

Material Limits on the Criminal Legislator: Their Interpretation by the Spanish Constitutional Court and the European Court of Human Rights

Enric Fossas Espadaler

1 Introduction

The aim of this contribution is to study the material limits on the criminal legislator set forth in the Spanish Constitution and in the European Convention of Human Rights, as interpreted by the Spanish Constitutional Court (SCC) and by the European Court of Human Rights (ECtHR).

Constitutionalism places an onus on all the powers, even the legislative branch, to subject themselves to limits and material obligations.¹ Therefore, the penal and procedural guarantees that define the model of minimal criminal Law are also considered constitutional safeguards that are binding even for the legislator.² These principles, as is well known, have their grounding in enlightened criminal philosophy, which not only proposes a formal limit on Criminal Law (*how to* punish) but also a substantive one (*what* and *how much* to punish), as it understands that Criminal Law should be used for sanctioning only those conducts that effectively harm relevant legal assets, as is proclaimed in Art. 8 of the Declaration of the Rights of Man and of the Citizen of 1789.³

The norms that place material limits on the criminal legislator take effect today within the framework of constitutional pluralism; in other words, in a situation in

Former Law Clerk at the Spanish Constitutional Court (1999–2003; 2005–2008), Professor of Constitutional Law at Universitat Autònoma de Barcelona.

¹Ferrajoli (2007), p. 567.

²Prieto Sanchís (2011), p. 31.

³The article stated: “The law should establish only penalties that are strictly and evidently necessary. (...)”.

E. Fossas Espadaler (✉)

Universitat Autònoma de Barcelona, Campus UAB, 08193 Bellaterra (Cerdanyola del Vallès), Barcelona, Spain

e-mail: enric.fossas@uab.cat

which there is a plurality of normative institutional orders, each with a constitution, at least in the sense of a corpus of hierarchical norms that establish and condition the exercise of political power and in which each one mutually recognizes the legitimacy of others, but without affirming the supremacy of one over another.⁴ It happens to be so in Spain, where the Spanish Constitution of 1978 (SC), the European Convention on Human Rights, signed in Rome, in 1950 (ECHR), and the Treaty of Lisbon of 2007 prevail. The last two, of a different nature, affect the freedom of the Spanish criminal legislator, although European Law does so in the form of obligatory criminal protection of the legal interests of the European Union, which follow a harmonizing logic that is completely different from constitutional and convention-related limits, tied to fundamental rights. Hence, the limits imposed by European Law will not be discussed.

This contribution will, therefore, analyse the limits that the SCC and the ECtHR have respectively found in the SC and in the ECHR. We adopt a broad concept of limits, which includes the norms that establish prohibitions on the legislator in the form of rules, those which proclaim values, principles and rights, and even the norms that contain mandates of punishment, which can be seen as limits to decriminalization. And this concept centres on limits directed at a specific manifestation of punitive power: the promulgation of criminal norms through the selection of criminal conduct and the determination of the corresponding sanctions. Moreover, only the material limits are approached and not the formal or procedural limits to the punitive power of the State, exercised through the law that defines offences and fixes penalties. The formal limits are often designated as “constitutional guarantees” related with Criminal Law, among which the principle of legality is prominent. The main purpose of this principle is to set an external limit to the monopolistic exercise of *ius puniendi* by the State, arising as an impediment so that the executive and judicial authorities may freely define crimes and penalties.⁵ The principle of criminal legality is therefore not understood as a material limit, but as a formal limit of *ius puniendi* in a State under the Rule of Law,⁶ and for that reason will not be discussed.

An attempt is made through this work to contribute to the debate over the so-called “minimum Criminal Law”, of which the maximum exponent is has Ferrajoli,⁷ and its comparison with the so-called “expansiveness” of Criminal Law, understood as a dominant tendency in the legislation towards the introduction of new criminal categories, as well as an aggravation of those already in existence.⁸ This tendency implies flexibility of categories and the relativization of principles, in view of which it is proposed to develop the norms of international Criminal Law that are protective of human rights.⁹ All of these issues lead us to ask ourselves how

⁴This definition, in line with McCormick’s, is from Bustos Gisbert (2012), p. 21.

