# In Pursuit of Basics for a New Principle of Legal Reserve in Supranational Criminal Law

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## Abstract

*Reflecting on the future challenges inherent in a globalized world is a pressing need at all levels (public sector, private sector and civil society). If the aim is to avoid asymmetries provoked by globalization and to face up, effectively and legitimately, to its growing risks, such as international financial instability and climate change or problems related to migration, poverty and crime, there is no alternative but to seek more effective mechanisms for cooperation and policy integration. However, these mechanisms must be introduced without neglecting the legitimacy of international and supranational institutions and of the decisions arising from them. With this backdrop in mind, this paper focuses on the study of the principle of legal reserve in criminal matters and aims to find basics for its adjustment to a supranational order, specifically to the EU. The purpose here is to show that the traditional principle of legal reserve may be configured differently at EU level, providing that a minimum content based on the mutual reinforcement of different ways of legitimacy is safeguarded. This would only be possible, however, if the new legislative discourse ensures the emergence of a rational criminal law. The legality principle is not currently working, even in national contexts, where it is undoubtedly going through a profound crisis of identity.*

## I. Introduction

It has traditionally been said that only States have *ius puniendi*, so that no global territorial institution has, in theory, any decision-making mechanisms provided with the classical safeguards which criminal law provisions must respect. The question which arises here is whether it would be possible to reconcile the ideal of universalism and, in particular, of harmonization, with the most essential guarantee of criminal law, namely the *precondition of a statutory basis*, also called *requirement of law* or *principle of legal reserve*. The answer will vary according to the legal tradition taken as a starting point. If a traditional Roman-Germanic perspective is taken, the answer will be negative. The French Revolution gave the national parliaments the power to enact criminal laws because they are the only institutions with sufficient democratic legitimacy. They are the expression of popular sovereignty and for this reason they can only limit individual freedoms. Given that there is no parliamentary assembly with full legislative powers in the European Union, criminal laws laid down there could not be considered legitimate from this perspective. The opposite view, which has arisen in modern times, considers that it would be absurd to transpose the nation-state paradigm to an international or European institutional

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context. If the democratic deficit argument were deployed in order to close the door upon the international or European criminal law, it would mean that changes in the socio-political scene could not be taken into account. In recognition of the latter position, this paper aims to refute certain statements such as "Only when the European Parliament has a position similar to the national parliament, can criminal legislative powers be transferred to the European [Union] without any breach of the Constitution"[1] or "no modification to the EU treaties by which formal and explicit penal competences are conferred on the European Parliament seems to be enough"[2]. The aim here is to show that the traditional principle of legal reserve may be configured differently at EU level, providing that a minimum content based on the mutual reinforcement of different ways of legitimacy is safeguarded[3]. This would only be possible, however, if the new legislative discourse ensures the emergence of rational criminal law.

A stop to consider different manners to configure a fundamental right is, at this point, necessary in order to achieve the aim in sight. Once different standards for protecting fundamental rights are presented (II), it will be stated that none of them is appropriate. This is followed by an analysis of the *functional equivalence* as a tool to configure a fundamental right, which will be also rejected because of the erosion of domestic legal reserve. If the precondition of a statutory basis can no longer assume its main role which is to guarantee separation of powers and popular sovereignty; and if Member States are no longer in favour of being bound to it, then it no longer makes sense to find a functional equivalence to a system which itself is defective (III). Taking into account that the principle of legality was born attached to a historical phase of "sovereignty" (the root of liberal democracy), the next step must necessarily include a stop at such a concept. A historical overview through the concept of sovereignty will verify how the current context has ended up being very different from that which existed at the start of liberal parliamentary sovereignty (IV). Finally, a sketch of a possible model of legal reserve for the European Union (V) will be presented.

## II. Standards for Protecting Fundamental Rights as a Failed Approach

The trend to compare the configuration of fundamental rights at national and European level is rooted in the development by the EU Court of Justice of a *sui generis* and praetorian system of fundamental rights protection based on principles of Community law, as well as on the international treaties on human rights, especially the European Convention on Human Rights (ECHR)[4], and the constitutional traditions common to the Member States. Indeed, since the *Internationale Handelsge-*

[1] *J.M. Silva Sánchez,* Los principios inspiradores de las propuestas de un Derecho penal europeo: Una aproximación crítica, Revista penal (RP), Issue 13, 2004, p. 146.

