

CRIMINAL LAW: SCIENCE ON THE BOUNDARIES OF THE POWER TO IMPOSE PENALTIES

Roberto Rampioni¹

Abstract

The author features the different theories about the function of criminal justice, in the tension between freedom and punitive power. The essay aims to highlight the increasing role of jurisprudential interpretation at the expense of criminal typicality despite the principle of absolute rule of law.

Keywords

Criminal Law. Freedom. Offence. Criminal typicality. Interpretation of Law.

1. Which is the safeguard for the citizen against the authoritarian power of the state? Which are the grounds of punitive intervention? Is substantive criminal law, but also procedural law, a “science about the limits of punitive power”? Or is it “a blind servant mechanism of the establishment”?

In the domain of *the idea of purpose*, criminal law now becomes a criterion for organising criminal law as a *technique of social control*. In the post-modern era, the “function” of the criminal legal framework takes the form of the preservation of the “social system”, which no longer aims at the preservation of society within the limits required for the *full expression of individual autonomy*.

Now, on the other hand, to quote Rousseau once again, “the Sovereign

¹ Full Professor of Criminal Law, Department of Law, University of Rome “Tor Vergata” (Italy).

cannot impose unnecessary chains on the community”, a formula that materialises an idea with a powerful “critical force”: that *social philosophy of freedom* which “the pre-revolutionary criminal age of enlightenment delivered to posterity through the critical function of criminal legality”.

Criminal law must constitute the “negation of all force”, it must be the guarantor against the arbitrary use of coercion where the force of criminal law is put at the service of a “particular governmental purpose”.

As Piero Calamandrei warned, “freedom is like air: you realise how valuable it is when it begins to lack”.

Today, with a drastic overturning of traditional postulates, criminal law tends towards *all-encompassingness* and, as if by absurdity, *fragmentariness* becomes the character of “freedom”.

And in such a context the legal asset – “due to the progressive and pressing monopoly of the State in its identification” – is degraded to a pure form, into which “arbitrarily established contingent contents” can be introduced. Moreover, a degenerate use of the interpretative instrument (also) for identifying the subject matter of protection puts into operation an “irrepressible push” towards the extension of the area of punishability. Thus, the legal asset is denied its primary *critical function*.

However, if one still intends to discuss the “science of the limits of punitive power” and, therefore, to insist on the attempt to fix – in the best humanly possible way – “the boundary line of fragmentary criminal law”, even today – thus anticipating my conclusions as of now – it does not seem possible to acquire “anything better” than what is offered by the theory of the legal asset, which invites one to argue in the sense of the mere existence of “gaps in *non-punishability*”.

Now, on the other hand, and in particular in the vast territories of the criminal law of economy, for the most diverse and emotionally felt reasons of protection, “the mere ‘administrative’ interest in the correct management of economic relations” is exchanged with those “entities” which really deserve *ultimate* protection.

On the contrary, in order to describe the “constitutive” unfair conduct of the offence, one must identify that “particular” asset, that “*truly significant and precisely determined entity for which the criminal conduct represents damage or danger*”. Therefore, (at least) in the perspective of the interpreter, the exact identification of the protected interest, on the one hand, leads to correctly identify the typical offence, an essential component of the offence; on the other hand, it allows to outline the scope of application of the criminal law, selectively fixing the relevant conduct in the only ones likely to attack that interest.

From this point of view, in order for the legal asset to constitute “a truly guaranteeing entity for the addressee” of the criminal provision, it must be clear that it cannot be resolved – as proposed by many – in the “generic” *ratio* of the incrimination. The legal asset identifies, in fact, the point of reference of that “specific” component of disvalue of the offence, constituted by the offence as a legal event; the *ratio* of incrimination refers, instead, to any other component of disvalue (of the action, of the psychological element) as the generic “political vision” of the legislator.

