

HARM, OFFENCE AND *OFFESA* IN THE ENGLISH AND THE ITALIAN CRIMINAL
LAW.

FOR A CONSTITUTIONALISATION OF A UNITARY PRINCIPLE OF HARM IN THE
ENGLISH LEGAL SYSTEM, ALSO AS CRITERION OF JUDICIAL INTERPRETATION*

HARM, OFFENCE *E OFFESA NEL DIRITTO PENALE INGLESE E ITALIANO.*
PER UNA COSTITUZIONALIZZAZIONE DI UN UNITARIO PRINCIPLE OF HARM NEL
SISTEMA GIURIDICO INGLESE, ANCHE COME CRITERIO DI INTERPRETAZIONE
GIUDIZIARIA

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Nonostante la sua tradizione liberale, il diritto inglese è ancora lontano dall'applicare l'harm principle quale principio fondamentale del diritto penale. Per un verso, il legislatore spesso incrimina condotte inoffensive; per altro verso, le corti ancora si servono del diritto penale per reprimere l'immoralità. Una nuova prospettiva proviene dal principio italiano di offensività, nella sua duplice dimensione di criterio legislativo e criterio di interpretazione-applicazione giudiziaria. Tale principio ha avuto un impatto considerevole sul diritto italiano, al punto che la Corte Costituzionale lo ha riconosciuto quale principio costituzionalizzato di diritto penale. Questo articolo valuta la possibilità di importare l'approccio costituzionalmente orientato italiano nel quadro giuridico inglese, nel tentativo di trovare un qualche fondamento normativo e costituzionale all'harm principle.

Despite its liberal tradition, the English law is still far from enforcing the harm principle as a fundamental principle of criminal law. On the one hand, the legislator often criminalises harmless behaviours; on the other hand, courts still seek to enforce morality through criminal law. A new perspective comes from the Italian doctrine of the principio di offensività (literally, principle of harmfulness), in its two-fold dimension of criterion of criminalisation and criterion of judicial interpretation-application. Such principle had a considerable impact on Italian law, to the extent that the Constitutional Court recognised it as a constitutionalised principle of criminal law. This article assesses the possibility of exporting the Italian constitutional oriented approach to the English legal framework, in the attempt of finding some legal and constitutional foundations for the harm principle.

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1. *Introduction. The global problem of the necessary harmfulness of crime and the importance of comparative dialogue.*

In these times of widespread preventionism, which impressed a «preventive turn»¹ to most criminal justice systems², the discussion on the necessary harmfulness of criminal conduct is particularly intense in every liberal-democratic jurisdiction.

Despite the global nature of the problem, comparative dialogue seems to be still scarce. Particularly, few are the exchanges between the common law and civil law traditions. There have been attempts to bridge the two different legal cultures. During the Forties, the American scholar Jerome Hall made of harm a fundamental element of crime, drawing upon English and continental theorisations³. In the Sixties, Albin Eser tried to attract the attention of Anglo-American penal scholarship to the theoretical exploration and practical employment of the principle of harm with an impressive comparative review of the legal framework of various legal traditions⁴. Others have tried to diffuse in common law literature categories typical of continental European systems, such as that of «crimes of danger»⁵. More recently, Italian scholars like Massimo Donini or Alessandro Spina faced some of the problematic issues of criminalisation

¹ A. CRAWFORD, *Introduction. The preventive turn in Europe*, in ID. (ed.), *Crime Prevention Policies in Comparative Perspective*, Cullompton (UK), 2009, xv.

² Cf., *ex multis*, L. ZEDNER, *Pre-crime and pre-punishment: a health warning*, in *Criminal Justice Matters*, 81(1), 2010, London (UK), 24-25; A. ASHWORTH, L. ZEDNER, *Preventive Justice*, Oxford (UK), 2014; ID., EAD., *Prevention and Criminalization: Justifications and Limits*, in *New Criminal Law Review*, 15, 2012, Oakland (CA), 542; G.R. SULLIVAN, I.H. DENNIS, *Seeking security*, Oxford (UK), 2012; L. ZEDNER, *Pre-crime and post-criminology?*, in *Theoretical Criminology*, 11, 2007, London (UK), 261-281; M. TUCK, *Crime Prevention: a Shift in Concept*, in *Home Office Research and Planning Research Bulletin*, 24, 1987, London (UK) 5.

³ J. HALL, *General Principles of Criminal Law* (1960), 2nd ed., reprinted, Clark (NJ, US), 2005.

⁴ A. ESER, *The Principle of «Harm» in the Concept of Crime*, A Comparative Analysis of the Criminally Protected Legal Interests, in *Duquesne University Law Review*, 4, 1966, Pittsburgh (PA, US), 345.

⁵ E.S. BINA VINCE, *Crimes of Danger*, in *Wayne Law Review*, 15(2), 1969, Detroit (MI, US), 683-708.

from a perspective focused also on common law theories⁶. Nevertheless, these remain quite isolated examples of a dialogue that could be much more prolific.

The aim of this article is to give a contribution to this dialogue, particularly by comparing the harm debate as it has developed in the English and the Italian legal system and assessing the exportability of the solutions adopted by the latter system to the English one.

There are specific reasons for these choices. The English legal system is not only the mother of all common law systems⁷, but it is especially the mother of the harm principle, as firstly conceived by John Stuart Mill in 1859, and of the famous Hart-Devlin controversy on the legal enforcement of morality, a pivotal moment in the harm debate. The Italian legal system is not only representative of the civil law tradition, but it is also the home of the *principio di offensività* (literally, principle of harmfulness), one of the most original and interesting developments of the material conception of crime as harm to a legal good, which has been recognised by the Constitutional Court as a constitutionalised criterion of both criminalisation and judicial interpretation-application of criminal law. Indeed, Donini has highlighted the need of a better dissemination overseas of the Italian model, whose exportability to other jurisdictions, at least as a methodology, is facilitated by the fact that the principle of *offensività* is derived from values and principles shared by all liberal-democratic traditions⁸.

My thesis is that, despite the very different constitutional framework, the Italian constitutionally oriented approach to criminal law might actually be exported, with the necessary adjustments, to the English legal system, in order to find some possible constitutional and, however, legal foundations for the harm principle, despite the lack of a written constitutional charter and of a constitutional court.

In the first part of the article, I will analyse the role and developments of the harm and offence principles in the English literature and criminal law. In the second part, I will consider the theoretical, legislative and constitutional bases of the Italian principle of *offensività* as developed by legal scholars and interpreted by courts. In the last part, I will compare the Italian and the English framework and I will try to verify the tenability of my thesis.

⁶ M. DONINI, «Danno» e «offesa» nella c.d. tutela penale dei sentimenti, Note su morale e sicurezza come beni giuridici, a margine della categoria dell'«offense» di Joel Feinberg, in *Riv. it. dir. proc. pen.*, 2008, 1546-1593; A. SPENA, *Esiste il paternalismo penale? Un contributo al dibattito sui principi di criminalizzazione*, *ivi*, 2014, 1209-1248.

⁷ P. DARBYSHIRE, *Darbyshire on the English Legal System*, 11th ed., London (UK), 2014, 11.

⁸ Cf. M. DONINI, *Il principio di offensività*, Dalla penalistica italiana ai programmi europei, in *Dir. pen. cont.*, 4, 2013, 22 and *passim* and ID., *L'eredità di Bricola e il costituzionalismo penale come metodo*, *Radici nazionali e sviluppi sovranazionali*, *ivi*, 2, 2012, 60-61.

Three methodological clarifications. First, this article will focus on the English legal system strictly considered as the legal system of England and Wales. Northern Ireland and Scotland are not covered, if not incidentally. Second, all the direct quotes from Italian texts were translated in English by me. Third, in both systems the literature is practically unlimited. To the benefit of readers unfamiliar with either or both English and Italian law, I will privilege clarity and contents in my narrative and I will refer only to some of the works I found more appropriate to my reasoning, instead of burdening these pages with fat footnotes stuffed with lists of names and titles aimed at an exhaustiveness that, in this area, might be, however, illusory.

PART I: ENGLISH LEGAL SYSTEM

2. *Harm and offence in the English legal theory. Mill's harm principle, its reception in the Wolfenden report and the Hart-Devlin debate on the legal enforcement of morality.*

In English criminal law, the harm principle is considered one of the principles that inform – or should inform – the decisions to criminalise. It is a product of legal scholarship and finds no express recognition in any of the primary internal sources of English criminal law: statute law and common law.

The principle was first articulated by John Stuart Mill in his famous *On Liberty*. In a most cited passage, Mill states that «the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant»⁹. It was this initial formulation of the harm principle – rather than the more intricate theory elaborated in the rest of the book¹⁰ – that, one century later, made its way through the English legal system and scholarship¹¹.

Mill's harm principle has a double thrust¹². On the one hand, it seeks to limit the state's authority to coerce, as it gives political priority to individual freedom rather than individual or collective goods such as morality or welfare. On the other hand, it seeks to identify the

⁹ J.S. MILL, *On Liberty*, London (UK), 1859, Ch. 1, par. 9.

¹⁰ B. HARCOURT, *The Collapse of the Harm Principle Redux*, On Same-Sex Marriage, the Supreme Court's Opinion in *United States v. Windsor*, John Stuart Mill's essay *On Liberty* (1859), and H.L.A. Hart's Modern Harm Principle, in *University of Chicago Public Law and Legal Theory Working Paper Series*, n. 437, 2013, available at <http://chicagounbound.uchicago.edu/public_law_and_legal_theory/422/> (23 June 2016), 1-2.

¹¹ *Ivi*, 1-2.

¹² W. WILSON, *Criminal Law*, 5th ed., Harlow (UK), 2014, 35.

justification for state coercion. In Mill's view the only possible justification for coercion is the prevention of harm to others: the state cannot intervene with coercion to prevent harm to one's self, mere offences to other people's sensibilities or immorality.

Such articulation of the harm principle poses at least the following problems. First, Mill does not provide a definition of harm¹³. This leaves the principle open to the most disparate interpretations and applications, which might end up in depriving the principle of its original meaning and frustrating its liberal purpose. If one should maintain, for instance, that immoral acts lead to «social disintegration» – as Lord Devlin did in his essay *The Enforcement of Morals*¹⁴ – then it could be said that such acts are harmful. Second, identifying the justification of state coercion in the *prevention* of harm implies that both the infliction of harm and the risk of harm are legitimate grounds for coercion. Without further limits, this paves the way for criminalising conducts only remotely capable of leading to harm – the so-called «remote harms»¹⁵. Third, the principle is expressed by Mill as a negative constraint¹⁶: in the absence of harm or the risk of harm, the state is not morally entitled to intervene¹⁷. This does not mean, though, that the state is always justified in intervening in the presence of harm or risk of harm. In other words, the harm principle acts as a necessary but not sufficient condition for state coercion¹⁸: other factors and criteria need to be considered, which lead to the formulation of other principles.

Mill's approach was followed, with specific regard to criminalisation, by the *Report of the Committee on Sexual Offences and Prostitution*¹⁹ presented to the English Parliament in September 1957 – better known as the Wolfenden report, after Sir – later Lord – John Wolfenden, who chaired the committee. According to the report, the function of criminal law would be «to preserve public order and decency, to protect the citizen from what is offensive and injurious and to provide sufficient safeguards against exploitation or corruption of others, particularly those who are specially vulnerable». It is not «the function of the law to intervene in

¹³ A.P. SIMESTER ET AL., *Simester and Sullivan's Criminal Law, Theory and Doctrine*, 5th ed., Oxford (UK) and Portland (OR, USA), 2013, 644.

¹⁴ P. DEVLIN, *The Enforcement of Morals*, Oxford (UK), 1965. See, *amplius*, below in this paragraph.

¹⁵ A.P. SIMESTER, A. VON HIRSCH, *Crimes, Harms, and Wrongs, On The Principles Of Criminalisation*, Oxford (UK), 2011, 53. See also A.P. SIMESTER, A. VON HIRSCH, *Remote Harms and Non-Constitutive Crimes, Criminal Justice Ethics*, 28(1), 2009, New York (NY, US), 89-107; D.J. BAKER, *The Moral Limits of Criminalizing Remote Harms*, in *New Criminal Law Review*, 10 (3), 2007, Oakland (CA, US), 370-391.

¹⁶ A.P. SIMESTER ET AL., *Simester and Sullivan's Criminal Law, Theory and Doctrine*, 5th ed., Oxford (UK) and Portland (OR, US), 2013, 644.

¹⁷ Horder calls this the «restrictive aspect» of the harm principle: J. HORDER, *Ashworth's Principles of Criminal Law*, 8th rev. ed., Oxford (UK), 68.

¹⁸ N. HOLTUG, *op. cit.*, 360.

¹⁹ Cmnd. 257 (1957).

the private lives of citizens, or to seek to enforce any particular pattern of behaviour, further than is necessary to carry out the purposes we have outlined»²⁰. «There must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business»²¹. Following these principles, the Wolfenden Committee recommended and led to the decriminalisation – through the Sexual Offences Act 1967 – of homosexual behaviour between consenting adults in private.

The Committee did not use the word «harm» and, unlike Mill, admitted as a justification of criminalisation the protection of citizens from «offence» – that is mere affronts to feelings –, other than «injury. It followed, however, Mill's position against the legal enforcement of morals and succeeded in changing a specific piece of legislation accordingly. It failed, though, in establishing the harm and offence principles in the fabric of English law, as it encountered the practically immediate resistance – if not the overt rejection – of the English judiciary, both in judicial decisions²² and in extra-judicial statements.

The most famous opposition came from the then High Court judge Lord Patrick Devlin. Devlin argued that immorality might lead to the disintegration of society and society is entitled to use its laws to protect itself from this danger. «It is not possible to set theoretical limits to the power of the State to legislate against immorality»²³. Devlin's position was contrasted by Herbert L.A. Hart²⁴. Like the Wolfenden Committee, Hart conceded that coercion might be justified by grounds other than the prevention of harm to others, such as offence to others, but denied any justification to the legal enforcement of morality as such²⁵. The exchange between Hart and Devlin set the main terms of the problem of harm and prompted one of the most important jurisprudential debates of the second half of the Twentieth century²⁶, which found its climax in Joel Feinberg's four-volume work *The Moral Limits of Criminal Law*²⁷.

²⁰ Wolfenden report, parr. 13-14.

²¹ *Ivi*, par. 61.

²² See below, par. 3.

²³ P. DEVLIN, *op. cit.*, 12-13 and *passim*. See also R. DWORKIN, *Lord Devlin and the Enforcement of Morals*, in *Yale Law Journal*, 75(6), 1966, New Haven (CT, US), 986 and *Id.*, *Taking Rights Seriously*, Cambridge (MA, US), 1977.

²⁴ H.L.A. HART, *Law, Liberty, and Morality*, Oxford (UK), 1963. On the so-called Devlin-Hart debate see 6. Y. CARON, *The Legal Enforcement of Morals and the So-Called Hart-Devlin Controversy*, in *McGill Law Journal*, 15(1), 1969, Montréal (QC), 9-47 and P. CANE, *Taking Law Seriously*, Starting Points of the Hart/Devlin Debate, in *Journal of Ethics*, 10(1-2), 2006, Dordrecht (NL), 21-51.

²⁵ H.L.A. HART, *op. cit.*, 46-47.

²⁶ P. CANE, *op. cit.*, 22.

²⁷ J. FEINBERG, *The Moral Limits of the Criminal Law*, vol. I, *Harm to Others*, Oxford (UK), 1987; *Id.*, *The Moral Limits of the Criminal Law*, vol. II, *Offense to Others*, Oxford (UK), 1988; *Id.*, *The Moral Limits of the Criminal Law*, vol. III, *Harm to Self*, Oxford (UK), 1989; *Id.*, *The Moral Limits of the Criminal Law*, vol. IV, *Harmless Wrongdoing*, Oxford (UK), 1990.

