mitchell 2005, p. 1697). Second: which law has today a permanent nature in the increasingly accentuated process of the hypertrophy of Criminal Law? (Silva Sánchez 2006; Palazzo 2001, p. 433 ff.). And thirdly: whether or not the work of the legislator is taken seriously would not be specifically attributed to such a situation. This situation really happens nowadays with the adoption of laws, the necessity for which are not verified beyond responding to "social alarm".

In any case, fewer problems arise with the *sunrise provisions*, in accordance with which the government has to inform Parliament on the legislation that is adopted or to complete periodic reports on the regulation (Bates 2002, p. 123). If it is not confirmed through the report on the need to intervene, it is therefore not possible to modify the law. In reality, the *sunrise provisions* are a very useful tool to implement some of the obligations in an effective way that arise from the general duty of public authorities to provide motivation when introducing measures in a specific context.[119] The logic is that measures are taken because a problem existed previously that is not possible to resolve through pre-existing measures. The *sunrise provisions*

[118] On the three types of validity, see Muñoz de Morales Romero (2011), pp. 574–623, 804–820; Muñoz de Morales Romero (2010).

[119] On the origins of motivation and its instrumental condition for the establishment of a deliberative democracy within the EU but applied at a national level, see Muñoz de Morales Romero (2011), p. 574 ff.

would mean having to explain the problem as well as the insufficiency of norms or programmes in force. Obviously, a strong motivation through a *sunrise provision* could not be constituted through a reference to the mere commission of crimes for intervention. On the contrary, it would have to oblige the legislator to propose questions, among which, on the crime rate and its general and specific fluctuations. An affirmation of the type "the rate of criminality has increased" and that "shows that our present measures are not working" and, therefore, "intervention is necessary" would not be enough to comply with a *sunrise provision*. The analysis of the need to intervene should be much deeper, taking into account the size and dimension of the problem (the crime rate in absolute and relative terms), the trends of the criminality problem (how it has changed over time and as a result of which factors), the exact localization of the problem and its comparison in other places, and of course the causes and factors that provoked the problem. The need for a more profound examination means looking at reliable empirical data and this in turn leads to something fundamental: if the *sunrise provisions* are taken "seriously" all norms should be accompanied by statistics, serious statistical, criminological, and sociological studies, etc.

On the one hand, a *sunrise provision* would lead to intense involvement by the experts at the time of drafting an act. If the intervention is to be justified, expert opinion must be sought. In addition, it would mean asking the question why the pre-existing norm or policy that is to be modified fails because it is badly proposed or because it is badly implemented. By discussing the controversial question about the true causes of the problem, e.g. situations of social exclusion (unemployment, poverty, etc.), the adoption of a social policy would be forced instead of creating specific crimes or simply stiffening the punishments. Finally, the fact of clearly determining the problem would help in so far as the response would continue to have the same starting point as changes of government take place: the new policies that follow on from the earlier ones would build on the achievements of their predecessors.

No less important is the contribution of the *sunrise provisions* to the analysis of the norm that is to be modified and its objectives and the degree to which they are achieved. It would help to indicate whether the results achieved were those sought before its approval. Taking into account that the objectives of the law and/or of a policy are multiple, divergent and even contradictory (Muñoz de Morales Romero 2010, p. 28) and that they are usually addressed in a vague and abstract way in the law (Mears 2010, p. 110) through references to symbolic values (Muñoz de Morales Romero 2010, p. 28), the information that is obtained would be very valuable. Equally, guidelines would be provided for the development and the theoretical basis of the existing or proposed policies, because in case of intervention, this would be focused on the fundamental causes of the problem. In third place, it would help to identify whether the law had failed because activities and services are relevant for the implementation of a policy.

We rarely find analyses of this nature as the basis of a particular policy or as the foundation of a new law. As Mears has indicated "policies normally emerge

without any type of empirical support on the need to intervene. It is simply assumed that the need exists" (Mears 2010, p. 82).

Finally, a *sunrise provision* understood as a "strong" and not merely as a procedural motivation (preparing nothing but a report), but a substantive one would facilitate the accountability of the legislator to society and before the courts, which is also perhaps the novelest aspect. The fact is that the whys and wherefores of the *sunrise provisions* would have to be indicated, providing the courts of justice with data to pronounce an opinion on the regulation that has been adopted (Emiliou 1996).

The last proposal to highlight in the U.S. doctrine (Broughton 2011, p. 457 ff.) to solve problems of rationality focuses on the parliamentary committees of inquiry. The possibility is specifically proposed of the committees holding hearings with those people whose interests have been prejudiced. In those hearings, not only the victims of the crimes should be taken into account, but also of those subjects who have been the direct object of certain criminal policies and who have been the object of criminal measures.

7.5 From the MPC to the Sunset/Sunrise Provisions: Of What Importance to Us Are They Anyway?

The idea of adopting a Model Penal Code in Europe has been present in doctrinal debate over many years (Sieber 1999, p. 445 ff.; Rüter 1993, p. 37; Weigend 1993, p. 790 ff.; Cadoppi 1996; Sevenster 1992, p. 29 ff.) and even in the Council of Europe, where a timid proposal stalled in 1993.[120] One of the reasons for its "inexistence" was because the national criminal laws in Europe were not afflicted at that time—nor are they now—with the classic and accentuated problems of irrationality, incoherence and inconsistency mentioned in the case of the American States. In other words, to the question concerning the imperious need for general structuring and systematisation of state criminal laws in Europe, the response has also been negative (Stapert 2002, p. 114). However, could the same be said at a "federal", supranational or if you like a "horizontal" level, in relation to the legislative criminal corpus of the EU?

[120] Model Penal Code for Europe. Memorando prepared at the request of the legal affairs committee of the Council of Europe (Nr. AS/Ju[22]45), Council of Europe, Parliamentary Assembly, Doc. 6851. 1403-25/5/93-4-E. Motion for a Recommendation on a Model European Penal Code. [Doc. 6851, 28 May 1993].

Following the adoption of the Treaty of Amsterdam,[121] we have seen a proliferation of framework decisions and directives of a criminal-substantive nature[122] which, although they have no paragon with U.S. legislative hypertrophy and overcriminalization, should not be underestimated.[123] From a horizontal point of view,

[121] Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, signed in Amsterdam on 2 October 1997 [OJEU C n° 340, 10 November 1997].

[122] Before with common actions and with two directives from the First Pillar, but in reality it was not until the Treaty of Amsterdam and the introduction of the framework decisions (legal instruments of a binding nature) that the European legislator started to have a more impact on national criminal rights of the Member States.

[123] In descending chronological order: Directive 2014/62/EU of the EP and the Council of 15 May 2014 on the protection of the euro and other currencies against counterfeiting by criminal law, and replacing Council Framework Decision 2000/383/JHA [OJ L 151, 21.05.2014]; European Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (market abuse directive) [OJ L 173, 12.06.2014]; Directive 2013/40/EU of the EP and the Council, of 12 August 2013, on attacks against information systems and replacing Council Framework Decision 2005/222/JHA [OJ L 218, 14.08.2013]; Directive 2011/36/EU, of the EP and the Council, of 5 April 2011, preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA [OJ L 101 of 15.4.2011]; Directive 011/92/EU of the EP and the Council of 13 December 2011, on combating sexual abuse and sexual exploitation of children, and child pornography, replacing the Council Framework—Decision 2004/68/JHA [OJ L 335, 18.12.2013]; Directive 2009/123/EC of the EP and the Council, of 21 October 2009, on ship-source pollution and on the introduction of penalties, particularly criminal penalties, for infringements. [OJ L 280, 27.10.2009]; Directive 2009/52/EC of the EP and of the Council, of 18 June 2009, providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals [OJ L 164 30.06.2009]; Council Framework Decision 2008/919/JHA, of 28 November 2008, on combatting terrorism [OJ L 330 9.12.2008]; Council Framework Decision 2008/913/JHA, of 28 November 2008, on combating certain forms and expressions of racism and xenophobia by means of criminal law. [OJ L 328 6.12.2008]; Directive 2008/99/EC of the EP and the Council of 19 November 2008, on the protection of the environment through criminal law. [OJ L 328 6.12.2008]; Council Framework Decision 2008/841/JHA, 24 October 2008, on the fight against organised crime [OJ L 300 11.11.2008]; Council Framework Decision 2005/667/JHA, of 12 July 2005, destined to reinforce to strengthen the criminal law framework for the enforcement of the law against ship-source pollution; [OJ L 255 30.9.2005]—Annulled by a judgment of the ECJ of 23 October 2007, case. C-440/05; Directive 2005/35/EC of the EP and the Council of 7 September 2005 on ship-source pollution and on the introduction of penalties, particularly criminal penalties, for infringements. [OJ L 255, 30 September 2005]; Council Framework Decision 2004/757/JHA, of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking [OJ L 335 11.11.2004]; Council Framework Decision 2004/68/JHA, of 22 December 2003, relating to on combating the sexual exploitation of children and child pornography. [OJ L 13 20.1.2004]; Council Framework Decision 2003/568/JHA, of 22 July 2003, on combating corruption in the private sector [OJ L 192 31.7.2003]; Council Framework Decision 2003/80/JHA, of 27 January 2003, on the protection of the environment through criminal law. [OJ L 29 5.2.2003]—Annulled by judgement of the ECJ, 13 September 2005, case. C-175/03; Council Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence [OJ L 328 5.12.2002]; Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings [OJ L 203 1.8.2002]; Council Framework

in other words, in the normative plane of the EU, certain incoherencies are starting to make themselves felt that should be corrected as soon as possible before "it is too late". In this respect, the *Manifesto on European Criminal Policy* (Saztger et al. 2009) is very illustrative. So, for example, it is shown that some framework decisions foresaw identical punishments for behaviours with a different degree of social harm. Thus, the case of the Framework *Decision on preventing and combating trafficking in human beings and protecting its victims*, in which the crime of trafficking human beings and endangering the life of the victim, whether wilfully or negligently was punished in the same way: by a maximum/minimum term of 8 years (article 3.2 a). What is more, the same penalty was established in the *Council framework Decision of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro*. The Directives of 2011 and 2014 which substituted their counterparts on the subject of trafficking and the falsification of money did not solve the situation. The 2011 Directive on trafficking raised the maximum and minimum punishment to 10 years (article 4,2 c) and solved *a priori* one of the problems of horizontal coherence, which is, the one relating to the principle of proportionality with regard to other less serious behaviours (falsification of money) that should be punished with a more minor punishment. However, no distinction between cases in which the life of the victim is endangered by criminal intent or by negligence is drawn for the purposes of the punishment.

Another example of horizontal incoherence detected in this same Manifesto is the *2008 Framework Decision on combating terrorism*. In this regulation, the activities of a terrorist organization are punished in the same way regardless of whether the intention of the organization is to carry out serious acts (article 1 i) or only to threaten them (article 1 a–h). At least, a different punishment is indeed foreseen when it concerns management of or participation in those organizations. In this case, the maximum/minimum penalty that is required was reduced to 8 years, if the crime merely amounted to threatening behaviour. But, on the contrary, no differentiation was established in terms of management or participation.

In order to avoid these types of incoherencies and, above all, thinking of the future, it could be useful to have a "codifying directive" with a general part for the purposes of *grading* (and perhaps not so much for *sentencing*). A European legislative corpus could also be useful as a code that would allow us to systematize

Decision 2002/475/JHA of 13 June 2002 on combating terrorism [OJ L 164 22.6.2002]; Council Framework Decision of 6 December 2001 amending Framework Decision 2000/383/JHA on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro [OJ L 329 de 14.12.2001]; Council Framework Decision 2000/383/JHA of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro [OJ L 140 14.6.2000]; drawing up the Convention on the protection of the European Communities' financial interests [Official Journal C 316 27.11.1995]; Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing [OJ L 166 28.6.1991]; Council Directive 89/592/EEC of 13 November 1989 coordinating regulations on insider dealing [OJ L 334, 18 .11.1989, p. 30].

and order the entire criminal field in relation to the protected legal interest, because it would allow access and would provide an overall view. It is true that all directives and framework decisions are published in the Official Journal of the EU (OJ EU), but in some cases when modifications have been introduced, they are not always consolidated, which complicates its reading.[124]

However, returning to the "grading scheme" and its utility. A system in which the different types of crimes would appear on a list (*felony of the first degree, felony of the second degree, felony of the third degree, misdemeanour of the first degree, misdemeanour of the second degree, misdemeanour of the third degree*, etc.) and, subsequently, the sanction attached to each type of crime would then be indicated (for example, a *felony* of the first degree would be punished by a term of imprisonment of up to 20 years; a *felony* of the second degree with a term of imprisonment of no more than 20 years, etc.), would assist the European legislator in setting the *quantum* of the punishments to be harmonized. According to this proposal, each directive in question (covering the so-called Special Part) would afterwards set out the type of *misdemeanour* or *felony* to which it referred (for example, the trafficking of human beings could be a *felony* of the first degree and as such would be punished by following the earlier example with a prison sentence of up to 8 years). It is an approach which was at one time supported in the case of the EU, although it never finally came to fruition. In 2002, the Council[125] indicated that the punishments should be set in the normative measures of the EU on the basis of a scale divided into four grades: punishments of a maximum duration of at least 1–3 years of imprisonment (1st Degree); of between 2 and 5 years of imprisonment (2nd Degree); of between 5 and 10 years of imprisonment (3rd Degree) and at least 10 years of imprisonment (4th Degree). This is the system that the Council also recommended afterwards in its *Guidelines for Future Criminal Law in EU Legislation*.[126]

If the starting point was clear, the criteria to determine which crimes should fall under one grade or another was not so clear. Those decisions were left for a subsequent moment in time, in particular at a time when each criminal area could be harmonized. In addition to requiring a categorization of the crimes from the start, the Council document made its poor practical utility clear, as it then went on to indicate that the four degrees that were envisaged neither had to be used as a whole in all of the framework decisions, nor would all the crimes that were envisaged have to be subject to sanctions harmonization. Without a doubt, thinking of the well-known "code" that obliged the Member States to punish crimes with effective and

[124] For example, the Framework Decision on terrorism of 2008 modifies that of 2002 and there is no consolidated text.

[125] Council Conclusions on model provisions, guiding the Council's criminal law deliberation [Doc. 9141/02, of 27 May 2002, p. 4].

[126] Council Conclusions on Guidelines for Future Criminal Law in EU Legislation [Doc. 14162/09, 9 of October 2009, p. 5].

dissuasive criminal sanctions without any need to set a minimum/maximum punishment.[127]

A system such as the American *grading scheme* presents inconveniences that cannot be bypassed, to which previous reference has been made: it is difficult to be respectful towards the principle of proportionality when the categories (the degrees) of crimes are reduced, which is precisely the failing of the Council document under analysis (only four degrees). On the contrary, when the number of categories is acceptable and exceptions are also included in particular cases, converting the general rule into an exception in the strict sense of the word, the advantages would compensate the drawbacks. This strong point was also shared by the Council document, as it made possible the use "of a punishment of a longer duration to the minimum of grade 4 under special circumstances". In effect, it is an exception that recalls the regulation of certain crimes that fall outside the grading; homicide, for example, in the case of the American PCs.

As things stand, an acceptable system of *grading* would allow the European legislator to observe the degree of seriousness that it allocated to a behaviour included in a particular category and, therefore, to make a comparison between one and another behaviour to study whether they deserve the same punishment.[128] In this way, the risks of horizontal incoherence would be avoided, or at least reduced. In other words, directives would exist that punish *a priori* less serious behaviours with stronger sanctions than other more serious crimes.

In second place, a *grading-scheme* would not be problematic from the point of view of competences. Article 83 would serve as the basis for the expression "minimum norms relating to the definition of criminal infractions and sanctions (. . .)".[129]

In third place, the system of degrees is accordance with the preferences of some States not to harmonize the minimum limits of the punishment,[130] as in fact, the

[127] On the origin and the evaluation of the expression effective, proportional and dissuasive "sanctions" and its use in criminal matters, see Muñoz de Morales Romero (2011), p. 227 ff.

[128] Thus, in relation to the American situation, see Cahill (2004), p. 601.

[129] On the contrary, the harmonization of typical rules for sentencing (for example, rules on the termination of the punishment before the concurrence of generic aggravating or attenuating circumstances, exonerating, penological rules in cases of perpetration and participation, attempted crimes, etc.) is much more complicated, as today it does not appear that article 83 TFEU can be the legal basis. In addition, it should be taken into account that these sorts of questions are very "attached" to national identity, respect for which is foreseen in article 4.2 TEU and 67.1 TFEU. In this sense, see Asp (2013), pp. 57 and 58.

[130] In harmony with Declaration n° 8 of the Treaty of Amsterdam, which established that the Member States that do not foresee minimum punishments in their respective legal orders could not be obliged to adopt them. Countries such as Denmark, France (except when a question of more serious crimes of passion), Ireland (except in the supposition of some crimes like homicide) and the United Kingdom with a general nature do not recognize an "abstract criminal framework" nor, therefore, do they recognise minimum limits for the punishment. See, in response to the questionnaire prepared by the Belgium Presidency [Doc. 9402/1/01 DROIPEN 50 of 19 July 2001] and the subsequent report prepared from them [Doc. 1253/01, DROIPEN 84, of 5 October 2001, pp. 5–6].

American criminal codes do not always include them and the graduation of the punishment usually refers to maximum limits.

No less important is, in third place, the possibility of avoiding these incoherencies on the vertical plane with regard to the criminal systems in the member States themselves. European norms address themselves to the Member States, while the U.S. *grading-schemes* are directed at legal operators (courts and prosecutors). This means that the European legislator has to respect a certain degree of Member State discretion when transposing the European legal instruments. And it is for that reason, among others, that the European legislator usually introduces an "improvement clause" in its directives, formerly framework decisions[131] that allows the Member States to go beyond the provisions of the European legal instrument. With this clause they can, in short, be more punitive.[132] But if they had an appropriate "top-down" *grading-scheme*, it could serve as a reference when meeting their European commitments, as it would be the Member States in accordance with their own PCs that would have previously reached a consensus on a European scale.

The model of the standing codification committee, in other words, the model of the committee that continues to play its role subsequent to the adoption of the reform, is a proposal that may also be imported. At a European level,[133] a commission could be set up for the development of a centralised European criminal Law with sub-commissions in the Member States. The evaluative functions that this committee and sub-committees would play would be of an *ex-post* and an *ex-ante* type, presenting suggestions and models for discussion to the public, to the administrations and to the parliaments that could serve as the basis for a debate across Europe.[134] It is true that a permanent committee of these characteristics have some important implicit economic costs, but as Mader has indicated on general costs that hinder any system of evaluation, it would have to be asked whether those costs are

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Nevertheless, this declaration has disappeared with the entry into force of the Treaty of Lisbon. Therefore the European directives may now oblige the Member States to punish behaviours with minimum limits. An example of the above is article 8.1 a) of the proposal for a Directive on the fight against fraud to the Union's financial interests by means of criminal law, through which the States are obliged to punish the behaviours with a minimum term of at least 6 months imprisonment.

[131] See, among others, article 15 of Directive 2009/52/EC Providing for Minimum Standards on Sanctions and Measures against Employers of Illegally Staying Third-Country Nationals [OJ L 164, 30 June, 2015) and whereas clause n° 12 of Directive 2008/99/EC of the EP and the Council of 19 November 2008, on the protection of the environment through criminal law. [OJ L 328, of 6 December 2008].

[132] On the "improvement clause" and its negative and positive effects, see Muñoz de Morales Romero (2011), pp. 371, 373, 407–410.

[133] Obviously it is also applicable at a national level. See Muñoz de Morales Romero (2011), p. 837.

[134] The proposal was presented by Albrecht at the hearing of the sub-committee of European Law at the Rechtsauschuss of the Bundestag, on 28 November 2007. See, Albrecht (2009), p. 161.

not in fact below those that bring with them evitable errors and an incapability of the legislator to learn enough (Mader 1985, p. 175).

It is less feasible to import the so-called official up-dated comments. The proposal would not be feasible in continental criminal systems such as the Spanish one, in the same way that they are proposed in the U.S. doctrine, because of the application of the principle of legality in its formal aspect (*nullum crimen, nulla poena sine lege parlamentaria*). However, if those comments are conceived as explanatory reports in the same style as those of the international conventions, they could perhaps fit in with each other through interpretative legal methods, in particular, the historic one. The historic interpretation lends attention to the norms and the circumstances in which they have their origin. In this sense, the preparatory (in other words, the *ex-ante* evaluations), contemporary and even subsequent works could be used to clarify the meanings of certain elements of that type, for example. This happens in countries like Sweden,[135] although the dominant method of interpretation appears to be teleological in nature (Cameron et al. 2011, p. 11 f.).

Neither would the Parliamentary committees of inquiry have a lot of success. Obviously, they can help but they depend a lot on the political will of their members and do not appear to be thought out for them.[136] Thus, for example, their inclusion in the *EP Rules of Procedure* (Article 198)[137] is to examine infringements and poor administrative praxis in the application of the European Union Law, fundamentally by an institution or an organ of the Union or by a public administration of a member State. They do not appear to have among their tasks, the completion of hearings on matters to reform. That is more a task for the Commission that it carries out through communications, white and green papers, and, above all, impact evaluations.[138] In the latter, comparative law reports on the problem are usually completed on the subject of a particular crime (Muñoz de Morales Romero 2011, p. 655). However, these studies are a long way off from assuming an integral approach at a vertical level, not so much for not conducting an in-depth examination of whether the actual

[135] On ex-ante evaluation in this country, see Maroto Calatayud, "Criminal policy assessment and rationality in legislative procedure: the example of Sweden", in this volume.

[136] Neither are the committees of inquiry thought out for such a task in Spain, as according to article 76 of the Spanish Constitution, they always appear to cover facts that point to suspicions of a criminal act having been committed and do not respond to questions of a legislative type. Perhaps the Council of State would be in better conditions to be able to carry out those tasks. It could do so through decisions, studies and reports (preferably preceptive and binding) on a legislative reform, although without its activities having to be requested by a "consulting authority". (President of the Government, Ministers and Presidents of the Autonomous Regions. See article 76 EC and articles 2.2. and 24 of Organic Law 3/1980, of 22 April, of the Council of State [Ley Orgánica 3/1980, de 22 de abril, del Consejo de Estado].

[137] Rules of Procedure of the European Parliament. Eighth Parliamentary Term, January 2015, available at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+RULES-EP+20150101+0+DOC+PDF+V0//EN&language=EN (last accessed 20.02.2015).

[138] On the pre-legislative phase in the field of the Union with special emphasis on the work of the Commission, see Muñoz de Morales Romero (2011), pp. 650–676.

criminal definitions, pre-existing in the Member States cover the new conducts that are proposed, but rather for not dwelling on whether harmonization in that sense might provoke some incoherence at a penological level. At a horizontal level, any examination of the inconsistencies detected in the *Manifesto on European criminal policy* and those to which reference has been made, is inexistent.

Finally, some of the experimental legislative techniques are 100 % importable. This is the case of the *sunrise provisions*. Although they could be seen as a sort of impact assessment (*Regulatory Impact Assessments* (RIA)), which the European Commission already carries out to justify its initiatives and in which a cost-benefit analysis of the European measure is included, in reality they would come to complete the evaluation cycle. The *sunrise provisions* would precisely require an evaluation of the extent to which the needs, objectives, ends and goals have been achieved, as indicated in the corresponding regulatory impact assessment, as well as to what degree in terms of efficacy and efficiency. In addition, a precept of these characteristics in the articles of the act (not as a whereas clause) would present a great advantage: if it appeared in a criminal act and not as a general obligation regardless of the matter in the evaluative analysis, the specific idiosyncrasies of the criminal discipline would be taken into account. The RIAs, subject to particular criticism for doing so, take no relative questions into consideration such as, for example, protected legal interests, or social harm (Muñoz de Morales Romero 2011, pp. 667–668).

Likewise, with the *sunrise provisions* a plus would be added to the duty of motivation present in the founding Treaties (Article 296 TFEU[139]) which is of a procedural type, appearing with a mention of the reasons that have led to the adoption of the norm in question. Finally, the now traditional conformity analysis that the Commission conducts between the provisions of the directive and its implementation or transposition that is carried out in each Member State would be surpassed.[140]

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[139] Article 296 TFEU: "Legal acts shall state the reasons on which they are based and shall refer to any proposals, initiatives, recommendations, requests or opinions required by the Treaties."

[140] On the obligation of the Committee to draw up a report on compliance by the Member States with the content of the framework decisions and directives, as well as its shortcomings, see Muñoz de Morales Romero (2011), p. 806 ff.

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Chapter 8
Criminal Legislation in Germany

Andreas Hoyer

Contents

8.1 Introduction

If I wish to inform you about "criminal legislation" ("Strafgesetzgebung") in Germany, I must straight away establish a fundamental difference, so as to distinguish, in what follows, between criminal legislation, as it is actually implemented, and criminal legislation, as it ought to be implemented by Law. It so happens that there are ostensible differences (in Germany at least) between its factual implementation, which we will analyse, and the normative 'ought to be' of criminal legislation. However, not in relation to the formal procedural channel, but in relation to the impetus ("Anstoß") of that procedure and the material criteria which should guide the decision-maker within it.

English translation by Antony Ross Price from a Spanish translation by Fernando Guanarteme Sánchez Lázaro of the original article in German by Andreas Hoyer.

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8.2 The Usual Course of Criminal Legislation in Practice

The criminal legislation that really takes place is characterized by a lack of independence in the actions of the democratically legitimated legislator, when he systematically analyses positive Law to establish if and how it functions in practice, so as then to confront it with his own concept of a society that functions in a upright (or "gerecht") manner. And finally, whether it is necessary, to try to bring positive Law, in an entirely planned way, in accordance with its ends, back to the underlying principles from which it has departed. Instead of that approach, criminal legislation in Germany is typically presented both as a short-lived ("kurzatmig") *ad hoc* reaction and as one that is heteronomously determined by the most recent "gap of punishability" that is exposed to the insight of public opinion.

As I come from Kiel, a coastal city of Germany, it comes to mind to describe such legislation, in a merely reactive way, as a seafaring scene: the seaworthiness ("Seetauglichkeit") of the ship that has been overhauled to sail the ocean is not periodically inspected and if necessary, its routine functions ("Funktionsabläufen") optimized, but the ship is always left to drift, until a new leak ("Leck") is found, that the crew try then try to repair, as swiftly as possible, with the means that are by chance found on board.

The difference between a leaking ship ("Schiffsleck") and a gap of punishability is merely that the first is recognizable, in general, in an objectively undebatable way because of the water that seeps into the ship, while gaps of punishability are perceived as such in a rather more subjective and even, intersubjective way, when they are raised by a specific case. Stimulated by the coverage of the mass media, calls for the immediate satisfaction of the punitive urge ("lechzender Strafhunger") proliferate in public opinion, thereby threatening a breakdown of trust in Positive Law, before which this Law cannot remain silent in its present form, unless the legislator acts swiftly to calm the fury that has broken loose, by harshening the criminal law ("die aufschäumende Wut") in question.

Gaps of punishability, especially, that potentially assist some prominent accused person, a short time after the media and public furore has abated, generally lead to a harshening of criminal Law: for example, a leading manager of a football team and a prominent female journalist embezzle a considerable amount of tax money, and the legislator has little choice but once again to increase the rigour of the rule on voluntary self-disclosure ("strafbefreiende Selbstanzeige"), already tightened up the last time in 2010. A prominent member of the German parliament, the Bundestag, downloads pornographic material over the internet that does not involve under-age children. Even lacking criminal-legal importance, the legislator is once again called on to end, as soon as possible, in line with popular judgment, this scandalous lack of punishability. An elderly senator of justice ("Justizsenator"), after finishing his political career, dedicates himself to helping people through assisted euthanasia ("Sterbehelfer"), a situation that finally obliges the legislator to undertake a long-awaited general reform of the criminal definitions of the crimes of murder, which date back to the times and the spirit of national-socialism.

In other cases, judicial decisions are the source of pressure on the legislator to act, to which, it appears, he always turns in each reform of criminal Law. Thus, for example, the judgments of the ECtHR or the German Constitutional Court (BVerfG) on secure custody or the judgement of the Grand Panel of the Federal Court of Justice ("des Großen BGH-Senats") on the gaps in criminal-legal understanding of corruption in the health service ("Gesundheitswesen"). In all these cases, the legislator reacts *a posteriori* to the regulatory deficit of the criminal law in force, of which he is only one may say aware, when the child has already fallen into the well ("das Kind... in den Brunnen gefallen ist"), instead of recognising it earlier, and preparing his organisational system ("Gestaltungsaufgabe") in a self-determined and directive way.

8.3 The Course of Criminal Legislation According to How It Ought To Be Under Law

After this none-too complimentary analysis of legal reality, I will go on to present the way in which criminal legislation should strictly speaking be prepared in Germany under our Law, which is to say in a completely different way to that described up until now:

8.3.1 Impact Study Prior to Parliamentary Approval of a New Criminal Norm

Already by 1975, in its first judgment on abortion, the German Constitutional Court inferred that fundamental rights not only assume a defensive function against criminal legal measures affecting general freedom of action, but also an inherently protective function that, if necessary, might oblige the legislator to safeguard a fundamental right, with criminal legal instruments as well. Criminal-legal protection of legal assets is the name we give to the measures to fulfil this task to protect the safeguards that arise from fundamental rights, which are entrusted to the legislator. When the legislator upholds his task of the protection of legal assets through the promulgation of norms of prohibition and orders envisaging punishment, it necessarily intervenes in the general freedom of action of everybody who is targeted by the prohibitions and the orders, thereby undermining the defensive function of that fundamental right. Likewise, the promulgation of each criminal-legal norm implies, above all, weighing up the defensive function that is affected and the protective function of fundamental Law with which the criminal legislator occupies himself. This weighing up must be guided according to the general principle of proportionality, which is to say, the criminal-legal norm to be assessed should be ideal for the fulfilment of the protective function that the legislator

imposes upon it, and should constitute the least harmful measure to do so. In contrast, a protective effect should be expected of the norm that essentially prevails over the limitations that, on the contrary, the criminal legal norm imposes on the general freedom of action of everybody whom it affects.

The legislator has a considerable margin of appreciation and prognosis in the estimation of if and how much protective efficacy ("Schutzwirkung") can be expected of a particular criminal norm, especially with regard to other possible protection measures and in relation to the limitations on freedom that it entails. This legislative prerogative of consequentialist calculation, in contrast with that of the Constitutional Court, is on the one hand derived particularly from the constitutional principle of democracy, as the legislator is democratically legitimated in a more direct way than the Constitutional Court and, on the other hand, from the separation of powers ("Gewaltenteilungsgrundsatz"), as the Constitutional Court should not erect itself as a replacement legislator, and much less so, as a supreme legislator.

However, this recognised pre-eminence of the legislator neither permits him to conduct a "blind" evaluation ("ins Blaue hinein") of the consequences without any factual grounds at all ("Tatsachengrundlage"), nor even to renounce an effective basis for prognosis. Together with their protective function against the legislator and the function that obliges the legislator to protect them, a third function is also tied to fundamental rights, to wit: that of balancing compliance with the two earlier functions, in their totality, in the best way possible, and to avoid breaches both of the prohibition of excessiveness and the prohibition of insufficiency. In case of a breach of the prohibition on excessiveness, it would affect the defensive function of fundamental rights, in case of a breach of the prohibition on insufficiency, it would affect the protective function—only by weighing up both functions on the basis of a carefully reasoned evaluation of the consequences will it respond in equal parts to the defensive and to the protective functions, thereby avoiding incompliance with both missions in the best possible way.

If the criminal legislator drafts a criminal norm that ignores this duty to undertake a preliminary and careful evaluation of the consequences, the criminal norm that has been approved will not be automatically declared unconstitutional, as it may happen that the criminal norm, as a product of legislative procedure, leads to a reasonable balance of the fundamental rights that are affected. But the personal actions and omissions of members of parliament who intervene in the legislative procedure and behave in a way, through their contribution to its framework, that contradicts their duty, have no justification. Even, therefore, when the results of the legislative procedure constitute a reasonable compromise ("vertretbar") between the threats of a breach of both the prohibitions of excessiveness and of insufficiency, the worthlessness of evaluative actions that are neglectful of the consequences remain in any case. A member of parliament who votes in favour of the promulgation of a criminal norm, for example, under pressure from the mass media, the general public ("Öffentlichkeit") or their political representatives, despite serious fears, given an insufficient evaluation of its legislative consequences, that it would contravene the prohibition of either excessiveness or insufficiency, could be liable to punishment by the mere act of voting. At least in terms of attempted

coercion (in the case of a breach of the prohibition of excessiveness) or as a protective guarantee, in terms of an attempted offence of improper omission (in the case of a breach of the prohibition of insufficiency).

8.3.2 Impact Evaluation of a Norm in Force

The longer the time that elapses following the approval of a criminal norm, the stronger the potential punishability of the member of parliament, even one who remains passive, because of the crime of omission that is committed. As the margin of appraisal of the legislator in the evaluation of the consequences of his legislative product, commented on above, progressively diminishes, the unjustifiable ex-post nature, apparently reasonable ex-ante, of his prognosis of efficacy ("Wirkungsprognose"), turns progressively unequivocal and undeniable. In the understanding of the Constitutional Court, the work of defence and protection of the legislator that arises from the fundamental rights changes after the approval of the law into a sort of "duty of supervision and if applicable, improvement of the product" ("Produktbeobachtungs- und ggf. Nachbesserungspflicht"). In other words, the legislator should regularly, and also irregularly when there is a motive, evaluate whether the law approved earlier by him in view of the new circumstances still effectively constitutes the best form of balancing the iusfundamental task of defence and protection. In a situation in which the legislator neglects the evaluation of a law, it implies a breach of a fundamental right by omission, which may be challenged through a constitutional complaint ("per Verfassungsbeschwerde") before the Constitutional Court. If a further violation of a fundamental right is noted in the unaltered permanence of a law that has not been evaluated, the Constitutional Court should determine as much, in each case, in a substitutive legislative evaluation that will be entrusted to the legislator.

The Constitutional Court has resorted to such a substitutive evaluation, for example, to be able to examine the constitutionality of the law of plea-bargaining ("Verständigungen") in criminal procedure, in 2009. Provisionally and, let us say, conditionally, although the Constitutional Court affirms the present constitutionality of the law, it clearly states, at the same time, that the margin for the prognosis of the legislator is progressively narrowed the longer, the validity of the law that has been passed remains in force. In this way, it enters a "state of unconstitutionality" when the difference between the prognosis of legislative impact and the impact of the law effectively evaluated is not diminished over time, without the legislator taking note and acting in consequence.

This judgment of the Constitutional court, relating to criminal procedure, can be upheld to the same extent and with even more reason, for material criminal Law as well. It reasons that there is a duty incumbent on the legislator to evaluate and, if necessary, to correct the impact of criminal legal normative products on a regular basis, which is to say, to evaluate its present conformity ("Nochvereinbarkeit") with the general principle of proportionality.

8.4 Conclusion

Certainly, this constitutional legal principle in good measure diametrically contradicts the observable praxis of present-day criminal legislation, as outlined above. However, if such a contradiction exists, it is therefore worth noting, in the words of *Hegel*, that it is "all the worse for praxis", or in the words of the Constitutional Court: A State under the rule of law, according to its definition, is characterized precisely by that, because it is the Law that determines the praxis and not the praxis, the Law.

Chapter 9
Evaluation and European Criminal Law: The Evaluation Model of the Commission

Fernando Guanarteme Sánchez Lázaro

Contents

9.1 Introduction

The complexity of the European legal system, a consequence of the political-legal structure of the European Union, has propagated the appearance of various levels of criminal legislation (Romeo Malanda 2012, p. 313 ff.; Saffeling 2012, p. 188 ff.).[1] In the foreground, criminal law emanating from the European legislator is found in the form of framework decisions and directives. It is, at present, a question of criminal Law with no direct application,[2] but is rather one that guides the national legislators, who specify the form of its application through transposition (Romeo Malanda 2012, p. 327 ff.). While in the background, we find the criminal law that emanates from the different national legislators, through the respective legislative

[1] Safferling underlines on p. 190: "die komplexe Mehrebenenstruktur des supranationalen Europarechts".

[2] On the margins of the regulation, more recently, however Weisser (2014), p. 438 ff.

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transpositions of the harmonizing norms. At these two levels, there is moreover a confluence of divergent bands between the member States, which are accentuated not only by the different particularities of the various legal cultures, but by the nature of the harmonizing norms as "minimum rules concerning the definition of criminal offences and sanctions",[3] which concede a certain degree of decision-making to the national authorities in their transposition. In this sense, in a general way, art. 288 of the TFEU also establishes that "A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods".[4]

The complexity of this normative framework concedes, likewise, an important space to the evaluation function. The different regulations emanating from the member States, first of all, need a comparative evaluation, so as to determine the degree to which the result is successful, according to the aforementioned art. 288 TFEU. However, although this function is understood, in a general sense, as a requirement for legislative rationality and legitimacy,[5] in the European legal framework, art. 70 of the TFEU foresees, in general terms, that: "the Council may, on a proposal from the Commission, adopt measures laying down the arrangements whereby Member States, in collaboration with the Commission, conduct objective and impartial evaluations of the implementation of the Union policies referred to in this Title by Member States' authorities"—in relation to the area of freedom, security and justice. More specifically, art. 23.1 of Directive 2011/36/EU, of 5 April 2011, on preventing and combating trafficking in human beings and protecting its victims, establishes that "The Commission shall, by 6 April 2015, submit a report to the European Parliament and the Council, assessing the extent to which the Member States have taken the necessary measures in order to comply with this Directive, including a description of action taken under Article 18(4), accompanied, if necessary, by legislative proposals",[6] while art. 9 of Framework

[3] In the terms of articles 83.1 and 2 of the Treaty on the Functioning of the European Union (TFUE).

[4] In the same terms, Commission report to the Council based on Article 9 of the Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector, COM (2007) 328 final, p. 4.

[5] More recently, in this respect Muñoz de Morales Romero (2011a), p. 54 ff. and (2011b), p. 590 ff.; Nieto Martín (2011), p. 81; Rodríguez Ferrández (2011), p. 464 ff. Generally speaking, as well Becerra Muñoz (2013), p. 323 ff. Earlier, Sánchez Lázaro (2006), pp. 191 ff., 195 ff.; Vogel (2005), pp. 263, 265 ff. Among others, also Romeo Malanda (2012), p. 361 f., pointing to the need for a certain homogeneity—and corresponding evaluation.

[6] Likewise, under article 23, it refers to the submission of a report from the Commission, "assessing the impact of existing national law ... on the prevention of trafficking in human beings". Also, see Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Strengthening the foundations of Smart Regulation—improving evaluation, COM (2013) 686 final, p. 2, underlining the need for EU policies to be evaluated "regularly and systematically", as well as on p. 8, on the need to promote "an evaluation culture"; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the

Decision 2003-568-JHA, of 22 July, on combating corruption in the private sector, had earlier on imposed a duty on Member States to transmit "to the General Secretariat of the Council and the Commission the text of the provisions transposing into their national law the obligations imposed on them", for assessment of "the extent to which [they] have complied with the provisions of this Framework Decision".

Although this concern that the evaluation function should take place for rational reasons that have been mentioned above, it is worth underlining the significant technical-legal complexity that its development presents (in detail II.3), given the features of the European criminal legal system, and, in particular, the concurrence of provisions approved in the framework of very different legal cultures.

9.2 On the Evaluation Model of the Commission

9.2.1 General Criteria

In the Report from the Commission to the Council and the European Parliament based on Article 10 of the Council Framework Decision of 19 July 2002 on combating trafficking in human beings, COM (2006) 187 final, it is suggested that, "[i]n order to be able to evaluate on an objective basis whether a framework decision has been fully implemented by a Member State, some general criteria have been developed with respect to Directives which should be applied mutatis mutandis to Framework Decisions",[7] after which four evaluation criteria are presented:

1. The form and methods of implementation of the result to be achieved must be chosen in a manner which ensures that the Directive functions effectively with account being taken of its aims;

Committee of the Regions Regulatory Fitness and Performance (REFIT): Results and Next Steps, COM (2013) 685 final, pp. 3 ff., 12 ff.; Communication from the Commission. Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union, COM (2010) 573 final, p. 7; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Smart Regulation in the European Union, COM (2010) 543 final, p. 2 ff. Likewise, see European Parliament Resolution of 9 September 2010 on better lawmaking (P7_TA (2010)0311).

[7] COM (2006) 187 final, p. 4. It is therefore a matter of an ex post evaluation model, that is, on the application of a previously drafted norm; for an explanatory work on this, see Muñoz de Morales Romero (2011a), p. 51 f.; Rodríguez Ferrández (2011), pp. 314 ff., 497 ff.; Communication to the Commission from Ms. Grybauskaité in agreement with the President. Responding to Strategic Needs: Reinforcing the use of evaluation, SEC(2007)213, pp. 7 ff., 13. Among others, finally, see Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Strengthening the foundations of Smart Regulation – improving evaluation, COM (2013) 686 final, p. 2 ff.

2. Each Member State is obliged to implement Directives in a manner which satisfies the requirements of clarity and legal certainty, and thus to transpose the provisions of the Directive into national provisions which have binding force;
3. Transposition need not necessarily require enactment in precisely the same words used in a Directive. Thus, for example, appropriate and pre-existing national measures may be sufficient, as long as the full application of the Directive is assured in a sufficiently clear and precise manner;
4. Directives must be implemented within the period prescribed therein.[8]

It is therefore a question, on the one hand, of the functional effectiveness of the form and the methods of execution, as well as the observance of the set deadlines, while, on the other hand, it depends on some kind of criteria relating to the legal-technical formulation of the corresponding national provisions: clarity, legal certainty, preciseness and completeness. However, under certain circumstances, specific criteria are mentioned in accordance with the specific object of regulation, as is specifically contained in the Report from the Commission to the Council, based on article 9 of Council Framework Decision 2003/568/JHA, of 22 July 2003, on combating corruption in the private sector.[9]

On a general note, the Commission begins, specifically, from a gradable observance of these European legal norms. Thus, it is noted in the Report from the Commission to the Council and the European Parliament [. . .], on compliance with the Council Framework Decision, of 19 July 20012, on combating trafficking in human beings, that "The evaluation shall take account, *as far as appropriate*, of the general criminal legal background of the Member States".[10] And such a perspective is particularly suggestive insofar as the evaluation of a greater or a lesser "measure of compliance" with the European regulation will assist a sort of legislative competition between different member States that, in turn, might favour better legislation.

[8] Report from the Commission to the Council and the European Parliament based on Article 10 of the Council Framework Decision of 19 July 2002 on combating trafficking in human beings, COM (2006) 187 final, p. 4. More succinctly, see Commission report to the Council based on Article 9 of the Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector, COM (2007) 328 final, p. 5: "practical effectiveness, clarity and legal certainty, full application and compliance with the time limit for transposition".

[9] COM (2007) 328 final, p. 5, noting that alongside the general criteria, "criteria specific to this Framework Decision are also used, [that] are provided in the context of the analysis of the individual Articles which follows". Likewise, see Muñoz de Morales Romero (2011b), p. 806, in relation to the Framework Decision on the European Arrest Warrant.

[10] COM (2006) 187 final, p. 5, (author's italics).

9.2.2 *Form of Evaluation*

However, the actions that the Commission has, up until now, taken, in compliance with this function, in no way correspond to the expectations awakened by such a positive framework or evaluation criteria. Thus, in general terms, the above-mentioned report anticipates, as an excuse, that it is "based on incomplete information". And, instead of evaluating the degree of clarity and legal safety of the different transpositions, a series of generic valuations are issued, with no desire for accuracy nor certainty on the degree of compliance: "the legislation of almost all Member States *appear* to reflect the provisions of the Framework Decision. As such, a large majority of the Member States *seem* to comply with Article 1… this requirement of the Framework Decision *appears* to be satisfied in almost all cases, though only some Member States have specific provisions on the issue.",[11] "All Member States will *presumably* be able to comply with this Article as regards the application of the territoriality principle… It *seems* that the vast majority of the Member States establish jurisdiction over offences that are committed abroad by their own nationals",[12] among other examples.

The completed evaluation was not entirely consistent with the criteria advanced for its completion. As although these appear to take account of the legality principle, when they point to the necessary compliance with "the requirements of clarity and legal certainty", as well as the need to ensure "full application of the Directive (…) in a sufficiently clear and precise manner" (Navarro Frías 2010, *passim*), they bypass all references to the principle of proportionality. However, greater concern is expressed in the evaluation for the latter than for the aforementioned requirements of determination, clarity and legal certainty. Thus, they point in a general way to the importance of establishing "proportional" punishments.[13] And special attention is lent to the full force of the consequences of the law: "Human trafficking is a serious crime, often committed against particularly vulnerable persons, and must be punishable with effective, proportional and dissuasive penalties", the determination of which should lend particular attention to "penalties for offences that are committed in aggravating circumstances, for example when the life of the victim has been endangered or where serious violence was used against the victim".[14] A concern that is likewise expressed in art. 4 of Framework Decision 2003/568/JHA, of 22 July, on combating corruption in the private sector, under

[11] Report from the Commission to the Council and the European Parliament based on Article 10 of the Council Framework Decision of 19 July 2002 on combating trafficking in human beings COM (2006) 187 final, p. 6, (author's italics). Critically, with a general nature Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Strengthening the foundations of Smart Regulation – improving evaluation COM, (2013) 686 final, p. 5.

[12] COM (2006) 187 final, p. 7 f., author's italics.

[13] Report based on Article 10 of Council Framework Decision 2002/629/JHA on combating trafficking in human beings, COM(2006)187 final, p. 7 f. (authors' italics).

[14] COM (2006) 187 final, p. 7.

point 1 that specifically envisages that "Each Member State shall take the necessary measures to ensure [. . .] effective, proportionate and dissuasive penalties".[15]

Along these same lines, it is worth questioning the criteria of proportionality that is employed. In particular, when it is observed in the evaluation that Austria "provides for a maximum period of imprisonment which is less than the minimum of the range provided under Article 4.2 Framework Decision",[16] in which a maximum duration of at least 1–3 years is foreseen. The FD insists on the importance of the proportionality of the punishment,[17] but gives no criteria whatsoever that might explain why the punishment—which is not part of this evaluation—envisaged in the Framework Decision should be understood as proportional. In fact, it appears that if it is a question of safeguarding "competition in relation to the purchase of goods or commercial services", as the ninth Whereas clause of this FD would have us believe, then on relations of proportionality, it would be worth questioning a legal consequence of the cost to fundamental law—in as much as it hardly corresponds to the acts to which it is linked. At first sight, the prohibition on "carrying on this particular or comparable business activity in a similar position or capacity" appears more fitting as a penalty, in as much as it only impacts on particular forms of the principle of freedom, in the terms defined under Title II of the CFREU,[18] or some of those covered under art. 6 of Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime, in relation to legal persons, such as the "exclusion from entitlement to public benefits or aid", or "temporary or permanent disqualification from the practice of commercial activities", or under point 2, of COM(2006)73, of 21 February, Disqualifications arising from criminal convictions in the European Union, to give various examples. In any case, such considerations also suggest the inclusion of the principle of proportionality, for reasons of congruency, among the general evaluation criteria.

Certainly, the same evaluative rigour is not evident in all the reports. Thus, the Report from the Commission to the Council, based on article 9 of Council Framework Decision 2003/568/JHA, of 22 July 2003, on combating corruption in the private sector, having succinctly referred to the aforementioned evaluation criteria,

[15] And in the same terms, art. 6, in relation to "Penalties on legal persons". Equally, in the Report to the Commission and to the Council, based on article 9 of the Council Framework Decision 2003/568/JHA of 22 July 2003, on combating corruption in the private sector, COM (2007) 328 final, pp. 2 and 7.

[16] Report from the Commission to the Council based on Article 9 of the Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector, COM (2007) 328 final, p. 8 f.

[17] Report from the Commission to the Council based on Article 9 of the Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector, COM (2007) 328 final, pp. 2, 4 and 7.

[18] Article 15 of which reads "Freedom to choose an occupation and right to engage in work", and paragraph 1 establishes that "Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation".

as well as to the use of "criteria specific to this Framework Decision", further details of which are found in "the analysis of the individual articles",[19] offers a protracted examination of their transposition. However, this greater rigour does not imply greater consistency. As in no case is the "clarity and... legal certainty" of different national regulations evaluated, neither are minimums of clarity and accuracy that guarantee its implementation "in a sufficiently clear and precise manner". The terminological completeness of the transposition is evaluated; in other words, the introduction of all elements of the definitions covered in the framework agreement in question, presumably requiring the use of "the same words employed in the Directive", in contradiction to what was advanced in the general criteria. Hence, for example, in relation to article 2.1.a): "promising, offering or giving, directly or through an intermediary, to a person who in any capacity directs or works for a private-sector entity an undue advantage of any kind, for that person or for a third party, in order that that person should perform or refrain from performing any act, in breach of that person's duties", it is not questioned whether the term 'offering' can subsume the act of promising, but it is noted in relation to this element of the definition covered in the framework agreement—"promising, offering or giving"—that "Eleven Member States met this requirement, but 7 (EE, HU, IT, NL, PL, PT, SK) omitted 'offering', LU omitted 'giving' and LV omitted 'promising'". Hence, no evaluation was offered in the light of the criteria advanced for that purpose, but in the light of "the 7 elements of the description under Article 2 1 (a) (active corruption) and 2 1 (b) (passive corruption)...".[20]

9.3 The Complexity Factor

Certainly, the complexity of the European criminal legal system affects the evaluation function. In this sense, the Commission notes "Member State legal systems can vary greatly, and that in many cases legal concepts and expressions cannot always be easily compared to one another.".[21] And more recently, the "legal pluralism (Romeo Malanda 2012, p. 355 ff.)[22] of the European Union" is remarked

[19] COM (2007) 328 final, p. 5.

[20] Cfr. Council Framework Decision 2003/568/JHA of 22 July 2003 On combating corruption in the private sector, COM (2007) 328 final, p. 5 ff. On this point, likewise Muñoz de Morales Romero (2011b), p. 809 ff.

[21] Report from the Commission to the Council and the European Parliament Based on Article 10 of the Council Framework Decision of 19 July 2002, on combating trafficking in human beings, COM (2006) 187 final, p. 6. Of a general nature, see Safferling 2012, p. 188 ff., noting "dass in den europäischen Mitgliedstaaten tatsächlich unterschiedliche Vorstellungen von Strafrecht bestehen"; in relation to interpretative cultures Silva Sánchez (2007), p. 82. Widely, Muñoz de Morales Romero (2011b), p. 195 ff.

[22] Along similar lines Muñoz de Morales Romero (2011a), p. 58 and 62; Schaut (2012), p. 28 ff.; Weisser (2014), p. 441. Of a general nature Vogel (2005), p. 268 ff.; Vogel (2002), p. 517 ff.

upon within the Spanish doctrine, where "substantial differences exist, even between the States whose legal systems belong to the Civil Law legal tradition, in the way that criminal liability is methodologically and systematically constructed (. . .), as well as the political-criminal criteria with which criminalization and penalization of different behaviours may be approached" (Muñoz de Morales Romero 2011a, pp. 58 and 62; Schaut 2012, p. 28 ff.; Weisser 2014, p. 441. Of a general nature Vogel 2005, p. 268 ff.; Vogel 2002, p. 517 ff.). In this sense, it is agreed that "today, neither the –national or European- legislator or judge – have a uniform regulatory framework, nor do they speak a common dogmatic language",[23] which conditions, among other aspects, the evaluation function.

In this context, the reference of the Commission to a principle, and in particular, to the principle of proportionality, deserves—notwithstanding II.2—a positive appraisal, in so far as it constitutes a common minimum of the different Orders subject to evaluation. It is, on the one hand, a component of Law—a principle—that is recognized both in *Civil Law* and in *Common Law*.[24] Moreover, the principle of proportionality is enshrined in art. 49, section 3, of the Charter of Fundamental Rights of the European Union, which entails its recognition by the different national legal orders subject to evaluation. In this sense, it is likewise worth referring to the principle of legal certainty, covered in turn under sections 1 and 2 of this provision.[25] A reduction to principles of the evaluation criteria is, therefore, particularly

[23] Romeo Malanda (2012), p. 356; also pointing out on p. 357, that "for that purpose, these minimum common elements that characterize European Criminal Law should be established on the basis of research into Comparative Law and in the framework of political consensus". On the institutional deficit, see Silva Sánchez (2007), p. 81 ff.

[24] On a general note, see Dworkin (1967–1968), p. 14 ff., in particular, p. 22 ff.; Dworkin (1978), pp. 14 ff., 46 ff.; Alexy (2007), p. 67 ff. Nevertheless, also Heinold (2011), passim. In relation to our paradigmatic discipline Ashworth (2009), passim; Roxin (1973), passim. Likewise, see Schünemann (2001), p. 23 ff.; Schünemann (2002), p. 512: "[ein Strafrechtsdenken], das (. . .) in der methodisch strengen Ausarbeitung rechtsstaatlicher Grundprinzipien wurzelt". In a general sense, see Saffeling (2012), p. 195: "die Sprache des Strafrechts wird in Europa überall verstanden. Strafrecht ist insofern Teil einer europäischen Rechtskultur oder in den Worten des Bundesverfassungsgerichts: 'Die Sicherung des Rechtsfriedens in Gestalt der Strafrechtspflege ist seit jeher eine zentrale Aufgabe staatlicher Gewalt'". Recently, also, see Schaut, Andreas B.: Europäische Strafrechtsprinzipien, cit. n. 24, passim.

