

THE ATTACK ON THE PROTECTED LEGAL INTEREST: A CRIMINALISATION PRINCIPLE AND AN ELEMENT OF THE CRIMINAL OFFENCE?

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ABSTRACT

This paper analyses the role played by the notion of legal interest as a criterion for decisions on criminalisation and, according to some scholars, as an element of criminal offence. First, the analysis tallies the impact of legal interest on criminal policy, focusing on the correlation between this concept's definition and underlying political theories. Subsequently, the article explores difficulties of using legal interest as an interpretative canon to determine whether the offender's deed can be deemed materially unlawful.

Keywords: criminal law, protected legal interest, theory of criminalisation, material unlawfulness, teleological interpretation

1. INTRODUCTION

In criminal law discussions, the term 'protected legal interest' is employed with either a descriptive or a normative meaning. In the descriptive sense, the term signifies legal interests protected under specific positive criminal law. Conversely, the normative usage denotes legal interests that, from a specific criminal policy perspective, warrant protection under criminal law.

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A possible approach to criminal theory, one I subscribe to despite it not being the sole or predominant viewpoint,¹ maintains that the principal object of criminal theory is positive criminal law. Its main function is to systematically expound the content of criminal legislation. From this perspective, a legal interest's significance arises from its consideration under criminal law, irrespective of the political opinion on its legal protection or the lack of protection extended to other interests. Hence, of prime importance in a theoretical context is the range of interests deemed protected by the prevailing criminal law.

This does not detract from the value of the argument regarding conditions legitimising the extension of criminal protection to a particular interest, whether we approach this question from an axiological or consequentialist standpoint. However, it is prudent to temper expectations raised by this proposal, as various historical, geographical, and social factors impact this issue. Hence, it is arguably whimsical to compile a definitive, exclusive list of interests warranting criminal protection, independent of a specific legal system. However, a compelling argument can be made for constitutionally based protection of certain interests within a particular legal system, even in the absence of explicit constitutional mandates for criminal protection.

Evaluating interests legally protected in most criminal law systems allows us to conceptualise 'legal interest' as an aspect of reality meriting criminal protection, given it conveys legal value.² This concept, therefore, possesses a material dimension (the 'legal interest' is, in this regard, a thing) and a value dimension (what defines such a thing as a legal interest is what the law considers valuable).

This value does not need to possess features allowing its classification as a subjective right. Indeed, the heart of legal interests recognised by traditional criminal law (individuals' life, health, freedom, property, or good name) can be characterised as subjective rights attributed to a person (a person who would be tantamount to the material substratum of such legal interests). As I will mention later, under liberal criminal law, the primary criterion for criminalising behaviour involves an attack on this category of individual interests recognised as subjective rights. However, in current criminal law – expanded and incrementally closer to communitarian postulates and assumptions – the value dimension of legal interest extends beyond the subjective right to include interests not strictly considered personal rights. This applies to collective interests like road safety and public order, and individual interests such as life or health of fetuses or animals, whose holders are not consistently recognised as legal subjects by legal systems. In fact, under current criminal law, academics typically associate the decision to legally protect subjective rights with their 'social' dimension rather than their value to their holders.³ Therefore, this contemporary notion of legal interest comprises not only individual interests but also collective or diffuse interests.⁴

¹ Cf. Silva Sánchez, J.M., 'Los tres ámbitos de la dogmática jurídico-penal', *Indret*, 2019, No. 4, *passim*.

² Mir Puig, S., *Derecho Penal. Parte General*, Barcelona, 1998, p. 136.

³ *Ibidem*, p. 137.

