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Some thoughts about judicial review of criminal legislation

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This working paper, presented at a seminar on "Constitutional Criminal Law" organised at the Toronto University on 14-15 September 2018 by Malcolm Thornburn and Christoph Burchard, is a response to a recent work by Javier Wilenmann, where he argues inter alia that constitutional judicial review of criminal legislation is ineffective and, when fully exercised by the courts, is in fact counter-productive. This paper reasons to the contrary that: i) judicial control of criminal legislation can be effective, and historically in many instances has been shown to be so; and ii) from a political and institutional viewpoint, there are sound reasons to justify the exercise of judicial control, provided that certain criteria are met.

A response to a paper by Javier Wilenmann

Is judicial review of criminal legislation really effective? Is a proactive role by the courts desirable in this area?

A recent and stimulating paper[1] by the Chilean professor Javier Wilenmann von Bernath gives a negative answer to both questions.

In reality, his paper goes beyond the scope of these questions. He criticises both *i)* the discourses developed by criminal law scholars who aim to set limits on the decisions made by political actors concerning criminal policies, and *ii)* the idea that such limits can be enforced by judicial actors based on constitutional principles.

I fully agree with the first part of his line of reasoning; (*i*): as I have myself argued elsewhere[2], criminal law scholars have struggled, at least throughout the second half of the 20th century, to shape principles which can work as *guidelines* for legislators in making – or more modestly, in limiting – decisions on whether or not to criminalise specific acts and the appropriate kind of punishment to impose. However, such efforts have clearly been unsuccessful. One of the explanations for this lack of success put forward by Wilenmann is that all too often it has not been clear *who* should be the institutional actor entrusted with the task of ensuring conformity of criminal legislation with these principles. Another, more radical explanation is that these principles lack any legal (i.e. positive) definition within the legal order, but are instead derived – as convincingly argued by Wilenmann – from theoretical assumptions (in general based on the essence and purpose of punishment) that are far from self-evident.

On the other hand, the many efforts deployed by criminal law scholars to provide these principles with a constitutional foundation – so as to make them judicially enforceable – have also failed primarily because courts throughout the world have generally not been prepared to accept them as implicit content of written constitutional provisions. A typical case is the judgment by the German Constitutional Court on incest, where the Karlsruhe justices adamantly rejected the claim that the

criminal provision at issue violated the *Rechtsgüterschutzprinzip*, a cornerstone of Germany's criminal law doctrine. Said principle, whatever meaning it might have, was simply denied the status of a *constitutional* principle and hence discarded as a possible basis for the annulment of the impugned provision[3].

My disagreement with Wilenmann's paper is directed at the second part of his discussion (*ii*). While conceding that constitutional arguments – i.e., constitutional provisions establishing general principles or fundamental rights – are at least "relatively precise in determining the conditions for the success of judicial review of criminal legislation"[4], he nonetheless argues that judicial review itself is "ineffective as a tool to control criminal policies in general and political decisions over criminalisation or decriminalisation in particular"[5].

In his opinion, judicial control has historically been totally incapable of limiting expressions of "penal populism" on such issues as over-criminalisation or massive incarceration. The poor record of the US Supreme Court is, in his opinion, illustrative: extremely harsh sentences for comparatively minor offences have systematically been upheld by the Court, in spite of their dubious compatibility with the "cruel and unusual punishments" clause contained in the Eighth Amendment, which according to the Court's own case law encompasses a prohibition of grossly disproportionate sentences. Even the German Constitutional Court, which does not have to deal with the same kind of penal populism in domestic legislation, shows a similar reluctance in exercising effective control over decisions on criminalisation, having upheld in its history, highly controversial provisions such as those penalising homosexual intercourse between adults (1958)[6], homosexual intercourse involving a minor (1973)[7], production and possession of cannabis (1994)[8] and, of course, incest (2008).

One might think that the current self-restraint shown by the courts is wrong, and that more courage by the judiciary is needed to enforce constitutional standards when it comes to criminal legislation. Wilenmann's point however, is that such a criticism would be unfair to the courts and would be missing the point. There are in fact good reasons, in his view, for courts to be reluctant to strike down criminal law provisions.

