Criminal law and constitution

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Abstract 1

This essay aims to provide some details on the current situation of the classic relationship between criminal law and constitution law in the democratic states of continental Europe and South America, which do not belong to the common law tradition. For this purpose, an account of the historical experience of the constitutionalisation of criminal law in Europe is offered, as well as observations on the most recent scope of this phenomenon in the legal systems of Latin American States. Furthermore, the issue of the relationship between fundamental rights and criminal law is approached from the double perspective of its defensive function against public interference and its protective function against usurpations of legal assets by third parties, to show how both functions of fundamental rights are related to each other within the limits that the constitutional law sets to criminal law.

I. Introduction

There is a particularly close relationship between criminal law and constitutional law in the democratic States of continental Europe and South America.[1] Criminal law sets limits to the (excessive) exercise of the constitutional freedoms by citizens, while the (disproportionate) exercise of the *ius puniendi* is limited by a constitution. Constitutional law presupposes the 2

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1 This paper concerns the legal experiences of Germany, Italy, Portugal, and Spain regarding the European continent, and the legal experiences of Argentina, Chile, Colombia, Uruguay, and Peru regarding the South American continent. These countries have been selected due to the origin of the bibliographical sources used, but also to the transfer of legal knowledge that has taken place between these countries, which have a similar background of political history.

existence of criminal law to ensure the order of values of legal peace and, simultaneously, criminal law presupposes the existence of a constitution or, at least, of a series of values that are so fundamental in society that punitive coercion cannot be renounced.[2]

3 However, the relationship between criminal law and constitutional law is not exempt from problems in practice. A profound lack of detailed research in this area produces a serious lack of clarity regarding the extent to which constitutional law influences criminal law. This, in turn, generates a certain sense of arbitrariness, ambiguity, and uncertainty regarding this influence. The development of criminal law in continental European and South American countries mentioned in note 1 has not sufficiently considered the paradigm shift introduced by fundamental rights, nor has the development of constitutional law in these countries taken into account the classical postulates of criminal law theory.[3] Thus, the lack of transparency in the relationship between criminal law and constitutional law must be examined more closely.[4]

II. Constitutionalising Criminal Law

4 Since the Enlightenment, modern criminal law has been developing its own limits in the laboratory of sociology, philosophy, and political theory. However, the real capacity of constitutional law of continental European and South American countries to limit the scope of criminal law dates back no more than thirty years, when the fundamental rights theory and the constitutional principle of proportionality began to be developed. This has given rise to a conceptual framework to criminal law that is self-sufficient to

2 Klaus Tiedemann, *Verfassungs und Strafrecht*, (C. F. Müller 1991) 1, 59; Eduardo Demetrio Crespo, *El Derecho penal del Estado de Derecho entre el espíritu de nuestro tiempo y la Constitución* (Reus 2020) 110; Kai Ambos, 'Ius puniendi and Constitution: A Comparative (Canadian-German) Perspective' (2020) 14 *Vienna Journal on International Constitutional Law* 253 ff.

3 Otto Lagodny, *Strafrecht vor den Schranken der Grundrechte: Die Ermächtigung zum strafrechtlichen Vorwurf im Lichte der Grundrechtsdogmatik, dargestellt am Beispiel der Vorfeldkriminalisierung*, (Mohr Siebeck GmbH & Co 1996) 73; Ivo Appel, *Verfassung und Strafe. Zu den verfassungsrechtlichen Grenzen staatlichen Strafrechts* (Dunker & Humblot 1998) 44 ff., 95 ff., 303 ff.

4 Johannes Kaspar, *Verhältnismässigkeit und Grundrechtsschutz im Präventionstrafrecht* (Nomos 2014) 47.

the rest of public law, and especially to constitutional law of the European and South American democratic countries mentioned.[5]

This 'difference in tempo' between the elaboration of the internal limits of criminal law and the provision of real constitutional borders to the *ius puniendi*, has entailed that the substantive principles and categories of criminal law count on hardly capacity at present to generate the links that initially intended. Principles as subsidiarity, proportionality and ultima ratio encounter serious difficulties to prevail over political decisions on penal matters which do not respect its requirements. This is the case of the Constitutional jurisdictions of Europe and South America above mentioned.[6] 5

However, the process for constitutionalising criminal law, an unceasing and open-ended task that has been long overdue, has the potential to be particularly beneficial for the classical principles and categories of criminal law just mentioned. Contemporary constitutions can convert natural law into positive law, transforming ontological and philosophical guidelines into authentic legal premises enforceable by force. Moreover, due to the greater transparency, verifiability, and simplification of the methodology of the arguments of constitutional law, as opposed to the encrypted doctrinal categories of classical criminal theory, modern constitutions can increase the rigour of the arguments setting the limits of criminal law, starting from the principle of the defeasibility through to other aspects impacting the reach of criminal law.[7] 6

In terms of policy, the process of constitutionalising criminal law entails the requirement of having additional reasons beyond a simple decision of a parliamentary majority for any interest to become *eo ipso* the object of criminal protection, because the legislative power is materially subject to the decision-making processes established by their respective constitutions.[8] In terms of criminal law theory, 'constitutional criminal law' entails the rethinking of dogmatic categories of criminal law in the light of constitutional principles, in a sort of composition between the two, in which 7

5 Klaus Ferdinand Gärditz, *Staat und Strafrechtspflege. Braucht die Verfassungstheorie einen Begriff von Strafe?* (Schoeningh 2016) 11 ff., 71 ff.