2. Now, however, the “scepticism” of (namely) Italian legal theory emerges clearly enough.

Mario Romano assumed: “The very concept of legal asset is at least partly obscure, and legal assets are not a prerogative of criminal law”; moreover, because of their “erratic nature” – because they are historically conditioned – their critical function with respect to the indictment decisions would not even be theorizable.

“It is an excessive claim – he noted in this sense – to make the legitimacy of a criminal regulation depend on the special ‘quality’ of this or that legal asset, but the assets are undoubtedly entrusted [...] a significant *critical function of orientation of criminal policy* [...] conventionally, assets can be defined as ‘functional units of value’ that are aggregated by

the free pluralism of ideas in society, in which the interests of individuals and social formations clash and recombine. In this process of identification of assets, criminal law is not in itself special with respect to the other branches of the legal system, because the latter too – as has been said – propose the defence of assets: *the x-factor that legitimises penalty is to be found outside the asset itself*".

“Politics of legal assets” – concluded the author – should be understood

“not in the sense that for its constitutional legitimacy, criminal law must be based on a legal asset of a special ‘quality’, but in the sense that the prohibited conduct must be *‘plausibly harmful to man or society [...]* the Constitutional Court, a non-elective body which as such has no political liability, will not be able to declare illegitimate a legal provision for the inadequacy of an asset deemed worthy and in need of criminal protection by the legislator if not when the provision, despite the intentions of those who established it, does not actually protect anything”.

Francesco Palazzo, for his part, recently pointed out that “the rational-utitarian paradigm of criminal law [governed by the pillars of the principles of laicity, legality and protection of legal assets] certainly continues to be affirmed *in the books* but reveals in the actual reality of the legislation and common sense (and sometimes also of the jurisprudential experience), in short, *in action*, the signs of some yielding to an ideocratic paradigm”: the idea of the inadequacies, if not the substantial *uselessness* of punishment for the purpose of containing crime; the so-called social sentimentalism, an ideocratic principle that clashes with the secular principle of rational utility; the instances of justice, if not ill-concealed revenge; the rediscovery of the victim; the feeling of insecurity induced by the so-called society of risk; the sensitivity to facts without objective social harmfulness; the widespread need for morality in the public sphere as in the economic one.

And, in particular, the author, in describing the progressive, in the post-

modern era, “liquefaction”, “de-mythologisation” of dogmas noted, among other things, that

“the legal asset reveals itself for what it is: not only a good-for-nothing instrument in the expansive direction of criminal law, but also a *conceptually ambiguous tool* in its unravelling into a myriad of ‘intermediate’ or ‘instrumental’ assets and *in any case unable to withstand the very strong tendency to anticipate protection* through abstract or presumed danger and *not even to the proliferation of purposive or formal offences*”.

Domenico Pulitanò’s long-standing position on this issue is different, but not the outcome. As regards the subject matter of protection, he outlined a different “relationship” between the interpreter and the solutions (i.e. criminal policy choices) adopted in the legislative sphere. Just as it is claimed – and by many – that the jurist by interpreting-applying the provision contributes to its creation, to the definition of the legal model, it is here recognised that he, also in the matter of the content of the offence, can *critically and rationally* “transcend” the regulatory framework which, in some way, establishes and describes, having selected it, a specific legal asset.

In essence, a critical function – once again – lies “in the hands” of the interpreter.

The interpreter (albeit an enlightened one), therefore, would not only be granted the power to contribute to the “creation”, to the definition of the legal model, but also to fix – always on a rational (in fact, *valoritative*) basis – the real offensive dimension of the offence. With which – it may be noted at this stage – the long process of erosion of the principle of absolute rule of law reaches its final goal: not only would the legislator be denied the function of giving “definitive” shape to the legal type, but the interpreter would also be left to determine the “real” offensive content of the fact. Criminal policy decisions would no longer be the responsibility of

the legislative power, but – actually – of a widespread, as well as indistinct, “counter-power”.