⁴ This last category would include interests of a supra-individual nature whose holders do not correspond to the group of citizens as a whole, but to an undefined and changing subgroup

As discussed below, a significant controversy in this debate relates to the autonomy of these supra-individual interests. From a communitarian standpoint, a social view of the human being supports the independent protection of such interests: separate and autonomous protection is needed to fulfil the constitutional mandate to promote conditions for genuine freedom and equality of individuals and groups.⁵ This protection also guarantees security and confidence in the effective operation of social institutions and safeguards socially weaker groups.⁶ In contrast, the liberal perspective sees this type of legal interest as an artificial construct intended to mask a substantial expansion of State intervention in criminal matters. In this context, Hassemer's well-known proposal to confine the acceptability of criminal protection of supra-individual interests to cases where they appear 'functionalised from the individual legal rights perspective' is noteworthy.⁷

This paper's initial aim is to assess the impact of the concept of legal interest in the criminal policy debate, specifically, the significance of this notion in establishing or supporting a particular theory of criminalisation. Furthermore, the analysis extends to the potential impact of this concept on the legal theory of crime, due to the widespread proposal to include the attack on the legal interest as an implicit element in the criminal offence.

2. CRIMINALISATION OF CONDUCT AND THE PROTECTION OF LEGAL INTERESTS

Criminalisation theory can be defined as the segment of criminal law philosophy that determines which behaviour should be punished and how the punishment should be administered.

The dominant view posits that any theoretical formulation regarding the first of these two tasks entails deciding which interests deserve protection under penalty and the intensity of their protection. Thus, evaluating the interest affected by the conduct is crucial in delineating which behaviour should be punished and which should not.⁸

thereof. These individuals become holders of such an interest due to the position they occupy in the scenario of a given social relation. This would be the case, among others, of consumer rights or workers' rights (Pérez-Sauquillo Muñoz, C., *Legitimidad y técnicas de protección penal de bienes jurídicos supraindividuales*, Valencia, 2019, p. 53 and f.).

⁵ Gracia Martín, L., 'La modernización del derecho penal como exigencia de la realización del postulado del estado de derecho (social y democrático)', *Revista de Derecho Penal y Criminología*, 2010, No. 3, p. 63.

⁶ Corcoy Bidasolo, M., *Delitos de peligro y protección de bienes jurídico-penales supraindividuales*, Valencia, 1999, p. 208.

⁷ Hassemer, W., 'Rasgos y crisis del Derecho Penal moderno', *Anuario de Derecho Penal y Ciencias Penales*, 1992, XLV, No. 1, p. 248.

⁸ This is not, however, the only possible perspective. Systemic functionalism is a particularly successful proposal that dispenses with the idea of the legal interest as a legitimising basis for criminalisation. As is well known, functionalism affirms that such interests are only protected as a by-product of a criminal law whose mission is to uphold the identity of society, and the latter's self-testing (Jakobs, G., *Sociedad, norma y persona en una teoría de un Derecho penal funcional*, Madrid, 1996, p. 18 et seq.)

In the broadest sense, the usual formulation of limiting principles that legitimise *ius puniendi* addresses this question. However, this response is remarkably vague, unsurprisingly, as it stems from a discussion about fundamental principles. This vagueness is particularly apparent in the criteria aimed at demarcating the conduct warranting criminal intervention; often, these standards merely provide very generic guidelines based on wide-ranging concepts such as necessity, limitation of criminal law protection to legal interests, or subsidiarity.

This relative lack of specificity makes these principles easy to support, and thus, their acceptance by scholars is extensive. Despite this, the significant scholarly agreement on these ultimate axioms (usually associated with the constitutional context arising from the characterisation of the State as a social and democratic State under the rule of law) cannot hide the fact that, just as this framework allows for a plurality of public policies inspired by diverse normative political theories, it also accommodates several criminalisation proposals influenced by the aforementioned political theories.

In my opinion, the focus on the type of legal interests for which protection is primarily sought constitutes one of the main factors that allow us to distinguish essentially liberal theories from primarily communitarian theories.