⁵Huerta Tocildo (2000), p. 513; Ruiz Robledo (2003), pp. 61 and ff.

⁶Mir Puig (2011), p. 71.

⁷Ferrajoli (1993).

⁸Silva Sánchez (1999), Rodríguez Montañés (2009).

⁹Mir Puig (2011), p. 13.

the criminal legislator is limited in the frame of constitutional pluralism, and to compare the responses that the highest judicial interpreters have given to that question. The comparison of the pronouncements of the SCC with those of the ECtHR will allow us to advance some considerations on the relation between criminal guaranteeism and constitutional pluralism.

In pursuit of these aims, the first section will be dedicated to explaining the position that the SCC and the ECtHR maintain with respect to the criminal legislator (2); while in the second, the case-law of both the SCC and the ECtHR on the material limits to criminal law will be studied (3); drawing to a close with some conclusions (4).

2 The Position of the SCC and of the ECtHR with Regard to the Criminal Legislator

The identification of the material limits to criminal law by the SCC and the ECtHR cannot be delinked from the position in which these Courts are placed with regard to the legislator. In as many words: the understanding of the two courts as to the character and the scope of the control that they should exercise over criminal law conditions in large part their interpretation of the material limits contained in the SC and the ECHR.

2.1 The Position of the SCC with Regard to Criminal Law

An overall vision of constitutional case-law in criminal matters clearly shows that the SCC has intervened in greater depth on the definition of procedural criminal Law than in substantive criminal Law, following the pattern of other courts.¹⁰ On the latter point, there is coincidence in pointing to the cautious, deferential and respectful attitude that the Constitutional Court has maintained towards the criminal legislator. For some authors, this attitude may be resumed in a single phrase: “little ponderation and very deferential”.¹¹ Others underline the “cautious attitude” that the Court itself proposed towards the use of the principle of proportionality in its control over criminal laws.¹² Some have also argued that the SCC has been rather more exacting in the setting of the constitutional framework and rather more

¹⁰Tiedemann (1991), p. 157.

¹¹Prieto Sanchís (2009), p. 288.

¹²Lopera Mesa (2006), p. 562; Díez-Ripollés (2005), p. 84; Rodríguez Mourullo (2002), p. 76; González Beilfus (2003), p. 65; Ferreres Comella (2012), p. 115; Rodríguez Montañés (2012), p. 59.

deferential in the final judgement over the inclusion of the norms that are challenged in that setting; the deference towards the criminal legislator being “manifest”.¹³

The STC 55/1996 of 28 March 1996 is usually cited as the decision that contains the doctrine of the Court on its position in relation to controls over the constitutionality of criminal law. That Judgement includes *“a reflection that already anticipates the limits that the jurisdiction of this Court has on this matter with regard to the legislator”* (FJ 6). Such a reflection begins with the first declarations of the Court on its own jurisdiction, from which it derives the position of the criminal legislator: *“In the exercise of his competence to select the legal assets that emanate from a particular model of social coexistence and from the threatening behaviours against them, as well as the determination of the necessary criminal sanctions for the preservation of the aforementioned model, the legislator enjoys, within the limits established in the Constitution, a wide margin of freedom that arises from his constitutional position and, in the last instance, his specific democratic legitimacy. Not only may it be affirmed, therefore, as could not be otherwise in a social and democratic State, that under the rule of Law, the design of criminal policy corresponds exclusively to the legislator, but also, with the exception of the aforementioned elemental guidelines that are taken from the Constitution, that he has full freedom to do so”*. This freedom is translated into *“the exclusive power of the legislator to organize the criminally protected assets, the criminally reprehensible behaviours, the type and the amount of criminal sanctions, and the proportion between the conducts that he seeks to avoid and the penalties with which he seeks to achieve them”*.

As this position of the criminal legislator is that control over constitutionality should be far less intense: *“Far, therefore, from proceeding to the evaluation of its convenience, of its effects, of its quality or perfectibility, or of its relation with other possible alternatives, we have to refer solely, when asked to do so, to its constitutional framework”*, which does not mean that it *“is possible to renounce all material control over the punishment as the area of criminal legislation is not a constitutionally exempt area”*.