[25] In concrete, art. 49 CFREU establishes: "Principles of legality and proportionality of criminal offences and penalties

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 law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than that which was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable.

2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles recognised by the community of nations.

3. The severity of penalties must not be disproportionate to the criminal offence." In a general sense, pointing to the appropriateness for the purposes of evaluation of the juridical-penal objectives that are included in inter- and supranational instruments, because of their greater

suggestive. They do not constitute criteria of rationality oriented towards the theory and legal order of one or various Member States, to give an opposing example, but of normative values that are common to them, which therefore lend them, to a greater extent, uniform evaluation criteria.[26]

On this same point, both principles are significantly in line with the purpose of the evaluation; in other words, "European criminal law that is configured in the Treaty of Lisbon. . . solely referring to the Special Part of substantive criminal Law" (Romeo Malanda 2012, p. 361),[27] in as much as they are informative principles on the matter. Certainly, the understanding of one principle or another varies between different legal cultures.[28] This leads to their deconstruction for their reduction to minimum common elements. And in that sense, the adoption by the Commission of "clarity", "legal certainty" and the preciseness of the provision[29] as evaluation criteria, rather than a generic referral to the legality principle that bypasses differences in its understanding, is illustrative.

9.4 Towards a Principle-Based Model of Evaluation

The reduction to principles of the evaluation model facilitates its application in the context of a legal framework such as the one that is described, insofar as it constitutes regulatory instruments recognized in the different legal orders that co-exist in the European Union. However, principles can have significant weak

progressive consensus and level of recognition", see Vogel (2005), p. 271. On their recognition by the different Member States, Gómez-Jara Díez (2003), pp. 8, 15 ff., 29 ff. Among others, see Pérez del Valle (2008), p. 11 ff.

[26] In relation to the harm principle, equally informative Meyer (2012), p. 759 ff.

[27] Specifically, also Vogel (2002), p. 529: "European juridical-criminal dogma is first and foremost dogmatism surrounding the definition of criminal offences, and its problems and questions are situated above all in the description of the offence". Finally, on this point Weisser (2014), pp. 444 ff., 451 f.

[28] Thus, Romeo Malanda (2012, p. 350): "the principle of criminal legality covers the principle of certain and strict criminal law (lex stricta and lex certa), which requires, among other mandates, that citizens can foresee the conduct for which they are criminally responsible. In this way, the principle of European criminal specificity does not require an absolute definition of the criminal behaviour, but the likelihood of that behaviour infringing a regulation and leading to a sanction. That likelihood will be determined by taking the literal meaning of the written norm/s into account as well as the jurisprudential precedents. Thus, the principle of legality is compatible with an objectively extensive interpretation and even with the parallel application in malam partem of the legislative text, provided that such a normative extension is already consolidated in the earlier jurisprudence. Moreover, the application of new crimes would also be accepted if the (criminal) penalty of the behaviour in question was foreseeable even though it had never been punished before (and even though it is not contained in a law of Parliament)". In relation to the principle of culpability, see Safferling (2012, p. 197), pointing to the importance of "die kulturellen Substrukturen in den einzelnen Mitgliedstaaten".

[29] For an informative work on this point, see Navarro Frías (2010), passim.

points; the need for a clear prior definition that permits their observance and evaluation. As an example, if we do not define dignity, we have no criterion to determine the degree to which this principle—dignity—is upheld or impinged upon.[30] Moreover, the doctrine sets out the very different understanding that is made of the principles in the different legal systems, and in particular, of the legality principle (Romeo Malanda 2012, p. 350). So, it is not only a question of defining but of approximating, of reducing to minimum common elements through such a definition. Two examples are given below:

9.4.1 Principle of Proportionality

9.4.1.1 Definition

Art. 49.3 CFREU helps us out here with the definition of the principle of proportionality, in which the principle is not merely mentioned, but the Charter sets out its own particular understanding: "The severity of penalties must not be disproportionate to the criminal offence." Specifically, proportionality is understood as a finely balanced relationship between the factual circumstances—the offense—and the legal consequence—the punishments—through the prohibition of disproportion in its respective degrees.[31] It is certainly an understanding that the European legislator upholds as a positive one, although it is not unknown to the legal orders of the member States,[32] where its foundation is found, among others, in the

[30] On a general note Bernal Pulido (2007), p. 63: "given that the determination of the normative content of all juridical pronouncements is a logical assumption of its application, the fundamental rights cannot be applied if their content has not previously been determined, in other words, if all of the perplexities that arise because of the irreducible deficit of precision and semantic explicitness of the constitutional provisions that define them have not been dispelled". More specifically, also Schaut (2012), p. 97 ff.

[31] For a different understanding, for example see Judgment of the Constitutional Count (STC) 96/2012, of 7 May, Points of Law 10°; BVerfG, 2 BvR 392/07 de 26.2.2008, margs. 34 f., both with subsequent references. In this other sense, see likewise art. 5.1 TEU, "[t]he limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality"; as well as paragraph 4: "Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties."

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Regulatory Fitness and Performance (Refit): Results and Next Steps COM (2013) 685 final, pp. 3, 14. In the Spanish scholarshipdo, Muñoz de Morales Romero (2011b), p. 375 ff.; Rodríguez Ferrández (2011), p. 340 f.

[32] To give two examples: STC 161/1997, of 2 October, points of law, 8 and 11, referring to "the ratio of proportionality between the rejection of the behaviour that defines it and the punishment... that is assigned to it"; BVerfG, 2 BvR 392/07 de 26.2.2008, marg. 37: "in the framework of the state punishment, it is assumed from the principles of culpability and proportionality, that the seriousness of a punishable act and the culpability of the author should be in just relation with the

principles of justice, dignity and culpability (Rodríguez Ferrández 2011, p. 485 ff.), in such a way that compliance with the principle of proportionality—also—implies upholding those other principles. And its positivization is evidence that it is a legal principle, the content of which should be specified in the framework of this same discourse; in other words, in the framework of the Law.

It is, therefore, a question of weighing up severities in the Law, in other words, how severe is the juridical consequence in Law, and then, the nature of the punishments—"deprivation of freedom, deprivation of other rights and fines", in the terms employed, for example, in art. 32 of the Spanish criminal code—as well as its greater or lesser seriousness.[33] While, in relation to the severity of the offence, it is a matter of the specific legal good or goods that are affected—life, health and "competence with regard to the acquisition of commercial goods and services... [and] solid economic development", to give three examples—and the specific way it is affected: harmed, or endangered in either a tangible or an abstract way, to give another three examples. In short, it is a matter of how much weight to attach to the factual circumstance and to the juridical consequence in Law (Alexy 2003, p. 771 ff.). And the relationship of proportionality should be established within the same framework. This framework, however, contrasts with the intuitive use that both the Commission and the legislator, although at an earlier point in time, appear to make of this principle (cfr. II.2).

9.4.1.2 Form of Application

Framework Decision 2003/568/JHA, of 22 July, Combating corruption in the private sector, envisages the criminal definitions for two types of conduct, under article 2, "carried out in the course of business activities:

(a) promising, offering or giving, directly or through an intermediary, to a person who in any capacity directs or works for a private-sector entity an undue advantage of any kind, for that person or for a third party, in order that that person should perform or refrain from performing any act, in breach of that person's duties;
(b) directly or through an intermediary, requesting or receiving an undue advantage of any kind, or accepting the promise of such an advantage, for oneself or for a third party, while in any capacity directing or working for a private-sector entity, in order to perform or refrain from performing any act, in breach of one's duties". While article four, paragraph 2, establishes the minimum limit of

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punishment. A threat of punishment, because of its class and extension, cannot be excessive for the behaviour that is the object of the penalty. The offence and the juridical consequence should first of all be duly calibrated (see Judgment of the Constitutional Court 90, 145 <173>, with subsequent references)". In the doctrine, recently Rodríguez Ferrández (2011), p. 485 ff., with subsequent references.

[33] For an informative work, see Alexy (2003), p. 771 ff.

the maximum duration of the corresponding punishments: "of a maximum of at least one to three years of imprisonment."; to which it adds, under paragraph 3, the possibility of a temporary prohibition on "carrying on this particular or comparable business activity in a similar position or capacity, if the facts established give reason to believe there to be a clear risk of abuse of position or of office by active or passive corruption." All of that in relation to the concern, underlined under paragraph 1, because "the conduct referred to in Articles 2 and 3" should be punishable by proportionate penalties, which are also "effective" and "dissuasive".

Generally speaking, it is proposed, on this point, that "Member States attach particular importance to combating corruption in both the public and the private sector, in the belief that in both those sectors it poses a threat to a law-abiding society as well as distorting competition in relation to the purchase of goods or commercial services and impeding sound economic development".[34] But observance of the principle of proportionality as proportionality of the punishment, beyond a vague reference to the interests at stake, calls for reasoning that relates to the weight and the degree to which legal goods are affected in factual circumstances, the juridical consequence, as well as the correlation between both,[35] all of which justifies why "the severity of the punishment" is not "disproportionate to the criminal offence", as in the wording of art. 49.3 CFREU. It is a question, in this last sense, of weights and severities in Law; in relation to the—valuative—legal framework in which the norm appears that is under evaluation. All of this is of interest in relation to observations, such as the one that applies to Austria, envisaging "a maximum period of imprisonment which is less than the minimum of the range provided under Article 4.2 Framework Decision".[36] As, the resolution of this question—to a greater or lesser extent—by the European legislator, does not free the national legislators from the latest proposal at the time of its transposition.

This may be inferred, in a general way, from the margins that European regulations permit in decisions, with regard to "minimum rules concerning the definition of criminal offences and sanctions", according to art. 83.1 of the TFEU

[34] Whereas clause nine; of a general nature, see also the Communication from the Commission Strategy for the Effective Implementation of the Charter of Fundamental Rights by the European Union COM (2010) 573 final, p. 5; as well as Saztger et al. (2012). Among others, critically Schünemann (2004a), pp. 383, 391 f.; Schünemann (2004b), p. 197; Schünemann (2006a), p. 62; Schünemann (2006b), p. 94 f.

[35] Cfr. BVerfG, 2 BvR 392/07, de 26.2.2008, marg. 37. Along these lines, previously Beccaria: "the obstacles that separate men from crimes should be stronger as the crimes are more contrary to the public interest. Hence, there should be proportion between crimes and punishments", cit. by Bernal Pulido (2007), p. 46. More recently, see Boldova Pasamar (2013), p. 46; Husak (2013), pp. 73, 145; Ossadón Widow (2009), pp. 463, 466 and 469. Among others, for an informative example, see Frisch (2014), pp. 489 ff., 493.

[36] Report from the Commission to the Council based on Article 9 of the Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector, COM (2007) 328 final, p. 8 f. On this, see likewise Nieto Martín (2011), p. 79 ff.

(cfr. Romeo Malanda 2012, 371 f.). And more specifically, in relation to the juridical consequence, article 4, paragraph 2, of this Framework Decision 2003/568/JHA, of 22 July, expects that "Each Member State shall take the necessary measures to ensure that the conduct referred to in Article 2 is punishable by a penalty of a maximum of at least one to three years of imprisonment." So, in such cases, the determination of the maximum—minimum—limits for such punishments will depend on the relation of proportion between the facts and the juridical circumstance, but now, at this second stage, from the perspective offered by the legal framework of the specific member State in which the transposition of the norm takes place.

In relation with our legal Order, it is worth noting first of all that "in a social and democratic State subject to the rule of law, as set forth in the Spanish Constitution (SC), personal freedom is not only a higher value of the legal Order (art. 1.1 SC), but it is also a fundamental right (art. 17 SC), the importance of which lies precisely in it being a premise of other fundamental freedoms and rights".[37] So, in as much as "competition in relation to the purchase of goods or commercial services.",[38] in no way constitutes "the highest value of its legal order (art. 1.1 SC)", nor "a fundamental right (art. 17 SC). . . the premise of other fundamental freedoms and rights", a certain deficit of proportionality starts to become apparent—to stress the perspective that the Spanish legal Order offers. And that gives us a final example: if according to the reasoning of the Spanish Constitutional Court, we attribute a high normative value to the principle of liberty—beginning with a scale: high, medium, low—and in relation to that, a medium value—relatively and at most—to "competition in relation to the purchase of goods or commercial services" it turns out that Framework Decision 2003/568/JHA, of 22 July, links a fact where a legal good is affected with—at most—a medium normative value, competition in the sense referred to above, to a juridical consequence that envisages the intervention of a legal good or interest of a notably superior normative value: a custodial sentence. If we transpose the high/medium/low scale into a numerical scale 3/2/1, it gives us the following representation shown in Table 9.1:

Table 9.1 Transposition of the high/medium/low scale into a numerical scale 3/2/1

Factual circumstance	Juridical consequence
2	3

And such divergences are likewise appreciated in relation to the degree of intervention. While in relation to the principle of liberty, the establishment of a maximum limit of 3 years' imprisonment may be understood as a precise and serious intervention, given that it prevents its suspension or substitution, by exceeding—in a general way—the corresponding time limits (Cfr. Gracia Martín and

[37] STC 82/2003, of 5 May, third point of law. In this regard, likewise, see STC 67/1997, of 7 April, second point of law; STC 341/1993, of 18 November, fifth and sixth points of law; all of these with subsequent references.

[38] Cfr. art. 2.3 Framework Decision 2003/568/JHA, of 22 July.

Alastuey Dobón 2006, pp. 302 ff., 333 ff.), and it implies an essential intervention in the aforementioned principle of liberty (Cfr. Boldova Pasamar 2006, p. 95 ff.).[39] It appears that the structure of the factual circumstances that the Spanish legislator has construed resembles the crime of abstract endangerment,[40] rather than its formulation as a crime with a concrete result or danger, as paragraph 3, of article 2 of this Framework Decision might have us understand, through the limitation of punishable acts to "conduct which involves, or could involve, a distortion of competition in relation to the purchase of goods or commercial services". Therefore, if the legal consequence is understood as a serious intervention—now changing the high/medium/low scale into serious/medium/slight—in the principle of liberty, it appears that that abstract endangerment should not be seen as anything else but a slight intervention or affectation (1)—in as much as harm is not required (3), nor specific endangerment (2) of the respective legal good "competition in relation to the purchase of goods or commercial services". Therefore (Table 9.2):

Table 9.2 Legal consequence

Factual circumstance	Legal consequence
2	3
1	3
(3)	(6)

And it would be worth adding the degree of empirical safety of each intervention (Alexy 2003, p. 789 f.).[41] While imprisonment allows one to speak of certainty in

[39] On a general note Bernal Pulido (2007), p. 782: "the severity of the legislative intervention in fundamental law will be greater, insofar as that intervention prevents or complicates the exercise of more prima facie positions linked to the fundamental law that is affected or to other fundamental laws… the longer the legislative intervention prevents or complicates the exercise of the prima facie iusfundamental position, the greater the intensity of that intervention and the greater the weight that should be attributed to the fundamental law in its ponderation".

[40] Art. 286 bis: "1. Whosoever by himself or through an intermediary promises, offers or gives to directors, administrators, employees or collaborators of a mercantile company or society, association, foundation or organization, a benefit or advantage of any kind that is not justified, so that they favour him or a third party, failing to comply with their obligations in the purchase or sale or merchandise or in the contracting of professional services, may be punished by a term of imprisonment of between six months to four years, by special disqualification from working in industry or commerce for a time of between one and six years and by a fine amounting to three times the value of the benefit or advantage. 2. The same punishments will apply to the director, administrator, employee or collaborator of a mercantile company, or a society, association, foundation or organization who, by himself or through an intermediary, receives, requests or accepts an unjustified benefit or advantage of any sort, with a view to favouring third parties to whom he gives or from whom he expects the benefit or the advantage, failing to comply with their obligations in the purchase or sale of goods or in the contracting of professional services, will be punished with the same punishments"; among others, see Navarro Frías and Melero Bosh (2011), p. 1 ff.

[41] On a general note Bernal Pulido (2007), p. 781 f.: "the greater the likelihood that the legislative intervention may prevent or complicate the exercise of the prima facie iusfundamental position, the greater the intensity of that intervention and the greater the weight that should be attributed to the fundamental law in its ponderation".

relation to the deprivation that it implies: the convicted person is or is not in prison; the crimes of endangerment do not allow the same margins of certainty, as endangerment constitutes an element that is "difficult to define and very controversial" (Jescheck and Weigend 1996, p. 263 f.).[42] Therefore, if a stronger empirical basis is attached to result crimes (defined by their consequences) as against those of endangerment, and among the latter, if a greater degree of certainty is attached to crimes of concrete endangerment as against those of general endangerment, in accordance with the greater margins of certainty that arise from the observation that the legal interest is present within the radius of action of the behaviour and, in consequence, a judgment of the likelihood of its harmful effects (cfr. Cerezo Mir 1998, p. 111 ff.), then the following scale shown in Table 9.3 would emerge:

Table 9.3 Harmful effects

Empirical basis	
Result crime	Strong
Offence of specific endangerment	Medium
Offence of general endangerment	Weak

or in correlative numerical terms (Table 9.4):

Table 9.4 Harmful effects in correlative numerical terms

Empirical basis	
Result crime	3
Offence of specific endangerment	2
Offence of general endangerment	1

And in this way, the correlation between the maximum upper limit of the prison term proposed in the Framework Decision—3 years' imprisonment—and the fact to which it is linked, allows us to represent it the terms used in Table 9.5:

Table 9.5 Correlation between factual circumstances and legal consequences

	Factual circumstance	Legal consequence
Abstract weight	Medium	High
Intervention	Slight	Serious
Empirical basis	Weak	Strong

or in equivalent numerical terms (Table 9.6):

[42] Equally, see Cerezo Mir (1998), p. 111 ff.; Luzón Peña (2012), p. 169 f., margs. 44 ff.; Mir Puig (2011), p. 239 ff., margs. 60 ff.; Roxin (2006), § 11 margs. 148 ff.

Table 9.6 Correlation between factual circumstances and legal consequences in equivalent numerical terms

	Factual circumstance	Juridical consequence
Abstract weight	2	3
Intervention	1	3
Empirical basis	1	3
	(4)	(9)

And these considerations speak out against the imposition of the upper maximum limit foreseen for the punishment of imprisonment in the Framework Decision: 3 years, heightened by the Spanish legislator, among others, who raised it to 4 years imprisonment in its transposition.[43] The factors used here, abstract weight, degree of intervention and empirical basis,[44] allow a preliminary rationalization of this principle of proportionality as an evaluation criterion.

9.4.2 Principle of Legality

9.4.2.1 Definition

According to art. 49.1 CFREU, "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 law or international law at the time when it was committed." A definition is offered in this way of the principle of legality which, after a degree of abstraction, is that: the reference—not to the law in a strict sense, but- to Law or, under art. 49.2 of this text, to "the general principles recognised by the community of nation", allows its adjustment to the different legal orders of the member States (cfr. Romeo Malanda 2012, p. 350; Schaut 2012, p. 126 ff.; Weisser 2014, p. 445 f., with subsequent references).[45] Such an abstraction, however, affects its functionality for the purposes of evaluation: faced with a definition such as the principle of proportionality, in as much as it is a mandate for adjustment—or an interdiction on disproportion. . . "must not be disproportionate"—between the factual circumstance and the legal consequence, which makes explicit, in this way, factors for its determination, the need is established for punishable behaviour to be described as

[43] Critically, on a general note, Nieto Martín (2011), p. 79 f.

[44] In detail see Alexy (2003), p. 773 ff. In a different sense, subsequently in turn Pérez-Barberá (2014), p. 525: "but given that the evil of what is unjust and the punishment are incommensurable between each other, one must overcome this inevitable difficulty through rougher transversal categories, which the dogma –and the praxis- of criminal law do indeed do with categories of criminal intent, imprudence, attenuated and aggravated punishments, the consideration of the victim and social aspects in the framework of the determination of the punishment".

[45] Earlier, also Silva Sánchez (2007), p. 71 f. From another perspective, Pérez del Valle (2008), p. 11 ff.

offences in "Domestic Law" or "International Law", without any subsequent precision in this regard.

Nevertheless, in Council Framework Decision of 19 July 2002 on Combating Trafficking in Human Beings, the degree of "clarity", "legal certainty" and "preciseness" are included as evaluation criteria.[46] And more recently, in the Communication from the Commission Strategy for the Effective Implementation of the Charter of Fundamental Rights by the European Union, the need of a general nature is put forward to evaluate the precision and predictability of the limitations of fundamental rights.[47] It refers in this way to contents of the principle of legality, in as much as a principle of principles, that includes together with the mandate for clarity, which is particularly sensitive to the perspective of the recipient, the mandate of precision and legal certainty (Navarro Frías 2010, *passim*). In this way, also, the principle of legality is deconstructed into minimum common elements that serve, precisely for that reason, as common evaluation criteria.

9.4.2.2 Form of Application

The mandate for precision refers first of all to normative meaning. In this sense, the requirement to express the limitations of fundamental rights in a precise manner impacts on the lexical choices used to constitute a legal text.[48] However, in relation to the elements that justify the specific injustice of the criminal definition, it is not about a shortcoming in the general normative meaning, but a shortcoming in the semantic norms of a technical juridical nature that communicate their material meaning. In this sense, the Spanish Constitutional Court refers to the "legal and jurisprudential context in which the criminal precept is inscribed... within which they [the precepts] acquire their own meaning and significance -...- each of the singular precepts",[49] giving the "criminal legislator", a defining task "when making use of expressions that because they are not rooted in the legal culture itself, lack all significant potential and therefore present, an unclear view of the conduct that is

[46] COM (2006) 187 final, p. 4. More briefly, See Report from the Commission to the Council based on Article 9 of the Council Framework Decision 2003/568/JHA of 22 July 2003 On combating corruption on the Private Sector, COM (2007) 328 final, p. 5. Nevertheless, in relation to the directives, with nuances see Schaut (2012), p. 140 ff.

[47] COM (2010) 573 final, p. 6; finally Weisser (2014), p. 445 f., with subsequent references.

[48] Cfr. COM (2010) 573 final, p. 6; on the scope of this mandate of determination Weisser (2014), pp. 444 ff., 452, who excludes from it, on p. 447, "the general assumptions of criminal liability do not affect the extension of the description of the criminal behaviour. It is a question of circumstances without specific reference to a particular such as general reasons of justification or innocence or questions of prescription", among others, the author points out on p. 451, that this duty likewise includes "the lower limits of punishable participation" as well as "the boundaries between unpunished acts of preparation and punishable criminal attempt".

[49] STC 89/1993, of 12 March, second point of law; in greater detail Ossadón Widow (2009), pp. 53 ff., 79 ff., conceptualizing legal language as a special language. Among others, see van Weezel (2011), pp. 75 ff., 82 ff.

defined through such expressions".[50] Three sources are therefore put forward for a preliminary evaluation of the precision of the concepts: law, doctrine and jurisprudence. And along these same lines, the Spanish Supreme Court has recently pointed to the supplemental nature of doctrinal and jurisprudential definitions as opposed to the legal ones.[51]

Certainly, the question of legal precision usually requires no more than a consultation of the particular Code in question.[52] So, for example, contempt is defined under art. 208 of the Spanish criminal code as "an action or an expression that harms the dignity of another person, undermining his fame or attacking his own self-esteem".[53] While in relation to breach of faith, it is established, under art. 22 of the general part of this same text, that: "the guilty party has committed any of the offences against persons using means, manners or ways to do so that tend directly or especially to assure them, without risk to his person that might arise from defence by the offended party."[54]

However, the certainty of doctrinal and jurisprudential definitions offers greater resistance to the type of evaluation that the Commission in fact carries out. In this other sense, it is worth pointing out that the offence of corruption between individuals has, it appears, yet to be appraised in Spanish courts.[55] Although, neither is

[50] STC 89/1993, of 12 March, third point of law; with subsequent references in van Weezel, Alex: La garantía de tipicidad en la jurisprudencia del Tribunal Constitucional, cit. n. 59, pp. 75 ff., 82 ff. On the increasing weakening of the constitutional requirement of certainty, see in turn Navarro Frías (2010), p. 68 ff.; Greco (2013), p. 22 f., pointing to the present "the constitutional consecration of the liberation of the legislator from observance of the mandate of certainty"; Basak (2013), pp. 74 f., 78 ff.; earlier, Lenckner (1977), p. 253 ff.; Stächelin (1998), p. 213 ff.; Cuerda Riezu (2001), p. 172 ff. Nevertheless, Madrid Conesa (2013), p. 164, who only appreciates a breach of the constitutional requirement for certainty when referring to concepts "whose content and scope cannot be known with the help of methods of interpretation", however, see p. 170.

[51] Expressly in relation to the concept of medical treatment, in the sense of the crime of bodily harm under art. 147 Spanish Penal Code, the Sentence of the Supreme Court (STS) 546/2014, of 9 July, first point of law, understands that it is a "normative concept that, in the absence of a legal definition, should be reached through doctrinal and jurisprudential contributions that grant it the necessary legal certainty that is required by the interpretation of the offence"; STS 180/2014, of 6 March, second point of law; STS 34/2014, of 6 February, second point of law; all of which with subsequent references.

[52] Among others, see STC 89/1993, of 12 March, third point of law, referring to the rest of the Order and in particular to international instruments.

[53] It is, therefore, a semantic meaning of the norm that offers criteria for the orientation and evaluation of the application of this concept, cfr. Navarro Conicet and Manrique (2005), p. 810; on the legal definitions, broadly Ossadón Widow (2009), p. 251 ff., pointing to their necessity, on p. 566, when "the linguistic sign to define is novel and not very consolidated", as well as "when its meaning is obscure or. . . has an uncertain conceptual extension"; among others, see Muñoz Conde (2013), p. 277 ff.

[54] With subsequent references, see Sánchez Lázaro (2013), p. 307.

[55] Among others, see SAP Barcelona, 5th section, of 30 June 2014, fourth point of law; AAP Salamanca 158/2012, 16 April, second point of law; SAP Barcelona 221/2010, 23 February, third point of law. Finally, in turn, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions

there a legal obligation to "coin specific definitions for each and every one of the terms that integrate the description of the offence", in the sense that was pointed out by the Spanish Constitutional Court.[56] In this respect, the proximity of the elements that compose these new crimes of corruption between individuals is illustrative—"promise, offer, or give", "benefit or advantage of any kind"—with those previously employed by the legislator in the definition of crimes of bribery—"might offer or hand over", "gift or reward of any class" or "gift, favour or reward". In particular, this proximity is because the technical-juridical linguistic conventions lend themselves to the latest nuances that facilitate new uses of concepts and expressions already coined in the composition of new criminal definitions, such as those relating to corruption between individuals, by the legislator.[57]

Certainly, the question of precision transcends that relating to the mere definition of the concept. In that sense, Spanish doctrine distinguishes between the core meaning and the field of meaning.[58] The first, the core meaning, comprises the irrefutable circumstances of application of a concept, while the field of meaning comprises the cases of uncertainty; the degree of precision for the purposes of its application arises from the correlation between both. The better the core meaning, the better the conceptual precision, that is, a greater margin of irrefutable application, and inversely, a wider field of meaning equals greater imprecision.[59] So, here, it would for example be worth including, in the field of meaning, the application of suture points in relation to the concept of medical or surgical treatment, that characterizes the crime—as against the absence—of injuries in the sense of art. 147 of the Spanish criminal code on bodily harm, given the contradiction of the jurisprudence in this respect[60] (Table 9.7):

Strengthening the foundations of Smart Regulation – improving evaluation, COM (2013) 686 final, pp. 2 ff., 6 f., pointing to the convenience of fitness checks; Smart regulation in the European Union. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM (2010) 543 final, p. 5 f.

[56] STC 89/1993, of 12 March, third point of law.

[57] Among others, on conventional nature see Navarro Conicet and Manrique (2005), pp. 809, 823 f., 833; Ossadón Widow (2009), p. 64 ff.; both with subsequent references.

[58] Following Philipp Heck, recently Navarro Frías (2010), p. 80 ff.

[59] In detail Navarro Frías (2010), p. 80 ff. Earlier, see also Noll (1973), p. 185 f. In a similar sense Ossadón Widow (2009), p. 67.

[60] In favor of understanding it, in any case, as medical treatment, STS 153/2013, of 6 March, eleventh and following points of law; demanding that they be "objectively necessary" SAP Pontevedra 24/2009, of 18 May, sixth point of law; in a negative sense, SAP Malaga 589/2010, 24 November, first point of law: "if... no other medical intervention is assumed than the initial cure, although this consists in a suture point, we will not maintain that there has been treatment", then falling into a certain contradiction; pointing out the need for "additional cures", SAP Madrid 271/2004, of 12 April, second legal ground; all of which with subsequent references.

Table 9.7 Relationship between core meaning and field of meaning

Core meaning	Field of meaning
	Suture points

And something similar may be concluded in relation to the cervical collar (Table 9.8).[61]

Table 9.8 Relationship between core meaning and field of meaning (cervical collar)

Core meaning	Field of meaning
	Suture points
	Cervical collar

Therefore, at this point in time, the correlation is as follows: 0–2.

All in all, it is a question of the degree of certainty of the concept up until that point, that is, up until the time of the evaluation.[62] However, it offers guidance for its future application, in the sense pointed out recently in the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Strengthening the foundations of Smart Regulation—improving evaluation,[63] permitting the evaluation and rationalization of the different meanings in force—suture points, cervical collar, etcetera—through these kinds of audits of certainty.

But the idea of *lex certa* transcends the plane of regulatory semantics. As the objects referred to by these—by the semantic norms—allow differences to be established in accordance with the degree of certainty that the confirmation of their specific features will allow.[64] So, for example, while the result and

[61] Rejecting its understanding as a medical treatment when it has a palliative sense, SAP Barcelona 804/2013, of 12 September, third legal ground; in a contrary sense, in turn, understanding it in all cases as medical treatment, SAP Leon 568/2013, of 26 July, second ground of law; both with subsequent references.

[62] In a critical sense, see Navarro Conicet and Manrique (2005, p. 816): "if greater or lesser vagueness depends on the greater or lesser quantity of marginal cases, it appears that all of the concepts that are projected into open universes of discourse are equally vague because they all have a potentially unlimited class of marginal cases".

[63] COM (2013) 686 final, pp. 2 ff., 6 ff., noting on p. 8, the need to prepare "continuous evaluation plans", frameworks "for compilation and control of data", as well as on p. 9, "frameworks for follow up and evaluation". Equally, see Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Regulatory Fitness and Performance (REFIT): Results and Next Steps, COM (2013) 685 final, p. 3: "Smart regulation is a continuous process, not a one off operation"; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Smart regulation in the European Union, COM (2010) 543 final, p. 3 ff.

[64] In general, on the semantic argument, see Klatt (2004), passim; Klatt (2005), pp. 355, 359 ff. Among others, on the terminology to use in legal provisions, see Noll (1973), pp. 244 ff., 258 ff. More recently, Paredes Castañón (2003), p. 158 n. 187, who pointed out that the convenience of using "those terms and expressions"; Ossadón Widow (2009), pp. 87 ff., 95, 546 ff. Likewise, see Madrid Conesa (2013), p. 215 f.

consummation of the crime of homicide allows, not only its subsumption in the corresponding concept,[65] but it also allows us to speak of certainty—on this other plane—in relation to its consummation, according to the corresponding technical regulations or experience. For example, having noted that the active subject firmly squeezed the neck of the victim "strangling him, which produced a mechanical asphyxia that was the cause of death".[66] However, the incidence of the individual acts of corruption between individuals in "competition in relation to the purchase of goods or commercial services",[67] does not permit such margins of certainty; there is no dead body here! And it lends itself to evaluation on the suggested scales to evaluate the empirical basis of the degree of accomplishment of the principles in the discourse of their application: "strong-medium-weak", "certain-plausible-not evidently false" or, by correlation, "3-2-1" (Alexy 2003, p. 789 f.; Sánchez Lázaro 2010, p. 369 ff.; Sánchez Lázaro 2009, p. 158 ff.; on linguistic rationality, in particular, p. 173 ff.). In this other sense, if we attribute to the predicted results of the crime of homicide a strong empirical base, in as much as it permits the direct confirmation of its consummation, the abstract endangerment that this crime of corruption between individuals involves permits no higher valuation than "plausible", as on this level, the endangerment does not stand out, but another type of element that allows the probability of the harm to be evaluated (cfr. Jescheck and Weigend 1996, p. 263 f.), hence (Table 9.9):

Table 9.9 Predicted results of crimes

Action	Result
Homicide	Certain
Corruption between individuals	Plausible

Or in the correlative numerical terms (Table 9.10):

Table 9.10 Predicted results of crimes in numerical terms

Action	Result
Homicide	3
Corruption between individuals	2

And, it is certainly possible to introduce other variables with their successive nuances: Direct empirical certainty/indirect empirical certainty? All in all, the

[65] Cfr. Muñoz Conde (2013), p. 33. Among others, for an illustrative example, see Pawlik (2014), 376 ff., recalling on p. 380: "each juridical institute from the general part and the core crimes from the special part have their own metadogmatic theoretical framework".

[66] STS 104/2014, of 14 February, proven facts.

[67] Art. 2.3 Council Framework Decision 2003/568/JHA of 22 July 2003, on combating corruption in the private sector.

[68] Cfr. Report from the Commission to the Council and the European Parliament, COM (2006) 187 final, p. 4; more recently, see the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Smart regulation in the European Union. COM (2010) 543 final, p. 9. On the differences

criteria expounded here take no account of principles such as clarity,[68] nor of the possible costs that the margins of precision can imply for other principles, such as that of prevention or the degree of functional efficacy "account being taken of its aims".[69] However, this last point now exceeds the framework of a technical-juridical evaluation model such as the one outlined that also advances principles, in as much as they are common forms of argument, as common evaluation criteria.[70]

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between certainty and precision cfr. likewise, Navarro Conicet and Manrique (2005), p. 811 ff. In relation to the scientifically conformed concepts, see Torío López (2001), p. 817 ff.

[69] Report from the Commission to the Council and the European Parliament, COM (2006) 187 final, p. 4. Ultimately, see the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Strengthening the Foundations of Smart Regulation—Improving Evaluation, COM (2013) 686 final, p. 2 ff.; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Regulatory Fitness and Performance (REFIT): Results and Next Steps, COM (2013) 685 final, pp. 3 ff., 12 ff.; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Strengthening the foundations of Smart Regulation—improving evaluation, COM (2010) 543 final, pp. 2 ff., 6 ff., pointing out on p. 7, that "the Commission will reinforce the assessment of impacts on fundamental rights, and will develop specific guidance for this." In the doctrine, Weisser (2014), pp. 433 ff., 440 ff.; crítically, at the same time, Nieto Martín (2011), p. 78 ff. Among others, see Becerra Muñoz (2013), pp. 323 ff., 329 ff.; Muñoz de Morales Romero (2011b), p. 602 ff.; Ossadón Widow (2009), pp. 269 ff., 359 ff. Critically, Rodríguez Ferrández (2011), p. 267 ff., p. 279 ff. Generally, see also the Communication to the Commission from Ms. Grybauskaité in agreement with the President. Responding to Strategic Needs: Reinforcing the use of evaluation, SEC(2007)213, p. 3 ff. Earlier, Vogel (2005), p. 265 f.

[70] On this point, Sánchez Lázaro (2014), p. 592 ff. Among others, also Schaut (2012), pp. 43 ff., 91 ff., 109 ff.

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Part III
Evaluation and Axiological Validity

Chapter 10
Harm and Intellectual Property. Music Piracy as an Example of Empirical Measurement of Damage

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Contents

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10.1 Introduction

There is no doubt that law discussion has been enormously helped by contributions from other scientific disciplines, particularly criminology. At this stage, there is fortunately nothing new in drawing attention to that fact, which manifests itself in multiple ways; from empirical verification of the so-called "deterrent effects of the punishment" by criminology,—which without a doubt should condition to some extent the discussion on the subject of criminal law—to contributions from psychology, so as to configure the subjective elements of crime in a satisfactory way (Díez Ripollés 1990). Economics is another of these sciences when applied to criminal law. It would be sufficient to mention the economic analysis of law to digest its importance (Ortiz de Urbina Gimeno 2004). This work is intended to be a contribution more along the lines of bringing knowledge of economics to criminal law. More specifically, my objective will consist in verifying the extent to which the contributions of economics can assist the debate on criminal harm in crimes against intellectual property.

So as to understand the terms of this study, I will take it as given that, when we speak of harm, we do so in a sense that is equivalent to "social damage that causes certain behaviours", even though doing so might entail undue identification of expressions that are perhaps not entirely synonymous. To turn this article into a work on the conceptual purity of the harm principle, would condemn the task that I have set myself to failure. Very basically, I propose to determine how economists contemplate "harm" in intellectual property so as to, in this way, discover how the debate between economists can enrich that of the penalists. As a secondary objective, it would at least be of interest to discover, in addition, whether economists and jurists engage in compatible discourse, even though it is differentiated by our respective fields of competence. In other words, to discover whether the theoretical premises of penalists with regard to harm in crimes against intellectual property are grounded in valid empirical assumptions.

It is no secret that penalists have not, in general, at least not until relatively recent times, been concerned about testing whether our dogmatic institutions, fundamental or otherwise, and our criminal policy propositions, had empirical support. This shortcoming has meant we are the recipients of an intense—and at least, in my opinion, partially justified—criticism on the part of criminologists, especially with regard to the deterrent effects of the punishment. In effect, of what use would it be, for example, to base criminal law on deterrence effects, if—in addition to its ethical problems—it is shown, as criminologists have done, that punishment has a very modest dissuasive effect? That weak link between criminal law theory and reality constitutes a recurrent criticism that we have, moreover, taken on board and accepted, and one that can usually be expressed—by ourselves—under well-known metaphors: that we live confined with our dogma in an ivory tower, or that we cultivate art for art's sake—as Silva Sánchez—(Silva Sánchez 1992, p. 77) has said, or that we practice scholasticism—in the words of Díez Ripollés (Díez Ripollés 2003, p. 14).

However, it cannot be forgotten that the theoretical opinions of academia have, on many occasions, a more prescriptive than descriptive component, and that moving with a fixed abode to the world of "empiricism" is as improper as living in an ivory tower, as knowledge of reality cannot provide satisfactory political-criminal guidelines to resolve a problem. As is so often said, a balanced approach is best, and that mid-way point between the two types of discourse will have to be reached. There are no end of doctrinal constructs to do so that allow their proper integration.[1]

If what I have just mentioned contributes nothing that is not already known, I nevertheless find no empirical approximation of harm in crimes against intellectual property. The hypothesis with which this work begins is that the contribution of knowledge of economics on the matter can contribute to a reworking or, at least, to a better comprehension of our criminal policy on intellectual property.

10.2 "Harm" in Offences Against the Copyrights of the Author from the Point of View of the Economy

The economy is, like criminology, an empirical-social science. So economists approach criminal problems in a very similar way to criminologists: as we know, they do not circumscribe their object of study to what formally constitutes a crime, but it is more a question of analysing "deviant behaviours". Hence, without going any further, there is the expression of a "grey area of crime" that is used by criminologists. It allows us to consider often non-criminal "deviant behaviours" as an object of study without any methodological problems, from truancy to suicide and, of course, illegal downloads from internet, a new and expanding field of criminological study over recent years. Added to which, a limitation on what is legally considered a crime would be of little use in the criminological field of study, in so far as what a crime is varies between countries and even in a particular state. Thus, while speaking of intellectual property, end-user piracy of works subject to copyright in the USA may be a crime, while in Spain it is not, without altering in the very least the utility of a criminological study on pirated downloads in Spain with regard to its utility in the USA.

Likewise, economists are not interested in circumscribing their field of study to whatever crime against intellectual property may be, since there is no logical reason for it. Economics studies, from its field of scientific competence, a "problematic" behaviour: the piracy of intellectual works and their socioeconomic consequences. In short, it studies the impact of behaviours of unlawful piracy—regardless of whether they are crimes—in the socioeconomic area of intellectual property. It should be clarified that economic analyses are usually circumscribed to the music

[1] This is precisely the grounds of the proposal by Díez Ripollés (2003) for legislative criminal rationality.

sector, probably because its study is easier. Although it is a very specific sector of the intellectual property business, it is a highly representative one. In any event, before embarking on a full analysis of these studies, it is necessary to distinguish between "authentic economic analysis" and pseudoscientific estimations that, on many occasions, are passed off as empirical evaluations of the economics of music piracy.

10.3 Inaccuracies in the Reports Sponsored by Lobbies and "Authentic" Economic Analysis

At the outset, a serious problem arises with the estimations of socioeconomic damage caused by attacks on intellectual property, in so far as many of them are sponsored by the principal representatives of the intellectual property industry and it is hardly surprising that their conclusions have exaggerated the real dimensions of the problem. It was not long before serious methodological objections to these estimations of "the industry" were raised, such that they rapidly lost credibility. Perhaps the most well-known and remarkable criticism was presented in the first studies in which a 100 % directly proportional relationship was established between pirated downloads and loss to intellectual property holders.[2] And so, for example, it was said that if an internet user downloaded an album valued at €15, then the artist (or the assignee of the rights, to be more precise) had occasioned losses of exactly €15. As from around 2006, it was no surprise to find a message similar to the following rough draft on many CDs: "Thank you for buying this CD. Do not copy this CD. Copying this CD is equivalent to theft from a shop." It is a message that ceased to appear over time, but it situates us very well at the height of the most controversial studies on the industry.

The methodological howlers of those studies contributed to increasing the unpopularity that was already felt towards the powerful lobbies which sponsored them. Those social agents lost the credibility that they sought to have through the contribution of "data on the reality of the problem" even with regard to certain political agents—although not their capability for direct or indirect influence, through other means. Over the following years, the lobbies themselves or people that sympathised with them sought to tidy up their poor image, precisely by distancing themselves from those initial estimations of economic losses; basically, by alleging that the fact that those studies were badly done could in no way mean

[2] The criticisms of these studies are customary among economists, regardless of whether or not they argue that piracy damages the industry. See, for example Oberholzer-Strumpf (2010), p. 21. Neither are critical observations along the same lines in short supply in penalist doctrine. See for example Fernández Teruelo (2007), p. 97.

that piracy would not damage the sector of intellectual property to any (uncertain) extent (Perlmutter 2010, p. 415 f.).[3]

It has meant that the latest estimations sponsored by the lobbyists present somewhat different characteristics. The appearance of a section specifically aimed at explaining the methodology of the study is not uncommon now, on the basis of which the estimations of losses are explained, although certainly still in a very superficial way.[4] Having seen the evolution of such studies, it would be improper to do no more than discount them, considering them to be methodologically "unsound", at least without a rigorous analysis that can shed light on their validity. However, in the present study, I shall occupy myself principally with "independent" works produced by academia, notwithstanding due attention that is lent to data from certain studies of the industry that might merit our attention.

10.4 Business Losses

Does piracy *really* damage the industry? Our common sense might suggest that, regardless of the exaggerations contained in the studies promoted by industry, piracy damages intellectual property, to some extent, from the socio-economic perspective; above all, at first sight, because an illegal free download of a work *substitutes* its purchase (Liebowitz 2005, pp. 440, 446).[5] However, from the empirical point of view, that conclusion is by no means clear. As Liebowitz has affirmed, the empirical observance of whether or not sharing files diminishes sales, is at the centre of the debate (Liebowitz 2005, p. 440). If at first economists tried to quantify the damage that piracy inflicted on the holders or the assignees of the copyrights, it is certain that some of them have come to question the central assumption; whether piracy really damages authors and other intermediaries (Liebowitz 2003, p. 2). The following reflections relate to this debate.

[3] "It is not necessary to believe that sharing files is the only cause, or that each illegally downloaded file corresponds to a private sale, but to conclude that this sharp decline [of sales] during this precise period of time is no coincidence"; also Promusicae (2005), p. 112, while recognizing the methodological errors of the estimates of the lobbyists: "Although not everybody that buys a pirated CD in the street would be willing to buy a CD illegally, it is undoubtable that the emergence of piracy (sales on the street and on Internet) is impacting in a significant way on Spanish industry".

[4] See, for example, the report from the Observatorio de Piratería y Hábitos de Consumo de Contenidos Digitales 2013 (GFK 2014), 18, available at http://www.cedro.org/docs/default-source/textos-de-inter%C3%A9s/observatorio-pirateria2013.pdf?sfvrsn=6 (accessed 21-01-2015).

[5] It is a question of what is called in economics the substitution effect. The copy, if it has the same or a very similar quality as the original product and is freely obtained or at a much reduced cost—for example, the price of a new CD-, will involve a reduction in the demand for original products, and consequently, a reduction in their price as well as their offer.

10.4.1 Global Data from the Industry and the Hypothesis of Economic Theory

10.4.1.1 Direct Impact of Piracy on the Loss of Sales

If there is some more or less reliable data on the statistics that industry produces, it is (whatever caveats they might wish to attach) the sales volumes. In principle, and without any need to refer in a generic way to "billions in lost sales and employment", the evidence for such data has to be examined. If we merely examine the sales volumes of long-playing CDs that may be taken from the RIAA (*Recording Industry Association of America*), we can confirm a sharp fall in sales since 1999. Curiously, if we look at those same figures, that year can be seen as the most successful in the history of music sales, since such data began to be compiled in 1973. It was also the year in which the first publicly known peer-to-peer (p2p) file exchange programme appeared: *Napster* (Goel et al. 2010, p. 6)[6] Was that decline in sales due to the p2p file exchange programmes? The truth is that it certainly might be due to other factors, whether concomitant or not. But a very plausible response is yes, it *evidently* was.[7]

We could say that the *Napster case* was a lost opportunity for empirical measurement of the damage. As Liebowitz has affirmed, although the reports presented by both parties in the judgment against *Napster* contained very suggestive conclusions, there was no end to the important methodological problems advanced by both camps. Thus, one of the reports presented by the industry had demonstrated that, from 1999 to 2000, purchases of CDs from retail music outlets close to university campuses fell by 2–3 %, in comparison with music outlets at different locations, at which sales rose by 7 %. That report appeared to highlight the negative impact of *Napster* on the industry, because the university students were, quite clearly, those that used the services of the p2p platform most of all. However, such conclusions were not reliable in so far as it was noted that, from 1998 to 1999, in other words, since the year before the launch of *Napster*, shops selling CDs close the university campuses saw a fall in their sales of 5 %, while sales increased in other shops by 3 %. So, to open a music outlet close to a campus appeared to be a bad business, after all, regardless of the p2p activity.

[6] According to RIAA, the profits from sales rose from 7.5 billion dollars in 1990 to 14.6 billion in 1999, only to fall to 8.5 billion in 2008. The opinion of the music industry in the USA was that Napster and other p2p networks had been responsible for 25 % of the losses in the sector.

[7] See the data on the evolution of music sales in the USA in Liebowitz (2005), p. 452, who paints the RIA figures in a less dramatic light, in so far as, when recomposing those figures, he removes sales of singles from the data and leaves only the figures for long-playing CDs, as the fall in sales of singles has a very different connotation. In any case, and with even less dramatic, the drop in sales is certainly pronounced. As the cited author says, "something unusual has to have happened over the past few years" that can explain this phenomenon; also Rob and Waldfogel (2006), p. 29 f.; Zentner (2005), p. 1 f.

In its defence, *Napster* argued that those figures served to demonstrate, in short, that sales had done nothing but rise since the launch of the downloading service, but that in itself was, of course, not sufficient proof. In fact, the industry would have increased its sales by an even larger percentage perhaps, without *Napster*. So that, apart from subsequent estimations on the impact of the downloads in the business of intellectual property, we will probably never know whether *Napster* was or was not advantageous for the industry (Liebowitz 2003, p. 16 ff.).

Despite everything else, there is nothing comparable with the absence of information that we have with regard to Spain, where the data on music sales are not in the public domain.[8] *Promusicae,* a private association that groups together the majority of musical companies from the national field, is in charge of the preparation of studies on sales, which is done in a similar way to those commissioned by the RIAA. In other words, by counting sales of copies registered by the bar-code readers of the main commercial establishments. *Promusicae* does not officially publish the data that are therefore secret. Everything that sees the light of day are lists of "the most sold", but we know nothing of the numbers of copies that are sold.

However, we have been able to ascertain the volume of music sales in Spain over recent years thanks to various leaks. The first occurred in 2011, and corresponded to week 16 (from 18 to 24 April, 2011). Having seen the filtered figures, it is understood a little better—although that in itself is no outright justification—why the data is not made public: the sales of CDs in Spain are so low that it is not convenient to broadcast them for promotional purposes. In effect, it turns out it was only necessary to sell 75 copies, to enter into the *top100* of the most sold, and that *Maná*, the group promoted as the exciting number one of the week, only sold 4273 examples. A number one, not so many years ago, according to information from the *Rolling Stone* magazine, sold around a minimum of 50,000 copies in that period.[9] The second of the alleged leaks was produced in 2013. In concrete, these corresponded to figures from week 50 (from 9 to 15 of December 2013), corresponding to actual physical sales of 79 %. In this case, the "number one of the hit parade" revealed data that was a little less dramatic, by exceeding the figure of 8000 copies, although it is also true that it took place in the middle of the Christmas shopping period.[10]

It appears unquestionable that sales of CDs have dropped in Spain, although the impact would probably have been less pronounced if digital sales, clearly on the rise with respect to the physical format, were considered together with physical sales.

[8] The sales data in the USA are accessible, but access is very expensive. See on this Oberholzer and Strumpf (2010), pp. 41, 51. A subscription to Nielsen Sound Scan—a service that provides detailed data on music sales—for academic purposes costs around $10,000 a year.

[9] http://www.rollingstone.es/noticias/view/una-filtracion-desvela-las-pauperrimas-ventas-de-discos-en-espana-75-ejemplares-para-entrar-en-los-mas-vendidos (last accessed 21 January 2014).

[10] See http://lareputada.com/2013/12/24/exclusiva-asi-son-las-ventas-reales-de-albumes-en-espana-por-navidad/(last accessed 21 January 2014), for the complete list of the 100 top selling CDs.

10.4.1.2 Six Alternative Explanations of the Trend

Even with the above in mind, other explanatory factors for the decline in music sales may not be discarded. We will look at some hypotheses put forward by economists. In the first place, we have the acquisition of other *alternative products* to music. In this sense, it is usual to find the affirmation that a possible cause of the drop in sales of music is due to the preference of users for new entertainment products, such as DVDs. It is significant that sales figures of digital video show a steady level of sales, precisely since 2000, a year in which their commercial marketing began to spread, substituting the formerly dominant format of analogic video, VHS, the success of which coincided over time with a drop in music sales from around the same date (Michel 2006, p. 8, critical of that idea).[11]

Another factor usually cited is the drop in the *quality of the music*, which brings with it a correlative drop in sales. However, this is a factor that is difficult to measure and could not therefore be taken into account in any sense (Goel et al. 2010, p. 7).[12]

The possibility may also be mentioned that the decline in sales of music in the CD format is to some extent due to the *possibility of legal downloads* available on the Internet. Economists who have concerned themselves with the topic have usually been sceptical about this factor, given the scant volume of legal downloads that the Internet offered up until quite recently.[13] However, the development of digital music platforms such as *iTunes, Amazon* and others have brought radical changes to the business of music sales, as the digital format has eclipsed the physical one. The same has happened with another type of intellectual work, particularly the literature on electronic formats. Practically all the economic studies on the topic focus on changes in the physical format, but not on sales in the digital format, which could mean that their estimations may no longer be up to date. Fortunately, we have a couple of studies that assess the impact of digital piracy on the purchase of digital music, which we shall analyse later on.

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[11] Liebowitz (2005), pp. 456–458, also sceptical of that conclusion, in so far as over other periods, the rises in sales of video and music have concurred over time; for example, from 1991 up to 1996, sales of music and video tapes rose in a similar way in the USA; Other frequently cited factors, such as the price of CDs, do not appear to be directly related with the fall in the level of sales, given that the price appears to have remained steady up until very recent times, since when they have undergone a sudden fall.

[12] Liebowitz (2005, p. 460 ff.), seeks to demonstrate the weak influence of this parameter on the decline in sales, but in my opinion the author does so with unconvincing arguments, in so far as it is based on indirect and extremely weak indicators, such as the decline in radio audiences applied to different listener age bands. I think that the most advisable approach is to leave this point aside, as it is too subjective.

[13] As pointed out by Zentner (2010), pp. 10, 12, the business of legal downloads represented 0.25 % of total sales of music with data from 2003. Michel (2006), p. 8, however, cites the intense volume of downloads from Internet platforms such as the Internet Underground Music Archive, inaugurated in 1993, according to whose—indirect—estimations had increased the benefits of sales in music through this channel by approximately 1 million dollars per year since 1998.

Another possible alternative explanation for the drop in sales of music lies in the *way in which the user listens to the music*, for example by substituting the purchase of music by listening to legal *streaming* (Goel et al. 2010, p. 7). The development of legal music platforms such as *Spotify, Radionomy* and so many others evidently highlights this, even though they were not in operation during the "critical" *post-Napster* era of downloaded music sales.

As if that in itself were not sufficiently complex to clarify the estimates of losses in the sector, the hypothesis related to the *value that the user gives to the music that is downloaded* is also presented. In other words: whether the illegal downloads of music affect sales, which is something that depends on the value that the user attaches to the downloaded music. As Rob and Waldfoger explained, if the user attributes a high value to the music that is downloaded, then it may be predicted that the person that uploads the contents to the Internet will have occasioned high levels of damage to the sector, given that a CD is obtained at zero cost that, in the absence of illegal downloads, the user would have purchased for a price. But if the value attached to the illegally downloaded music is low (music is downloaded that is not valued very highly or that is valued little and music that is legally purchased is given a high value in the opinion of the user), then there is no effective damage to the business, in so far as, in the absence of illegal downloads, the user would not have acquired the downloaded product (Rob and Waldfogel 2006, pp. 30 f., 36 ff.).