Within liberal theories, the foundation for criminalisation rests on the normative premise that individual freedom has primacy in the 'negative' sense; that is, one has the freedom to act without interference from the State or others.⁹ The further recognition of pluralism as the most reasonable model of social organisation encourages us to postulate the broadest possible scope of negative freedom, allowing each individual to pursue their purposes and prioritise the values they choose. Naturally, in a pluralistic society, conflicts arise due to the diversity of goals and values that guide individual conduct, making the assertion of unlimited scope for the exercise of freedom impossible within an organised social group.

In liberalism, the material legitimacy of State intervention in these conflicts is based precisely on its guarantee that all citizens enjoy a higher degree of freedom to act than they would if there were no intervention at all (that is, a degree of liberty superior to what would exist in a 'natural state'). This entails renunciation of a potentially unlimited exercise of one's private autonomy in exchange for establishing a framework to maximise such freedom in conflict with others. From a metaethical viewpoint, this position would be supported not only by deontological rationality but also by the teleological rationality of utilitarianism; both traditions, as is well known, are present in the original foundation of this political theory.

In my opinion, this maximisation entails, at the very least:

- (a) Reserving punitive intervention for instances where individual freedom or other individual rights are infringed or endangered due to the actions of third parties. Therefore, the attack on goods and rights shapes the guiding principle for criminalisation in liberalism, prioritising injury to the legal interest as the paradigm for incrimination, to the detriment of alternatives such as duty

⁹ Berlin, I., *Liberty*, Oxford, 2009, p. 216.

infringement and criminal offences based on mere willingness to cause harm (such as impossible attempts).¹⁰

- (b) Basing legal interests on a factual substratum functionally linked to the exercise of individual freedom. These must be individual interests or – when necessary and exceptionally – well-defined supra-individual interests that can be directly traced back to individual interests. The harm principle – a crucial guideline of incrimination – is primarily defined as damage to or endangerment of individual interests.¹¹
- (c) Ensuring the state's neutrality regarding citizens' moral convictions, i.e., what constitutes the 'good' or a 'good life'. This would then prohibit paternalistic and perfectionist criteria when selecting legal interests that warrant criminal law protection. In a liberal order, the criminalisation process must reflect moral values, but immorality does not per se justify incrimination. The State's neutrality does not suggest a morally sceptical or relative standpoint. On the contrary, it implies a theory of political morality that emphasises values such as rational autonomy, dignity, and freedom.¹² The liberal order depends on society members sharing normative commitments and developing rules and attitudes that reflect them, such as the fundamental value of freedom, the teleological link between the legal order and the prevention of harm and injury to others, or the restraint in seeking to impose one's idea of the good upon others.¹³

Therefore, liberal criminal theory establishes guidelines to sacrifice the minimum possible freedom necessary to guarantee the greatest possible freedom for all. A feasible method to determine whether the outcome is suitable from a liberal perspective would focus on its potential recognition by citizens who consider their interests regardless of the role they may eventually play¹⁴ (either as potential victims or offenders).¹⁵

The communitarian perspective on criminalisation differs significantly.

¹⁰ Of course, stating that harm to others is a relevant reason for criminalising conduct does not imply that it is sufficient, as there may be moral and practical costs of criminalisation that justify, even in the presence of harm, not incriminating the conduct.

¹¹ By contrast, within the systemic functionalist model referred to above, the harm principle ceases to be a criterion of criminalisation and is replaced – at least to some extent – by a model based on the breach of duty. The latter conception is linked, in a clear communitarian way, with the existence of prior institutions that define the subject's status, with an idea of a homogeneous community and with the detriment to duties of supportive behaviour towards others. Sánchez-Vera Gómez-Trelles, J., *Delito de infracción de deber y participación delictiva*, Madrid, 2002, p. 183 et seq., thus expressly links offences of breach of duty with positive duties that he claims to derive from the principle *neminem laedere* and that he builds upon a moral concept of positive freedom that goes beyond liberalism (op. cit., p. 141).