Decisions over the criminalisation or decriminalisation of a particular type of conduct are, according to Wilenmann, inherently *political* decisions, since they always result in a choice being made between conflicting interests, values or visions. Such a choice is necessarily controversial. Therefore, in spite of the effort a court might make in order to justify its decision as the logical consequence of normative premises, the mere fact of expressing support for one of the contending views would naturally be regarded as an improper intrusion by the judiciary into territory that should instead be left to political and democratically legitimised decision makers. A judicial decision overriding a legislative choice on criminalisation, therefore, would inevitably spark harsh criticism and, more generally, adverse reactions by the media and political actors. This could easily undermine the moral authority of the judiciary, making it ultimately more vulnerable to attacks by the political branches of power.

Roe v. Wade is, in Wilenmann's eyes, a perfect example of where the US Supreme Court overstepped the mark when curtailing legislative discretion by superimposing its own view above that of democratic legislators concerning a very sensitive conflict of interests, rights and values. As a result, 45 years after that decision, abortion laws are still at the centre of the political debate in the US. The perception by the public of the *political* nature of judicial decisions has been magnified, and the idea that justices are selected by the President in order to pursue a *political* agenda from the bench has become a sort of truism among the media and general public.

Wilenmann's conclusion is therefore, quite straightforward: decisions over criminalisation or decriminalisation should be left to political actors, within the context of an institutional and procedural framework shaped by the constitution – whose role, in this ambit, should not be mistaken for a kind of trump-card in favour of, or against, other possible solutions. The only

role for the judiciary that Wilenmann would consider appropriate here is what he calls a "weak judicial review"[9], loosely inspired by the British model based on the *Human Rights Act*: i.e., the possibility for the courts to submit their *doubts* to parliament, about the constitutionality of the criminal legislation in force, so as to give political actors full responsibility in considering making a change to the law.

I will explain why I am unconvinced by Wilenmann's approach. I will defend the idea of a "strong judicial review" – i.e., a review open to the possibility of declaring a provision void because of its incompatibility with the constitution, even in the area of criminal legislation, provided that certain preconditions are met.

1. Is constitutional judicial review of criminal legislation really ineffective?

As we have seen, Wilenmann's starting point is a statement of fact: judicial control over criminal legislation has proven to be ineffective[10]. In his view, the history of both the US Supreme Court and the German Constitutional Court clearly demonstrate this.

This factual premise seems to me somewhat overstated.

Admittedly, the German Constitutional Court has always been very cautious in criminal law matters, having only struck down criminal provisions in exceptional cases (including, though, a remarkable judgment declaring void a provision over the confiscation of all property owned by perpetrators of particularly heinous offences, which the Court held to be incompatible with several corollaries of the principle of legality in criminal matters[11]).

The same criticism against the US Supreme Court however, is only partially justified.

The US Supreme Court, immediately after bringing back capital punishment in *Gregg v. Georgia* (1976), began to strike down, in a succession of cases, state criminal provisions that prescribed the death penalty for offences other than intentional homicide[12], or for defendants who were minors or suffered from mental disabilities at the time of the commission of the offence[13]. In a parallel line of cases the same court declared unconstitutional several laws providing for life imprisonment without possibility of parole for recidivists in non-violent crimes[14], or with respect to offences committed by minors[15].

These judgments were made by tiny majorities, often 5:4, with the conservative justices (headed by Scalia) strongly dissenting over the alleged invasion of legislative responsibility by a group of judges with no democratic legitimation, who were trying to impose their own views about what should be considered a 'just' punishment upon the opinion of the political majority in different states. And yet, such judicial decisions were not perceived as particularly problematic by American society to the extent that these decisions contributed to a significant reduction in the field of application of both the death penalty and life imprisonment without parole on a nation-wide scale. Nor these decisions sparked, in the medium or the long term, any appreciable adverse reaction against the Court.