In addition to highlighting these factors, a causal direct relation between an increase in pirated downloads and a decline in music sales—or as said, of any other intellectual product—will not always follow, if we look at the *income level of the "pirate user"*. In fact, a user who cannot purchase something at market prices and who illegally downloads it, is "not damaging" the sector of intellectual property, simply because in the absence of the possibility of illegal downloads, such a user would not have purchased the downloaded product (Landes and Posner 2003, p. 47; Lessig 2004, p. 64). In these cases, in addition, the impossibility of downloads by whoever cannot purchase it at market prices is inefficient in global social terms, as the damage occasioned by the download would be "0", from which we have to subtract the gratification that the pirate user no longer obtains (Liebowitz 2003, p. 11).

In all, we cannot discount other additional factors that influence this dramatic panorama of decline in music sales,—among which without doubt figure, apart from those mentioned, the ever-present *crisis*. In any case, empirical support is necessary, fundamentally from economists, to establish scientific evidence that the fall in sales is related to piracy.

10.4.2 Empirical Evidence

Fortunately, for over some years, we have had a good number of independent studies—read, produced by academia—on the matter, even though the difficulty should always be taken into account, of measuring with certainty all the variables at

play and of determining their specific area of influence, as well as other methodological problems that these studies present.[14] It is already a very productive field of study, such that only some of the more representative analyses will detailed in this respect.

To begin with, macroeconomic studies such as the one by Peitz and Waerboeck appear to be saying that the activity of illegal downloads of mp3 files implied a reduction of approximately 20 % in music sales across the world during the period 1998–2002.[15] A more modest figure is found in the study by Zentner, one of the most complete to date, despite centring solely on Europe and, in addition to the previously mentioned study, exclusively on sales of music.[16] That study pointed to p2p downloads in 2002 that reduced the *probability* of buying music by 30 % and that, without the possibility of illegally downloading files from Internet, sales of

[14] This study will not go into fine detail to assess the methodology of the studies. It is enough to say that the majority of percentages on the impact of piracy on business—whether for or against—are taken from multiple regression analyses, in which various variables are jointly taken into account that can intervene in the analysis, as well as the sale of music and illegal Internet downloads (for example: age, income level, intensity of the purchase of music, etcetera). Also, on occasions we also see some analysis of simple linear regression, in which only two variables are valued; a constant and another function with regard to the former—for example, inference on the basis of contrasting the data: "user downloads/does not download illegally from Internet" and "volume of purchases of music by the user". This type of analysis can offer very suggestive conclusions, but these are less reliable than those obtained by multiple regression analysis. Having said as much, it does not mean leaving some methodological aspects unmentioned, when they are relevant. Anyway, the best work on a critical review of the methodology of economists when assessing these activities is without doubt Liebowitz (2005), especially as from p. 463. Also, more up-to-date, Liebowitz (2011) and Oberholzer and Strumpf (2010), although with perceptions of the activity that are practically opposed.

[15] To do so, the authors took the 16 countries, as a reference, which represent 90 % of the digital sales volumes of CDs from all over the world: Australia, Belgium, Canada, France, Germany, Holland, Italy, Japan, Mexico, South Korea, Spain, Switzerland, Taiwan and the United States of America. See Peitz and Waelbroeck (2004), p. 73 ff. As a macroeconomic study, nothing more than a very superficial approach to the true scale of the problem, however empirical it may be, can be taken. Thus, elements such as PIB, the availability of broad band, the percentage of users that have downloaded an mp3 at least once from the Internet—without measuring the intensity with which it is done—or the data on availability by residence of such devices as DVD or CD-ROM players. The authors themselves refer to the need for subsequent microeconomic studies to verify the exact amount of sales losses (on that point p. 78). Likewise, it is meaningful that the authors leave out the study of the measurement of commercial piracy; in other words, what in Spain and in the majority of Western countries implies a crime, in so far as "it appears to have little relevance for the majority of countries in the sample" (on p. 76). This aspect already has relevance for the penalist, and will be covered later on, at the end of the present study.

[16] It should be taken into account that the estimations by the author are based on a previous macro survey on consumption in Europe called Consumer's Technographics, carried out by the Forrester consultancy and that, owing to its objective, covers multiple items, the majority of which are not related to our field of analysis. The study covers seven European countries that move 27.8 % of the global volume of music sales: France, Germany, Italy, Holland, Spain, Sweden and the United Kingdom. See Zentner (2010), p. 13 f. Likewise, note that although the last work by this author is cited, from 2010, it is a study originally published in 2003.

music would have increased by 7.8 % that same year (Zentner 2010, pp. 1, 5, 26 ff.).[17]

Another analysis completed by Rob and Waldfogel, more limited in as much as it used a sample of university students from the USA and not from the population in general, examined downloaded music and the CDs purchased by the interviewees, to arrive at two conclusions: (a) the purchase of an original CD is reduced by 20 % for each CD that is downloaded: and, (b) the downloading of music by Internet reduced sales of CD over 2003 by approximately 10 % among the survey participants. The strength of this study lies in it being the first one—and to the best of my knowledge, the only one—that offers results related to the value that the user attaches to the downloaded music, a hypothesis that we had mentioned earlier. So, it appears to be verified that the music that was generally downloaded by the survey participants was usually of little value in the opinions of those users and would therefore not have been legally purchased, had the possibility of illegal downloads not existed, in such a way that the damage caused by downloads in these cases is, in socioeconomic terms—limited (Rob and Waldfogel 2006, pp. 31, 60).

The study of Michel is also especially important. Its principal conclusion suggests that *some consumers* of music in the United States *could* have reduced the purchase of CDs to a maximum of approximately 13 %, due to the sharing of files between 1998 and 2003 (Michel 2006, pp. 1, 7).[18] As may be seen from the results in italics, those conclusions reflect great caution.

The main problem that this study presents is that it infers its conclusions principally from the intersection of two pieces of information; the presence of a computer in the home and expenditure on CDs—in other words, the fact that a householder owns a computer and purchases less music, would be positively related to file exchange behaviour. As the same study recognizes, individuals with a computer may not participate in sharing music files over the Internet and even so may have spent less money on music for other reasons (Michel 2006, p. 3).[19]

The striking thing about the study is that it demonstrates that, in any case, those who own computers *always buy more music than those who do not have one*. If we follow the implication of this analysis, in principle we would arrive at the conclusion that there is a positive relation between file sharing and music purchases—piracy, in short, benefits the business. However, a significant fall in the purchase of music among users who have a computer was detected over 2002–2003; in other words, over the years in which the p2p exchange programmes were reconfigured and relaunched after *Napster* had closed down. Moreover, that change in

[17] The study uses highly suggestive data that will be analysed later on.

[18] Although on p. 11 the period of time is 1999–2003. Data from a consumer survey carried out by the US Bureau of Labor Statistics called Consumer Expenditure Survey was used, based on individual interviews covering purchasing patterns of certain consumer products among other aspects. To do so, certain "consumer units" were used (homes, university residences, etc.).

[19] Takes into account that the interviews on which the study is based never asked about file sharing.

purchasing trends—downwards—is concentrated in the group of users that purchased more music than on average. It is on that basis that the earlier conclusions are drawn, in addition to noting that it does not *seem* that there is empirical evidence that the exchange of files over the Internet will lead to increased sales (Michel 2006, p. 11).[20]

It is likewise convenient to bring the study by Danaher and his colleagues to the debate, as it centres on the sales of digital music, an area that economists have practically left unexplored due to its highly contemporary nature. The basic aim of the study was to verify how the French *Hadopi* Law had influenced the purchase of digital music. That law basically consisted in a graduated "three-step" response to piracy. In the case of an infringement of copyright, the user is sent a warning by electronic mail. If the user behaviour persists, a second warning is sent out, and the third infringement means the matter is passed to the criminal justice system that has available to it the imposition of a fine and the suspension of internet Access (Danaher et al. 2012, p. 1 f.). The study expressed no interest in whether the law functioned effectively, but sought to establish how the diffusion of the news of the approval and the implementation of the *Hadopi* law influenced the behaviour of French internet users (Danaher et al. 2012, pp. 3 f., 7 f.).[21] In this way, a treatment group—sales in France from the iTunes shop over a period in which news of the *Hadopi law* was broadcast—was compared with a control group—sales in other European countries (Belgium, Germany, Italy, Spain, and the United Kingdom) on the same digital music platform. The control group shared market profiles with the treatment group—the French one—in so far as a characteristic of those countries, and of France, was that they headed ranking of digital music sales through *iTunes* (Danaher et al. 2012, p. 8). The result was that the sale of songs and albums had increased in the treatment group by 22.5 % and 25 %, respectively, in comparison with the control group (Danaher et al. 2012, pp. 13–14). That study was not specifically about the impact of piracy on musical business, although it may be

[20] The possible advantages that piracy offers for the intellectual property market will be examined further on. This study shows a certain relation with another by Zentner (2005), in which inferences were established on the basis of, among other aspects, the penetration of broad band in many countries of the world and the fall in music sales. It is another indirect indicator, different from p2p file Exchange, but closely related to the study by Michel.

[21] It should be taken into account that this period of "diffusion" of the law among the public started in June 2008, when the proposed law was presented in the French senate, although it had a complicated legislative process. In March 2009, it arrived at Congress where it was first approved and then rejected. In May 2009, an amended version of the law was once again presented, but the French Constitutional Council rejected the Project, basically because no judicial review existed in case "the third warning" was given, in other words the institution of criminal charges. Finally, the law was approved in October 2009, following compliance with the requirement from that Council, envisaging a body for judicial review. However, as of 2011, nobody has been given a "third warning". Hence, it was decided to cover that period as a "period of impact" of the law on the general public Finally, it should be taken into account, as its authors acknowledge, that the law set in motion a series of publicity campaigns on respect for the rights of the author, such that the correct isolation of which effects are due to the application of the law and which to the success of the publicity campaign is not possible.

concluded in an indirect way that, if we assume the *Hadopi* Law lowered piracy rates, that lower rate of piracy led to an increase in sales, which is something that, in brief, suggests that piracy could have a negative impact on sales.

10.5 The Functional Component of Piracy for the Intellectual Property Business

Despite the data in the earlier section, which suggest a certain influence—although quite limited—, of p2p file Exchange and other forms of piracy on the drop of music sales, multiple nuances are presented that could suggest a certain beneficial component of piracy for the intellectual property business, some of which we shall see.

10.5.1 Theoretical Formulation

As much as it may appear counter-intuitive that, in the end, piracy benefits the sector (Perlmutter 2010, p. 415),[22] this hypothesis has also been the object of a theoretical formulation. The arguments for this approach are based on various premises.

10.5.1.1 The Effect of Sampling or Exposition

In simple terms, the sharing of free illegal copies, especially over the Internet, can have a functional component for a sector related to the exploitation of copyright. Without file sharing over the Internet and in view of the broad variety of products on the market in this sector, the artistic or intellectual activity in question would have passed by completely unnoticed, and the purchase would not therefore have taken place. The hypothesis is therefore reasonable that the illegal sharing of non-authorized copies, together with a decrease in profits, also has a component

[22] This counter-intuitive nature is not only given by the sales figures, which have fallen sharply since piracy has become generalized on the Internet, or by the logical proposal that a user can obtain a work at a cost of zero Euros with a minimum risk of facing negative legal consequences—arguments that are usually brought up, as we have seen, by economists. I would add that if piracy is so beneficial for business, it is not clearly understood why the main companies of the sector are so concerned to prosecute it. Are the lobbies really so short-sighted? Common sense appears to suggest otherwise. In fact, as Maffioletti and Ramello (2004), p. 85, pointed out, beginning with the reproduction of a musical work (for example, copying it on a CD) that always has a zero or close to zero cost for economists, "if the existence of technology that makes the copy so easy and so cheap were the only important fact that guided the decision to copy or not to copy, then the question that would have to be asked is why does that sector of the market exist at all". It is evident that there are more factors at play and shallow approaches do not apply.

that adds lucrative profits to the sector. This is precisely what the defenders of *Napster* alleged in the trial that, finally, closed down this pioneering p2p platform: putting the user in contact with the music that is consumed "as a sample" will mean a greater likelihood of a purchase than in the case of that sampling not having taken place, in so far as the sampling "increases the thirst for music" in the user (Liebowitz 2003, p. 9 f.). It is, however, exceedingly difficult to evaluate in concrete terms.[23]

In the first place, as Liebowitz noted, it would be necessary to explain why a user, who already holds free illegal copies of protected works, would acquire them by paying money for them. The theory suggests various responses, among which the attitude of "honour" held by the user, who wishes to support the artist by buying the music once it has been sampled and has established that it is of sufficient quality to either purchase legally or, once the work of the author has been subjected to *partial sampling* (for example downloading four or five songs of a CD), it turns out to be more satisfactory to acquire the complete work (Liebowitz 2005, p. 442 f.).[24]

But a user who decides to buy an intellectual work that the same user had previously illegally obtained at zero cost not only is in keeping with ethical rules, but there is an explanation for it in economic terms, which states that intellectual works constitute a type of asset known as an *experience good* in economics. Those goods are characterized, because we are only able to know the qualities of the product once we have consumed it. In this way, we only know *a priori* the price of the product, but little or nothing with regard to its content. This is what happens, for example, with a book, a CD, a film or videogame. Precisely for that reason, it is more likely that an intellectual work will be bought, if the consumer has previously downloaded it, in comparison with other types of goods on which more previous information is available, and where downloading appears less likely (Gopal et al. 2006, pp. 8, 11; Peitz and Waelbroeck 2006, p. 2 f.; Takeyama 2003, p. 55).[25] So, in a sufficiently diverse and heterogeneous market, access to pirate downloads should stimulate, according to this hypothesis, a higher number of sales and, therefore, an increase in the profits for the intellectual property sector (Peitz and Waelbroeck 2006, p. 3).

In my opinion, the studies of which we are aware on internet user habits, although not in a condition to reject or to confirm these economic hypotheses,[26] leave immense areas of ambivalence open on this matter. For example, we have the interesting study by Cuadrado García and Miquel Romero, which was done through

[23] On this hypothesis of possible profits gained through the illegal copying and file-sharing of works protected by the rights of the author, see Peitz and Waelbroeck (2004), p. 71. Originally, it was called exposition effect, and at present it is usually called—sampling effect. See, on this, Liebowitz (2005), p. 442.

[24] Pointing out that there is not very much empirical support for this thesis; Liebowitz (2003), p. 20.

[25] Although affirming that, for this to happen, the copy would have to be an imperfect substitute.

[26] See a critique of the survey method to draw conclusions on economic impact in Liebowitz (2003), pp. 12, 17 f.

a survey on over 1000 Spanish users of between 15 and 45 years old, in which they were asked to rate their agreement or disagreement with certain items in the survey, on a scale of 1–5, in which "1" signalled complete disagreement, while "5" signalled total agreement with it. Under the item "*Illegal downloads allow me to listen to music before buying it*", which could be identified with that sampling effect to which the economists refer, the average was 2.93. However, that average rose to 4.60 for the item "*I download pirated music because it is more economic*" (Cuadrado García and Miquel Romero 2009, p. 8). It appears that the majority of consumers would not, therefore, be in agreement with paying for the original product after downloading it, or they would be more in agreement with saving the money for the legal purchase than with the illegal acquisition of the work as a sample.

In turn, the results of a further study that measures the activities of the Spanish public in relation to illegal downloads, the *Observatorio de la piratería y otros hábitos de consumo digital 2013,* in this case completed at the request of the Spanish coalition in the intellectual property sector, showed that 70 % of surveyees answered that they downloaded illegally, because "*I don't pay for content if I can access it without cost*", which points to the previously mentioned "*substitution effect*", and, therefore to the capability of illegal downloads to cause socio-economic damage. However, 60 % of surveyees responded likewise that "*I don't pay for content that I may not like*", which would be, on the contrary, positively related to the effect of sampling (GFK 2014, p. 7 ff.).

Finally, and although it is of much less importance with regard to the representativeness of the sample, Oberholzer and Strumpf completed a survey, in 2002, of 159 p2p users, in which 65 % responded that downloading an album saved them having to buy it, although 80 % affirmed that they had bought at least one CD after having downloaded it.

In addition, according to these results, the use of p2p networks had increased the purchase of music by eight CDs per user (Oberholzer and Strumpf 2004, pp. 2–3).

10.5.1.2 The Network Effect

In second place, the so-called network effect is proven, in favour of this hypothesis of "functional piracy". It basically consists in noting how the value of a product changes as a function of whether it is used by many people. The classic example that is usually given, to explain how it functions, is that of the telephone. The value of the telephone depends directly on the number of users who also have a telephone, and of course it is of no use to have a telephone or a fax, if nobody else has one.

On the contrary, the more people use the telephone, the more value it will have in the economy (Liebowitz 2005, p. 446 f.; Liebowitz 2003, p. 5; Dolfsma 2007, p. 70). In the field of intellectual property, it is worth recalling a good example from Lessig*: "when the Chinese steal Windows, that makes the Chinese dependent on Microsoft. Microsoft loses the value of the programmes that have been robbed. But it wins users that have been accustomed to living in the world of Microsoft. Over*

time, as the country becomes wealthier, more and more people will buy the programmes instead of robbing them. And for that reason, over time, as those purchases will benefit Microsoft, Microsoft will have benefitted from unlawful sales. If instead of illegally copying Microsoft Windows, the Chinese had used the open access GNU/Linux system, then Chinese users would not buy Microsoft. Thus, in the absence of illegal copying, Microsoft would have lost out" (Lessig 2004, p. 65).[27]

Moreover, this example is valid for us to take on board that piracy can provoke a very rapid expansion of a product, particularly computer programmes, such that, and once again in line with the aforementioned example, not only might it stimulate a positive network effect, but even more so, as Landes and Posner affirmed, a *network monopoly* (Landes and Posner 2003, p. 46). It will escape nobody's attention that that is precisely what has happened with *Windows*. Or at least particularly in Spain, where at the start of the past decade, the piracy of *Windows* operating systems was endemic and, in effect as Lessig pointed out, with regard to computing, we live at present in a world of Windows, with a very reduced presence of *Apple* or *GNU/Linux* systems, at least without counting the market for the latest tablets and smart-phones, in which *Microsoft* has a much weaker presence than its competitors.

In the domain of music, file sharing could also have a similar effect, however difficult it might be to verify. As Liebowitz said, people who file-share do so to access music, including those who are not willing to pay for it. Nevertheless, the fact that there are more listeners to music, although only initially due to illegal-sharing of works, could produce a *positive network effect*, by increasing the way music is appreciated among the general public. Hence, it may be predicted that those people who do not share music illegally will at least purchase more music (Liebowitz 2005, p. 447 ff.).[28]

The degree of importance the network effect has is variable among analysts. If for some, as we have seen, it constitutes a factor that can significantly increase sales of music, it has to be accepted that too many factors or patterns of behaviour intervene, with regard to music, which makes it very difficult to predict an effect of increased sales with certainty. Hence, other authors in the end attribute a much reduced value to the capability of this effect associated with piracy to produce significant benefits.[29]

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[27] See that line of argument, also used in relation to computer programmes, in Liebowitz (2005), p. 447, with references; also Maffioletti and Ramello (2004), p. 83 f.

[28] If we look carefully, as the cited author points out, along with others, it is an effect that, in so far as it refers to music, has been traditionally sought by the radio transmission of songs. Moreover, even in the field of the radio, it appears that the studies that have been completed suggest that the broadcasting of music over the radio does not increase sales. In fact, at its beginnings, in the 20s, in the United States of America, it led to a fall in sales. Therefore, whether the exchange of files over the network promotes the aforementioned network effect at significant levels hardly appears easy to demonstrate.

[29] On this point, Liebowitz (2005), p. 449, stated his opinion, although specifically in reference to the sale of music. The theory appears to have more support with regard to computer programmes. However, other authors, such as Wall (2007), p. 98, suggested that it is beginning to be demonstrated that mp3 downloads are contributing to the promotion of musical culture that is expanding the original capacity of this market.

However, it still has to be taken into account that this network effect might not appear in the sales of CDs and, on the contrary, could appear in other beneficial consumer patterns, above all for the musician. In this sense, it is frequently said by those critical of the industry, amongst whom there are undoubtedly no few musicians, that what really benefits the artist is the attendance of the public at concerts. This conclusion begins with the premise that musicians gain, with few exceptions, very little benefit through the sale of CDs, which above all fill the pockets of the music promoters; on the contrary, the benefits obtained by the artist, from the attendance of the public at concerts are considerably higher, to the point at which it may be said that music "lives off concerts". Looking in depth at this situation, piracy would be beneficial for those artists. In so far as, if the music of the artist had been pirated, many participants might have listened to their music and would therefore decide to attend the concert, increasing its profitability. Were it not for this piracy, the music of the artist would not be so widespread and there would not be so many spectators at the concerts.[30] As may be seen, in this case, in addition to the question of whether illegal downloads of music are of global benefit to the music business, a redistribution is proposed by the music consumer of the share of profits between the artist and the intermediaries, which in this argument would move from the producer to the artist.[31] Although this proposal may also find application in some (not many) fields of intellectual property, such as for example academic works. In the words of Landes and Posner: *"Authors, especially academics, may prefer minimal protection of their copyrights, because in this way access to their works will be widened, which means they can gain more benefits, −both pecuniary and non-pecuniary from conference honoraria and academic promotion to academic prestige-, than they lose because of the authors' fees linked to the sale of books"* (Landes and Posner 2003, p. 48).[32]

Moreover, neither can we forget the possibility that piracy of the main product may help increase the sale of other complementary products—thus, for example,

[30] For unquestionable evidence that even the most well recognized artists earn more from concerts than from the sale of CDs, see Oberholzer and Strumpf (2010), pp. 44–46, with data.

[31] See academic support for this thesis in Martin (1998), p. 33; Oberholzer and Strumpf (2010), pp. 19 ff., 46 ff.; Dolfsma (2007), p. 91, raises objections to the disproportionate income that goes to intermediaries—approximately 80 %—and artists, noting what is more that the risk assumed by the intermediary in artistic creation does not justify such a wide profit margin. As mentioned earlier, there are no end of artists who have supported this argument, such as Pink Floyd, Radiohead, Blur and Courtney Love, who in 2000 made the following graphic statement: "Today I want to talk about piracy and music. What is piracy? Piracy is the act of stealing an artist's work without any intention of paying for it. I'm not talking about Napster-type software. I'm talking about major label recording contracts". Although the most widely quoted internationally by academia is that of the Spanish artist Ignacio Escolar (Escolar 2002)—from the now defunct band Meteosat and at present a journalist with El Diario-, published on Internet under the title "Please, pirate my songs!" See subsequent references to this argument and the range of artists who promote it in Gelsthorpe (2010), p. 408; Yar (2007), p. 105 f.; Bailey (2000), p. 486 f.; also Roca Sales and Castells (2007), pp. 79, 115 ff.

[32] It may be added that, in the end, the best proof of this is that normally academics do not charge for publishing in academic journals and at times the academic pays to do so.

the well-known *merchandising* that is so common in more than a few sectors of intellectual property, particularly music, literature and television.[33]

10.5.1.3 Indirect Appropriability

It is convenient to dwell briefly, before ending, on the possible beneficial effect of *indirect appropriability*, although it has far less of a leading role for criminal law; an expression coined in the 1980s by one of the economists that we have closely followed in this study, Liebowitz, whose basic idea consisted in considering that the fact of being able to make copies of an original work adds extra value to the product and presumably increases demand. A discrimination of prices placed on the same product arises from this idea: those purchasers who could make copies would pay a higher price than those who could not. In the field of intellectual property, it has been suggested that the idea be put into practice with the photocopies of journals for scientific use. In so far as there is a high volume of photocopies from scientific journals in libraries, the subscription price of the journal could increase for institutions, while the same product could have a lower price for individual subscribers (Liebowitz 2005, p. 450 f.; Liebowitz 2003, p. 47; Landes and Posner 2003, p. 46 f.).[34] Its viability is however different in the world of music, as it is impossible *a priori* to determine whether or not a CD will be made available to other users through file-sharing over the Internet, without mentioning the difficulty of controlling illegal copying (Liebowitz 2005, p. 451; Landes and Posner 2003, p. 47, Watt 2005).[35]

[33] But also in other products, such as for example computer programmes. As Landes and Posner (2003), p. 46, made clear: "even illegal copying of programmes, something about which the software industry complains so much, does not imply losses for the software designers. Demand may be created by the pirates for complementary products made by the manufacturer of the pirated programmes".

[34] Although for Landes and Posner, that idea would arise both in the possibility of a legal and an illegal copy, in so far as Liebowitz appears to make reference, through the idea of indirect appropriability, to the higher value of the product when legal copies are possible.

[35] However, Liebowitz (2003, p. 6 ff.) has defended in another place the theoretical application of indirect appropriability to the CD market, although it would take place in a situation in which the copies of CDs, as well as being prohibited, were susceptible to control; a situation which the same author recognized as reasonably unlikely. Liebowitz gives an example that is technologically outdated today, but is very enlightening. If we assume (a) that people have CD players at home but only have cassette players in the car; (b) that copying is prohibited and that people will comply with that prohibition; (c) that those users would pay 9$ for a CD from an LP and 4$ for the tape of that same LP (so as to be able to listen to music at home and in the car), then it is likely that the seller of the work would allow CDs to be sold that come with a taped copy, in exchange for rise in the price of the CD up to a maximum of 13$, without the sales being affected, while the CDs that could not be copied would continue to be sold at 9$. This situation seems to me, however, practically impossible at present. For example, although in recent times it has been quite normal to purchase a "physical" DVD that includes a digital copy, that is not due to implementation of indirect appropriability,—as the market price for those products has not increased as a result—but rather to the fact that the anticopy labels of the DVDs conflict with the aforementioned right to copy.

In any case, in Spain, as in many other countries, the solution is to legalize this practice, which leaves us directly outside piracy. First, because making copies for research purposes, among other possible uses, is absolutely legal. In second place, because the legislative solutions that are normally adopted mean that the costs of copying are passed on to the general public in an indiscriminate way and not only to those people who make copies. This is the case of the "cannons" that will line the pockets of the agencies that manage intellectual property rights—, and that in Spain have been applied with a different scope.[36]

10.5.2 Empirical Support

10.5.2.1 Some Revealing Data

It is now time to verify whether empirical support exists for these theoretical bases. In a study by *Forrester Research* on consumption in Europe, it was found that the percentage of people who bought music was higher among those who downloaded music from Internet illegally (55.8 %) than among those who did not download it (37.7 %). If only that segment of the sample with internet at home is considered, the pattern repeats itself, although it is reduced in proportion: 55.1 % of people who download music also buy it and 45 % of those who have Internet and who do not download music, buy music (see this references in Zentner 2010, pp. 15, 38).

As Zentner has explained, the data that may be extracted from a simple linear regression are expressed in that way, and we could arrive at unreliable conclusions; however, the author notes that that relation persists when he himself corrected that study, combining the variable of Internet downloads with other control variables, such as age, education and other user profiles (Zentner 2010, p. 4 ff.). This allows us to arrive at the conclusion that the individuals who illegally download Internet files are more likely to purchase works through legal channels than those who do not download, and would point positively to the aforementioned functional component of piracy for the business of intellectual property. Among other points, in principle it is contradictory with the conclusions advanced by Zentner, as we have seen before, in that same study: if there is no possibility of illegal downloads, sales of music would have increased by 7.8 % in 2002. This apparent contradiction is, however, explained by other factors that intervene, such as the possibility that the person who downloads the files distribute copies to other people who do not share the same profile, which results in a global loss of benefits. Moreover, specific data on the quantity of music that is acquired or on the intensity with which music is downloaded from Internet, were not available for this study, which undoubtedly

[36] On the changes to the "cannons" applicable to different concepts in Spain, see De la Cueva González-Cotera (2014).

will have a considerable effect on the global figures that are exploited (Zentner 2010, p. 26).

10.5.2.2 Study by Obelholzer and Strumpf

Nevertheless, one of the most revealing studies is without a doubt by Oberholzer and Strumpf, originally published in 2004.[37] It noted that, at the very least, p2p networked file-sharing caused no damage at all to the intellectual property sector. So, it should come as no surprise that this study reached a high level of popularity among critics of the industry in no time at all. We should therefore lend it due attention.[38]

In order to measure the impact of p2p illegal downloads on the sale of music, data were observed corresponding to the last 4 months of 2002 on downloads of music from a p2p platform in the USA, and they were then compared with sales of music in the USA over that same period. The novelty of the study was that the data that was gathered allowed the researchers to know which song had been downloaded in each case, which allowed a more precise comparison, as the impact of the downloads of those songs was observed on the specific sale of the albums in which those songs were found. In addition, the fact that, unlike the survey-based studies, the design of this study allowed researchers to observe the download activity of users, without their being aware that they were being observed, should be positively appraised (Oberholzer and Strumpf 2004, p. 8; 2006, p. 8).[39]

Likewise, the impact of possible exogenous variables were taken into account, like school and university holidays (as, on the one hand, the students from secondary school and university are the main users of the p2p networks, which they especially accessed during the study weeks and, on the other hand, half of the sales of CDs occurred during the holiday period[40]) and other technical details, such as network congestion—that delays the downloads—and the duration of the songs—longer songs take longer to be downloaded and take up more space on

[37] The work is by Oberholzer and Strumpf (2004). However, in subsequent years this work has been published again with some additions and corrections, as is the case of Oberholzer and Strumpf (2006), which we shall also use here.

[38] In addition, this study was submitted to an intense and prolonged criticism by Stan Liebowitz. In general, such criticism appears well grounded to me and for that reason I also lend it the attention it deserves, although the "parallel discourse" of criticisms will be maintained in footnotes so as not to lose track of the guiding thread of the presentation.

[39] Specifically, the p2p network, called OpenNap, allowed the technical means to access that information.

[40] In addition, this quasi experiment begins on the basis that there are fewer downloads in the summer holidays. The concentration of sales of CDs refer on the contrary to December holidays. Further on we will enter into detail on this. The "historic" context of this study has to be borne in mind, over 10 years ago, in so far as the high-speed internet connection was available on campus, but much less in households, while Internet is almost ubiquitous today. This information explains why there were fewer downloads in summer. See Oberholzer and Strumpf (2006), p. 6.

the hard drive, all of which in 2002, a year when mass storage capacities were notably smaller than at present—(Oberholzer and Strumpf 2004, pp. 3, 8, 14 ff., 19 f.).[41] Likewise, the sales of music were broken down by categories, so as to find out whether this factor had any explanatory importance.

The results of the linear regression analysis showed a positive correlation that existed between music downloads and sales of music, such that this could hasten the conclusion that piracy is functional for the sale of music. However, as the authors themselves noted, there was a significant bias in these results, insofar as the most popular albums registered the highest number of illegal downloads and the highest sales.

Having taken this "simultaneous" bias into account, the final results might not lead to the impressive conclusion that, in fact, piracy would benefit the intellectual property sector, but they would be in a position to prove that the impact of downloads on the business of intellectual creation was minimal or non-existent. The authors came to the conclusion that, even in the most pessimistic scenario, 5000 downloads would be needed to "eliminate" the sale of an álbum (Oberholzer and Strumpf 2004, pp. 3, 13, 24 f.; 2006, p. 5).[42]

In addition to comparisons of completed sales by Oberholzer and Strumpf, this study used two more quasi-experiments that supported their conclusions[43]:

(a) One begins with the idea that there are fewer downloads during the summer holidays. Upholding the majority thesis that downloads damage the intellectual property sector, the authors hypothesised that during this period a higher level of sales should be appreciated, as there was less p2p file-sharing. They found that sales of CDs did not rise over summer; a situation that would support the thesis that downloads do not harm CD producers/authors (Oberholzer and Strumpf 2006, p. 6).[44]

[41] A study of this kind would not have been possible in Spain, without access to secret information, because, as mentioned earlier, the data on music sales are neither accessible nor freely available to the public in Spain.

[42] Although this work is not the most appropriate to delve into methodological aspects, Liebowitz has dedicated successive monographic studies that contain harsh criticism of the study by Oberholzer and Strumpf, which may be summarised as follows: (1) the positive correlation between the download of songs and the purchase of albums—the more downloads there are, the more that specific music is bought—is not sufficient in itself to explain whether, in general, downloads prejudice intellectual property; (2) the problem of simultaneity, basically reflected by the music with the highest sales also being the music with most downloads; in other words, one variable simultaneously determines the other, although this, as we have seen in the text, is likewise recognized by the authors of the study; (3) the variables chosen to mitigate the impact produced by the bias of simultaneity—for example, the duration of the songs—produced a contrary effect to that intended, in this study; they increased the correlation between pirated downloads and music sales. See Liebowitz (2005), p. 470 ff.

[43] See Liebowitz (2007), p. 2, for a summary of the quasi-experiments.

[44] Criticism of these premises may be seen in Liebowitz (2007), p. 5 f.,—with data—for whoever is absolutely unable to demonstrate that there are fewer downloads by Internet users in summer, which in their opinion would invalidate the conclusions upheld by Oberholzer and Strumpf.

(b) The pattern was noted in the data that approximately 16 % of user downloads in the USA came from Germany, so the study began with the following hypothesis: on the East coast of the USA there should be more user activity on the p2p network than on the West coast, as Europeans switch off their computers when they go to sleep and US citizens from the East coast share more "waking" hours with Europe than users on the West coast. In other words, were the majority thesis that downloading actually harms the sector a consistent one, then fewer downloads would take place on the West coast where sales would fall less than on the East coast, where there should be a more pronounced fall in sales. However, the study by *Olberholzer and Strump* verified that nothing of the sort took place in practice, which would once again reject the conclusion that piracy damages sales (Oberholzer and Strumpf 2006, pp. 6, 13, 15 f.).[45]

10.5.2.3 Other Studies: Andersen and Franz, and Hammond

The earlier study that we have reviewed is perhaps the most popular, but is not therefore the only one that rejects the premise that piracy damages in all cases the business of artists and authors. For example, the study by Hammond compared the level of album sales that had previously been leaked before their official launch on the p2p *Bittorrent* platform, without a negative impact of the leakages being appreciated on subsequent sales (Hammond 2013).[46]

In another study completed by Andersen and Franz (2007) for the Government of Canada, the conclusion was reached that file-sharing by Canadian p2p network users could be positive, as for every 12 downloaded songs, sales increased by 0.44 CDs. This observation means that the illegal downloads of a CD (if we accept that a CD can, more or less, have 12 songs on average) stimulates the purchase of almost "half a CD". Likewise, both ripping of CDs and the downloading of songs from illegal web pages point to the previously mentioned positive effect of piracy. It appears that only the activity of "*copying MP3s*" has a clearly negative effect on the purchase of music (Oberholzer and Strumpf 2006, pp. 3, 26 ff., 33).

Another relevant conclusion of the study is that the users who downloaded songs from p2p networks "because they did not find them on another site" were more likely to buy music. In concrete, an increase of 1 % in downloading activity is associated with a 4 % increase in music purchases. All of these figures clearly point to the presence of an important "functional" effect of sampling. On the contrary, in the case of users who downloaded pirated copies, because they considered that the price of the CD was excessive, the opposite trend may be seen. Each increase of 1 %

[45] Liebowitz (2007), pp. 7–8, presented data that express the contrary; that the decline in sales stood out far more on the East coast than on the West coast. Later criticism based on exaggeration of the "European" factor of this study may likewise be seen in Liebowitz (2010).

[46] The data are for 2010, and were collected every Tuesday, the weekday on which the official launch of new albums in the USA takes place.

in downloading activity on p2p networks entailed a decline in CD purchases of around 3.2 % (Oberholzer and Strumpf 2006, pp. 3, 27 ff.).

With regard to the influence of p2p downloads on the purchase of digital music, no positive or negative relation was found. However, an important study on this particular topic revealed different conclusions, as we shall see below (Oberholzer and Strumpf 2006, pp. 3, 27, 34).

d) Impact on digital sales: Study of the Institute for prospective technological studies.

If practically all the studies that we have reviewed up until now are based on testing the impact of musical piracy on sales in a physical format, this study presented the important novelty of measuring the impact of piracy on sales of music in a digital format. We have to attach a lot of weight to this study in our assessment of the matter, for the simple reason that the digital format is actually the predominant one in the music business. This study was basically about observing the behaviour of 16,000 internet users from five countries of the European Union, among which Spain, and to observe their behaviour. This observation had as its objective to establish how visits to illegal download sites influenced the acquisition of legal music in a digital format.

The evidence suggests that illegal downloads rather than harming digital sales, did quite the contrary; sampling having a slightly positive effect. In detail, clicks on legal downloads increased by 0.2 % for each 10 % of clicks on *illegal downloads*. The increase in the number of clicks on *legal pages* for streaming purposes led to an increase in clicks on pages for legal downloads by 0.7 %. In such a way that the sampling, whether offered by legal or illegal channels, has a slightly positive effect on sales (Institute for prospective and technological studies 2013). The study suggested that the copyright holders should not overly concern themselves with illegal downloads, although it expressed caution with regard to the physical format that was not its object of study. These results spread like a wildfire and were broadcast by practically all national and international communications media.

10.6 So, Is There Any Damage?

At the start of this study, it was pointed out that economists, as much as criminologists developed empirical-social research. In my opinion, the results of such research encounter the same problems as criminology. Does rehabilitation work? Does prison "work"? Criminology has in general responded with very timid standards of knowledge with regard to these topics, given the limitations of all empirical-social investigations. In this case, the conclusions of economics with regard to our topic of study present the same limitations. It is difficult to give a clear response to the question of whether piracy damages the business of intellectual property even after a fine-detailed analysis of the matter in the light of economic science. And that response is of an undeniably speculative nature. Likewise, the great heterogeneity of studies in terms of the initial hypotheses and the results

should be taken into account, which would advise against making any type of "average estimate".[47]

The reader may judge whether a criminal policy on intellectual property really makes sense based on the protection of the assets of artists or assignees of the exploitation rights of the works. In my judgement, and drawing a parallel with the well-known phrase of the *US National Academy of Sciences* in relation to the deterrent effect of punishment, I would venture to say that "the empirical evidence is more in favour of affirming that piracy damages the sector of creators than affirming that piracy does not damage it or even benefits the creators".[48] It is a key aspect, the concrete political-criminal impact of which I shall evaluate in the Conclusions section.

10.7 Just a Moment: What About Commercial Piracy?

If we direct our attention to the Spanish penal code and in concrete to crimes against intellectual property in Spain, we realize that up until now we have on an empirical basis, more or less, been concerned to verify the element of the crime "third-party prejudice" of art. 270.1.[49] However, in the majority of Western countries, there is another element of copyright crimes that marks the point of criminal intervention: piracy is done for commercial purposes.[50] In reality, it has been a global standard since 1994 in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), although it is true that a growing number of countries, motivated by certain lobbies, above all in the USA, have abandoned those minimum standards of protection in favour of other wider ones. Even with such a globalizing political-criminal trend underway, empirical proof of the specific damage that piracy-related behaviour for commercial ends inflicts on the industry is still of immense interest, at least for the penalist.

However, economists have almost nothing to say on the subject. The state of empirical analysis of the damage caused to the intellectual property sector by piracy usually takes as its basis the global dimension of the activity, something that we

[47] Liebowitz (2011, especially p. 5 ff.). In addition, this author reworked this table making various deletions and methodological corrections which, in his opinion, would prove an even greater impact of piracy on the decline of sales. However, take into account that I have updated the aforementioned table with studies that had not been completed in 2011.

[48] See above all, for example, and among many others, Tonry (2008), p. 279, Medina Ariza (2011), p. 47, with references.

[49] At least, if one is in agreement with the majority doctrine, in as much as it is an objective element of the criminal definition and that, effectively, there is no need to prove the effective damage that has been inflicted, but rather the objective likelihood of the behaviour that causes the damage. See supra, note 85.

[50] The terms "intent" and "scale" have been interpreted as practically the same, despite their different meanings. More details in Rando Casermeiro (2015).

have seen with clarity through this study, covering any form of piracy. On some occasions, it is explicitly assumed that commercial piracy presents no problem of high socioeconomic dimensions, although without too much empirical support. This silence or disinterest of economists has, however, to my understanding, an easy explanation: commercial goals are not a variable that in any way determines the economic impact of piracy in the intellectual property business.

In effect, what commercial piracy implies, from the economic point of view, is that *professional lucrative piracy* "destroys" the monopoly on exploitation by the copyright holder or assignee. It competes under very advantageous conditions, in so far as piracy does not have to assume what are on occasions the high production costs of an intellectual work. This, added to the facility of reproduction of the works that provide new technologies, as well as the scant marginal cost of each non-authorized reproduction, means that the professional pirate can offer the intellectual product at a much lower price than the price on the licit market. Thus, from that point of view, the non-authorized traders of intellectual works compete "disloyally" with the monopolist.

They can even offer those products freely to the user; something that is absolutely conventional these days, at least in piracy that is committed or facilitated over the Internet, so as to centre profit generation on income from publicity that is inserted on the internet pages which contain—or which link up to—the downloads.

However, an internet user who, without any commercial goals whatsoever or even with altruistic intent, uploads works to the network in a non-authorized way, whether through a p2p programme, or by posting the works on the Internet, has at the least the same capability for inflicting economic damage on the business as the "commercial pirate". In fact, very frequently, it may be thought that the non-commercial pirate will have a greater capability for inflicting economic damage on the intellectual creators of the sector and their intermediaries. In fact, why purchase a work from the street sellers, at half the market price, for instance, if we can get it for free? Why suffer the annoying publicity of a download page, if other users can offer us the same works without having to put up with the advertising?

The domestic, *altruistic*, non-commercial pirates, frequently place themselves in situations of greater competitiveness with the monopolist than the commercial pirate who makes a profit out of piracy.

Without economic studies on commercial piracy, what do we know about it? Certainly, not very much. And the little we can know is supplied by reports from lobbyists, in general methodologically constrained, as earlier pointed out, as they need a balance of "dramatic figures" to ensure that legislative and governance agencies are more receptive to their petitions. Those figures are presented, in addition, in a fragmentary and inconstant way in time, which greatly reduces their utility.

For example, according to the data from the International Federation of the Phonographic Industry (IFPI) referring back to 2005, more than a third of the CDs

acquired by consumers across the world were pirated (IFPI 2006, p. 4).[51] According to data from the White Book of Music referring to 2003, one of very four CDs commercialized in Spain were pirated (Promusicae 2005, pp. 14, 22 f.).[52]

These data are apparently based on "market studies" and other surveys, the data and the methodology on which are not in those publications. This lack of transparency means that only with difficulty may they be taken into account for the purposes of arriving at reliable conclusions on the actual impact that commercial piracy causes to the socio-economic sector of intellectual property, with a view to their comparison with those empirically obtained for piracy in general, whether commercial or non-commercial.

Returning to the absence of empirical evidence on the damage caused by commercial piracy, it would certainly be fallacious to roundly affirm that, because the economists say nothing specifically about the damage produced by commercial piracy, then that is empirical proof that piracy in that form causes as much or less damage than non-commercial piracy. What may be affirmed is that the specific study of these forms of lucrative piracy are not present in economic science, because the hypothesis that they cause more damage than non-commercial piracy is not, on the face of it, very reasonable. However, I believe that very relevant conclusions for criminal policy on intellectual property may be drawn, even from the mere silence of the economy in that respect.

10.8 Conclusions: Some Political-Criminal Recommendations for Spanish Criminal Law

Hereinafter, I will use the conclusions obtained by economic science to elaborate some criminal justice policy suggestions regarding Spanish Penal Code. Nonetheless, said conclusions might be extrapolated to some others similar internal Criminal Law systems.

10.8.1 Piracy Is, in General, Harmful to the Assets of Intellectual Creators and Business Intermediaries

Following the above analysis of the results of economic science, we are better equipped to draw valid conclusions for criminal policy. The most significant, as was pointed out a moment ago, is that *the evidence is indeed more in favour of concluding that piracy reduces the sales of music than the contrary*, and it is

[51] Specifically, 37 %.

[52] It has to be remembered that this report uses data taken from the IPFI reports.

plausible that future studies will confirm that result in other sectors of intellectual property.

It empirically reinforces the pretension of constructing a criminal policy on intellectual property that revolves around damage to assets inflicted on the holders/assignees of the rights of economic exploitation. In effect, if the economy were to give us more ambiguous results, it would be time to suggest a change of political-criminal direction, for example, towards the protection of moral rights or, why not indeed, towards the decriminalization of these crimes, leaving the response to copyright infringements to other branches of the legal order. This is not, however, the case.

10.8.2 It Is Necessary to Interpret in a Particularly Strict Way the Criminal Definition of "in Prejudice of a Third Party" from Art. 270 Spanish Criminal Code

Nevertheless, the socioeconomic damage that the illegal downloads cause to this industry is significantly more reduced than is reflected in the biased studies of the lobbies. Additionally, some academic studies suggest that certain patterns of piracy inflict no damage on the sector and that they may even be functional. This is very relevant, given that, although globally, and with the earlier figures in hand, we may consider that "piracy damages the industry", not all piracy behaviour contributes to that damage. And this conclusion prevents us from making generalizations on the likelihood of such behaviour damaging assets. The social damage that it causes is, in any case, difficult to specify. If we follow the chronological sequence of the studies presented earlier in *Table 1*, we reach the conclusion that—with the exception of the study by Danaher and his colleagues—the studies that most clearly demonstrate the damage of piracy to the business of intellectual property are those that study the impact of piracy on the physical format. It is not that this format is looked down on at present, but there is of course no doubt that it has lost ground with regard to the digital format. And precisely in this field, the new knowledge of economic sciences appears, at least, to be ambivalent.

This means *being particularly rigorous with the interpretation of the criminal definition of art. 270. 1 Penal Code "in prejudice to third parties"*, understood as the likelihood that the behaviour will damage the assets of the copyright holders.[53] In this sense, the results of the empirical investigation on the matter do not give us the starting point from which the criminal intervention proceeds, as, when

[53] In favour of this interpretation, see, among many others, Martínez-Buján Pérez (2011), p. 153; Díaz y García Conlledo (2009), p. 115; Rodríguez Moro (2012), p. 348; Gómez Rivero (2012), pp. 139, 145. On the contrary, Miró Liinares (2003, p. 347 ff.) understands that prejudice to third parties should be interpreted as a subjective element of the crime; on the fluctuating positions of jurisprudence, see also Puente Alba (2008).

circumscribing the area of criminal intervention, we are moving along evaluative planes of decision-making. What in my opinion these results are prepared to suggest is the convenience of moving to the incrimination of only those particularly serious behaviours, whether because of the volume of diffusion of the pirated works, or other factors.

If a particular monetary threshold needs to be established for the identification of those serious behaviours that mark the point of criminal intervention, as happens for example with financial crime and with theft, then the way that threshold is calculated—market price, profit obtained and other instruments of measurement—is a very debatable question, although the important point from the perspective of the commission of the offence should not be overlooked, which is to note the aptitude of the behaviour in prejudice of a third party and not the actual prejudice that is produced.[54]

In any event, setting monetary thresholds was partially the technique used to incriminate *street traders* in Spain, following the 2010 reform of art. 270 CP—when the profit that is obtained is not in excess of €400, the act is punishable as a misdemeanor-; or the technique of incrimination for non-commercial piracy in USA, in 1997—download or uploads of works in excess of $1000. In any case, and in view of the estimates made by economists—a little bit more detailed than those of industry—, those thresholds leave me thinking that they are significantly lower in both cases and would in my opinion be symptomatic of a breach of the principle of proportionality, both in their "abstract" version and with regard to the specific punishments.[55] Incrimination of only those behaviours of a considerably greater seriousness therefore follows.

10.8.3 What Has Profit Seeking to Do with Harm to the Legally Protected Interest?

If one is in agreement that the only thing that is protected *in a direct way* in crimes against intellectual property are the patrimonial rights of the creators and other intermediaries,—something that is almost unanimous in the Spanish doctrine—then it would have to be accepted that the standard requirement of a specific subjective element of the crime, such as "profit seeking" understood as "commercial goals", is somewhat twisted from the point of view of the harm principle.

In effect, the important thing, from the majority doctrinal perspective, is the economic damage to copyright holders. With all good reason, the criminal requirement of "*profit seeking*" in art. 270 of the Penal Code, understood as *commercial goals,* has been seen by criminal doctrine as the definitive proof that criminal law

[54] Against the option of setting amounts to define the boundaries, Gómez Rivero (2012), p. 144.

[55] On both dimensions of the principle of proportionality, see, among others, Aguado Correa (2013), p. 123 and off; 227 ff.

protects only patrimonial interests.[56] However, other behaviours not guided by such goals can turn out, as we have seen, to be more prejudicial to the assets of intellectual creators. And it is important not to confuse two ideas: that someone makes a profit with another person's intellectual creation without being authorised to do so is not the same thing as the prejudice that can be inflicted as a consequence of that behaviour. These are two different things. And what is important from the point of view of criminal law is not what the professional pirate earns, but what the owner or assignee of the rights of exploitation of the work loses—or stands to lose.

In view of this conclusion, the possibility of incriminating non-professional pirates who upload contents onto the Internet on a large scale has to be contemplated. This possibility, however politically incorrect it may be, is coherent with the findings of economic science in relation to the harmfulness of infringements of the rights of the author.

In any case, and in view of the evidence of some of the studies under examination, the criminalization of the user who simply downloads from the Internet, including through p2p platforms, would be completely against all common sense in terms of harm.

Once it is clear that piracy, to some extent, causes harm to copyright holders, criminal policy moves on to employ the "second filter" of the *fragmentation principle* in criminal law, which basically implies criminalization of only the most harmful crimes. In my opinion, to continue turning to the principle of fragmentation to argue that the most serious behaviours that threaten intellectual property rights are, in any case, those of commercial piracy, hardly appears to me to be justified on the basis of the empirical evidence that has been presented. I think that this proposal of fragmentation applied to profit seeking has been more or less present albeit implicitly or intuitively, in the penalist doctrine.[57] From the point of view of the "fragmentation test" therefore, neither does the fact that the behaviour is or is not guided by commercial goals affect the appraisal of its seriousness.

The greatest obstacles to the incrimination of harmful and very serious behaviours, but not guided by commercial goals, can come from the *principle of subsidiarity* of criminal law. If other less damaging remedies or sanctions are sufficient to face up to the attacks against intellectual property that produce a *better, equal or not significantly inferior* level of protection of the legally protected interest than penal law can offer, it is clear that we should turn to those other sub-systems of social control. On the one hand, the criminal policy failure of countries that opted to criminalize behaviours not guided by commercial goals should be borne in mind.[58]

[56] Thus, for example Díaz y García Conlledo (2009), p. 97 f. For an analysis of the important debate raised around whether to protect moral rights, patrimonial rights or both, see the complete analysis of Rodríguez Moro (2012), pp. 73–153, although at present the discussion has lost interest following the Criminal Code of 1995.

[57] I myself did so, to a certain point, in Rando Casermeiro (2012), p. 267.

[58] This is the case of Australia, Germany, the United Kingdom, and the United States. See Ibidem. Although, probably, that lack of success is due to the enormous breadth with which the criminal definitions were written, which permits the incrimination of virtually any Internet user who might illegally download protected works.

On the other hand, however, we have to remember that in Spain, and unlike what has happened in other countries such as the United States, the United Kingdom and Germany, efficient responses have not been introduced via non-sanctioning civil and administrative control mechanisms. The desirable situation is that the legal subsystems of non-sanctioning controls fulfil a satisfactory role, with them replacing criminal interventions in those circumstances. But it may not be overlooked that, in other sectors of criminal law, such as urban planning, it was the absolute inactivity of other legal subsystems of control that prompted the "entry on scene" of penal law. And it is clearly not enough to brandish a generic judgement of subsidiarity, to discredit penal law in this field, heedless of the functioning of less expeditious control systems. We therefore need to opt decidedly for those other subsystems but, an evaluation of effectiveness is also very important, before having recourse to criminal law.

10.8.4 We Should Reformulate Civil Liability

Civil liability is probably the aspect in which the way the legal debate may benefit an approach to the economy can be particularly well perceived. Let us raise the example of the judgement in the well-known "*Tom Tom*" Spanish case—which concerned the piracy of computer devices used to navigate by satellite. The Judgment of the Provincial Court of Alicante 132/2012, of 3 March, convicted the owner of a webpage, with links for the download of the aforementioned programme, to a fine of over 5 million Euros in compensation. The calculation was done by considering that each download was the equivalent to one unsold unit. With it, the judgment adhered to the clumsy calculation method used by the first estimations of the lobby groups up to the middle of the first decade of the new millennium—each illegal download equalled a lost sale. This method is currently rejected at present, both by those groups and, of course, by the economists that have dedicated time to study the topic. Economic knowledge on the topic has to be applied, so as to limit the amount of the compensation. Although we are talking of a civil case, it is evident that these conclusions would be perfectly well extrapolated to civil responsibility for the crime.[59]

10.8.5 Summary

As a final summary, I have advanced the following four key ideas:

1. It is necessary to construct a criminal policy on intellectual property based on the socioeconomic damage inflicted on the authors and other intermediaries in the sector, but with very many nuances and limitations.