This doctrine based on STC 55/1996 has been reiterated by the Constitutional Court in subsequent decisions (SSTC 161/1997 of 2 October 1997, FJ 9; 59/2008 of 14 May 2008, FJ 6; 45/2009 of 19 February 2009, FJ 3; 127/2009 of 26 May 2009, FJ 3; 41/2010 of 22 July 2010, FJ 5), in which the scope of constitutional control over criminal law has been achieved: *“The judgement that takes place in this court, in protection of fundamental rights, should therefore be very cautious. It is limited to verifying that the criminal norm will not produce ‘a patent useless waste of coercion that converts the norm into an arbitrary matter and that undermines the principal elements of justice inherent to the dignity of the person and to the Rule of Law’”* (STC 55/1996, FJ 8).

¹³This is the conclusion of the excellent study of constitutional case-law in criminal matters from Lascurain Sánchez (2012), p. 23.

The position of the Court towards the criminal legislator can be statistically demonstrated, through an examination of the twenty-four headline judgements delivered in constitutional control processes over the past thirty years. Only nine were favourable to the appellants and declared the unconstitutionality of some legal precepts, grounded essentially in a violation of “constitutional guarantees”, and in one case (STC 136/1999 of 20 July 1999) of those nine judgements was the unconstitutionality concluded on the basis of the principle of proportionality.¹⁴ In the controversial Judgement *Herri Batasuna*,¹⁵ no change was apparently introduced in the general doctrine in relation to control over the punitive power of the State, but only a different application of that doctrine to a case that was also different.¹⁶

This self-restrictive attitude of the Court against criminal law was also prominent in the interpretation of constitutional mandates directed at the criminal legislator, such as the one contained in Art. 25.2 SC, according to which custodial sentences will be oriented towards re-education and social rehabilitation and may not consist of forced labour. The Court has declared that the aforesaid norm contains no fundamental right but a constitutional mandate to the legislator (ATC 15/1984 of 11 January 1984). And it has maintained that it can “*serve as a parameter of the constitutionality of [criminal and prison] law*” (STC 75/1988 of 25 April 1988, FJ 29), but that neither rehabilitation nor re-education “*may be considered in each case as a condition of legitimacy of the punishment*” (STC 35/1994 of 31 January 1994, FJ 2). Hence, it has been affirmed that in reality neither rehabilitation nor re-socialization would be conditions for the constitutional legitimacy of the punishment; in such a way that it would be practically impossible, when designing a penalty, to invalidate a legal norm of this type for non-compliance with constitutional objectives.¹⁷

2.2 *The Position of the ECtHR with Regard to State Criminal Law*

Although the ECtHR is not a Constitutional Court, it assumes a role close to that of a constitutional judge in so far as it supervises the actions of state powers to verify their compatibility with the rights that it interprets. That proximity is reinforced by the supervision that it can initiate, in order to control the compliance of State laws with the Convention.¹⁸ The Court could in this way issue a “judgement of conventionality”, declaring that the existence of certain legislation can produce a violation

¹⁴Lascuráin Sánchez (2012), pp. 22–23.

¹⁵Bilbao Ubillos (2000), pp. 277–342.

¹⁶Prieto Sanchís (2009), p. 293.

¹⁷Urías Martínez (2001), p. 65.

¹⁸Saiz Arnáiz (1999), p. 145.

of a right, but also, considering that the right is violated by the punitive passivity of the state legislator.¹⁹

However, that proximity in no way implies a comparison with the control of constitutionality. Essentially, because the ECHR establishes a minimum European standard of fundamental rights arising from the legal and the political heterogeneity of the States. And that reasoning explains the harmonizing rather than the uniformizing function of the European systems that the ECtHR performs. Hence, important consequences ensue for the parameter of ECtHR judgements; which is not one of identity-conformity with the European standard, but one of proximity-compatibility, understood in terms of the principle of non-contradiction.²⁰