However, it is the Canadian experience in particular that, as far as I can see, shows how effective a judicial review of criminal legislation can be. The Canadian Supreme Court has recently struck down three provisions criminalising various activities related to prostitution (such as keeping a bawdy-house, living on the avails of prostitution, communicating in public for the purposes of prostitution), holding that these restrictions put the safety and lives of prostitutes at risk by preventing them

from implementing certain safety measures — such as hiring security guards or "screening" potential clients — that could protect them from violence, and by *de facto* imposing dangerous working conditions on them. The Court held, therefore, that these provisions violated section 7 of the Charter, which protects the rights to life and security of the person[16].

In another decision, the Canadian Supreme Court declared the provisions of the criminal code penalising physician-assisted suicide to be void, with the effect of legalising the practice of active euthanasia to competent adults who consent to the termination of life and suffer from a grievous and irremediable medical condition that causes enduring and intolerable pain[17].

Both decisions by the Canadian Court have intervened in highly controversial areas of criminal law in almost every jurisdiction, where opinions among the public on the criminalisation or decriminalisation of the relevant courses of conduct are still sharply divided. Yet the Court has not refrained from stepping in and imposing, in the latter case through a *de facto* overruling of a relatively recent precedent[18], a clear-cut solution, considered to be the only one compatible with the Charter. The legislator then followed the path opened by the Court, by enacting a law on euthanasia in 2016, that is broadly in line with the principles laid down by the judgment[19], albeit with some controversial restrictions that could give rise, in the future, to further judicial challenges[20].

Other jurisdictions vested with powers of constitutional review of legislation throughout the world have also shown a remarkable degree of judicial activism concerning criminal legislation in especially sensitive areas. The Colombian Constitutional Court as early as 1997 adopted a similar solution to that of the Canadian Supreme Court in 2014, by declaring unconstitutional the application of the criminal provision on homicide in consensual death of the victim in the case of physician-assisted suicide for incurable patients under intense suffering. The punishment of a doctor helping a patient to die with dignity would, according to the Court, run counter to the fundamental rights to human dignity and personal autonomy recognised by the Constitution[21]. The Argentinian Supreme Court, has gone as far as striking down criminalisation for mere possession of drugs, on the basis that such a provision is incompatible with the individual's fundamental right to private life[22]. Both the French *Conseil Constitutionnel* and the Spanish Constitutional Court, on the other side of the Atlantic, held that the criminalisation of denial of historical genocides is contrary to the right to freedom of expression recognised by the respective constitutional charters, and have consequently annulled two controversial provisions enacted with full support of the majorities in the Spanish and French parliaments just a few years prior[23].

The most recent example of a judicial decision which has not shown any self-restraint towards legislative discretion in criminal matters is represented by the judgment whereby the Supreme Court of India, overruled a precedent dating back just four years[24], declaring void a section of the Indian Penal Code which penalised, *inter alia*, homosexual intercourse[25]. A unanimous court considered the provision incompatible with a whole range of constitutional rights: human dignity, right to liberty, right to equal treatment and the non-written right to privacy. In spite of the (apparent) self-evidence of the decision in the eyes of a Westerner[26], this judgment boldly intervenes in a still socially controversial issue, explicitly stating that the Court's mission is to enforce the "constitutional morality" over any conflicting "social morality"[27]. And this within the framework of an ideology, fully embraced by the Court, of "transformative constitutionalism"[28], which considers the Constitution and its interpretation by judicial actors, as crucial motors for change in Indian society, independent of decisions, or lack of decisions, by political institutions.

Additionally, the Italian Constitutional Court, of which I am honoured to be a member since last March, holds a significant record in judgments which have struck down penal provisions.

A part of these judgments refers to the criminalisation of certain acts. Archaic provisions that were still present in the Italian criminal code at the time of those judgments were declared void because of their incompatibility with a specific constitutional right. For example, the Court declared unconstitutional a provision stemming from the fascist era, criminalising strikes led by workers and unions: the offence was found to be in breach of the constitutional provision recognizing the right to strike within the limits set by law[29]. Similarly, the outdated offence of female adultery was annulled because of its incompatibility with the constitutional principle of equality between spouses[30]. More recently, a decision in the year 2000 declared the criminal offence of contempt of the Catholic religion unconstitutional, as it was found to violate the principle of equality of all religions before the law[31].