[59] An analysis of the judgment can be seen in Peguera Poch (2012), pp. 67–68, an author who qualified the calculation method as "at the least, surprising", and the compensation as "very high".

2. A satisfactory criminal policy for intellectual property should "delay" the barriers of criminal protection for really serious behaviours.
3. The restriction of criminal intervention on the punishment of behaviours involving commercial goals might not be, in all cases, the correct solution from the point of view of the criminal law principles of harm and fragmentation. From the point of view of subsidiarity, we would need to evaluate civil and administrative levels of protection at an empirical level before resorting to criminal measures.
4. Civil responsibility, whether or not for crime, should be reformed, paying some degree of attention to the estimates of losses that appear in the empirical studies on the matter.

I think that, in global terms, I am formulating a restrictive political criminal proposal, and for that reason setting it in motion should involve the withdrawal of criminal law interventions in a good number of behaviours: from street traders to some forms of commercial piracy in the sector. Although this specific proposal is in no way new and, in fact, a particular sector of the doctrine and jurisprudence continues to support the constraints on criminal measures applied to matters of intellectual property, the same approach would now be upheld by more precise knowledge of the harmfulness of behaviours that threaten the intellectual property rights of the author. The latter leaves us better placed to select in the field of criminal protection.

However, everything is not decriminalization in the present political-criminal proposal, in so far as where the legal mechanisms of protection contemplated in the third conclusion fail, then that might be the time to reorient our criminal policy towards the incrimination of new behaviours not guided by a commercial goal, provided that, at the same time, the requirements described in the second conclusion are upheld.

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Chapter 11
The Proportionality Principle in a Broad Sense and Its Content of Rationality: The Principle of Subsidiarity

Ana María Prieto del Pino

Contents

11.1 From the Principle of Minimal Intervention to the Principle of Proportionality in a Broad Sense or the Prohibition on Excessiveness

It is undeniable that Criminal Law has the nature of a two-edged sword. Its much-needed efforts to protect legal assets are only exercised at the detriment of other legal assets, in such a way that, as has rightly been cautioned, it is also necessary to be protected from it. Moreover, given that it exercises the exclusive task of

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protecting legal assets, which implies the deployment of the most harmful measures that the legal order has at its disposal, the doctrine unanimously demands[1] that the exercise of *ius puniendi* be constrained by the principle of minimal intervention; by virtue of which, the punitive activity of the State should be kept to the indispensable minimum to maintain peaceful coexistence. Paradoxically, its specific role and its contents lack precise features, despite being treated as a principle that is upheld with great assiduity to endorse critical positions in the face of particular decisions by the legislator, seen to constitute an excess of repressive vigour.

Opinions vary greatly over the mission of the principle of minimal intervention. Thus, while some affirm that it develops an essential function in our punitive system,[2] others consider that it lacks the necessary independence to occupy its own place amongst other juridical-penal principles, in so far as the constraints that it imposes may not be considered different from those exercised by other guarantees of a constitutional nature (Bacigalupo Zapater 1994, p. 32).[3]

In relation with its content, the first remarkable aspect is the diversity of structures that are attributed to it. For one sector of the doctrine, the precepts or principles of *ultima ratio* or the subsidiarity and the fragmentariety of the punitive measure come under the principle of minimal intervention (Berdugo Gómez de la Torre et al. 1994, pp. 59–61; Cancio Meliá 2014, p. 97).[4] Subsidiarity leaves criminal Law as the *ultima ratio* of the legal order, its application therefore being dependent on the inappropriateness of other less harmful means. The fragmentariety principle, harshly criticised by Binding and praised today as a fundamental guarantee, implies that only the essential assets of coexistence may receive criminal protection and that the protection given to these assets should be reduced to the area of the most serious aggressions. For other authors, on the contrary, the principle of minimal intervention is a formula—introduced in Spain by Muñoz Conde—that refers exclusively to the principle of subsidiarity or *ultima ratio* (Luzón Peña 1996, p. 83; 2012, p. 25 f.).[5] However, Muñoz Conde (Muñoz

[1] As affirmed by Silva Sánchez (1992), p. 246.

[2] García Rivas (1996, p. 53), affirms in this sense that "the principle of minimal intervention has been placed at the centre of the stress between the democratic State and the social State, playing an almost cathartic role in contemporary criminal legislation".

[3] From the 4th edition, no reference is made to the principle of minimal intervention in this work. See 5th ed. completely updated, Akal/iure (1998), p. 19 f., in which the author affirms that the limitations on the use of ius puniendi arise from articles 1, 10, 14 ff. and 53 of the Spanish Constitution (SC): the highest values of the legal order (liberty, justice, equality and political pluralism), related to the foundations of political order and social peace and the fundamental rights that are derived from them.

[4] Martos Núñez considers that there are three postulates that integrate the principle: in addition to the last two mentioned above, the accessorial or secondary nature of criminal Law (Martos Núñez 1987, p. 101 ff.).

[5] This perspective coincides with the one borrowed from the German doctrine, in which no denomination exists that integrates the principles of subsidiarity and fragmentariety, even though clear connections are established between them both. It also leaves the principle of fragmentariety outside the context of the principle of minimal intervention. See Silva Sánchez (1992), p. 246 f.

Conde and García Arán 2010, p. 72; Muñoz Conde 1975, p. 59 ff.) sustains that when reference is made to the principle of minimal intervention, it means "that Criminal law should only intervene in cases of serious attacks on the most important legal assets (...). The lightest infringements of the legal order are the object of other branches of Law. Hence, it is also said that criminal Law is of a "subsidiary" nature in relation to the other branches of the legal Order". From his point of view, the "subsidiarity" of criminal law, which is considered a synonym of "accessoriness" and "secondariness",[6] "is nothing more than one of the consequences derived from the principle of minimal intervention". Other such consequences are also, in his opinion, the principle of the exclusive protection of legal assets, the fragmentary nature of Criminal Law, the principle of the humanity of punishments and the principle of proportional punishment and security measures (Muñoz Conde and García Arán 2010, p. 78 ff.).

Let us ignore the concrete denominations that are applied and centre our attention on the *ratios* or criteria to which the contents can lead in which minimal intervention is really expressed in the various doctrinal constructions. In those definitions that accept the aforementioned formula with a single element and those in which it is understood to have the dichotomous structure referred to above, the existence of two underlying ratios, judgments or criteria are confirmed: the criteria of utility, likened to considerations that relate to the need for punishment, and the criteria of the seriousness of the charge or the importance of the legal asset that is affected, which some authors identify with what is deserving of punishment. Having come this far, it should be underlined that the principle of subsidiarity is unanimously considered an expression of the principle of necessity, noting the differences with regard to the principle of fragmentariety.

In my judgment, assuming the inherent limitations of all attempts at systematization or classification, the standpoints that exist on the principle of fragmentariety may be reorganized in the following way:

(a) For some authors, the exemplary or fragmentary nature of criminal Law only responds to considerations linked to the idea of efficiency, existing as a function that maintains its effectiveness or dissuasive capability. Only by limiting it to the repression of the most serious acts—it is argued—is it possible to maintain its preventive efficacy (Petters 1965, pp. 470–471, specially p. 475; Vogler 1978, p. 144).
(b) One sector of the doctrine affirms in an explicit way that both the principle of *ultima ratio* and of fragmentariety are subject to the criteria or principle of necessity (Mir Puig 2011, pp. 117–119; Luzón Peña 1996, p. 83; 2012, p. 26; Cancio Meliá 2014, p. 97; Berdugo et al. 1999, p. 57 ff.; Cobo del Rosal et al. 1996, p. 78 ff.; Velásquez 2007, p.40). However, the examination of the

[6] Also considered coincidental ultima ratio, subsidiary character and the mere sanctioning or secondary nature of criminal law Berdugo Gómez de la Torre et al. (2010), p. 33. These authors sustain that the affirmation of the subsidiary nature has its origin in the theory of norms put forward by Binding.

concrete contents assigned to that criteria reveal that a large number of the authors that maintain this opinion introduce aspects into the idea of fragmentariety, such as the importance of the protected legal asset or the seriousness of the attack against it, which do not respond directly to the principle of necessity, in so far as they imply considerations that relate to the idea of proportionality (Mir Puig 1976, p. 124 ff.; Mir Puig 2011, p. 118).[7] From this perspective, it is for example affirmed that less serious measures for the citizen are sufficient in the face of less important or less dangerous assaults on a legal asset (Roxin 1994, p. 24; Mir Puig 1976, p. 126).[8] In some cases, the confluence of elements of a different nature, to which reference has just been made, is a consequence of following up major criteria of deservingness, necessity and the capability of criminal protection in the selection of legal assets (Muñoz Conde 1975, p. 59 ff.; García-Pablos 2012, pp. 565–569; Otto 2004, p. 10).[9]

(c) Other authors expressly recognize that other principles—which are the importance of the legal asset and the seriousness of the attack—, together with considerations of utility or necessity, subordinate to the principle of proportionality, intervene in the fragmentariety principle. Hence, they consider that the principle of minimal intervention only covers the principle of *ultima ratio* (Silva Sánchez 1992, pp. 246 f. 284).[10]

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[7] For this author, a fragmentary nature implies that "criminal Law does not have to sanction all conduct harmful of the assets that it protects, but only the most dangerous modalities of attack for them". The raison d'être of this fragmentary nature in the present preventive conceptualization of criminal Law resides, in my opinion, in the lack of need (the non "absolute need to defend Society"). In the opinion of Muñoz Conde (1975), p. 59, the fragmentary nature is a quantitative consequence of the principle of minimal intervention. García Rivas (1996), p. 55, links the principle of minimum intervention globally, which seeks in his opinion to guarantee legitimacy and the efficacy of criminal intervention with the criteria of Max Ernst Mayer on deservingness of protection, need for protection and capability of protection, linking the fragmentary nature to the need for criminal protection.

[8] Octavio de Toledo y Ubieto (1981), separately defines ultima ratio and fragmentariety on p. 358 f., but on pp. 360 and 361 he affirms: "(. . .) to the extent that certain legal assets receive sufficient protection through these other legal instruments which are (at the least they should be in theory) less harmful than the criminal ones, this situation should not convert them into their objects of protection and if they shown themselves to be sufficient to provide them with protection against lesser attacks, criminal law may offer them their protection but only with regard to behaviour that implies a more important charge than those for which the non-criminal juridical instruments are sufficient to restrain (fragmentary nature of criminal Law)". See, likewise, García Rivas (1996), p. 55: "This "minimal" or subsidiary character of the criminal intervention places us, from another angle, in the classic postulate of the fragmentariety of punitive Law, which precisely demands that the assets deserving of criminal protection be protected—as a general rule—in a "fragmentary" way, in other words, solely against the modalities of more serious and relevant aggressions, rejecting overwhelming or "totalitarian" protection and, therefore, uniform and undifferentiated protection as well".

[9] Otto considers that criminal Law has a fragmentary nature, such that not all behaviour deserving of punishment presents the need for punishment.

[10] With regard to the principle of fragmentariety and justifying the separation of the principle of minimal intervention referred to in the text, affirms that "not only utilitarianist considerations affect it (. . .) but also proportionality" (italics added). On the same point p. 260 ff.

(d) For others, the fragmentary nature of criminal Law is a consequence of the selective protection that criminal Law develops, exclusively in response to proportionality, between the seriousness of the illegal act and the legal consequence that is applied. In some cases the formula "deserving of punishment" (Jescheck and Weigend 1996, p. 50 f.)[11] is used, to refer to the idea that the defining element of fragmentariety is the seriousness of the illegal act and the legal consequence applied, while in others it is affirmed that the principle of fragmentariety is not derived from the ends of the punishment, but from its nature (García Pérez 1997, p. 334 ff.).

An examination—albeit as brief as the above—of the contents that are attributed in the doctrine to the legitimating principles of punitive intervention reveals the need to continue advancing in the preparation of axiological patterns that are operative in the analysis of the legitimacy of the decisions adopted by the criminal legislator. Above all, it appears necessary to realign the various principles (subsidiarity, fragmentariety, harmfulness...) with the material criteria or judgments of which they are really the expression, laying aside terminological apriorisms and eliminating the imposition of plans and constructions.

In short, deeper examination of the contents of the legitimating principles is essential from an integrative, realist perspective, aware of the mission that has to be developed within a much-needed theory of criminal legislation. In other words, a doctrine that relates to the productive activity of punitive norms and both their formal and their material optimization.[12] Such a theory, by imposing procedural requirements tending to guarantee the suitability of the legislative decision and to contribute axiological patterns of legitimacy, would allow formalized and global control of the processes of incrimination. After highlighting the need to remedy this shortfall, Díez Ripollés (1997, p. 13 ff.; 2012, p. 49; 2001, p. 3 ff.) convinced that the constitutional principle of proportionality was inadequate to achieve it (Díez Ripollés 2013a, p. 247 ff., b p.193 ff.), developed a solid model, beginning with the construction advanced by Atienza in the general theory of Law, which integrates five levels (ethical, teleological, pragmatic, legal-formal and linguistic) of legislative rationality for criminal law (Díez Ripollés 2003; 2013a, 247 ff., b, p. 193 ff.).

In my judgment, as I argued over a decade ago (Prieto del Pino 2004), the most suitable framework to carry out the in-depth examination referred to previously is that which brings together the principle of the prohibition on excessiveness or the principle of proportionality in a broad sense; within which, provided it is the object of an acceptable conceptual development, the synthesis of preventive and guarantist ends (the ends of crime prevention and minimization of criminal violence) can find

[11] For Jescheck, the need for punishment presupposes that the punishment is deserved. From that author's point of view, the punishment that is deserved responds to the value of the protected legal asset, the danger of the attack on the object of the action in which the legal asset is framed (abnormality of the action) and the reproachability of the internal attitude of the perpetrator (abnormality of internal attitude).

[12] See, on the generic concept of the theory of legislation Atienza (1997), p. 15 ff.

a place. In my understanding this conceptualization responds to the legitimizing principles of criminal Law.[13] Its assumption by the constitutional courts of very many democratic States and its broad doctrinal dissemination allows us to consider the aforementioned principle as a particularly promising way of advancing the theory of legislation.

11.2 Approach to the Contents Attributed to the Principle of the Prohibition on Excessiveness or Proportionality in a Broad Sense

1. Assuming the principle of the exclusive protection of legal assets as the basis of its axiological constructions, part of the modern criminal doctrine redirects the idea of the limitation of punitive power to the principle of the prohibition on excessiveness or the principle of proportionality in a broad sense, complementing its content with the demands derived from the principles of legality and culpability. The contents traditionally attributed to the principle of minimal intervention are in fact redirected to the prohibition on excessiveness (*Übermassverbot*) (Roxin 1994, p. 24 f.).[14]

2. There is no unanimous opinion with regard to its foundation. Strongly rooted in the doctrine and in German constitutional jurisprudence, the principle of proportionality has been considered a constitutional principle derived from the principle of the State under the Rule of Law by virtue of which, "given that criminal Law inflicts the harshest attacks of the State on the liberty of the citizen, it should only intervene there where the softest of all measures fail to promise an acceptable result" (Roxin 1994, p. 24).[15] Its validity may be affirmed for one sector of the Spanish doctrine on the basis of article 1º of the Constitution, not only in as much as this precept constitutes a proclamation of the Rule of law, but also to the extent that it declares that liberty is one of the highest values of the Spanish legal order, given that the "principle of the prohibition on excessiveness constitutes a rule of maximization of liberty" (Cobo del Rosal and Vives Antón 1996, pp. 75–76); but it may be derived from constitutional precepts such as, among others, articles 15, 17.2, 17.4 and 55.2 second paragraph (Cobo del Rosal and Vives Antón 1996, p. 76). The purpose of these references and the axiom we are considering is for others a principle linked to

[13] See, on this same point Mir Puig (2009), p. 1361 f.

[14] In the Spanish doctrine Núñez Castaño (2010), p. 70 ff., who maintains that the principle of proportionality constitutes a manifestation of what is called "the internal dimension of the principle of minimal intervention".

[15] The following work in the Spanish doctrine considers that it arises from the concept of the Democratic State under the Rule of Law Arroyo Zapatero (1997), p. 4. In the opinion of this author, the principle of proportionality "requires that any measure of the legislator or the Administration affecting the rights of citizens has to have an increase in shared welfare as its final end".

the democratic State (Octavio de Toledo 1981, p. 366).[16] And it has also been affirmed that the principle of proportionality "is an idea of justice immanent to all Law" (Muñoz Conde 1975, p. 78). In 1982, the Spanish Constitutional Court considered that the principle could be inferred from art. 10. 2 Spanish Constitution (SC) in relation to articles 10.2 and 18 of the Convention of Rome,[17] and in 1999 considered it linked to the principle of legality[18]; however, both in earlier and in subsequent decisions, including its most recent pronouncement in this respect (Judgment STC 60/2010 of 7 October, FJ 7º), the Court has established that the principle of proportionality "fulfils an institutional function". It operates as a presupposition of constitutionality for the measures that restrict constitutional principles and, more specifically, as a limit on norms and acts that restrict fundamental rights. Hence, the fundamental regulation of this presupposition of the constitutionality of the Law can be found in the constitutional provisions that recognize them. From this perspective, the principle of proportionality has been characterized in the doctrine as the "limit of limits" (Lopera Mesa 2006, p. 45).

3. It is worth making the point that the expressions "principle of proportionality in a broad sense or the prohibition on excessiveness" lack their own content or independence, as these formulas are only used to designate or to encompass the principles of suitability of means, the need for their use and proportionality in the strict sense, as well as the proportionality of their effects. In some constructions, the aforementioned tripartite structure is redirected towards a dichotomous scheme,

[16] In the opinion of this author, only the democratic State guarantees material and not merely formal equality. The principle of proportionality—it is argued—implies giving to each person according to the deservedness and treating the unequal in an unequal way, and in so far as it limits ius puniendi "it indicates the requirement, operating in both the legislative and in the judicial fields, that the prevision, determination, and imposition of the seriousness of crimes and criminal measures be done in accordance with the seriousness of the crime with regard to the former and the criminal endangerment of the subject with regard to the second".

[17] STC 62/1982, of 15 October. See Cobo del Rosal and Vives Antón (1996), p. 76.

[18] STC 136/1999, of 20 July of 1999, Point of Law 21º: "Proportionality in a strict sense and the need for the measure constitute two elements and two complementary perspectives of the principle of proportionality of criminal sanctions, inherent, in assumptions like the present, in the relation between art. 25.1 SC and the other fundamental rights and public freedoms, in this case the personal freedom of art. 17 SC and the freedoms of arts. 20 and 23 SC (...). It is worth noting in this respect that the right to criminal legality operates, first and foremost, before the legislator. It is the law, in a first instance, that should guarantee that sacrificing the rights of citizens should be the minimal essential and that its limits and restrictions should be proportionate". In its Point of Law 30º, the Constitutional Court reiterated in relation to the sentence imposed on members of the Commission of Herri Batasuna for collaboration with armed groups that "a violation of the principle of criminal legality has taken place in so far as it includes the constitutional proscription of disproportionate punishments, as a direct consequence of the application of art. 174 bis a) Penal Code 1973. The precept is, in fact, unconstitutional solely in so far as it incorporates no provision at all that would have attuned the criminal sanction to the importance of acts of collaboration with armed groups that, although they can on occasions be of scant importance with regard to the protected legal asset, should not for that reason be left unpunished."

given that the principle of suitability can be considered a requirement or presupposition of the principle of the suitability of means (Günther 1983, p. 180 f.).[19]

4. In general terms, the principle of suitability imposes the appropriateness of the means for the end that is pursued. It affirms that a means is not suitable when it can be demonstrated that its application produces no effect at all in relation to the end that is sought, either because the laws of causality or logic indicate that it is not possible to achieve it with those means, or due to their application turning out to be counterproductive (Günther 1983, pp. 183–184). When the objective that is pursued is the protection of a legal asset and the means that come to mind to achieve that protection are the punitive measures, their suitability may only really be affirmed when they really serve to protect the legal asset, and they bring no negative consequences for that asset (Günther 1983, p. 186). As Luzón explained (1996, p. 84; 2012, p. 27 f.), this principle that the author also called effectiveness or efficacy, means that "criminal Law can and should only be applied when it is minimally effective and appropriate for the prevention of the crime and, therefore, it is necessary to stop its intervention when it is politically-criminally inoperative, ineffective, inadequate or ever counterproductive for the prevention of crime". Some authors identify the principle of suitability with the Mayerian category referred to as the capability to provide criminal protection of the legal asset (Arroyo Zapatero 1997, p. 4; Aguado Correa 1999, p. 151 ff.).

5. Finally, the principle of "necessity" (*Erforderlichkeitsprinzip)*, also referred to as the principle of "requirement for minimal intervention", of the "minimal possible aggression", or the "principle of the relatively softer means" requires that state aggressions against the juridical positions of the individual should not go beyond what is required by the objective that they serve (Günther 1983, p. 189). Its application to the means takes place once it has passed the filter of the principle of suitability; in other words, when the measure in question is shown to be suitable to produce the effect that was intended when adopted. From among various suitable means to achieve an objective, the aim is to select the one that impacts least of all on the citizen and on the general public (Günther 1983, p. 189 f.).

For some authors, both the subsidiarity and the fragmentariety of criminal Law, in which they introduce references to susceptibility and the need for protection, alongside traditional considerations relating to the dignity or the relevance of the legal asset and the seriousness of the attacks against it, obey this principle (Cuerda Arnau 1997, p. 470 ff.).[20]

[19] For their part, Tiedemann (1969), p. 144, considers it possible to attribute the principle of proportionality in a broad sense to the comprehensive bipartite structure of proportionality in a strict sense and subsidiarity, as suitability and effectiveness can be understood as a previous requirement to proportionality in a strict sense.

[20] This author, however, nuances his affirmation pointing out that the likelihood of criminal protection can be redirected to the principle of suitability, and the need to protect the subsidiary nature of criminal Law instead of integrating it in fragmentariety. In the opinion of Aguado Correa 1999, p. 159 ff., the principle of necessity is defined in criminal Law in the principle of exclusive protection of legal assets and in the principle of minimal intervention, the principles of subsidiarity and fragmentariety being integrated in the latter principle.

Others, on the contrary, identify the principle of necessity with subsidiarity or the principle of *ultima ratio*, conceptualizing it as a "flow of utilitarian rationality towards the objective", free from all sorts of considerations relating to the normative weight of the objective that is pursued or to the proportion between the advantages and the disadvantages that its use entails. From this point of view, the necessity of the punishment only has a relationship with the criteria of utility, efficacy and efficiency, in such a way that low public interest might make a severe attack on a fundamental right necessary, if there are no softer measures available. According to this pattern, it is considered that some means are unnecessary when other softer means exist that manage to achieve the same—or even better—results than the other is capable of producing in view of the end that is sought (Günther 1983, p. 190; Tiedemann 1974, p. 33). Those who maintain that position show themselves to be critical of the meaning that the doctrine attributes to the principle of need as a criterion for criminal selection, taken from Ihering, Merkel and v. Liszt, a meaning that is not purely coincidental with the idea of subsidiarity, but that is enhanced by aspects of proportionality. Necessity and proportionality—they contend—appear to be mixed questions, with which it is forgotten that the need for one measure is exclusively determined by drawing a comparison with other suitable measures.

The German Constitutional Court understands that more appropriate means can burden citizens in a considerably more onerous way without that implying any harm to the principle of necessity. Doubts over the effectiveness of the softer alternative make the harsher but certainly more effective measure necessary. An ex-ante prognosis of probability is sufficient, as happens with the test of suitability. The affirmation of its necessity merely requires that the softer measure should not be considered, for a good reason, sufficiently effective, following its careful examination by the holder of sovereignty (Günther 1983, p. 190).

6. It has been said in a very graphic way that the principle of proportionality (*Verhältnismässigkeitsprinzip*) in a strict sense is a prohibition on "taking a sledgehammer to crack a nut". Proportionality is predicated on the relation between the means and the end that is sought, disproportion between both extremes responding to both causes. It may be due to the inadmissible nature of the objective that is sought or because it is not in the public interest. It may also be due to the fact that there is a prohibition of the use of the means. However, as a general rule disproportion arises between the attack that is to be assessed—in other words, the attack or aggression that is implicit in the measure that is applied—and the objective that is sought. Having affirmed this, given that punishment is the most serious measure available to the legal order, its intervention has to maintain a relation with the seriousness of the crime that it seeks to repress (Günther 1983, p. 190).

The elements that the principle of proportionality places in the scales are, for one sector of the doctrine, on the one hand, the punishment; on the other, the seriousness of the crime and its appropriateness to the purpose of the protection, which is given a utilitarian content or one of necessity. For some authors the purposes of the protection is the most important criteria, such that in case of collision, the latter will

prevail,[21] and for others, on the other hand, both criteria should have the same weight (Carbonell Mateu 1996, p. 203 ff., specially 204).[22]

Another doctrinal sector contends that the principle of proportionality in a strict sense, unlike the principle of necessity, is oriented in an exclusive way towards the ideal of justice.[23] The connection between the principle of proportionality and the fundamental condition of justice—it affirms—means that criminal Law acquires greater weight than that which is attributed to the principle of necessity (Günther 1983, p. 210). As a consequence of this approach, the contents and the specific criteria of the principle of fragmentariety find a place in this principle and not in necessity, maintaining an emphatic separation between both.

11.3 The Principle of Proportionality in a Broad Sense in Spanish Constitutional Jurisprudence

The principle of the prohibition on excessiveness has been welcomed as decisive criteria by a good number of the Constitutional Tribunals of European States (Germany, France, Switzerland, Italy and Portugal) (Günther 1983, p. 181). The Spanish Constitutional Court has also adopted in its decisions—even in some of the

[21] From this point of view, it is affirmed that: "the punishment meted out to the seriousness of the crime will also be, in abstract, appropriate to the purposes of the protection. But it might happen that, in specific cases, that finality will be satisfied with a lesser punishment and, even, without any punishment at all. In such cases, proportionality would have to be understood in terms of the requirements of the purposes of the protection, which is the authentic object to be weighed up, and not according to the seriousness of the crime, which is only a generic criterion in the process. In this sense,—it is added—it would come to converge with necessity". Thus Cobo del Rosal and Vives Antón (1996), p. 71. For these authors, the seriousness of the crime is determined by its unjust content, the harm caused and the greater or lesser reproachability of its perpetrator. Likewise, Cuerda Arnau (1997), p. 475 y 477: "(...) proportionality is understood first and foremost on the basis of the protective function that is assigned to it in relation to the punishment. Precisely on that basis, from such a assumption, it is not only possible but it is obligatory to consider that the legitimate course of action is to set one punishment aside and select another lesser one, when by doing so the purpose of the protection is satisfied". Lascuraín Sánchez (1998), p. 177, affirms that the judgment of proportionality is "eminently valuative".

[22] In the opinion of this author, by virtue of the principle of proportionality, the punishment should not be greater than the seriousness of the behaviour might deserve, nor greater than whatever might be necessary for the purpose of protection of the legal asset. Above all, reasons of justice, but also of efficacy require it be so, as "the courts tend not to apply punishments when these are disproportionate". In the opinion of the author, the seriousness of the crime requires sufficient relevance of the legal asset that is affected by the act to be sanctioned to justify the imposition of a custodial prison sentence; as well as a sufficiently serious behaviour—inflicting harm on or endangerment of the legal asset.

[23] In the opinion of Arroyo Zapatero (1997), p. 7, "the idea of proportionality in a strict sense is directly founded on the idea of justice, on the basis of which it should be weighed up whether the benefit that the sanction seeks justifies its costs".

first[24]—the principle of proportionality as the template for the constitutionality of certain aspects of criminal norms and their application.

The analysis of Spanish constitutional jurisprudence requires that we distinguish between the attribution of two sets of contents of very diverse scope to the principle of proportionality. Thus, in some of their resolutions, such as in STC 150/1991, on 4th July, the Constitutional Court adopted the principle of proportionality as the template to which the punishment that was imposed should be adjusted.[25] In others, on the contrary, both implicitly and explicitly, it conceded a much broader radius of action to it, converting it into the globally understood levelling rod of the constitutionality of criminal precepts, not only as a requirement of the abstract or concrete punishment. A paradigm of this conceptual understanding is STC 111/1993, of 25 March—in particular under legal grounds no 9º—in so far as a particular interpretation of a precept of the criminal Code was declared unconstitutional, because it was thought to violate the "principle of proportionality between the injustice and the punishment". The Court based its verdict of unconstitutionality on the disproportion implicit in punishment with a criminal sanction of a behaviour that is slightly harmful for the protected legal asset that, in itself, should be sanctioned "with the mere imposition, where applicable, of an administrative sanction".[26] This second content, which basically coincides with what in doctrinal terms is attributed to the principle of excessiveness, is what is of interest in this work.

There are, in my opinion, three defining elements of constitutional doctrine on the principle of proportionality in a broad sense.

The first of these elements is the negation of its character as an independent canon of constitutionality. Given that the principle of proportionality lacks a specific place among the constitutional principles, its invocation—the Constitutional Court specifies—will necessarily be linked to the violation of some precept or

[24] Thus, already in STC 62/1982 (Point of Law 5º).

[25] BOE nº 180, of 29 July 1991. In this judgment, relating to the aggravated cause of reoffending, the Constitutional Court concerned itself with the principle of the proportionality of the punishment, affirming that in relation to the judgment awaiting its ruling "both with regard to the general provision in relation to the punishable facts and to its specific determination with regard to the criteria and rules that are thought pertinent, it is the competence of the legislator in the field of its criminal policy, provided there is no disproportion of such a scope that it violates the principle of the rule of Law, the value of justice, the dignity of the person and the principle of criminal culpability that arises from it". In that sense, STC 65/1986, of 22 May, Point of Law 3º.

[26] In effect, in the judgment, it was affirmed that it is unconstitutional to understand that the professional exercise of the activity of a real estate agent in an intermediary role without the official qualification required to do so, that is, of a real estate agent, constitutes the offence of encroachment in a professional field by a non-professional (art. 321.1 ACP). And that is so, by considering that the offences of encroachment are only subsumed under art. 321.1 ACP in "those professions that, because they impact on legal goods of maximum relevance—life, personal integrity, freedom and security—, not only need for their exercise the completion of those studies that require the possession of an ad hoc university qualification, but that also deserve the special protection that guarantees the criminal instrument against all intromission that might entail damage or endangerment of such legal assets".

other of the Constitution,[27] in such a way that the principle of proportionality is considered infringed when the lack of proportion implies an excessive and unnecessary sacrifice of the rights guaranteed in the Constitution. In the absence of further specifications, the criteria of "unnecessary excessive sacrifice" established by the Constitutional Court may be interpreted in two ways. In accordance with one of them, the reference to the "excessive" character of the sacrifice of constitutional rights becomes tautological: the excessive measure is disproportionate. In accordance with the second interpretation—by which the excessiveness of the sacrifice is linked to its condition of "unnecessary"—only a vague allusion to the principle of necessity understood as a "prohibition of an excessively costly alternative" is found in that reference.[28] However, the Constitutional Court specifies in judgment 136/1999 that the excessive sacrifice in criminal matters to which reference is made "can be brought about either because a reaction of a criminal nature is unnecessary or because the quantity or the extent of the punishment in relation to the importance of the crime is excessive (disproportion in the strict sense)".[29]

The second defining element is the limited scope of control that by virtue of the principle of proportionality the Court may exercise over the decisions of the criminal legislator. That control, given the constitutional position of the legislator and his specific democratic legitimacy, which confers a broad margin of freedom on him within the limits established by the Constitution,—the Constitutional Court insists—should be done in a different way as well as with a qualitatively different intensity from that applied to the organs in charge of the interpretation and application of the laws.[30] Thus in Judgment 60/2010 (Point of Law 22), the Court

[27] Thus SSTC 62/1982, Point of Law 5º; 66/1985, Point of Law 1º; 19/1988, Point of Law 8º; 85/1992, Point of Law 5º; 50/1995, Point of Law 7º; or STC 55/1996 (Point of Law 3º), after which follow 161/1997 and 136/1999 (Point of Law 20), in which the Constitutional Court affirmed that: "The principle of proportionality in our legal order does not constitute an independent canon of constitutionality the allegation of which may be advanced in an isolated way with regard to other constitutional precepts (. . .). If the existence of disproportion is adduced, it should first be alleged and later evaluated the extent to which this affects the content of the constitutional precepts that are invoked: only when the disproportion implies a violation of these precepts may unconstitutionality be declared (. . .) This observation does not mean that in some specific circumstance the principle of proportionality may be argued to conclude that an infraction of other types of constitutional precepts have not taken place. But in any case, as has been said, not only should the existence of disproportion between ends and means be investigated, but also to what extent those precepts are violated as a consequence of the aforementioned disproportion".

[28] The above is precisely the content that is attributed to the principle of proportionality in Point of Law 4º of the STC 215/1994, of 14 July. This expression, in Cuerda Arnau (1997), p. 464, is taken up, following Alonso García (1984), p. 226 ff.

[29] Point of Law 22º.

[30] In this respect, the Court refers to the legislator in judgment 55/1996 (Point of Law 6º) as follows: "(. . .) [the legislator] obviously lacks the guidelines of a precise table that unequivocally relates means and objectives, and has to attend not only to the essential and direct end of protection to which the norm responds, but also to other legitimate ends that he might pursue with the punishment and the various ways in which it operates and which could be catalogued as functions or immediate ends: to the various ways in which abstract admonition of the punishment and its

once again emphasized the argument that, so as not to encroach on the free definition of crimes and punishments that corresponds to the democratic legislator, one may only "declare the unconstitutionality of criminal Law, on the grounds of lack of proportion, when the alleged excess or imbalance of the measure that it incorporates is truly manifest or evident. In other words, while any imbalance between the two variables subject to reciprocal assessment in this stage of control can give rise to a complaint to the legislator from the point of view of the external legitimacy or appropriateness of the measure that is adopted, for the disproportion to acquire constitutional relevance, it has to concern a truly patent and manifest excess." Moreover, Point of Law 14º established that the judgment of necessity "is of very limited scope and intensity, otherwise it usurps a role of imaginary legislator, that does not correspond to it and sees itself tied up with the corresponding political, economic and opportunistic considerations that are institutionally beyond its remit and for which it is not constitutionally designed".

The third defining element is the attribution of a tripartite structure, integrated by the principles of suitability, necessity and proportionality in a strict sense, the application of which is preceded by a mechanism of constitutional control that differs from that of proportionality in a broad sense.

Thus, in judgment 55/1996, of 28 March,[31] the Constitutional Court considered that the logical *prius* of proportionality in a broad sense is the existence of a legal asset "or an immediate or intermediate end of protection that is constitutionally relevant"; the absence of which could therefore determine the declaration of unconstitutionality of the norm in question. Having overcome this preliminary filter, the principle of suitability comes into play, although as a mere rhetorical expedient. In this case,—the Constitutional Court argues—the suitability of the punishment has not been questioned, nor do reasons exist to doubt whether the requirements of the aforementioned principle might concur. When going on to concern itself with the principle of necessity and insisting on the amplitude of the margin of freedom that the legislator enjoys, the Spanish Constitutional Court concurs with its German counterpart when defining necessity in terms of the existence or worth of alternative less costly measures but of the same efficacy.[32] In consequence, "Only if, in the light of logical reasoning, of unchallenged empirical data and of the portfolio of sanctions that the same legislator has thought

application influence the behaviour of the recipients of the norm—intimidation, elimination of private shame, consolidation of general ethical convictions, reinforcement of the feeling of fidelity to the order, resocialization, etc.—and that are doctrinally classified under the denominations of general prevention and special prevention. These effects of the punishment depend in turn on such factors as the seriousness of the behaviour that it is intended to dissuade, the factual possibilities of its detection and sanction, and the social perceptions relating to the balance between crime and punishment".

[31] A question of unconstitutionality submitted by the Provincial Court of Seville in relation to punishments imposed on a conscientious objector who refused to comply with alternative social service.

[32] Point of Law 8º.

necessary, so as to arrive at analogous ends of protection, the manifest acceptability of an alternative measure, less restrictive of rights, appears evident for the equally effective achievement of the ends that the legislator desires, could the annulment of the norm in the legal order take place". It is worth noting that the Spanish Constitutional Court, in an explicit way, introduces in its judgment of necessity "valuative patterns that are constitutionally questionable", as a consequence of which, in addition to comparing the decision of the legislator with those adopted in cases involving similar behaviour, assesses the seriousness of the offence committed in itself.

With regard to the judgment of proportionality in a strict sense,[33] the Court, despite circumscribing it to the comparison between the importance of the crime and the importance of the punishment, considers that the legislator determines the abstract criminal framework, uniting this criterion with other multiples, such as that of the importance of the ends to which the incrimination of the behaviour might serve. These ends are considered in concrete cases as constitutionally relevant, surpassing the level of mere administrative interest, and in so far as they justify the repression through criminal Law of the behaviours that harm them.

The same scheme that has just been outlined is basically reproduced in judgment 136/1999, in which the relevance of the protected assets or interests are analyzed, followed by suitability—in the sense that the punishment is "instrumentally apt" for the achievement of the ends that are pursued (Point of Law 23)—and the need for criminal intervention; and, finally, the strict judgment of proportionality. In the strict judgment of proportionality—the Constitutional Court explains—it compares "the seriousness of the crime the prevention of which it seeks to prevent and, in general, the beneficial effects that the norm generates from the perspective of the constitutional values".[34]

Also, judgment STC 60/2010 de 7 of October (Point of Law 9º) establishes the existence of constitutional control prior to its control of the principle of proportionality in a broad sense, which is verification that the norm in question "pursues a constitutionally legitimate end". In other words, it leans towards "the preservation of constitutionally legitimate assets or interests" (Point of Law 10º). Such assets or interests—the Constitutional Court clarifies—do not coincide with the legal asset protected by the norm in question, but they are "the immediate and intermediate ends of its protection".[35] Furthermore, Point of Law 12º underlines that the ends of suitability result in a negative appreciation, in so far as "the measure will have to be deemed unsuitable or inappropriate if it hinders or, even, if it is indifferent to the satisfaction of its ends".

[33] Point of Law 9º.

[34] Point of Law 29º. Previously, on Point of Law 23º, the Court, referring to this same aspect, reproduces Point of Law 6º of STC 55/1996 and 9º 161/1997.

[35] Judgment STC 60/2010 refers on this point to STC 136/1999, of 20 July, Point of Law 23º, which in turn takes as its basis STC 55/1996, Point of Law 7º; and STC 111/1993, Point of Law 9º.

11.4 Personal Proposal on the Configuration of the Principle of the Prohibition on Excessiveness as a Template for the Legitimacy of the Punitive Measure in the Phase Relating to the Incrimination of Behaviour

The preceding analysis suggests some critical reflections on the treatment that both criminal doctrine and the Spanish Constitutional Court have given to the principle of the prohibition on excessiveness.

In the first place, I would like to call attention to the fact that the application of its three integrating principles is usually done by following the same order in which they are presented: confirmation of the suitability of the criminal sanction of a behaviour, its necessity is questioned and, finally, whether the planned punishment is proportionate to the seriousness of the crime is weighed up.[36] From my point of view, the application of these steps is not feasible, in so far as following them might give rise to approaching the appropriateness of the punishment as a protective measure for a particular legal asset before having determined whether or not its relevance justifies the measure in criminal Law. Precisely because, as a first step, logic obliges us to respond to this question, the Spanish Constitutional Court has established—as previously presented—the existence of a *prius* constitutional control of proportionality in a broad sense aiming to verify whether the precept that is questioned "pursues the preservation of constitutionally legitimate assets and interests", in other words, that are neither constitutionally proscribed nor socially irrelevant. Nevertheless, it is difficult to assume that the necessary "*logical prius*" mentioned previously is not integrated in the principle of proportionality in a broad sense, as in judgment STC 62/1982 of 15 October, it was established that the weighing up and judgment of the principle of proportionality in a strict sense has, as an essential element, the legal asset that is the object (and/or end) of protection, as it should be done from "the perspective of the fundamental right and the legal asset that has come to limit its exercise".

In second place, the partial superimposition of the contents of the principles of necessity and proportionality in a strict sense has to be highlighted, which involves some constructions. That superimposition occurs when it is affirmed that the fragmentary nature of criminal Law—which requires, at a minimum, that the legal asset is deserving of the protection of this sector of the legal order and that the attacks upon it are equally deserving with regard to their seriousness—and the

[36] See supra the aforementioned judgments of the Constitutional Court. With regard to the presentations of the doctrine, I have found nothing in which it indicates another order of application, different from the one adopted in the theoretical development or in which it is specified that the aforementioned order is assumed for presentation purpose but not for its application. The exception may be found in Cuerda Arnau (1997), p. 477 footnote 122 i.f., in which the author refers to the entry of the principle of proportionality "from the outset"—and not after—"the moment at which the criminal measure is applied".

subsidiary nature, form part of the principle of necessity and, subsequently, it is estimated that the essential content of the principle of proportionality in a strict sense is the protective end of the punishment, which responds to criteria of necessity.

The aforementioned pattern also becomes visible in the decisions of the Constitutional Court, given that some "constitutionally questionable evaluative patterns" that integrate the judgment of necessity, such as the seriousness of the offence committed in itself, are criteria that belong, in addition, to a judgment of proportionality in the strict sense.[37]

As previously indicated, I believe that this superimposition of contents should be eliminated. To that end, it should be held in mind that the analysis of the principle of minimal intervention highlighted the existence of two different judgments. One begins with the fact that punishment is the most serious reaction that a legal order has to repress socially damaging conduct. It seeks to establish when its employment (to defend which assets and with regard to which attacks) is justified or deserving. The other seeks to determine whether the introduction of non-punitive measures is enough, or on the contrary, whether "heavy artillery" is necessary, to repress a harmful behaviour of a legal good.

Both judgements are not, however, independent from each other and it is likely that the relation that links them leads many authors, and also the Constitutional Court, to bring them together under one and the same principle. Doing so thereby integrating contents and criteria that obey different arguments under the same denomination that, in itself, is unable to encompass them all or the application of which is incoherent. On the one hand, when the sufficiency of a non-criminal measure is questioned to protect a legal asset, the nature of the punishment, its extreme seriousness, is also taken into account. On the other hand, the limitation or legitimization of punitive power demands the combination of the "verdicts" of both assessments. The greater seriousness of a conduct is usually but not always identified with the need for more serious measures for its repression. The criminal measure may be deserved because of certain component with regard to its seriousness (understood in the sense traditionally attributed to the principle of fragmentariety), but a measure from another sector of the legal order might be sufficient to combat it in a general way or in some of its modalities. In other cases, quite the contrary can happen. However, in my view, it is one thing that the result taken from the application of the barometer of fragmentariety impacts on the judgment relating to the necessity of the criminal reaction and vice versa, and another quite different thing that the terms of both judgments be mixed up. This last point leads to a murky analysis and to duplicated contents.

It follows from the above, in my judgment, that it is, in the first place, necessary to determine what type of relation exists between both judgments, for which it is essential to establish whether they both have the same weight in the above-mentioned legitimizing function or whether one of them assumes greater

[37] See STC 55/96.

importance. The importance of each one of them will be decisive to address the order that their application should follow. In second place, I consider that the identification of different principles only acquires a full meaning when each one of them encapsulates and designs a different content. I think that it is possible and very opportune to establish the correspondences between each of the principles that integrate the prohibition on excessiveness with one of the aforementioned judgments. As pointed out earlier, the construction of Günther establishes such a correspondence. Thus, the principle of the necessity of means is a content that is fully coincident with the principle of subsidiarity or *ultima ratio*, related only to criteria of efficiency. The principle of proportionality is conceived as linked in an exclusive way to the idea of justice, encompassing all aspects related to the idea of the deserving nature of the punishment.[38]

I also reason like this author when he affirms that the principle of proportionality in criminal Law, precisely because of its content of justice, assumes greater weight than that corresponding to purely utilitarian considerations. The judgment of proportionality determines the minimums and the maximums of the legitimacy of a hypothetical punitive measure and decides whether the criminal intervention is possible. The realization of this possibility depends on the principle of necessity, from which the criminal measure must be excluded and its intensity graduated within the limits set by proportionality, which is the principle that marks the pattern of criminal intervention. Need or usefulness is a criterion worthy of consideration within the limits of proportionality, which is the principle that shapes the pattern of the criminal measure. It is compliance with the demands of rationality in accordance with values, which leads afterwards to proposing whether or not the end may be achieved through criminal Law.

The principle of the prohibition on excessiveness provides space for the two counterposed ends of criminal law that have previously been defined; the ends of social protection through the prevention of criminal behaviours and the ends of the minimization of punitive violence. All aspects of the principles of suitability and necessity that endorse the incrimination of a behaviour are the expression of the first of these. On the contrary, the second manifests itself through criteria that restrict the maximizing tendency of the ends of social protection. Unlike the first of these ends, of a purely utilitarian character, the ends of the minimization of punitive violence possess aspects that respond to a judgment of utilitarian rationality and others that might be traced back to value-based rationality. Those that obey utilitarian rationality form part of the principles of suitability and necessity. Those that respond to rationality in accordance with values are in my opinion integrated in the principle of proportionality in a strict sense, which only contain requirements relating to the seriousness that has to characterize a behaviour, so that it may legitimately be

[38] Thus Silva Sánchez (1992), p. 291. Although the author refers to the deservedness and the necessity of a punishment, his affirmation supports the inclusion in the text, in so far as Silva attributes a content of proportionality to the first and a content of utility to the necessity for the punishment.

incriminated. Those requirements exist—I insist—regardless of any consideration relating to the efficacy or to the utility that the punitive measure may entail.

The judgment of proportionality in a strict sense, given its direct connection with the idea of justice, possesses greater weight than the judgment of utility in the legitimization of the actions of criminal Law. Thus, the requirements that the principle of proportionality imposes determine whether incrimination of a socially damaging behaviour is justified and, if that is so, what the maximum scope of an eventually prohibitive precept is. The synthesis of the aforementioned utilitarian legitimizing criteria will take place within the limits established by those requirements; in other words, of those criteria that constitute the expression of the ends of crime prevention, which advocate the option of criminalization, and of the guarantist principles that oversee the minimization of violence. This synthesis can justify a more limited punitive measure than the one permitted by the principle of proportionality in a strict sense. It can even delegitimize the punitive option for reasons that are always linked to the idea of efficacy or utility. It may not, on the contrary, enlarge the area set aside for the application of the principle of fragmentariety.

Two levels or phases in which these principles are active should be distinguished, so as to define the role that each one of these principles plays in the process of incrimination (or decriminalization).

At a first level, it is questioned whether a particularly damaging social behaviour should be repressed and what the nature of that repression should be (extrajudicial, civil, administration, criminal. . .). Taking Criminal Law as a point of reference, this first level could be described as an external one, given that aspects enter into play that advocate opting either for its intervention or for its total or partial exclusion. An initial favourable response to criminal protection of a legal asset, based on its particular relevance within the social system does not mean that it is considered legitimate to dispense indiscriminate protection to it, but that as the principle of fragmentariety in a strict sense indicates—which I consider an integral part of the principle of proportionality in a strict sense—that protection should restrict itself to the most intolerable of the attacks to which it is subjected. Moreover, with regard to necessity, the punitive defence of that asset—whether generally or in relation to some forms of attack—may not be required, as an equally effective or greater degree of protection may be reached with softer measures. The principle of subsidiarity compares various measures previously considered suitable to reach an end. Organized in accordance with criteria based on economics and efficiency, it obliges the adoption of measures with the fewest possible consequences for individual citizens and the general public. The principle of subsidiarity understood in this way arises from the ends of the punishment. State attacks on the legal status of the individual should not go beyond what is required by the objective that they serve.

Externally, the principle of subsidiarity attributes a subsidiary character to criminal Law, by making it the *ultima ratio* of the legal order: it should only take action against a socially harmful behaviour when this may not be effectively

repressed by less harmful means.[39] As has been pointed out, the application of the filter of subsidiarity requires at its external level, previous awareness of the concrete effectiveness of the different legal consequences on the repression of a behaviour. From this perspective, the principle of suitability is a presupposition of the principle of necessity.

At an external level, the "if", the "how" and the "up to what point" of the criminal law measure are clarified.

When the criminal measure appears fully legitimized, a second level is reached in which the aforementioned principles once again intervene, together with other criminal principles, in the specific definition of the criminal offence, of its component parts and of the abstract punishment. Following the same criteria used earlier, this second level can be called "internal". In broad terms, it may be said that proportionality demands that the seriousness of the punishment to be imposed be in line with the seriousness of the specific criminal offence. Moreover, the principle of necessity requires that the legislator justify recourse to the most serious punishment at the expense of another softer measure—with regard to its nature, character and/or extension—[40]; and, previously, requires a similar justification in relation to the level of suitability—also in relation to its nature, character and/or extension—of the various punishments that may be imposed.

The ordering of the process of incrimination of a conduct in accordance with the aforementioned plan would be what is set out below:

11.4.1 External Level of the Principle of Proportionality in a Broad Sense

1. Fragmentariety (expression of the principle of proportionality in a strict sense)
   (a) Most important legal assets. Presupposition: existence of a legal asset. Principle of exclusive protection of legal assets. Content: relevance of the asset.
   (b) Most serious attacks. Presupposition: principle of harmfulness. Content: disvalue of the action-disvalue of the result.
2. Necessity:
   (a) Presupposition: Suitability of criminal Law to achieve the desired end, in other words, to avoid behaviours that are harmful to the legal asset without causing greater damage than which it seeks to avoid.

[39] I use the qualificative adjective "subsidiary" in so far as it is a synonym of ultima ratio and not in its sense equivalent to "accessory" or endowed with a "secondary nature" or "merely sanctioning".

[40] The existence of this internal level of the principle of subsidiarity is highlighted by Silva Sánchez (1992), p. 247; Niggli (1993), p. 238 ff., and García Pérez (1997), p. 339.

(b) Subsidiarity: the imposition of punishment has to be necessary, in other words, it has to demonstrate that other sectors of the legal order fail to reach a satisfactory level of protective efficacy of that asset at lower costs (necessity of punishment).

As may be confirmed, I do not assume the thesis maintained by our Constitutional Court and by a sector of the doctrine, by which the efficacy of the non-criminal measures that may be selected rather than criminal Law measures has to be equal or better than the efficacy of the criminal sector of the legal order. I will return again to this point later on.

11.4.2 Internal Level of the Principle of Proportionality in a Broad Sense

1. Proportionality of crime-abstract punishment
2. Necessity of more or less serious abstract punishment:
   (a) Presupposition: Suitability of the punishment foreseen to achieve the desired end, or to avoid behaviours that may be harmful to the legal asset without causing greater damage than that which it seeks to avoid.
   (b) Subsidiarity: Necessity for the punishment. It has to be demonstrated that another less serious punishment (different in its nature, character and/or extension) is not achieving a satisfactory level of protective efficacy at lower costs.

Obviously, these abstract assumptions are in need of refinement. It is necessary to develop each one of these principles in a way that can really operate as limits to *ius puniendi* in practice. In what follows, although with modest pretensions, limited moreover by reasons of space, an exploration with such a view is completed into the contents of the principle of necessity or subsidiarity.

11.5 Personal Proposal for the Definition of the Principle of Necessity or Subsidiarity

11.5.1 Previous Considerations: Subsidiarity of the State Intervention Through Law to Avoid Socially Damaging Behaviours as a Manifestation of the Principle of Need

In general terms, the principle of necessity or subsidiarity imposes a clear limitation on the intervention of public powers linked to a democratic State living under the rule of law: the attacks on the legal positions of individuals should not go any

further than whatever the object that they serve might require. Hence, when the legislator seeks to combat a socially damaging behaviour, he is obliged to chose the means that are the least onerous as possible to achieve that end. However, the above principle brings a preliminary duty to the legislator to evaluate the degree of onerosity presented in the different measures of the legal order at his disposal, which is to determine whether the avoidance of that social damage really requires or not, in general terms, the intervention of the Law.

In effect, in accordance with the principle of subsidiarity, the distribution of tasks duties and rights in society has to be done in a scaled and ascendant way, starting from a first step in which the individual is found. Groups, associations and organized groups (intermediate bodies) occupy the following steps, the penultimate and the last of which would correspond, respectively, to the State and to the organizations or unions of States endowed with regulatory power.[41]

When the intention is to assign the completion of a particular task, the step to a higher grade—in other words, its attribution to a higher instance—is only justified to the extent that the individual or group that is convoked, in the first place shows itself to be incapable of doing so, given its resources, capabilities and/or power. So, the incumbent of a higher position in this social design must abstain from all action (a negative aspect of the principle of subsidiarity) until unable to do so any longer due to the manifest incapability of the lower body. Such a requirement having arisen, the duty to abstain disappears and with it the obligation to intervene arises (a positive aspect of the principle of subsidiarity) (Kaufmann 1973, p. 91 f.; Justo López 1981, p. 23 ff.).

From what has been presented, the decisive influence of the principle of subsidiarity on the definition of not only the role of individuals in the development of the social system but, above all of the patterns of action to which the public powers should adapt themselves may be deduced. In relation with the functions of the latter, it has been upheld that a correct understanding of the aforementioned principle should cover both its negative and its positive aspects.