6 Kaspar (fn 4) 38.

7 Luis Greco, 'Verfassungskonformes oder legitimer Strafrecht? Zu den Grenzen einer verfassungsrechtlichen Orientierung der Strafrechtswissenshaft', en Beatrice Brunhöber et al. (Hrsg.), *Strafrecht und Verfassung* (Nomos 2012) 20 ff.

8 Gregor Stächelin, *Strafgesetzgebung im Verfassungsstaat* (Duncker & Humblot 1999) 81.

each doctrinal category is preceded by the interposition of one or more constitutional principles.[9]

8 This phenomenon first began to manifest itself barely half a century ago in the aftermath of the fall of the totalitarian regimes in European States Axis-aligned nations, arising at that time as a necessary consequence of the liberal freedoms proclaimed in the emerging democratic constitutions in Germany, Italy, Portugal, and Spain. The process of constitutionalising criminal law was therefore considered a 'child of its time',[10] but at present, it has turned into a universal trend, also reaching practically all South American legal systems where the theory of the 'principles' by Robert Alexy[11] has given rise to the development of a unique method, known as 'Penal Principalism' (*Principialismo Penal*), specially employed by jurists from Argentina, Chile, Colombia, Uruguay, or Peru.[12]

I. Constitutionalising Criminal Policy

9 Constitutionalism has always influenced criminal policy as drafting constitutional texts was inherently connected to the proclamation of rights and guarantees. However, in the constitutional texts enacted prior to World War II "the substantive and the procedural were amalgamated, without it being easy to discern what matters more, one or the other, or what came before what".[13] Contemporary constitutions have overcome the confrontation between the citizen and the State, channelling dialogue in which criminal law is employed as a system of protection in a broad sense, for the recovery of

9 Massimo Donini, 'La herencia de Bricola y el Constitucionalismo penal como método: raíces nacionales y desarrollos supranacionales', (2011) 77 *Nuevo Foro Penal* 62.

10 Enzo Musco, *L'Illusione penalistica* (Giuffrè 2004) 59 ff.

11 Robert Alexy, *Theorie der Grundrechte* (Nomos, 1985) 75 ff.

12 Armando Rafael Aquino Britos (Ed.), *Derecho penal y constitucional. Las garantías constitucionales y el Proceso penal* (Olejnik 2020); Arturo Crispín Sánchez (Ed.), *Derecho penal Constitucional* (Gaceta Jurídica 2020); José Sebastián Cornejo Aguiar y Jorge Isaac Torres Manrique, *Tratado de Derecho penal constitucional aplicado* (Olejnik, 2021); Marco Antonio Terragni, *Derecho penal constitucional* (Rubinzal 2021); Alberto Poveda Perdomo y Alberto Poveda Rodríguez y Abelardo Poveda Perdomo, *Lecciones de Derecho penal colombiano. Parte General* (Ibáñez, 2021).

13 Miguel Revenga Sánchez, 'La relación entre la Constitución y el Derecho penal. Una mirada desde la orilla constitucional" 45 (2020) RP 101.

the human person, of victims and offenders, and to maintain a balanced social life.[14]

The influence of constitutional arguments in criminal policy is fluid. 10
According to the first hypothesis made by Klaus Tiedemann on the relationship between criminal law and constitutional law "constitutional law influences and shapes criminal policy based on directives and impulses".[15] For this reason, the nineteenth-century image of a legislator who, for lack of sufficient normative links, must be tamed based on the internal limits of criminal law is obsolete in the contemporary constitutional State. However, in practice, there is no agreement as to which constitutional precepts are affected by criminal law, how these are to be considered when formulating criminal rules and what exactly the quality of the intervention of criminal rules should be from the perspective created by these rules.[16]

Various readings of the democratic constitutions in force in European 11
and South American States mentioned in fn 1 have existed over time to clarify the relationship between criminal and constitucional law. These resulted in different models of thought and argumentation. Looking at past practice, a distinction can be made between a 'strong or maximalist reading of a constitution' that seeks to find constitutional limits and establish the grounds for criminal intervention; and a 'weak or minimalist reading of a constitution' that is content to simply find the limits to the *ius puniendi*. The former always lead to adopting a methodology that is more closed to political influence because it tends to observe constitutional prescriptions binding on the legislator. The latter is configured as a method more open to various types of political input.[17]

a) Weak or minimalist readings of a constitution on penal (substantive) matters

The first function that a constitution plays in a criminal law system comes 12
from its higher (formal) legal status, being therefore evident that it represents a limit that public authorities cannot go beyond by prohibiting them,

14 Francesco Palazzo, *Corso di Diritto penale. Parte Generale* (Giappichelli 2021) 3.
15 Tiedemann (fn 2) 13.
16 Appel (fn 3) 49, 50, 331.
17 Nicolas García Rivas, *El poder punitivo en el Estado democrático* (Ediciones de la UCLM 1996) 43; Massimo Donini, 'Principios constitucionales y sistema penal', (2010) 13 RGDP 5.

for example, from making decisions that contradict the provisions of the relevant constitution. From the perspective of the hierarchy of sources, a constitution is critical to the State's exercise of the *ius puniendi*, forming an unbreakable boundary that delimits the spaces not available to the legislator, putting negative pressure on what can be the object of criminal protection.[18]