Other, and probably more interesting judgments by the Italian Constitutional Court concern the *punishment* provided for by the impugned criminal provision. In these instances the Court has widely used a kind of double scrutiny, assessing the compatibility of the challenged provision with both the principle of equality before the law enshrined in Article 3 of the Constitution and the principle according to which penalties should aim at the convict's rehabilitation set forth in Article 27. The combining of these two safeguards has led the Court to recognise a non-written principle of *proportionality* between the severity of the sentence and the seriousness of the offence, which in turn has allowed several provisions on mandatory minimum penalties or mandatory aggravation of the penalty to be struck down, in as far as they prevented the trial court from determining a proportional sentence for the offender[32] This is also the case concerning provisions that have recently been enacted by parliament, in the pursuit of tough-on-crime policies that are clear expression of what Wilenmann– in the wake of Garland– labels "penal populism". Noteworthy in this respect, for example, is a 2010 judgment whereby the Court declared a provision void that had been enacted just two years before, setting forth an aggravating circumstance applicable to any offence committed by an alien illegally residing in Italy, because of its incompatibility with the principle of equality before the law[33], in spite of this provision having been emphatically supported by the government in office at the time as a strategic tool to fight against illegal immigration.

A third set of interesting cases decided by the Italian Constitutional Court refers to rules governing the *execution of the sentence*. On a number of occasions the Court has struck down provisions that excluded special categories of detainees – generally sentenced for particularly serious offences – from the possibility of temporarily leaving prison for family, educational or professional reasons, or to be considered for early release, irrespective of their progress towards rehabilitation. Such provisions have been held incompatible with the mandatory precedence of rehabilitation over any other, albeit legitimate, purpose of punishment, including deterrence and retribution[34].

2. Is judicial review of criminal legislation politically defensible?

The above considerations clearly demonstrate, in my opinion, that judicial control of criminal legislation (at both the constitutional and international level) has historically proven to be *effective* in numerous instances. Decisions by the democratically elected legislators to criminalise, or not to decriminalise, controversial courses of behaviour have often been overthrown by courts; and the courts' decisions have been for the most part respected by political actors, and accepted by public opinion.

The question is, however, whether the active role played by courts in criminal law matters can also be *justified* from an deontological perspective and in particular from a political standpoint. Wilenmann's thesis is clear in this respect: according to him, there are good reasons why courts *should be*, if they are not already, reluctant to intervene in criminal law matters. By

stepping into the realm of controversial conflicts of interest, values and visions that underlie decisions on criminal legislation, judicial actors would appear as *political* actors, without having any democratic legitimation and would therefore lose prestige and credibility in the eyes of the public.

Is his analysis really convincing?

Let us start with a basic – and obvious – consideration. A judicial review of legislation, even if performed by a special court such as a constitutional court, should never be mistaken as a review on the *merits* of the choices made by legislative powers. Democratically elected parliaments should be free to strike what *they* think is an appropriate balance between the competing interests and values at stake in criminal law matters as well as in any other sector of the legal system. Therefore, the golden rule for courts, while exercising a judicial review of legislation, should always be *deference* towards legislative discretion. It is up to the people, through their elected representatives, to decide which of the competing interests and values underlying a political decision – in criminal matters as much as anywhere else – should prevail.

However, constitutions are not only – as Wilenmann implicitly seems to suggest – mere normative frameworks establishing institutions and setting forth procedural rules for the production of legislation by those institutions. They also lay down *principles* relating to the *content* of the rules that those institutions will then have the responsibility of putting in place. These principles often aspire to serve as *guidance* for future legislation[35] and in any case work as *limits* to the discretion of political bodies in shaping legislative rules. Such is, in particular, the role of the *fundamental rights* enshrined in constitutions, which set firm boundaries regarding the discretion of legislative bodies, to safeguard a number of individual, and particularly sensitive, interests.