In accordance with the negative side, characteristic of a liberal State, the State should abstain from giving help when the individuals or the group do not need it, its role having to be limited under such circumstances to the maintenance of sovereignty, to make sure peace prevails and to uphold a legal order (Kaufmann 1973, p. 98). In accordance with the positive aspect, also called the principle of solidarity—proper to a social State—the public powers are obliged to lend help to the individual and to other intermediate bodies in the works that these individuals and bodies can not perform. By virtue of its positive or social appearance, the state entity is not, however, a mere substitute for the provision of assistance, but it represents "a perfectionism and a complement based on the essence of human

[41] In my opinion, this aspect may not be by-passed at present. Although it is true that the constructions on the principle of subsidiarity that could be considered classic contain no references to it, I think that such an omission is merely due to the time in history in which they were drafted. At that time, suprastate organizations and unions such as the European Union represented, at most, mere aspirations.

personality and required by it", which is translated into such aspects as the guarantee of legal assets and fundamental laws necessary for personal fulfilment, the offer of basic opportunities through the corresponding institutional measures and in numerous specific grants (Kaufmann 1973, p. 98). Moreover, its intervention is not an excuse for the other groups and individuals not to provide assistance, but that, in many cases, given the nature of the desired objective, they should assist in its achievement (Kaufmann 1973, pp. 98 and 99).

Both aspects—positive and negative—express counterposed, although complementary requirements and tendencies, which, as pointed out earlier, should be included in the interpretation of the aforementioned principle. Each one of them conditions in a different sense the role of the intervention of public powers in their diverse manifestations. With regard to the expressions linked to the exercise of social control, it may be said that the principle of subsidiarity integrates public powers as a security mechanism in a complex machine, in such a way that its activation is subordinate to the failure of other devices that were operating earlier, whether it is to substitute them, or to reinforce them.

However, given that the principle of subsidiarity has as its basis the relations between the individual and the community and that these are not produced in accordance with laws that are presented *a priori*, but in accordance with a concrete situation, their application to a specific subject area does not provide a response in a direct way to the question of whether that corresponds to the individual or to the collective (Kaufmann 1973, p. 99 f.). It is a matter of an initial guiding principle (Kaufmann 1973, p. 97), the virtue of which consists in adjusting the decision that was adopted to the state of things that exist and the concrete necessities (Kaufmann 1973, p. 99 f.).

It may be understood from the arguments presented above, that called to participate in the work of preventing a socially damaging behaviour, they are, on the one hand, in principle, different subjects or instances (intermediate bodies) from public powers. But, on the other hand, the necessity also follows from those arguments to analyze the real effectiveness of those intermediate bodies in the performance of their mission, in such a way that the success or acceptability of the control exercised by non-state instances would suppose an obligation for the State or the supra-state organizations[42] to waive their role in the matter. On the contrary,

[42] In the case of Spain and the other member States, the normative capability of the European Union may not be forgotten. The Treaty on European Union in its consolidated version (Official Diary of the European Union of 30 March 2010) establishes under art. 3 that "The Union shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties". In accordance with sec. 3 of the aforementioned art. 5 "Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol".

the incapability of those organizations to act would imply state intervention of a compulsory nature through legal channels. The principle of suitability is therefore revealed, as a presupposition for the application of the principle of subsidiarity.

11.5.2 Its Presupposition: The Principle of Suitability

11.5.2.1 General Considerations

As previously pointed out, the judgment of suitability responds exclusively to utilitarian and to economic criteria, by virtue of which an instrument may be considered unsuitable to achieve its end when it is not possible to reach it, showing itself to be ineffective. In the most extreme cases of lack of suitability, the measure under consideration is counterproductive with regard to its chances of achieving the desired objective.[43]

The mission of the principle of suitability is to contribute the grounding on which the principle of necessity should operate. As, through the application of the latter, the aim is to determine whether other less damaging means than criminal law are capable of effective protection of a particular asset, I think that there are two objectives that the criterion discussed here should meet. In the first place, its requirements should serve to exclude those measures that, given their incapability to reach the aforementioned end, should not be taken into consideration at the time of adopting a legislative decision. In second place, it should allow us to establish in a way that is as closely connected to reality as possible, what the degree of efficiency or suitability is that may be expected from each of the measures examined for the completion of the end that is pursued.

11.5.2.2 The Need to Adopt a Global Perspective When Determining the Suitability of the Intervention in a Sector of the Legal Order for the Avoidance of a Socially Harmful Behaviour

The suitability of the measure for a sector of the legal order in the avoidance of a socially harmful behaviour is usually evaluated by adopting a particularist perspective; in other words, by responding only to the degree of efficacy that a particular regulation reaches to protect the concrete legal good that is affected by that conduct. Some theoretical presentations in relation to the principle of suitability in the field of criminal Law will support my affirmation (Günther 1983, p. 186; Arroyo Zapatero 1997, p. 4). And the same may be said of the construction of the

[43] Thus, in the opinion of Arroyo Zapatero (1997), p. 4, for whom the principle of suitability coincides with the capability for criminal protection, "the legal definition of behaviour is inadequate when no protection whatsoever will be obtained from the legal asset or, more so, when its legal definition will cause more damage than benefits".

Constitutional Court, which only contemplates the effects that the regulation generates the constitutionality of which is questioned in relation to the ends of the punishment.

Adopting a broader perspective, other authors refer that evaluation to the totality of the effects that the protection given to a legal asset can generate. In other words, both the effects that have a relation with that asset and those effects provoked by the protection of other legal assets. This analysis reveals that a "suitable" legal measure to reach a particular end can provoke negative or counterproductive ends on the protection of other socially valuable purposes, preventing or hindering it (García Pérez 1997, p. 338).[44] In effect, a global contemplation of the social system reveals the existence of perverse "collateral effects"; at times, the efficacy achieved by a particular sector of the legal order in safeguarding some areas of the social system, generates inefficacy in others. Some penalists have turned to the example supplied by the accusation of blackmail through the offence of conditional threats during the validity of the earlier Spanish Legal Code, in order to illustrate this argument. Given that the accusation of blackmail relating to the exposure or report of an earlier offence that had been committed brought with it, for the person who was blackmailed, a charge that was more than likely to accuse him of that offence, the person in question usually chose to continue living with the threats that violated the protected legal asset (García Pérez 1997, p. 338 f.). This situation of the protection of an asset at the cost of leaving another unprotected one was partially corrected by the legislator in the Penal Code of 1995, which introduced under art. 171.3 the possibility that the Ministry of Justice "to facilitate the punishment of the threat" might decline to open a case for a crime the revelation of which might have been threatened, provided that the foreseen sanction was not over 2 years (García Pérez 1997, pp. 338–339).

The adoption of a global perspective—in the previously mentioned sense—in the analysis of the suitability of the measure from a sector of the legal order for the solution of a social conflict appears essential to me in view of the application of the principle of the prohibition on excessiveness.[45]

Moreover, it should be remembered that the same sector can offer different formulas or regulatory structures in the valuation of the suitability of a legal measure, to each of which a level of suitability or efficiency may correspond that is also different. Hence, it is necessary to distinguish between abstract suitability that presents a particular type of measure, a quality referring to the general aptitude of a particular sector of the legal order to protect a legal asset, and the concrete suitability of a particular normative expression from that sector. This question assumes particular importance, given that, quite often, a simplistic view is adopted

[44] This author makes no reference, however, to the suitability of the measure as a specific demand within the principle of necessity.

[45] The importance of this global valuation has previously been pointed out from the viewpoint of economic analysis of Law Coase (1960, 1988), p. 26 f. For this author, the advantages of the intervention of the state in the correction of an externality should not be overvalued, given that the legal measure also has its costs.

and the unsuitability—for example—of criminal Law or of administrative sanctioning Law to sanction a particular behaviour is affirmed when, in reality, the lack of suitability may only be predicated from a concrete precept with regard to its content and the interpretations that those contents provoke.

The legislator may also be expected to adopt the formula or the legal measure for the prevention of a socially harmful behaviour that responds to the true response capability of the legal sector from which it proceeds. This aspect assumes particular relevance when the aforementioned measure is of a punitive nature. On the one hand, the limited nature of human resources and materials that a State can allocate to the prevention of infringements: the amount of resources assigned to the repression of a modality of behaviour can result in a reduction in the level of protection given to other forms in which the same behaviour or harmful behaviours for other legal assets manifest themselves. Moreover, for strictly criminal behaviour, it should be remembered that a suitable criminal definition is not one that covers the whole range of punitive action that is permitted by the principle of fragmentariety, but that which is suitable for the real capabilities of punitive control. A criminal Law that is unable to comply in an acceptable way with the preventive function that is its purpose is nothing more than a "paper tiger". The punitive measure or its more energetic use in sectors in which structural problems exists that it can not solve and that it is more likely to aggravate, gives rise to a profound "deficit of implementation" that, in addition to a worsening of the situation, leads to a generalized loss of prestige for criminal Law (Hassemer 1993, p. 642).[46]

Special attention from this point of view has to be given to the requirement that every incrimination of a behaviour also has suitable procedural resources for its effective application.[47]

[46] The deception that the symbolic function brings with it, as Hassemer highlights, finally leads to a loss in trust in the justice system: "the explosive mixture of great "necessities for action" of a social nature, of almost blind faith in the efficacy of juridical-penal measures and of the enormous deficits that these instruments then have when they are in reality applied, can give rise to the danger that criminal law lives off the illusion of really solving its problems, when in the short term, it can be gratifying, but in the long term it is destructive". In his opinion, it is necessary to end that tendency, written into the phenomena that the author refers to as a "dialectic of the modern, that leads—erroneously—to considering criminal law capable of resolving social problems. The proposal of Hassemer to remedy this situation is articulated around two large axes, which are the reduction of criminal law to a basic penal law and the creation of a law on intervention. This new sector of the legal Order (par. 646) situated between criminal Law and administrative sanctioning Law, civil Law and public Law, would try to give a solution to the specific problems of modern societies.

[47] Insisting on this point, Aguado Correa (1999), p. 154 f.; Hassemer and Muñoz Conde (1995), p. 32 f. These authors refer critically to the opening of large processes in sectors such as the environment, public health and the economy that do not usually go beyond the instruction phase, in contrast with a selective application of the law on "little fish". The principle of procedural practicality proposed by Díez Ripollés (1997), p. 15 f., to mitigate the lack of coordination between criminal Law and the procedural means that are detected in practice that prohibit criminal measures on conducts that are not accessible to the operative conditions of the criminal process, whether inherent to their fundamental principles, or whether produced as a matter of contingence, but frequently and that are insurmountable".

What has been established so far in relation to the external level of the principle of subsidiarity is also applicable to what has been called *supra* the internal level, within which attention must be paid to the presupposition of the suitability of the abstract punishment. Having determined the legitimacy of the criminal Law measure to protect a legal asset, it has to be taken into consideration that it can offer multiple responses with different degrees of preventive efficacy and "collateral effects" that also differ—in quality and number—on other assets and interests different from those whose protection pursues the applicable punishment.

In my opinion, the analysis that the Constitutional Court applies in the light of the principle of suitability in judgment 60/2010 constitutes a paradigm for the lack of attention paid to this point, as the Spanish Court only takes the efficacy of the punishment under question into consideration to achieve the ends that it pursues, overlooking the negative effects in its analysis generated by its imposition on other legal assets other than those protected by the offence. The constitutional complaint raised by the Provincial Court of Las Palmas[48] challenged the obligatory imposition of no-contact order (distancing order). The Chamber began with the consideration that a distancing order involves the privation of rights that affects various rights of the convicted person, but also of the victim and, in some cases, it also impacts on shared children.[49] Likewise, it considered that art. 57.2 Penal Code violated the principle of proportionality of punishments (art. 25.1 SC in relation to art. 9 SC) because, given the way in which the criminal precept in the request was worded, it failed to identify which legal asset the punishment sought to protect with sufficient clarity; provided that it was applied to a multiplicity of crimes, not only to the habitual ones of damage and of mistreatment, but also to offences against honour and against patrimony, in which no danger to the victim's safety is generated. In addition—the constitutional complaint—its imposition overlooks the seriousness of the act and the danger that the criminal represents, aspects that, on the contrary, are applied when the victim has not family link with the convicted person. Furthermore, the punishment—the chamber argues—would turn out, in its own time, to be unnecessary, on the one hand, because its purposes are achieved with the principal punishments envisaged for each of the crimes and, there again, because art. 57.1 SC allows the courts to apply the distancing order when considered necessary for the protection of the victim, even against the victim's wishes. Further still, in the concrete case, it would not have been demonstrated that a distancing order were

[48] 23 November 2005.

[49] It has a direct impact—as affirmed in the constitutional complaint—in the right to family intimacy (art. 18.1 SC), as a consequence and arising from the right to free development of the personality (arts. 1.1 and 10.1 SC). It affects the freedom of residency and of the freedom of movement within national territory (art. 19.1 SC), the right to contract and live in matrimony (art. 32 SC) and the right to work in the profession of one's choice (art. 35 SC). Likewise, the Court considers a quo that the introduction of this punishment against the will of the victim would entail a flagrant breach of defence rights contrary to art. 24.1 SC, given that a measure is imposed that undeniably affects the victim without that person having been heard and without having participated in the proceedings.

necessary for the protection of the rights of the woman and the shared children but that, instead, the effectiveness of such a punishment could place family coexistence at serious risk.

As pointed out earlier, the Constitutional Court limited itself to consider that in order to appreciate the appropriateness of art. 57.2 SC "it is sufficient that the provision under question contributes in some way to the achievement of the desired end, in such a way that it would only be necessary to declare the unconstitutionality of it in this phase of the control of proportionality, if it were manifest that the obligatory imposition of the distancing order frustrates or, at least, is indifferent from the perspective of compliance with its ends".[50] The adoption of such a limited perspective should, in my opinion, be rejected. The contemplation of the multiple "collateral effects" generated by the obligatory imposition of the accessory distancing order, opportunely expressed by the court *a quo*, is obligatory when the suitability of the measure is analysed, the constitutionality of which was challenged. The aforementioned assessment should take place, moreover, not only when the criminal measure is analyzed, but also once the legitimacy of such a measure has been established.

From this point of view, it may be reproved that the Constitutional court considers that the proposed alternative in the constitutional complaint is the elimination of art. 57. 2, given that the court *a quo* steely criticizes that the reform operated in Organic Law 15/2003 changed the nature of the distancing order from facultative to obligatory and, in addition, offered arguments in defence of its facultative application with regard to the circumstances of the particular case and of the convicted person.[51] The affirmation of the Constitutional Court that the alternative to the accessorial punishment of a distancing order can only be its suppression, highlights that, despite the careful reasoning contributed by the writ of certiorari, the possibility of considering—due to lack of suitability—its obligatory nature disproportionate is not even raised.

[50] Point of Law 12º.

[51] On Point of Law 15º it establishes that: "(...) However, as in this case a norm contemplates the preceptive imposition of an accessory sanction and as the alternative measure is also affected by its mere disappearance, the arguments developed earlier in relation to the appropriateness or suitability of the measure that is challenged allows us to arrive in time at the conclusion that the sanctioning regime that is derived from the inexistence of art. 57.2 SC would in no case be equally effective for the satisfaction of the end that is pursued than the measure contemplated by the provision that is challenged. This is so because the alternative measure would simply disappear, without the increase in efficacy being compensated through other channels that is measured by the positive contribution of the enforcement of the distancing order to the protection of legal assets protected by the criminal offences contemplated under art 57.1 SC through the function of the prevention of future harm."

11.5.2.3 Intervention of Criminal Law and the Principle of Subsidiarity

As previously indicated, I consider that the content of the principle of subsidiarity is of a purely utilitarian nature, in such a way that the comparison between the different measures applicable to achieve the objective that it is intended to establish will respond to criteria that are exclusively based on economics and efficiency. Through this prism, from which criminal Law is contemplated as the *ultima ratio* of the legal order, the punitive measure to protect a legal asset is only legitimate if it is not possible to provide effective protection to it through another less harmful subsystem of social control. Obviously, only those measures that allow the set objective to be reached can be considered elements on the aforementioned comparison. In other words: only the means that have satisfied the requirements imposed by the principle of suitability enter into consideration.

Having set this down, the application of this principle begs two broad questions. The first of them has to do with the degree of effectiveness or suitability required from a measure so that it may be considered as an alternative with regard to the criminal Law. The second question revolves around the subjects with regard to whom the onerosity of the measures will have to be determined from among which the legislator has to choose: "for whom does it have to be less serious? For the individual citizen who will be sanctioned by the violation of the mandate or prohibition or for the whole community?" (Arroyo Zapatero 1997, p. 5). Given the limitations on space in the work, only the first of these two questions will be approached in the following lines.

The most demanding position in relation to the efficacy of the non-criminal measures is expressed by the German Constitutional Court, which expresses the opinion that the failure of a softer measure justifies a more serious measure, the doubts over the effectiveness of the first being enough to consider a harsher but more effective measure necessary. This consideration linked to the conviction that the general-preventive effects of criminal Law exceed those generated by the remaining branches of Law, leads to a broad justification of the incrimination of behaviours. In view of the opinion of the German High Court, some authors consider that recourse to the criminal sanction is only legitimated when it achieves a significant reduction in the number of infringements of a particular mandate or prohibition in comparison with the preventive level reached by other measures (García Pérez 1997, p. 338). Another has been the opinion expressed by the Spanish Constitutional Court, which has established in its resolutions that the principle of necessity prohibits the adoption of more intensive measures only when the forms of the weakest attacks show "the same" or "similar suitability", or "a manifestly similar functionality" pursuant to achieving the end. From this point of view, the criminal norm or the criminal sanction is considered unnecessary when "in the light of logical reasoning, the unchallenged empirical data and the set of sanctions that the same legislator has considered necessary to achieve the analogous ends of protection, the manifest acceptability of an alternative measure is evident, that is

less restrictive of rights for the equally effective achievement of the ends desired by the legislator".[52]

From my point of view, contrary to the opinion expressed by our Constitutional Court and by the majority doctrine,[53] the efficacy of the alternatives to criminal measures do not have to equal the level that the criminal ones achieve, as such a requirement practically rules out the restrictive scope of the principle of necessity. Suitability of the criminal measure presupposes the existence of a toxic effect the elimination of which calls for—in an exclusive way or in combination with other types of measures—the application of sanctions that have a dissuasive effect. Given that—in a general nature—no other sector of the legal order possesses characteristics from which a higher level of protection may be expected than that achieved by criminal Law, the option of the legislator in favour of criminal law would rarely be lacking support. Having noted the suitability of dissuasive measures in a particular issue, the criminalizing option would always emerge triumphant in the comparison with other sectors. In accordance with this pattern, only those behaviours with regard to which the manifest lack of suitability of the punitive measure could be proven, could legitimately escape from the long arm of *ius puniendi* (Tiedemann 1991).[54] In the remaining cases, the lack of empirical data leads one to presume the higher degree of effectiveness of criminal Law, a presumption that, also due to the lack of knowledge relating to the efficacy of other sectors, hands the legislator a "white card" to appeal for the punishment. It is true that, as Roxin affirmed, "the principle of subsidiarity is more of a criminal policy guideline than a forcible mandate" (Roxin 1994, p. 25). But if it is wished that the principle of necessity really does exercise a control function over material legitimacy and does not operate as a mere formal register that identifies the suitability of criminal law with its necessity, I think that it is necessary to accept measures with lower levels of efficacy than those obtained by *ius puniendi*.

However, it appears equally necessary to establish a minimum limit or optimum level of efficacy that may be required from any legislative option that is presented

[52] STC 60/2010 Point of Law 14º, in which the Constitutional Court cites STC 55/1996, [RTC 1996, 55] Point of Law 8º and STC 136/1999, of 20 July [RTC 1999, 136], Point of Law 23º. Point of Law 15º of STC 60/2010 established that: "In short, in so far as the alternative measure proposed in the constitutional complaint effectively generated a greater restriction of the constitutional rights and principles affected as a consequence of the criminal norm that was challenged, it may not be considered reasonable that it displays a similar degree of achievement of the ends that are sought, for which reason it has to be concluded that the preceptive imposition of the distancing order contemplated under art. 57.2 SC satisfies the requirements of the principle of necessity.

[53] Italy too is in a majority position, and the Circular of the Presidency of the Italian Council of Ministers of 19 December 1983 required the same efficacy. See Dolcini (1987), p. 795.

[54] The author criticises that the German Constitutional Court in the judgment on the decriminalization of abortion (BVerfG 39, 1, 42 ff.) should exhaustively check the forms of alternative protection but not call into judgment the preventive aptitude of criminal law to protect the life of the nasciturus nor demand an empirical and a criminological grounding. The German High Court, added Tiedemann, did empirically confirm on the other hand the correction of the legislative decision of the old § 175, which punished homosexual behaviour.

as an alternative to criminal law in the protection of a legal asset. Such a limit, unlike what is sustained by the resolutions of the Spanish and German constitutional courts, will not always coincide with the level of efficiency of criminal law. To set an optimal and socially acceptable pattern of protection in relation to each legal asset that could be criminally protected and the behaviours that attack each asset is, in my understanding, essential, if we wish to avoid provoking the opposite effect that was pointed out earlier. If, as I have argued beforehand, requiring a level of efficiency from non-criminal measures that is comparable to criminal law means preventing all legislative interventions outside of the exercises of *ius puniendi* when this is suitable, considering that enough to reject the criminalization with which they obtain weak results, would be to support not only the subsidiary nature of criminal law, but its exceptional nature at the cost of leaving society unprotected. It is true that empirical knowledge of the efficiency of the different subsystems are scant, but it is no less true that the results of earlier legislative experiences, both internal and international, also constitute a valuable guide. Furthermore, we have some orienting guidelines that should be followed by the legislator. We know, for example, that however much more extensive the social damage that provokes the behaviour, the greater the social demand for efficacy in its repression. Hence, we may infer that the more doubtful the suitability of a non-criminal measure, the less prepared society will be to accept its application in the repression of that behaviour. Likewise, I think that it may be stated that the greater the social harm that a particular behaviour will inflict, the greater the costs that society will be prepared to assume to combat that harm.

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Part IV
Evaluation and Judicial Control

Chapter 12
Constitutional Control of Criminal Law

Juan Antonio Lascuraín

Contents

12.1 Introduction

In their function of control over criminal law, constitutional judges often feel something like Ulysses between Scylla and Charybdis. If they consider that the law under question does not comply with the parameters of the Fundamental Law and decide to annul it, they run the risk of enduring the democratic objection that in spite of the secondary nature of their legitimation, they are correcting the representatives of the people.[1] If out of respect for the latter, they tolerate the existence of

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[1] Consider, for example, the decision of the Spanish Constitutional Court that decided to declare unconstitutional—on account of its violating the right to freedom of expression—the criminal law sanctioning the negation of genocide (STC 235/2007). Article 607.2 of the Spanish Penal Code contemplated one to two years' imprisonment for "the dissemination by any media of ideas or doctrines that deny [. . .] the crimes defined in the previous section of this Article", which are those of genocide. See, in this respect, Lascuraín Sánchez, "La libertad de expresión tenía un precio

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laws "of poor constitutional content", so to speak, they can be criticized for their axiological insensitivity and the pointlessness of the institution to which they belong.[2]

The aim of this article is to examine this dilemma in depth and to suggest an escape route from it, through a moderate criterion of deference towards the legislator. I will base my exposition on the Spanish experience of constitutional control over criminal law.

12.2 The Criterion of Deference to the Legislator

The primary democratic objection to the action of the constitutional courts is nothing more than a reflection of the classic objection to the model of the constitutional state: Why should Parliament—the direct representative of the people—have to be tied to what is written in the Constitution? Why must the people be bound to what was decided in the past or what was stated, in fact, by another set of people? Would not the Legislative rule of law be better–better, that is, from the point of view of democratic legitimation?

This objection has had some very convincing rebuttals. So convincing that democratic states continue to be, for the most part, constitutional states. Although it would go beyond the scope of this article to analyze such rebuttals in any detail, I find it useful, as an indirect defence of constitutional jurisdiction, to mention the essential nerve that runs through them, which is none other than the guarantee of the procedural and substantive essences of the system. Without political liberties we cannot know what the majority want, nor whether the law is a just expression of this; on the other hand, without the remaining fundamental rights and liberties the system enters into contradiction with its own axiological assumptions, and fails to guarantee the possibilities of full participation by all in public affairs.[3]

A Constitution sets out to uphold the system by embodying its essential features in a supreme text, normally approved by qualified majority and by referendum, the normative force of which is subject to judicial control. Such texts enshrine the rules of the political game—binding upon the legislator as well, to whom such founding, genuine agreements constitute a *coto vedado* (or "protected reserve"), to use the felicitous expression of Garzón Valdés (Garzón Valdés 1993, p. 644 ff.). Of

(Sobre la STC 235/2007, de inconstitucionalidad del delito de negación del genocidio)", in Revista Aranzadi Doctrinal 6, October 2010, pp. 69–78.

[2] We may recall, for instance, STC 161/1997, which held that the statutory rule sanctioning the mere refusal to submit to a police alcohol test with a penalty greater than that for driving under the influence of alcohol was not unconstitutional on the grounds of disproportionality.

[3] As Villaverde Menéndez states, "the existence of fundamental rights is consubstantial to the model of the democratic constitutional system, because the latter, in order to be such, presupposes, precisely, that basic legal statute of the person and the citizen, without which there is no democratic rule of law". See Villaverde Menéndez (2002), p. 320.

course—as Bayón Mohíno has stressed—"it is a matter of controversy which rights must be considered 'preconditions of democracy'" and how we are to resolve that controversy in the awareness that "the procedure of majority decision does not in fact constitute a valuable ideal [. . .] unless certain prior conditions are satisfied; but the more demanding the definition of these conditions is, the greater the number of questions will be that, as prerequisites for democracy, must be excluded from the procedure of majority decision [. . .]. The way out of this dilemma [. . .] doubtless requires the articulation of a normative theory that justifies a point of equilibrium between both demands" (Bayón Mohíno 2010, p. 298 ff.) Such a point will arise, speaking now in Rawlsian terms, from the fact that a less extensive freedom of participation is sufficiently compensated for by the greater security and extension of the remaining liberties (Rawls 1971, p. 229).

Another incisive objection to the rule of majority decision is that directed precisely against a certain type of control of the constitutional courts, whether specialized or not. Such an objection would indeed concede priority to the Constitution—not, however, to a constitutional court, but to the legislators, as regards everything that is left open-ended within it. If the constitutional framework of the law is not negated beyond doubt, but only questioned to the degree that involves a certain interpretation of the constitutional text, there would be no democratic sense in making the understanding of the court prevail over that which has served as basis for the democratic legislator. In Jeremy Waldron's words, "when citizens or their representatives disagree about what rights we have or what those rights entail, it seems something of an insult to say that this is not something they are to be permitted to sort out by majoritarian processes, but that the issue is to be assigned instead for final determination to a small group of judges" (Waldron 1999, p. 15).

This objection is of considerable relevance for the type of constitutional control that I shall now deal with, that of criminal laws, which are usually challenged less on the basis of rules and more on the basis of principles. And the principles, inasmuch as mandates for the optimization of particular constitutional values (Alexy 1998, p. 12) are not only rarely set forth explicitly in the Constitution but, when they are, they do not contain the definition of the minimum content may be constitutionally required.

To control a law through the parameter of a principle supposes a high degree of discretion. Control on the basis of rules calls for affirmative or negative answers—yes or no: the rule prohibiting murder is either observed or not, you either kill or you don't kill, you do not just kill a bit; principles, on the other hand, imply a quantitative graduation as regards the greater or lesser degree of conformity of a rule to a value. A rule can be more or less precise, more or less defined and, along with that, more or less in accordance with the principle of legality and, in that sense, more or less constitutional. And in terms of that *continuum*, that *sorites*,[4] it is

[4] The paradox of the *sorites* (from Gk. soreites < soros, a heap) is attributed to Eubulides of Miletus, a contemporary of Aristotle; it consists in determining how many grains of wheat are necessary for a heap of wheat to exist. Beyond the logical implications of the paradox, the

certainly discretional, it has a strong component of decision-making—not of derivation from a previous decision but, rather, the generation in fact of a new rule, the determination of a concrete level at which the lack of respect for a principle is intolerable and causes the questioned statute or article to remain "beyond the pale" of the system. In more technical terms, it is highly discretional in defining the principle, not as a mandate of optimization but as a rule of exclusion.

Thus there will be no problem at all for a constitutional court to annul a criminal statute contemplating the death penalty, given the existence of a constitutional rule that proscribes the death penalty. The court's decision will be unequivocal; for there can be no doubt that it speaks with the pristine voice of the Constitution. Doubts will appear when the analysis of constitutionality is carried out from the perspective of a principle or from some other type of constitutional norm that contains an indeterminate concept: when the court, confronting the considerations of the legislators, pronounces that a particular sanction constitutes a form of inhumane treatment, or is disproportionate,[5] or that a particular precept is intolerably indeterminate.[6] Why must the judgment of the court prevail over that of the legislator?

Once again, to a certain extent, one has to weigh up the majority principle and the preconditions of democracy. If one understands that in accordance with the constitutionalist model such preconditions exist, that certain rules and principles pending greater specification must form part of that protected reserve, and if one understands that the control of that reserve must be entrusted to a jurisdictional organ and not precisely to the constitutional organ limited by the aforementioned reserve, it appears that the consequence would be to entrust control *ex principiis* to a constitutional court. That said, one must also stress the importance of the court acting with due attention to a point of equilibrium in which the preservation of the preconditions compensates the sacrifice of political participation.

Because what should prevail, and in this what is at stake is the survival of the democratic system itself: the Constitution over and above the legislator. And the Constitution—on account of its supreme and constitutive function—is, perhaps primarily, a catalogue of values and principles, and a catalogue of rights, and it

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semantic and the epistemological implications are interesting: "it belongs to the very nature of a vague predicate that one cannot trace a clear dividing line between the things it applies to and those to which it does not apply. We may, perhaps, be able to make use of comparative approximations and say, for instance, that something is more or less close to being a heap, but we cannot establish a precise moment at which it passes from a heap into a non-heap. And where epistemology is concerned, the case is just the same: there is a wide range of situations in which we cannot know whether we are dealing with a heap or not, for our cognitive mechanisms do not have the necessary precision". See Laporta (2004), p. 19 ff.

[5] This was the Spanish Constitutional Court's judgment in relation with the minimum sanction of six years imprisonment under criminal law for any kind of collaboration with terrorist organizations (STC 136/1999).

[6] The Spanish Constitutional Court considered an article that criminally sanctioned the not expressly authorized hunting of non-threatened species to be unconstitutional because of its indeterminate nature (STC 101/2012).

has to be such in a necessarily radical way—in the original sense of a representation of roots—and likewise abstract.[7] To renounce control through such parameters is to a considerable degree to renounce *constitutional* control and hence the previously mentioned virtues of the constitutional state as a guarantor of the democratic legitimation of the system.

A large part of the work of constitutional courts lies in interpreting the contents of principles and frequently in declaring these principles. Regarding control of criminal law—that is to say control over something that represents the maximum possible interference in the life of the citizen—this means a control over the existence, for example, of uncertain, cruel, arbitrary, and disproportionate punishments. The Spanish Constitution, for example, does not expressly mention the principle of culpability or that of proportionality, nor perhaps does it need to, because it is not thought out specifically in terms of criminal law. But it is undeniable that legal codification would be intolerable without those principles. It would be intolerable, for instance, that mothers should be punished in the place of their delinquent offspring in default, that a person could be sent to prison for spitting in the street, or that a thief should be flogged—no matter how popular such decisions might be with a majority of the population at a certain moment in time.

All this implies that if one wishes to exercise constitutional control over penal power, and to do so with a minimum level of seriousness, there is no other remedy than to do so on the basis of the vague set of instruments provided by principles and rights. The fears raised by this vagueness are not only that of possible excess, to the detriment of the legislator, but also that of failing to meet those minimum levels, to the detriment of constitutional values. And this fear can become terror, if the vagueness results in a renunciation of control. It seems more sensible to persevere in this endeavour of exercising control and to optimize it by paying attention to "who" and to "how". It seems more reasonable to exercise control via an organ of at least derivative legitimation, a constitutional organ; with the advantage that a constitutional court brings an external, and hence disinterested, vision to bear on political debate and does so in a specialized, deliberative manner, expository in its arguments, establishing doctrines, i.e. general solutions—not only for the particular law under scrutiny—and determining when failure to observe a principle or a right is intolerable for our system of values.[8]

[7] "The notes of extreme abstraction and openness are what seem to bestow on fundamental law its peculiar identity, which conditions the mode of its legal interpretation" (Villaverde Menéndez 2002, p. 329). Or again, in the words of Bayón Mohíno, "given that the constitutional precepts that declare basic rights are normally formulated in considerably vague and abstract terms, their application makes a 'moral reading' of them" strictly inevitable. Bayón Mohíno (2000), p. 69. Regarding the greater degree of indeterminacy of the precepts contained in a Constitution, see also, García Amado (2004), p. 72, or Revenga Sánchez (2005, p. 152), who observes that the Constitution is "plagued with abstract, open provisions, with an intense ideological burden".

[8] Regarding these advantages of judicial interpretation, see Ferreres Comella (2010), p. 376 ff.

In a constitutional State, therefore, a control exercised solely on the basis of rules—and not on that of principles or rights (or from the principlist content of the latter)—is insufficient, in the sense that such control only acquires legitimation in areas of complete clarity, but not, of course, in areas of obscurity or even in the grey areas. For partisans of that kind of restrictive constitutional justice, in conditions of constitutional uncertainty, the option of the democratic legislators must prevail: by virtue of their specific legitimacy and because, if the constituent assembly left the question open—i.e. did not fix a rule—, it is simply because it wished to delegate the matter to future legislators. More precisely: it wished to leave it outside the "protected reserve" expressly closed to future legislation.

The problem, to which I have already pointed, is that in view of the normative structure of constitutional texts this leads us to a semi-constitutionalist state, with a "protected reserve" too narrow to guarantee the axiological foundations of the system and, among these, potentially, the very legitimacy of the legislator—for example, out of deficient control in deference to freedom of expression. The writers of the Constitution could not have wished for so little.

A similar dissatisfaction arises from the enforcement to the legislator of the ultimate rules of control over judicial resolutions. I am not referring only to the very lax rules relative to the existence of a judicial protection by virtue of the fact that such rulings must be supported upon some norm (so that there can be no arbitrariness) and that the interpretation of the same must not be "manifestly unreasonable".[9] Within such parameters it would suffice that this framework of reference were not likewise "manifestly unreasonable", in order for a law to be constitutional: something not so different from supposing a transfer of the rule of the presumption of innocence onto a measure that would at the outset have a strong presumption of legal constitutionality (De Lora Deltoro 2000, p. 55 ff.).[10] As was already proposed by James Thayer in the late nineteenth century, a law should only be declared unconstitutional, if its constitutionality did not appear to be a rational alternative, (De Lora Deltoro 1998, p. 248) which, as it happens, would seem to imply the supposition that it ought to be considered so by unanimity (De Lora Deltoro 2000, p. 71).[11]

I also refer to another defectively unsatisfactory control measure that would be afforded by the much less restrained model of ultimate control over criminal sentences, that at the least have to constitute a "reasonable" interpretation of law in order to be "legal", in accordance with the legality principle in its aspect of

[9] In this respect, Viver i Pi-Sunyer (2006), p. 74 ff.

[10] De Lora Del Toro holds that the criterion of constitutional control must be the criterion *in dubio pro legislatore*: "the Constitucional Court is called upon to carry its role as definitive interpreter to its ultimate consequences only in extreme cases: when the violation of the Constitution has been demonstrated beyond all doubt" (De Lora Deltoro 2000, 55).

[11] Thus, De Lora Deltoro ("in order to overrule the legislator it will be necessary to have the conviction of all members [of the Court]", who, nonetheless, warns that one must not "confuse the doubt of anyone with any doubt [at all]", so that "we must be in the presence of the expression a reasonable doubt" (De Lora Deltoro 2000, p. 68).

judicial submission to the law: i.e. semantically, methodologically and axiologically reasonable (Lascuraín Sánchez 2009, p. 103 ff.) If it is now a matter of certifying whether the legislator has begun with a reasonable interpretation of the Constitution and whether what is in question is respect for the principle, it will be difficult to maintain that the level of respect for the principle selected as "intolerable" is not reasonable—for instance, to maintain that the norm is not unconstitutionally indeterminate. It would hardly be against semantics to hold that a certain degree of determination exists; it would scarcely offend methodology to weigh up the degree of determination against the benefits for justice that a laxer statutory description might offer; it would hardly be axiologically "unreasonable" [to offer] a particular option *pro* justice and *contra* determination.

The need for integral constitutional control should not blind us to the risks of excessive control—where a group of judges sees itself as a kind of constituent assembly so as to hedge around the will of the democratic legislator. Those who criticise the constitutional state, and likewise constitutional control *ex principiis*, are to be thanked for having brought attention to bear on this danger of the system becoming perverted. If for the reasons already mentioned, it is not considered that a constitutional court ought to set aside the Constitution itself, or alternatively the legislator's integral control on the basis of the latter, it will at least have to be admitted that very good reasons exist for the self-restraint of constitutional courts—for a rigorous attitude of deference towards the legislator.[12]

Hence, constitutional judges must be conscious of the fact that the annulment of a law has an obvious democratic cost and that such cost is only affordable, if it is seen clearly to be compensated for in axiological terms[13]: if the cost of overruling a majority decision is seen beyond doubt to be offset by the preservation of the procedural and substantive presuppositions of the system, by the safeguarding of fundamental rights and values.

In what is this criterion of deference to the legislator grounded? Pending greater reflection and development, I shall set forth some criteria in this respect.

The first guiding principle is the obvious one of the presumption of constitutionality of the law, which takes as its basic supposition the constitutional loyalty of the democratic legislator. One consequence of the presumption is that the legislator is under no obligation to ground in the preamble of a law its constitutional fitness, and that the burden of argumentation of unconstitutionality falls upon the court.

The second principle has to do with the type of judgment necessary for neutralizing this presumption, which must differ with regard to principles and with regard to rules. In relation with principles it should be remembered that the constitutional court does not analyze the constitutional *quality* of a norm, but only its constitutional *viability*. The constitutional judge is not a sort of quality inspector who evaluates with his "legitimometer" the axiological value of the law. The Spanish Constitutional Court, for example, did not have to pronounce an opinion on how

[12] Critically, see Revenga Sánchez (2005), pp. 154, 157 ff.).

[13] See, in this respect, Ferreres Comellas (2011), p. 16.

determinate the meagre penal definition of "possession of prohibited weapons" was (Art. 563 CP), but only whether it was intolerably indeterminate.[14] Now, both in the comprehension of the contested norm and, above all, in the interpretation of the constitutional principle that is invoked, the Court has to take care not to convert a framework of cohabitation into a corset. And for this reason it has to situate the red zone of the "legitimometer", the register of intolerability, at a point that is sufficiently low to respect the broad margin of discretion which the legislator should enjoy. The extraction of the rule of exclusion must be performed in such a way as to leave a broad field open to legislative deliberation.

When control of the law is performed on the basis of a rule—when, for instance, what is under scrutiny is the echelon of a particular law, or the prohibition of the death penalty—it appears that such control should be governed by the canon of reasonableness. A law is constitutional if it is a reasonable option from semantic, methodological and axiological parameters of comprehension of the law and the Constitution. It would not be a matter of the direct judgment of the court regarding the norm but, rather, of its judgment concerning the reasonableness of the option chosen by the legislator; not so much of analyzing whether we are looking at the most reasonable option as of qualifying, or not, the constitutionality of the law in terms of reasonableness.

I am aware that the guidelines sketched above are no more than vague pointers; and then there are rights, of which the principlist and regulative components are subject to discussion[15]; and that rules contain indeterminate concepts that bring

[14] STC 24/2004.

[15] As stated by Atienza, in order to do justice to the normative dimension of rights "we need—or we may need—to rely on both rules and principles" (Atienza 2011, p. 76). Much of the normative content of fundamental rights is of the nature of principles. It deals with "how the concrete normative rules are applicable to the case to be created with the ultimate purpose of optimizing the legal power of self-determination of individual behaviour, the object of every fundamental right, in a particular legal relation" (Villaverde Menéndez 2002, 329). Every basic right is thus "a norm of principle". The "optimal application of a fundamental right will be one that does not unduly close its possibilities (maintains the norm open), and if one does proceed to a situation of closure, this should respond to a prior constitutional qualification and, in its concrete application, proportionate means should be employed (proportionality principle)" (p. 331). As such, "every fundamental right contains a mandate of optimization of individual liberty protected in every concrete fundamental right" (p. 336).

The limits imposed upon the legislator by fundamental rights are of two kinds. An essential content exists that can not be contravened; the remaining content can only be restricted in conditions of proportionality. Think of the analogy between the task of expression (interpretation) of the essential content of a basic liberty and the determination of the essential content of a principle; think, likewise, of the degree of discretionality entailed in the control of legislative restriction in pro of the preservation of another constitutional asset or right; finally, think of the fact that, once the essential content has been *regulated*, the work of control must be based on the reasonableness of the legislative option (for instance, whether it is reasonable to understand that the law respects the intangibility of information that is "diligently sought" and "of public interest").

Some contents of fundamental rights are also in the nature of rules. Think of the prohibition of prior censorship (Art. 20.2 Spanish Constitution) (SC), of the insistence upon the need for a judicial resolution for the intervention of communications (Art. 18.2 SC) or the maximum period of 72 h for preventive detention (Art. 17.2 SC).

their porous quality close to that of principles.[16] What is, for example, "an inhuman or degrading punishment" (Art. 15 of the Spanish Constitution)? I would stray from my purpose if I set out to analyze these details; but perhaps it will help if I summarize the intuition expressed above: deference, not lack of control, when recourse is had to a slippery parameter of constitutional control; control of reasonableness when a precise parameter of constitutional control is employed. Or in the following terms if one prefers: deference towards the legislator has to be evident both in the extraction of the constitutional rule (restriction of the protected reserve) and in its control (reasonableness).

12.3 The Spanish Experience

How has the Spanish Constitutional Court controlled the legislator in the field of criminal law? I shall describe this experience in two stages. I would like first to present a brief "snapshot" of Spanish constitutional jurisdiction in the control of criminal law: how many laws it has controlled, what were the parameters of control—on the basis of what constitutional rules, principles or values; what has the result of that control been—how many laws have been annulled. That snapshot will then allow us to climb to the second rung and to evaluate the aesthetics of the photo: the attitude of the Court as restrictive,[17] or as deferent[18]: has Spanish constitutional jurisdiction displayed a strict control, rigorous in the determination of the limits of policy on criminal law, and in the application of those limits to the criminal norms under question? Or could one rather say that it has been condescending before the criminal law legislator, whether at the moment of establishing constitutional requirements, or when applying them?

The third rung of analysis—for which some parameters have already been advanced in the previous section—would consist in the political evaluation of the restrictive or deferent attitude of the Constitutional Court dependant upon a prior

[16] In this sense, see Atienza (2011), p. 78.

[17] The restrictive tendency would be identified with a comparatively more limitative interpretation of the Constitution as regards the legislator's field of operation in relation with other possible alternatives.

[18] We may speak of a tendency to defer to the legislator if, in view of the imaginable or available alternatives, which in relation to the constitutional text are many, the Court opts for an extensive understanding of it, such that it facilitates the compatibility of the contested judicial statement. A manifestation of such deference would be, likewise, an interpretation of the latter aimed at making such a framing possible: in such cases it is not the framework but the text to be framed that is worked upon. From this point of view, such interpretative judgments can be understood as showing a deferent attitude towards the legislators, as an operation aimed at salvaging the fruit of their activity: "Interpretative decisions are the fruit of a weighing up of substantial interests that are drawn from institutional principles (presumption of constitutionality of the law, the principle of conservation of norms, interpretation that is the reserve of ordinary legality) that influence the very basis of the decision [. . .]. It would not be an exaggeration to affirm that the interpretative decision assumes [. . .] an extremely valuable function at the service of the general strategy of neutralization (and even negation) of conflicts that is a normal feature of Western democracies in their seeking to avoid endangering a horizon of immutable stability" (López Bofill 2004, pp. 25, 30).

political consideration of the position and the functions of the Constitutional Court and the legislator in the democratic state.[19]

12.3.1 The Data of Constitutional Control Over Criminal Law

If we take into account only the serious challenges (those that have been admitted and have given rise to a judgment),[20] and only those strictly pertaining to the sphere of criminal law (and not those referring to procedural laws, prison regulations or security measures),[21] during the 33 years of constitutional jurisdiction the round figure of 25 penal norms have been analyzed.[22]

[19] When qualifying constitutional jurisdiction as "strict" or as "deferent", the commentator may, depending on his/her general attitude, intend praise or censure. Those who affirm that the Constitutional Court has been strict may wish to say that it has been faithful to the mandate of the Constituent Legislature to keep watch over ongoing respect for fundamental principles and rights. The qualification of "deferent" may express a similar approbation: if the Court has retained its constitutional position it has been because of its respect for the principal depositary of popular sovereignty.

The same qualifications can be expressed in a negative sense. By being strict the Court would be doing what it ought not to do. Strict is equivalent to invasive, even usurpative of legislative power. Alternatively, when showing condescension, the Tribunal would be failing in its duty: in the minds of those who express themselves in that way, deference would be an abdication of the important role of control over the basic features of the system that the Spanish people entrusted to the Constitutional Court.

[20] Declarations of inadmissibility are not included that (when not referring merely to formal irregularities) ruled that the complaint in question was "manifestly unfounded" (Art. 37.1 LOTC).

[21] Hence neither STC 36/1991, relating to the measures to be imposed on minors who commit penally sanctionable unlawful acts, nor STC 24/1993, on security measures applicable to those whom the previous Penal Code described as alienated (i.e. insane), are included in the account of judgments dealt with in this article. Likewise, challenges to laws regulating prisons are excluded: STC 72/1994 dismissed an objection of inequality in the military code regarding discharge of penalties through work; STC 94/1986 pondered the "possible violation of the *non bis in idem* principle (dealt with in Art. 25 of the Spanish Constitution), in the case of refusing the benefit of discharge of penalties by work to those sentenced or remanded in custody for an offense of breach of prison or other act of contumacy (Arts. 334 ff. of the Penal Code); the basis for disputation was that for the commission of this offense, the sentenced or remanded person can be punished with the penalty corresponding thereto, and at the same time, with the privation of the aforesaid benefit, applicable where appropriate in the serving of sentences imposed for other offenses" (FJ 1). Nor are the judgments on laws of process, or of doubtful process status, considered here, such as those regulating negative prescription (or statute of limitations): STC 157/1990 resolved the question regarding "whether the regulation made by the current Penal Code of the prescription of misdemeanours, with regard to the fixing, by Art. 113.6 of the Penal Code, of a brief lapse for prescription—two months—and the ordering by Art. 114.2 that the same should run from the paralysis of the proceedings, without distinguishing the causes responsible for the aforementioned paralysis, supposes, in view of the judicial circumstances at the time, a practical denial of justice, by producing a generalized prescription of misdemeanours" (FJ 3).

[22] I have not considered any weak challenge of a penal statute that is only resolved in judgment on account of accompanying some other more solid constitutional objections, or that in any case did not merit thorough attention by the Constitutional Court. Hence, in the constitutional remedies

It is therefore a matter of a group of rulings in the area of control over criminal law, leaving aside judgments on constitutional protection of the right to criminal legality that validate or invalidate a particular interpretation of a statutory offence and which are in that same sense interpretative judgments of the statutory offence that is applied.[23] As exceptions, I include two judgments on legal protection (SSTC 67/1998 and 136/1999): because both were pronounced by the Plenary Court, both contain declarations on the unconstitutionality of the law, and because in that respect they set out an examination of it.

Of what, then, have these 25 challenges consisted? It will be useful to list them briefly, so as to afford an overall panorama before proceeding to further reflection and for their possible comparison with jurisdictional experience in other countries.

I firstly presented judgments on the proportionality of punishments. More precisely: on the proportionality of the restriction of the right that the criminal norm implements through the punishment. The contested penal norms in this category were the following three:

– that which sanctioned with a minimum of two years and four months of imprisonment the refusal to perform community service in lieu of military service (STC 55/1996);
– that which punished as "flagrant disobedience" (with six months to a year of prison), the refusal to submit to tests of alcohol ingestion or consumption of intoxicating, narcotic, or psychotropic drugs; which involved a heavier punishment than for driving under the effects of such substances (STC 161/1997);

("cuestiones de inconstitucionalidad") at the origin of STC 234/1997—together with the objections of unconstitutionality in relation with the then Article 380 of the Penal Code (overruled in the case of the statute on alcohol testing) already resolved by STC 161/1997—the right to privacy was invoked: "the alleged unconstitutionality would be imputable, not to Art. 380 of the Penal Code, which does not regulate any kind of test—since it is limited to describing as an offense of disobedience the refusal to submit to the tests that are legally established for the purpose of establishing whether a person is driving under the effect of alcoholic drinks, drugs or any other psychotropic substance—but to the norm that regulates this type of test" (FJ 9). STC 160/1987 analyzed the compatibility with the principles of equality, proportionality and *non bis in idem* of the penal statutes sanctioning those who do not appear for, or refuse to perform, community service in substitution for military service (FJ 6), a problem that in essence was taken up again and analyzed in greater depth in STC 55/1996. STC 199/1987 challenged—on the principle of legality and the right to effective judicial guidance—the validity of foreign sentences for the purposes of considering the concurrency of recidivism in crimes of terrorism (FJ 5).

[23] Very significant in this respect is STC 111/1993, a judgment on an appeal for protection that considered that the exercise of actions proper to a profession not requiring an official academic degree could not be regarded as included in the category of "intrusismo" (illegal practice of a profession) as set forth in Art. 321.1 of the previous Penal Code.

– and that which sanctioned collaboration with an armed band with six to twelve years of imprisonment. This was only an indirect challenge—through an action for constitutional protection—and partial (relating only to the inclusion of *any* kind of act of collaboration). The STC 136/1999 contains a declaration of unconstitutionality which did not lead to an *autocuestión* (a constitutional remedy initiated by the Court), in view of the declaration of the repeal of the norm at the time of the sentence.

Although complaints against laws of decriminalization are usually catalogued as invocations of the right that is allegedly left legally unprotected, they could also be understood as addressing matters of proportionality. Two cases are offered by our brief history of constitutional jurisprudence.[24] These are: (1) the judgement known as the "abortion ruling"—and later the "first ruling on abortion" (STC 53/1985)—which analyzed, prior to its becoming law, whether a particular system of decriminalization of abortion, when consented and under particular circumstances, was unconstitutional,[25] and (2) the failure to sanction, under certain conditions, the unconsented or involuntary sterilization of a person judged to be incompetent on the grounds of some serious psychological deficiency (STC 215/1994).

In both cases the question of unconstitutionality is not, of course, whether the non-existent prison sentence is excessive compared with whatever an impossibly lighter sentence provides or could provide, and whether thereby we are in the presence of a disproportionate deprivation of liberty. It is rather a question of whether the absence of punishment supposes leaving a constitutional asset excessively unprotected—in view of the benefits a non-existent punishment fails to provide, or might otherwise provide—and hence a disproportionate normative treatment of the aforementioned asset.

If we pass from the principle of proportionality to the second great substantial principle of criminal law, we find two replies to allegations that two statutory criminal laws contradicted the postulates of the principle of culpability. And both rulings were negative.

With simple and direct arguments, very close to the wording of the decision to accept the legal challenge of the regulation, STC 150/1991 overrules the alleged

[24] STC 67/1998, which addressed alleged discrimination regarding non-payment of family maintenance, is not, strictly speaking, a case of complaint against decriminalization by reduction of penalties against legally married couples. The ratio decidendi of the annulment of the precept does not lie in the fact that children born out of wedlock are not protected under criminal law, but in the fact of their being discriminated against in comparison with those born to legally married couples, so that the emendation could have consisted equally in extending the penal category to non-payment of maintenance to an unmarried partner and the children of their relationship, or in decriminalizing the non-payment of maintenance in cases of legally married couples.

[25] This was a system referred to as "of indications"—an expression rooted in thinking on criminal law, but of doubtful semantic precision, since what was involved was to permit certain types of cases, not to "indicate" them—which, as regards the nature of such indications, coincided with that in force until the approval of LO 2/2010, of March 3, on sexual and reproductive health and the voluntary interruption of pregnancy (establishing a system of deadlines).

contravention of the principle of the aggravating effect of recidivism.[26] Much more recently, STC 60/2010 found that the distancing order does not contradict the principle of "personality of sanctions"[27] by penalizing the victim of the offense as well as the author, since "*the restriction of rights that may be occasioned to the injured party by the execution of a distancing order is, in any case, a consequence tied to the very purpose of the sentence imposed on the defendant, but is not a manifestation of the exercise of* ius puniendi *by the state against the injured party*" (FJ 4).

On account of their recent appearance and because of the social and doctrinal debate to which they have given rise, some of the sentences relating to the principle of equality are well known: those that affirm the constitutionality of the four penal statutes aimed at combating specifically gender-based violence (injuries, ill-treatment, threats and coercions: SSTC 41/2010, 59/2008, 45/2009 and 127/2009, respectively). These sentences also face a significant reproach of culpability, relative to "*whether one is not attributing to the male individual 'a collective responsibility, as a representative of, or heir to, the oppressive group'*" (STC 59/2008, FJ 11),[28] and a relevant challenge of proportionality, above all STC 45/2009: if the classification as a criminal offense (and the sanction assigned to it) of a threat of lesser degree, without the presence of a weapon, by a man to a woman who is or has been his partner, is disproportionate.[29]

Another two judgments regarding equality exist, separated by a lapse of ten years, in which elements of criminal law are disputed. STC 19/1988 deals with the constitutionality of a term of imprisonment in cases where the offender failed to pay the initially imposed fine (imprisonment in lieu of fine or "subsidiary criminal liability"); STC 67/1998, a judgment of the Plenary Court, found that the precept assigning a law enforcement officer to maintenance payments only in cases of matrimonial paternity was discriminatory: the said precept only applied the offense

[26] Since it cannot be maintained "that the complex regulation of recidivism does not permit citizens to comprehend it normally and to foresee, therefore, the consequences of their acts" (FJ 4). Note that the argument refers above all to the principle of legality. Nor does the Court consider that the aggravating circumstance supposes a double jeopardy (*bis in idem*) (FJ 9).