2.1. *The harm and the offence principles according to Joel Feinberg.*

Feinberg's endeavour is deliberately narrower than Mill's concern in *On Liberty*, as it seeks to answer specifically the question: «what sorts of conduct may the state rightly make criminal?»²⁸. Starting from a presumption in favour of liberty, Feinberg rejects harm to self (legal paternalism) and immorality (legal moralism) as possible grounds for criminalisation and argues that the harm and offence principles exhaust the classes of morally relevant reasons for criminal prohibition (liberalism). Feinberg's restatement of the harm principle reads as follows: «it is always a good reason in support of penal legislation that it would be effective in preventing (eliminating, reducing) harm to persons other than the actor (the one prohibited from acting) and there is no other means that is equally effective at no greater cost to other values»²⁹. His offence principle reads: «it is always a good reason in support of a proposed criminal prohibition that it would probably be an effective way of preventing serious offense (as opposed to injury or harm) to persons other than the actor, and that it is probably a necessary means to that end»³⁰.

Feinberg identifies two different notions of harm: a non-normative notion of harm as a setback to interests, and a normative notion of harm as a wrong – that is, morally indefensible («neither excusable nor justifiable») conduct that violates some rights of the person harmed³¹, which needs not to be harmful in the first sense. As used in the harm principle, «harm» represents the overlap of these two notions: «only setbacks of interests that are wrongs, and wrongs that are setbacks to interest, are to count as harms in the appropriate sense»³². Similarly, Feinberg maintains that, in his offence principle, «offense» embraces both a general notion of offence as a miscellany of disliked mental states (disgust, shame, hurt, anxiety, etc.), which are not necessarily harmful, nor necessarily offensive in the strict sense of ordinary language – that is, insulting –, and a specifically normative notion of offence as states caused only by wrongful (right-violating) behaviour³³.

Like Mill's early statement of the harm principle, Feinberg's formulation covers both harm and the threat of harm – which leaves the problematic issue of remote harms open³⁴. Like Mill,

²⁸ ID., *Harm to Others*, cit., 3.

²⁹ *Ivi*, 26.

³⁰ ID., *Offense to Others*, cit., 1.

³¹ ID., *Harm to Others*, cit., 105-106.

³² *Ivi*, 36.

³³ ID., *Offense to Others*, cit., 1-2.

³⁴ A.P. SIMESTER, A. VON HIRSCH A. *Crimes, Harms, and Wrongs*, cit., 53.

Feinberg considers the prevention of harm a necessary but not sufficient condition for criminalisation. He admits that not every kind of act causing harm to others can be rightly prohibited, but only those that cause «avoidable and substantial» harm³⁵. Amongst the criteria that Feinberg identifies to restrict the application of the harm principle to the most serious harm there is the magnitude of the harm committed, the probability of the harm occurring, the relative importance of the harm, and the aggregative nature of the harm³⁶. Feinberg's formulation also includes some of the limiting principles, such as effectiveness and cost, later reprised and expanded by the so-called minimalist approach to criminal law³⁷.

Unlike Mill's, though, Feinberg's articulation of the harm principle is not exclusive³⁸, as it is formulated a positive claim³⁹. Mill considered the prevention of harm the only reason for coercion. Feinberg admits, along the lines of the Wolfenden report, that also the criminalisation of conduct causing offence may be justified⁴⁰. In Feinberg's perspective, however, it is against harm that the criminal law is primarily pitched, while the criminalisation of offensive behaviours is subjected to restrictive conditions⁴¹, such as their seriousness and unreasonableness⁴².

2.2. The more recent debate on the harm principle and the consolidation and the emergence of other principles and theories of criminalisation.

After Feinberg, a conspicuous literature has developed around the harm principle. Although voices contrasting, more or less radically, the main tenets of the harm principle can still be heard, the principle is now largely acknowledged by scholars as one of the fundamental principles of criminal law. One of the clearest evidences is its appearance in most of the major English criminal law textbooks.

In general, the most recent literature on the harm principle reflects two different but somehow converging attitudes. On the one hand, from a descriptive point of view, scholars admit the shortcomings of the harm principle and its still scarce implementation in English criminal law –

³⁵ J. FEINBERG, *Harm to Others*, cit., 12.

³⁶ *Ivi*, Ch. 5, *Assessing and Comparing Harms*.

³⁷ See below, par 2.2.

³⁸ R.A. DUFF, *Harms and Wrongs*, in *Buffalo Criminal Law Review*, 5(1), 2001, Oakland (CA, US), 13.

³⁹ A.P. SIMESTER ET AL., *Simester and Sullivan's Criminal Law*, cit., 645. Horder calls this the «permissive aspect of the harm principle»: J. HORDER, *op. cit.*, 73.

⁴⁰ See R.A. DUFF, *op.cit.*, 13-14.

⁴¹ W. WILSON, *op. cit.*, 36-37.

⁴² See, *amplius*, J. FEINBERG, *Harm to Others*, cit., Ch. 8.

described by some as «historically contingent», rather than governed by principles⁴³. On the other hand, this awareness has prompted new theories (and the refinement of old ones) on the harm and offence principles and on criminalisation in general⁴⁴, that aim at suggesting, from a normative point of view, more effective applications of it, often in conjunction with other principles and doctrines⁴⁵.

Particularly, while reflecting a number of different positions and theories – which it would be impossible to even summarise here –, the academic debate following Feinberg's elaboration is characterised by some common acquisitions.

A) *The moral and the normative dimensions of the harm principle. From the grading of harms to the grading of interests and goods.* There is a general acknowledgement of the moral implications⁴⁶ and the normative dimensions⁴⁷ of the harm principle – which make it so elusive and debatable. Feinberg's notion of harm does not resolve the moral, cultural, and political issues underlying the selection of the interests recognized in a particular system⁴⁸. Indeed, in the following years, scholars have paid further attention to the definition and grading of the interests susceptible of being harmed, as well as to the consequent categorisation and gauging of harms, both for criminalising and sentencing purposes.

With respect to criminalisation, Simester and von Hirsch suggested that an interest would be a resource over which a person has a normative claim⁴⁹, whereas a resource would be an asset – as derived from Rawlsian conceptions of goods⁵⁰ – or a capability – as derived from Amartyan Sen's notions of a person's capacity to exercise skills or undertake a particular course of conduct⁵¹. More recently, Jeremy Horder emphasised that criminal law is concerned with the protection of certain goods, which he distinguishes in two main categories. On the one hand, there are intrinsically valuable goods, which do not derive their value from any higher value and can be personal (e.g. bodily integrity or health) or inter-personal (e.g. the expression of sexual

⁴³ A. ASHWORTH, *Is the Criminal Law a Lost Cause?*, in *Law Quarterly Review*, 2000, London (UK), 226. Cf. also R.A. DUFF, *Towards a Modest Legal Moralism*, in *Criminal Law and Philosophy*, 8(1), 2012, Dordrecht (NL), 224, according to whom the story of the processes of criminalisation would be a complicated, messy, often depressing story, based on historical, sociological, psychological and political evidence.

⁴⁴ See, for one, Douglas Husak's theory of criminalisation in his *Overcriminalization*, New York (NY, US), 2008.

⁴⁵ See, for instance, Ashworth's propositions in his *Is the Criminal Law a Lost Cause?* and Duff's in his *Towards a Modest Legal Moralism*.

⁴⁶ Cf. D.N. MCCORMICK, *Legal Right and Social Democracy*, Oxford (UK), 1982.

⁴⁷ B. HARCOURT, *The Collapse of the Harm Principle*, in *Journal of Criminal Law and Criminology*, 90(1), 1999, Chicago (IL, US), 185.

⁴⁸ Cf. A. ASHWORTH, J. HORDER, *Principles of Criminal Law*, 7th ed., Oxford (UK), 2013, 28.

⁴⁹ A.P. SIMESTER, A. VON HIRSCH, *Crimes, Harms, and Wrongs*, cit., 37

⁵⁰ J. RAWLS, *A Theory of Justice*, Cambridge (MA, US), 1971, 90-95.

⁵¹ A. SEN, *The Idea of Justice*, London (UK), 2009, 231-241.

choices, property-holding or privacy)⁵². On the other hand, there are public goods through which the people's «lives in common» take place, which include both goods serving the interests of a particular community (e.g. security, public health, safe public places) and goods which are open to all to enjoy without community or national limits (e.g. environmental elements)⁵³. Public goods, Horder argues, can be particularly fragile, either because threatened by over-use or because likely to be prone to injustice in point of access, and might require to be supported in practice by the state, either because of the incapacity of non-state institutions to protect them or because they are exposed to the erosive action of too many people⁵⁴. Horder maintains that criminal law might have an important role to play in all these cases, mainly by imposing criminal sanctions on those individuals or, especially, businesses that violate legally imposed duties to protect or promote public goods. This is generally achieved through the creation of anticipatory (regulatory) offences primarily concerned with deterring and punishing unacceptable risks of harm, rather than its causation. These are often in tension with several principles of criminalisation, such as the harm principle, the principle of proportionality or the principle of minimal criminalisation (see below). Moreover, as opposed to harm-based offences, the question whether such offences have been committed might too often depend on the exercise of judgment by expert officials, so that their foundation may be questioned⁵⁵.

With respect to sentencing, while admitting that harm varies significantly in degree and character and affect different people in different ways, Dennis Baker insisted that a «harmfulness grid» to divide harm in crude categories could at least provide the lawmaker with a general guidance, although in the end many decisions would be determined as a matter of degree within a particular category of harm⁵⁶. Von Hirsch and Jareborg suggested a five-point harm-scale (grave, serious, upper-intermediate, lower-intermediate and lesser) based on five different levels of the living standard intruded upon (subsistence, minimal well-being, adequate well-being, enhanced well-being, living standard not affected or marginally so) and flexible enough to allow for within-category variations⁵⁷.

B) *Harm prevention as a justification for criminalisation*. A second point of agreement is the idea that both the infliction and the threat or the risk of harm may be legitimate, although not

⁵² J. HORDER, *Ashworth's Principles*, cit. 43-46.

⁵³ *Ivi*, 47-50.

⁵⁴ *Ivi*, 52.

⁵⁵ *Ivi*, 52-58.

⁵⁶ D. BAKER, *Constitutionalizing the Harm Principle*, in *Criminal Justice Ethics*, 27(2), 2008, New York (NY, US), 17.

⁵⁷ A. VON HIRSCH, N. JAREBORG, *Gauging Criminal Harm: A Living-Standard Analysis*, in *Oxford Journal of Legal Studies*, 11(1), 1991, Oxford (UK), 28.

sufficient⁵⁸, reasons for criminalisation, in accordance with a paradigm of the harm principle based on harm prevention⁵⁹. To the extent that there is some discussion about the possibility of considering potential harms harm⁶⁰. There is awareness, of course, of the «grave dangers»⁶¹ that this approach entails, especially with regard to the criminalisation of remote harms. If we accept that the notion of harm includes not only «injury»⁶² or «bad consequences»⁶³, but also the risk of these consequences, then we have to accept that the harm principle justifies criminalisation aimed at preventing not only harm, but also the risk of harm, thus leading to the criminalisation of behaviours that are innocuous in themselves, but might indirectly (and unwillingly) increase the risk of harm depending on uncontrollable conduct of others, at least in a liberal state centred on individual autonomy.

The discussion on these issues is particularly heated, especially facing the proliferation of preventive offences somehow departing from the traditional paradigms of criminal liability based on harm plus culpability⁶⁴ or harm, unlawfulness and culpability⁶⁵. Such offences include inchoate offences – such as attempt, conspiracy or assisting and encouraging crime – and a number of harmless or remotely harmful conducts criminalised for preventive purposes – such as pre-inchoate crimes, crimes of possession, crimes of membership, crimes of endangerment, according to Ashworth and Zedner's taxonomy⁶⁶ – some of which are assumed to create or increase risk of harm in relation to the possibility of future conduct of third parties⁶⁷. In the variety of views expressed in the debate, Jeremy Horder identifies two opposite perspectives⁶⁸. On one side, he argues, there are proponents, such as Ashworth and Husak, of a harm-based

⁵⁸ A. ASHWORTH, *Is the Criminal Law*, cit., 254.

⁵⁹ Cf., for instance, W. WILSON, *op. cit.*, 36 and A. VON HIRSCH, N. JAREBORG, *op. cit.*, 2; D. BAKER, *Collective Criminalization and the Constitutional Right to Endanger Others*, in *Criminal Justice Ethics*, 28(2), 2009, New York (NY, US), 168-200; A. ASHWORTH, *Criminal Attempts and the Role of Resulting Harm under the Code, and in Common Law*, in *Rutgers Law Journal*, 19, 1987-1988, Camden (NJ, US), 734. See also J. J. HORDER, *Harmless Wrongdoing and the Anticipatory Perspective on Criminalisation*, in G.R. SULLIVAN, I. DENNIS (eds.), *Seeking Security*, Pre-Emptying the Commission of Criminal Harms, Oxford (UK), 2012, 79-103.

⁶⁰ See A. VON HIRSCH, *Past or Future Crimes*, New Brunswick (NJ, US), 1985, 64. For a positive answer in the field of tort law, see C. FINKELSTEIN, *Is Risk a Harm?*, in *University of Pennsylvania Law Review*, 151(3), 2003, Philadelphia (PA, US), 963-1001. *Contra*, S.R. PERRY, *Risk, Harm, Responsibility*, in D.G. OWEN, *The Philosophical Foundations of Tort Law*, Oxford (UK), 1997. For discussion see J. OBERDIEK, *Towards a Right Against Risking*, in *Law and Philosophy*, 28(4), 2008, Dordrecht (NL), 367-392.; ID., *The Moral Significance of Risking*, in *Legal Theory*, 18(03), 2012, Cambridge (UK), 339-356.

⁶¹ J. HERRING, *Criminal Law*, 6th ed., Oxford (UK), 2014, 22.

⁶² A. VON HIRSCH, *Past or Future Crimes*, cit., 64.

⁶³ D. BAKER, *Collective Criminalization*, cit., *passim* and ID., *Constitutionalizing*, cit., *passim*.

⁶⁴ A. ASHWORTH, *Criminal Attempts*, cit., 726; A. VON HIRSCH, *Past or Future Crimes*, cit., 64.

⁶⁵ See G. FLETCHER, *Rethinking Criminal Law* (1978), reprinted, Oxford (UK), 2000, 575-79; P.H. ROBINSON, A *Theory of Justification*, Societal Harm as a Prerequisite of Criminal Liability, in *UCLA Law Review*, 23, 1975, 266.

⁶⁶ A. ASHWORTH, L. ZEDNER, *Prevention and Criminalization*, cit., 545-546.

⁶⁷ D. BAKER, *Collective Criminalization*, cit., 168-169.

⁶⁸ J. HORDER, *Harmless Wrongdoing*, cit.

minimalist approach which sees in harmful wrongdoing the primary focus (the building blocks)⁶⁹ of criminal law and relegates the criminalisation of unwarranted risks of harm within the limited scope of a merely secondary focus. On the other side, there is what Horder calls «the anticipatory perspective on criminalisation» – which he himself advocates –, which promotes the idea that the deterrence or prevention of harmful wrongdoing «can be achieved by targeting conduct at a stage when such harm is yet to be done»⁷⁰, including, he argues, harmless wrongdoing that risks harm⁷¹.

Horder's «stark dichotomy»⁷² between the two supposedly opposite perspectives fails to offer a faithful representation of the complexity of the positions involved and, especially, to capture the significant elements that both approaches have in common. Indeed, those who insist in the centrality of the harm principle do not deny the possibility of justifying the criminalisation of conduct causing merely remote risk of harm⁷³, provided that certain principled constraints based both on moral and empirical considerations are respected⁷⁴. On the other hand, Horder himself admits that the focus of the anticipatory perspective on «unacceptable risk posed» presupposes the reference, at least in the background, to a harm risked⁷⁵. Moreover, not very differently from the minimalist approach, he also concedes the need for restraint, respect of proportionality and consideration of countervailing considerations in creating risk-based offences⁷⁶.