13 Weak or minimalist readings of a constitution with a view to criminal law are solely based on this function, departing from the understanding that a constitution does not define any prefiguration of criminal policy, without prejudice to the fact that it does indeed guide public authorities in his hermeneutic task. From this perspective, the decision as to which legal interests (*Rechtsgüter, bienes juridicos*) are protected by criminal law must be taken by the legislator within the bounds of what is constitutionally allowed, and such decisions should not be easily challenged in a Constitutional Court.[19] These minimalist readings of constitution law do not recognize the existence of prescriptive (positive) connections that subject a legislator to limits in its political assessment,[20] because it is "one thing that the interpretation of criminal law must always begin with a reading in a constitutional law term, but quite another that there is no room for any legal statements that can be categorized in different ways".[21]

14 This type of interpretation has been particularly useful in facing the new challenges that have arisen since the 1990s with the consolidation of the globalization process, allowing criminal protection to be extended, without virtually any constitutional objections, to collective and diffuse legal interests as well as advancing the barriers of intervention to a dangerously high level to liberties of citizens. Hence, minimalist readings of democratic constitutions of European and South American countries enjoy greater acceptance in their respective political realm.[22]

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18 Mario Durán Migliardi, 'El planteamiento teleológico constitucional de la Escuela de Bologna y la obra de Franco Bricola como antecedentes históricos y metodológicos de la noción de Derecho penal Constitucional', (2013) 20–2 *Revista de Derecho Universidad Católica del Norte* 306, 307.

19 Antonella Merli, *Introduzione alla teoria generale del bene giuridico. Il problema. Le fonti. Le tecniche di tutela penale* (Edizioni Scientifiche Italiane 2006) 214, 215, 218, 219, 244.

20 Donini (fn 17) 9, 10.

21 Gonzalo Quintero Olivares (Ed.), *Derecho penal constitucional* (Tirant lo Blanch 2015) 31, 32, 86 ff.

22 Enrico Contieri, *Dialettica del bene giuridico. Per il recupero di una prospettiva costituzionalmente orientata* (Pacini Editore 2019) 118, 120, 121

However, minimalist readings of constitutions on criminal matters carried out in continental Europe have been so weak that they even lack a programme and paradigmatic authors. In fact, it is not a question of an authentic constitutional orientation of criminal law, but rather the opposite, a 'criminal orientation of constitutional law' since the relationship of constitutional law with criminal law is interpreted through a penal code.[23] The phenomenon referred as 'constitutionally oriented penal legislation' (legislación penal constitucionalmente tutelada) seriously calls into question the functionality of weak or minimalist readings of constitutional law on criminal matters by directly or indirectly evoking the idea that there are grounds (in addition of limits) for criminal law in the constitutional texts. The political questions of internal security acquire a new legal-conceptual disguise in current constitutional doctrine of duties of the State to ensure and protect fundamental rights (grundrechtliche Schutzpflichten), that replace the resource to classical theories of the purposes of the State for providing the reasons why the State could punish certain behaviors.[24] 15

b) Strong or maximalist readings of constitutions on penal (substantive) matters

Though the second function that constitutional law exercises in connection with a criminal law system results less evident, more and more authors are of the opinion that a constitution contains elements of the framework of grounds of criminal law that the legislator must take into consideration when drafting the legally protected interests, in addition to setting the limits. Constitutional law shows itself from this perspective to be 'integrative' with the criminal law, exerting a kind of positive pressure on what can be decided as a result of ongoing considerations regarding the proximity of the ideas of limits and grounds in criminal law.[25] 16

From this function emerge the strong or maximalist readings of constitutions on criminal matters based on the understanding that a constitution not only establishes the limits, but also the foundations or grounds for criminal law. Furthermore, in fulfilling this function, constitutional law 17

23 Donini (fn 9) 67.

24 Doménico Pulitanò, 'Obblighi costituzionale di tutela penale' (1983) Riv. ital. dirit. proced. Penale 487 ff.

25 Durán Migliardi (fn 18) 306, 307.

provides legislators with a series of guidelines on incriminatory options.[26] The basic guidelines for a criminal policy provided by constitutional law to a legislator is that freedom, because of its enormous relevance in European and South American constitutional and democratic States can only be limited through criminal law for the protection of other interests of equal value.[27] From this starting point, two types of strong or maximalist constitutional readings of criminal law are born: one abstract and the other strict, depending on whether the endpoint of constitutional foundations or grounds of criminal law is located in the theory and philosophy of the State or in the theory of fundamental rights proclaimed by said norm, respectively.

18 The enormous proliferation of regulations and jurisprudence regarding constitutional law that requires public authorities to carry out certain positive actions to protect fundamental rights, especially within the European Union legal framework, confirms the universal tendency towards maximalist and strict readings of constitutions on criminal matters. This phenomenon entails strong epistemic changes in sovereign competences in criminal matters, "now subjected to a theoretical ordering of criminal intervention as a constitutional mandate" with the passage from the political plane of legislative discretion to the constitutional plane of State obligations on criminal protection, transforming the classic power (*ius*) to punish into a modern power-duty (*officium*) to punish.[28]

19 However, this type of interpretation has not yet been consolidated in doctrines of criminal and constitutional law, and for the moment there are more objections than reasons. These theses are accused of lacking the capacity to provide useful concepts to become real material criteria for decisions, especially regarding the hierarchy of private-legal interests to be protected by the State. The norms of fundamental rights in the constitutions of European and South American States continues to be silent on the question of which behaviour can or must be criminalised, prosecuted, and punished, meaning that it fails to provide meaningful guidelines in such matters. In this regard, one of the best-known studies confirmed that "if one

26 Lagodny (fn 3) 3, 4.
27 Franco Bricola, *Teoría general del Delito. Traducción de Diana Restrepo Rodríguez. Prólogo y anotaciones de Massimo Donini* (BdF 2012).
28 Pulitanò (fn 24) 487 ff.