The political idea behind this mechanism is straightforward. In a *constitutional democracy* those majorities put into power following periodic elections are *in principle* vested with the power of shaping rules that shall be binding on the whole community, at least until a new majority is elected. However, this power is counterbalanced by a series of limits aimed at protecting *minorities*, and ultimately *every individual* within the community, against rules which would adversely affect a series of basic interests that majorities are not allowed to dispose of. These interests broadly correspond, in the language of 18th century political philosophy, to the sphere of those "unalienable rights" that man retains and will not waiver in favour of the sovereign, when entering a social contract. In essence, modern constitutions are nothing more than the positivisation of those unalienable rights, setting limits to the powers of the (contingent) majorities, the modern Leviathans.

More or less the same perspective inspires *international human rights law*, as it was conceived after the traumatic experience of World War II. The very core of fundamental rights that had been traditionally recognised by national constitutions, the protection of which had proven to be too weak within individual states, were then elevated to "human rights" protected by the international community, which committed itself – in various forms at universal and regional levels – to react against their violation, wherever committed in the world by any state actor. This mechanism necessarily implies the idea of a limitation to the very *sovereignty* of states, when it comes to the protection of human rights, and ultimately to the legislative power of the states, at least where the international community is concerned.

In both contexts – at a national and international level – *judicial actors* have been vested with the power of *enforcing* those limits, sometimes by simply declaring their violation and providing for some indirect redress (as is the case of the international court of human rights), sometimes by directly *annulling* the state act (including a legislative provision) responsible for the violation. Both mechanisms – and the latter in particular – represent a form of encroachment on political

choices made by democratically legitimised organs. But precisely such encroachments are necessary – as the US Supreme Court discovered as early as in 1803, in its landmark case *Marbury v. Madison* – in order to ensure effectiveness of those limits in case of a lack of spontaneous compliance by political bodies.

Courts should not, of course, dictate how a legislative provision be shaped. As Hans Kelsen, the father of modern constitutionalism, pointed out, the role of the courts when exercising a judicial review of legislation should be conceived, at least in principle, as a mere *negative* one. Courts are only called upon to declare that a particular law infringes the limits on legislative discretion set by the constitution (or by a charter on human rights), and to draw from this declaration the consequences provided for in the respective legal order for each occurrence. The state political actors will *then* remain free to exercise their full discretion in shaping a new law, on the condition that they respect the limits enforced by the court's previous decision. Simply said, a court can say, that solution X is not permitted; but it cannot choose an alternative solution (A, B, C, D...), since this responsibility continues to rest on the shoulders of political actors.

Now, quite frankly, I cannot see any reason why these points should be considered out of place when it comes to *criminal* legislation. Constitutions and human rights charters set forth a series of limits to state legislative discretion, for the sake of the addressee of the criminal norm (starting with the *nullum crimen* and its corollaries) and later the defendant (privacy rights, fair trial rights, personal liberty, etc.) and the offender (ban on certain kinds of penalties, prohibition of inhuman and degrading treatments, or – in the Italian example – mandatory orientation of the penalty towards rehabilitation). The individual fundamental freedoms work, too, as limits to criminal provisions, preventing the state from penalising acts that constitute the exercise of these very freedoms. All these limits should be enforced by judicial actors, whenever the legislator disregards them – even if this means the annulment of the relevant provision.

If a court vested with the power of judicial review of legislation should refrain from fulfilling this task out of fear of criticism by political actors or public opinion, it would betray its very *raison d'être* in a modern society.

3. Rethinking the preconditions of an effective (and politically sustainable) judicial review of criminal legislation

Having said all this as a matter of principle, one cannot but recognise the compelling nature of Wilenmann's argument from a *factual* perspective. Every judgment overstepping a legislative decision, particularly (but not exclusively) in criminal law matters, *risks* exposing the court to sharp criticism by the political parties that had supported the law, as well as among public opinion at large.