What remains unclear is to what exactly risk, threat, danger of harm or potential harm amounts, as these and similar expressions are sometimes used as synonyms. Is it the possibility of harm or the probability? What degree of possibility amounts to probability? What degree of possibility or probability is required to justify a decision to criminalise? John Oberdiek suggests that risk is a probability of harm and, also drawing upon philosophical theories of probability, admits that risk appears to be indeterminate, no matter what account of probability (objective or epistemic) one chooses to follow⁷⁷. Eventually, in the impossibility of escaping such vagueness, the determination of the levels of the likelihood of harm risks to be entirely abandoned to the contingent assessment of legislators. This probably explains why, rather than insisting in philosophical disquisitions on risk and probability, other scholars are committed in suggesting

⁶⁹ A. ASHWORTH, J. HORDER, *Principles*, cit., 28

⁷⁰ J. HORDER, *Harmless Wrongdoing*, cit., 92.

⁷¹ *Ivi*, 93.

⁷² A. ASHWORTH, L. ZEDNER, *Prevention and Criminalization*, cit., 553.

⁷³ A. ASHWORTH, *Criminal Attempts*, cit., 727.

⁷⁴ See A. ASHWORTH, L. ZEDNER, *Prevention and Criminalization*, cit., *passim*, and A. ASHWORTH, J. HORDER, *Principles*, cit., ch. 2.

⁷⁵ J. HORDER, *Harmless Wrongdoing*, cit., 100.

⁷⁶ *Ivi*, 93-94.

⁷⁷ J. OBERDIEK, *Towards a Right*, cit., 369-371.

moral and practical constraints to legislative discretion, which result, as we are about to see, in a set of additional principles of criminalisation.

C) *The interdependence between the harm principle and other principles.* Indeed, a well-established acquisition is the idea of a certain degree of mutual interdependence between the harm principle and other principles and doctrines.

One of the most important of these principles is the principle of individual autonomy, according to which the individuals are capable of free and rational choices (factual element) and they should be respected and treated as such (normative element)⁷⁸. In order to be autonomous, the individual must be free from coercion and manipulation⁷⁹, including undue state power⁸⁰. In such a perspective, coercive rules, including criminal law, are justified by the fact that they act to promote human autonomy, rather than restrict it⁸¹. At the heart of liberal theories, including Mill's utilitarian liberalism, the principle of autonomy had been widely discussed by Feinberg in his *Harm to Self*⁸², but it found one of its leading proponents in Joseph Raz. In his *The Morality and Freedom* Raz suggests an autonomy-based harm principle, relying on a very strong connection between the harm principle and the principle of autonomy, whereas the former is derivable from and defensible in the light of the latter⁸³. Raz maintains that the state has the duty not merely to prevent the denial of freedom, but also to promote it by creating the conditions of autonomy and that any action infringing people's autonomy can only be justified by the need to protect or promote the autonomy of others⁸⁴.

As Ashworth observes, these considerations lead to the development of other doctrines of criminalisation, namely the principle of welfare and what he calls the «minimalist» approach to criminal law⁸⁵. The principle of welfare suggests that the promotion of individual autonomy requires the state to fulfil its obligation to put in place the facilities and structures that constitute its conditions. Criminalisation might be a legitimate means to protect some of these conditions, but it might also end up in conflicting with autonomy itself whenever it seeks to protect collective interests such as security and public safety or collective moral values considered

⁷⁸ A. ASHWORTH, J. HORDER, *Principles*, cit., 23-24.

⁷⁹ Cf. J. RAZ, *The Morality of Freedom*, Oxford (UK), 1986, ch. 14.

⁸⁰ Cf. also Jeremy Horder's variation: the «lifestyle autonomy principle», in J. HORDER, *Ashworth's Principles*, cit., ch. 4, particularly at 68.

⁸¹ Cf. W. WILSON, *Criminal Law*, cit., 34-35 and J. HORDER, *Ashworth's Principles*, cit., 53.

⁸² J. FEINBERG, *Harm to Self*, cit., ch. 18 and *passim*.

⁸³ J. RAZ, *The Morality*, cit., 415-418.

⁸⁴ *Ivi*, 425.

⁸⁵ A. ASHWORTH, J. HORDER, *Principles*, cit., 26.

essential to the survival of society⁸⁶, without any special weighting of and protection for individual rights⁸⁷. The minimalist approach to criminal law suggests a set of principles or constraints. Ashworth identifies them in a) the principle of respect for human rights, b) the right not to be subjected to state punishment, c) the principle that the criminal law should not be invoked unless other techniques are inappropriate, and d) the principle that conduct should not be criminalised if the effects of doing so would be as bad as, or worse than, not doing so⁸⁸. Along these lines, together with Lucia Zedner, Ashworth also suggests a series of principles to constrain preventive criminalisation⁸⁹. Husak, who also maintains that a right not to be punished should be recognised, identifies seven constraints on criminalisation⁹⁰: 1) crimes must be designed to proscribe a harm or evil, 2) criminal conduct must be wrongful, 3) persons may only be punished according to their desert, 4) the state must bear the burden of proof to justify a penal offense, 5) a criminal offense is unjustified unless the government has a substantial interest in enacting it, 6) the statute must directly advance the government's purpose, and 7) the law must be no more extensive than necessary to achieve its objective.

E) *Alternatives to the criminal law*. Part of the English debate on harm investigates alternatives to criminalisation. These would be less restrictive and less formal measures, namely administrative and regulatory offences, that the state could use, instead of criminal law, to prevent harm. Two main concerns animate the discussion in this respect. On the one hand, the employment of such measures is welcomed as correct application of the principle of last resort⁹¹. On the other hand, scholars are aware that the state might conceive alternative measures, such as civil preventive orders (e.g. ASBOs), that are as much restrictive as criminal penalties and yet escape the individual safeguards typical of criminal justice, thus resulting in a «subversion of criminal law»⁹².

3. *The harm and offence principles in the English law.*

⁸⁶ Cf. W. WILSON, *Criminal Law*, cit., 39-44.

⁸⁷ Cf. A. ASHWORTH, J. HORDER, *Principles*, cit., 26-27, who also rely on N. LACEY, *State punishment*, London (UK), 1988 and EAD., *Community in Legal Theory: Idea, Ideal or Ideology*, in *Studies in Law, Politics and Society*, 15, 1996, Bingley (UK), 105-146. See also J. HORDER, *Ashworth's Principles*, cit., 49.

⁸⁸ A. ASHWORTH, J. HORDER, *Principles*, cit., 31-35.

⁸⁹ A. ASHWORTH, L. ZEDNER, *Prevention and Criminalization*, cit., *passim*.

⁹⁰ D. HUSAK, *Overcriminalization*, cit., ch. 2 and 3.

⁹¹ Cf. A. ASHWORTH, L. ZEDNER, *Prevention and Criminalization*, cit., 567-570.

⁹² R.A. DUFF, *Perversions and Subversions of Criminal Law*, in ID. ET AL. (eds.), *The Boundaries of Criminal Law*, Oxford (UK), 2010, 88-112. Cf. A. ASHWORTH, L. ZEDNER, *Prevention and Criminalization*, cit., 562-567

The harm and offence principles do not find express recognition in the English criminal law. Not only no legal provision explicitly establishes such principles – the absence of a written constitutional charter makes this even more evident –, but the Parliament clearly does not seem to consider itself obligated to respect them, as the many cases of criminalisation of harmless conduct demonstrate. As for case law, English courts show quite a tenacious resistance to a full application the principles of harm or offence and do not seem willing to give up the possibility of using criminal law to enforce morality.

The so-called general part of English criminal law does not contain elements that might be interpreted in favour of a generalised recognition of the harm or the offence principles. The most meaningful example is impossibility with regard to attempts and conspiracy. In Italy a defence is available whenever the «damaging or dangerous event» is impossible either because the action is inadequate to cause it or because its object is inexistent («*reato impossibile*», art. 49 penal code). This can be interpreted, as we will see later, as a reflection of a general principle whereby when no actual harm is possible no punishment is justified. English law of attempts and conspiracy expressly establishes that a person may be guilty of, respectively, attempting or agreeing to commit an offence even though the facts are such that the commission of the offence is physically impossible⁹³. In these cases, as well as in cases where the attempt fails because of ineptitude, defendants are judged on the facts as they believe them to be and, therefore, may be found guilty for an act which is totally harmless. Their punishment will be based exclusively on their culpability and justified eminently by preventive reasons⁹⁴.

The English courts are aligned with the Parliament on this. In *Anderton v Ryan*, the (then) House of Lords had ruled in favour of the acquittal of a woman who bought a video-cassette recorder believing it was stolen when in fact it was not, arguing – against the intention of the legislature and the letter of the Criminal Attempts Act 1981 – that hers was an «objectively innocent act»⁹⁵. In the later case *R v Shivpuri*⁹⁶, which is now the leading case on impossible attempts, the House of Lords overruled its previous decision and upheld the conviction of a man who received and harboured a powdered substance believing it was heroin, while it was in fact a vegetable matter akin to snuff. The Law Lords rejected the idea of «objectively innocent acts», stating that what turns an otherwise innocent act into a crime is the intent of the actor to commit

⁹³ Criminal Attempts Act 1981, s. 1(2) and (3). For an outline see J. HERRING, *Criminal Law*, cit., 790-794, 807 and 816.

⁹⁴ For discussion see A. ASHWORTH, *Criminal Attempts*, cit.

⁹⁵ [1985] AC 560. See the critique by G. WILLIAMS, *The Lords and Impossible Attempts, or Quis Custodiet Ipsos Custodes?*, in *Cambridge Law Journal*, 45(1), 1986, Cambridge (UK), 33.

⁹⁶ [1987] AC 1.

an offence. To cite the example made by Lord Bridge: «A puts his hand into B's pocket. Whether or not there is anything in the pocket capable of being stolen, if A intends to steal, his act is a criminal attempt; if he does not so intend, his act is innocent»⁹⁷.

This decision should not come as a surprise if one considers the stance that the House of Lords took, more than twenty years before, right after the publication of the Wolfenden Report, in the famous case *Shaw v DPP*⁹⁸. The appellant was charged with conspiracy to corrupt public morals, living on the earnings of prostitution and publishing an obscene article for having published a booklet, the *Ladies' Directory*, advertising prostitution services. The House of Lords affirmed that «the supreme and fundamental purpose of the law» is «to conserve not only the safety and order but also the moral welfare of the State». The courts would have a residual power to enforce such purpose where no statute has yet intervened to supersede the judge-made law. A clear reference is made to the evolutions prospected by the Wolfenden report: «let it be supposed that at some future, perhaps, early, date homosexual practices between adult consenting males are no longer a crime. Would it not be an offence if even without obscenity, such practices were publicly advocated and encouraged by pamphlet and advertisement? Or must we wait until Parliament finds time to deal with such conduct? I say, my Lords, that if the common law is powerless in such an event, then we should no longer do her reverence». Based on these arguments, the House of Lords revived the common law offence of conspiracy to corrupt public morals in what seemed to be an open rejection of the principles stated by the Wolfenden Committee.

The decision in *Shaw* was upheld, a few years later, by the House of Lords in *Kneller (Publishing, Printing and Promotions) Ltd v DPP*⁹⁹, a case concerning the publication in a magazine of a column inviting readers to meet the advertisers for the purpose of private homosexual practices, which after the enactment of the Sexual Offences Act 1967 were no longer a crime. While clarifying that *Shaw* is not to be taken as affirming or supporting the doctrine that the courts have some general or residual power either to create new offences or to widen existing offences so as to make punishable conduct of a type previously not subject to punishment, the House of Lords stated that an offence of conspiracy to corrupt public morals can be committed by encouraging conduct which, although not itself illegal, might be calculated to result in such corruption.

⁹⁷ *R v Shivpuri*, cit., 22.

⁹⁸ [1962] AC 220.

⁹⁹ [1973] AC 435.

A strong moralist view was also taken in *R v Brown (Anthony)*¹⁰⁰. The appellants were convicted of assaults occasioning actual bodily harm and wounding (not involving mutilation) for having intentionally inflicted violence upon another with the consent of the victim in the course of private consensual sado-masochistic homosexual encounters. The House of Lords maintained that the satisfying of sado-masochistic desires does not constitute a good reason for victim's consent to be defence to a charge under the Offences Against the Person Act 1861. According to the Law Lords, the violence involved in sado-masochistic encounters, which entails the indulgence of cruelty by sadists and the degradation of victims, is injurious to the participants and unpredictably dangerous. Other than the risk of serious harm or infection, the House of Lords emphasised the risk of moral corruption of youths, as some of the victims were introduced to sado-masochism before the age of 21. «Society is entitled and bound to protect itself against a cult of violence. Pleasure derived from the infliction of pain is an evil thing. Cruelty is uncivilised»¹⁰¹. The real question here revolves around the wrongfulness of the non-normative harm (the physical injuries) inflicted. Consent elides wrongfulness, as there is no infringement of individual autonomy. The victims did not suffer any wrongdoing, which is one of the essential requirements for criminalisation and punishment. However, the arguments of the House of Lords seem to imply that the decision is based not merely on the private harm caused (or the risk of greater harm posed), but especially on the belief that the violent sexual conduct that caused it is a risk of a (very remote) harm for society at large. This particular view is the weakest link of the Law Lords' reasoning, for neither evidence nor reasonable justification is given to support the idea that certain sexual behaviours might entail the risk of harm to society (corruption of the youth, promotion of a cult of violence etc.), which seems to be based exclusively on the Law Lords' own moral beliefs and undermined by the strictly private environments in which sado-masochism was practiced in the case. Incidentally, the European Court of Human Rights upheld, with questionable reasoning based on the significant degree of injury or wounding involved by the applicants' activities, the House of Lords decision, on the basis of the necessity to protect of health (not morality) *ex art. 8, par. 2, ECHR*¹⁰².

This account of the House of Lords' legal moralism and paternalism is confirmed by the stark contradiction with other decisions concerning consented injuries of non-sexual character and, more generally, with the acceptability of consensual violence in other contexts such as sports,

¹⁰⁰ [1994] 1 AC 212.

¹⁰¹ *Ivi*, 237.

¹⁰² *Laskey, Jaggard, and Brown v UK* (1997) 24 EHRR 39, especially parr. 45 and 51.

horseplay or non-therapeutic surgery and tattooing¹⁰³. In *Wilson*¹⁰⁴, the Court of Appeal acquitted a man who branded his initials on his wife's buttocks with a hot knife, upon her request. Like *Brown*, *Wilson* is a case of violence perpetrated in private and with the victim's consent. The physical injuries caused were more serious than in *Brown*. Nevertheless, the Court distinguished this case from *Brown* and quashed the conviction, on the assumption that the conduct of the appellant could be equated to tattooing and, therefore, should not be of any public concern, based on a supposed – but unexplained – social acceptability. This distinction is arbitrary and artificial and clearly has no other basis than the moral inclinations of the judges who rendered it.

More recent examples of criminalisation of harmless behaviours and legal enforcement of morality can be found in the so-called special part of criminal legislation. A notable example is that of the offence of possession of fabricated pornographic images of children, as established by section 62 of the Coroners and Justice Act 2009. The word «image» includes images of an imaginary child, as well as images conveying a predominant impression that the person shown is a child, even if portrayed with adult physical characteristics¹⁰⁵. The harmfulness or offensiveness of the mere possession of such images is highly debatable¹⁰⁶. Yet, the Home Office justified the introduction on the basis of professedly undemonstrated assumptions. «We are unaware of any specific research into whether there is a link between accessing these fantasy images of child sexual abuse and the commission of offences against children, but it is felt by police and children's welfare organisations that the possession and circulation of these images serves to legitimize and reinforce highly inappropriate views about children»¹⁰⁷. It is worth noticing how this approach is the same followed by English courts. No evidence of harm or the risk of harm, nor even of individual dangerousness, is given: only intuitions.