[27] Which, surprisingly, it regards as forming "part of the principle of legality" (FJ 4).

[28] Likewise, where there exists "a legislative presumption that in aggressions by a man towards a person who is or has been his legally married spouse or affective female companion there subsists a discriminatory intention, or an abuse of superiority, or a situation of vulnerability on the part of the victim" (FJ 11), but this seems, strictly, a denunciation of the violation of the presumption of innocence.

[29] One must insist on the difference between the judgment of proportionality of the norm, "that has as referents the benefits and costs of the norm questioned in terms of constitutional axiology", and the analysis of proportionality entailed in the judgment of equality, which "compares the consequences of the cases differentiated" (STC 45/2009, FJ 7).

of failure to pay alimony in cases following annulment of marriage, separation or divorce.[30]

The most numerous group of constitutional challenges of penal norms corresponds to the perspective of the principle of legality. For a better understanding of the defects in constitutional terms attributed with some justification to criminal legislation, we can go further and subdivide the corresponding judgments into two groups.

The first corresponds to formal complaints on the grounds of legality. Two of these judgments adduce the lack of organic-law status of penal laws that would in fact require such status.[31] These were: the criminal provisions of the Exchange Control Law that contemplated sentences involving deprivation of liberty (*Ley de Control de Cambios*: STC 160/1986) and the extension of the range of acts of desecration of the flag contemplated under the "Flag Law" (*Ley de Banderas*: STC 119/1992). Likewise, Art. 24.2 of Law 11/1988 (December 26) of the Autonomous Community of Valencia, which granted specific criminal protection to the investigative function of the *Síndico de Agravios* (or *Síndic de Greuges*: the Autonomous Community's "ombudsman"), qualifying certain forms of behaviour concerned with the remittance of reports or data that it requested as a criminal offense of disobedience. The law was not declared null due to it lacking organic-law status; but rather in consideration that it constituted a prior invasion of the exclusive competence of the Spanish state in the area of penal legislation (STC 162/1996).

Another four rulings refer to respect for the requirement of certainty. This requirement was considered to be upheld in respect of the criminal use of the term "terrorism" (STC 89/1993) and—when interpreted in a particular way—in respect of the meagre definition of the penal category of illicit possession of arms (STC 24/2004), a materially referential norm that, as such, poses formal problems of hierarchy. In contrast, it was overturned in STC 101/2012 in relation to a partially analogous precept of structure, which sanctions hunting and fishing, unless expressly authorized, of non-threatened species (Art. 335 of the Penal Code in its version prior to LO 15/2003). A minimally constitutional degree of determinacy as regards classification was also denied regarding the offense of river fishing, which based its description on the reiteration of administrative infractions and did so, besides, vaguely, as it did not make clear whether what was being sanctioned was the reiteration of the same infraction or of any infraction in the field of river fishing (STC 53/1994).

[30] The judgement on an appeal for protection [amparo] acknowledges "unequivocally the incompatibility of Art. 487 bis of the Penal Code then in force with the right to equality (Art. 14 of the Spanish Constitution)".

[31] According to the Spanish legal code, an organic law must be passed by absolute majority in Parliament in order to be valid (Art. 81.2 of the Spanish Constitution). The types of law to be approved as organic laws include "those relating to the development of basic rights and public liberties, those approving Statutes of Autonomy and the general electoral regime and those others contemplated in the Constitution" (Art. 81.1 of the Spanish Constitution).

STC 120/2000 referred to the requirement of social reintegration. The Court rejected in this judgment that brief prison sentences were in contravention of this requirement in the terms laid down by the Constitution in Article 25.2.

In the three remaining judgments of our list, control of criminal laws was demanded for the alleged breach of some fundamental right. The criminal provision contemplated in the STC 105/1988 was Article 509 of the previous Penal Code, containing a curious precept involving a presumption of culpability; it was thus objectionable on the basis of the right to the presumption of innocence—even in the form of a forced interpretive judgment—as the Constitutional Court ended up affirming: it sanctioned whosoever had in their possession picklocks or other instruments designed specifically for executing the offence of [burglary or] theft and was unable to give sufficient account of their acquisition or conservation (STC 105/1988). Of notable impact was STC 235/2007, which considered punishment of the negation of genocide to be contrary to freedom of expression and only with respect to that freedom, the *justification* of genocide, if it supposed an incitation, even indirectly, to its perpetration. And, at the end of the list, the first judgment of control over penal legislation: STC 11/1981, which concerned the challenge to Decree-Law 17/1977, regulating the right to strike.[32]

If we prepare a brief review of the results we find the following figure. Taking into account that in STC 235/2007 two separate criminal norms were challenged: those defining as criminal offenses both the negation and the justification of genocide, the 24 aforementioned judgments analyzed 25 criminal norms. Of these:

- thirteen were declared in accordance with the Constitution;
- three (those referring to possession of instruments for committing theft, the illicit possession of arms, and the justification of genocide) were declared constitutional in the case of their being subject to a particular interpretation;
- and nine were declared unconstitutional.

Of these nine judgments it appears to me important to emphasize the following:

- three of the cases involved norms that had already been repealed (those that punished the failure to pay family maintenance, collaboration with terrorism, and unauthorized hunting and fishing), which supposed a correction of the legislator to which the legislator had already attended;
- in another three judgments (Exchange Control Law, Flag Law, Valencian Law on the "Síndico de Agravios"), the reason for the unconstitutionality was the

[32] According to its grounding in law, the tenor of Art. 222 of the previous Penal Code is not contrary to the said right [to strike], since "what is penalized is an attack against the security of the state". The said precept considered "guilty of sedition [. . .] those functionaries responsible for the performance of all kinds of public services or those of recognized and unpostponable necessity who, by suspending their activity, cause disturbances to the same, or, in any way, obstruct or disorder their regularity" and "those employers and workers who, with the intention of putting in jeopardy the security of the state, impairing its authority, or perturbing its normal activity, suspend or upset the regularity of work".

contravention of a formal rule, the preservation of the organic legislator against the ordinary or regional legislator;
– in two more cases (abortion or denial of genocide), the unconstitutionality—very partial, actually, in the case of the abortion judgment—comes about from the contraposition of the law with an asset or right (life or freedom of expression).

12.3.2 Evaluation of the Constitutional Control of Criminal Law

Rereading the above-mentioned judgments, I can now confirm two intuitions that I had already entertained as a habitual reader of constitutional jurisprudence. With such nuances and exceptions as may be necessary, those intuitive insights perceive that the Constitutional Court has tended to strictness where the delineation of the constitutional penal framework is concerned and, rather, to deference in its final judgments, as regards inclusion of the contested norms in the aforementioned framework.

Thus, in the former respect, one may understand that it has interpreted the Constitution as comprehensive of certain principles that—as guarantors of basic constitutional values—limit the penal legislator, and has outlined their content with a degree of rigour in the framework of that interpretation. In view of the imaginable alternatives, the Constitution thus becomes—fortunately, I believe—a small, rather than a large, framework for legislating punishment. A framework, for instance, in which the textual absence of the corresponding substantiations does not prevent our Constitution from proclaiming the principles of proportionality (Díez Ripollés 2008, pp. 241, 247, 255) or culpability; one that is not content, as regards the former principle, with a vague respect for the interdiction of arbitrariness; that strongly delineates the requirements of legality in the administration of sanctions, including precision in the description of offenses, the insistence on a qualified majority for the privation of liberty or the subjection of judges to the law, to the point of submitting their interpretations of statutory offenses to constitutional review (*recurso de amparo*), in order to show precisely what they are: judicial interpretations and not recreations of law.

"There's more wanting", it might be said. But this would be to make a necessity out of virtue. There was always the option of denying all control over the proportionality of the punishment; for rejecting any remedy that might suppose a review of penal interpretation; for limiting control to the lax canon of effective judicial protection (only excluding manifest unreasonableness, patent error or arbitrariness); for excluding penal legislators from the need to justify their differentiations (their "unequalizations") in terms of reasonableness and proportion; for regarding the penal norm as a matter of ordinary law; or for attributing a greater margin of deliberation to the legislator for sanctioning the harm that the expression might imply.

The above-mentioned intuition contrasts with a second one. Having established a narrower framework for penal policy, in the actual debates—debates with strong arguments in support of both alternatives—regarding the degree of adjustment of norms of doubtful constitutionality to that framework, the tendency has been more towards insertion than exclusion: more towards constitutional validation of the norm than to its annulment.

This tendency has been manifested at times in the broader definition of the general framework that has been outlined. Rigour in the selection of materials weakens as the building progresses. Once a principle has been admitted as constitutional and its components have been established with rigour, what has happened is that—again in relation to the available options—the Court has set a low minimum principal of what may be constitutionally required, whether in the abstract or at the moment of applying it to the contested statutory provisions. In other words, it has been relatively lax in the application of the principle as a norm of exclusion. It has drawn a reductive rule of the "protected reserve".

I believe that the constitutional doctrine that best illustrates these statements is that relating to the proportionality principle (Lascuraín Sánchez 1998; Aguado 1999; González Beilfuss 2003; Lopera Mesa 2006; De la Mata Barranco 2007; Bernal Pulido 2007).

As I have already pointed out, the proportionality principle is not expressed as such in the Constitution. If to this we add that it entails difficult empirical and value judgments regarding the minimum effective sanction—or, in general, the legal strategy—for the protection of an asset, or of the disadvantages of the sanction compared to the value it contributes,[33] the original temptation, dear to a certain constitutionalist doctrine, of understanding that the material control of criminal law legislation was something alien to the Constitutional Court is not surprising. With two types of limits: the very concrete, but exceptional, ones relating to the fact that the legally defined conduct could not be the exercise of a fundamental right and that

[33] As STC 55/1996, expressively points out: "the relation of proportion that a statutorily defined criminal behaviour must maintain with the sanction assigned to it will be the fruit of a complex judgment of opportuneness on the part of the legislator", who, "obviously, when establishing the penalties, lacks the guide of a precise table that relates univocally measures and objectives, and has to attend not only to the essential and direct aim of protection to which the norm responds, but also to other legitimate aims that it may seek to attain by means of the penalty and to the different ways in which it may operate and that could be catalogued as its functions or immediate ends: to the various ways in which the abstract cautioning of the penalty and its actual application influence the behaviour of the addressees of the norm—intimidation, elimination of private vengeance, consolidation of the general ethical convictions, strengthening of the sense of fidelity to the legal code, social reintegration, etc.—and what is classified doctrinally under the denominations of general prevention and special prevention. These effects of the penalty depend in turn on factors such as the seriousness of the behaviour that it is intended to dissuade, the actual possibilities of detection and sanction, and social perceptions regarding the 'fit´ between crime and punishment. In the final instance, concerning the proportionality of a specific penalty, this Court cannot, in order to establish it, take as a reference an exact penalty, that would appear as the only possible concretion of the constitutionally required proportion, since the Supreme Law does not contain criteria from which that measure can be inferred" (FJ 6).

the penalty imposed could not be inhumane or degrading; and the very abstract one pertaining to the interdiction of arbitrariness.[34]

That temptation became a sin in the early period of constitutional jurisprudence. Thus, significantly in relation to the same statute that was to give rise to the first ruling on proportionality (STC 55/1996)—which was the law penalizing refusal to perform community service in substitution for obligatory military service—, STC 160/1987 stated that "*the problem of proportionality between sanction and offense is the competence of legislators in the sphere of their policy on criminal law, which does not exclude the possibility of the existence in a penal statute of a disproportion of such measure as to violate the principle of the Rule of Law, the value of justice and the dignity of the human being*" (FJ 6). This same doctrine of distance of constitutional control was to be confirmed some years later in relation with the aggravating effect of recidivism (STC 150/1991, FJ 5).

What the second doctrine of proportionality denies is that the criminal law legislator can "*do without certain constitutional limits*" or that the Constitutional Court ought to "*renounce all material control over the sanction, since the sphere of penal legislation is not a constitutionally exempt sphere*" (STC 55/1996, FJ 6). Hence, with skilful argumentation, it lays down, in a nutshell, that all public activity aimed at restricting fundamental rights must be proportionate in the quadruple sense of being: (1) oriented towards a legitimate end; (2) useful for such an end; (3) minimal or necessary in its degree of restriction; and, (4) advantageous or strictly proportionate. This jurisprudence is inherited to a large extent from its German homologue, although our Constitutional Court anchors the doctrine of proportionality not in the state itself as a constitutional state—an ephemeral anchorage as it happens—but, more firmly, in the very content of a restricted right.[35] The priority of fundamental rights means that these can only be limited by sanction in the above-mentioned terms of proportionality: in a way that is both minimal and advantageous for the sake of a constitutional asset.

This way of understanding the Constitution, of specifying it, has had a beneficial influence on both doctrine and jurisprudence. To academic reflection, it has suggested rationality in the content of the principle of proportionality and firmness

[34] I differ with Díez Ripollés (2008, pp. 223, 240 ff. 258 ff.) regarding the potentiality he attributes to the latter principle for the material control of legislative activity in the area of criminal law. I consider that its exiguous conceptual solidity and its consequently slight practical utility in constitutional jurisdiction, so well described by Díez Ripollés (p. 235 ff.), are due to an endogenous lack of substance as a limiting principle upon the legislator; these factors convert it, precisely, into a democratically perilous instrument in the hands of a Constitutional Court lacking in caution. I believe that the interdiction on arbitrariness has full sense for the control of the judicial organs as an expression of their subjection to the law. The arbitrariness of the legislator does not seem to be anything other than ignorance of the Constitution, and the latter needs to be specified in parameters of much greater precision, such as, for instance, the very principle of proportionality. In other words: the proportionality principle is one of the manifestations of the interdiction of arbitrariness.

[35] Critically, because of what it implies in terms of "attribution to the proportionality principle of a mere labour of guaranteeing fundamental rights", Díez Ripollés (2008), pp. 248, 255.

with its rootedness in the Constitution: it organizes, relates and makes more comprehensible the traditional principles of exclusive protection of legal assets in the constitutional framework, *ultima ratio* and minimum intervention (Díez Ripollés, p. 249 ff.). Its contribution to penal jurisprudence is novelty in the form of an interpretative principle of criminal norms.[36]

In my opinion, the Constitutional Court is doing what it is supposed to do here: proclaiming a principle without which criminal law would be indecent, carrying out pedagogy with this proclamation, and informing the public powers—the penal judges, but above all the penal legislator—of an inescapable condition: that its punitive activity should be informed by proportionality (the idea of the minimal, efficacious and contained sanction).

Perhaps as an acceptable corrective balance of an advanced jurisprudence, what the Constitutional Court does is to set the red line of intolerable indifference to the principle at a fairly low level. Note, for example, the justified niceties that surround the constitutional judgments of necessity and strict proportionality, third and fourth analytical components of the proportionality of a norm.[37] The Court considers that "*constitutional control regarding the existence or otherwise of alternative less onerous measures, but of similar efficacy to those analyzed, has a very limited reach and intensity, limited to assessing whether a patently unnecessary sacrifice of rights guaranteed under the Constitution has taken place [. . .]. Hence only if an alternative measure less restrictive of rights is evidently and manifestly sufficient for an equally effective achievement of the purposes desired by the legislators, would the Court be justified—in the light of logical reason, of uncontroverted empirical data and the whole set of sanctions that the legislators themselves have deemed necessary in order to reach goals of analogous protection—in proceeding to the expulsion of the statute from the legal order [. . .]. Only on the basis of such premises might it be stated that a patent and unnecessary squandering of coercion has taken place that renders the statute arbitrary and undermines the principal elements of justice inherent in the dignity of the individual and the rule of law*" (STC 55/1996, FJ 8).[38] And in relation to the strict assessment of proportionality, such an assessment will only yield a result of unconstitutionality "*when a patent and excessive or unreasonable disequilibrium occurs between the sanction and the purpose of the statute on the basis of constitutionally indisputable axiological guidelines and their concretion in the legislative activity itself*" (STC 55/1996, FJ 9).[39]

[36] The contribution would have been greater if, in STC 136/1999 (Mesa Nacional de Herri Batasuna) the question had been focused, not as an excess on the part of the legislator in applying severe penalties upon less important acts of collaboration, but as an axiologically unreasonable judicial interpretation of the norm as embracing acts of collaboration such as the one brought to trial (sending a video of the ETA terrorist organization for the purposes of broadcasting as electoral propaganda on radio and television). On the utilization of the proportionality principle in jurisprudence, see De la Mata Barranco (2007), p. 217 ff.

[37] For the concrete arguments it sets forth, see the detailed study by Díez Ripollés (2008), p. 245 ff.

[38] Likewise: SSTC 161/1997, FJ 11; 136/1999, FJ 23; 60/2010, FJ 14, 16.

[39] Likewise: 161/1997, FJ 12; 136/1999, FJ 23; 60/2010, FJ 7; AATC 233/2004, FJ 3; 332/2005, FJ 3.

Once the instrument of analysis is securely fixed (Díez Ripollés 2008, pp. 249 and 255), but with its cutting edge slightly blunted, it should not surprise us that the constitutionally disproportionate character of almost all the contested norms is denied: those penalizing insubordination in the performance of the substitutable community service, the refusal to submit to testing for alcohol, domestic violence and gender violence between a man and a woman currently or formerly in a relationship. The only legal norm declared unconstitutional due to its disproportionate nature was on collaboration with terrorist organizations.[40]

The example of the doctrine of proportionality is enough to illustrate this dual—and in my opinion praiseworthy—strategy of jurisdictional policy: firmness in the declaration of principles and deference in the determination of the constitutionally indispensable minimum, and hence, in its application.

The Court does nothing else, to mention a second example, with the mandate of certainty and, more concretely, where criminal norms with referential elements are concerned, has been no different.[41] The Court is zealous in theory, but generous in allowing the survival of such meagre penal categories as, for instance, that of possession of prohibited weapons.

Since this type of statutory provision represents a hornet's nest of constitutional problems—of a normative or determinative nature or regarding equality—the Constitutional Court has had to deal with them and has done so with a quite sensible canon of analysis of legitimation. The referential legislative technique is valid when necessary for the ultimate precision of a criminally sanctioned offense and for the adaptation of criminal legislation to a changing context. And it is valid, above all, if what is involved is finding support in other more agile and precise statutes, but not when delegating to other norms the actual definition of the offense. Hence the initial statutory provision should already contain "the essential nucleus of the prohibition". Likewise, the final result, the integrated penal precept, must be sufficiently precise and accessible for its target population.[42]

[40] I believe that this (juris)prudence shows more of an acceptable comprehension of the limits of constitutional control over the penal legislator than the serious reservations expressed by Díez Ripollés regarding the performance of the proportionality principle as a parameter of constitutionality (Díez Ripollés 2008, p. 256).

[41] This technique is usually referred to as a "blank penal norm", which is quite equivocal, because the statutory provision seems to announce the solution to the problem of legitimation: we know that it contains a "blank", but what is at stake is to see whether this is necessary, residual and can be easily filled; it is a matter, among other things, of elucidating whether the norm is "left blank"—or, in the words of STC 101/2012, "totally blank" (FJ 1).

[42] Hence, the Constitutional Court admits that "the technique that enables the profile of statutory offences to be filled out by means of a normative referral, constitutes a practice that [. . .] from the point of view of conceptual orthodoxy may justify certain initial misgivings". Nonetheless, "it is entirely necessary in a highly developed society, one that requires an extremely precise response regarding the limits that delineate lawful behaviour from that which not only is not lawful, but which calls for the most energetic and firm reaction provided for by the code of law, as is the penal sanction" (STC 24/1996, FJ 3). Thus, the requirements of the legality principle "do not suppose that only a descriptive and complete drafting in penal law of the types of behaviour codified as in

The most difficult case in this context was that arising from the regulation of "possession of prohibited arms". As against the more intuitive solution to "*the only matter in dispute [. . .]—i.e. whether the penal norm defines the essential nucleus of the prohibition, such that the statute referred to is limited to completing the content of the said norm in an instrumental capacity and in subordination to the Law*" (STC 24/2004, FJ 4)—the Court opted for an interpretative solution: it judged that the statutory law under consideration does contain that nucleus "*on the basis of the concept of arms*" and of "*the general limiting principles of the exercise of* ius puniendi" (FJ 7), and with the added limitation that a second degree reference cannot be allowed, "*as this would by doing so dilute the function of guaranteeing legal certainty and the legal security of criminal definitions such that Art. 25.1 of the Spanish Constitution would be violated*" (FJ 4).

I shall set in contraposition to these examples an "anti-example", which is the analysis, from the perspective of equality, of the constitutionality of penal norms aimed at combating gender violence, which aggravates the punishment of bodily harm (Art. 148.4 of the Penal Code), ill treatment and less severe bodily harm (Art. 153.1 of the Penal Code), threats of a lesser nature (Art. 171.4 of the Penal Code) and acts of coercion of a lesser degree (Art. 172.2 of the Penal Code) in the case of the aggressor being a man and the victim a woman, who is or was his partner. Bearing in mind the distinction made in Spanish law between the general principle of equality and the stricter prohibition of discrimination, which occurs when the reason for the differentiation is "odious"[43] (birth, race, sex, religion, opinion and other analogous causes), it may have seemed more appropriate that the Court should approach the matter from the latter perspective.

It did not, however, do so.[44] Possibly a deferential intention, in keeping with its history and, I think, with constitutional law, led it to apply to the contested statutes the mould of generic equality, laxer than that of the prohibition of discrimination. More faithful to that history, as the above lines have tried to illustrate, would have been an attempt to have dealt directly with what the said prohibition implies and

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fact criminally illicit is constitutionally admissible. On the contrary, incorporation in the type of normative elements (STC 62/1982, of October 15) is possible and the legislative use and judicial application of the so-called 'blank penal laws' is reconcilable with constitutional assumptions (STC 122/1987, of July 14): that is, of incomplete penal norms in which the particular conduct or the consequence under penal law is not exhaustively specified, so that it is necessary to refer to another different norm in order to complete them; with the proviso that the following requirements are satisfied: that the normative referral is express and justified in terms of the legal asset protected by the penal norm; that the law, besides stating the penalty, contains the essential nucleus of the prohibition and the demand for certainty is satisfied or, as stated in the cited ruling STC 122/1987, sufficient concretion is given, so that the conduct described as criminal remains sufficiently specified by means of the indispensable complement of the form to which the penal law is referred, and the guarantor function of the offense is in this way safeguarded with the possibility of knowing the act that is criminally censured." (STC 127/1990, FJ 3; also SSTC 118/1992, FJ 2; 120/1998, FJ 5; 283/2006, FJ 8.).

[43] To use the adjective employed by the Court itself (for instance, STC 62/2008, FJ 5).

[44] The rulings were STC 59/2008, STC 45/2009, STC 127/2009 and STC 41/2010.

what canon of analysis derives from that. It would have been more constructive to develop a necessary doctrine of principle (of which constitutional jurisdiction is still in need), irrespective of the degree to which prudence might have counselled tempering this principle, either by fixing at a low point disregard of the principle as the level of exclusion of the norm from the system, or else by applying it in condescendence with the validity of the statute, whether through the imposition of a particular interpretation of it, or otherwise.[45]

12.4 Reasons for Deference

I believe that the Court has been fully conscious in maintaining a deferent attitude towards the criminal legislator[46] and that this has been out of concern for democratic legitimation. It has affirmed this in its judgments, in which statements referring to the broad scope of decision enjoyed by the legislator in the development of criminal law policy are recurrent, and, correlative, to the prudence with which the Court seeks to adopt at the moment of fixing its judgment on conformity with the Constitution.

It thus manifests that "*the design of criminal policy falls exclusively to the legislator*" (SSTC 55/1996, FJ 3; 59/2008, FJ 6; 45/2009, FJ 3; 127/2009, FJ 3): i.e. the determination of "*criminally protected assets, criminally reprehensible behaviours, the classification of statutory offenses and degrees of severity or lenience of penal sanctions, as well as the proportion between the conducts one seeks to avoid and the punishments through which one seeks to achieve this*". This configuration supposes "*a complex judgment of opportunity*" so that legislators, with the exception of their subjection to "*elemental guidelines that emanate from the constitutional Text*", enjoy "*full liberty*". It is because of this that the work of constitutional jurisdiction has to be "*very cautious*": it consists only in determining the "*constitutional framing*" of the statute, without this entailing any evaluation of quality or degree of perfection, even in terms of constitutional values: hence, the overruling of a request for a review on a point of law supposes "*no other type of*

[45] See, in this respect (in greater detail), Lascuraín Sánchez (2013), p. 329 ff.

[46] According to Gómez Corona's overall study (2009, p. 263 ff.), the percentage of rulings rejecting requests for constitutional control over a law is 48 %, not much lower than that revealed by the present study restricted to judgments on penal legislation (52 %). Among those upholding the request, the rate was significantly lower for interpretative rulings on penal law: 13 % as against 23 %. This author concludes that "in view of these data it can be affirmed that control by the Constitutional Court has been exercised, as a general rule, with moderation and self-restraint" and that "one can only acknowledge that the work of the Constitutional Court has been respectful as regards the position of the legislator" (pp. 284 and 287).

positive evaluation of the norm" (SSTC 55/1996, FJ 6; likewise: SSTC 161/1997, FJ 9; 59/2008, FJ 6; 45/2009, FJ 7; 127/2009, FJ 8; 41/2010, FJ 5; 60/2010, FJ 7).[47]

The main reason for the deference of the Constitutional Court towards the legislator seems, then, to be a sincere conviction, based on its understanding of the Constitution, linked, on the one hand, to its weaker democratic legitimation, and, on the other, to the risks of an interfering control that derive from the broad margin of action afforded by constitutional principles: risks arising from its degree of discretion in the fixing of a minimum limit of respect in a continuum.

That reason converges with another important pragmatic consideration in favour of deference towards the legislator in matters of criminal law, which is that of the inconvenience—also measurable in terms of constitutional axiology—entailed in annulling a penal statute. This would of course not be the case if the statute in question were entirely unconstitutional. If it were to penalize, for example, homosexual relations or the right to strike; or the negation of genocide (STC 235/2007). In such cases we should welcome both the demise of the statute the splendid retroactive effects associated with its nullity: which permit the court "*to review processes closed in firm judgments with the force of* res iudicata" if it concerns "*criminal law or contentious-administrative procedures referring to a sanctioning procedure in which, as a consequence of the nullity of the statute that is applied, the result is a reduction of the penalty or sanction or an exclusion, exemption or limitation of responsibility*" (Art. 40.1 Organic Law of the Constitutional Court).

The problem will present itself when constitutionality is not, if I may say, "full": When a correct core of punishment, and hence protection, subsists. When, for instance, what the precept levies is the high nature of the minimum threshold of the penalty (STC 136/1999, regarding the offense of collaboration with a terrorist organization or group), or the indeterminacy of its description (which was the reason for challenging the offense of illicit possession of weapons: STC 24/2004). In these cases, declaring the unconstitutionality and nullity of the statutes will mean proceeding to an inconvenient decriminalization.[48] It will be tantamount to leaving essential assets—whether directly or indirectly constitutional—

[47] An interesting counterpoint to this "doctrine of deference" can be found in the recent STC 60/2010, on the imposition of the distancing order. Its reasoning is: since criminal law is constitutionally more intrusive, affecting in a peculiar way constitutional assets and rights, its limits must be more intense and the work of control of constitutional jurisdiction more demanding. Thus, "in the institutional perspective proper to the delimitation of functions in respect of the penal legislator and this Constitutional Court, it must be specified [...] that the very Constitution, far from submitting the action of the legislator to the same substantive limits irrespective of the object upon which the latter is projected or the types of decisions incorporated, contemplates more severe limits in the case of penal norms than in that of other legislative decisions, due, precisely, to the scope of the effects deriving from the former, since the more intense the restriction of constitutional principles—in particular, of the rights and liberties recognized in the constitutional text—the more demanding the substantive presuppositions of constitutionality of the measure that generates them" (FJ 7).

[48] López Bofill (2004, p. 318) qualifies these effects as "devastating". See also Ferreres Comella (2002), p. 141 ff.

provisionally unprotected and to annulling fully justified convictions definitively, with the deterioration in prevention which that implies: squashing the convictions of whoever tried to circulate a video of the terrorist organization ETA as much as whoever was training terrorists; the convictions for possession of a flick-knife (Art. 4.1.f of the Regulation on Arms) but also of someone who was stockpiling missiles in the cellar of his house (Art. 6.1.f of the Regulation on Arms).

The same problem will be posed by penal norms that are unjustifiably unequal or discriminatory—think of the consequences of nullification of the offense of failure to pay family maintenance contested in STC 67/1998—with the addition that in these cases the problem did not consist in eliminating an unjust sanction: the charge of unconstitutionality is so by comparison and thus could be remedied equally by penalizing conduct that is not penalized or by decriminalizing that which is penalized, a decision that falls exclusively to the legislator.

In all these cases the intolerably unprotected situation of constitutional assets to which nullification leads would counsel having recourse to deferred nullity, if that is possible, or to an interpretative ruling. As regards the former procedure it is regrettable that the Organic Law of the Constitutional Court does not expressly contemplate this possibility.[49]

Interpretative judgments are in reality a neutralization of the conflict with the legislator and serve, besides, to get around traumas in the legal order.[50] They are a manifestation of deference: instead of declaring a criminal article unconstitutional, what the Court does, so to speak, is to "trim off the fat", to interpret it in such a way as to make it fit it within the constitutional framework: to demonstrate that some or other of the norms derived from the statutory provision are constitutional and others are not and the legislator therefore only had the former in mind.[51]

[49] The latest reform bill did contemplate this possibility, offering the following wording for its article 39.1: "When the ruling declares unconstitutionality, it shall likewise declare the nullity of the norms that are challenged or questioned. Notwithstanding, in a reasoned way and in order to preserve the values and interests safeguarded by the Constitution, the ruling may declare solely unconstitutionality or defer the effects of nullity for a period that in no case shall exceed three years."

[50] López Bofill (2004, p. 20) defines them as "judgments that declare the constitutionality of the contested legal norm but in which the normative content of the law is made subject to an interpretation that the Constitutional Court upholds as adequate in terms of the Constitution"; see also Díaz Revorio (2001, p. 25 ff.): "in the strict sense, only those which [. . .] contain a ruling that, while affecting the normative content of a legal norm, leave its text unaltered, shall be deemed an interpretative judgment"). One of the most powerful reasons for issuing such rulings, according to López Bofill (2004, p. 317), as an alternative to the nullification of the contested legal disposition "is not so much the desire to protect a Fundamental Right as the need to maintain the penal (or administrative) sanction upon a particular conduct irrespective of the Fundamental Right".

[51] This, according to López Bofill (2004, pp. 265, 279), is "a strategy for eliding the conflict of constitutionality, whether by minimizing controversy with the legislator [. . .], or sweetening the destructive consequences of the declaration of unconstitutionality or nullity". Besides, "with this ingenious strategy, the constitutional judges impute to the legislator their own constitutionally adequate interpretation of the law [. . .]. The Courts arrive at the statement: 'this is the interpretation of the legal norms that the legislator holds in esteem when taking into account the constitutional mandates, whose exegesis corresponds to us in the last resort'".

In the control of criminal law, this is a technique the use of which, however, tends to be restricted because of its security costs. In a field with pressing security needs, it is not at all desirable that the normative area (the conducts for which a citizen can end up deprived of liberty) should remain fixed not only by a legal provision, in nearly all cases codified, but also by the contents of a judgment by the Constitutional Court.[52] This impairment of legal certainty finds some consolation in the fact that it concerns reductions of the statutory offense: the result will inevitably be a normative surprise favourable to the person who is accused, indicted or sentenced.[53] Furthermore, it is only this reduction which makes it an acceptable procedure in the end, one that offers greater constitutional advantages than drawbacks. Such a technique will become unacceptable if the normative trimming results in a greater degree of penalization, for instance, when an attenuating or exonerating circumstance is interpreted restrictively.

The second cost is one of administration. Interpretative penal judgments open a complex process of judicial review on each sentence already imposed. It is not just a matter of annulling the punitive effects of a law declared to be unconstitutional, but on a case-by-case basis of analyzing whether each sentence passed was handed down in virtue of the normative content excluded from the statutory provision *ex Constitutione*: for example, if a sentence for justification of genocide was handed down for a manifestation that was not inciting violence or that constituted mere political adherence (STC 235/2007).

[52] Since in all these decisions the Court "alters the normative content of the law". In all these decisions it "contributes something 'new' to the comprehension of the law that was not there previously". Hence, according to López Bofill (2004, pp. 21, 320) the employment of this recourse "should be proportional to the preservation of other legal assets whose protection under criminal law is rooted in constitutional terms".

[53] Díaz Revorio (2001, p. 222) considers that such cases do not offend the principle of legality. Decriminalization also affects legal certainty, but in a relevantly less intense way. It does so, in the first place, because decriminalization constitutes a negative limitation on penalization: because the cognoscibility of what is no longer penalized is cognoscibility of what is still sanctioned. In the second place, it does so because penal norms do not only restrict liberty with threats and prohibitions, but do so with the intention of preventing harmful forms of behaviour and thus safeguard legal assets. Penal norms are instruments for protecting the principal social assets and in that sense the knowledge of such protection contributes to legal certainty, which is the foreseeable nature of the behaviour of others in which we may find ourselves involved. The knowledge that others may not injure us, insult us or raid our computer records forms part of legal certainty, likewise that the prohibition of such conducts is not just any prohibition, but the most forceful possible: a penal prohibition.

One might, in fact, refer both to a broad interpretation and another stricter one of the Spanish phrase *seguridad jurídica*. According to the former, *seguridad jurídica* means legal certainty: i.e. cognoscibility of what has been ordained, and foreseeableness of the consequences that public regulations assign to the behaviour of citizens. However, the phrase can also be taken—according to a common understanding of the word *seguridad*—to mean legal security or safety: i.e. freedom from "danger, harm or risk". Within the concept of legal certainty it is worth distinguishing an unavoidable content, not to be subordinated to other values or interests, which is that constituted by the foreseeableness for citizens of the legal consequences of their behaviour that would be relevantly negative for them.

I am loath to finish without remarking on the problems of lack of deference entailed by the control of laws of decriminalization: is it not a radical lack of deference towards legislators, not content with erasing their work from the official gazette, but to go to the extreme of obliging them to write in it and in a particular sense? Can legislators be reproached, not for what they do, but for what they fail to do—penalize certain conducts?

As what is challenged is a decriminalizing law, it may be said that it would be enough, for the constitutional reparation of the contested legal statute, to annul this and to maintain the law that was previously suppressed. But, in the first place, it is remarkable that this is a mechanism of depuration of the legal order that can only operate when legislators "*undo*" (decriminalize) and not when they "fail to do" (fail to penalize). The question is: can constitutional jurisdiction impose a penalization despite only being able to do so when what is challenged is a decriminalizing statute but not when the problem is one of the unimpugnable absence of a norm? And, in the second place, the final result is the validity of a law—one which used to penalize and now once again penalizes—without legislators: a law that nobody wants, that nobody now upholds.

12.5 Suggestions for Constitutional Judges

An important part of the task of controlling a penal law is performed on the basis of precise constitutional rules. In this case, the line that marks the confluence of responsibility and prudence is constituted by a control of reasonableness: criminal laws whose constitutionality is reasonably sustained should not be annulled.

What is more difficult is the work of control *ex principiis*. But this is unrenounceable. On the basis of the relativity of this control and the weak legitimation of the Constitutional Court *vis-à-vis* the legislator, the appropriate attitude is deference regarding the contested law.

The primary attitude of deference is the presumption of the constitutionality of the law. This presumption can only be weakened through good reasons that will have to be made explicit in the judgment.

The Constitutional Court will have to proclaim and define principles. What deference will impose here is the placing of the minimum level of respect at a relatively low point.

Deference and justice will incline judges at times to issue an interpretative judgment. This possibility must be handled with prudence: the devil of insecurity carries the burden.

The Constitutional Court should not sit in judgment on the legislator's penal omissions.

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Chapter 13
Controlling the Constitutionality of Criminal Law Against the Onslaught of Irrationality Criminal Policy

Luis A. Vélez Rodríguez

Contents

13.1 Introduction

Plato—Michel de Montaigne reminds us—maintained that those who sought to weed out all the defects of a law were doing nothing more than cutting off one of the Hydra's many heads (Montaigne 2013, p. 668). I thought it is pertinent to repeat this affirmation as a warning, so as to maintain a certain caution in the approach to the

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question and its goals that bring us together today: the design and evaluation of tools that mean we may have better criminal laws. But the exhortation is not, of course, an invitation to desist from the enterprise.

This study proposes a twofold objective: the first, aims to defend the contribution that the constitutional courts can make to increase the rationality of legislative decisions in criminal matters. The second is aimed at presenting some critical observations in relation to the performance and regulation of the abstract control of criminal laws, an activity of the headquarters of the Spanish Constitutional Court.

To do so, some characteristic and problematic features of contemporary criminal policy are first of all presented, which would justify the need to establish mechanisms for intervention oriented at its rationalization. Subsequently, it is upheld that abstract control of the constitutionality of laws is an adequate institution to incentivize the legislator to adopt these mechanisms. At the same time, some general guidelines are advanced for the constitutional courts to place greater attention on the deliberative component, which should lead to greater rationality of criminal law. Finally, some critical observations will be made on the scant repercussion that the decisions of the Spanish Constitutional Court have for the rationality of criminal legislation. Likewise, the scope of some norms that regulate the unconstitutionality of laws brought before this Court will be commented on, which limit their possibilities for greater democratic impact on the control of criminal legislation.

13.2 Political-Criminal Panorama

It is common practice to begin with the introduction of a series of questions, to approach the existing knowledge of the current state of criminal policy and the ends that it seeks, so as to then search for possible responses. So, we might well ask:

Is the design of criminal policy oriented towards the establishment of effective strategies for crime reduction? Does it pay attention to criteria that permit social rehabilitation, re-education and reinsertion of criminals? Does it fulfill a protective function for society against the dangerous individuals that threaten it? Are its criminal sanctions designed in accordance with strict scales of proportionality with regard to the offence that they sanction, with a view to fulfilling the principle of retributive justice? Does it really look after the interests of crime victims so that they receive compensation for the harm inflicted on them and recover their confidence and dignity in society? Does it seek to send out messages that encourage the stability of social expectations?

It is clear that the responses given to these questions have guided the political-criminal and criminal-law apparatus since its birth, with the emergence of the modern state, up until today. The same answers have their grounding in the diversity of ideological stances, as well as principles from different historic sources and lines of development. The plurality of focuses and interpretations have given rise to the creation and introduction of systems, arrangements and mechanisms that,

taken as a whole, and despite their inherent contradictions, constitute the spectrum of principles that we know as criminal law.

However, if we look at the present-day context and ask ourselves where criminal policy is heading, we will probably find that it is not all together along the lines of these, varied ideals of criminal law. At least, not in a way that is easy to identify. In fact, a description of the orientation of present-day criminal policy seen through the filter of the purposes of the punishment that underlie the questions outlined above does not allow a clear characterization, with those questions, of that policy. It appears that the criminal policy is moving along a *different* line.

13.2.1 Problems

This line or direction to which I refer is what Pettit (Pettit 2002) has called the *dynamic of indignation*. In relation to decision-making in criminal policy, this dynamic would be characterized by the difficulties that legislators, in so far as they are politicians, to establish stable policies, regardless of their foundation and even of the efficacy with which they achieve the ends for which they were established. The stability of criminal policies and norms is under constant pressure from a society that, in the face of problems and situations that it considers morally serious, demands the application of urgent measures, based on maximalist criteria.

The requirements that this author proposes, so that this dynamic enters into operation are threefold: in the first place, it requires a literate society that has broad access to channels of communication that portrays the existence of behaviour that is valued as *bad*. In second place, the society in question accepts a series of values, in a generalized way, that we could broadly call humanitarian, the violation of which usually awakens feelings of indignation, anger or fear in people. Finally, in third place, society should organize itself in a democratic way, where politicians are expected, to a greater or to a lesser degree, to respond to that emotional reaction through positive actions, or to face the threat of electoral losses.

In a similar way, Garland (2001, p. 13), in his influential work on the *Culture of control*, reminded us that contemporary criminal policy—referring to the United States and the United Kingdom—has been marked by profound *politicisation* and *populism*, through which decisions on matters referring to the control of the crime are adopted, in a search to *make an impact* on public opinion, with the intention of making electoral gains. This search for votes has meant less attention is paid to an expert approach to crime and to criminal phenomena, regardless of the explanations provided by criminological investigations as relevant elements in the criminal policy decision. On the contrary, constant appeals to common sense and to the authority of the people are made, which require decisive measures.

In the Spanish context, Díez Ripollés (2007, p. 94), among others (Larrauri 2006; Álvarez García 2006), has called attention to the way in which this diagnosis made by Garland is also reflected in the development of the criminal policy of the country. With regard to this politicisation and undermining of an expert approach to

criminality and to the control of crime, he points out that this dynamic impoverishes the social debate on these matters, because of its simplistic and uniform approach to them, as well as by the exclusion of points of view and plural alternatives. He highlights how this attitude held by the political classes makes no attempt to respond to its own ideological or party identity, but aims to demonstrate to the public who is the hardest on crime.[1]

In this dynamic, the so-called *resurgence of the victim* plays a decisive role. From a critical perspective of victimology and criminology, over recent decades, demands have been placed on the justice system to turn its regard towards the victim of the crime, with a view to providing mechanisms of assistance and support, especially in the course of phases of criminal investigation, proceedings and enforcement, with a view to mitigating and preventing the effects of victimization and re-victimization. Alongside these legitimate demands, justified by the traditional abandonment of the victims of the crime in criminal law, this renewed consideration of their interests has turned a corner with regard to their presence at the level of drafting and designing criminal policy.

Thus, we face a scenario in which the demands of the victims are defining the direction that criminal policy should take. In contrast with the calls for attention and support noted above, appealing to the interests of the victims is done by beginning with a criticism of the guarantees and rights that the system offers to criminals. In this way, an attempt is made to give the impression that their interests are in opposition to those of the victim.[2,3]

In the panorama that we are painting, the communication media plays an essential role. They are meant to serve as a sounding board, both for popular demand as well as for intervention strategies that are presented to satisfy them. With regard to the understanding of the crime and criminality, the function of the mass media is to give visibility to criminal acts, so that they are recognized and defined.

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[1] In a similar sense, Pozuelo Pérez (2013), p. 15, when he points out that "The need to introduce the relevant criminal reforms has periodically taken place in the change-overs in political power of the two main parties in Spain, as if it were necessary to leave a mark, as well as a sort of inheritance. And an absolutely essential aspect is added: the electoral gains that are thought to ensue from the fact of reforming criminal law, above all when the motive of the reform has had a media impact and, with it, social consequences".

[2] See, critically, on the role of victims and their relation with the rights of the criminal: Tonry (2010), p. 391. Also, Garland (2001), p. 11; Díez Ripollés (2007), p. 90 f. The contribution from Silva Sánchez (2001), p. 52, found a relation between the social demands of criminalization and the attitude of identification with the victim, with what is called a society of passive classes, classes that are framed in the social model of the crisis of the welfare state.

[3] On this point, the recent call to demonstrate (27/10/2013) made by the Association of victims of Terrorism (AVT) against the judgment of the European Court of Human Rights (Case of Río Prada v. Spain) which led to the non-application of the so-called "Parot Doctrine", under the slogan: "Justice: For a final with winners and losers". See: http://www.avt.org/comunicados-y-noticias/rotundo-exito-de-la-concentracion-de-la-avt-mas-de-medio-millon-de-personas-gritan-justicia-junto-a-las-victimas/1026.

In this sense, it is through the mass media that the public acquire knowledge of criminal acts of which they would very probably never have direct experience. In accordance with the way the information is filtered, the way the events are presented and the allocation of lengthy news slots, it is the public who decides whether a specific situation acquires the category of public interest and, in consequence, appears on the political agenda, or who abandon interest, causing social concern to dissipate (Vélez Rodríguez 2012, p. 348 ff.; Roberts et al. 2002; Díez Ripollés 2003, p. 27 ff.; Becerra Muñoz 2013, p. 94 ff.). Likewise, this selection and the way the information is presented is not done on a neutral plane, but is conditioned by the specific structure and values of each media channel, such as their need to spread news and to give the public what it wants, in their desire to capture and to maintain audience ratings (Thompson 1998, p. 34 ff.).

Thus, we find that the relation between public opinion, communication media and political actors is done in the framework of reciprocal and interactive movements between these social agents. In this way, if public policies in political-criminal matters are based on the state of public opinion, public opinion is, in turn, found to be conditioned by the news items carried in the communication media. This interrelation in the form of a loop allows no clear identification of whether one agent prevails over another, a question that, among others, we have no interest in addressing now (Pozuelo Pérez 2013, p. 42 ff.). What should attract our attention are the effects that occur, particularly in the creation of legislation in criminal matters.

In the first place, the situation that we are presenting leads to the impoverishment of the social debate in view of the possible solutions to these problems that they attempt to answer. When the terms of the debate are established in an alarmist way, giving prominence to the impact of the act over and above a careful assessment of the behaviour, the response that is called for is, because of its forcefulness, comparable to the harm that has been caused. The legislator reacts with a docile attitude to reform criminal law and to harden the sanctions for those behaviours that provoke the most indignation and social alarm.

This is done by passing over the investigation of different options for action that are available. All the more so, not only are other means of response ignored, but any warning about the consequences or new risks involved in the new regulation are overlooked (Sunstein 2005, p. 37).

In second place, the efforts of politicians to satisfy the demands of their electorate, as well as the efforts of the communications media to reach large audiences, raises further social concerns over crime in the face of dysfunctional social situations that do not exist or that may not have the seriousness or importance that those actors would wish to give them in public.[4] When focusing on singular

[4] On this point, Díez Ripollés (2003), p. 21 points out that: "Social dysfunction can be, in its factual circumstances, real or apparent, the latter being a quality of which the social agents activating the process may or may not be aware or they may be motivated by the intention of passing off an apparent dysfunction for a real one. The frequency with which people have to work with apparent social dysfunctions, that is with representations of reality disproved by empirical-social data, should not be underestimated".

events and describing criminal acts with the features of *the worst scenarios*, both the mass communications media and politicians create a new problem, to wit: *fear of crime*.

Fear, considered in itself, should not be a matter of political-criminal relevance and neither should it constitute a factor that is directly associated with victimization. However, generalized fear implies social costs (Sunstein 2005, p. 128). Here, politicians may feel tempted to adopt measures to respond to dangers that will perhaps never arrive, but which are the response to that social fear. These apparent solutions involve expenditure and investment of resources that might deprive other sectors that really require them, causing the emergence of new and unforeseen problems.

Associated with this, in third place, we find that the dynamic that has been described brings with it legislative instability. This instability turns into a weakening of the mandate of legal certainty and in consequence, as if Beccaria had no need to say as much, of its efficacy.[5] A normative modification is much more than a correction of a text. This affirmation appears obvious, but there is no harm in recalling that any modification of criminal law impacts on the criminal justice system[6]: from police practice, to alterations in criminal instruction and the criminal process, to the enforcement of prison sentences, legislative changes envisage a kind of institutional renovation with a view to adapting concrete areas of control to new normative demands. When reforms go ahead without really having a proven capability to find a solution to the situations for which they were designed, they do not allow the necessary processes to become embedded for acceptable operation of the institutions. This brings with it social implications, at least in so far as they affect the trust of the general public in the justice system.

In fourth place, a worrying alteration may be seen in the democratic system. Democratic and not populist knowledge requires, as it is a base principle for impartial decision-making, that all those potentially affected by the measure may

[5] The Marquis said: "The certainty of a punishment, however moderate, will always cause a greater impression than the fear of another more terrible one but linked to the hope of impunity; as evils, although minimal, when they are true, always frighten the spirit of man, and hope, a celestial gift that is frequently all that is left, always distances the idea of the worst evils, principally when impunity, which avarice and weakness often occasion, increases in strength" (Beccaria 2000, p. 53).

[6] This once again reveals the difference between a populist approach and a technocratic approach to problems related to criminality. The populist approach tends to orient all of its attention in the most visible part of the problem, ignoring the rest, such that it assumes that the measures adopted to attend to a particular situation will only affect that particular area. As for the technocrats, they pay attention to systematic reviews, or put another way, they watch the film and not the snapshot. I do not wish to say that the latter are always accurate, but when ordinary people are in disagreement with experts, as Sunstein (2005), p. 87 highlighted, it is often not because of a conflict of value judgments, but because the ordinary citizens are more likely to be captivated by discourse based on the impact of the fact and its moral valuation, paying no attention to aspects of probability and the consequences on the system. In the same sense, Moccia (2006), p. 309, warned of the ever greater tendency towards a criminal policy founded on emotions than on a broad strategic design.

participate in the decision-making procedure.[7] In the panorama that is presented here, the consideration of the victim of the crime, in the light of a stereotyped and homogenous prism, complicates full public participation. The idealized image that is presented of the victim of the crime has as a parallel story, a characterization of the criminal as *the other*, who should be fought.

So, by presenting a sacralised image of the victim on one hand, and that of an extreme and evil danger, on the other, the decision over regulation is set forth in terms of choosing between those two extremes. The way in which the terms of the discussion are taught, their emotional overtones, and the trust of those who sponsor the reforms, finish by creating group polarization, because people are finally more condescending towards the dominant stances: trust feeds extremism (Sunstein 2005, p. 101).

This unidirectional approach to understanding the crime from the point of view of the victim distances itself from any intention to understand the criminal, whose image acquires grossly exaggerated features and he is only judged under criteria of danger. In this way, there is a break with the possibilities of social and democratic dialogue that should guide all criminal interventions, provoking cracks in the structure of society because of the logic of enmity and its imposition (Aponte 2005, p. 12 f.), which entails social fragmentation and an increasing loss of the capability for political intervention and negotiation by groups already traditionally excluded (Binder 1997, p. 86).[8]

In summary, in the context that has been described, we find ourselves facing a political-criminal panorama with three general problems: a democratic deficit, a deficit in the rationality of legislative decisions in criminal matters and the potential generation of greater exclusion and social marginalisation. We have moreover identified the social actors that intervene in this dynamic: public opinion, communication media and legislative power.[9]

[7] See Gargarella (1996), p. 85: [...] "but in turn consider that such participation does not constitute a necessary and sufficient condition of such impartiality".

[8] Referring to this as the "culture of the plague".

[9] It would be worth mentioning, at the least, an additional actor, to wit: the economic powers. Nevertheless, I think that these, as they are normally constituted in the form of pressure groups that fit into the dynamic of political parties, as well as the functioning of the communications media, would be included in the process described up to this point. In any case, whichever has not up to now been expressly mentioned in the development of the text, does not imply unawareness of their role in what has been said or in the presentation that follows. Very illustrative in this sense is the analysis by Rando Casermeiro (2012), on the role played by pressure groups in the film and music industry in the search for the criminalization of Internet downloads of audiovisual material, because they threaten intellectual property rights and the rights of the author.

13.2.2 Solutions

However, if we ask what the juridical-penal science can do to try to limit this situation, it has to be recognized that the real possibilities of intervention in the communications mass media and of affecting levels of public indignation are very limited. With regard to the first, because any attempt to regulate the selection of information and the way its content is presented involves risks relating to the rights that are inherent to this function, such as freedom of the press and the free circulation of information. With regard to the second, it appears impossible—and perhaps it is also undesirable—to try to mould or rationalize the feelings of indignation or fear in a particular way that certain circumstances awaken within us (Pettit 2002, p. 13).[10]

The approach therefore turns to the search to establish criteria and mechanisms that aim to achieve both technical and democratic improvements in the decision-making processes of legislative power. The proposals developed in this sense run in two directions: on one hand, those directed at inserting legislative techniques of argumentation, in a comparable sense to those of the judicial argument, which revitalize the prestige of criminal legislation (Marcilla Córdoba 2012, p. 69). On the other hand, by establishing permanent technical bodies at the different democratic strata, composed of experts who would act as a technocratic counterweight to the populist currents that drive criminal policy.

In the first group, the model of legislative rationality proposed by Díez Ripollés stands out, which is structured at five levels that respond to ethical, political, empirical, juridical-systemic and linguistic aspects. This model is oriented towards configuring the argumentative parameters that should justify a legislative decision in criminal matters, in such a way that its adjustment to the social reality in which it intervenes is verifiable (Díez Ripollés 2003, p. 86 ff.).

In the second group, Becerra Muñoz (2013, pp. 537 ff., 627 ff.), on the basis of a recent review of experiences in different legal-constitutional environments and taking the previously mentioned model of criminal legislative rationality, in the Spanish case, proposed to incorporate a criminal policy division in the Ministry of Justice—the ministry that leads the great majority of government initiatives on criminal policy. It would be integrated by experts and professionals in areas close to the criminal question and would have a stable character and independent criteria. A reworking of the general Committee on legislative processes could be added to this, giving it a more active role in matters referring to the systematization and revision of criminal regulations.

