

GIOVANNI GRASSO*

THE DUTY TO PROSECUTE VIOLATIONS OF HUMAN DIGNITY: A CRIMINAL LAW PERSPECTIVE**

ABSTRACT. The author underlines that the system of fundamental rights protection rise to obligations to criminalize certain behaviours. We have to observe that obligations to criminalize are not self-executing: the existence of treaty-based obligations to criminalize conduct lacks direct effectiveness in terms of legislative implementation. The framework outlined above changes once the legislature has already intervened to implement, within the domestic criminal system, the obligation to prosecute certain conduct established at the conventional (international) level. First of all, the adopted legislation gives rise to an obligation of consistent interpretation. A second significant issue arises once the national legislature has implemented an international obligation to criminalize; according to the case law of the Constitutional Court the legislature can no longer arbitrarily repeal the criminal provisions introduced.

* Full Professor in Criminal Law, Catania University.

** The article builds upon the presentation given at the conference “International Protection Of Human Dignity Trough Criminal Law: Strengthening Italy’s Implementation Record (Dignita)”, held on February 25th, 2025, and organised by RomaTre University.

1. It is now widely acknowledged that the system of fundamental rights protection gives rise to obligations to criminalize certain behaviors.

This fact highlights the peculiar tension between criminal law and human rights, a relationship that has evolved significantly over time.¹

Criminal law, originally conceived as a repressive instrument that the human rights protection system had to contain and limit, has progressively become a means of protection – perhaps even an indispensable one – for ensuring the effective safeguarding of human rights.

In fact, constitutional fundamental rights are no longer understood merely as *Abwehrrechte* (defensive rights) aimed at guaranteeing individuals and society a sphere of freedom against state aggression (as expressed through criminal law), but rather as values or principles that guide legislative activity, including in the field of criminal law.²

Within this framework, it is important to note that the existence of positive obligations to criminalize certain conduct has been repeatedly addressed by the European Court of Human Rights (ECtHR). The leading case in this respect is *X and Y v. the Netherlands*, in which the ECtHR recognized a positive obligation to protect the right to sexual autonomy.³ According to the Court, the facts under examination revealed a gap in the Dutch criminal system concerning a victim (a woman with disabilities) who had been subjected to acts infringing her sexual freedom. Dutch judges had ruled that the crime of sexual violence could not apply due to the lack of required elements, while the crime of corruption of minors was inapplicable because a formal complaint was necessary. Yet such a complaint could not be lodged by the victim, as she was legally incapacitated; nor by her parents, since she was over sixteen; nor could a guardian be appointed for that purpose, as Dutch law allowed this only for individuals over twenty-one.

According to the ECtHR, “when fundamental values and essential aspects of private life are at stake”, civil law remedies are “insufficient”. “Effective deterrence is indispensable in this area and can only be achieved through criminal law provisions.”

¹ Cfr. Giovanni Grasso, ‘La prospettiva penalistica (Protezione dei diritti fondamentale e obblighi di tutela penale)’, in Antonio Ruggeri (ed.), *Nuove forme di tutela delle situazioni soggettive nelle esperienze processuali* (Giuffrè, 2004) 115.

² Anna Maria Maugeri, ‘I reati di sospetto dopo la pronuncia della Corte costituzionale n. 370 del 1996: alcuni spunti di riflessione sul principio di ragionevolezza, di proporzione e di tassatività’ (1999) *Riv. it. Dir. proc. pen.* 468.

³ ECtHR, 26 march 1985, *X and Y v. Nederland*, serie A, n. 91; Id 22 october 1996, *Stubbings and others v. United Kingdom*, § 64.

The Court also noted that the Dutch legal system generally provided for criminal law interventions – except, notably, in situations such as the one faced by the victim in this case, thus creating a “gap in protection”.

In short, the ECtHR concluded that the absence of criminal penalties in this case constituted a violation of the positive obligation to protect private life.

However, positive obligations to ensure criminal law protection are not limited to rights protected under Article 8 of the ECHR.

Important in this regard are the conclusions reached by the ECtHR concerning Italy’s legal system, particularly in relation to acts of torture committed during the 2001 G8 summit in Genoa at the Diaz school, which occurred before the introduction in 2017 of Article 613-bis of the Penal Code. This article, introduced to comply with international obligations – especially under the Convention Against Torture (CAT) – established the criminal offense of torture under Italian law.

In the 2015 case *Cestaro v. Italy*, the ECtHR found a substantive violation of Article 3 ECHR due to the lack of a specific legal provision criminalizing acts of torture in Italy. The Court held that Italy was under an obligation to introduce “appropriate legal instruments to adequately sanction those responsible for acts of torture or other treatments prohibited by Article 3 and to prevent them from receiving benefits incompatible with the Court’s jurisprudence, in order to remedy the consequences of the established violation.”⁴

These conclusions were reiterated in 2017 in *Bartesaghi Gallo and Others v. Italy*, which concerned claims brought by other victims of the events during the 2001 G8 in Genoa.⁵

2. One important point must be emphasized: Obligations to criminalize are not self-executing.

As Francesco Palazzo rightly noted, the existence of treaty-based obligations to criminalize conduct lacks direct effectiveness in terms of legislative implementation.⁶

In particular, a violation of such an obligation cannot be followed by a Constitutional Court ruling that would have in *malam partem* effect (i.e., to the

⁴ ECtHR, Fourth Section, 7 april 2015, *Cestaro v. Italy*.