Even more striking and controversial is the offence of possession of extreme pornographic images established by sec. 63 of the Criminal Justice and Immigration Act 2008, whereby an extreme image is an offensive, disgusting or obscene image portraying, explicitly and realistically, life-threatening acts, acts resulting or likely to result in serious injury to a person's

¹⁰³ *R v Brown*, cit., 231, 245, 277. Cf. A.P. SIMESTER ET AL., *Simester and Sullivan's Criminal Law*, cit., 779.

¹⁰⁴ [1997] QB 47 (CA).

¹⁰⁵ S. 65. The Act does not concern indecent photographs or pseudo-photographs, which fall within the provisions of the Protection of Children Act 1978.

¹⁰⁶ S. OST, *Criminalising Fabricated Images of Child Pornography: A Matter of Harm or Morality?*, in *Legal Studies*, 30(2), 2010, London (UK), 230.

¹⁰⁷ Home Office, *Consultation on possession of non-photographic visual depiction of sexual child abuse*, London (UK), 2007, 1.

anus, breasts or genitals or sexual acts with corpses or animals¹⁰⁸. The image does not have to represent real persons or animals, provided that a reasonable person would think that the portrayed person or animal was real. The mere possession of such images is plainly harmless, especially in cases of realistic but artificial depictions. Being confined to the private sphere, it is also inoffensive and does not constitute a public wrong. The criminalisation of this conduct is eminently preventive in nature, as the consultation paper that announced the introduction of the offence made clear: «Our intention [...] is to try to break the demand/supply cycle and to discourage interest in this material which we consider may encourage or reinforce interest in violent and aberrant sexual activity. As to evidence of harm, conducting research in this area is complex. We do not yet have sufficient evidence from which to draw any definite conclusions as to the likely long term impact of this kind of material on individuals generally, or on those who may already be predisposed to violent or aberrant sexual behaviour»¹⁰⁹.

To these examples one can add the criminalisation of the breach of civil preventive orders, like ASBOs, which can result in the punishment of conduct that is not harmful in itself and it is less serious than the anti-social behaviour that the measure seeks to prevent¹¹⁰.

The conclusion is that the English criminal law is well far from recognising and implementing the harm and offence principles – not even as threshold principles, so as to exclude the criminalisation and punishment of primarily or purely immoral behaviours and stimulate «secular inquiries» about the effects of subjecting the conduct into question to the criminal sanction, as suggested by Herbert Packer¹¹¹. The only firm limit to both criminalisation and conviction is the requirement of a material act, according to the well-established principle whereby mere thoughts cannot be punished¹¹². The criminal character of this act, however, may derive purely from the author's intentions, rather than from its harmfulness¹¹³. In practice, the only mechanism currently enabling to keep into account the concrete harmlessness of a

¹⁰⁸ On this topic see, from different perspectives: N. COWEN, *Millian Liberalism and Extreme Pornography*, in *American Journal of Political Science*, 60(2), 2016, Bloomington (IN, US), 509-520; E. Rackley, C. McGlynn, *Prosecuting the possession of extreme pornography, A misunderstood and mis-used law*, in *Criminal Law Review*, 2013, London (UK), 400-405; S. EASTON, *Criminalising the Possession of Extreme Pornography, Sword or Shield?*, in *The Journal of Criminal Law*, 75(5), 2011, London (UK), 391-413; A. CARLINE, *Criminal justice, extreme pornography and prostitution, Protecting women or promoting morality?*, in *Sexualities*, 14(3), 2011, London (UK), 312-333.

¹⁰⁹ Home Office, *Consultation on the possession of extreme pornographic material*, London (UK), 2006, 2.

¹¹⁰ A. ASHWORTH, L. ZEDNER, *Prevention and Criminalization*, cit., 565.

¹¹¹ H. PACKER, *The Limits of Criminal Sanction*, Stanford (CA, US), 1968.

¹¹² *R v Higgins* (1801) 2 East 5.

¹¹³ On this A. ASHWORTH, *Criminal Attempts*, cit., *passim*.

behaviour already defined as criminal legislator in order to avoid unjust convictions resides within the scope of the prosecution's discretion not to prosecute¹¹⁴.

PART II: ITALIAN LEGAL SYSTEM

4. *The «principio di offensività» in the Italian legal theory.*

In Italy one principle encompasses the contents and the functions of the English principles of harm and offence. This is the *principio di offensività* (literally principle of harmfulness), whereby there cannot be crime without harm¹¹⁵: *nullum crimen sine iniuria*¹¹⁶. Such principle is directly concerned with the problem of the substantive definition of crime, rather than the act of criminalisation itself, of which the former is a logical antecedent. If crime is defined as necessarily harmful conduct, then harm is a constitutive element of crime. This means not only that the legislator cannot criminalise harmless behaviours, but also that the judge cannot consider criminal and therefore punish any concrete realisation of the criminalised conduct that, in the specific case, results to be harmless¹¹⁷. In other words, the principle of *offensività* is both a principle of criminalisation and a principle of judicial interpretation-application of criminal law.

The notion of *offesa* (harm) is unanimously interpreted as damage (*danno*) or danger (*pericolo*) of damage to a legal good¹¹⁸ – that is, the probability of harm. These definitions come from the penal code, which defines the «event» from which the existence of the offence depends, as the damaging or dangerous result of the action or omission of the offender (art. 40). The event is the possible naturalistic consequence of the offender's conduct – which is a constitutive element only of those offences that require it (*reati di evento*, the equivalent of the English result crimes¹¹⁹, such as murder, as opposed to *reati di pura condotta* – conduct crimes¹²⁰) – although, some consider it as the negative legal consequence that every crime must have, that is, the *offesa*

¹¹⁴ Compare the observations of A. ASHWORTH, *Criminal Attempts*, cit., 763 and J. HORDER, *Harmless Wrongdoing*, cit., 101.

¹¹⁵ For one, see G. MARINUCCI, E. DOLCINI, *Manuale di Diritto Penale*, Parte Generale, 5th ed., Milano (Italy), 2015, 10.

¹¹⁶ Cf., for instance, F. MANTOVANI, *Diritto penale*, Parte generale, 9th ed., Padova (Italy), 2015, 181.

¹¹⁷ S. VINCIGUERRA, *Appunti sull'inoffensività, la tenuità dell'offesa e la tenuità del reato in Italia nel secondo Novecento*, in E. DOLCINI, C.E. PALIERO (eds.), *Studi in onore di Giorgio Marinucci*, tome 2, *Teoria della pena*, Milano (Italy), 2081.

¹¹⁸ Cf. G. MARINUCCI, E. DOLCINI, *Manuale*, cit., 219.

¹¹⁹ D. ORMEROD, K. LAND, *Smith and Hogan's Criminal Law*, 14th ed., Oxford (UK), 53.

¹²⁰ *Ibidem*.

itself. In such framework, consummated harm is the destruction or a diminution of the legal good and potential harm is unequivocally defined as danger of damage, without terminological ambiguities, such as threat or risk of harm. Danger, in turn, is generally defined in term of probability¹²¹, that is, a «relevant possibility»¹²², although, like in the English legal system, there is discussion about the exact level of possibility. Moreover, some decisions still define danger as possibility¹²³. Offences criminalising mere endangerment are called *reati di pericolo*, as opposed to *reati di danno*, which require a consummated damage to the legal good. The former can be further distinguished in *reati di pericolo concreto* (crimes of concrete danger), which expressly require the causation of a concrete situation of danger, and *reati di pericolo astratto* or, better, *presunto* (crimes of abstract or presumed danger), which criminalise behaviours that the legislator presumes to be dangerous, although in fact they might not be.

The apparent clarity of the Italian definition of harm should not deceive, as the definition problem that affects the notion of harm in the English system in Italy is shifted on the notion of legal good, which might become an empty box. The problem is, therefore, the selection of legal goods deserving to be protected through criminal law: are mere feelings a legal good? Are moral beliefs acceptable legal goods? Is nuisance harm to any legal good? This also shows that the principle of *offensività* covers both the categories known in common law systems as harm and offence: the notion of legal good is flexible enough to include non-material goods (mental states, feelings) whose setback in common law is generally constitutive of offence¹²⁴ and the notion of *offesa* is broad enough to include any form of aggression to such goods, including those typically qualified as offence, such as communicative wrongs¹²⁵. For instance, until 2016, mere private insult was a criminal offence, because it was considered harmful to the legal good of personal honour¹²⁶ or personal dignity and decorum¹²⁷.

Like the harm and offence principles, the *principio di offensività* is the product of legal theory. Its roots can be found, on the one hand, in the Enlightenment idea that punitive powers could be used only against actions expressing a socially relevant harm to the natural rights pre-existing the

¹²¹ See, for instance, cass. pen., sez. IV, 25 January 2016, n. 12675; cass. pen., sez. IV, 21 October 2015, n. 45438; cass. pen., sez. I, 19 September 2014, n. 45001; cass. pen., sez. IV, 19 June 2012, n. 36639; cass. pen., sez. VI, 11 October 2005, n. 42726.

¹²² Cass. pen. sez IV, 13 March 2015, n. 14859. On the academic debate on the notion of danger, see, recently, A. BELL, *Pericolo e incolumità pubblica*, Santarcangelo di Romagna (Italy), 2015, Ch. 1.

¹²³ For instance, cass. pen., sez. V, 11 December 2013, n. 5260; cass. pen., sez. I, 14 October 2013, n. 49717; cass. pen., sez. V, 5 July 2006, n. 31451.

¹²⁴ On this, see *amplius* M. DONINI, «Danno» e «offesa», par. 1.

¹²⁵ Cf. A.P. SIMESTER, A. VON HIRSCH, *Crimes, Harms, and Wrongs*, cit., 91-137.

¹²⁶ Cass. pen., sez. V, 18 June 2015, n. 44401.

¹²⁷ Cass. pen., sez. V, 22 March 2012, n. 25431.

stipulation of the social pact¹²⁸ and, on the other hand, in the idea of legal goods (*Rechthsgüter*), as developed by Birnbaum¹²⁹, Binding¹³⁰ and, especially von Liszt, who conceived criminal law as instrument of protection of legal goods pre-existing legislation (so-called «material conception» of the legal good)¹³¹.

A fuller affirmation of the principio di *offensività*, however, came only after the entrance into force of the republican Constitution (1948). Indeed, during the Nazi-fascist era, legal positivism and technicism, led in Italy by Arturo Rocco¹³², deprived the legal good of any pre-legal meaning and identified it in the right of the state to be obeyed by its people¹³³ or, in Germany, in the duty of loyalty towards the *Führer*¹³⁴, thus absorbing crime into mere disobedience¹³⁵ and law into morals¹³⁶. The Constitution¹³⁷ reaffirmed a liberal-democratic relationship between the individual and the state, centred on the fundamental value of the human person (art. 2), with his or her inviolable liberty (art. 13), rights and freedoms (art. 2), as proclaimed by the detailed first part of the Constitution.

¹²⁸ I. KANT, *Metaphysik der sitten* (1797), in ID., *Werke*, Akademie-Textausgabe, vol. VI, Berlin (Germany), 1968; J. Locke, *Second Treatise of Government*, An Essay Concerning the True Original, Extent and End of Civil Government, London (UK), 1689, ch. 2; P.J.A. VON FEUERBACH, *Lehrbuch des gemeinen in Deutschland geltenden Peinlichen Rechts*, Giessen (Germany), 1812; C. BECCARIA, *Dei delitti e delle pene*, Milano (Italy), 1764.

¹²⁹ J.M.F. Birnbaum, *Über das Erforderniß einer Rechtsverletzung zum Begriffe des Verbrechens, mit besonderer Rücksicht auf den Begriff der Ehrenkränkung*, in *Archiv des Criminalrechts*, 14, 1834, Halle (Germany), 149-194, which is traditionally considered the initiator of the theorisations on «legal goods» as the object of criminal law protection as Mill's On Liberty initiated the debate on harm: see M. DUBBER, *Foundational Texts in Modern Criminal Law*, Oxford (UK), 2014, 12. On these developments in Germany, see A.K. AMELUNG, *Rechtsgüterschutz und Schutz der Gesellschaft*, Untersuchungen zum Inhalt und zum Anwendungsbereich eines Strafrechtsprinzips auf dogmengeschichtlicher Grundlage; zugleich ein Beitrag zur Lehre von der «Sozialschädlichkeit» des Verbrechens, Frankfurt a.M. (Germany), 1972; A. ESER, *Rechtsgut und Opfer*, Zur Überhöhung des einen auf Kosten des anderen, in U. IMMENGA ET AL. (Hrsg.), *Festschrift für Ernst Joachim Mestmäcker*, Baden-Baden (Germany), 1005-1024. More recently, also K. NUOTIO, *Theories of Criminalization and the Limits of Criminal Law: a Legal Cultural Approach*, in R.A. DUFF ET AL. (eds.), *The Boundaries of Criminal Law*, cit., 238-262.

¹³⁰ K. BINDING, *Die Normen und ihre Übertretung*, Eine Untersuchung über die rechtmäßige Handlung und die Arten des Delikts, Leipzig (Germany), 1872.

¹³¹ F. VON LISZT, *Der Begriff des Rechtsgutes im Strafrecht und in der Encyclopädie der Rechtswissenschaft*, in *Zeitschrift für die gesamte Strafrechtswissenschaft*, 1888, Berlin (Germany), 138.

¹³² Not to be confused with his brother Alfredo Rocco, the Minister of Justice during the fascist era after whom the Italian penal code is named.

¹³³ AR. ROCCO, *L'oggetto del reato e della tutela giuridica penale*, Contributo alle teorie generali del reato e della pena, Torino (Italy), 1913.

¹³⁴ Cf. especially G. DAHM, *Der Methodenstreit in der heutigen Strafrechtswissenschaft*, in *Zeitschrift für die gesamte Strafrechtswissenschaft*, 1938, Berlin (Germany), 225 and Shaffstein, *Der Streit um das Rechtsgutsverletzungsdogma*, in *Deutsches Strafrecht*, 1937, 335.

¹³⁵ See W. GALLAS, *Zur Kritik der Lehre vom Verbrechen als Rechtsgutsverletzung*, in *Gegenwartsfragen der Strafrechtswissenschaft*, in G. DAHM ET AL. (eds.), *Gegenwartsfragen der Strafrechtswissenschaft*, Festschrift zum 60. Geburtstag von Graf W. Gleispach, Berlin-Leipzig (Germany), 1936, 50 ff.

¹³⁶ Cf. G. FIANDACA, E. MUSCO, *Diritto penale*, Parte generale, 7th ed., Bologna (Italy), 11.

¹³⁷ Available in English language on <https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf> (28 August 2016). See also the academic translation edited and annotated by Carlo Casonato and Jens Woelk: <<http://www.jus.unitn.it/dsg/pubblicazioni/costituzione/costituzione%20genn2008eng.pdf>> (28 August 2016).

This «personalistic» approach inspires also the constitutional principles concerning criminal matters, such as the principle of legality and non-retroactivity of penal norms (*nullum crimen, nulla poena sine praevia lege poenali*, art. 25, par. 2), the principle of personal criminal liability (art. 27, par. 1), the presumption of non-culpability (art. 27, par. 2), the principles of humanisation of punishment and of «re-education» (art. 27, par. 3), the principles of fair trial and *audiatur et altera pars* (art. 111, par. 1 and 2) etc.

Such renovated liberal framework stimulated a critical rethinking of the criteria of legitimation of the punitive powers of the state¹³⁸ anchored to the Constitutional norms, in which the idea of criminal law as protection of legal goods found a renewed vitality. In this context, scholars have started investigating whether the principle whereby the state cannot punish harmless behaviours could have specific positive foundations either in the legislation or even in the Constitution itself.

4.1. *The attempt to find a positive foundation of the principle of offensività in the penal code.*

Many scholars saw the possible statutory foundation of a principle of necessary harmfulness in art. 49, par. 2 of the penal code¹³⁹, regulating impossible offences: «punishability is [...] excluded when the damaging or dangerous event is impossible, because of the inadequacy of the action or the inexistence of its object».