expects to obtain answers to the questions of criminal law in constitutional jurisprudence, one is quickly disappointed".[29]

2. Constitutionalising Criminal Law Doctrine

Constitutional arguments have barely any influence on criminal law theory, albeit only on the issues that border on criminal policy. This is because, according to Tiedemann's first hypothesis on the relationship between criminal law and a constitution, «dogmatics (*Dogmatik*) is a matter for the doctrine and practice of the courts since it is part of positive law and is the exclusive monopoly of the ordinary jurisdiction". However, the second hypothesis thereon qualifies that "a certain area of the fundamental questions of criminal law dogmatics – without preference between the type, the unlawful and the guilty – are open to the influence of constitutional law, those that in a certain way are within the boundaries of constitutional law".[30] 20

According to some authors, we are witnessing historical revisionism of doctrinal thought which, in an attempt to connect the old ideas of the theory of crime (*Verbrechenlehre*) with the new realities of criminal policy, has to face the rejection of a doctrinal method excessively closed in on itself and inadequate to form an operating technique that does not remain impermeable to policy evaluations.[31] In this sense, one of the already mentioned benefits that can be expected from a constitution is greater transparency, verifiability and simplification of its arguments that are not only accessible to members of the academy but also have a certain institutional connotation.[32] 21

The genuine constitutional orientation of criminal law, employed in Italy since the 1970s, opened the discussion between the criminal doctrine and the legislator to establish a more fertile ground for the encounter between dogmatics and criminal policy. The idea of a constitution contains "the face of crime" (*il volto del reato*)[33] served as a bridge between criminal policy and criminal law theory, with the Constitution playing a role of positivist 22

29 Lagodny (fn 3) 52.
30 Tiedemann (fn 2) 13.
31 José María Silva Sánchez, *Aproximación al Derecho penal contemporáneo* (Bosch Editores 1992) 246.
32 Greco (fn 7) 26.
33 Bricola (fn 27) 1, 2.

mediator between one and the other. The constitutional orientation of Italian criminal law is a 'teleological project' that try to filter criminal policy into the field of criminal law theory, and consist of

> "the individualisation, on a constitutional basis, of an *a priori* synthesis or *reductio ad unun* of the fundamental features and of the structural and content characteristics of the criminal offense, in a deontological perspective and not only analytical, prescriptive, and non-descriptive".[34]

23 On the Italian experience with regard to constitutionalising criminal law, the classical doctrine of doctrinal categories was joined by the constitutional theory of principles.[35] However, the universal notion of constitutional criminal law (*Strafverfassungsrecht*) is not yet among the canon of established scholarly terms, and the concept is rarely used casually and without further reflection on its content. For the time being, constitutional criminal law does not result in doctrinal content in the sense that it does not promise any direct answers to legal questions; however, it is rather something of a guiding concept (*Leit- oder Schlüsselbegriff*) capable of shaping the discourse of criminal law scholarship to further the attainment of knowledge. Furthermore, there is little to no clarity provided by constitutional jurisprudence on the scope of key concepts of criminal law, such as the concept of punishment or of legally protected interests.[36]

3. Penal Principalism

24 Penal Principalism is a recent hermeneutic trend that is increasingly manifesting itself in the penal doctrines of Latin American countries, especially in Colombia, Argentina, Peru, and Uruguay. The basic idea is that constitutional principles embody the values of fundamental rights from which the legally protected interests emanate, being the only criteria capable of

34 Contieri (fn 22) 101.

35 Vittorio Manes, *Il principio di offensività nel Diritto penale. Canone di Politica criminale, criterio ermeneutico, parametro di raggionevolezza* (Giappicheli 2005) 51.

36 Matthias Jahn, 'Strafverfassungsrecht. Das Grundgesetz als Herausforderung für die Dogmatik des Straf- und Strafverfahrensrechts', en Klaus Tiedemann (Hrsg.), *Die moderne Verfassungs Strafrechtspflege. Erinnerung von Joachim Vogel* (fnomos 2016) 65; Christoph Burchard, 'Strafverfassungsrecht. Vorüberlegungen zu einem Schlüsselbegriff', en Klaus Tiedemann (Hrsg.), *Die moderne Verfassungs Strafrechtspflege. Erinnerung von Joachim Vogel* (Nomos 2016) 28.

providing adequate answers in the resolution of the endless debates that derives from artificial theories in criminal law concerning the limits of criminal law.[37]

25 For Penal Principalism, constitutional principles establish the limits of the coercive State power providing a defence that each citizen can interpose to legislative pretension of criminalizing. Constitutional principles also establish the foundations and grounds of criminal law, which, support the essence of the legal interests protected by criminal law.[38] In fact, some interpretations of Penal Principalism have recourse to Bricola's genuine constitutional theory of legal interests.[39]

26 Penal Principalism also tries to elaborate a criminal law theory based on constitutional principles, framing them as "the only criteria capable of providing adequate answers in the resolution of the endless debates that take place in penal science". In this sense, Silvestroni considers that, in the development of the theory of crime,

> "it is essential to resort to the constitution and to look at criminal law through its prism, to develop an interpretation that, while preserving coherence, allows the best enforcement and operability of the substantive principles that it enshrines".