A different question is that of the interpretative value that the ECHR has in the Spanish legal order, arising from the clause contained in art. 10.2 SC, according to which all Spanish public powers are obliged to interpret the norms relating to fundamental rights and liberties recognizes in the Constitution in accordance with international treaties and agreements on the same matters ratified by Spain. One of the functions of art. 10.2 SC is its operation as a rule of “conforming interpretation”, a constitutional expression that denotes a process of comparison between two interpretations and the incorporation or the reception of the European *acquis* in matters of human rights.²¹ It could, for example, lead to a comparison of the interpretation of art. 15 of the SC by the SCC, and that of art. 3 ECHR by the ECtHR when specifying how the prohibition of “inhuman and degrading punishments” limits the criminal legislator.

Due to its position with respect to the sovereign state legislators, the ECtHR in principle clearly manifests a position that is even more respectful towards them than the SCC. The ECtHR has defined its deferential position not only in relation to the criminal legislator, but in relation to the regime of criminal justice, when affirming that the latter is in principle outside of the control exercised by the Court, provided that the system does not ignore the principles of the Convention (ECtHR Judgement of 29 March 2006, c. Achour v. France; ECtHR Judgement of 12 February 2008, c. Kafkaris v. Cyprus), and in consequence, it should give the States a margin of appreciation to determine an acceptable duration of the term of imprisonment corresponding to the different offences (ECtHR Judgement of 9 July 2013, c. Vinter and others v. the United Kingdom).

The position of the ECtHR would likewise be conditioned by the interpretative criterion of “autonomous concepts”, according to which the meaning of the terms of the Convention will not necessarily correspond with the meaning that those same terms are found to have in their internal legal orders.²² Criminal Law has been one of the areas in which the autonomous concepts have been used more than any other,

¹⁹Ruiz Miguel (1997), p. 41.

²⁰Queralt Jiménez (2008), p. 104.

²¹Arzo Santisteban (2014), p. 180.

²²Casadevall (2012), p.140.

where both their notions and the “criminal matter”, which condition the application of art. 6 ECHR, are interpreted in an autonomous manner by the Court.²³

3 Case-Law of the SCC and the ECtHR on the Material Limits on the Criminal Law

Having seen the position adopted by the CC and the ECtHR towards the criminal legislator, the material limits that each one of them has identified in their respective interpretations of the SC and the ECHR will be set out in this section.

3.1 *The Case-Law of the Spanish Constitutional Court*

Constitutional case-law could be summarized in one idea: identification of few material limits and, essentially, through the principle of proportionality. The SC contains more limits than those identified in constitutional case-law. Thus, some explicit material limits in the SC have been underlined in the doctrine,²⁴ and other limits linked to the specific functions of the social and democratic State (art. 1 SC) have been “discovered”.²⁵ However, the SCC has identified the material limits on the criminal legislator, basically through a none-too-intense application of the principle of proportionality.²⁶

3.1.1 The Principle of Proportionality as the Limit of Limits

It is worth asking why and how the SCC has applied the principle of proportionality as a substantive limit and what results it has achieved. The response to the first

²³Burgorgue-Larsen (2005), p. 324.

²⁴For example, the prohibition of inhuman and degrading punishments (Art. 15 CE). See Cuerda Riezu (2011) on life imprisonment. The topic has sprung into the news following the last reform of the Spanish Criminal Code in 2015, which has introduced the so-called “reviewable life sentence” for a series of very serious crimes (art. 92), which have been considered unconstitutional by numerous criminologists. See Arroyo Zapatero et al. (2016).

²⁵Carbonell Mateu (1996) maintained the validity, among others, of the “principle of excessive prohibition (or proportionality)” as a limit to legislative power (pp. 82–192). Mir Puig (2011) presented the principle of proportionality, the principle of culpability, the principle of humanity and the principle of rehabilitation as constitutional limits of *ius puniendi* in the social and democratic State subject to the rule of Law (p. 94).