As Wilenmann states, this risk cannot simply be shielded through language, i.e. by presenting the judicial decision as the logical (and therefore unavoidable) consequence of some normative premise contained in a written provision. Every application of a norm presupposes its interpretation, and every interpretation presupposes the exercise of discretion by the interpreter and a choice of possible options. This is especially true when it comes to constitutional provisions, which are generally framed in concise and vague terms and set forth principles instead of rules, which must often be balanced against – and reconciled with – other constitutionally relevant principles or interests. As a consequence, only in exceptional cases the incompatibility between a legislative provision and a constitutional norm will appear evident to the observer. In most cases, an incompatibility will have to be demonstrated by the constitutional court through more or less persuasive reasoning, almost every step of which will be open to criticism.

Any court vested with the power of exercising a judicial review of legislation – including international courts called upon to examine the compatibility of legislation with human rights – is therefore faced with a crucial dilemma. It either fulfils its role of protecting the core values entrusted to it, thereby exposing itself to the accusation of making political choices; or simply retreats from difficult decisions, thereby failing to defend those values from legislative abuse.

In fact, there is no choice: courts *must* fulfil their role, in a constitutional democracy as well as in an international scenario, where protection of human rights is now conceived as the universal imperative of justice. The question is rather, *what strategies* could and should courts adopt, in order to minimise the risks inevitably connected with their role.

Indeed, courts do have a counter-majoritarian mission to fulfil, but they also need, at the same time, for their authority to be at least in principle recognised and respected even by those who might disagree with their decisions. This requires that courts always be perceived as *impartial* bodies, no matter how questionable their single decisions may be. Severe loss of trust in the public eye to the impartiality of the judiciary (and, in particular, of a constitutional court) could easily lead to dangerous attempts to delegitimise the courts and, ultimately, undermine their powers through legislative or even constitutional changes, as shown by recent and worrying examples in some European jurisdictions.

Focusing here on judicial review of *criminal* legislation by *national* courts, I think it is convenient to differentiate between two types of application.

The first refers to criminal provisions that are already obsolete and no longer reflect the current prevailing system of values within the community. A clear example is the criminalisation of female adultery in Italy, or – in more recent times – the several provisions that penalised, throughout the world, homosexual intercourse as "unnatural sexual acts". All the judicial decisions that have annulled such provisions – such as the very recent judgment by the Indian Supreme Court mentioned above – each took place at a time when the respective societies were more than mature for such a step despite, many legislators being hesitant to make changes, probably out of fear of losing votes among the more conservative sectors of their electorates.

In such cases, the judicial decision to strike down the provision is not really problematic – "progressive" politicians will openly welcome it and conservatives will, in the end, be relieved to have been spared the responsibility of making an awkward choice themselves and risking division among their supporters. In this instance, the court's decision simply overcomes a political impasse and can be immediately accepted as a natural evolution of the law in force.

A more complicated situation arises, by contrast, in respect of controversial issues, particularly when a court is faced with a provision recently enacted by parliament, which still enjoys support by the ruling majority. This is in fact the type of situation discussed by Wilenmann, which has very often to do with policies of "penal populism", which involve draconian enhancement of mandatory penalties, or strict reductions to the possibility of non-custodial execution of sentences.

In such cases, any judicial decision striking down the law risks being seen as part of a *political* agenda pursued by the court and opposed to by the majority. However, since the court should not refrain from intervening in defence of the fundamental rights which have been violated, the only viable alternative for the court seems to me to be that of making an additional *argumentative effort* to explain the *valid reasons* – or even better, the *compelling* reasons – behind the court's decision.

Showing that the decision does not come out of the blue, but is consistent with *established precedents* is, obviously, an essential part of this strategy. The more a judicial decision can be foreseen by political actors as a natural consequence of previous well-settled case law of the court, the less the court will be exposed to the risk of being accused of political partiality or arbitrariness.

However, long litanies of precedents within the judgment are probably not enough in politically polarised contexts. Those valid reasons that have guided the court to the point of declaring void a law still supported by the majority probably also need to be *spelled out in simple terms*, beyond any technicalities: in the judgment itself, through press releases and – if necessary – though interviews by the most senior members of the court. The judiciary has in the present world, *nolens volens*, a vital educational mission to fulfil – that of making clear to the general public that the majority rule, so co-essential as it is to democracy, is not absolute and is indeed limited by constitutional principles and fundamental rights, the protection of which is entrusted to institutional actors who are not themselves controlled by the majority. And since public trust in the ability of these actors to appropriately fulfil this task cannot be taken for granted, courts should deploy every effort to make the logic of their decisions clear to the public, through arguments and language that are easily accessible to laypersons.