In a similar way, among the proposals that impact on giving a more decisive role to the experts in political-criminal decisions, those that propose removing matters that refer to the design and contents of criminal law from the political discussion

[10] This does not mean that both experts and politicians and the communications media have no social responsibility to try to abate social fears, above all when these are irrational in the view of the available scientific knowledge.

stand out. These proposals involve the creation of a centralized body, outside of the system of criminal justice, which functions with an action plan that is comparable to central banks in the regulation of the economic activity of the states.[11]

The idea that underlies these sorts of proposals—with the exception of the one above—is accurate in the sense that it seeks to contribute to raising the quality of criminal laws through further technical instruments and expert knowledge of reality. In addition, it presupposes that the major importance given to the arguments presented by the experts should lead to an increase in the quality of the reasoning that is presented in the democratic debate. Accepting this basic proposal, except for the specific questions that may be raised on these proposals, the problem that they involve is their actual implementation. This may only arise, in the present state of affairs, by the good will of the legislator. What incentive does he have to place limits on his actions?

13.3 Constitutional Justice and Criminal Law

Having described the main features of the ground on which we stand, as well as the lines forward directed at constructing mechanisms that impact on rational decision-making in the drafting of criminal laws, I would now like to look at the question of the role that constitutional justice should play in relation to the decisions of the legislator in matters of criminal justice.

The position that I uphold here is directed at defending the institution of judicial control over the constitutionality of the law as an acceptable mechanism through which to introduce the criteria of rationality in the processes of drafting criminal law. This could be achieved by paying attention to two fundamental criteria: the first, general to all legislation, is oriented towards ensuring that the regulatory measures contained in the legislation are adopted within a process that takes account of the different conflicting stances of all the parties that are potentially affected. The second, specific to criminal policy, upholds that the pattern of scrutiny of criminal legislative decisions should be one of strict control, which implies verifying that these are founded on solid empirical premises.

Prior to the presentation of the criteria that I consider should be present in all reviews of the constitutionality of criminal law, it is necessary to present some essential elements to criminal policy that, as an *Arquimedean point*, should offer the essential groundwork for constitutional control.

[11] On this, see Pettit (2002), p. 16 ff. Critically, with regard to the elitist nature of these proposals, Díez Ripollés (2003), p. 172 ff.

13.3.1 Content of Criminal Policy: Basic Assumptions

I cannot occupy myself here with an explanation of sufficient length to do justice to the unavailable content that should be present in the design of all criminal policy. It is sufficient in the meantime to say that the necessary framework of reference is that provided to us in the constitutional model that enshrines the social and democratic state under the rule of law.[12]

In this sense, I will confine myself to stating a series of points, advanced as assumptions, which should guide legislative decision-making in criminal matters and which, in consequence, should be present in the body responsible for constitutional control. I consider that, in addition to those guiding principles of criminal policy that are traditionally presented as limits of the state powers of *ius puniendi*., an acceptable criminal policy should take the following criteria into account:

In the first place, I wish to highlight that criminal law, in comparison with any other type of legal order, is *different*. The difference to which I refer is not limited to its intervention in fundamental rights, specifically that of freedom. Although there is an easy association between criminal law and prison, we find numerous examples that show different types of reactions, from civil or even administrative law, which can be more serious than other alternative sanctions that are specific to criminal law. But, we must not fall into the trap. Criminal law is different, not only because of the sanctions that we associate with it. Criminal law is different because it implies the limitation of, at least, two types of freedoms: the first, the message of censure that is sent to proscribe certain behaviours. The second, the particular stigmatization that is associated with the criminal sanction with a high potential for social marginalization (Husak 2004, p. 232).

Likewise, in second place, it should not be forgotten that the state has a large set of different mechanisms for criminal measures to respond to criminal behaviour. In this sense, the *ultima ratio* principle is essential as a guide for all legislative decisions that involve criminal measures. Therefore, when we turn to criminal law as a means to confront social conflicts, a message is sent to society that the other means of intervention have failed, for which reason it is necessary to resort to criminal law:

(a) Demonstrate the existence of the risk that criminalization seeks to counteract (*harm principle*).
(b) Demonstrate why more benign measures have not been adopted (*necessity principle*).
(c) Demonstrate that the opinions of all those who are potentially affected by the decision have been taken into account. This cannot be the result of the majority and much less a minority that imposes its views (*democratic principle*).

[12] Thus, Zipf (1979), p. 24. "All criminal policy outlines are always incorporated in the referential framework of a particular state situation" [. . .]. Whoever actually wishes to determine the fundamental principles of our constitutional order, will immediately find themselves facing the concept of the "social State under the rule of law".

In third place, and taking into account that the adoption of a particular criminal policy means an expression of the exercise of power, and in so far as all power in a democracy should be subject to control, the decision-making mechanisms should have sufficiently broad avenues for public participation that guarantee transparency of decision-making and a public process of reflection that takes into account and responds to all opinions in the conflict. This is done on the grounds that maintain that political pluralism is not only good in itself, but an adequate means to achieve more balanced agreements (reduction of extremist positions). In this sense, the democratic system should open up spaces so that minorities can question the decisions taken by the majority.

13.3.2 The Role of the Constitutional Courts

Along these lines, I consider that the work of the constitutional courts, framed in the division of powers under the rule of law, should focus on the analysis of the constitutionality of norms within a framework that protects the independence of the public in connection, above all, with procedural conditions and the communicative circumstances of the lawmaking process (Habermas 2008, p. 336 f.).

Thus, I assume that the discussion on the existence of controls over the constitutionality of law and their legitimacy is no longer proposed in terms of an institution in which discussion ensues about whether it fits into state structures, It is rather a matter of how far its actions may extend in compliance with its function, without the result of an excessive intrusion into the actions of other state powers. In this sense, the tension refers to the determination of the scope of jurisdiction of the constitutional courts, in view of the principle of the power to draft new legislation in criminal matters.

With the birth of the constitutional state, this power of the legislator finds its limits within the normative margins imposed by the fundamental charter. If the constitutional courts offer the most authoritative interpretation of the constitution, they are also the ones that define and give substance to those constitutional limits. The formulation of this principle, although generally shared, when so presented suffers from great vagueness. In relation to the aforementioned stress lines between the legislator and constitutional justice, I think that elements that refer to the specific legal context which concern us here would have to be introduced. In other words, the legitimacy and scope of constitutional control should not be solved by looking exclusively at the principles that arise from the division of powers, but that greater relevance should be given to the democratic and institutional conditions of the situation in each state.

So, the general principle that would condition the legitimacy of greater or lesser levels of constitutional control will be given by greater or lesser complexity in the legislative decision-making processes in an inversely proportional relation: greater complexity of arrangements for participation in the preparation of decision-making will mean lower levels of intervention by the constitutional courts, and vice versa.

Having given this warning, in relation to the monitoring of criminal law, controls over constitutionality should contain at least the following:

(a) A review to guarantee that the new criminal regulation has been established within a process that has taken account of the different conflicting postures of all those potentially affected by the measure.
(b) A review that corroborates that the legislative decision is founded on solid empirical premises. In this sense, it would be acceptable to turn to rules and objective criteria, such as probability analyses.
(c) Constitutional scrutiny should be especially careful, if it observes any sign of potential threats to the rights of minorities.
(d) Mechanisms should be foreseen so that the public can question the constitutionality of a law at any point in time (*Guarantee of contradiction*). Here, constitutional control is constituted as a means of assuring deliberation.

13.4 The Constitutional Court and Criminal Law

When looking at the context in which the Spanish constitutional court undertakes constitutional controls in relation to criminal legislation, the definition of the contents pointed out earlier is very limited. I will subsequently justify this diagnosis, first of all, through a short presentation on the way in which material control of criminal laws is conducted, specifically through the application of the principle of proportionality. In second place, I will mention some normative aspects that refer to actions on the grounds of unconstitutionality that impact on that principle, which are presented as obstacles to confront the aforementioned democratic deficit of criminal policy.

13.4.1 Material Control of Criminal Laws: The Role of the Principle of Proportionality

The use of the principle of proportionality as a controlling canon of criminal laws is not the only unique interpretative criterion that the Spanish Constitutional Court employs. Other principles, such as that of culpability, criminal legality, and equality, among others, have historically maintained an undeniable importance in the review of the constitutionality of criminal laws. These, in addition, have undergone continual development both within the criminal-legal dogma, as well as with the support of the constitutional charter. This stability has, of course, not led to the fossilization of these principles.

The particular attention that the principle of proportionality deserves here, as a control parameter of the constitutionality of criminal laws, is made evident by the fact that, although not the sole control criteria, its progressive acceptance by the

constitutional courts, whenever not turned into an absolute, does at the very least tend to give it pre-eminence over other perspectives Both the choice of the interpretative criterion, with the scope and definition that the judges bring to it have important consequences.

It is not possible, given the obligatory brevity of this presentation, to give a detailed list of the content of the principle of proportionality and the way in which it has been defined in the different judgements pronounced by the Spanish Constitutional Court, in which this interpretative canon is used for the revision of criminal laws (Lopera Mesa 2006).[13]

Nevertheless, on reviewing the stance of the Spanish Constitutional Court in relation to its role in controlling the activity of the legislator in matters of criminal law, at least with regard to the application of the principle of proportionality as an analytical instrument, I think that it would be difficult to uphold a contrary opinion to one that accepts that the Court concedes a very broad and a not very exacting framework faced with the justification of the reasons that uphold the normative decision.

If we look, therefore, at the reasons that the Constitutional Court raises, we see that it recognizes, as an initial criterion to define its scope of intervention, its lesser democratic legitimacy to determine the scope of the decisions that affect the set of citizens, whose direct representation resides with the legislator. This self-awareness on the part of the Court with regard to its institutional position towards the other public powers of the state and in particular with regard to the legislator, is the first element to take into account, to conduct a balanced review of an accurate demarcation of the scope of its controlling function.

So, the Constitutional Court, for Lascuraín, has rigorously delineated the constitutional framework within which the criminal legislator should act. A restrictive framework in its design that would take in the area of legislative discretion in the definition of crimes and punishments. However, the Court relaxes its approach in the specific application of its analysis of the constitutionality of the criminal norms that are challenged before it, by conceding a broader field of appreciation and relaxing the content of the principle that it had described in the abstract, as follows [...] "Having safely set the instrument of analysis, but its cutting edge lowered, it should not be surprising that the constitutionally disproportionate nature of almost all of the provisions that are contested is rejected" [...] (Lascuraín Sánchez 2012, p. 16).

It is found here, therefore, that the Court adequately identifies the structure of the principle of proportionality, but leaves its effective interpretation in the hands of the legislator, whose decisions would be practically unquestionable except for those events in so far as they reveal a manifest and incontrovertible violation of the constitutional precepts or rights in question. But the principle of proportionality is not necessary for this purpose; if this is the criteria that the Court assumes we therefore face a superfluous analytical tool. The exemplary deployment of the

[13] Likewise, the SSTC 55/1996, 161/1997, 136/199 and 60/2010.

structure and contents of the principle would not go beyond ostentatious rhetoric, in a similar way to the exhibition of a muscular Hercules at a fair.[14]

That lesser institutional democratic legitimacy of the Court is undeniable, with which this caution may be justified. However, this cannot mean a displacement of the constitutional control functions of the regulations of the legislator. The attitude that the Court shows when evaluating criminal law obliges us to think that fundamentally its task moves from a duty to protect and to define the meaning of constitutional precepts, to an activity of protection and sustainability of legislation.

So, the Constitutional Court itself warned of the delicate task that it has in its hands when it recalled the potential consequences implicit in a declaration of the unconstitutionality of a criminal law: such as, for example, the retroactive effects of a massive annulment of the criminal responsibility of previously convicted individuals, with all of its attached consequences.[15]

Likewise, those cases in which the factual component of the criminal norm is in line with the constitution, but the envisaged sanction is disproportionate, and should therefore be declared unconstitutional, cannot be overlooked and they raise a serious conflict for the Court. On the one hand, the declaration of the unconstitutionality of the punishment, in other words, the annulment of the norm, would imply that the Court had left a socially relevant legal good unprotected. On the other, if it delivered a decision that modified the literal tenor of the norm, it would be attributing itself a function that corresponds exclusively to the legislator (Lamarca Pérez 2011, p. 60).

Nevertheless, these precautions are only one side of the coin. Although it is true that the effects of decriminalization and depenalization can entail a series of social and economic consequences that should not be ignored, neither should the personal costs be ignored that it has for the individuals affected by the criminal measures who are specifically considered. Quite fairly, in a constitutional state founded on the

[14] In this same sense, Lamarca (2011), p. 61, notes that "reducing its operation to cases of obvious and undeniable excess implies restricting its use to evident and irrational unconstitutionalities, those in which it is not even necessary to develop a sophisticated test of proportionality because a clear breach of the specific precepts has occurred". In a similar sense, Rubio Llorente (1997), p. 426, pointed out that: "The decisions of the Court, grounded in general in a more extensive way and with a certain didactic tone, are reached on the basis of purely formal reasoning in which no data are taken other than those contributed by the parties, and in which considerations are rarely or never introduced that are formed on the basis of a direct analysis of the social or natural reality on which the norm operates".

[15] As an example, the contents of STC 55/1996 FJ 2: [...] "the hypothetical annulment of the unconstitutional rule would, among others and unlike its mere legislative substitution by another measure more favourable to the prisoner—in other words, the mere mitigation of the punishment—, have the following effects; a judicial pronouncement of free absolution in the proceedings and in all those in which the accusation concerns the behaviour described in the regulation; the annulment of all criminal responsibility for previously convicted individuals, on the basis of the retroactivity of the sentence; and the possibility of access to indirect compensation of an economic order, in so far as they were deprived of their freedom and that their rights of participation in the public activity were restricted due to the application of an unconstitutional norm".

basis of human dignity,[16] the work of constitutional judges, as a counter-majority organ, is to prevent the indiscriminate sacrifice or infringement of people's rights in the name of a supposed social or economic utility of a majority.

The Constitutional Court attempts to bypass this point, placing the weight of the judgement of proportionality on the importance of the legal good protected by the criminal measure.[17] But when these goods are of such conceptual vagueness as the *general interest, public health care, the defence of the state, the principle of authority* etc., and the behaviours that are criminalized do not in themselves have any real capability of posing a real risk to the good that they seek to protect,[18] one may have the well-grounded suspicion that the Court is rubber stamping the work of the legislator, who can at its discretion define any crimes under the blanket of a legal good that, at the end of the day, will have an almost absolute value.

Likewise, the contempt that is revealed in the reasoning of the Court towards questions of an empirical nature[19] means that the debate in parliament centres almost exclusively on the search to enter into negotiations and transactions, so as to win the majorities that are necessary for the approval of the norms.[20] True control over these aspects would oblige or at the least should create a greater incentive to respond to all possible aspects linked to the decision in the discussion within the legislative body.

As pointed out in the first part, to turn to criminal law is a strategy that in the short term usually brings political capital to whoever supports measures introduced through criminal policy, because of their high level impact on the media and on the collective emotions. But the costs in terms of the sacrifice of freedom can be enormous.

The controlling mechanism can function at an important level to uncover those arguments that were passed over in the area set aside for legislative development

[16] It would not be excessive to recall here that dignity is above all else and is, therefore, unavailable. So, following Kant (2012, p. 148): "In the realm of ends everything has either a price or an intrinsic value. Anything with a price can be replaced by something else as its equivalent, whereas anything that is above all price and therefore admits of no equivalent has intrinsic value. Something that involves general human desires and needs has a market price. Something that does not involve anyone's needing anything but accords with a certain taste (i.e. with pleasure in the purposeless play of our feelings) has a luxury price. But if something makes it possible—and is the only thing that makes it possible—for something to be an end in itself, then it does not have mere relative value (a price) but has intrinsic value: i.e. dignity".

[17] See on this point SSTC 55/1996 FJ 9, 161/1997 FFJJ 12 and 13.

[18] Expressing himself with a similar opinion on the one noted here, see Hassemer (1997), p. 54 ff.

[19] Expressing himself in the same way, see Díez Ripollés (2007), p. 236 ff.

[20] On this, Lopera Mesa (2006), p. 594: has pointed out that "A consequence of the scant importance that the Court attributes to the foundations of the factual premises involved in the control of the constitutionality of laws is the poverty of the arguments that usually characterizes the judgments of idealness and necessity, in particular with regard to the control of criminal regulations, in which faced with the lack of empirical evidence that confirms or refutes the diagnoses or prognoses that support legislative intervention, the Court is left with no other option than their unrestricted acceptance [...]".

and, by doing so, can contribute to strengthening the deliberative component to which the constitutional democracy aspires. Nevertheless, when the evaluation standard constructed by the Constitutional Court sets the threshold that requires a justification of the decisions of the legislator at minimal levels, this lacks incentives to carry out normative constructions founded on solid empirical premises that take in both the diagnosis of the social reality on which it will act, as well as the prognosis of the results that it expects to gain through the measure.

13.4.2 Legitimization for Submitting Applications on the Grounds of Unconstitutionality

It is now time to concern ourselves with the regulatory framework within which the control takes place and, in particular, possible legitimization for the submission of applications on the grounds of unconstitutionality in relation to laws of doubtful constitutional value. This point is important provided that this constitutional action helps to strengthen the deliberative element of democracy and, in turn, democracy itself, as it serves to reaffirm the sense of pluralist participation and attention to social and political minorities, whether represented, lacking representation and, very importantly from a political-criminal point of view, those that cannot be represented.

We will leave the question of unconstitutionality to one side, while making it clear, nevertheless, that this procedure has within constitutional practice been used to force pronouncements from the Constitutional Court which would otherwise have remained silent.[21] The initiative on the part of ordinary courts has been of immense importance when maintaining the debate on the constitutionality of certain criminal precepts that raised doubts with regard to their compatibility with the constitution.[22]

The same may not be said of the application on the grounds of unconstitutionality, particularly if we refer to criminal laws, when the scant use of this action is observed by those legitimately empowered to do so.

The regulation of this mechanism in the Spanish legal order is strictly assessed in terms of the legitimization to submit applications on the grounds of unconstitutionality. The following reflections are directed at reviewing some problematic questions of these provisions and to demonstrate how they especially affect matters related to criminal law.[23]

So it is therefore found that legitimization to submit applications on the grounds of unconstitutionality against laws or regulatory acts with the force of law in the

[21] Recently the Judgments of the Constitutional Court (SsTC) 235/2007; 59/2008; 60/2010.

[22] See on this point, Ferreres (2012), p. 109 ff.

[23] Therefore, it is not a question here of carrying out an in-depth study of the appeal mechanism of unconstitutionality, but only to observe the above-mentioned aspects.

Spanish constitutional order are exclusively set aside for a series of state organs, in accordance with what was established in articles 162.1 a) Spanish Constitution and 32 of the Organic Law of the Constitutional Court—LOTC—, to wit: the president of the government, the public ombudsman, 50 members of parliament or 50 senators and the executive collegiate organs of the autonomous communities.

This strict normative provision implies that members of the public, whether considered individually or collectively, are excluded from the possibility of initiating a procedure to challenge the constitutionality of the law. They are only able to appeal in an indirect manner, by means of a question of unconstitutionality,[24] by means of a complaint addressed to the public ombudsman or through an internal (examination) of unconstitutionality that the Constitutional Court can initiate in the process of an application for the protection of legal rights (Gónzalez Rivas 2010, p. 354).

The principal reason for this limitation lies in the relevant political position occupied with the constitutional system by the people with legitimate grounds to submit the application, in accordance with which, by virtue of their institutional vocation, their actions are directed at the defence of the public interest and not of a particular interest (Gónzalez Rivas 2010, p. 354). This is the opinion upheld by the Constitutional Court since its early jurisprudence when it affirmed that this restriction is founded "on paying attention to reasons of political prudence and security and legal normality".[25]

This motivation also extends to restrict the intervention of associates once the proceedings have been initiated by any of the aforementioned actors. The list of the legitimatised actors in articles 162.1 a) Spanish Constitution and 32 LOTC is strict and rigorous for the Court, and no extension can be made by analogy. Provided that the finality of the procedure is the abstract defence of the constitution, through the comparison of this and a particular legal text, the Court imposes a restrictive interpretation of the participants in the process by reason of its objective nature.[26] There is there no correlation for the Court between the defence of subjective rights and legitimization for the presentation of an application on the grounds of unconstitutionality.[27] The inherent reason for this resistance from the Constitutional Court has been the consideration that the procedure of unconstitutionality of the law follows a public interest and not that of an individual party.

This decision of the Spanish electorate, endorsed by the Constitutional Court, of limiting the application on the grounds of unconstitutionality to an assessed series of legitimatized parties may be understood from the point of view of the historic

[24] Which in any case will be a decision at the discretion of the appointed judge.

[25] ATC 6/1981, of 14 January.

[26] See AATC 132/1983, 252/1996 and 378/1996.

[27] The same does not happen with interventions in the appeal for protection procedure that, under art. 47 LOTC, accepts help for those who show a legitimate interest in it. Having a legitimate interest is not equivalent for the Constitutional Court to benefiting from the result of the ordinary procedure (González Rivas 2010, p. 527).

landscape of achieving a peaceful evolution towards the establishment of a constitutional state in which the democratic component prevails. As Rubio Llorente has pointed out, the decisions and measures that are adopted within the process of the transition from the Francoist dictatorship to the constitutional democracy, directed at incorporating the functioning of the new institutions of the Parliamentary monarchy, resulted in a significant accentuation of the role of the political parties as almost omnimode parties in the political life of the nascent democracy (Rubio Llorente 1997, p. 18).

Thus, the Spanish political system is based on an iron discipline of parties as cohesive structures that represent a common will, which allows them to maintain a framework of predictability when identifying the constitutional visions that are at stake. A situation that lends stability to the terms of the debate in the procedures of drafting norms. This is extended to the legitimacy for the presentation of applications on the grounds of unconstitutionality, especially with regard to the provision of 50 members of parliament or 50 senators. This arrangement is formally directed at giving the parliamentary minorities "an instrument for the defence of their view of the constitutionality of laws against the parliamentary majority" (González Rivas 2010, p. 357). Nevertheless, in material terms, it is an instrument given over almost exclusively to the largest opposition party, with which the criteria of political opportunity continue to prevail.

Moreover, it appears unlikely that the president of government will sponsor applications to contest the constitutionality of a law from the Spanish Parliament as he would normally rely on the support of the parliamentary majority. Likewise, the path to the public ombudsman is of little relevance as it is clear from the ombudsman selection process that appointment to this public office is dependent on the decisions of the large political parties, with which it is easy to conclude that the office of the ombudsman lends attention to reasons that are principally, if not exclusively, political.

As things stand, it appears to be that what is gained from stability, is lost in terms of political pluralism, public participation and, therefore, in the consideration of other stances and important arguments that might be relevant and impact on the quality of decision-making.

The problem of restricting the legitimate grounds on which to submit applications on the grounds of unconstitutionality to political minorities that are represented in parliament is that these have interest in an eventual access to power, which conditions their actions. In the face of criminal policy, they would only be promoted with difficulty to question laws that do not help them obtain votes later on, even though they present signs of unconstitutionality. Think here of cases related to sex crimes or terrorism, in which the tendency of law enforcement bodies, procedural and punitive organs, and executing bodies is to create different legal treatments that extend to measures following the conviction that deny the framework of guarantees envisaged for ordinary members of the public.

Even if we accept, as a virtue of constitutional design, the restricted framework of legitimatized bodies for the submission of an application to contest the constitutionality of laws, the rejection by the Constitutional Court of the appearance of

third parties as participants is less easy to understand, as there is no specific barrier to this in the legal order. The argument of the Court is not upheld when it points out that legitimizing the participation of third parties in proceedings on unconstitutionality would mean overturning the objective nature of the defence of the constitutional norm, as third parties would act in the interests of defending a subjective right and not in the public interest. As Montilla Martos accurately points out:

Constitutional justice complies, in any circumstances, with a subjective function of the defence of concrete and specific interests, together with the objective function of the defence of the constitution. These are not two different conceptualizations of constitutional justice. Both vertices are closely linked: there is no defence of the constitution if there is no protection of rights and interests and there is no guarantee of these without the defence and the protection of the constitution. The attempts to separate or counterpose both dimensions of the constitutional jurisdiction have only served to deform it or reduce its efficacy (Montilla Martos 2002, p. 23).

In this sense, moreover, it is ingenuous to think that when parliamentarians initiate the procedure for the submission of an application on the grounds of unconstitutionality, they do it focusing exclusively on an objective defence of the constitution. The political minority that sponsors the decision over whether to lodge an application that challenges the constitutionality of a legal norm is motivated by political opportunity, as well as by juridical-constitutional reasons; both aspects usually overlap with each other, which is not intended to deny that only juridical reasons should have any weight in the constitutional process (Montilla Martos 2002, p. 141).

The fact that parliamentary minorities perform strategic calculations to decide on the submission of applications is something that springs to mind, because of the scarce quantitative importance of these types of actions that have ended in sentences on the part of the Constitutional Court.[28] Political groups know that a lot can be put into play when submitting an application to contest the constitutional validity of a law. The dangers of seeing their credibility affected, in the case of the court not upholding their complaints, is something to consider in relation to their electorate. The same happens if they demonstrate against measures that have broad popular acceptance. It may be added that, in practice, in a democratic state with a markedly bi-party nature, the possibility of the remaining minority parties reuniting the 50 or so members of parliament or 50 senators is certainly limited.

From the point of view of participation and pluralist policies, these arrangements discourage civil intervention in those matters that concern all citizens. In one way,

[28] Among the judgments of political criminal relevance, we find SSTC 53/1985 (on the decriminalization of abortion), 341/1993 (on the organic law of public security) and at present, but without a decision on the part of the Court, the appeal initiated by 71 members of parliament of the Popular Party against LO 2/2010 that removed voluntary regulation of pregnancy from the criminal code. For a critical assessment of the arguments of the appellants with analysis of the stance of the Spanish Constitutional Court from the STC 53/1985, see Laurenzo Copello (2012), p. 101 ff.

the consideration of other isolated minorities in parliament, with the condition of a permanent minority, is sidelined by the initiative for the submission of applications that refers exclusively to either political or transient minorities (Montilla Martos 2002, p. 117). It ends up by weakening the internalization of the norms by the very people the norms affect, as they will not feel that they are true participants in the lawmaking process, but rather mere recipients.[29] In this sense, moreover, spaces of social and political exclusion are opened up, provided that relations of power are established in an asymmetrical way. Finally, the lack of possibilities for control over normative decisions stimulates arbitrariness in decision-making processes, as it interferes in the life of those who are affected by the norms without responding to their interests or opinions.[30]

This arbitrariness is particularly serious in the design of criminal policy, if we take into account how the intervention of the state through criminal law can impact on the generation of greater social exclusion of individuals and groups, already themselves in conditions of marginalisation. Punitive rigour usually manifests itself in a more intense way on those people who by reason of their social and economic position find themselves removed from the spheres of political decision-making. A clear example of this affirmation, among many others, is found in the political-criminal reaction to immigration (Laurenzo Copello 2007, pp. 67–91). The search to find a balanced response to immigration between the states, in the framework of a more globalized world, has led to greater unification of legal-penal criteria to respond to it, but with a corresponding suppleness in individual guarantees. In an effort to summarize the state of affairs in relation to the design of criminal policy on criminality linked to migratory trends, it may be said that the basic formula is "without a right to vote, with a right to prison".

13.5 The Constitutional Court on the Expression of Social Pluralism and Public Deliberation

We identify a series of situations or patterns as rational shortcomings of contemporary criminal policy that would be driving an approach to criminality further towards greater punitive rigour, scant or no consideration of relevant information on the reality that the policy will affect in legislative terms and, finally, the production of the effects of social exclusion and segregation on certain individuals or groups. All of this weakens the ideas that define the model of a social and democratic state under the rule of law.

[29] In a close sense Gargarella (2008), p. 153.

[30] On this point, Pettit (1999, p. 82) pointed out that "an arbitrary act by virtue of the control—or lack of control—that characterizes its execution, not because of the particular consequences that it brings with it [. . .], an act of interference will not be arbitrary, in so far as it is forced to take into account the interests and the opinions or interpretations of the person affected by the interference".

Constitutional courts committed to the constitutional paradigm of the social and democratic state under the rule of law should be able, if not to eradicate, at least to counter the irrationalist onslaught that is influencing the direction of contemporary criminal policy. Their singular institutional position offers an important aptitude to do so, without this amounting to a reduction in the area of legislative innovation for the legislator in criminal law.

In this sense, we have referred to the scant relevance that the Constitutional Court gives to a careful approach to the empirical content that upholds the premises that support legislative decisions in criminal law and that constitute the factual circumstances of the contents of the principle of proportionality. The reason for this deference to the legislator lies, principally, in the scant democratic legitimacy of the Constitutional Court and the delicate task that it exercises of maintaining the integrity of the constitutional legal order without appropriating tasks that only correspond to the seat of popular sovereignty.

Nevertheless, this important note of caution should not lead the Court to renounce greater activism in its control of the rational content of the law through the strengthening of the democratic spectrum that the Constitution not only authorizes, but also orders all public powers to do.[31]

The legislative chambers are, by their own vocation, acceptable forums to carry forward the debates on those matters that affect all members of society and to decide on the channels for normative regulation that heighten the quality of community life. In the end, we presume that the representatives of those affected by legislative decisions are found in democratic parliaments. These representatives, in addition, are not only committed to the interests and values that they represent, but to the ideas of rationality and impartiality as rules for collective decision-making.

Nevertheless, as we have pointed out, the legislative processes of decision-making house within them multiple factors that distort the possibilities of deliberation: pressure groups, the appearance of incentives that are not directly related to the decision, defective information, lack of a justification, inconsideration of the possible undesired effects of the decision, etc.

Thus, we acknowledge that in legislative decision-making, in particular in decisions affecting criminal matters, there are elements that, without being illegitimate, can affect both the quality of the public discussion and its result. Nor can we ignore the weight of emotions such as anger, fear, indignation and their reflection in a good part of the legislation in criminal matters.

So, if we consider that living under a democratic constitution involves a form of government that strives to guarantee that the legislative decisions are the result of a reasoned and responsible process of drafting legislation directed at the common good and the non-arbitrary exercise of power, we should also rely on mechanisms that ensure things are like that.

[31] Arts. 9.2 and 23.1 Spanish Constitution.

Constitutional courts show themselves to be particularly good, in this sense, at filtering out that series of elements that affect the deliberative decision-making process. So, the courts should be ready to respond to claims from those who consider that they have not been listened to or that they have been treated improperly during the criminal law drafting process. This is related to compliance with the requirements for drafting the law (procedural defects) and the possibility of arranging spaces for those social stances that are not represented in parliament who consider that their opinions and interests should have been responded to during the administrative procedure of the criminal law.

This is legitimate and may not be considered a breach of the competences of the legislator, provided that here the courts would be carrying out an activity directed at broadening legislative procedure, instead of restricting it, granting greater capability for participation to those who have not had the opportunity. Moreover, neither may it be considered that this opening up of the courts to more groups is a source of imbalance to the detriment of the legislator, as the courts have the duty of listening to all parties involved in the conflict that appear before them and not only to the appellants.

In this sense, despite the considered limitation on the legitimization of parties to submit applications on the grounds of unconstitutionality, the Constitutional Court should explore the possibility of modifying its restrictive interpretation of those intervening in the procedure on unconstitutionality, once this has been initiated by some of those people with legitimate grounds for doing so. It appears contradictory that the Spanish legal order accepts a legal formula such as the *popular prosecution* in criminal procedures and that the Constitutional Court maintains its position that rejects the participation of members of the public, whether in the role of indirect or direct participants.[32]

In the same way as the legislator and the government show themselves to be willing and ready to respond to social demands for greater intervention, it should not be overlooked that this also involves interference and the imposition of barriers in the area of common and private freedom for all citizens. Not only should those directly represented in the legislative organs have something to say in the decision-taking procedures, but the institutions should have the means for liberalization and for inclusion that work to the benefit of the social actors, especially those who have traditionally been excluded, so that they participate in the legislative decisions.

[32] In this sense, a good example of the importance that public participation has in the control of the activity of the legislator through control over constitutionality is constituted by the role played by the Colombian Constitutional Court responding to public actions contesting the constitutionality of a law. This mechanism gives any citizen of majority age the possibility of questioning the decisions of the legislator at any time, subject to details. See on this, among others: Cepeda Espinosa (2004), López Medina (2006), García Jaramillo (2010). Moreover, the possibility of the public intervening directly in controls over the decisions of the legislator through judicial channels is not a mechanism that is completely unknown in Spanish constitutional history. So, article 123 of the Republican constitution of 1931 foresaw among the people with legitimate grounds to appeal to the Court of constitutional guarantees: "5° Every individual or collective, even though they may not have been directly aggrieved".

This should not lead to destabilization of the democratic system, but to greater confidence in it. Greater demands for criminalization and for punishment of behaviours are intimately linked to an increased social demand for state intervention. These demands drive interference in the social and private life of individuals that is constantly threatened and advanced with a reduction of areas of freedom. Increased power of intervention should have as a correlation, greater control by those who, ultimately, will be affected by it.

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Part V
Conclusions

Chapter 14
A Necessary Triangle: The Science of Legislation, the Constitutional Control of Criminal Laws and Experimental Legislation

Adán Nieto Martín

Contents

14.1 The Context of the Science of Legislation: The Crisis of Legitimacy and Rationality of Criminal Law

There has been consensus, for over a decade, in pointing to the acute crisis of rationality that criminal legislation is experiencing. Although we will look at this concept in greater depth later on, in the meantime, by lack of rationality, I fundamentally wish to flag up two factors. In the first place, the progressive distance

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in the most recent reforms from the model of criminal law emanating from the welfare state. In second place, the loss of quality of the law in all of its dimensions, from the renouncement of efficacy, through to aspects such as symbolic legislation, to the presence of very slight levels of formal technical quality or of "motorized" legislation, which puts an end to one of the inherent values of legislative rationality: legal certainty.[1]

This crisis of quality and rationality coincides over time with another no less important crisis of legitimacy, which also has two different frontlines. In the first place, it coincides with the loss of sovereignty of national legislative assemblies that is taking place as a consequence of legal globalization. There are increasingly more sectors of criminal policy in which legislative assemblies have lost their power of initiative and control. In spaces such as the EU, the loss of state sovereignty has taken place due to the assumption of criminal competencies, above all, after the entry into force of the Treaty of Lisbon (among others, Muñoz de Morales Romero 2011). Nevertheless, the process of internationalization of criminal policy is much broader and more complex. Organisations participate within it which know far fewer transparent decision-making systems that the EU system; and it moreover coincides with such phenomena as Americanization (Delmas Marty et al. 2009).

But unfortunately, and in second place, this crisis of legitimacy also has an especially acute internal manifestation. National parliaments have in many countries, and Spain is no exception, left aside their function of control over the Government. In reality, they behave as "lackeys" (Schünemann 2003, p. 531) or as the "strong arm" of the executive, restricting their role to defending governmental legislative initiatives or simply of the party. This degradation of the function of legislative assemblies opens the way to populism penal approaches and to such phenomena as the uncontrolled and hardly transparent activity of *lobbyists* (Díez Ripollés 2003b, p. 30 ff.; Muñoz de Morales Romero 2011, p. 483 ff.)

[1] The bibliography describing the crisis of the rationality of criminal law is very extensive, so I shall limit myself to listing the most general and basic works. The classic work for the USA is Garland (2005); Stunz (2001); Husak (2013). In Spain, the analyses of Díez Ripollés (2003a); Díez Ripollés (2004); Díez Ripollés (2012), the correct citations of Diez Ripolles are:

- Díez Ripollés, El Derecho penal simbólico y los efectos de la pena, in Arroyo/Nieto/Neumann, Crítica y justificación del derecho penal en el cambio de siglo. . .2003.
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- Diez Ripollés/Prieto del Pino/Soto Navarro, La política legislativa en occidente. Una perspectiva comparada. Valencia. Tirant lo Blanch. 2005 are all fundamental. Equally deserving of recognition is Arroyo Zapatero (2014), p. 15 ff. In what concerns the matter of legislative hypertrophy, Menéndez Menéndez (2004). A summary of various national experiences may also be consulted in Díez Ripollés (2005). On the situation in Germany: Area de Derecho penal UPF (2000).

This crisis of rationality and legitimacy is generating proposals of a very diverse nature. Some arise from the law theory, where the Science of legislation and legislative technique has been reborn over something more than a decade[2]; others arise from political science, where such decisive terms such as *good governance*[3] and *accountability*[4] have been coined and methods for the evaluation of public policies have been developed[5]; others are framed by authors from political philosophy such as *Habermas*, whose theory of discourse is serving to rethinking legislative procedures (Habermas 1998).[6] Others develop in the area of the social sciences, such as economics, through the economic analysis of law.[7]

The first part of the work briefly presents a sort of history on the successive crises of rationality and legitimacy of the law and of the various solutions that have been proposed over history (14.2). The present crisis is neither the first nor will it be the last. For this reason, the various proposals that are on offer at present, which make up a renewed Science of Legislation (14.3), should be integrated in the earlier ones and very especially in checks and balances over the constitutionality of criminal laws. That was the response to the deep crisis of legitimacy that the law experienced before to the World War II.

The second part of the study looks at this idea in greater depth: the possibility of reinforcing the constitutional control of criminal law (14.6), connecting up the constitutional principles of criminal law, especially the legal reserve and the principle of proportionality, with two of the most important contributions of the present-day Science of legislation: deliberative democracy, emerging from the theory of discourse (14.4) and legislative evaluation (14.5). Quite clearly, the benefits of Legislative Science of legislation have no need to exhaust their energies on the constitutional control of the law. There should be an aspiration to find new types of law, which are capable of recovering all the potential of this new knowledge. In this sense, it should be remembered that one of the main demands of the science of legislation is that the law should be based on empirical data, which demonstrates its efficiency. This requires a new type of law that some have called experimental legislation (Doménech Pascual 2004, p. 145 ff.; Galiana Saura 2008; Morand 1993), with which we will concern ourselves in the last section of this study (14.7).

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[2] In Spain, the GRETEL group was a pioneer, as is well know GRETEL (1989).

[3] Fundamental for us, European Governance (2001); recently, on the contents of this concept Arellano Gault et al. (2014), p. 117 ff.

[4] With multiple references, Muñoz de Morales Romero (2011), p. 566; see also Villoria Mendieta (2011).

[5] See Muñoz Arenas, Chap. 1, in this volume. A pioneer in Spain Montoro Chiner (2001).

[6] On Habermas, from the point of view of interest here, see Díez Ripollés (2003b), p. 183 ff.; Nino (1997), p. 171 ff.; Marcilla Córdoba (2005), p. 322 ff., and likewise, with reference to criminal law, with a critical vision on the possible contributions to the theory of discourse, Portilla Contreras (2003), p. 99 ff.

[7] See Ortíz de Urbina Gimeno, Chap. 3, in this volume.

14.2 A Brief History of the Problem of the Rationality and the Legitimacy of Criminal Laws

After the twilight of absolute monarchy, the Enlightenment shed light on a concept of the law that had enjoyed an enviable coherence and health at its beginnings. The law had two foundations for a man of the Enlightenment: the will of the people, which guaranteed its legitimacy, and its rationality (Laporta 2004, p. 31 ff.).[8] The latter even meant that it could be said that the law acted as a limitation on the will of the people or, in the language at that time, of the "whim of the sovereign". In this way, the concept of law was not so very distant from the concept of natural law, which *Newton* had proclaimed through scientific experimentation (García de Enterría 1985, p. 22). The generality, the abstraction of the law and its vocation of permanence or durability, also present in natural laws, contributed to giving it that halo of rationality.

The conception of the law in the Enlightenment was dominant on both sides of the Atlantic. The—extraordinarily suggestive and modern—idea that the legislative assembly, in its search of rationality, should serve as a restraint on the legislator, by which it had already set out the principal remedy against legislative populism, was quite clear in correspondence between *Madison* and *Jefferson* (The Papers of James Madison 2010). In Europe, *Beccaria* pointed out that "laws have been, for the most part the work of the passions of a few, not dictated by a cool examiner of human nature" (Beccaria 1974, p. 67). Even *Napoleon* was inclined to include a very meaningful initial article in his Civil Code: "There is a universal and immutable law, a source of all positive laws; that law is nothing more than natural reason in so far as it governs all men". In brief, the law was something more than a form of taking decisions in the Enlightenment. The law—to merit such a name—had to be minimally rational.

This excellent state of health started to disintegrate in the liberal state with the help of two. On the one hand, legal positivism pushed the Science of Legislation, to which Bentham and Filangieri, two mainstream authors, had lent so much attention, outside of Juridical Science. The mission of the jurist was the interpretation of positive law. The genesis of the norms and their rationality were left totally outside their tasks. In criminal law, *Binding* spoke about the "thick mist" that was hidden behind the decisions of the legislator. The intention of the legislator was converted into a protected reserve for jurists. (Marcilla Córdoba 2005, p. 258). But, in second place, we are also witnessing a progressive identification of the law with the general will in the liberal State. If in the Enlightenment, the law rested, as we have seen, on two pillars: the will of the people + rationality, as the liberal State advanced, the law was identified with a mere act of willpower (Marcilla Córdoba 2005, p. 113). The famous phrase attributed *Bismarck* "Law and sausage are two things you do not

[8] Also, fundamentally on this point and on what follows Marcilla Córdoba (2005), p. 79 ff.

want to see being made", implied abandonment in every sense of the word of the rationality of the law.

Moreover, the general will as the sum of the will of all citizens through their representatives, is in the end taken for the will of the State as a political body. With it the law loses its content as a restraint on the sovereign and the applier of the fact, the judges, can do nothing else but apply it in an acritical mode. The reduction of the judge to the mouthpiece of the law, which could have made sense when the law embodied reason, acquires a very different political content when the law is converted into an instrument of power. Of course, the law enjoyed absolute immunity for the judge in this scheme of things, who had to refuse to exercise any type of control over it.

The consequence of such an unhealthy atmosphere, it is no surprise that in the last decades of the nineteenth century and in the first decades of the twentieth, the law underwent its first big crisis, in terms of its validity and of its legitimacy. This is due to numerous factors: the arrival of the proletariat and social movements, which questioned the legitimacy of the laws approved by national parliaments, in which only the bourgeoisie was represented through censitary suffrage; the appearance of new social problems that mean legal responses have to be more agile and dynamic and convert themselves into a tool of action and social transformation etc. (Laporta 2004, p. 40 ff.) The response to this crisis of identity was the empowerment of judges, reinforcing their powers as interpreters of the law. In the first few years of the twentieth century, from the North-American realism of *Pound* or the free law doctrine (Freirechtslehre) in Europe of Kantorovitz, the role of the judge was recovered as the guarantor of the legal rationality in view that the law is considered insufficient to face the complexity of modern life (Marcilla Córdoba 2005, p. 155).

After World War II and after the experience of fascism (Marcilla Córdoba 2005, p. 165 ff.), an intermediary solution was imposed: The Constitutional State. Intermediate, because its trustworthiness continues to guarantee the rationality and the legitimacy of the law. It trusts in the law, not in any law, but in a *law of laws*, which is the constitution. It also trusts in judges, but above all, in some very special judges, which are the constitutional judges. In any case, and although the system of European constitutional justice, unlike the North-American *judicial review*, is concentrated, and only the constitutional judges can declare a norm unconstitutional, the ordinary judges have more hermeneutic tools available to correct the irrationality of the law, through instruments such as interpretation in accordance with the Constitution (Marcilla Córdoba 2005, p. 220 ff.). The empowerment of the constitutional and the ordinary judge is favoured, because the constitutions that followed World War II are not only procedural texts, which set the competences between national and federal legislators, and establish the division of powers (Marcilla Córdoba 2005, p. 213 ff.). They are constitutions that incorporate, at least in so far as they affect criminal law and fundamental rights, almost all the principles of good legislation that were coined in the Enlightenment. They are constitutions that not only indicate who should legislate, but also to a great extent how legislation should be done (among others, Prieto Sanchís 1998).

We have educated various generations of jurists in this solution to the problem of rationality and legitimacy of laws, who are accustomed to think that the constitution

is, almost always, good and rational and that the judges are there in any case to save us from the nonsenses into which the legislator may fall.[9] What has really been happened so that we have the sensation that criminal legislation is living through one of its lowest hours? Why do we have the feeling that legislative populism, once again the "whim of the legislator", has won the game?

Well, the answer can be nothing other than neither the constitutional foundation of criminal law, nor constitutional control imply such an effective medicine—as we might have thought—to free us from the cancer of bad legislation. Respect for the constitution guarantees a canon of considerable rationality, but does not assure fully rational legislation. But the part of the treatment that has probably failed most of all is judicial control. The constitutional judges always move under suspicion of their lesser democratic legitimacy faced with the decisions that the legislator takes (Lascuráin Sánchez, Chap. 12, in this volume). Their position is particularly weak, when the control is done through principles, such as proportionality or equality, or using the balancing (Abwägung) as a tool between the various different interests that are at play.

From Habermas to Luhmann, passing through the greater part of constitutional doctrine, it may be affirmed that constitutional judges can not question the cost, the opportuneness or the adjustment of laws, insofar as that would imply a breach of the separation of powers (Ferreres Comella 2010; Díez Ripollés 2003b, p. 81 ff.). A sort of consensus has, in this way, been reached, by which material control is only carried out when the violation of a principle or the lack of sound judgment in the weighting are manifest or, even more so, if no type of weighting has been used at all. Having come so far, the question is whether the rebirth of the Science of Legislation can serve to reinforce judicial constitutional control. The answer as we shall soon see is positive, but before we shall, albeit in a summary manner, take a look at these new proposals.

14.3 The Renovated Science of Legislation

Since more than a decade ago, there have been proposals that have sought to overcome the present-day crisis of legitimacy and rationality of the law and, especially, criminal law. As has previously been said, these proposals are of varied progeny. A first abundant and developed group of them is drawn from the law theory. From its ranks, the arguments were first of all for a minimum content of the Science of Legislation. It was fundamentally a question of improving the technical quality of laws, with recourse to the theory of legislation and of improving their efficiency. The ideology of positivism, which still forms the hard drive of many

[9] In this context, the attempts to link the contents of criminal Law with the Constitution should, of course, be read, since the pioneering work of Bricola (1973), p. 7 ff., for its impact in Italy Donini (2001a), p. 29; Donini (2001b), p. 24. In Spain, to mention only the first contributions on this matter, Arroyo Zapatero (1987), p. 103 ff.; Mir Puig (1982).

juridical mindsets, was unable to look kindly on the fact that it was also the purpose of the Science of legislation to question the options that the legislator had taken or the final ends of his interventions.[10] Today, in contrast, what triumphs is the opinion that the Science of legislation has to have a *maximum programme*, which also analyses the elections of the legislator and, more specifically, the ends that they seek to achieve through their programme of action (Marcilla Córdoba 2005, p. 275 ff.). In other words, a content that encompasses without a doubt legislative policy and, in our case, criminal policy.

As it is not necessary for the purposes of this work to account for all the proposals,[11] I will move on to prepare the contents of this *maximun programme*. Said in the simplest possible way, if the legislator wishes to make good laws, these four things should be verified:

(a) In the first place, the ethical rationality or the axiology of the law should be explained. In the case of criminal legislation, it is the part that traditional criminal policy develops more than any other. It is the discussion concerning values (Rechtsguter) that may be protected, the way in which liability may be attributed, and the sanctions that can be foreseen.[12] The ethical rationality of a law is, of course, important, but its objectives are limited. It basically functions in a negative way, as a limit, but it gives no solutions to how to tie up the problems that it tries to resolve.[13]

(b) The second type of rationality is of a procedural type. A procedure for the preparation of legislation that produces good legislation must be found. This aspect was essential in the Enlightenment: If laws are the expression of the public will and their participation, they will not be irrational. Nobody will advance norms that may prejudice them (Galiana Saura 2008, 128 ff.).[14] This rationality is closely linked to ethical rationality (df. Díez Ripollés 2003b, p. 96). The procedure, who makes the law and how it is made, is without a doubt essential for its axiological legitimacy. But it is also a preliminary tool before the quality requirements. The worse the legislative procedure, the poorer the quality of the norms. The existence of a legislative procedure, in which the scientific community, the Science of criminal law, as well as all those possibly affected by the norms participate, is a requirement that increases the possibility of rational laws.

[10] From the point of view of criminal law, but also from the point of view of any other sector, it means that the Science of legislation in this broad understanding also covers criminal policy or any type of legal policy. However, distinguishing between both, see Vogel (2003), p. 252.

[11] As is known, the key work in Spain is Atienza (1997); and with regard to criminal law, on the basis of this model, Díez Ripollés (2003b), passim.

[12] Broadly, on ethical rationality Díez Ripollés (2003b), p. 109 ff.

[13] This type of rationality basically follows *The Manifesto on European Criminal Policy,* available at http://www.crimpol.eu/manifesto/ (02/02/2016).

[14] On the different models on which to base legislative procedure Stächelin (1998), p. 322 ff.

(c) The third requirement of all good laws is technical (Atienza 1997; Díez Ripollés 2003b, p. 96 ff.)[15] and systematic rationality or legislative coherence, as is indicated in the framework of the legislation of the EU.[16] The legal norms should communicate their message with clarity both to its target population and to those who have to enforce them. And to do that, they have to give it an appropriate language and structure; without incurring in ambiguities, syntactic failings etc. This was the first element claimed by the Science of Legislation, through legislative technique.[17] The linguistic rationality or technique of a norm is easy to measure: it is enough to survey the public, or its target population, to see the extent to which its pronouncements are understood or simply to pay attention to the amount of legal disputes that are principally due to the obscurity of its terms or errors of syntax or drafting.

However, the problems of understanding a law are not only found in its wording, but they also emerge when situating it in connection with other norms. The Enlightement's ideas of "legal order" and codification are expressions of this type of rationality, which require that there is no redundancy of meaning between different norms and that they are not contradictory.[18] Hence, in the criminal context, this type of rationality is missing when the criminal norms constantly give rise to overlapping problems with other norms.

[15] The lack of technical and systematic rationality is immensely greater in the North-American order, in comparison with the Europeans, is discussed by Muñoz de Morales, Chap. 7, in this volume.

[16] See, for example, references to the idea of a coherent legislation in *The Manifesto on European Criminal Policy*: "The invasive character of criminal law makes it especially important to ensure that every criminal law system is a coherent system. Such inherent coherence is a necessary condition if criminal law is to be able to reflect the values held to be important by society collectively and by individuals and their understanding of justice. Inner coherence is, furthermore, necessary in order to ensure acceptance of criminal law. When enacting instruments which affect criminal law, the European legislator should pay special attention to the coherence of the national criminal law systems, which constitute part of the identities of the Member States, and which are protected under Article 4 (2) of the (new) Treaty on European Union (vertical coherence). This means, first and foremost, that the minimum-maximum penalties provided for in different EU instruments must not create a need for increasing the maximum penalties in a way which would conflict with the existing systems. In addition, the European legislator must pay regard to the framework provided for in different EU-instruments (horizontal coherence, cf. Art. 11 (3) [new] Treaty on European Union)". See the *Manifesto* for examples of lack of coherence or systematic rationality. On this principle, Asp (2012), p. 206 ff. Nevertheless, as this principle is conceived and linked to national identity, it also contains elements of ethical rationality.

[17] The different works on this matter that are contained in Menéndez Menéndez (2004), especially Martín Casals (2004), p. 243 ff. In Spain, as in other countries of the EU, a series of directives on legislative technique was published (Resolución de 28 de julio de 2005, de la Subsecretaría, por la que se da publicidad al Acuerdo del Consejo de Ministros, de 22 de julio de 2005, por el que se aprueban las Directrices de técnica normativa), which are however solely centred on the formal structure of laws, but which overlook other aspects such as legal language and the analysis of its coherence.

[18] Cf. Pau Pedrón (2004), p. 457 ff. In Spain, there is a General Committee on Codification that centres its work on the area of private law.

A criminal definition that is constantly overlapping with other norms and that leads to constant doubts over its field of application, suffers from a lack of systematic rationality. A very clear example of this lack of rationality is the problem, in Spain, of *ne bis in idem* between penal and administrative sanctions, as it reveals redundant precepts, without a field of application that is clearly its own.

The lack of systematic rationality also appears when contradictions exist. When the prohibited conduct is a conduct that is valued or even promoted by another sector of the legal order. In criminal law this type of rationality is foster for the *Lehre von der Straftat*, which arise from the law that is in force. Attempt against this rationality criminal laws that for example ignore the distinction between direct and accessorial perpetration or between attempt and completed offences. In short, when a law contributes to eroding the structure of criminal law, systematic rationality is lacking.

(d) We can have a plainly satisfactory law from the point of view of values, well drafted and adopted through an unblemished legislative procedure, but it may even be ineffective. For this reason, the fourth type of rationality that should be sought out is pragmatic rationality.[19] This has two different levels. The first is the law compliance that requires an appropriate implementation (Díez Ripollés 2003c, p. 163 ff.). But, in second place, pragmatic rationality requires a further step: having demonstrated that the law is upheld, does it achieve its expected objectives? Does it solve the problem for which it was created? Does it do so at a reasonable cost?[20] Equally, this rationality means examining whether the norm produces undesirable effects; a level of rationality that is, without any doubt, much more empirical than the others.