⁵ ECtHR, Grand Chamber, 22 June 2017, *Bartesaghi, Gallo and others v. Italy*.

⁶ Francesco Palazzo, *Valori costituzionali e diritto penale (un contributo comparatistico allo studio del tema)*, in Alessandro Pizzorusso and Vincenzo Varano (eds), *L’influenza dei valori costituzionali sui sistemi giuridici contemporanei*, (Giuffrè, 1985) 603.

detriment of the accused). Such a ruling would exceed the constitutional powers of the Italian Constitutional Court.⁷

It should be noted, however, that the framework outlined above changes once the legislature has already intervened to implement, within the domestic criminal system, the obligation to prosecute certain conduct established at the conventional (international) level.

First of all, the adopted legislation gives rise to an obligation of consistent interpretation: among the various possible interpretations of domestic law, preference must be given to the one that ensures compliance with obligations arising from international law.

This issue, which has general significance, has been the subject of particularly interesting academic debate and a considerable number of practical applications, especially in relation to community law – and, after the Lisbon Treaty, to EU Law. A recent and important contribution on this topic was made by Sandro Bernardi.⁸

Excluding the theory that rejects any interpretation producing in *malam partem* effects, the prevailing view in legal scholarship considers an extensive interpretation to be admissible, while excluding any analogical interpretation.⁹

Thus, with regard to Article 613-bis of the Italian Penal Code, it has been held that a consistent interpretation with international obligations requires considering the offense described in paragraph 2 (the so-called “state torture”) as a distinct and autonomous offense, rather than merely an aggravated version of the basic offense described in paragraph 1. This carries significant consequences in terms of legal classification and procedural guarantees in the Italian criminal system.¹⁰

⁷ Constitutional Court, 27 July 1995, n. 411.

⁸ Alessandro Bernardi, ‘Sull’interpretazione conforme al diritto UE con effetti in *malam partem*’, in Anna Maria Maugeri, Rosaria Sicurella, Francesco Siracusano, Grazia Maria Vagliasindi, Valeria Scalia, Annalisa Lucifora (eds), *Diritto Penale dell’Unione Europea e nell’Unione Europea. Studi in onore di Giovanni Grasso*, (Pisa University Press, 2023) 497.

⁹ Bernardi, op. cit. 508.

¹⁰ Fabio Salvatore Cassibba and Angela Colella, ‘Art. 3 Proibizione della tortura’, in Giulio Ubertis and Francesco Viganò (eds), *Corte di Strasburgo e giustizia penale*, (Giappichelli, 2022) 94.

3.1. A second significant issue arises once the national legislature has implemented an international obligation to criminalize: the legislature can no longer arbitrarily repeal the criminal provisions it introduced. In effect, a form of prohibition on regression applies.

This results from the position of the Constitutional Court, which holds that, in a legal system governed by the principle of legality, the Court cannot issue rulings that would create new criminal offenses – such authority rests exclusively with the legislature. Likewise, it cannot issue rulings that would aggravate penalties or reintroduce previously repealed or decriminalized offenses.

Nevertheless, the Constitutional Court has acknowledged that – in limited cases – in *malam partem* constitutional review may be permitted.

In its judgment no. 37 of 2019, the Court outlined a coherent framework of such exceptional cases. Among them is the violation of an obligation deriving from supranational law.¹¹

Specifically, the Court held that “constitutional review with effects in *malam partem* is admissible where the contested provision is alleged to violate supranational obligations relevant under Article 11 or Article 117(1) of the Constitution.”

In a recent judgment concerning the constitutionality of the provision that repealed the offense of abuse of office, the Constitutional Court clarified that this scenario covers not only violations of obligations deriving from supranational norms but also those arising from international law.¹²

In essence, once the obligation to criminalize has been implemented, the legislature is no longer free “to backtrack” and repeal the related criminal provisions.

4. The implications are particularly significant for the offense introduced under Article 613-bis of the Penal Code.

The criminalization of torture in Italy is based on multiple legal foundations: the CAT Convention, Article 3 of the ECHR, and Article 4 of the EU Charter of Fundamental Rights, which is substantially equivalent in content to Article 3 ECHR.

Moreover, in *Cestaro v. Italy*, the ECtHR made clear that Article 3 ECHR gives rise to an obligation to criminalize torture through a dedicated offense that reflects the

¹¹ Constitutional Court, 23 January 2019, n. 37.

¹² Constitutional Court, 3 July 2025, no. 95; in that particular case, however, the Court found that no such violation existed.

enduring gravity of such acts. This conclusion is well established in the Court's case law.

As such any outright repeal of the torture offense – or its replacement with a mere system of aggravating circumstances, as proposed in the Vietri bill¹³ – should be considered unconstitutional. The proposed model fails to meet the ECtHR's requirement of an autonomous criminal offense for torture.

Therefore, the bill in question should be considered incompatible with Articles 11 and 117 of the Italian Constitution.

More than that: since the proposed reform would also violate Article 4 of the EU Charter of Fundamental Rights, it would breach not just international but supranational obligations

¹³ The bill n. 623/2022 was presented by On. Vietri and others on 23rd november 2022.