27 According to this author, it would not be necessary to carry out a reconstruction of the doctrinal categories of the theory of crime to adapt them to the requirements of constitutional principles since the consideration of crime as a typical, wrongful action is functional to the constitutional principles.[40]

37 Mariano Silvestroni, *Teoría constitucional del Delito* (Ediciones del Puerto 2004) 1 ff; Gilberto Rodríguez Olivar, *Teoría constitucional del reproche penal. Programa de un Derecho penal constitucional*, (BdeF 2013); Esiquio Manuel Sánchez Herrera, *Derecho penal constitucional. El principalismo penal* (Ediciones de la Universidad del Externado de Colombia 2014); Fernando Velásquez y Renato Vargas Lozano (Eds.), *Derecho penal y Constitución* (Universidad Sergio Arboleda 2014).

38 Silvestroni (fn 37) 107, 185; Sánchez Herrera (fn 37) 21, 62.

39 See Sánchez Herrera (fn 37) 53, 54, 55, 65, 68; Rodríguez Olivar (fn 37) 4.

40 Silvestroni (fn 37) 184, 185.

III. Criminal Law and Fundamental Rights

28 One key ideological feature of a constitutional State is the presence of fundamental rights at its core. The whole constitutional order revolves around the functionality of fundamental rights, which act as a viaduct linking a constitution with criminal law.[41] A close relationship between a constitution and its associated body of criminal law is only possible in the presence of fundamental rights since criminal law "is the most immediate instrument both to protect and to deny fundamental human rights".[42] The sophistication of the theory of fundamental rights and its refinement by means of the constitutional principle of proportionality in the democratic States of continental Europe and South America leaves no doubt as to the value of measuring criminal norms in accordance with constitutions.[43] In fact, if attempts to constitutionalise criminal law persist, it is due to the hope that fundamental rights will be raised as authentic limits to the punitive power of the State.[44]

29 However, criminal law doctrine has to become more attuned with the theory of fundamental rights, a matter that until now has been so neglected that it has given rise to a structural deficiency when it comes to relating criminal law to fundamental rights in practice, despite its close relationship in constitutional law theory.[45] In this sense, fundamental rights play a subordinate role in discussions on penal matters, since neither in doctrine nor jurisprudence of democratic States of continental Europe and South America is there any agreement on the norms of fundamental rights that are affected by the criminal rule system, which for these purposes is broken down into rules of conduct and rules of punishment. There is meridian clarity in pointing out the interference with the general freedom of action,

41 Juan José Solozábal Echevarría, 'Constitución y Derecho penal. Los límites penales de los Derechos Fundamentales', en Francisco Rubio Llorente et al (Eds.), *La Constitución política de España. Estudios en Homenaje a Manuel Aragón Reyes* (CEPC 2016) 924.

42 Fernando Mantovani, *Diritto penale. Parte Generale* (Cedam 11th ed. 2020) XXVI.

43 Kaspar (fn 4) 261.

44 Greco (fn 7) 20.

45 Fernández Cruz, José Ángel, 'Principialismo, garantismo, reglas y derrotabilidad en el control de constitucionalidad de las leyes penales', (2015) 85 *Revista Nuevo Foro Penal* 57.

but the scope of the violation of the criminal law on personality rights is unknown.[46]

One of the most recent developments of fundamental rights that criminal law theory does not fully understand is the function of protection that they have acquired against encroachments by third parties. This has the potential to transform the entire discourse on the relationship between fundamental rights and criminal law. Fundamental rights go from imposing limits on criminal law to providing impetus for the exercise of the *ius puniendi*. Josef Isensee has, among others, demonstred that the protective function of fundamental rights is by no means a modern vision of fundamental rights, but that the claim it incorporates, namely the establishment of guarantees to individuals' protected legal interests against usurpation by third parties, is located in the oldest genetic layer of the modern State.[47] 30

In constitutional States of continental Europe and South American mentioned in fn 1, several theories of fundamental rights coexist, each one linked to the different theories that integrate the formula of the social and democratic State. The task of the legislator is to harmonise the existence of all these theories, finding a way to combine them to be effective as an imperative of the State duties of protection which need to be applied by the gentlest means possible.[48] All of this is well established in most of the doctrine and jurisprudence of South American States. Specifically, Penal Principalism deals with a particular dual function of fundamental rights in criminal law.[49] 31

I. The dual function of fundamental rights in criminal law

As fundamental rights almost invariably lie at the heart of modern constitutions, their norms are the source of two functions that a constitution exer- 32

46 Appel (fn 3) 163 ff.

47 Josef Isensee, *El derecho constitucional a la seguridad. Sobre los deberes de protección del Estado Constitucional liberal* (Rubinzal Culzoni, 2014); Peter Lars Störring, *Das Untermaßverbot in der Diskussion. Untersuchung einer umstrittenen Rechtsfigur* (Dunker & Humblot 2008) 18.

48 Josef Isensee, ‚Das Strafrecht als Medium der grundrechtlichen Schutzpflicht', en Rainer Beckmann et al. (Hrsg.), *Gedächtnisschrift für Herbert Tröndle* (Duncker & Humblot 2019), 252. 251.