According to the traditional interpretation, art. 49, par. 2, would just represent the «negative side» of attempt, as regulated by art. 56, which requires «adequate acts unequivocally directed to commit a criminal offence». Thus, it would signify the prohibition of punishing impossible attempts and the need to judge the offender for the facts as they actually are, in an *ex post* perspective, instead of as he believed them to be¹⁴⁰. Unlike in the English law, the pickpocket who puts his hand into an empty pocket with the intent to steal could be therefore acquitted¹⁴¹. This is already a step towards the principle of *offensività*, but during the Fifties-Sixties scholars

¹³⁸ G. FIANDACA, E. MUSCO, *op. cit.* 11.

¹³⁹ Although drafted in the fascist era and entered into force before the Constitution, as a product of legal technicism, the Italian penal code of 1930 still preserved some of the most important liberal principles and had an exemplary systematic coherence, to the extent that, depurated of some (not all) illiberal elements, it is still into force. See AA. VV., *Il codice Rocco cinquant'anni dopo*, in *Quest. Crim.*, 1981; E. DOLCINI, *Codice penale*, in *Dig. disc. pen.*, vol. II, 1988, 270.

¹⁴⁰ In this sense, G. FIANDACA, E. MUSCO, *op. cit.*, 505-506. *Contra* S. VINCIGUERRA, *op. cit.*, 2088.

¹⁴¹ Italian courts, however, clarifies that the inexistence of the object has to be absolute or *in rerum natura*, and not merely temporary and accidental: see below, par. 5.

such as Marcello Gallo and Guido Neppi Modona¹⁴², started suggesting that art. 49, par. 2, expresses the more general principle, valid for all crimes, whereby the judge cannot convict when the action committed, although perfectly corresponding to the legal definition of the offence, does not cause any harm (danger or damage) to any legal good. The judge should first derive the legal good the legislature intended to protect from the intrinsic structure of the incriminating norm and then assess the concrete harmfulness of the offender's conduct accordingly.

This theory has been strongly criticised for two main reasons¹⁴³. First, it is logically contradictory, inasmuch as, on the one hand, it assumes that there might be offences that the legislator defines without any harm requirement, and, on the other hand, it implies that it is possible for the judge to detect a harmful dimension in the structure of every offence. Secondly, the detachment of harm from the statutory definition of an offence, as if it were an additional extra-legislative requirement, means abandoning the individuation of the protected legal good and, more generally, of the harmfulness of the criminalised behaviour to judicial discretion. The judges would participate to the definition of criminal offences, in overt violation of the Constitutional principle of strict legality in criminal matters¹⁴⁴.

A later orientation suggested that art. 49 could be interpreted as a statutory expression of the principle of *offensività*, at least as a criterion for judicial interpretation, provided that the role of courts is confined within the respect the principle of legality. Thus, the principle would still require the judges to convict only when the offender's acts concretise the harmful dimension of the offence, provided that it is expressly or implicitly identified by the incriminating norm in the form of damage or endangerment to legal goods (so-called *reati di offesa*: crimes of harm). But when the legislature irremediably criminalises harmless behaviours (so-called *reati senza offesa*: harmless crimes), then it is the constitutionality of the criminalising norm that should be questioned¹⁴⁵. However, this makes clear the inadequacy of art. 49 to set any constraints to the Parliament, which are rather to be sought in the Constitution.

4.2. *The constitutionally oriented theory of legal goods and the attempts of constitutionalisation of the principle of offensività.*

¹⁴² Cf. M. GALLO, *Dolo (Dir. pen.)*, in *Enc. dir.*, XIII, 1964, 786 and G. NEPPI MODONA, *Il reato impossibile*, Milano (Italy), 1965.

¹⁴³ For a synthesis and further references see G. FIANDACA, E. MUSCO, *op. cit.*, 503-505.

¹⁴⁴ Cf., for instance, F. MANTOVANI, *op. cit.*, 191-192.

¹⁴⁵ *Ivi*, 192-193.

An attempt to find the positive foundations to the principle of *offensività* in the Constitutional norms has been provided by Franco Bricola's constitutionally oriented general theory of crime¹⁴⁶. According to Bricola, the Constitution traces a specific normative substantive conception of crime as harm to constitutionally relevant legal goods. These can be goods expressly mentioned in the Constitution (explicit constitutional relevance) or goods that are only implicitly recognised by the Constitution (implicit constitutional relevance), for instance, because they are instrumental to the protection of explicitly relevant goods.

Bricola derives such a «constitutional face» of crime from the following principles.

a) *Individual liberty* (art. 13, par. 1): punishment affects directly (imprisonment) or indirectly (fines and financial sanctions) personal liberty, a good that the Constitution declares inviolable, qualifying it as one of the highest constitutional values. It follows that both the abstract threat (criminalisation) and the concrete infliction of punishment is justified only when strictly necessary to protect equally relevant constitutional goods.

b) *Legality* (art. 25, par. 2): the exclusive attribution of the power of making law in criminal matters to the Parliament («no one shall be punished but on the basis of a [statutory] law entered in force before the [criminalised] fact was committed») signifies a minimalist conception of criminal law as a very delicate instrument, to be used only as a last resort and according to specific legislative procedures.

c) *Personal criminal liability* (27, par. 1): the requirement that the criminal liability be personal – which includes imputability and culpability, with the consequent exclusion of any form of strict liability – reiterates the conception of criminal law as last resort, inasmuch as it poses structural limits to that particular form of liability so to reduce its employment in favour of other instruments of protection (e.g., civil and administrative liability).

d) *Re-education* (art. 27, par. 3): the affirmation of the re-educative tendency of punishment («Punishment shall tend to re-educate the convicted») implies a notion of crime as the breach of values that, in the light of pluralistic and democratic system traced by the Constitution also as opposed as the authoritarian framework imposed by fascism, cannot be identified in mere moral values, but rather in those values (goods) that the Constitution recognises as the foundations of a peaceful human society.

All these arguments support the conclusion that the Constitution implicitly affirms the principle whereby crime must necessarily be a significant harm to constitutionally relevant goods, which is known as *principio di offensività*.

¹⁴⁶ F. BRICOLA, *Teoria generale del reato*, in *Noviss. Dig. it.*, vol. XIV, Torino (Italy), 1973, 7-93.

During the last decades, many Italian scholars have furthered the idea of the constitutionalisation of such a principle¹⁴⁷, offering additional arguments. Mantovani, for instance, observes that the reference made by article 25, par. 2, to the criminal «fact», which in the language of Italian criminal law means the *actus reus* in its entirety, including both the action of the offender and its harmful (material or immaterial) consequences, presupposes that the state cannot punish behaviours or attitudes, such as mere disobedience, that do not result in any harm¹⁴⁸. Fiandaca and Musco add that, insofar as it frustrates the full expression of human personality, punishment affects not only liberty, but also social dignity, equality (art. 3) and all the fundamental rights, proclaimed by the Constitution, that are essential to that expression (art. 2). Therefore, the Constitution seems to justify punishment only to prevent harm to equally valuable and constitutionally relevant goods¹⁴⁹.

Despite its success, the constitutionally oriented theory has raised some criticism. In the very first place, some have observed that the Constitution is a polyvalent and somehow «ethereal» text that discloses a multiplicity of interpretative knots, from which it is impossible to derive a catalogue of goods and even less so a hierarchy of such goods¹⁵⁰. And, however, the category of goods that might have some constitutional relevance is so comprehensive, especially when it includes also implicitly relevant goods, that it is difficult to see how it could actually represent a constraint to legislative discretion. Moreover, the Constitution does not give any indication about the minimum amount or seriousness of harm required in order to justify criminalisation¹⁵¹.

Another criticism is that the principle of *offensività* still has merely normative character, as the Italian legislation, like the English one, makes large resort to the legislative techniques of the so-called «anticipatory penal protection» – namely, *reati di pericolo* and *senza offesa* –, which some consider necessary precisely to protect particularly relevant constitutional goods¹⁵², especially from forms of attacks unforeseen at the time of the entrance in force of the Constitution¹⁵³. Therefore, some deny the constitutionalisation of the principle of *offensività*¹⁵⁴

¹⁴⁷ See, notably, M. GALLO, *I reati di pericolo*, in *Foro pen.*, 1969, 8; E. MUSCO, *Bene giuridico e tutela dell'onore*, Milano (Italy), 1974, 81; G. MARINUCCI, *Politica criminale e riforma del diritto penale*, in *Jus*, 1974, 463.

¹⁴⁸ F. MANTOVANI, *op. cit.*, 182.

¹⁴⁹ G. FIANDACA, E. MUSCO, *Diritto penale*, cit., 13. See also G. FIANDACA, *La giustizia penale in Bicamerale*, in *Foro it.*, V, 1997, 161.

¹⁵⁰ S. RIONDATO, *Un diritto penale detto «ragionevole»*, Raccontando Giuseppe Bettioli, Padova (Italy), 2005, 97; F. MANTOVANI, *op. cit.*, 196-197.

¹⁵¹ Cf. T. PADOVANI, *Diritto penale*, 10th ed., Milano (Italy), 2012, 87-88 and F. ANGIONI, *Il pericolo concreto come elemento della fattispecie penale*, 2nd ed., Milano (Italy), 1994.

¹⁵² T. PADOVANI, *op. cit.*, 88-89. Compare his arguments with Horder's in his *Harmless wrongdoing*, cit., and Ashworth's *Principles*, cit.

¹⁵³ For a reply to these objections, see G. FIANDACA, E. MUSCO, *Diritto penale*, cit., 13.

and even that such principle implies a material conception of crime, with the consequence that the protected legal good does not pre-exist to crime but is to be derived from the incriminating norm¹⁵⁵. Others, while insisting on its constitutional foundation, maintain that the principle is not absolute, as it admits derogations in order to prevent harm to primary legal goods¹⁵⁶.

The critics of a direct constitutional foundation of the principle of *offensività* also notice that its supposed constitutionalisation is rather conveyed by the constitutionalisation of other principles, such as the principle – corollary of legality – of sufficient determinacy of law, inasmuch as a definition of offence that does not make clear the protected legal good lacks precision and clarity, or the principles protecting particular values, so that any criminal offence that should protect an interest contrasting with those values would be unconstitutional¹⁵⁷.

The critiques to the constitutionally oriented theory of legal goods and of the constitutionalisation of the principle of *offensività* do not undermine their main tenets, which need to be protected and promoted as some of the most important and original acquisitions of the Italian elaboration on these issues. In the first place, whether we agree or not about the constitutionalisation of the principle of *offensività*, the theory has the merit of anchoring its tenets to principles written in the Constitution, instead of relying on much more debatable philosophical, moral or natural legal principles. Incidentally, as Donini observes, the benefits of this approach go well beyond the mere issue of harm, as it has also stimulated a more general re-foundation of criminal law and re-systematisation of criminal legal theory on constitutional principles, rather than on abstract dogmatic categories, as it is now reflected in the structure of many Italian criminal law textbooks¹⁵⁸. Secondly, it offers the constitutional basis for a construction of the principle of *offensività* as a constraint both to criminalisation, as only the Constitution is above the legislator, and to judicial interpretation and application of criminal law (no punishment without a concrete harm), in harmony with the principle of legality. Thirdly, while it might be true that the Constitution does not lend itself to be construed as a rigid catalogue of legal goods, it is also true that constitutional principles are the expression of clearly identifiable fundamental values. Besides, this is, as Zagrebelsky points out, the nature of a principle: it does not dictate a specific rule but it affirms a value («rules are to be obeyed; principles are to be adhered to»)¹⁵⁹. These values outline a constitutional model of criminal

¹⁵⁴ S. VINCIGUERRA, *op. cit.*, 2080-2081

¹⁵⁵ G. NEPI MODONA, *Reato impossibile*, in *Dig. disc. pen.*, vol. XI, Torino (Italy), 1996, 267.

¹⁵⁶ F. MANTOVANI, *op. cit.*, 182-183 and 212.

¹⁵⁷ S. VINCIGUERRA, *op. cit.*, 2081.

¹⁵⁸ M. DONINI, *L'eredità di Bricola*, cit., 56 and *passim*.

¹⁵⁹ G. ZAGREBELSKY, *Il diritto mite*, Torino (Italy), 1992, 149.

offence and represent a «permanent pre-legislative constraint»¹⁶⁰ against which the constitutional legitimation of legislative choices of criminalisation and the validity of judicial interpretations can be assessed. Moreover, the breadth and flexibility of constitutional principles, provides criminal law with the necessary scope to adjust to the evolving needs of protection, both allowing for the identification of new emerging legal goods and for the introduction of new techniques of protection¹⁶¹.

In this framework, of course, the role of the Constitutional Court is crucial. And indeed the Constitutional Court seems to have followed the indications of the constitutionally oriented theory in different occasions. This is another merit of that theory, as it did not remain within the pages of academic books but it produced a considerable impact on the decisions of Constitutional court, which, in turn, produced legislative or interpretative changes, as we are about to see.

5. *The principio di offensività in the Italian law.*

The principle of *offensività* can be considered immanent in the Italian legal system¹⁶², provided that we acknowledge some contradictions. On the one hand, many parts of Italian law, including the Constitution, imply an underlying recognition of the principle, to the extent that both the Constitutional Court and the Supreme Court expressly recognise it as one of the fundamental principles of Italian criminal law, both as a limit to the legislature and as a criterion of judicial interpretation-application. This represents by itself an extraordinary and probably unique achievement of the Italian criminal law, capable of serving as a model to many different countries. On the other hand, the enforcement of the principle by the legislature and the courts is still incoherent and the constitutional review on legislation conflicting with the principle still weak. Recent legislative and judicial developments, though, suggest that the process towards a more stable implementation of the principle is still ongoing: the contribution of scholars, courts and the legislature in the years to come is therefore fundamental.

5.1. *Penal legislation.*

¹⁶⁰ M. DONINI, *Il principio*, cit., 22.

¹⁶¹ Cf. *ibidem* and G. FIANDACA, E. MUSCO, *Diritto penale*, cit., 17.

¹⁶² Vinciguerra, 2089-2090.

Indicators of a possible legislative recognition of the principle of *offensività* can be found in some norms of the penal code. Even without adhering to the theory that sees in it the statutory foundation of the principle, the non-punishability of impossible attempts declared by art. 49, par. 2, is a considerable example of the relevance that the harmful dimension of crime has in the Italian legal system even since 1930. Similarly, agreement and instigation to commit a crime, which in the English criminal law would fall under the offence of conspiracy, cannot be punished if the crime is not committed (art. 115, parr. 1 and 3). The underlying rationale of these dispositions is that no concretely harmless action should be punished. However, both art. 49 (par. 4) and art. 115 (parr. 2 and 4) establish that in these cases the judge can still apply a security measure. Security measures are applicable based on the judicial finding of individual dangerousness as manifested through the commission of a crime or a quasi-crime – such as the cases of art. 49, par. 2 and 115, parr. 1 and 3. In theory, they should have a rehabilitating purpose, but in practice they have restrictive contents similar to those of punishment and they are actually used as an additional instrument of social control.

Nevertheless, the impact of these norms on the judicial affirmation of the principle of *offensività* cannot be underestimated, as they suggest a practical application of the principle that goes beyond the idea of a tendential criterion of criminalisation and even beyond the mere consideration of the seriousness of harm to sentencing purposes (required, however, by art. 133, n. 2, whereby, in the exercise of his or her discretion in the application of punishment, the judge shall keep into account the seriousness of the offence, as derived, amongst others, from the «seriousness of the damage or danger caused to the victim»). And, indeed, even before the decisions of the Constitutional Court, criminal courts and the Supreme Court had come to apply the principle as a constraint to their own interpretative and applicative powers. For instance, with regard to forgery, the courts have always maintained that when the alterations to a genuine document are so evident and clumsy that even a distracted observer would notice them, the forgery is «absolutely inadequate to deceive» and the offender shall be acquitted, even if the intent to deceive and/or to cause prejudice is proved¹⁶³. Sometimes, this reasoning has been brought to the extremes. In 1989, the Supreme Court qualified as impossible crime the case of a robber who fired some gunshots against a jeweller who was behind by bulletproof glass, which saved him from being hit, as, in an *ex post* perspective, in the concrete circumstances of the case the shots were objectively inadequate to harm the protected legal good¹⁶⁴.