¹² Dworkin, R., 'Liberalism', in: Sandel, M. (ed.), *Liberalism and its critics*, New York, p. 77, and Husak, D., *Philosophy of Criminal Law*, New Jersey, 1987, p. 244.

¹³ Jacobs, J., 'Criminal Justice and the Liberal Polity', *Criminal Justice Ethics*, 2011, Vol. 30, Issue 2, p. 176.

¹⁴ Alcácer Guirao, R., 'Los fines del Derecho penal. Una aproximación desde la filosofía política', *Anuario de Derecho Penal y Ciencias Penales*, 1998, LI, pp. 539.

¹⁵ Cf. Silva Sánchez, J.M., '¿Directivas de conducta o expectativas institucionalizadas? Aspectos de la discusión actual sobre la teoría de las normas', in: *Modernas tendencias en la ciencia del Derecho Penal y en la Criminología*, Madrid, 2001, p. 566 et seq.

First, communitarianism supports a reformulation of the harm principle as a standard of incrimination. As mentioned above, liberalism confines this criterion to causing harm to other individuals' property and rights. On the other hand, the most fervent communitarian thought supports the legal protection of the prevailing moral convictions of the community without any restrictions other than what legislators may decide.¹⁶ The enforcement of this shared moral horizon – which sometimes reflects the prevailing morality and sometimes results from the addition of minority morals – together with assigning a pedagogical function to current criminal law, is revealed in the punitive emphasis on the motivation of criminal offences (it also manifests as a readiness to punish the very expression of divergent moral opinions).

Even in the more moderate – and widespread – versions of communitarianism, a different articulation of the harm principle can be found. This version also advocates for the extension of the scope of what is criminally sanctioned to conduct that affects elements beyond individual rights. However, the reasons offered here are not built on prevailing moral convictions but on social and economic aspects. This is the case, for example, of (i) assigning to citizens 'promoting powers' that obligate them to perform additional services to safeguard the state's ability to operate or to guarantee the primary conditions of personal existence¹⁷ or (ii) certain conditions of the social distribution of such individual rights that, from a communitarian perspective, are structurally vital to society.¹⁸

As indicated above, the most notable example of this perspective is expanding criminal protection to supra-individual interests regardless of their immediate or indirect connection with individual rights. Creating these supra-individual interests also runs the risk of incurring a certain artifice that, in some cases, can obscure the fact that they are abstractions founded on individual interests.¹⁹

The emphasis on collective interests is tied to another significant manifestation of the communitarian approach, namely the widespread criminalisation of abstract danger.²⁰ Undoubtedly, the incrimination of merely dangerous conduct is not far removed from a liberal theory of criminalisation, albeit with a decidedly restricted role given how it can exponentially expand the scope of state intervention.²¹

¹⁶ Thus, Devlin, P., *The enforcement of morals*, Indianapolis, 2009, p. 12 et seq., affirms the impossibility of setting theoretical limits to the state's power to legislate against immorality, which (in this model) is consistent with the importance attributed to the communion of values for the preservation of society.

¹⁷ Pawlik, M., 'El delito, ¿lesión de un bien jurídico?', *InDret*, 2016, No. 2, p. 11.

¹⁸ In this sense, for example, Pettit, P., Braithwaite, J., 'Not Just Deserts, Even in Sentencing', *Current Issues in Criminal Justice*, 1993, Vol. 4, Issue 3, p. 203, connect the public character of the harm not only with the affectation of the victim's 'domain', but with the general distribution of domain in society.

¹⁹ This is evident when scholars specify that the supra-individual interest must be understood as a 'spiritualised' or 'institutionalised' interest, only protected to the extent that it refers, more or less immediately, to genuine individual legal interests. Actually, the supra-individual interest is, in many cases, nothing more than an objectifying construction of a situation of danger for the individual interests of an indefinite plurality of subjects.

²⁰ Hassemer, W., *Rasgos y crisis...*, op. cit., p. 241 et seq.