49 Sánchez Herrera (fn 37) 51 ff., 77; Antonio Bascuñán Rodríguez, 'Derechos Fundamentales y Derecho Penal', (2007) 9 *REJ* 47 ff.

cises over criminal law. On the one hand, they safeguard citizens against public interference by establishing limits, requiring the State to abstain from any unjustified measure that could harm or endanger them. On the other hand, they ensure their own integrity against encroachments by other holders of fundamental rights, requiring the State to take action to prevent unjustified abuses of freedom. In this way, the fundamental rights try to neutralise both the threat posed by excessive State activity as well as the threat deriving from an unjustified omission in the fulfilment of its duties and obligations.[50]

33 These two functions of fundamental rights have two repercussions in criminal law systems which are represented in the figurative form of a 'sword and shield'.[51] On the one hand, fundamental rights are the indispensable object of protection for criminal law, providing a legislator with objectives, interests and values that are worthy of criminal protection. On the other hand, fundamental rights represent limits to the punitive pretension of a State, curbing the punitive activity of the public authorities insofar as such activity is unjustified. Thus, it must be assumed that the State not only has the right to use the *ius puniendi*, but also the obligation to intervene by means of criminal law when certain circumstances arise.[52]

34 The introduction of the protective function of fundamental rights into the criminal law discourse breaks with the classical bipolar view of the relationship between fundamental rights and criminal law as a negative conflict between State and citizen. This is due to the protective function expanding the framework of action into a triangular constellation in which a potential victim is introduced, applying the norms of fundamental rights not only in the subjective but also utilising their potential as objective norms of value.[53] Doing so means that criminal law acquires a multipolar constitutional approach, whereby

50 Josef Isensee, 'Das Grundrecht als Abwehrrecht und als Staatliche Schutzpflicht', en Josef Isensee y Paul Kirchhoff et al. (Hrsg.), *Handbuch des Staatsrechts. Band IX. Allgemeine Grundrechtslehre* (C. F. Müller 3rd ed. 2011) 414 ff.

51 For the source of this metaphor see Ambos (fn 2) 253 ff.

52 Stefano Manacorda, '«Dovere di punire»? Gli obblighi di tutela penale nell'era della internazionalizzazione del Diritto', en Massimo Mecareli et al (Dirs.), *Il lato oscuro dei Diritti Umani. Esigenze emancipatorie e logiche di dominio nella tutela giuridica dell'individuo* (Ediciones de la UCIIIM 2014) 337.

53 Matthias Mayer, *Untermaß, Übermaß und Wesentgehaltgarantie. Die Bedeutung staatlicher Schutzpflichten für den Gestaltungsspielraum des Gesetzgebers im Grundrechtbereicht* (Nomos 2005) 16, 79, 174.

> "every criminal norm must be a duplex rule, with dual effects in opposite directions. While one of the faces of this peculiar Janus is penal and, naturally coercive, the other seeks legitimacy for its advantageous service to freedom".[54]

a) Defending Fundamental Rights against the State

From a historical perspective, fundamental rights are the product of moder- 35
nity, of the 'enlightened thinking' that inspired the bourgeois revolutions in Europe of the eighteenth century, a time when the protection of the individual was based on the need to establish barriers to limit the activities of a State. Therefore, according to the classical conception, fundamental rights are freedoms of the individual against the State that establish limits by means of negative obligations to the punitive pretension of public authorities. The validity of the protective function of fundamental rights is supported by their recognition by constitutional law tradition of more than 200 years so that their main claim does not need to be proven by means of any doctrine or theory.[55]

As stated in the explanatory memorandum of the Spanish Criminal 36
Code, criminal law is a type of constitution in the negative that limits the exercise of fundamental rights by establishing the barriers of unlawfulness to limit the private exercise of freedoms. As such, fundamental rights often, although not always, end where criminal law begins.[56] The protective function of fundamental rights is composed of those parcels of freedom that cannot be renounced with the social contract, which refer to personal qualities of doing or not doing what one wants to do without State intervention in the sense of an absence of coercion. These rights protect their holders from State action, indicating the maximum barriers or limits to which punitive coercion can be extended in negative terms.[57]

The doctrine of the defensive function of fundamental rights deals with 37
the question of the bipolar relationship between the State and a potential aggressor or criminal, disregarding both the collective interest and the potential offended or affected by the crime as directly affected subjects.

54 Juan Antonio Lascuraín Sánchez, *Principios penales democráticos* (Iustel 2021) 72.
55 Isensee (fn 50) 415, 435, 450.
56 Solozábal Echevarría (fn 41) 925.
57 Winfried Hassemer, 'Rasgos y crisis del Derecho penal moderno', (1992) 45 *ADPCP* 237.

Here, what is always at issue is whether a general threat or an imposition of punishment has interfered in a permissible and, in particular, proportionate manner with the fundamental freedoms of potential aggressor or criminal. Thus, by itself, the protective function of fundamental rights is not capable of founding or guaranteeing political action and any type of positive protective action is outside the scope of its claims.

38 The area in which these doctrinal questions of fundamental rights in the constitutional principle of proportionality occupies the classic place of the prohibition on excessiveness (*Übermaßverbot*). Both in theory and practice, the protective function of fundamental rights is well developed through the prohibition on excessiveness, since it is considered that its ideology inspires this triangular structure of the constitutional principle of proportionality, to the point where the three factors are conceptually assigned equal weight. This interpretative canon is aimed at establishing the maximum in terms of protection that a State cannot offer or cross, eliminating all public activities that represent an excess in the use of the monopolised power of force.[58]

b) Protecting and Ensuring Fundamental Rights through the State

39 The global transformation of political, social, and economic conditions in the last century has revealed that the legal interests and fundamental rights have also been exposed to the influence of private power, the unmerciful side of nature or under threat from foreign States. In the last fifty years, the need to extend the guarantees of fundamental rights beyond their negative function as rights providing protection has grown significantly. This requires that the State intervenes beforehand in a regulatory manner to guarantee that there is adequate protection for fundamental rights. Although the function of the protection function of fundamental rights has been widely recognised by jurists and politicians of continental Europe and South America, it still requires scholarship to become visible and achieve identity, being necessary to justify its validity and necessity. But it does not mean that it is of secondary importance, since the classical (or negative) functions of Fundamental Rights in criminal law does not explain by itself the state action as a whole.[59]

58 Markus González Beifluss, *El principio de proporcionalidad en la jurisprudencia del Tribunal Constitucional* (Aranzadi 2nd. 2015) 82.