¹⁶³ Cass pen V 20.11.85

¹⁶⁴ Cass pen 15 maggio 1989, Lungaro, in Cass pen 1991, 574.

This approach is *ictu oculi* significantly different from that of the English law of attempts (and forgery), but it is certainly not representative of the variegated and at times contradictory case law on the principle of *offensività*. Indeed, certain decisions tend to restrict the scope of the principle. Just a few months later, the same section of the Supreme Court quashed the acquittal of a person who shot against the potential victim without killing her, because the bullet happened to lack propellant and thus got stuck in the barrel. The Court reasoned that, according to common experience and «to the situation as known and capable of being known by the offender», the committed acts were likely to cause the harmful event¹⁶⁵. Even more significantly, the Supreme Court has established that according to art. 49 punishability is excluded only when the inexistence of the object is absolute and original and not when it is merely «temporary and accidental». On the basis of such interpretation, the Court upheld the conviction of robbers who attempted to steal from empty purses, houses or safes¹⁶⁶. This interpretative line makes the law of impossible attempts closer to the English one.

Another relevant legislative development is the so-called decriminalisation, that is, the transformation of criminal offences in administrative offences. This policy is motivated partly by the lesser degree of harmfulness of decriminalised behaviours¹⁶⁷, according to a minimalist approach to criminal law, partly by the practical needs for a more prompt and effective repression and for deflating the workload of criminal courts. Nevertheless, many of the decriminalised offences are indeed «micro-harms» that could barely justify the resort to criminal law¹⁶⁸. The issue here is that of the alternatives to criminal law and, to some extent, of the boundaries between civil, administrative and criminal measures, which is also well-known in the English legal system and, more generally, in the common law tradition. The particularity of the Italian legal system is that the so-called *illeciti amministrativi* are regulated by an autonomous and quite developed legislative system, governed by its own principles and procedures.

The main legislative framework is provided by law n. 689 of 1981, which realised a first massive decriminalisation. The legislature was aware that moving certain offences out of the criminal law's domain could entail the risk of subtracting them from the application of traditional liberal safeguards for the liberty and rights of the defendant. Therefore, law n.

¹⁶⁵ Cass pen 2 apr 1990, Pesante, in Cass pen 1991, 1784, with an annotation by Cerase, *Contrasti giurisprudenziali in materia di reato impossibile*. Cf. Seminara, *Il Delitto tentato*, Milano, 960, n. 198.

¹⁶⁶ Cass. pen., sez. II, 22 February 1985; cass. pen., sez. II, 16 May 1985; cass. pen., sez. II, 21 November 1988; cass. pen., sez. I, 26 November 1991; cass. pen., sez. V, 5 February 1993; cass. pen., sez. IV, 11 March 1996, n. 8171; cass. pen., sez. II, 8 January 2009, n. 3189; cass. pen., sez. II, 13 November 2013, n. 8026.

¹⁶⁷ Cf. Siniscalco, *Depenalizzazione e garanzia*, Bologna, 1983, 124.

¹⁶⁸ G. FIANDACA, E. MUSCO, *Diritto penale*, cit., 905-906.

689/1981 expressly restated some of the fundamental principles of criminal law and procedure so to make them applicable also to the authors of administrative offences. However, not only there is no mention in that law of a principle of harmfulness whatsoever, but in a recent decision, the Supreme Court has stated that it is not possible to exclude liability for administrative offences on the basis of an evaluation of the harmfulness of the committed behaviour, and, specifically, of «its concrete adequacy to cause the proscribed effect», as this evaluation has been carried out *ex ante* by the legislator in establishing the administrative sanction¹⁶⁹. This decision is a departure – allowed by the supposed autonomy of the system of administrative offences – from the well-established judicial achievements on the principle of *offensività* in criminal cases. Its view of role of the judge as very formal and acritical can have the effect of creating an area of law in which the legislator can penalise –with mere fines, but potentially very high ones – harmless behaviours, in a framework where individual safeguards are however lower than in the criminal justice system. Thus, the alternative to criminalisation becomes more dangerous than criminal law itself.

Finally, harmfulness is considered by the legislator, together with other criteria, to exclude conviction in particularly trivial cases. The cause of non-punishability of young offenders for trivial and occasional offences aims at safeguarding the educational needs of minors¹⁷⁰. Similarly, art. 34 of legislative decree n. 274 of 2000, regulating criminal trials before the justices of the peace, establishes that the judge can dismiss the trial whenever the «fact is particularly trivial», that is, when «the insignificance of the damage or the danger that derived from it, its occasional nature and the degree of culpability with regard to the protected interest do not justify the exercise of penal action, also in consideration of the prejudice that the trial might cause to the work, study, family or health needs of the defendant». Finally, the newly introduced art. 131-*bis* of the penal code¹⁷¹ excludes the punishability of the author of offences for which the law establishes the penalty of imprisonment for up to five years or a fine, whenever the harm caused is particularly trivial with regard to the modalities of the conduct and the insignificance of damage or danger – except when the conduct is habitual or there are other aggravating factors increasing the degree of harmfulness.

All these cases are complex and problematic, also on the procedural level, and exposed to judicial distortions motivated by reasons of expediency rather than justice. What it is important to highlight here is that these norms represent another instance of legalisation of a minimalist

¹⁶⁹ Cass. civ., sez. II, 16 February 2016, n. 2956.

¹⁷⁰ Art. 27, decree of the President of the Republic n. 448/1988.

¹⁷¹ Introduced by legislative decree n. 28/2015.

approach to criminal law also based on the principle of *offensività*, although in a different perspective¹⁷². Indeed, they do not apply to concrete behaviours that are completely harmless, as it happens in the cases regulated by art. 49, par. 2. Instead, they apply to concrete behaviours that are perfectly corresponding to the legal definition and harmful, but so trivial that punishment would appear disproportionate and unjustified. Eventually, such norms end up in counterbalancing the rigidity of the constitutional principle of mandatory prosecution (art. 112) and the final result – the selection of facts based on the seriousness of their harmful dimension – is not much different from that achieved in the English legal system through the exercise of prosecution discretion¹⁷³.

5.2. *The decisions of the Constitutional Court and the Supreme Court of Cassation.*

A most important contribution to the affirmation of the principle of *offensività* in the Italian law came from a long series of judgments rendered by the Constitutional Court in the last thirty years¹⁷⁴. A perfect synthesis of the Court's positions is offered by the recent decision n. 109 of 9 March 2016. The Court recalls that, according to its established case-law, the principle of *offensività* operates on two different levels: on the one hand, as a command to the legislature, who can criminalise only facts that, in their abstract configuration, are capable of causing harm to goods or interests deserving protection (so-called «abstract harmfulness»); on the other hand, as an interpretative-applicative criterion for the judge, who, in assessing the correspondence of a concrete fact to the statutory definition of the offence, must exclude behaviours lacking any harmful potential («concrete harmfulness»)¹⁷⁵. The principle of *offensività* «in the abstract» does not imply that the only constitutionally legitimate model of criminalisation is that of *reati di evento*, but allows the legislature to resort to the model of crimes of abstract danger¹⁷⁶ and entrusts it with the individuation of the threshold of dangerousness that justifies the punitive

¹⁷² R. BORSARI, *La codificazione della tenuità del fatto tra (in)offensività e non punibilità*, Commento al d. Lgs. 28/2015, in *La legislazione penale*, 15 March 2016, 7 (also for further references).

¹⁷³ Cf. R. BORSARI, *ivi*, 4; F. CAPRIOLI, *Due iniziative di riforma nel segno della deflazione: la sospensione del procedimento con messa alla prova dell'imputato maggiorenne e l'archiviazione per tenuità del fatto*, in *Cass. pen.*, 2012, 17; R.E. KOSTORIS, *Obbligatorietà dell'azione penale, esigenze di deflazione e «irrelevanza del fatto»*, in AA.VV., *I nuovi binari del processo penale tra giurisprudenza costituzionale e riforma*, Atti del Convegno (Caserta-Napoli, 8-10 dicembre 1995), Milano (Italy), 1996, 1 ff.

¹⁷⁴ The decisions of the Italian Constitutional Court are published on www.cortecostituzionale.it, where the English translation of the most recent cases can also be found.

¹⁷⁵ Corte cost. n. 225/2008, n. 265/2005, n. 519/2000, n. 263/2000, n. 144/1991, n. 285/1991 n. 62/1986.

¹⁷⁶ Corte cost. n. 133/1992, n. 333/1991 and n. 62/1986.

response¹⁷⁷. In this case, however, it is necessary that the legislative evaluation of the abstract dangerousness of the facts to be criminalised is neither irrational nor arbitrary, but compliant with the *id quod plerumque accidit*¹⁷⁸. What is banned from legislative discretion is the resort to of crimes without harm (*reati senza offesa*), which seems to be considered irremediably unconstitutional¹⁷⁹.

The Court identifies the foundation of the principle of *offensività* in art. 25, par. 2 of the Constitution and in the need for respecting fundamental rights and the values connected to human dignity, both of which postulate an «uninterrupted operating of the principle of *offensività* from the moment of the abstract normative disposition to that of concrete application»¹⁸⁰, thus requiring that criminal liability be based on facts and not on personal qualities or on previous acts unrelated to the criminal offence¹⁸¹. The Court has explicitly affirmed its own power of constitutional review of legislation violating the principle of *offensività*¹⁸², to be carried out according to a criterion of reasonableness¹⁸³ embracing various principles, such as a fair balancing between opposite interests (especially between constitutional interests and rights)¹⁸⁴, strict necessity and last resort, the proportion between costs and benefits of criminalisation, the adequacy of criminalisation as a means to achieve the purposes pursued by the legislator and the fact that the selected legal good is actually deserving penal protection (c.d. *meritevolezza*)¹⁸⁵. And indeed, the Court actually came to declare the unconstitutionality of some pieces of legislation¹⁸⁶. Moreover, it has progressively expanded the scope of applicability of the principle, which operates not only with regard to the definition of the offence, but also to aggravating circumstances and, more generally, to all the dispositions that affect the individualisation and the final determination of punishment¹⁸⁷.

¹⁷⁷ Corte cost. n. 225/2008.

¹⁷⁸ Corte cost. n. 225/2008; similarly, n. 333/1991.

¹⁷⁹ See also on this development S. RIONDATO, *Un diritto penale*, cit., 122.

¹⁸⁰ Corte cost. n. 263/2000.

¹⁸¹ Corte cost. nn. 354/1988 and 249/2000.

¹⁸² Corte cost. n. 225/2008.

¹⁸³ On this see F. PALAZZO, *Offensività e ragionevolezza nel controllo di costituzionalità sul contenuto delle leggi penali*, in *Riv. it. dir. proc. pen.*, 1998, 350.

¹⁸⁴ Corte cost. n. 249/2010.

¹⁸⁵ Cf. the review of judgments proposed by S. RIONDATO, *Un diritto penale*, cit., 129-130.

¹⁸⁶ For instance, it considered the offence of drunkenness committed by persons previously convicted for a crime of intent (art. 688, par. 2, penal code) an «overt violation of the principle of *offensività*» as a limit to legislative discretion, whereas it criminalises a subjective status – the previous conviction –, rather than a criminal fact, since drunkenness is otherwise lawful (Corte cost. n. 354/2002). The Court also declared unconstitutional the aggravating circumstance of having committed an offence while being illegally in the Italian territory (art. 61, n. 11-bis penal code), as this does not increase the harmfulness of any crime, but is used to denote a «general and presumed negative quality» of the author (Corte cost. n. 249/2010).

¹⁸⁷ Corte cost. nn. 249/2010, 251/2010 and 105/2016.

After a certain resistance¹⁸⁸, this approach has been now fully endorsed by two recent decisions of the United Sections of the Supreme Court of Cassation¹⁸⁹. The Court remarked the «roots and the unexpressed hermeneutic potential» of the principle di *offensività*, by emphasising its constitutionalisation, achieved, following Bricola's theory, through the combined construction of various constitutional principles: art. 27, par. 3, as both the retributive and re-educative functions of punishment imply a harmful conduct; art. 25, par. 2, whereby the reference to a «fact» excludes the punishment of mere disobedience; art. 27, par. 1, which entails the prohibition of instrumentalisation of man for purposes of criminal policy. The Court also reiterated that criminal courts have the «obligation» to hermeneutically adapt criminal norms to Constitution, applying them only to facts concretely and appreciably harmful. Interpretation should reconcile the separation between legal definition of the offence and harmfulness: guided by the criterion of the legal good, judges will have to exclude from the possible meanings of criminalising norms those that imply harmless behaviours.

The extraordinary potential of the slow revolution led by the Constitutional Court is self-evident. Without subverting the principle of the separation of power and the exclusive parliamentary reservation of law-making in criminal matters, the Court followed many of the suggestions given by scholars to carve a constitutional principle out of a Constitution that does not proclaim it expressly. The principle is now so important and consolidated, that it is used as a criterion of judicial review. This must be clearly stated as it is right to attribute the proper merit to the Italian legal system for such a development, which, in its peculiar features, is probably a *unicum* worldwide. The approach of the Constitutional Court still has some limits.

In the first place, the idea that a harmful connotation is an «indispensable» element in the legal definition of each offence, in conjunction with the role of criminal courts in enforcing the principle of *offensività* «in concrete», especially as restated by the United Sections of the Supreme Court, entails the risk, anticipated by scholars, that the courts might be induced to find a harmful dimension at all costs, also in cases of blatant criminalisation of harmless behaviours, which should be rather referred to the Constitutional Court in order to assess their constitutionality. There might be, indeed, examples of formalistic approaches in which the courts have transformed offences without any harmful dimensions in crimes of damage¹⁹⁰. A clear example is that of the offence of unauthorised works on landscape heritage assets¹⁹¹, which is

¹⁸⁸ S. RIONDATO, *Un diritto penale*, cit., 125.

¹⁸⁹ Cass. pen. ss. uu., 25 February 2016, n. 13682 and 18 July 2013 n. 40354.

¹⁹⁰ Cf. S. RIONDATO, *Un diritto penale*, cit., 123-126.

¹⁹¹ Art. 181, legislative decree n. 42/2004.

defined by the legislator without any reference to harmfulness whatsoever. The Supreme Court has repeatedly declared that this is a «formal crime of danger» that is perfected, regardless any damage caused to landscape, by any intervention «abstractly capable of affecting, by modifying it, the original shape of the territory [...] carried out without or in contrast with the prescribed authorisation»¹⁹². This way, concrete danger is magically reduced to abstract danger and the function of control entrusted by the Constitutional Court to the ordinary courts is frustrated. However, it is also true that in many instances the courts have implemented the indications of the Constitutional Court in a restrictive sense. For example, in the case of cultivation of *cannabis* plants, the Supreme Court has constantly affirmed the principle that the correspondence of the plant with the botanic type prohibited by the legislator is not enough to convict: it is also required that the plant produces or is effectively and presently capable to produce enough active ingredients to have a narcotic effect and cause a concrete danger of increasing of the availability and diffusion of the substance¹⁹³. In a recent case of breaking home detention, the Supreme Court quashed the conviction by the Court of Appeal, because although the defendant was actually and intentionally out of his house in breach of the court order, there was no concrete harmfulness, as he did so after a fight with the wife and after having called the police to warn them that he would go out to wait for them, therefore he was never subtracted to the control of the police¹⁹⁴.