²¹ Husak, D., *Overcriminalization*, Oxford, 2008, p. 159 et seq.

This criminalisation technique – a paradigm of new risk prevention – involves criminalising conduct that either does not necessarily pose an actual danger to individual interests or generates a risk that is insufficient to justify state intervention. The reduced harmfulness of abstract danger to individual rights supports the identification of vague supra-individual interests as legally protected interests.²² Communitarianism accepts the legitimacy of the criminalisation of abstract danger even where such danger does not refer to an individual interest but a supra-individual one.²³ An extreme version of the enlargement of the harm principle, also promoted by communitarianism,²⁴ is the proposal for incriminating cumulative offences, where the actual danger to the legal interest (which, in the most significant examples of this type of offence, is already a supra-individual interest) only materialises through the theoretical accumulation of countless individual actions that are insignificant on their own.

3. THE ATTACK ON THE PROTECTED INTEREST AS AN ELEMENT OF THE CRIMINAL OFFENCE (THE DOCTRINE OF ‘MATERIAL UNLAWFULNESS’)

As explained earlier, the notion of ‘protected legal interest’ is central to the argument on criminalisation and, thus, shapes the focus of the State’s criminal policy. However, the significance of this concept in the discussion regarding criminal law does not end here; its presence in the theoretical discourse impacts the debate on critical issues such as the structure of the criminal offence.

Among various areas where this concept impacts criminal law theory, this paper concentrates on the proposed integration of the attack on the legal interest as an ‘element’ of the criminal offence. This proposal relates to the doctrine – somewhat endorsed by scholars and case law, albeit not universally²⁵ – that argues for a distinction between an act’s formal and material unlawfulness. The former attributes an action as a consequence of its correspondence to the legal definition of the offence. In contrast, the latter requires, beyond that correspondence, an attack (or even a relevant attack) on the protected legal interest. When this doctrine of

²² Naturally, the problems disappear when the reference to the legal interest as a basis for justifying criminal intervention is dispensed with. Thus, for systemic functionalism, the criminalisation of abstract danger is legitimised insofar as it can be argued that social identity involves the guarantee of the expectation of not having to take into account conduct that only abstractly refers to the result (Jakobs, G., *Society, norm and person...*, op. cit., p. 43 ff.).

²³ Gómez Martín, V., ‘Libertad, seguridad y sociedad del riesgo’, in: *La política criminal en Europa*, Barcelona, 2004, p. 78. It is undeniable that the scholars who support these positions are determined to set up guaranteeing standards in the construction of these criminal offences. Still, it is also clear that they do not object to advancing state intervention.

²⁴ Schünemann, B., ‘¿Ofrece la reforma del Derecho penal económico alemán un modelo o un escarmiento?’, *Jornadas sobre la ‘Reforma del Derecho Penal en Alemania*, Consejo General del Poder Judicial, Madrid, 1991, p. 36 et seq.

²⁵ Cf. for example, Orts Berenguer, E., González Cussac, J.L., *Compendio de Derecho Penal. Parte general*, Valencia, 2022, p. 234, as well as the Sentencia de la Sala 2ª del Tribunal Supremo español de 21 de junio de 2003, RJ 2003/4362.

material unlawfulness is articulated by incorporating the attack on the legal interest into the criminal offence (as if it were an element of the legal definition), it typically promotes a general cause of exemption from criminal liability applicable to cases where the offence's legal definition is uncontested, but the attack on the legal interest is deemed non-existent or insufficient.²⁶

The practical implementation of this doctrine typically invokes standards such as the principle of minimum intervention and the principle of insignificance. The argument states that without an attack (or a sufficiently severe attack) on the legal interest, there is no basis for imposing a criminal sanction, even if the action formally complies with the legal stipulation. Although labelled as a technical argument, it could also be considered political because it depends on the influence of rather vague political principles that are not thoroughly constitutionalised. Advocating that such principles should guide criminal policy does not imply that they should play a role in interpreting the law. The need for interpretation arises from semantic indeterminacy; the meaning of the law (not the political decision behind it) needs clarification. The legislator has already decided the extent of intervention deemed appropriate, despite the ambiguity in the legal expression of such a decision.²⁷