²⁶The majority of authors who have dealt with the question coincide with this appraisal: Prieto Sanchís (2009), p. 285; Mir Puig, p. 96; Lopera Mesa (2006), p. 561; González Beilfus (2003), p. 49; Díez-Ripollés (2005), p. 83; Rodríguez Montañés (2012), p. 57; Rodríguez Mourullo (2002), p. 73; Lascuraín Sánchez (2012), p. 15.

question is that the SC contains no definitive catalogue of legal criminal assets, and given that criminal laws restrict the exercise of fundamental rights, the parameter of its control should be the principle of proportionality in a broad sense. The SCC states that disproportion between the end that is pursued and the means that are employed to achieve it, “can give rise to a control from the constitutional perspective when that lack of proportion implies excessive or unnecessary sacrifice of the rights that the Constitution guarantees” (STC 55/1996, FJ 3).

But that control has to consider the special relation that exists between the law and the Constitution, since *“the legislator does not limit himself to enforcing or applying the Constitution, but he freely adopts the political options that at each time he considers most advisable within the framework that the Constitution outlines. In fact, unlike what happens with respect to other institutions that are entrusted with the task of interpreting and applying the law, the legislator, when establishing the sanctions, obviously lacks the guidance of a precise table that unequivocally relates the means to the ends, and has not only to pay attention to the essential and direct objective of protection that the norm upholds, but also to other legitimate ends that it may pursue with the sanction and to the various ways in which it operates”* (STC 55/1996, FJ 6).

How has the SCC used the principle of proportionality in its control over the criminal legislator? Well, unlike other courts, it has acted so cautiously that the principle has not operated as a material limit derived from the Constitution, in other words, as a limit of limits. The SCC states that the principle of proportionality in no way constitutes *“an autonomous canon of constitutionality”* but rather *“a principle that may be inferred from certain constitutional precepts and, as such, it essentially operates as a criterion for interpretation that permits an appraisal of the possible violations of specific constitutional norms”*. In that way *“if the existence of disproportion is adduced, it should first be asserted and then judged to what extent this disproportion affects the content of the constitutional norms that are invoked”*.

This perspective of the SCC has in general been accepted into the doctrine, on the basis of different arguments: the affirmation that the Constitution contains no “criminal programme”, and the difficulties of the Court when performing complex criminological and evaluative judgements that would disempower the role of the legislator.²⁷ It has been said that to control the law through the principle of proportionality implies a high degree of discretionality, and if the control is excessive, it entails risks that justify a rigorous attitude of deference towards the legislator.²⁸

The case-law of the SCC raises two questions. The first is if such a broad freedom of the criminal legislator, at a time of the expansion of criminal Law, can seriously compromise the guaranteeist political programme of

²⁷ See Lopera Mesa (2006), pp. 569–570; Lascuraín Sánchez (2012), p. 16.

²⁸ Lascuraín Sánchez (2014), p. 320. A difference stance was taken by Huerta Tocildo (2000), for whom *“the necessary attitude of caution when delivering a judgement of proportionality on criminal norms is practically converted into the concession of a ‘open cheque’ to the criminal legislator to design criminal policy...”,* p. 63.

decriminalization. The times we live in are not only marked by the “pulverization” of legislative law, and the increasingly marked “contractualization” of the contents of the law,²⁹ but also by the resurgence of a “legislation of struggle”³⁰ against new criminal behaviour to which a response is sought, pressured by social demand for punishment. It could be paradoxical that when exercising the most terrible of powers, the power of punishment, the legislator is subjected to so few and to such weak material limits derived from the Constitution. It suggests that perhaps the guardian of the Constitution makes no assurance that the criminal order is reserved for the most intolerable abuses of fundamental assets, as enlightened philosophy always maintained.

The second question that this case-law raises is whether the Constitutional Court, when renouncing the exercise of strict control over criminal laws, prevents a real and profound debate over the decisions of the majorities, which affect fundamental rights. If the Constitutional Court is so unexacting in its appraisals, the legislator will see no need to deliberate and to try to justify his decisions on the controversial questions in society.³¹ In any case, it will not be done through a deliberative process that is developed through constitutional case-law. Instead, by using the mechanisms of a democratic State: the submission of the majorities and their decisions to the scrutiny of the electorate, and to the judgement of public opinion. That being so, it may be asked up to what point the Constitution operates as a material limit to the criminal legislator and what its efficacy is to ensure the guaranteeist program of minimum Criminal Law.