Secondly, along the same lines, there is the risk that the Constitutional Court might be too deferent towards the choices of the legislator. As Manes observes, the Court seem to have adopted a cautious self-restraint, «saving» from the unconstitutionality several offences suspected of criminalising harmless behaviours¹⁹⁵. Indeed, so far the declarations of unconstitutionality for the violation of the principle of *offensività* are outnumbered by the rejections¹⁹⁶. This cannot but facilitate the proliferation of crimes without harm. For instance, just like in the English legal system, the detention of virtual pornographic images representing children is a criminal offence, even when the images do not represent real situations but, because of their quality, they appear to do so (art. 600-*quater*.1 penal code).

¹⁹² Cass. pen., sez. III, 18 February 2015, n. 11048, which recalls sez III, 4 February 2014, 7343, sez. III, 8 June 2011, n. 28227, sez. III, 20 October 2009, n. 2903.

¹⁹³ Recently, cass. pen., sez. VI, 17 February 2016, n. 8058; cass. pen., sez I, 14 December 2015, n. 5204; sez. VI, 10 November 2015, n. 5254; cass. pen., sez. IV, 27 October 2015, n. 44136; cass. pen., sez. VI, 21 October 2015, n. 2618 and many others.

¹⁹⁴ Cass. pen., sez. VI, 6 October 2015, n. 44595

¹⁹⁵ V. MANES, *I recenti tracciati della giurisprudenza costituzionale in materia di offensività e ragionevolezza*, in *Dir. pen. cont.*, 1, 2012, 100-101.

¹⁹⁶ Cf. G. FIANDAFCA, E. MUSCO, *Diritto penale*, cit., 21-24.

PART III: COMPARATIVE ANALYSIS

6. *For a possible exportation of the Italian model to the English legal system.*

The English and the Italian approaches to the harm problem might appear quite different: (1) the Italian principle of *offensività*, covers, in the unitary notion of *offesa*, both harm and offence, which, in England, are the objects of two separate principles; (2) while the principle of *offensività* is both a principle of criminalisation and a principle of legal interpretation-application, the English harm and offence principles are mainly addressed to the legislator; (3) Italian courts acknowledge the legalisation and the constitutionalisation of the principle of *offensività* both as a principle of criminalisation and of interpretation-application and actually use it to prevent the application of criminal law to certainly harmless behaviours, while the harm and offence principles are scarcely applied by English courts; (4) unlike the English legal system, Italy can rely on a mechanism of constitutional review to scrutinise instances of unreasonable criminalisation of harmless wrongdoing; (5) the English debate on the legal enforcement of morals is particularly developed, while in Italy, as in other continental systems, legal positivism brought to a general agreement on the need to separate morals from criminal law¹⁹⁷.

There are, however, considerable similarities as well: (1) the principles of harm and offence and the principle of *offensività* still maintain, each in its own legal system, a high degree of normativity, as a full implementation of them is still yet to come; (2) both the English and the Italian legal system more or less explicitly recognise and actually implement the principle whereby no one can be punished for mere intention (*nullum crimen sine actione* or *cogitationis poenam nemo patitur*)¹⁹⁸, which is the basis of the principles of harm, offence or *offensività*; (3) both the harm principle and the principle of *offensività* admit the possibility of criminalising potential harm; (4) both the English and the Italian debates seem to converge, although from different routes, on the importance of a thorough reflection on the objects of penal protection (legal goods, interests, values etc.) and on their classification and grading; (5) like the harm and offence principles, the principle of *offensività* is conceived as necessary but not sufficient ground for criminalisation; (6) indeed, most importantly, the harm and offence principles and the

¹⁹⁷ Cf. M. DONINI, «Danno» e «Offesa», cit., par. 5-6.

¹⁹⁸ On this issue, M. DAN-COHEN, *Harmful Thoughts*, Essays on Law, Self and Morality, Princeton (NJ, US), 2009.

principle of *offensività* are all derived from or interconnected with different principles (autonomy, last resort, respect of human rights etc.).

The comparison between the two systems allows for interesting theoretical disquisitions, but what matters the most is which of them affords a more effective implementation of the principle whereby no harmless (or inoffensive) behaviour can be criminalised and punished. In this respect, despite its faults and contradictions, the Italian criminal law offers a more promising framework.

In the first place, the distinction between harm and offence seems pretty artificial. Both harm and offence are negative consequences affecting interests that society deems to deserve protection. Neither the notion of harm nor that of offence offers any final criterion to define the interests respectively affected by each category of consequences, nor to distinguish between the scope of the harm and offence principles. Nor the distinction is capable of providing additional constraints to criminalisation, as the blurred category of offence lends itself, even better than the already vague notion of harm, to be manipulated to criminalise mere immorality or disobedience. It rather seems to me that offence is a special type of harm – a particular modality of inflicting harm to particular human interests, generally (but not necessarily) of minor intensity of the setback caused by the traditional definition of harm. I do not see any sense and benefit in giving to a special form of criminal aggression such relevance as to make it the basis for a separate principle from the harm principle. If there were any, then we should admit the opportunity of having a different «harm principle» for any of the conceivable forms of aggression.

Important steps towards the unification of the two principles have already been taken by English scholars. Simester and von Hirsch highlight the common elements of harm and offence¹⁹⁹. Like harm, they argue, in order to be criminalised, offence needs to be wrongful. This distinguishes offence (and harm) from immorality, as the wrongfulness of both offence and harm signifies priority is given to the interests of people and not to mere morality. Moreover, offence can lead directly or indirectly to harm («harmful offence») and it only this kind of offence that, according to the authors, deserves criminalisation. The main difference between harm and offence would be that, while the wrong required by the harm principle «has no special marque»²⁰⁰, the wrong of offence is a «communicative wrong», which would involve no setback to the victim's interests or well-being, apart from the affronted mental state of the victim (mere

¹⁹⁹ See A.P. SIMESTER, A. VON HIRSCH, *Crimes, Harms, and Wrongs*, cit., 91-137 and ID., ID., *Rethinking the offence principle*, in *Legal Theory*, 8(3), 2002, Cambridge (UK), 269-295.

²⁰⁰ Ivi, 294.

affront)²⁰¹. This distinction is inconsistent²⁰². First, as Simester and von Hirsch admit, offence, especially when «harmful», might have physical or psychological consequences as much as serious as harm's (for instance, in the case of racial insult)²⁰³. Secondly, the idea that harm has no special marque, while offence is necessarily communicative is misleading. This is but a reflection of the *species* to *genus* relation between offence and harm: offence merely captures a specific modality of aggression to certain legal interests, while all the other forms of attack perpetrated with a non-communicative behaviour (violent, fraudulent etc.) would fall within the category of harm.

I suggest therefore that the offence principle should be absorbed by the harm principle in favour of a more fluid unitary conception of the negative consequences of crime, similar to the Italian idea of *offesa*, which would emphasise the importance of focusing, on the one hand, on the interests deserving to be protected through criminal law, and, on the one hand, on the many possible modalities of criminal aggressions to those interests. A single notion of harm, moreover, would be flexible enough to represent all the possible combinations between harmful modalities, harmful intensity and protected interest, without the rigidity of the harm-offence distinction. In the following paragraphs I will therefore use the expressions harm and harm principle so to include also offence and offence principle.

The Italian model is also preferable due to the twofold conception of the principle of *offensività* both as criterion of criminalisation and criterion of judicial interpretation. Conceiving the harm principle as a mere principle of criminalisation, as the English do, means halving its potential. A two-fold conception would allow the legislature to pursue its preventive objective by criminalise wrongdoing based on (reasonable and non-arbitrary) presumptions of also remote dangerousness, as the judge will not convict the defendant whenever such dangerousness is not concretised. Some arguments developed by common law scholars could support the introduction of this conception in the English legal system. Also relying on British authorities, Jerome Hall suggested that harm should be considered the «*ratio essendi* of the crime, for it is the criminal harm inflicted that makes the perpetrator's conduct sanctionable»²⁰⁴ and «the fulcrum between criminal conduct and the punitive sanction»²⁰⁵. In this sense, harm becomes a necessary element of crime to be proved in court, together with the other components of *actus reus* and with *mens*

²⁰¹ *Ivi*, 283.

²⁰² Compare also the observations by J. Stanton-Ife, *What is the principle of harm for?*, in *Criminal Law and Philosophy*, 10, 2016, 346.

²⁰³ *Ivi*, 288.

²⁰⁴ A. ESER, *The Principle of «Harm»*, cit., 346

²⁰⁵ J. HALL, *op. cit.*, 213.

rea, in order for the actor to be convicted. In another line of argument, Duff, Husak and Baker suggested that criminalisation goes beyond mere legislative activity, so to include also judicial interpretation²⁰⁶. If this is so, then the harm principle as criterion of criminalisation (broadly considered) addresses also the judiciary.

Another drawback of the English approach to the harm principle is given by the moral nature generally attributed to the principle and the scarcity of attempts to found it on legal or constitutional norms²⁰⁷. The peculiarities of the English legal system contribute to this situation. The lack of a written constitutional charter and of a constitutional court to enforce its principles prevents the immediate identification of hierarchically superior legal norms from which the harm principle can be derived. Moreover, the (constitutional) principle of Parliamentary sovereignty not only prevents the courts from overruling the legislation – thus being an obstacle to the development of a principle of harm conceived as an interpretative limit to the concrete infliction of punishment –, but also implies that the constitutional principles written in ordinary legislation or in courts' decisions can be easily changed by future Parliaments. Finally, the lack of a codified systematic general part of the criminal law hinders the search for a substantive legislative notion of crime as necessarily harmful or offensive conduct, which, although subject to the possibility of statutory derogation or abrogation, could at least provide a legislative basis for the harm principle. In such a legal context, the temptation is therefore to look for the foundations of the principle in the instable ground of moral values – some of which perhaps considered constitutionalised – that are supposed to inform the English legal system.

Founding the harm principle on moral grounds has two major practical problems. First, it raises the debate to very sophisticated philosophical levels, which, however rigorous, might be too complex or too far from legal practice to have an immediate impact on legislative and judicial decisions. Secondly, the English judiciary suffers from a longstanding lack of social diversity²⁰⁸, which might affect judicial decisions on morality. Until the Constitutional Reform Act 2005, the appointment of judges was based on a debatable system of consultations (so-called «secret soundings») between the Lord Chancellor – a politician – and the existing judges, who

²⁰⁶ A. DUFF, *Towards a Modest*, cit., 225; D. BAKER, *Constitutionalizing*, cit., 4; D. HUSAK, *Overcriminalization*, cit., 3-44.

²⁰⁷ Significantly, for instance, Simester and von Hirsch admit that their investigation is «moral rather than constitutional», as it seeks to answer the question, what conduct should a responsible legislator criminalise, instead of the question, what does such legislator have the legal authority to criminalise: A.P. SIMESTER, A. VON HIRSCH, *Crimes, Harms, and Wrongs*, cit., 31.

²⁰⁸ On this problem see P. DARBYSHIRE, *Darbyshire*, cit., 378-398 (also for further references). See also Darbyshire's most interesting investigation in EAD., *Where do English and Welsh Judges Come From?*, in *Cambridge Law Journal*, 66(2), 2007, 365-388.

recommended for appointment the barristers that they considered to be the most suitable amongst those they had the occasion to see at work in court²⁰⁹. This was a «self-perpetuating» system²¹⁰, as the judges tended to suggest for appointment people of their own social background, that is, mainly senior white males from the upper class. In such a framework, English courts might end up in identifying the moral values of the state with those of their own social milieu. Nor the possibility of jury trials is an effective corrective to the problem²¹¹, as only a minority of criminal cases are dealt with by juries²¹² and, however, especially on moral issues, particularly open to honest and reasoned disagreement, different juries might reach different conclusions²¹³, to the detriment of the principles of equality and legal certainty. It is therefore necessary to find some legal, if not constitutional, foundations to the harm principle.

One significant contribution to the constitutionalisation of the harm principle in a common law perspective – although mainly focused on the US and Canadian legal systems and limited to the question of the legitimacy of imprisonment²¹⁴ – has been offered by Dennis Baker. Baker acknowledges the moral nature of the harm principle and the fact that, unlike constitutional rights, it has no legal force, but he suggests that it is one of the principles of morality that underlie the constitutional recognition of fundamental rights, unified by a Millian idea of individual autonomy, and that, therefore, constrain the judicial interpretation in the decisions that concern such rights²¹⁵. Baker's suggestion has important merits. First, it recognises the need for anchoring the harm principle in the constitutional fabric, instead of leaving it to legal philosophy. Secondly, as we saw, it suggests that harm prevention is a condition for the justification not only of criminalisation, but also of the infliction of punishment (at least when it involves imprisonment). Thirdly, it admits the possibility for the legislator to criminalise harmless behaviours, but envisages a possible form of control in harm-based judicial interpretation as a limit to the infliction of at least the most serious punishments.

Baker's arguments are close to some of those that, in a more complex and stratified fashion, brought to the constitutionalisation of the principle of *offensività* in Italy. Indeed, while focused on Italian positive norms, the Italian constitutionally oriented approach relies on principles based

²⁰⁹ P. DARBYSHIRE, *Darbyshire*, cit., 380-381 and House of Commons Home Affairs Committee, *Judicial Appointment Procedures*, vol. II, third report for the session 1995-1996, London (UK), 1996, 219.

²¹⁰ *Ivi*, 5.

²¹¹ Cf. P. DEVLIN, *Law, Democracy and Morality*, in *University of Pennsylvania Law Review*, 110, 1962, Philadelphia (PA, US), 648 and also ID., *The Enforcement*, cit., 20-21.

²¹² P. DARBYSHIRE, *Darbyshire*, cit., 430.

²¹³ A.P. SIMESTER ET AL., *Simester and Sullivan's*, cit., 655.

²¹⁴ D. BAKER, *Constitutionalizing*, cit., 12.

²¹⁵ *Ivi*, 9-10 and *passim*.

on the fundamental conception of the human person as the ultimate value that the state and its legal order are called to protect, and therefore shared by any liberal-democratic legal system²¹⁶. Its methodology and many of its arguments are therefore applicable, amongst others, to the English constitutional framework – which is based on the same principles – in order to support the constitutionalisation of a unified harm principle (including, that is, harm and offence), also as criteria of judicial interpretation and application.

6.1. *A constitutionally oriented theory of the harm principle. The constitutional and positive legal foundations of the harm and offence principles in the English legal system.*

Both the principle of *offensività* and the harm principle are functional to the protection fundamental human values such as dignity, liberty, autonomy and the basic rights that are conditions for their full enjoyment. As such, those principles derive from, depend on and operate in close connection with a number of primary principles expressing and protecting the above values and rights. In the English legal system, like in the Italian one, these are proper constitutional principles, rooted in the libertarian tradition of the English rule of law dating back to the Magna Carta of 1215 and the Bill of Rights of 1689, and now explicitly affirmed, on the one hand, by many international conventions to which the United Kingdom is a party – including the Universal Declaration of Human Rights (UDHR) of 1948, the European Convention on Human Rights (ECHR) of 1950, which were drafted with the collaboration of British lawyers such as Sir David Maxwell-Fyfe²¹⁷, the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) both of 1966 – and, on the other hand, by the Human Rights Act (HRA) 1998, which incorporated the dispositions of the ECHR in the English legal system. While the latter can be considered one of the sources of the British Constitution²¹⁸, the UDHR, the ICCPR and the ICESCR are however sources of English law imposing obligations on the state that the rule of law demands to fulfil²¹⁹.

A) *Liberty, dignity, equality and fundamental rights.* Both the principle of *offensività* and the harm principle are founded on the values of individual liberty and autonomy, which are directly affected by punishment. We saw that in Italy individual liberty is declared inviolable and

²¹⁶ M. DONINI, *Il principio di offensività*, cit., 11.

²¹⁷ W.A. SCHABAS, *The European Convention on Human Rights, A Commentary*, Oxford (UK), 2015, 331 and P. DARBYSHIRE, *Darbyshire*, cit., 81.