3. The hypertrophy of criminal law – which has long been lamented – actually leads to the so-called “fragmentary freedom”: in a drastic reversal of traditional postulates, criminal law tends towards *all-inclusiveness*, so that *fragmentary* nature becomes a feature of freedom.

Today – as Tullio Padovani pointed out – even the postulate of the law as the only source of criminal law has disappeared, freedom appears, moreover, “precarious”; “lawless precepts crowd the system distributing the punitive intervention at various levels and overturning the old hierarchy of sources”.

In such a context, on the side of the protection of interests, first and foremost, the legal asset “due to the progressive and pressing monopoly of the State on the identification of the legal good” falls to “a pure form into which arbitrarily determined contingent contents can be introduced”. And, then, more generally, the same judgement of typicality ends up being emptied on the functional level, on the one hand, due to the increasingly significant role played in the criminal dynamics by the so-called “social sources” of punitive intervention (the reasons of justice, the expectations of the victim); on the other hand, because of the (no lesser) expansive capacity that such a judgement takes when the power to classify a given human behaviour as unlawful lies in the dominant thought in society (so-called social sentimentality) or, worse, in the personal opinion of the interpreter.

The nature of legality thus changes: it is no longer descriptive and truthful, but teleological and design-oriented.

The argument referred to here is as suggestive as it is unacceptable in

terms of the results it may lead to, at least in terms of practical applications: no longer a “legal criminal type”, necessarily pre-defined, but precisely a “jurisprudential criminal type”, *hybrid*, which comes to life during the assessment of the actual case according to the new canons – set by the European Court – of the *substance of the incrimination* and the *reasonable foreseeability* of the result of the interpretation. This is done on the basis of a prior understanding of the case and with a view to finding a reasonable and just solution, i.e. one that is deemed appropriate to the particularities of the case and in accordance with the constitutional table of values by the “reasonable *partners*” of the interpretative community to which the judge is addressed.

4. In the perspective of an alleged *modernisation* of criminal law, *collective goods*, *super-individual goods* and *institutional goods* are invoked, forgetting that the interests deserving criminal protection cannot but have a *personal need* as their basis.

When speaking of “security”, as is all too often the case, it is necessary to distinguish a concept of security understood as a “collective need”, as a strategy of social defence implemented by public authorities (against, for example, the phenomenon of terrorism), from a notion of security referring to the rights of the individual, as a demand for protection (Hobbesian) against dangerous situations.

For the “security of rights” in particular, criminal law is a “double-edged sword”. Enlightenment-liberal criminal law also speaks, at the same time, of freedom and security: principles of guarantee (rule of law, legality, culpability and so on) that mark the limits, which cannot be exceeded by the “powers” of authority; principle of protection of legal assets, conceived and practised in a liberal key, and which nevertheless stands, at the same time, for security of assets deserving protection. The idea of the

“security of a legal asset” – especially if it is vague – can give rise to forms of intervention that are significantly premature and capable to thwart individual rights and guarantees.

Today, as Massimo Donini accurately pointed out, the “right to security” is even equated with the rights of the individual; and “the problem that this way of interpreting security poses is that of its hierarchy between the original assets of the individual and the instrumental assets of politics. If it does not have a more political and contingent value, it has the same rank as the other rights of the individual. The result is that the state feels entitled to manage security by balancing it with life and liberty as if they were equal, rather than being required to find in the latter fundamental goods a limit to the political management of security”.

Security understood as a “collective need”, on the other hand, raises the issue of the possible abuses that, in the name of security, state power may carry out in the exercise of individual freedoms. It is no coincidence that Marcello Gallo, speaking of crimes of abstract-presumed danger, cited crimes of “mere disobedience”.

As Carlo Enrico Paliero observed more generally, the ever-increasing 'administration' of “complex situations”, emerging from the so-called risk society, favours the creation of increasingly immaterial and artificial legal assets. The personalist conception of legal asset is therefore in danger of being supplanted by “functionalism” in the policy of legal goods. The proliferation of “instrumental” and “intermediate” assets, on the other hand, is covered by “final” assets which, “as such, are by definition *constitutional*”, – precisely – in this sense the artificial creation of the imaginary *topos* of collective safety which has as its final covering good nothing less than the *Grundrechtgut* of citizens' lives is emblematic.