59 Wibke Streuer, *Die positiven Verpflichtungen des Staates* (Nomos 2003) 48, 49, 75, 76; Isensee (fn 49) 435, 450.

Fundamental rights must also represent certain claims for protection that allow citizens to claim from public authorities a guarantee of their integrity of legal interests against encroachments by third parties. Otherwise, this raises concerns that the lack of a complete set of instruments designed to safeguard the full development of fundamental rights against the misuse of constitutional freedoms that may reduce its effectiveness against private powers encroachments..[60] The protective function of fundamental rights imposes these limits on the legislator's discretion through positive obligations and may even require intervention through criminal law when no other measure establishes the sufficiency required by the State's duty to protect.[61] 40

The theory of State duties to protect fundamental freedoms is concerned with balancing the opposing positions of the triangular relationship between the citizen, as a potential victim, the State and the citizen, as potential perpetrators, protecting the victim from a perpetrator's assault while still respecting the integrity and freedoms of the (potential) perpetrator. The question here is whether a general threat or a particular imposition of punishment is the only suitable and proportionate means to uphold the fundamental freedoms of all the parties.[62] Protective function of fundamental rights plays a relevant role in criminal law, enhancing its constitutionalisation utilising solid arguments in favour of the infusion of fundamental rights norms into positive law, which provide their "own partial constitutional legitimacy".[63] 41

In the constitutional principle of proportionality, the protective function of fundamental rights occupies the disputed position of the prohibition on defectiveness (*Untermaßverbot*). This interpretative canon is aimed at establishing the minimum level of protection that the State must provide to fundamental right holders, preventing the State from going beyond what it has agreed to with the citizenry in the constitution and, therefore, applying to situations involving a lack of public action or defective regulation. However, there is a certain general scepticism about this figure when it comes 42

60 Roberto Bartoli, '«Chiaro e oscuro» dei Diritti Umani alla luce del processo di giurisdizionalizzazione del Diritto', en Massimo Mecareli et al (Dirs.), *Il lato oscuro dei Diritti Umani. Esigenze emancipatorie e logiche di dominio nella tutela giuridica dell'individuo* (Ediciones de la UCIIIM 2014) 151.

61 Francesco Viganò, 'La arbitrariedad del no punir. Sobre las obligaciones de tutela penal de los derechos fundamentales' (2014) 9–18 *Polít. crim*. 430, 431, 470.

62 Isensee (fn 50) 532, 416, 517.

63 Isensee (fn 48) 250, 268.

to putting it into practice since there is not even a basic agreement as to how it deploys its ideology in the three metrics upon which the principle of proportionality is based.[64] The prohibition on defectiveness is not, unlike the prohibition of excess, a classic concept in criminal law scholarship.[65]

2. The relationship between the two functions of fundamental rights in criminal law

43 There is agreement that between the two functions of fundamental rights there exists a relationship of complementarity in terms of their importance. The functions behave as 'the two sides of the same coin' operating to preserve the integrity of fundamental rights so that these can combat the presence of two evils: the power of the State to punish (limited by constitutional law) and the capability of the citizen to harm or endanger legal interests of fellow citizens (limited by criminal law)..[66]

44 However, it is also widely agreed that, in criminal law, claims deriving from each of the two functions of fundamental rights appear diametrically opposed, because a Penal Code protects a portion of the legal interests of citizens through the intervention in another part of these interests, what is called "protection through injerence" (*Schutz durch Eingriff*). As such, on the one hand, the State appears as a party favourable to the development of fundamental rights, while, on the other hand, as a burden. In the triangular structure of the constitutional principle of proportionality, the citizen has both a positive status of defence against encroachment and a negative status of defence against interference, where the State must not only observe the proportionality standard of the prohibition on defectiveness, but also proportionality derived from the prohibition on excessiveness.[67]

45 When the 'two sides of the coin' of the integrity of fundamental rights meet in the constitutional principle of proportionality, both reveal their true face of 'Scylla and Charybdis', trapping a legislator between their

64 Vasileios Tzemos, *Das Untermaßverbot* (Peter Lang 2004) 42, 43, 44, 166, 167, 169; Mayer (fn 53)14, 72; Störring (fn 47) 41, 46.

65 Winfried Hassemer, '¿Puede haber delitos que no afecten a un bien jurídico penal', en Ronald Hefendehl et al (Eds.), *La teoría del bien jurídico ¿Fundamento de legitimación del Derecho penal o juego de abalorios dogmático?* (Marcial Pons 2016) 97.

66 Peter Unruh, *Zur Dogmatik der grundrechtliche Schutzpflichten* (Dunker & Humblot 1996) 56, 57.

67 Isensee (50) 416, 517.

requirements. The broad discretion that a constitution establishes for a legislator in criminal matters remains deeply limited by the double function of the fundamental rights both in fundamentals or grounds and in limits for criminalising. A legislator cannot go below the minimum level of protection that must be respected in the choice of means by virtue of the existence of State duties of protection and ensure fundamental rights. However, a legislator can never exceed the restricted zone in the choice of means, by virtue of the existence of rights of defence against the State.[68] The question of the margin of manoeuvre remaining to a legislator caught between the prohibition on defectiveness and the prohibition on excessiveness is a pending issue of public law, one which remains without a clear answer.