An important part of this strategy is, in my opinion, to show that the decision made by the courts enjoys ample support at an international level, in legislation as well as in case law of *other* constitutional and human rights courts. An *international consensus* on a particular solution is never a trump-card, but is always a good argument in favour of the reasonableness of a particular solution, both in the decision-making process and, later, in explaining to readers and the general public the reasons behind that solution. Therefore, the citation of foreign or international precedents is, at least in my eyes, a technique that courts should generously use when dealing with difficult cases. In doing so, courts should not simply enumerate non-domestic precedents, but should above all discuss the valid reasons that underlie the solutions adopted by those judgments – in particular the reasons which are not linked to the peculiarities of each jurisdiction and could be considered as expression of universal criteria of justice. This exercise is especially fruitful when speaking about the protection of basic individual rights – a matter of universal concern, which is regulated by international charters and raises similar challenges everywhere in a globalised world.

All these strategies will never of course grant a full political acceptance of the decision, nor will they necessarily gain public support; but they will, at least, reduce the risk of too virulent, and in the long terms dangerous, attacks on the court as an independent and impartial institution.

On the other hand, no argumentative strategy will ever shield the court from such attacks in the case of clearly premature decisions on issues that are still too controversial to be resolved in a clear-cut way. An instructive example of this situation is probably *Roe v. Wade* where a judicial decision established a fundamental right to abortion as part of a recently introduced right to privacy, and curtailed – as a consequence – the power of state legislators to independently strike the balance between the competing interests at stake. This was probably not one of the wisest steps taken by the US Court. The issue was, at that time, highly controversial, and was at the very centre of the political arena; the counter-interest at stake – the life of the foetus – was not negligible at all and would definitively have deserved more careful consideration by the Court majority. The only relevant case law was represented by some recent decisions on the right to privacy, which had dealt with far less complex issues, such as regulation of contraception. A consensus at international level on the issue in the seventies was still a long way off. A greater degree of self-restraint would have probably better served the reputation and ultimately, the moral authority of the Court.

4. Closing remarks

This paper has basically argued *i)* that judicial control of criminal legislation can be, and in many instances has historically been, effective; and *ii)* that there are firm grounds to justify, from a political and institutional viewpoint, the exercise of effective judicial control, provided that courts make every possible effort to explain to the public the valid reasons for overthrowing legislative decisions even whilst they still enjoy support by political majorities.

Just to avoid any misunderstanding though, let me add a few words on what I think is the actual *Leistungsfähigkeit* of the judicial review in this field – that is, on the performance that can be reasonably expected of it.

Effective judicial control in itself is no guarantee for a coherent, rational and "just" criminal policy. Ensuring these results is the responsibility of the political branches of power. The judiciary can only, through its powers of reviewing the constitutionality of legislation, set some external *limits* to the criminal policy put in place by political actors, in particular by declaring unconstitutional specific solutions that unduly impinge on an individual's fundamental rights. A comprehensive way towards a better criminal system can only be paved at a political level, through an ordinary democratic decision-making process.

One cannot expect more than this from judicial review of criminal legislation. I think though, it would be unreasonable to consider it a peripheral undertaking. All the criminal offenders whose lives have been spared as a consequence of the decisions by the US Supreme Court mentioned above are surely grateful to those justices who, in spite of ample public support for the laws in force at the time of judgment, declared those laws unconstitutional. I have no doubt that the daily lives of gays and lesbians in India since September 6 this year, have become a little brighter after the judgment by their Supreme Court, which relieved them from the fear of being prosecuted or blackmailed on the sole ground of their sexual orientation.

Protection of fundamental rights cannot, alone, make the world a better place, but can, most certainly, avoid blatant injustices perpetrated by political majorities on individuals, and sometimes on entire classes of individuals. No more maybe, but surely no less.