5. The main critical issues facing criminal law today are well known: the

flexibilisation, due to the predominance of the “idea of purpose” to the detriment of the “idea of law”; the “*moralization*”, due to the progressive (cultural) loss of “secularity” of the system; the *materialisation*, due to the increasingly frequent recourse to “evaluations of content” aimed at eliminating any (alleged) “lack of punishability” and, in the procedural field, at circumventing the “defensive guarantees” of the rule of law; the *subjectivization*, due to the tendency to privilege the expressive elements of the inner attitude of the agent to the detriment of the objective elements of the offence.

On the other hand, if one intends to discuss (above all, from an applicative point of view) the “science of the limits of punitive power” and, therefore, to try to fix (in the best humanly possible way) “the borderline of fragmentary criminal law”, even at present it does not seem possible to acquire “anything better” than what is offered by the theory of the legal asset. As T. Vormbaum stressed, however, it is important that

“the involvement of the subject matter of the legal good [...] should take place asymmetrically, i.e. not with a view to an extensive interpretation; and in this sense, having identified in the interpretation the ‘unitary’ direction of protection chosen by the legislation (without giving rise to a personal multiplication of directions in the perspective of plurioffensiveness), reasoning in the sense of the mere existence of ‘gaps in non-punishability’”.

Rousseau’s formula, abstract if you like, perhaps “indifferent to the concreteness of individual needs expressed in the everyday reality of reality”, materialised an idea with a powerful “critical force”:

“a liberal criminal law, free from any reliance on teleological kaleidoscopes and the contingency of political decisions, in its ability to recover the guaranteeing significance of the rule of law as a safeguard at the service of social autonomy; a value which, with the support of the Constitution, finds its own normative safeguard in the *extrema ratio* pre-

positive guarantee”.

That social philosophy of freedom which, precisely, pre-revolutionary criminal Enlightenment handed down to posterity through the critical function of criminal legality.

“*Law* remains the decisive word in the locution *criminal law*”, observed Comelius Prittwitz. As a result of the *politics of criminal law* – as a topical domestic policy – criminal law is in danger of dissolving, pursuing aims which, on the one hand, distort it and, on the other, highlight its ineffectiveness.

Current criminal legislation, but also a large part of criminal science, disregarding Wolfgang Naucke’s warning, proceed “according to the principle: legal form + need for a punishment capable of meeting the consensus of the community = criminal law”. On the contrary, criminal law, as an instrument of guarantees for the citizen and of protection of personal legal assets, must continue to feel – and strongly – the critical call for conceptual and normative delimitation.

The idea – variously re-proposed over time – of the “crisis” of the critical function of criminal legality “veils” the comparison, which is immanent, between the theory of public powers and the theory of individual freedoms, so that this theme, cyclically, re-emerges and, in fact, re-proposes itself to the attention of the jurist.

Criminal law is an instrument for the protection of individual assets.

It is a fact that man is a social being and achieves his goals as well as protecting his interests also through institutions; in this sense, therefore, the so-called super-individual assets deserve recognition and protection. However, in the light of what has been said, the protection of such institutions constitutes nothing more than the protection of certain assets (the impartiality and good performance of the public administration, the

proper legal circulation of documents and so on) in the “mediated” interest of individuals when they come into contact with each institution.

According to Thomas Hobbes – at least in this sense a forerunner of liberal thought – in the relationship between the individual and the state, despite the absolute form of political power, the central and overriding element is the individual and not the state. The state, wrote Hobbes, “is not an end in itself, but is established for the benefit of the citizens”.

The state, as it will later be for Kant, is an *instrument*, not a *value*, so that the “right to resistance” is admitted.