a) The Theory of the Corridor

The Corridor Theory is based on the assertion that the prohibition on defectiveness and the prohibition on excessiveness are two extremes that do not coincide and must be balanced in a wide corridor that exists between the minimum and maximum limits of the two prohibitions. The two functions of fundamental rights do not appear disconnected from each other but interconnected in that what one function takes away comes at the expense of the other and vice versa. This leads to a structural narrowing of a legislator's room for manoeuvre but leaves a sufficiently wide corridor for permissible actions that avoid falling into offering too little protection or becoming an excessive interference.[69] 46

The Corridor Theory does not seek to overly restrict a legislator's scope of discretion, as this would represent a great danger to the principles of democracy and separation of powers by denying the legislator the possibility of offering fundamental rights a higher level of protection than that required by the prohibition on defectiveness while not running afoul of the prohibition of excess.[70] The minimum protection that, in principle, fundamental rights require can be exceeded by a legislator since, beyond the express or tacit requirements of the relevant constitution, criminal 47

68 Laura Clérico, 'El examen de proporcionalidad. Entre el exceso por acción y la insuficiencia por omisión o defecto', en Miguel Carbonell (Ed.), *El principio de proporcionalidad y la interpretación constitucional* (Ministro de Justicia y Derechos Humanos 2008) 126, 127.

69 Isensee (fn 50) 496, 497, 555.

70 Störring (fn 47) 128.

intervention is based only on a criminal policy decision that is neither required as such nor constitutionally controllable.[71] The Corridor Theory finds the theory of the protective function of fundamental rights as a knot of arguments to legitimise recourse to criminal law but not to limit it. Thus, a legislator must resort to criminal law to the extent that it is obliged to do so by the constitution and may resort to a higher level of protection within the limits of the prohibition of excess so that the lack of a State obligation to criminalise does not mean the unconstitutionality of the criminal rules.[72]

48 Some arguments of the Corridor Theory also present certain doctrinal inconsistencies in criminal law. In principle, the existence of a corridor implies that the two limits meet at some point since the very idea of disproportionality must be inserted somewhere so that such a measure becomes excessive and, therefore, unconstitutional. If approximately that limit is in the middle of both claims of fundamental rights, it is not understood what the need for more intense protection through criminal law is that is not already part of the prohibition of under protection, what is 'strictly necessary'.

b) The Theory of Congruence

49 The Theory of Congruency (*Kongruenzthese*) is based on the understanding that the prohibition on defectiveness and the prohibition on excessiveness coincide, denying the existence of any corridor between the two limits deriving from the same fundamental right. According to this theory, the two functions of the fundamental rights contain claims that coincide because the duties of the State to protect and ensure fundamental rights exist within the limits that are already derived from the prohibition of excess. The result reached by combining both limits is the same since the dual functions of fundamental rights are two aspects of limits that touch each other, so that "«what appears to be the maximum from the perspective of the potential perpetrator, appears to be the minimum from the perspective of the potential victim".[73]

50 In this sense, the prohibition on defectiveness turns out to be congruent with the prohibition on excessiveness, the former being 'a mirror image' of

71 Solozábal Echevarría (fn 41) 926.
72 Kaspar (fn 4) 208, 260, 266.
73 Isensee (fn 50) 557, 558.

the latter.[74] In other words, what is 'required' in the sense of the prohibition on defectiveness is exactly what the State must respect by virtue of the prohibition on excessiveness. More precisely, in criminal law, one should always count on the invocation of the prohibition on defectiveness in the form of a criminalisation requirement since in this branch of the legal system the contradiction between the two functions of fundamental rights in the criminal law discourse "is more apparent than real".[75]

From this point of view, the theory of the protective function of fundamental rights would not only provide guidelines on the need to resort to criminal law from a constitutional point of view, but also when it is prohibited because it is not considered an extreme necessity, or *ultima ratio,* by linking to the same regulatory principle the indispensable minimum content of State consistency with the insurmountable limit of criminal protection.[76] However, these claims face the objection that a constitution is a framework of plural political options that do not allow for overly restricting a legislator's scope of discretion without jeopardising the principles of democracy and the separation of powers, especially when there are no specific guidelines in this regard. 51

IV. Conclusions

Despite being a classic issue, the relationship between criminal law and constitutions is currently being presented in novel terms. The constitutionalisation of criminal law has gone from being seen as a 'child of its time' to becoming a universal trend that is calling for a common hermeneutic of application for all democratic constitutional States. 52

Strong or maximalist constitutional readings of criminal law, which view constitutions as providing the limits and foundations or grounds of criminal law, are being imposed on weak or minimalist readings, which understand constitutions as only providing the limits of criminal law. In turn, the strict constitutional readings seem to be a more adequate tool for the universalisation of constitutional criminal law since it is inherently tied to respect for fundamental rights, an essential element of any democratic system. 53

74 Oliver Klein, 'Das Untermaßverbot. Über die Justiziabilität grundrechtlicher Schutzpflichterfüllung' (2006) 46 *JuS* 961.
75 Manacorda (fn 52) 338; Störring (fn 47) 120–122.
76 Pulitanò (fn 24) 495; Viganò (fn 61) 468.

54 Fundamental rights provide the basis for any intervention of criminal law through the duties of the State to protect and ensure fundamental rights while limiting punitive coercion by means of their defensive function or freedoms against punishment. The Theory of Congruence between the two functions of fundamental rights entails assuming that the minimum criminal law required by the duties of the State to protect and ensure is, simultaneously, the maximum criminal law allowed by the fundamental rights as protective structures against abuses by the State. Thus, a constitution provides criminal law with the limiting grounds for its intervention.

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