[1] Wilenmann von Bernath, 'Control institucional de decisiones legislativas político-criminales', *Estudios constitucionales*, Thomson Reuters, 2017, issue 15, n° 2, pp. 389-445.

[2] Viganò, *Menschenrechte und Strafrecht. Ein Plädoyer für eine Neuorientierung*, in Beulke-FS, 2015, pp. 55-68.

[3] BVerfGE 120, 224, in particular at 39.

[4] Wilenmann 414.

[5] Wilenmann 415.

[6] BVerfGE 6, 389.

[7] BVerfGE 36, 41.

[8] BVerfGE 90, 145.

[9] Wilenmann 437.

[10] See Wilenmann 418: "la orientación al control judicial no ha tenido ninguna capacidad de rendimiento en reencuazar a la política criminal".

[11] BVerfG, Zweiter Senat, 20.3.2002 – 2 BvR 749/95.

[12] See *Coker v. Georgia* (1977): death penalty unconstitutional for the offence of rape; *Enmund v. Florida* (1982): death penalty unconstitutional for the so called "constructive murder"; *Kennedy v. Louisiana* (2008): death penalty unconstitutional for all offences different form intentional murder, treason and espionage.

[13] See *Thompson v. Oklahoma* (1988): death penalty unconstitutional for intentional homicide committed by minors of 16; *Aktins v. Virginia* (2002): death penalty unconstitutional for intentional homicide committed by persons with mental disabilities, while not being insane; *Roper v. Simmons* (2005): death penalty unconstitutional for intentional homicides committed by minors of 18.

[14] See *Solem v. Helm* (1983).

[15] See *Graham c. Florida* (2010); *Miller v. Alabama* (2012).

[16] *Attorney General vs Bedford*, 2013 SCC 72.

[17] *Carter v. Canada (Attorney General)*, 2015 SCC 5.

[18] *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519.

[19] Statutes of Canada, Chapter 2, *An Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying)* (2016).

[20] Such as the requirement of the "foreseeability" of natural death for the person requesting assistance in dying.

[21] Corte constitucional de Colombia, sentencia 239/97. The same court, in its judgment T-970/14, more recently held that the right to die with dignity enshrined in the Constitution should be ensured to anyone in Colombia even in the (persistent) absence of a legislative regulation of the matter.

[22] Corte Suprema de la Nación de Argentina, sentencia 25.8.2009, *Arriola, Sebastián y o.*

[23] Tribunal Constitucional de España n°235/2007; Conseil Constitutionnel, décision 2012-647 DC of 28.2.2012.

[24] Supreme Court of India, *Suresh Kumar*, (2014) 1 SCC 1.

[25] Supreme Court of India, judgment of 6.9.2018 on the writ petition (criminal) No. 76 of 2016 and o. (available on line at https://www.sci.gov.in/supremecourt/2016/14961/14961_2016_Judgement_06-Sep-2018.pdf). The same court had recognised the fundamental right to privacy in its landmark judgment *Puttaswamy*, (2017) 10 SCC 1.

[26] Who should not forget, by the way, that a corresponding decision was made by the US Supreme Court, by a 6:3 majority, only in 2003 (in *Lawrence v. Texas*, 539 U.S. 558 (2003), which finally overruled the unfortunate judgment *Bowers v. Hardwick*, 478 U.S. 186 (1986), which had upheld a provision criminalizing, *inter alia*, homosexual intercourse between consenting adults).

[27] Opinion by Diprak Misra CJI, at 111-124.

[28] *Ibidem*, at 96-97.

[29] Corte cost., judgment 29/1960.

[30] Corte cost., judgment 126/1968.

[31] Corte cost., judgment 508/2000.

[32] See, for example, Corte cost., judgments 106/2016, 74/2016, 185/2015, 105/2014, 251/2012. See also judgment 168/1994, which declared unconstitutional the provision of life imprisonment for juveniles.

[33] Corte cost., judgment 249/2010.

[34] Corte cost., judgment 149/2018 and precedents quoted therein.

[35] As in the case of Article 3 (2) of the Italian Constitution: "It is the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the country".