But not only the law theory is generating new proposal in order to increase the quality of the law, the second thread from which the proposals to step up the rationality of the legislation and its legitimacy are found in Political Science and in ideas such as those from governance. Governance is, simply, a method of government based on principles such as openness, responsibility, participation, effectiveness and coherence. Good governance has broader intentions than simply making good laws, but that without a doubt include increased quality and efficacy of the legislation and the improvement of decision-making processes. On this point, governance is associated with a form of adopting public policies based on empirical evidence, which therefore can and should equally be refuted (Muñoz de Morales Romero 2011, p. 549 ff.). This turn-around leads us, once again, to connect the law with natural laws, as we saw in the paradigm of rationality emanating from the Enlightenment.

[19] Broadly, although with the name of normative feasability, Galiana Saura (2008), p. 143 ff. I use the expression taken from Atienza (1997), p. 36 ff. and picked up by Díez Ripollés (2003b), p. 95.

[20] On the relations between the Science of criminal law and scientific method, see Donini (2003), p. 69 ff.

In the EU, techniques have flourished since the *European White Paper on Governance*[21] such as impact evaluations (extensively, on impact evaluation Muñoz de Morales Romero 2011, p. 583 ff.), legislative *ex-post* evaluation[22] or, more recently those referred to as *smart legislation* and *regulatory fitness* (European Commission 2004), the objectives of which are to avoid the accumulation of obsolete laws and legislative simplification, with which periodic evaluations of legislation are completed by sectors. All of these techniques have led to the amendment of almost 6000 laws, since 2005.

This brief explanation of both viewpoints on legislative rationality shows how a relation of complementarity already exists between the proposals emerging from governance and the law theory. It could be said, on the one hand, that the tools prepared by political science contribute to making the proposals that have been drawn from the law theorymore operational. *Regulatory fitness* is a good tool to guarantee technical and systematic rationality. In this sense, evaluation is essential, as we will quickly see, to guarantee pragmatic rationality or how the proposals of deliberative democracy are superimposed over the necessity for an acceptable procedure. On the other hand, the proposals emanating from the law theory law theory have contributed to determining the role that the values and the principles of criminal law have to play in legislative processes. Of course, in no way does this assessment imply that deliberative democracy and governance begin from a similar evaluative framework. The impact evaluations of the EU in all cases usually dwell, for example, on how a particular regulation affects fundamental rights. However, this evaluation greatly overlooks the basic principles of criminal law. Proposals such as those carried out on this point by *Díez-Ripollés* (Díez Ripollés 2003b, p. 109 ff.; Satzger et al. 2012)[23] or those in the *Manifesto for a European criminal policy* could serve to reorder the catalogue of points that an impact evaluation on criminal law should follow.

[21] *White paper on European Governance*, the improvements in normative quality, together with improvements in participation and global governance represent one of the central aspects of the White paper, p. 21 ff. The White Paper is at the origin of concerns over normative quality in the EU and the starting point of the other initiatives.

[22] For years, the fundamental reference has been Mader (1985). Up until now, a distinction has usually been drawn between ex-ante evaluation (centred on impact evaluations) and ex-post, see, for example, accepting this division Montoro Chiner (2001), p. 109 ff.; Muñoz de Morales Romero (2011), p. 588 ff.; Galiana Saura (2008), p. 300 ff.; on legislative evaluation in Spain, accepting this approach see Rodríguez Ferrández, Chap. 4, in this volume.

[23] In fact, the group that forms the European Criminal Law Policy Initiative founded on the principles that the Manifesto pronounces have been systematically evaluating the proposals of the Commission for harmonization in criminal matters. These evaluations are available from the web-page of the group, http://www.crimpol.eu/other-publications/evaluations/ (last access 02/02/2016).

14.4 Deliberative Democracy

The reformulation of legislative procedures through notions of deliberative democracy is one of the most important proposals of the present-day Science of Legislation.[24] Deliberative democracy as presented by *Habermas* represents the political expression of his ethical discourse. While this approach searches for norms that are of general validity, deliberative democracy, as a singular application, concretizes these rules on a political plane. The principal objective of the theory of discourse is to return the central role to citizens in political decision making, so as in this way to ensure its legitimacy. To do so, it is essential that channels of participation are constituted that allow the public to participate in its formation.

These channels are subjected to two important quality criteria.[25] In the first place, participation, in other words, democracy. A norm is only legitimate if all those affected have the opportunity of participating in its process of preparation and in addition can do so under equal conditions ("ideal space of free communication") (Habermas 1998, p. 382). The second is deliberation, which is expressed in duties for argumentation (Habermas 1998, p. 218). As may be appreciated, for the theory of discourse, the legitimacy of a norm is not only a question of majorities, "of vote counting".

The idea of participation is broader than that underlying representative democracy. It is not only a question of participating through representatives (in elected posts) who are members of the legislative assemblies, and, it is not only done in the legislative phase. It is a question of giving communicative power to those affected (Habermas 1998, p. 215) through the process of designing and drafting a law, especially in the pre-legislative phase. One of the central objectives of the theory of discourse is that those affected by the norm, the citizens, are not found facing closed, pre-set ideas, taken from the debate.

The requirement that the participation of those affected is done under conditions of equality is also essential. Translated to legislative procedure essentially it warns against the lobby and corruption. The point at which lobbying menaces the "ideal space for communication" is one in which a lobby group rises above all others in an unfair way, altering the situation of equality between all participants (setting out the problem Muñoz de Morales Romero 2011, p. 556 ff.). And the same occurs with corruption, for example, of parliamentarians or any of the politicians who have to take relevant decisions in the process of preparing a law. Both situations imply a negation of the rules of discourse and materially contravene the pillars of

[24] Pioneering Vogel (2003), p. 249 ff.; although with a lesser presence of the ideas of Habermas, but underlining the importance of finding solutions of a procedural type to the present irrationality and lack of legitimization of criminal law, see also Voß (1989); Stächelin (1998), p. 322 ff. In the Spanish doctrine, in relation to the EU harmonization of criminal law, Muñoz de Morales Romero (2011), p. 556 ff. In other proposals on the reformulation of legislative procedures in criminal matters, the influence of Habermas is somewhat less, see, for example, Becerra Muñoz (2013).

[25] A clear exposition of the theory of Habermas may be found in Muñoz de Morales Romero (2011), p. 556 ff.

deliberative democracy. From the theory of discourse, the importance of the participation of experts as an essential feature of the deliberative process has been underlined. Its function is like an alarm bell against the manipulation of the process by interested *lobbyists* and their absence implies a lack of discursiveness, of reasoning, which affects the legitimacy of the laws (cf. Vogel 2003, p. 252).

The second pillar of the proposal is deliberation (Habermas 1998, p. 348 ff.). Decision-making is only legitimate when those who would adopt it comply with a series of duties of argumentation.[26] In this way, it is contrary to the quality of deliberation to have hidden information or not to have offered all of the necessary information. It is not any sort of deliberation that satisfies the requirements of the rules of discourse, but only that which is apt to generate reflexive debate (Habermas 1998, p. 215). The duties of motivation also serve to guarantee political *accountability* (cf. Muñoz de Morales Romero 2011, p. 565). The public can only value their elected representatives when these people have given full account of the relevant information for decision-making. But, what is more, the duties of reasoning are also essential to ensure the judicial *accountability* of the legislator. This is how we saw one of the essential findings of the Constitutional State, control over the law in the hands of the constitutional courts. In the second section, it will be shown that these duties of motivation and the information that they supply are the key to "empowerment" to the constitutional judges to exercise greater control over the law.

Deliberative democracy of course covers parliamentary procedure for the drafting of a law, but it should also concern the prelegislative procedure. What is more, in view of the decisive role that this has taken in recent times, their requirements should be especially applicable at that moment. In concrete, the application of deliberative procedure would require:

(a) Institutional channels that have the participation, under conditions of equality, of all those affected and of the experts.
(b) Mechanisms that prevent closed-door lobbying and corruption;
(c) Obligations to tell the truth and provide complete information and sources of motivation by those who propose the Law.
(d) Rules that guarantee transparency.

Deliberative democracy represents a return to the idea of popular sovereignty that, as we have seen, found itself upholding the rationality of law in the days of the Enlightenment.

The influence of these ideas is already visible in certain legislative procedures such as that of the EU (Muñoz de Morales Romero 2011, p. 631 ff., 832 ff.). The first step taken by the *White paper on European governance* has been turned into a title of the TEU, "Provisions on Democratic principles", art. 11 of which in a certain way constitutionalizes deliberative democracy: "In all its activities, the Union shall observe the principle of the equality of its citizens, who shall receive equal attention

[26] Especially the *Manifesto for a European criminal policy* (Satzger et al. 2012), has formulated the duties of reasoning as an additional requirement to each of the basic guarantees of criminal law.

from its institutions, bodies, offices and agencies. Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to national citizenship and shall not replace it", and in addition will oblige the Commission to maintain "an open, transparent and regular dialogue with representative associations and civil society", and to carry out "broad consultations with parties concerned. . .".

In Spain, the prelegislative phase appears constitutionalized in art. 88 of the Constitution that requires draft laws to be accompanied by Explanatory Notes and the necessary antecedents, to pronounce on them.[27] This highly original precept from the point of view of comparative law constitutionalizes the existence of duties of reasoning in relation to the executive powers. However, and despite its potential, it has been the objective of a scant, if not to say null, utilization by the Constitutional Court. The Court has pointed out that, in effect, the regulatory norms of legislative procedure form part of the block of constitutionality and constitute, in consequence, parameters of the legitimacy of law. Prelegislative procedure is not, however, integrated in this block of constitutionality, which for the Constitutional Court is a simple administrative procedure. In addition, and in any case, the defects of reasoning would only provoke the unconstitutionality of the law when they had altered the process in which the democratic will of legislative power is formed. This form of understanding the legislative process, in addition to regulating the importance of reasoning, ignores the importance that deliberative democracy has today for the legitimacy of norms and contrasts with their constitutionalization in the TFUE (cf. Díez Ripollés 2005, p. 299 ff.).

The ECJ has also expressed itself with great caution on the constitutional relevance of the sources of motivation. The obligation is limited to the indication of the general situation that leads to the adoption of the act and the general objectives that are it proposes to reach. Setting out the reasons that have led to the adoption of the act is not therefore required in a minutious way. As *Marta Muñoz* points out "the obligation of motivation is a duty of a procedural nature that covers the whys and wherefores of the presentation of the reasons", but simply in a very general way (Muñoz de Morales Romero 2011, p. 574 ff.).

Solely the German Constitutional Court appears to have taken a step in relation to the constitutionalization of the duties of reasoning and what is more in the pre-legislative phase. At this point, the legislator would be obliged "to procure a concept on the fundamentals of its considerations in accordance with safe sources" and "to exhaust the sources of knowledge at its power, to be able to value the consequences of its regulations as safely as possible" (Vogel 2003, pp. 252 and 261). In any case, these procedural failures, in the same sense as the Spanish Constitutional Court has indicated, are only relevant when they are evident or affect the compatibility of the law with material Constitutional Law.

[27] On the pre-legislative phase both from the perspective of be and should be and subsequent references, see Rodríguez Ferrández, Chap. 4, in this volume.

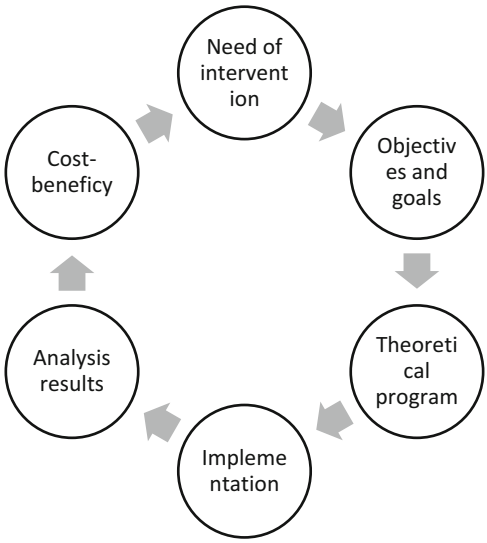

Fig. 14.1 Dynamic model of legislative evaluation

14.5 Legislative Evaluation

The fact that public interventions, which we call laws, are conceived and designed in such a way that they may be evaluated is essential to improve the effectiveness of criminal law and is absolutely necessary in the framework of a new Science of legislation. Evaluation is an essential tool for pragmatic rationality, as it was formulated from the ranks of the law theory, but equally to improve legislative procedures in the way that deliberative democracy would follow. Equally, it is an essential tool to improve the political *accountability* of the legislator, but also judicial accountability as we shall see later on.

According to one of the most extensive definitions, evaluation is the systematic application of procedures of social investigation coming from the social sciences to value conceptualization, design and the implementation of public interventions.[28] Although evaluation has traditionally been associated with an activity to carry out once a law is passed, it has for some time been understood as a dynamic process that starts with the phase of the drafting of a law and continues throughout its life. So that a law or policy may be evaluated it has to be drafted in a way that it may be evaluated.[29]

The dynamic model of legislative evaluation, shown in the Fig. 14.1, has six different phases.[30] While the first three contain the *ex-ante* evaluation, and

[28] On the concept of evaluation see Muñoz Arenas, Chap. 1, in this volume.

[29] See Muñoz Arenas, Chap. 1, in this volume.

[30] The model is taken from Rossi et al. (2004), p. 53 ff., for a succinct description of it. This model is followed in the criminal field by Mears (2010).

guarantee that it may be evaluated, the three remaining ones are executed once the norm is already in force. In the theory of evaluation, the evaluability of the programme is spoken of to describe the characteristics that a social intervention should have *ex-ante* so that it may be evaluated *ex-post*. The achievement of evaluability implies the definition of the duties of reasoning established by deliberative democracy. Having achieved evaluability, to complete the cycle reaching legislative rationality is essential, and, for what is of interest to us now, to guarantee legislative control (Fig. 14.1).

14.5.1 Ex-Ante Evaluation

Evaluation starts with a needs assessment or definition of the problem that you wish to solve (broadly, Rossi et al. 2004, p. 101 ff.), for example, the increase in burgled country houses or the high level of recidivism among sex offenders. A good part of legislative irrationality comes precisely from the non-existence of a definition of the needs for intervention carried out in accordance with the methodology of social sciences that serves as a counterweight to populist or simply biased discourse. The power of need assessment—the problems—in matters of criminal policy is under the responsibility of political leaders, *lobbyists*, crime victims (Cerezo Dominguez 2010), means of communication etc. In this phase it is also necessary a dialogue with the stakeholders who have called attention to the problem. A social problem is not an objective occurrence, but a construction that emerges from the interests of various parties which affect these interests. However, if this construction unfolds on the basis of scientific method, guaranteeing participation under conditions of equality for the affected parties, will undoubtedly have important benefits for the rationality and legitimacy of the law.

In the definition of the problem, a margin of discretionality ought to be conceded to the legislator, when deciding on the relevance given in a particular problem or, even more so, whether or not you consider it a problem. It is a decision loaded with ideology, which in a democratic society should be respected. While from a political standpoint, a 10 % increase in burglaries of country houses may not constitute a relevant problem, which determines a need for further measures, from another point of view it may be so; the increase in the number of abortions may equally be considered in a very different way depending on religious values etc. On this point, as a corrector of subjectivity, it is where an essential role of the concept of *Rechtsgut* or legal interest may be played out. To determine the protected interest forms an unavoidable part of the duty of the legislator to exercise reasoning, as one part of the definition of the problem (*needs assessment*). Nevertheless, and as we shall find out, in the case that public intervention is the increase in criminal prohibitions or sanctions, the need for intervention is a much more complex operation to find a legal interest that may be legitimately protected.

To recognise that problems of criminal-policy, like any other social problem, are a construction, in no way implies that a scientific methodology exists that has to

take the legislator into account. This methodology integrates the duties of reasoning that form part of deliberative democracy. The first step is to determine its size, distribution (social, geographic, temporal...), density, intensity, prevalence, number of risks etc. (Mears 2010, p. 53 ff.). Crime statistics, if they exist, are essential on this point. However, with no acceptable prior data, the definition of a problem of criminal policy requires time. To determine an apparently simply problem, such as the rise in the murder rate, requires a study of some years in which its area is circumscribed, as its causes may be varied depending on the sector of the population or area of the city in which it is located, the class of perpetrator (young or of an older age), the situations in which the murders occur (robbery, burglaries, drug trafficking, gangs of youths, gender violence etc.), the type of victim etc. An increase in the number of occasional murders in a year, which does not form part of a continuous tendency is without a doubt a social problem, which needs some type of intervention, but it can not in itself serve beforehand to justify an increase in punishments.[31] An essential requirement of a rational criminal policy should be not to attend to occasional problems. In evaluation theory, the need to verify the evolution of the problem in the future, is in this sense discussed, its endurance, before any decision is adopted.[32]

Having defined the problem, the following step is to determine the objectives and goals of the intervention (Rossi et al. 2004, p. 149 ff.). The goal is the ultimate or abstract finality of a particular intervention (the drop in rates of reoffending, burglaries in the countryside), while the objectives consist in defining this general goal (the drop in 5 % through the application of the problem in certain geographic areas). The selection of the objectives, in criminal matters, should necessarily begin on the basis of an assessment of the at-risk population, in which the priority needs for protection are defined, after the corresponding risk analysis (Rossi et al. 2004, p. 121 ff.). An irrational model of legislation operates in an extraordinarily naive way: the publication in the Official Journal of a new criminal type or an increase in punishments will cause a reduction in countryside robbery. This reasoning is not sustained from the point of view of social sciences. Of course, the drafting or the harshening of criminal definitions may be a necessary step, but the setting of objectives should lead to determining the extent of the expected fall in criminality. And that depends on the resources that will be assigned to the implementation plan for this norm. In this sense, the fall in crime figures should include categorisation by geographical areas depending on the complement that will be employed in it.

All social measures, whether explicitly or implicitly, are based on a theory that contributes its logic and determines how it will act. In reality, the description of the need for intervention should not only solely concern itself with the social problem that it is trying to approach, but also its causes, which already in some way implies a

[31] In this sense, see for example the study on criminal murders that the Institute of Investigations of the Supreme Court of Argentina, under the direction of Matias Bailone, http://www.csjn.gov.ar/investigaciones/ (last access 02/02/2016).

[32] Rossi et al. 2004, p. 117.

prior decision on the way in which the intervention is subsequently delivered. The essential aspect within the ex-ante evaluation phase is to determine the theory on which the fundamentals of the measures are sustained, in which the way that the programme will produce the social benefits that are expected of it (Rossi et al. 2004, p. 133 ff.; Mears 2010, p. 53 ff., with example referring to criminal policy measures). On this point, a distinction is usually made between the theory of impact and procedural theory (Rossi et al. 2004, p. 142 ff.). The first describes the social changes which, in the short, medium or long term would bring with it the implementation of the programme and the relation of cause and effect between the intervention and these changes. Procedural theory points to the way in which it will be implemented and to the organisation of the programme to achieve the goals and objectives that are pointed out.

The choice of the theory of impact requires the establishment of a causal hypothesis: for example, reoffending is fundamentally occasioned by unemployment, so that here on in, to point to the model of intervention: to increase education in prison and give incentives to entrepreneurs who contract ex-in mates, will reduce reoffending. When action is taken on a problem, where previously a model of intervention has been chosen, the first step is to establish whether the future intervention should be done in accordance with the same explanatory theory used up until now or whether a change of strategy is needed. It should be taken into account, moreover, that the effects may or may not be linear. It is a matter of linear effects when each "dosage" (for example, each additional year of punishment) produces a particular effect (10 % less crime), in the non-linear effects this relation does not occur: increments the custodial sentence from 10 years to 11, produce a lower effect than passing from 2 to 3.

It is essential for the evaluable quality (Rossi et al. 2004, p. 136) of the programme that the impact model or theory that sustains the programme is upheld, with an indication of its goals and objectives. The absence of model of repercussion enormously constrains the possibility of controlling the quality and effectiveness of a programme, and equally makes it difficult to determine its strong and weak points. The argumentation duties should centre on achieving the evaluability of the programme and, on this point, a central aspect is to find out why the chosen theory is plausible. To do so, it is essential, for example, to back up the proposal with previous studies and statements.

The suggestion that evaluation should be based on an impact-based theory or model implies the application of an experimental methodology, taken from the social sciences, which has been called theory-based evaluation (Rossi et al. 2004, p. 139).[33] Of course, there are other possibilities. Evaluation theories distinguish between pragmatic or naturalist evaluation: models of evaluation that seek to gather qualitative or valuative data, rather than quantitative data. At the opposing end of the spectrum of evaluation methods that are set forth here, evaluation may be

[33] On other types of evaluation see Muñoz Arenas, Chap. 1, in this volume. Equally, Bueno Suarez and Osuna Llaneza (2012).

designed as a process of negotiation between the evaluated and the evaluator, recognising that the subjectivity of any assessment process is irremediable. Without denying, of course, that these alternative types of evaluation can be of great utility, in this work the most developed or the most traditional model of evaluation was employed, based on the application of the natural sciences and its methods to public interventions. This model is better suited to the objectives of the Science of Legislation, the need for the legislator argue the reasons that led him to restrict public rights or, in general, the adoption of measures that imply public expenditure. The quality of the reasoning requires that the legislator take part and expound with clarity the objectives that he seeks to achieve and the road to achieve this.

Impact evaluations, which have been in use for years in the EU criminal policy, would be the form of guaranteeing the evaluability of criminal norms. Impact evaluation would be the document that fulfils the duties of reasoning of the legislator, which arise from deliberative democracy and that concern the organ (government) that proposes the law. Impact evaluations should refer to the set of elements that as we saw earlier guarantee legislative rationality.

In criminal matters, a correct structure would be: (a) axiological justification of the norm, (b) justification of its technical and systematic correction, (c) evaluability from a pragmatic or ex–ante evaluation point of view, in the sense, precisely, of the theory of evaluation. An important aspect of the debate is the organ and its characteristics that should conduct this evaluation (Muñoz de Morales Romero 2011, p. 595 ff.). In this sense, the creation of a specific department of criminal policy, within the Ministry of Justice, would be a suitable option.

14.5.2 Ex-Post Evaluation

Ex-post evaluation has, as its finality, to find confirmation whether the circumstances of the intervention (necessity and theory), as has been described in the impact evaluation report, are correct. It implies a critical review of the programme. To do so, as a prior requirement, all programmes or evaluable laws should create a system of documentation that will make its subsequent evaluation possible, regardless of the existing judicial statistics.

The first step of *ex-post* evaluation consists in analysing the implementation of the programme, which in reality implies evaluating procedural theory, which should contain the impact evaluation (Rossi et al. 2004, p. 171 ff.). Evaluation of the measure comprises two activities. The first is to confirm whether in effect full respect is paid to the activities and provisions of the procedural theory of the programme. The second phase responds to the mode and above all to the quality with which these activities have been carried out. While the first phase is more quantitative, the second has got to do with qualitative aspects. Evaluation of implementation has multiple advantages, helps to improve the effectiveness of criminal policy, insofar as it guides us to improving its execution, to establishing responsibilities in case the expected results have not been obtained and, above all,

helps to check whether the theory on which the programme is based is correct. *Ex-post* evaluation should, of course, concern itself with the theoretical foundation of the programme, but it is logical to confirm beforehand whether the implementation is on the right lines. Only when it is, and things have not worked, is it right to criticize the theoretical assumptions of the intervention.

The second step for *ex-post* evaluation is to determine whether the expected results have come about (Rossi et al. 2004, p. 203 ff.). This also entails two different activities. The first, the evaluation of the results in itself: for example, if a fall in the crime has occurred as expected. The second is the impact evaluation (Rossi et al. 2004, p. 233 ff.): it should be established that in fact the expected results (the drop in crime rates) are a consequence of the intervention and not of other external causes. Impact evaluation therefore consists in searching for alternative explanations (Rossi et al. 2004, p. 265 ff.), beyond the criminal policy undertaken. From the point of view of the principle of proportionality, this point is extraordinarily important. A criminal norm that has no significant causal effects on a drop in crime rates is contrary to the principle of proportionality. The evaluation of results is therefore essential to render the legislator accountable for criminal policy.

Impact evaluation as an optimal methodology would require having a control group, with homogeneous populations where the criminal policy measure under evaluation would not have been applied. In Spain, as in the majority of EU countries, criminal norms are applied across the whole territory. This does not happen in federal states, like the USA, in which each state has competencies in criminal matters. This lack of uniformity makes the impact evaluation of a theory possible. In a following section, the possibilities of carrying out experimental legislation in criminal law will be analysed, in which the existence of control groups would be possible. It is a question of a vital need for European criminal policy, in which the harmonization of broad parcels of criminal law imply the impoverishment of criminal policy and in addition prevents experimenting with various interventions. This handicap of criminal law may, however, be seen as solved in great measure through studies of comparative law, centred on the efficiency of criminal policy, involving homogeneous societies. Nevertheless, in the majority of punitive criminal interventions what does not usually exist at all is an evaluation of the results (Ortiz de Urbina, Chap. 3, in this volume). The most frequent is that the introduction of a new incriminating measure or the harshening of punishments has no effect whatsoever on crime rates.

An essential aspect in *ex-post* evaluation is cost-benefit analysis Ortiz de Urbina, Chap. 3, in this volume). In a world of scarce resources, the costs attached to criminal policy have to be optimised. That in first place because public policies in this matter compete with other public policies and, in second place, because a particular criminal policy may be costlier and inefficient than another alternative. An elemental development of the duties of reasoning that are born of deliberative democracy is to justify that the public resources are employed in an efficient manner, obtaining maximum social benefits at the lowest possible cost.

The importance of the "cost" of criminal policies is an important debate in Anglo-Saxon countries. In the United States, for instance, the debate around the

death penalty has focused on these last years through this argument, with a view to demonstrating that alternative measures to the death penalty can be equally effective and cheaper than this punishment. Equally in this country, as a consequence of the economic crisis, its policy of mass imprisonment is under review, with the aim of underlining the lower costs of measures on re-education and re-socialisation. In the United Kingdom, the costs of long-term imprisonment are also under review, especially life imprisonment.

The economic analysis of criminal policy requires three distinct operations: cost analysis, cost-effectiveness analysis and cost-benefit analysis Ortiz de Urbina, Chap. 3, in this volume). The first is the simplest and most basic; it simply addresses the estimation of the global price of the implementation of a criminal policy (for example, the cost of an increase of over 2 years' imprisonment to sanction a particular crime). The second more complicated one, consists in connecting the costs of the measure with the results that are obtained. To do so, it is logically necessary to rely on an impact evaluation that effectively confirms the transformation of a particular social problem. Cost-efficiency analysis indicates what the expenditure has been to achieve a particular policy (for example: a reduction of 10 % in drug trafficking through the increase of sanctions at a cost of two million Euros). It is an essential analysis when the aim is to check the efficacy of two public policies that pursue the same end (in the earlier example: a reduction of drug trafficking through awareness-raising campaigns *v*. heavier sanctions).

The cost-benefit analysis is complementary to the latter. Its objective is to render the costs of a policy in economic terms and the benefits that this brings with it (for example, a reduction in drug trafficking has supposed a saving under various budget headings for the State of 5000 million Euros, such that for each Euro of investment approximately €2.5 has been saved). Cost-benefit analysis is essential to prioritize public policies with different agendas, as against others (for example: the two million Euros invested in the construction of new prisons has estimated benefits of four million Euros, whereas that same investment in health policies would have implied benefits of six million Euros).

The most complex aspect of this analysis is to decide what we include under each of these budget headings and all the ingredients that may be monetized. As regards the first question, at present a broad perspective is adopted when defining both concepts. It includes the set of costs ranging from judicial to political, to the costs of all types that the perpetration of a crime involves for the victims[34] and, with that, the benefits, from the possible improvements in health and savings in sanitary expenditure, to the development of areas of the city blighted by criminality . . .. This broad vision should come to include the impact that a measure has in terms of freedoms and fundamental rights, and that in both senses: both those that cut down on the prohibition and the sanction, as much as those that are derived from greater

[34] Distinguishing between direct and indirect costs and benefits, tangible and intangible, fixed and marginal and so-called opportunity cost Mears (2010), p. 215.

efficacy of criminal law (to how much does the safety factor rise when using the Internet because of reduced harassment over mobile telephones?)

The attachment of a price to all of these concepts is certainly a complex operation, above all when it is a matter of intangible cost/benefits, where no reference market usually exists that allows us to ascertain the costs (for example: the cost to the victims of a crime) (Mears 2010, p. 218). Despite the difficulty, it is however a task that is in essence no different from those that for some years have been taking place in tort law, where it is a matter of indemnifying moral damages.

14.6 The Science of Legislation and Constitutional Control

As we have concluded, the constitutional control of norms, and particularly criminal laws, constitute the most important mechanism to guarantee their rationality and legitimacy. It is the paradigm that arises in the majority of European countries after World War II, with the approval of constitutions filled with values, principles and judges. The thesis that is maintained in this work is that the resurgence of the Science of legislation, before abandoning this paradigm or running parallel to it, should serve to delve deeper into it. To do so, the road that is proposed is to look more deeply into the relations between the constitutional principles of criminal law and those contained in the Science of legislation. In particular, it will be a question of placing in relation to each other deliberative democracy and evaluation with the principles of the legal reservation (Gesetz Vorbehalt) and proportionality.[35]

This choice obeys the following control strategy of the legislator[36]: examining the law reservation leads us to procedural control, the type of constitutional control that lays down the fewest objections. This type of control does not judge the contents and the decisions of the legislator, but the way in which the legislator has justified and reasoned these decisions, and to what extent the procedure complies with standards of quality, destined to ensure the participation of those affected. But in second place, the increase in duties of reasoning, which will form part of the reserve of the law, will contribute empirical evidence on legislative procedure (ex-ante) evaluation and during the life of the law (ex-post evaluation),

[35] Without of course denying that the implications can even be greater. For example, the development of legislative technique can contribute to strengthening the principle of criminal determination, which in most constitutional jurisprudence is hardly of relevance. So, for example, the norms without elemental aspects of legislative technique should be considered contrary to the principle of legality. When there is clearly a possibility of formulating a criminal definition in a more certain or precise way or when the legislator by carelessness has not set the boundaries between two types of criminal behaviour, creating notable problems of interpretation, it should give rise to a declaration of unconstitutionality. The technical quality of the law, in the expression of the ECtHR, should be the object of constitutional control at least in the framework of criminal law.

[36] Another road is proposed by Cruz Villalón (2004), p. 119.

which will permit greater material control, from holding to the principle of proportionality. It concerns, as may be seen, independent but complementary controls. The increase in procedural requirements results in greater effectiveness of control over proportionality.

14.6.1 Nullum Crimen Sine Lege Parlamentaria from the Standpoint of Deliberative Democracy

Unlike the rest of the basic principles of criminal law, such as proportionality or culpability, the principle of *nullum crimen sine lege parliamentaria* or the reserve of law has been reduced to a tremendously formal principle. It is enough to assure that appropriate legislative procedure has been used. This formal content contrasts with the meaning of the law in the Enlightenment. As is revealed in the historic analysis that has been presented, the law, and therefore the reserve of the law, was much more than respect for procedure.

The *Gesetz Vorbehalt* contains three substantial or material parts.[37] The first is an appropriate process that allows the participation of those affected. This procedure guarantees its legitimacy, but it ought also to be designed with the aim of guaranteeing its rationality. In accordance with the ideas of the Enlightenment: if all those who see themselves affected can participate under conditions of equality, a well-founded decision is more likely. In criminal material that moreover implies a guarantee of overall importance for the citizen. If those people affected by the restriction of freedoms are those that take the decision, it is more likely that the restriction of freedoms is reduced to its minimal expression.

The second substantial element of the reserve of the law is that this procedure is also transparent so that it allows accountability. The security of the parliamentary process, is that it allows us to learn, through public debate and the minutes of the sessions ("light and stenography") the position of each of its representatives and in consequence offers political accountability, which is exercised through the right to vote. Greater transparency of parliamentary procedure also serves to ascertain which social interests influence the process of preparation. The illegitimate action of lobbyists is easier there where the decision-making mechanisms are not transparent.

Finally, the reserve of the law, as its priority objective, curbs executive power in decision-making. This objective however is not so much an objective in itself, but a means, to reach the ultimate finality of the reserve of the law. The importance of the exclusion of the executive is tied to the importance of the participation of those affected by the law. As we have pointed out earlier, if those affected by the crime intervene in the preparation of norms, fewer restrictions on guarantees are more likely.

[37] See, in what follows Grandi (2010), p. 188 ff.

At present, the reserve of the law, at least in criminal matters, is still far from achieving these objectives, because it has in a "formal" manner been shaped around observance of the intervention of legislative assemblies in the parliamentary phase of the drafting of the law. With it the reserve of the law has been anchored in the past, linked to an ideal parliamentary model, which at least in many countries like Spain and in other countries of the EU simply no longer exist. In the architecture that has been presented, parliaments dominated the law-making process, but today things are undoubtedly not or almost never that way. The most important decisions are adopted in the governmental phase of the law, beginning with the construction of the legislative agenda (Soto Navarro 2003, p. 130 ff.).[38] Having presented the draft bill, the legislative assemblies lack the means and the necessary technical capability to question the projects that come from government. The government, through the control of parliamentary committees, in addition, sets the times of the debates and whether they are guillotined or fast-tracked.

In a world of a scant few basic laws, like that of the Enlightenment, it was perhaps possible to think of a parliament constituted as the great director or maker of policy, but today it is no longer so. In the best of cases, the law is the product of teamwork between the government and the parliamentary majority that sustains it. In many other cases, parliaments, when a sufficiently large majority exists, are merely rubber stamping the wishes of the government. The possibility of parliamentary minorities effectively controlling the proposals from government is minimal, among other reasons, because the parliamentary groups play with an absolute disproportion of means in relation to the government that places all of its machinery at the service of the approval of the law.

If our constitutional world has evolved in this way, what makes no sense is to continue making exclusive use of the supervisory mechanisms of control over power and rationality in the parliamentary phase. The objectives that the reserve of the law pursues should also be required in the phase that is more important in its preparation today: the governmental phase. The proposal that is put forward in this work is to consider that this phase should also form part of the principle of the reserve of the law, which implies that it should be constituted in such a way that it guarantees the substantial contents of the reserve of the law: the participation of those affected, transparency and accountability. It coincides with the most recent visions of the reserve of the law that see a series of guarantees of a procedural nature in it. In other words, that they consider that the principal virtue is not so much the "law" as the characteristics of parliamentary procedure. A procedure with similar qualities followed before another organ could also be valid from the point of the view of the reserve of the law.

The proposal put forward in this work is, of course, not aimed at the suppression of parliament by government, of law by regulation. It is a matter of a proposal that seeks to summarise the guarantees flowing from parliamentary procedure, those

[38] This author was a pioneer on this point; further essential reading in Díez Ripollés (2003b), p. 18 ff.; Becerra Muñoz (2013).

other ones that have to dominate in pre-legislative procedures, designed in the way proposed in the earlier section in accordance with the requirements of deliberative democracy. That requires, in the first place, the construction at the time, of a framework for dialogue in which all those affected by the law, as well as the groups of experts can manifest their opinion, under conditions of equality. In second place, it implies duties of motivation for the proponent of the law, which as explained, should be specified in the evaluability of the law.

Constitutional control of the reserve of the law in a prelegislative phase should be aimed to safeguarding the essential or minimal contents of both elements. In particular, in accordance with these criteria the pre-legislative procedures should comply with two minimum or essential requirements, infraction of which should be considered contrary to the reserve of the law:

Transparency and accountability require that duties of argumentation be imposed on the legislator as required by deliberative democracy. There is no control if whoever has greater technical capability to generate relevant information to endorse the suitability of the decision, firstly, does not generate it and afterwards fails to communicate it correctly. The argumentation duties should contribute sufficient information, to ensure the evaluability of the law, which as we have seen is the objective of ex-ante evaluation. The approval of a law without having clearly defined the need for intervention, the theory on which it is based and the necessary implementation to achieve the objectives, should be considered contrary to the reserve of the law, insofar as it drastically reduces the possibilities of control, demands for political responsibility and judicial control of the legislator. The necessity to generate and to contribute sufficient information to justify a decision implies of course an important form of control. Logically, and *ad maiorem,* the contribution of false information in an intentional way or by serious negligence, when this information refers to fundamental aspects in decision-making, should also be considered contrary to the reserve of the law.

The functiones of the reserve of the law is also assisted by another great pillar of deliberative democracy. The need for the principles affected by the criminal norm to be considered in this phase refers to the safeguarding of guarantees that the reserve of the law seeks, as well as the achievement of rationality. The non-participation of a group that is affected or over-representation of any of the groups distorts this procedure and should be considered contrary to the reserve of the law. The illicit activities of *lobbyists* and the exclusive consideration of the opinions of the victims should be examined from this point of view.

14.6.2 The Principle of Proportionality

For the purposes of this presentation, it is enough to point out that the principle of proportionality is composed by the following elementes (recently, Lascuraín and Rusconi 2014): (a) the existence of a relevant public interest, which in criminal law implies the protection of legal interest (*Rechtsgut*); (b) the suitability of the

prohibition and of the sanction to achieve greater protection of the asset; (c) the non-existence of less taxing alternatives that provide similar protection to the legal asset; and, (d) proportionality strictu sensu, which means that the costs of the prohibition and the punishment are reasonable with regard to the end that is pursued and the degree to which that end is achieved.

The principle of proportionality should be accompanied by duties of reasoning, to be truly operative as an instrument of control. Without obligations of reasoning, the control that principle exercises is significantly reduced. For this reason, the reserve of the law and the principle of proportionality are functionally complementary. The reserve of the law establishes a procedure that means that the restriction of freedoms tends to be minimal, but above all it imposes duties of reasoning on the legislator. As has been indicated, these duties of reasoning coincide with the need for laws that may be evaluated (evaluability of the law), in the sense proposed by legislative evaluation and have to be expressed in the impact evaluations. Evaluation remediates the most important failing of the principle of proportionality in the criminal field, the lack of an empirical base, which has led all Constitutional Courts to use this principle in an extraordinarily cautious way (Lascuraín and Rusconi 2014).

The empirical information that legislative evaluation provides is useful, in the first place, to establish the relevant public interest that constitutes the first part of the test of the principle of proportionality. To demonstrate the need for intervention requires, in addition, a more complex and a richer analysis than determining the legal asset that the measure protects. The possibilities of control that this first step offers are greater than those that the concept of a legal good supplies in itself, the determination of which merely constitutes a preliminary step before the determination of the need for intervention.

The theory of the impact of the programme, its procedural theory and the setting of goals and objectives are essential to test suitability; the second element of the test of proportionality. It is as well to underline that these duties of reasoning are not satisfied, to appreciate its potential correctly, for example, with a generic invocation to general prevention, with a view to justifying an increase in punishments. On the one hand, because we all know that it is false under certain conditions. Criminology shows that it is not the quantity of the sanction but the certainty of punishment which truly intimidates. But above all, because evaluability demands quite a lot more than a generic invocation of the ends of the punishment, it is for example necessary to determine the drop in criminality that is expected in the sector and the procedural measures that will be adopted (increase in inspectors or police, prison officers, information campaigns...).

The compatibility of a norm with the principle of proportionality is however on many occasions complex for us to appreciate at the time of its birth. At that time, the legislator will normally find it complicated to contribute relevant data on whether the theoretical programme in which the law is grounded really functions. Even more complicated still is that which may offer definitive data on whether cost less alternatives exist. For this reason, and if as has been affirmed, the principle of proportionality is not understood without duties of reasoning, these should extend

throughout the lifetime of the law. A reduction of these duties at the time of the approval of the criminal law means that there is no possibility of the constitutional judges controlling its proportionality throughout its lifetime. Criminal law restricts rights throughout its lifetime, such that throughout the time it is in force, it has to fulfil the duties of reasoning. This continuous duty of reasoning will be executed through r a periodic ex-post evaluation of criminal laws.

Ex-post evaluation serves, in consequence, to specify the duties of reasoning that accompany the life of the criminal law, contributing information of absolute importance for constitutional control. The judgment of suitability is reinforced through the evaluation of results, but above all the impact evaluation. Not only it is necessary to demonstrate that a drop in the crime rate has taken place as a consequence of the entry into force of the law, but that this drop is moreover due to the theoretical programme on which the intervention rests being causally acceptable.

Cost-benefit analysis connects with the principle of subsidiarity or *ultima ratio*.[39] It is a powerful tool to determine the extent to which alternatives exist to the chosen means of intervention, which generate better results at a lower cost. This proposal is, of course, controversial and objections may be raised that it implies an understanding of criminal law and the principle of subsidiarity in purely economic terms. This criticism, however, falls short on meaning. As we have seen the cost-benefit analysis as has been understood at present, begins with a broad vision regarding which elements should be included in each pan of the scales. It is a sophisticated tool, which does not solely measure economic data. Cost-benefit analysis takes place in a particular axiological framework, the State under the rule of law, which implies that, on the one hand, the restrictions on liberty entailed in the prohibition of behaviour should be included in the costs, but above all the imposition of a sanction or the impact that the procedure can have on fundamental rights.

But in any case, the introduction of tools related to the economic analysis of law in the proportionality test hardly entails a high risk of overlooking purely evaluative considerations. The structure of the proportionality test constitutes a conglomerate of utilitarian and normative points of view. Whereas the suitability and subsidiarity need a clear utilitarian reading, proportionality in the strict sense constitutes a part of the eminently evaluative test.[40] It is fundamentally a question of comparing the degrees of restriction of rights and freedoms that a measure entails with the degree of greater rights and freedoms that it involves.

[39] Broadly, see Prieto del Pino, Chap. 11, in this volume.

[40] A weighting criterion that adapts itself, in my understanding, to this last section, as proposed by Sánchez Lázaro, Chap. 9, in this volume.

14.6.3 Conclusions: Advances, Limits and Dangers

Up until now this work has sought to demonstrate that the Science of legislation complements the solution given by the Constitutional State to the problem of legitimacy and rationality. It has especially shown how the contents of the Science of legislation can serve to reawaken principles such as the reserve of the law and to increase the efficacy of the principle of proportionality. At least, from a purely theoretical point of view, I think that the former offers no room for doubt. However, it should not hide some dangers and limitations that especially push legislative evaluation The well-known article of Martinson (Martinson 1974, p. 22), negatively evaluating the resocializing policies of the 60s and 70s, served to dismantle a system of criminal execution based on reeducation, even though Martinson himself, a few years afterwards, recognised some errors in it (Martinson 1979, p. 24 ss.). Hence, the establishment of an organ of legislative revaluation with a high level of professionality and independence is very important. Equally, and at a methodological level, one can but recognise that the evaluation of laws is less developed than the evaluation of their public policies (Bussmann 2010, p. 290 ff.). The majority of evaluations have been carried out on the effectiveness of programmes to avoid reoffending, the increase of police officers etc. in other words on more concrete and measurable measures of criminal policy than the law. This concrete nature implies, in addition, that the programmes are generally of a more restricted scope of application, limited for example to a municipality or region, such that it is possible to find control groups with greater ease. It is true that in the case of laws, recourse to comparative law could always serve as a sort of control group; above all, when it is a question of homogenous societies. Nevertheless, it should be acknowledged that as homogeneous as European societies may be today, cultural and social divergence is still very present.[41]

Despite these problems, supporting the evaluation of criminal laws is better than continuing to be immersed in a criminal policy where any empirical evidence is spurned. Only from an exclusively retributionist vision of criminal law is it possible to detach from the need to apply policies with empirical evidence. In any case, the limitations that have been pointed out should be held present when analysing the possibilities of constitutional control of criminal norms through the empirical data that the evaluation supplies. This is of fundamental relevance insofar as criminal proportionality is concerned. The constitutional deference of constitutional judges means the legislator should mitigate opinions but not disappear. Constitutional control with an empirical grounding should be conscience of the advances that

[41] One of the first evaluations carried out in Europe was completed in 1966, in Norway, with a view to measuring the effectiveness of a new legal text that enlarges the rights of domestic employees. The evaluation highlighted that the principal drawback in its application was that, given their different social status, the employees were unable to have their rights respected. This example shows us how the effects of a law depend enormously on the social conditions in which they are applied, on this point Haarhuis and Niemeijer Synthesizing (2009), p. 403 ss.

are still necessary in the mechanisms of legislative evaluation. Hence, it should be especially strict in the control of evaluable qualities from the standpoint of the reserve of the law. At first, effort should focus on the legislator satisfying his obligations of reasoning.

An important question is to determine whether this new model of constitutional control based on empirical evidence does not need important changes in the legislation that regulates the activity of constitutional courts. In the first place, it appears evident to me that we need a new type of constitutional judgement in which, for example, before declaring the unconstitutionality of a law, the judges oblige the legislator within a timespan, to comply in due manner with his duties and to provide further empirical data. These new sentences could either, in the most serious cases, suspend the application of a norm until its effectiveness is not duly argued or, generally, to leave the norm in force but on the condition that the legislator evaluates it over a particular period of time. This constitutional justice of an empirical kind should also reflect on the possibility of proposing and carrying out expert tests on constitutional procedure.

Constitutional control with a large number of legitimised people when submitting appeals on the grounds of unconstitutionality would also be coherent against the parameters of deliberative democracy on what we have constituted as the reserve of the law.[42] In a reserve of law exclusively proposed through representative democracy, it is normal that legitimated principles for the submission of an appeal of unconstitutionality should be parliamentary. Moreover, the empowerment of the public, which is the aim of deliberative democracy, requires, for it to be coherent, that the stakeholders, who should legitimately participate in the preparation process, may also participate in its control process. The theory of stakeholders would therefore have a lot to do with may be said in the future on the way legitimacy should be redesigned for the constitutionality of a particular norm to be called into question.

14.7 Experimental Legislation

The new Science of legislation would not only require modifications in constitutional control, but also a new form of legislating, which has come to be called experimental legislation and that responds to the old idea of *Monstesquieu* who held it "appropriate to test a law before establishing it". In reality, legislative evaluation implies the introduction of an important degree of experimentation in the drafting of the law. The laws should begin with a hypothesis that is necessary to verify, which implies accepting that the law is a social experiment.

When we speak about experimental legislation, in reality, it is a question of going a step further (Galiana Saura 2008, p. 306 ff.). This type of legislation begins

[42] See, for example, Veléz Rodríguez, Chap. 13, in this volume.

with an open attitude of the legislator; in which he openly recognises his uncertainty concerning the suitability of the norm to provoke the desired social changes. The principal characteristic of experimental legislation is that the legislator intentionally limits the validity of the norm with a view to testing its adjustment, before giving it generalised validity. Such a restriction can basically operate in three ways: territorially, personally or over time, by placing an expiry date on the norm.

Experimental legislation, although it is not frequent, is not an unknown fact at all and has been used in such fields as administrative law and labour law, in relation to measures to stimulate employment or contract types, as well as in the framework of the organisation of justice and judicial procedure. It is not even surprising in criminal law. In 1975, the French Parliament decided to decriminalize abortion partially, but in a limited way over time. The law conceived the causes of decriminalisation under the form of a provisional suspension on criminal accusations, for a time of over 5 years. Parliament had to take the decision to confirm the measures undertaken once this time had finished (Galiana Saura 2008, p. 316).

Sunset legislation probably represents the most frequent and well known case of limitations on the temporal validity of the law (broadly Myers 2008, p. 1328 ff.). The idea of creating laws of limited temporal validity is something that is present in the theory of North American legislation, ever since the constitutional debates between *Jefferson* and *Madison*. At this time, temporal constraints were understood as a way in which each generation has a right to show its conformity with the laws approved by another, which would even include the Constitution itself. Sometime earlier they have been used with experimental ends, in a similar way to the French law on abortion. Its use has not been unknown, if anything on the contrary, in the framework of criminal law. Those measures that have an enormously limiting nature on fundamental rights are an appropriate area for *sunset legislation*. The most well-known case is the *Patriot Act*. In these circumstances, a norm is prudent if its validity may convalidated over time in view of the results that are obtained.

Sunset legislation creates an ideal climate for evaluation and experimentation. On the one hand, by maintaining it, the government and stakeholder groups will be in charge of carrying out empirical studies that demonstrate its effectiveness, on the other, opposing groups will lobby against its maintenance.

As may be appreciated, these types of laws constitute a modality of temporal criminal law. But, unlike this, it is first done with the purpose of experimentation, and secondly, the reason for its approval is not the appearance of an exceptional problem, but of the need to confirm the effectiveness of the norm before it is made totally effective. In fact, *sunset legislation* is also proposed in the USA, with a view to preventing the legal order from filling up with useless and obsolete norms. The need to confirm the validity of a norm after a certain time avoids this occurrence. The difference with temporal laws means that they behave in a different way in relation to the principle of favourable retroactivity. In the case of *sunset legislation*, the application of this principle is beyond doubt and may be one of the specific effects sought by the legislator. It is demonstrated that prohibition is not useful after the timeframe has elapsed and its derogation should therefore have retroactive effects. Otherwise, it would give rise to the imposition of a disproportionate punishment.

Logically, the greatest problem of experimental legislation is that of its legitimacy, insofar as it can enter into conflict with constitutional principles such as proportionality, equality and even dignity (Doménech Pascual 2004, p. 145 ff.). The application of these principles depends logically on the type of event and the type of limitation (temporal, spatial or personal) that the experimental law imposes. If we centre on the creation of criminal norms, which punish new conducts or increase sanctions, the collision with the aforementioned constitutional principles is inevitable when the limitation is personal or territorial. In a country like Spain, where criminal competence is the reserve of the State and not the Autonomous Communities, it can not be justified that the citizens of one part of the country are subjected to a prohibition or sanction that does not apply to other territories. Far less possible would be a personal limitation (example: adult men between 18 and 25 years old).

Sunset legislation on the contrary is constitutional. It has no problems of equality nor of proportionality. Conformity with this principle demands passing the habitual test of proportionality, with the nuance that the legislator should at the outset be conceded a margin of discretionality that is even greater, after having temporarily limited its measure. To subject citizens to a restriction of provisional rights or limited over time, always implies a lesser intervention than doing so in a definitive way. The generalization of this type of legislation, should allow the constitutional court to declare the constitutionality of a criminal norm, converting it into sunset legislation. It is therefore obliged to show effectiveness over a period of time, or on the contrary be declared unconstitutional. The law must necessarily be correctly designed, to pass the test of proportionality, from the point of view of its evaluation. Otherwise, it would be unsuitable to comply with one its ends, which is that of obtaining information on the effectiveness of the norm.

The territorial limitation of the validity of the law would be a change indicated in the heart of the EU. The EU has a certain sort of asymmetric criminal federalism. Ireland, Denmark and the United Kingdom have opt-out rights, as is well known, which allow them to remain on the fringe of norms applying criminal or procedural harmonisation. Equally, and with a general character, we have the possibility of reinforced cooperation, legislative initiatives to which a group of countries subscribe. Reinforced cooperation is expressly foreseen in the Area of Freedom, Security and Justice both in procedural and material harmonisation (art. 82.3 and 83.3 TFEU), as in the case of the European prosecutor (art. 86 TFEU). It is true that its final ends are different. All these cases appear to be associated with the negative of one or various States derived from the use of the emergency brake or, in the case of the prosecutor, motives of a political sort. Nevertheless, nobody prevents the use of this possibility for the purposes of experimental legislation. This form of proceeding is not unknown in the USA, where certain initiatives have taken place in a State before moving on the rest.[43] To do so, it is essential that the experimental

[43] See the Minneapolis Domestic Violence Experiment: In the USA experiments took place in the case of gender violence to test the extent to which distancing orders were effective, see Mears (2010), p. 153.

design of the directives is accentuated to ensure its evaluability. The group of countries that is outside the measure would function as a sort of "control group". When reinforced cooperation has exclusively experimental ends, control groups may be sought out, composed of social classes that are homogeneous to those introduced in the measure.

In contexts such as that of the EU, in which a complicated negotiation exists, but also in the national context, it is important to highlight that experimental legislation is a useful tool, insofar as it does not force any "all or nothing" decisions to be taken. In it, the legislator is situated in a position of dialogue and accepts that he may be mistaken. It is therefore a road, in the same way as evaluation in general, which favours consensus and the continuity of criminal policy, regardless of the political force that is found in the government. In the EU, the approval of directives with the nature of *sunset legislation* constitutes, in addition, a good mechanism so that harmonisation does not imply that the EU appropriates the harmonised material in a definitive way. Up until now, this has been the effect of harmonisation. Competence over harmonised materials, up until now, has never been recovered by member States. This is without a doubt questionable in accordance with the principles of European subsidiarity and proportionality.

Experimental legislation implies returning to the law, in some way, the character of a scientific law that was upheld in the Enlightenment. It implies accepting that there is no conclusive separation between natural and social laws and, in turn, that experimentation is possible in both sectors. Although positivism made a clear separation between types of sciences, the evolution of the philosophy of science has once again shown that there are no qualitative differences between the social and the experimental sciences. The principal characteristic of a natural law has been its falsifiability, the possibility of confirming through experimentation, the lack of adjustment of a law (Popper 1995, p. 128 ff.). So, experimental legislation, and in general the evaluation of legislation, use the same criteria. The experimental legislator is a scientific legislator and is therefore modest, is willing to admit that his decisions might not be the best. This implies that he is also a legislator engaged in dialogue, which will not abuse the existence of majorities; nothing can be more unscientific than voting on whether the law of gravity exists. Only this type of legislator, with modesty at heart and willing to dialogue, is able to guarantee the rationality of legal norms, which are given greater legitimacy by their flexible condition.

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