Despite these concerns, one of the most popular approaches to implementing the doctrine of material unlawfulness relies on a specific method of interpretation (i.e., the teleological interpretation). This method reduces the scope of the legal definition of the criminal offence in cases where the interpreter deems the level of attack on the protected legal interest to be insufficient.

The teleological interpretation doctrine posits that legislative provisions should be interpreted in light of their intended purpose. It is thus connected with the functional aspect of the context in which a legal statement is made. As Wróblewski noted, formulating universally acceptable functional guidelines for interpretation is a controversial and challenging task.²⁸ However, I believe that the essential core of teleological interpretation aligns well with one of Wróblewski's proposed functional guidelines, specifically directive DI1-11, which links the meaning of a legal rule to the institution's pursued purpose.²⁹

This reference to the institution's purpose is often associated with notions such as the 'aim', the 'spirit' or the 'intent' of the law. According to the traditionally dominant interpretive ideology, these criteria are of central importance.³⁰ Within

²⁶ In the field of economic criminal law, see Martínez-Buján Pérez, C., *Derecho Penal Económico y de la Empresa*, Valencia, 2022, p. 428.

²⁷ Adjustment of criminal law to the harm principle is required to further a reasonably delimited criminal law. However, such adjustment is not a valid criterion for ascertaining the semantic probability of a given understanding of an indeterminate legal term or statement. As Larsen, P., 'Entre la estética intelectual, el arbitrio de los jueces y la seguridad jurídica', *Indret*, 2015, No. 3, p. 20 et seq., has pointed out, its lack of legal and constitutional enshrinement means that its application by case law is uneven and even haphazard, which leads to a proliferation of different decisions for very similar cases.

²⁸ Wróblewski, J., *Constitución y teoría general de la interpretación jurídica*, Madrid, 1985, p. 45 ff.

²⁹ Wróblewski, J., *Constitución...*, op. cit., p. 50 et seq., and idem, *The Judicial Application of Law*, Dordrecht, 1992, p. 106.

³⁰ Cf. Larenz, K., *Metodología de la Ciencia del Derecho*, Barcelona, 1966, p. 263 et seq., and, in the field of criminal law, Cuello Calón, E., *Derecho Penal. Volume I, General Part, Volume 1*, Barce-

the framework of this interpretative ideology, such expressions ('purpose', 'spirit', 'will') are metaphorical, drawing a tacit comparison of the law's intent with the legislator's intent. However, resorting to metaphors creates ontological difficulties when identifying the law's purpose, spirit, or intent, entities deemed distinct from legislative intent by teleological interpretation. Therefore, questions arise about what constitutes the purpose of the law, how is it recognised, and where is it stated? Which purposes of their creators are sufficiently relevant to be attributed to the law as its intention? What identification criteria allow us to declare with certainty that the purpose of the law has been discovered?

According to the prevalent version of the teleological interpretation doctrine, the recognised purpose of criminal law is to protect an interest; hence, the protected legal interest becomes key to resolving the uncertainty posed by any semantic indeterminacy in the legal definition of a criminal offence.³¹ Maurach and Zipf assert that interpreting criminal law – and thereby understanding it – is impossible without the guidance of the protected legal interest.³²

If one accepts the premise that the purpose of any legal provision defining a criminal offence is to protect a specific interest,³³ then this protective aim to protect such interest would indeed form part of the functional context of the legal provision. As a result, it could be incorporated into an interpretive argument.