²¹⁸ R. BLACKBURN, *Enacting a Written Constitution for the United Kingdom*, in *Statute Law Review*, 36(1), 2015, Oxford (UK), 4.

²¹⁹ T. BINGHAM, *The Rule of Law*, London (UK), 2010, Ch. 10.

protected against arbitrary state interference by art. 13 of the Constitution, while individual autonomy finds a strong recognition in art. 27, which traces a system of criminal liability based on an idea of the individual as capable of free choices and responsible for them. In England, individual liberty is proclaimed by art. 5 of the ECHR, artt. 3 and 9 of the UDHR and by art. 9 of the ICCPR. The principle of autonomy underlies several dispositions of the UDRH, the ECHR (notably, artt. 8-12) and the ICCPR (e.g., artt. 17-20, art. 21-23) based on the idea of self-determination. Other values expressive of human personality and typically affected by punishment, such as dignity, equality and fundamental rights, are explicitly proclaimed and protected by the dispositions of the UDHR (artt. 1 and 7), the ECHR and the ICCPR. Now, following the arguments of the Italian constitutionally oriented theory, we may say that since punishment affect such fundamental human values protected by the English legal and constitutional norms, then the same norms clearly cannot justify the resort to punishment (criminalisation and conviction) for any other reason than preventing harm to equally valuable and constitutionally relevant goods, interests or values. The constitutional relevance can be explicit or implicit, for it might be necessary to protect through the means of criminal law goods that are instrumental to the protection of the values and interested expressly proclaimed by the HRA and other constitutional norms.

B) *Welfare*. The principle of welfare finds recognition – as foundation of both state obligations to promote the conditions of autonomy and to refrain from undue interferences – not only, implicitly, in the HRA and in the UDHR, since the proclamation of rights and freedoms presupposes that the state respect them and provides the structures and facilities required for their full exercise, but also, more explicitly, in the ICCPR and the ICESCR, both of which establish the obligation for member states to ensure the enjoyment of all economic, social and cultural rights set in the Covenants (art. 2 ICCPR and art. 3 ICESCR).

C) *Legality*. Nowadays criminalisation is entrusted exclusively to the Parliament²²⁰. As it has been acknowledged also by the House of Lords in *Jones et al*, there exists no power in the courts to create new criminal offences²²¹. The principle is strengthened by the constitutional principle of Parliamentary sovereignty. This framework cannot be equated with the principle of legality established by art. 25 of the Italian Constitution, but, like the former principle, it conveys the idea that criminal law is a very delicate instrument to be used only as a last resort and according to specific legislative procedures, in a perspective of minimum criminalisation.

²²⁰ Cf., *ex multis*, A.P. SIMESTER ET AL., *Simester and Sullivan's Criminal Law*, cit., 44.

²²¹ [2006] UKHL 16, 28. Here the House of Lords refers also to its unanimous decision in *Kneller*, cit.

D) *Prohibition of degrading treatment*. The English legal system does not know a principle of personal criminal liability, as stated by art. 27, par. 1, of the Italian Constitution, as it admits strict liability offences. However, the principle of *mens rea*, in conjunction with the principle of autonomy, reflects the idea that the individual should be held responsible only for his own choices²²². There is no trace, in English law, of a principle of re-education, as established by art. 27, par. 3 of the Italian Constitution, but the prohibition of torture and cruel, inhuman or degrading treatment or punishment (art. 3 ECHR, art. 5 UDHR, artt. 7 and 10 ICCPR) presupposes the awareness of the negative contents of punishment and its retributive dimension and aims at protecting the convicted from any treatment that would degrade his dignity. These principles imply a conception of the human person as a value, and never as an instrument, which forbids the compression of harmless expressions of individual autonomy and liberty, also through criminalisation and conviction, for purely pre-emptive purposes. More generally, this framework, in putting more constraints to criminalisation and punishment, reiterates the idea of criminal law as last resort.

E) *Pluralism*. The highly pluralistic approach of the ECHR, the UDHR, the ICCPR and the ICESCR, similar to that of the Italian Constitution, together with the minimalist conception of criminal law traced by the above dispositions, excludes the possibility that the values protected through criminal law can be identified with the moral values of the state, not even when they reflect the views of the majority of people. This interpretation is not undermined by the possibility of legal state interferences with individual rights and freedoms necessary for the protection of morals established by several articles of the ECHR and ICCPR. The European Court of Human Rights (ECtHR) clarified that the test of necessity is satisfied only by «pressing social needs»²²³ – another expression of the idea of last resort – and that the protection of morals cannot be rigidly distinguished from the protection of the rights and freedoms of others, as it may imply either «safeguarding the moral ethos or moral standards of a society as a whole» or protecting the «moral interests and welfare of particular sections of society, which the Court identifies in the vulnerable members of society, such as the young, the mentally disabled, etc.»²²⁴. In the restrictive interpretation of the Court, the moral ethos of society as a whole cannot be identified with that of majority of its members, but rather in the minimum, but generally accepted moral ethos that characterises the liberal-democratic framework of the state, as

²²² A. ASHWORTH, J. HORDER, *Principles*, cit., 74.

²²³ *Dudgeon v UK* (1982) 4 EHRR 149, par. 51; *Norris v Northern Ireland* (1988) 13 EHRR 186, parr. 44 and 49.

²²⁴ *Dudgeon v UK*, cit., parr. 47-49; *Norris v Northern Ireland*, cit., par. 42.

reflected, first of all, in the values, rights and freedoms intrinsic to human personality, of which the pluralism is a corollary.

F) *Act or omission*. Art. 7 of ECHR, art. 11 UDHR and art. 15 of ICCPR make express reference to «an act or omission» as the minimum material basis for a criminal offence – which confirms at a constitutional level the principle of *nullum crimen sine actione*, which is the first step towards the harm principle. Moreover, although, unlike the term «fact» mentioned by art. 25, par. 2, of the Italian Constitution, the expression «act or omission» seems to indicate merely the conduct element of the *actus reus*, in the light of the principles summarised in the previous points it is clear that such act or omission can be relevant for criminal law only because of its negative consequences on the interests of other individuals or society at large. This confirms that the state cannot punish mere disobedience or mere immorality.

A comprehensive reading of all these principles supports the conclusion that the British Constitution and the obligations imposed on the United Kingdom by international law imply the principle that the resort to punishment, both by the legislator (criminalisation) and the judge (conviction), is justified only for the prevention of harm to goods (interests, rights and values) explicitly or implicitly recognised by the constitutional sources and representing the essential conditions of a peaceful and orderly society²²⁵. This implies the possibility of criminalising and punishing both consummated harms and potential harms, in order not to frustrate the preventive purpose, but at the same time it sets potential harm as the lower limit of the legitimacy of criminalisation and conviction. The Parliament can resort to anticipatory techniques of criminalisation to protect particularly vulnerable goods when any other means would be ineffective, provided that the acts to be criminalised can be presumed to be at least dangerous for those goods according to the best experience, of which the Parliament is to give evidence (*abstract harm principle*). It is not necessary for the legislator to include in the definition of the offence an express requirement that the criminalised behaviour be harmful or dangerous also in concrete, as the (constitutionalised) idea of punishing only what is somehow conducive to harm is implicit in the very same rationale of the criminalisation. It will be a duty of the courts to assess, in their interpretation and application of criminal law, whether the conduct of the defendant is concretely harmful in the circumstances of the case, with regard to the goods that the statutory offence aims at protecting (*concrete harm principle*). This system would preserve the preventive effect of (reasonable and non-arbitrary) instances of criminalisation of wrongdoing that is harmful only *in abstracto*, while protecting the individual from convictions in

²²⁵ Cf. A. ASHWORTH, J. HORDER, *Principles*, cit., 31.

case of concretely harmless wrongdoing. The criminalisation of totally harmless behaviours or behaviours assumed to be harmful on arbitrary or irrational bases is forbidden – in fact, unconstitutional.

6.2. Mechanisms of implementation.

This transposition of the Italian constitutionally oriented theory to the UK constitutional framework raises many questions, especially about its practical implementation. How can the courts, in a system ruled by Parliamentary sovereignty, interpretatively add a requirement (concrete harmfulness) when it is not included in the statutory definition of a criminal offence? Even worse, how can the courts override statutory dispositions, such as those criminalising impossible attempts, whereby the legislator expressly requires the punishment of concretely harmless acts, based on the criminal intent of the offender? And what if the Parliament does not give any evidence of the abstract harmfulness of a criminalised behaviour, as it happened for the criminalisation of extreme pornography and virtual child pornography, or the assumption of harmfulness appears to be arbitrary?

The first question concerns the problem of the legitimation of judges to perform a so-called «diffused control» of the conformity of legislation to the harm principle. This problem is not necessarily distinctive of the English constitutional system with its Parliamentary sovereignty, as it might well be posed also in relation to the principle of strict legality in criminal matters typical of continental traditions such as Italy. A solution can be found not only on the grounds of principles, but also in specific constitutional provisions. In a system governed by the rule of law, it is to be assumed that the principle of Parliamentary sovereignty aims at ensuring the democracy of law-making, thus protecting the interests of the people, rather than parliamentary powers in themselves – exactly in the same way as the principle of legality is aimed at favouring the individuals, rather than the legislature itself. This is confirmed also by the principle of separation of powers, which entails a reciprocal control between the different powers of the state. So, when statutory law lends itself to interpretations that might contrast with the interests and rights of the human person as protected by the British constitution, it seems reasonable, in the light of the above principles, that the courts seek to avoid them in favour of interpretations that are more respectful of such interests and rights. In the UK, these principles find a constitutionalisation in section 3 of HRA, whereby, «so far as it is possible», primary and subordinate legislation «must be read and given effect in a way which is compatible with the

Convention rights» - without this affecting «the validity, continuing operation or enforcement of any incompatible primary legislation».

The problem is different when such a compatible interpretation is not possible, due to the literal formulation of legislation or to its intrinsic irrationality or arbitrariness. This brings us to the second and the third questions, which concern the problem of the lack of any form of judicial constitutional review of legislation in the English legal system. While they cannot be equated to the role of a constitutional court, there are three forms of control on the compatibility of legislative choices with the Convention, other than judicial interpretation. The first one operates *ex ante*, before the enactment of legislation, the others *ex post*, after a statute has entered into force.

Standing Order n. 152B of the House of Commons established a Joint Select Committee on Human Rights to consider «matters relating to human rights in the United Kingdom» (excluding individual cases). One of the roles that the Committee has undertaken so far is to scrutinise every Government Bill for its compatibility with human rights – not only those under the ECHR, but also common law fundamental rights and liberties and the human rights contained in other international obligations of the UK²²⁶. Of course, this instrument of control has limits, as it has been created by the Parliament (and by the Parliament could be eliminated) and it is entrusted to members of the Parliament.

The second form of control is up to the judiciary. Section 4 of the HRA establishes that if a court (High Court or superior) is satisfied that a legislative provision is incompatible with a Convention right, it may issue a declaration of incompatibility. The weakness of such remedy is that the declaration does not invalidate the incompatible provision, which still has to be applied in the particular case. Moreover, there is no obligation for the Parliament to amend such a provision, with the result that the effective protection of conventional rights and principles is still in the hands of the Parliament²²⁷. The Joint Committee, however, scrutinises the Government's response to court judgments concerning human rights and it seems quite rare that the Parliament would refuse to take any action after a declaration of incompatibility. Since the HRA came into force on 2 October 2000, UK courts have made 29 declarations, of which 20 have become final²²⁸. Of these 12 have been remedied by later legislation, 3 have been remedied by a remedial order under section 10 of HRA, 4 related to provisions that had already been remedied by

²²⁶ House of Lords, House of Commons Joint Committee on Human Rights, *Human Rights Judgments*, Seventh Report of Session 2014-2015, HL Paper 130, HC 1088, London (UK), 11 March 2015, 3.

²²⁷ Cf. V. BOGDANOR, *The New British Constitution*, Oxford (UK) and Portland (OR, US), 2009, 59-61.

²²⁸ *Human Rights Judgments*, cit., 17.

primary legislation at the time of the declaration, and 1 is under consideration as to how to remedy the incompatibility²²⁹. Moreover, if the Parliament should decide not to remedy the incompatibility, a litigant would have a strong case to bring before the ECtHR²³⁰, which is the third form of control on legislation.

The ECtHR cannot invalidate British legislation in the way a constitutional court would do, but its decisions have important effects on the English legal system. They are binding on the United Kingdom by virtue of the obligations taken under Convention (art. 46) and, although they are not binding on English courts, the UK Supreme Court has stated that it would have to involve some truly fundamental principle of law or the most egregious oversight or misunderstanding before it would be appropriate for the Supreme Court to refuse to follow Grand Chamber decisions of the ECtHR²³¹. Moreover, the Joint Committee also scrutinises the UK's compliance with its international human rights law obligations.

It is true that the decisions of the ECtHR on issues related to harm have been quite cautious so far (the *Laskey* judgment is the clearest example), like those of the Italian Constitutional Court on alleged violations of the principle of *offensività*. There have been, however, cases in which the Court considered certain instances of criminalisation of harmless behaviours – based on a misconceived idea of the protection morals – a violation of human rights²³². Moreover, in the constitutionally oriented model outlined above, the intervention of the ECtHR should not be the norm, but the exception, as the conception of harm as principle of both criminalisation and judicial interpretation-application, allows to solve many cases of suspected illegitimate criminalisation – namely those based on a reasonably presumed harmfulness, which may not be realised in the concrete case – through the ordinary interpretative activity of the courts.

7. Conclusions

The comparative analysis shows that, despite their still limited enforcement, the principles of harm, offense and *offensività* have an extraordinary applicative potential. Particularly, the comparison between the English and the Italian law discloses the still unexpressed possibilities of the harm principle and, to a certain extent, the direction of some possible evolutions.

²²⁹ *Responding to human rights judgments*, Report to the Joint Committee on Human Rights on the Government response to human rights judgments 2013–14 Presented to Parliament by the Lord Chancellor and Secretary of State for Justice by Command of Her Majesty, London (UK), December 2014, 32; and *Human Rights Judgments*, cit., 19.

²³⁰ *V. BOGDANOR*, *op. cit.*, 60.

²³¹ *R (on the application of Chester) v Secretary of State for Justice* [2013] UKSC 63, 27.

²³² *Dudgeon v UK*, cit. and *Norris v Northern Ireland*, cit.

In the first place, the distinction between harm and offence is questionable, insofar as the latter seems to be a species of the former. A unitary category of harm, similar to the Italian notion of *offesa*, comprehensive of both harm and offence would help academic clarity, law-making and judicial reasoning. Secondly, the harm principle should be intended not only as a principle of criminalisation (*abstract harm principle*), but also as a principle of judicial interpretation-application (*concrete harm principle*), thus acting as a much more powerful constraint to state coercion through legal penalties. Thirdly, since the UK constitutional principles, as well as the UK international law obligations, imply a minimalist conception of punishment (criminalisation and conviction) as justified only when necessary to prevent harm to constitutionally relevant legal interests, we can positively conclude that the harm principle, in its both abstract and concrete dimensions, is a constitutionalised principle of the English criminal law. The mechanisms established by the Human Rights Act 1998 and by the European Convention of Human Rights – namely the diffused interpretative control by criminal courts, the declaration of incompatibility, the Joint Select Committee on Human Rights and the judgments of the European Court of Human Rights – should ensure its enforcement.

To be sure, more research is needed to test, assess, criticise, develop, and improve this constitutional approach to the harm problem – in Italy as in the UK (for instance, it would be interesting to explore the role of juries in the implementation of the principle of concrete harm). But one thing is certain: the harm principle is far from being useless. Much work is still to be done. At a national level, it is up to scholars, courts and lawmakers to take full advantage of the several possible legal and constitutional bases of the harm principle to develop all its potentialities. At a global level, the challenge, particularly for legal scholars, will be to initiate a comparative dialogue to share models, methodologies and categories, towards the establishment of an increasingly global grammar of the harm principle.