3.1.2 Other Material Limits on the Criminal Legislator

As has been seen, fundamental rights have operated as a limit to the limiting capability of rights that the criminal legislator has, whose control has been exercised through the deferential application of the principle of proportionality. But the rights, for the SCC, have also been recognized as a limit, because their “essential content” is raised as an “impassable limit for the criminal legislator”. This much was affirmed in the judgement of the constitutionality of art. 607.2 Penal Code, which defined as an offense the diffusion of ideas or doctrines through any medium that deny or justify crimes of genocide. The majority of the Court justified the mere inclusion of “denial” in the criminal definition as unconstitutional because it violated art. 20.1 SC. Its reasoning was that the freedom of definition of the criminal legislator finds its limit in the essential content of the right to freedom of expression, in such a way that the constitutional order does not permit the definition of the mere communication of ideas as a crime (STC 235/2007 of 7 November 2007, FJ 6).

²⁹Zagrebel'sky (2005), p. 37.

³⁰An expression from German terminology, employed by Rodríguez Montañés (2009), p. 1657.

³¹Lopera Mesa (2006), p. 571.

A third channel for the use of rights as conditioners of the freedom of the criminal legislator could, as the ECtHR has done, be in the form of mandates of punishment. However, the Constitutional Court has declared that “*the Constitution does not guarantee, as a content of fundamental rights, the criminal repression of their violations*” (ATC 261/1993 of 20 July 1993, FJ 3), which does not imply that the legislator decides, as he has done, to define some conducts as offences that violate fundamental rights.

Another limit for the legislator, rather than in terms of criminalization, may be the decriminalization of certain conducts. In these circumstances, the Court carries out a “positive control” in the sense that the legislator is obliged to suppress a gap in criminal protection through the definition of criminal offences, as has been stressed in the German doctrine.³² I think that the SCC pronounced on this matter in the historic STC 53/1985 of 11 April 1985, where it judged the alleged unconstitutionality of the decriminalization of consensual abortion in certain circumstances or situations. The Court understood that the protection offered to the *nasciturus* by the SC placed an obligation on the State to establish “*a legal system for the defence of life that implies its effective protection and that, given the fundamental nature of life, also includes, as a final safeguard, the criminal norms*” (FJ 7). The question was whether the legislator can exclude in certain circumstances the life of the *nasciturus* from criminal protection. However, the Judgement declared that “*the legislator (...) can also forego the criminal sanction of a conduct that could objectively represent an unbearable burden, notwithstanding that, if applicable, the duty of protection from the State still exists with regard to the legal asset in other areas*” (FJ 9). I believe that it may be inferred from this Judgement, and from that of STC 215/1994 of 14 July 1994, on the decriminalisation of sterilization authorized by the judge of incapacitated persons who suffer serious psychotic disabilities, that the Court has also considered the criminal protection of certain constitutional assets as a limit on the legislator.

Finally, the Court has pronounced on the mandate of rehabilitation in art. 25.2 SC, and has accepted that the constitutional precept can serve as a parameter of the constitutionality of criminal and prison laws. But once again, its application has highlighted the weakness of the mandate as a parameter of control. So, in STC 120/2000 of 10 May 2000, the constitutionality of art. 586 bis Penal Code was questioned, among other reasons, for establishing a penalty deemed unfit to achieve the ends of rehabilitation, as it had to be served at home and without judicial supervision. The Court rejected such reasoning, declaring that the mandate that established art. 25.2 SC operates as a parameter for pondering “*the complete system of the enforcement of sentences and the institutions that they integrate*”. So, a single prison sentence cannot be evaluated, but must be considered within the framework of a system in which there are institutions such as the sentence and conditional release, alternatives to imprisonment, and, finally, the different regimes for serving the prison sentence (FJ 4).

³²Tiedemann (1991), p. 165.

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