However, it must be acknowledged that determining the specific interest protected by a legal provision defining a criminal offence is often controversial. Suppose there are strong contextual arguments supporting the decision, or the legislator expressly states the purpose of the legal provision. Even in these cases, the argument is susceptible to critique, as stating that the purpose of a given legal provision is to protect a specific interest does not clarify the intensity, degree, form, exceptions, or circumstances of the legal protection of that interest. Acknowledging that the legal provision's purpose is to protect a specific interest does not necessarily support any particular inference regarding the form and degree that protection should take. Specifically, it cannot be assumed that the legal provision aims for the greatest, best, or most effective protection of the interest.

Why is this important? Because semantic indeterminacy – and therefore, the need for interpretation – usually stems from the absence of a precise boundary

lona, 1980, p. 216. Under the Spanish legal system, it is common to attribute the reception of this guideline to Article 3.1 of the Civil Code and its indication of the need to interpret the norms 'fundamentally taking into account their spirit and purpose'. The adverb 'fundamentally' in this provision seems to support the thesis of its centrality as an interpretative criterion.

³¹ Cobo Del Rosal, M., Vives Antón, T.S., *Derecho Penal. Parte General*, Valencia, 1999, p. 118; Gimbernat Ordeig, E., *Concepto y método de la ciencia del derecho penal*, Madrid, 1999, pp. 87 f.; Jescheck, H.-H., *Tratado de Derecho Penal. Parte General*, Granada, 1993, p. 149; Luzón Peña, D.M., *Curso de Derecho Penal. Parte General I*, Madrid, 1996, pp. 169 f.; Mezger, E., 'Tratado de Derecho Penal', *Revista de Derecho Privado*, Madrid, 1955, pp. 138 f.; Mir Puig, S., *Introducción a las bases del Derecho Penal. Concepto y Método*, Barcelona, 1976, p. 139 et seq. and 312 et seq.

³² Maurach, R., Zipf, H., *Criminal Law. Parte General*, Buenos Aires, 1994, p. 150 et seq. and in particular p. 339.

³³ The acceptance of this assumption is not a given; for instance, it is objected to by systemic functionalism, as discussed in the previous section.

for the degree of protection of the interest established by the law. Identifying the protected legal interest can become quite problematic, but interpretative issues more commonly relate to defining the exact level of protection legally provided.

At this juncture, the reasoning strategy involved in teleological interpretation, in my view, reverses the relevant process of argumentation. Only the terms the law uses to describe criminal offence can delimit the scope of the legal protection of the interest. Accepting that the legal provision's purpose is to protect an interest allows only one inference: the law aims to protect the interest to the exact extent determined by the legal provision's wording. Therefore, the definition of the type of attack on the legal interest required to classify the action as a criminal offence is a legislative decision expressed in the very wording of the legal provision. It cannot be modified or replaced by a description of the protected legal interest.

Teleological interpretation becomes circular at this stage, as the only proper criterion for determining the characteristics of the protection established by the legal provision is the same legal provision requiring interpretation. Identifying the interest whose protection constitutes the legal provision's purpose according to this doctrine depends precisely on how said provision describes the criminal offence. As Nuvolone³⁴ and Pagliaro³⁵ have pointed out, the *ratio legis* is discovered exclusively through interpreting the legal provision. Therefore, it is paradoxical to set the *ratio legis* as an interpretive criterion, essentially switching the *prius* for the *posterius*.

Therefore, teleological interpretation involves a certain fallacy. The interpretative standard is an element (the degree of protection of the legal interest) whose definition depends on the terms by which the legal provision describes the criminal offence. These terms, by hypothesis – since we are dealing with a matter of interpretation rather than isomorphy – are not clear. This situation implies that we are simultaneously stating that the description of the criminal offence is unclear (as it requires interpretation) and that it is clear (as it allows identifying the degree of the legal interest protection). The simultaneous assertion of both clarity and vagueness of the legal terms results in a discernible paradox.

Despite these issues, Spanish criminal law scholars wholeheartedly acknowledge the primacy of this version of teleological interpretation. However, I believe the consequences of this doctrine should be contested. As explained earlier, teleological interpretation can lead to practical aporias, as recognising a legal provision's purpose results in an never-ending circular reference between the protected legal interest and the description of the criminal offence within the legal provision. There is a significant risk that teleological interpretation ends up identifying the law's purpose with the interpreter's individual construction, or the purpose the interpreter believes the law should pursue. As Guastini emphatically states, appealing to the will of the law as something distinct from the legislator's (relatively) concrete will is often a tactic used to circumvent, disregard, or disrupt the legislative bodies' legal policy, replacing it with the policy supported by the interpreter.³⁶ Thus, when applying this doctrine,

³⁴ Nuvolone, P., *Il possesso nel Diritto Penale*, Milan, 1942, p. 55 et seq.

³⁵ Pagliaro, A., *Principi di Diritto Penale. Parte generale*, Milan, 2000, p. 78 et seq.

³⁶ Guastini, R., 'Técnicas interpretativas', *Revista jurídica de Castilla-La Mancha*, 1993, No. 19, p. 9 et seq.

identifying both the protected legal interest and the degree of protection dispensed by the law usually results from a purely subjective opinion. By hypothesis, this opinion cannot be based on the legal provision itself since the provision is vague in some relevant aspect. In such situations, legal interpretation becomes a process governed by the interpreter's preferences regarding criminal policy.

The consequences are particularly severe when applying this technique results in a teleological reduction of the legal provision's scope. This usually happens when, for reasons related to the supposed purpose of the law (for instance, when the attack on the protected legal interest is considered insufficiently severe), the legal provision is not applied in a case where it should be applied according to the provision's wording. Despite the widespread acceptance of this practise – allegedly interpretative – by the Spanish Constitutional Court (since STC 237/2005 of 26 September), the Spanish Supreme Court (since the STS of 20 June 2006, RJ 2006/5184), and the majority of Spanish scholarship, I believe there are grounds to contest its legitimacy.

First, it is uncertain whether this can be appropriately qualified as an interpretative activity. This is certainly not the case when the legal provision is explicit, which is the usual instance of teleological reduction. Because of reasons allegedly connected to the purpose of the law, one of the standard cases covered by the legal provision is excluded – hence, the consideration of the outcome as a reduction. In my view, this does not qualify as an interpretative activity because, by definition, there would be no contextual reasons supporting the dismissal of an understanding of the legal provision considered a standard case. Instead, this would qualify as an activity of semantic legislation – a restriction of the semantic range of the legal statement subject to interpretation – and thus, it is not part of the set of functions assigned to a scholar or a judge.³⁷

As stated, some logical problems arise when the protected legal interest is placed as the primary interpretative canon. These problems can only increase when this controversial criterion is not employed to tackle the contentious meaning of a legal provision but to exclude the application of a well-defined provision to a standard case. Although this is a classic scholarly approach to the issue, I believe this strategy cannot be considered a distinct instance of interpretative activity since it is ultimately grounded on a subjective political opinion about the degree of protection merited by a particular legal interest.

4. CONCLUSION

The concept of legal interest presents definite advantages in the criminal policy argument. Despite its limitations, this concept defines the boundaries of the discussion. In particular, it enables fine-tuning criminal policy according to the underlying political theory one supports. However, its impact on legal theory should be assessed with greater caution. As shown, the doctrine of material unlawfulness (one of the primary embodiments of that impact) not only strains

³⁷ Cf. García Amado, J.A., '¿Interpretación judicial con propósito de enmienda? Acerca de la jurisprudencia sobre el artículo 133 del Código Civil', *La Ley*, 2001, Vol. V, p. 1675.

the Rule of Law but also raises objections of a logical nature and incites recourse to subjective decisions when dealing with issues of semantic indeterminacy of the legal provisions.

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