[2] *J.M. Silva Sánchez,* RP 2004, p. 147.

[3] *A. von Bogdandy,* Supranationaler Föderalismus als Wirklichkeit und Idee einer neuen Herrschaftsform. Zur Gestalt der europäischen Union nach Amsterdam, Baden-Baden, Nomos, 1999, p. 56 et seq.

*sellschaft mbH* case[5], sources of inspiration as such have been a constant reference in EU Court of Justice's jurisprudence. However, it should not be forgotten that the Court of Justice has never suggested that configuring fundamental rights at European level is strictly subject to both external parameters. In others words, the European Court has never indicated that it is mathematically linked either to the constitutional traditions common to Member States nor to the ECHR[6]. On the contrary, what the European Court of Justice designed is a flexible protection system developing a standard which takes into account both the national values such as those are contained in international conventions and treaties (especially those rights set forth in the ECHR), and which corresponds to the structure and purposes of Community law[7]. This method seems to be generally geared towards a *broad* standard of protection, but not to a *maximum* standard in relation to the protection of a particular law provided by the law of a Member State.

In accordance with the doctrine[8], there are four standards used by ECJ case-law: the "highest" standard or the "maximalist" approach of protection, the "prevailing system approach", the "lowest common denominator" approach and the "better law solution" approach.

The "highest" standard of protection requires that protection of fundamental rights such as those provided by domestic constitutions is equally provided when the European Union exercises its regulatory powers once Treaties have been ratified. Applied in the extreme, this human rights standard would result in the illegitimacy of whatever EU act, violating not only common fundamental rights in most European constitutions, but also any fundamental right under a small number of constitutional texts or even under a single *Norma Normarum*[9]. With the maximal approach, the legitimacy of European acts is also assessed based on the highest degree of development of a fundamental right in one or more constitutional systems of the Member States, rather than taking into account the preferential development of any fundamental right at European level. Its intensity can, however, be softened, even requiring the Union to protect the fundamental rights common to at least most of the Member States[10].

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[4] European Court of Justice (ECJ) 12. 11. 1969, case 29/69 (*Erich Stauder/Stadt Ulm-Sozialamt*), [1973]; ECJ14. 5. 1974, case 4/73 (*Nold*); ECJ13. 12. 1979, case 44/79 (*Hauer v. Land Rheinland-Pfalz*), ECJ 18. 04. 1980, case 154 and others (*Valsabbia/Commission*).

[5] Case 11/70, judgement of 17 December, 1970.

[6] See *C. Lebeck*, The European Court of Human Rights on the relations between ECHR and EC-law: the limits of constituionalisation of public international law, Zeitschrift für öffentliches Recht (ZÖR), Issue 62, 2007, p. 207.

[7] *J. Kühling*, Fundamental Rights, in:A. vonBogdandy/J. Bast(eds.), Principles of European Constitutional Law, Modern Studies in European Law, Issue 8, Hart, Oxford, 2006, p. 505 et seq.

[8] See, above all, *A. Bernardi*, "Riserva di legge" e fonti europee in materia penale, Annali dell'Università di Ferrara – Scienze Giuridiche (AUF), vol. XX, 2006, p. 1 et seq.

[9] See *ECJ, Nold* (fn. 5), where it is stated that "in safeguarding a human right, the Court is bound to draw inspiration from the constitutional traditions common to the Member States and cannot uphold measures which are incompatible with the fundamental rights established and guaranteed by the constitutions of these States".

[10] Another author sharing this opinion is *E.W. Füss*, Die europäischen Gemeinschaften und der Rechtsstaatsgedanke, Luxemburg, 1967, p. 13 et seq., and *E. Steidorff*, Rechtsschutz und Verfahren im Recht der europäischen Gemeinschaften, Baden-Baden, 1964, p. 57 et seq.

On the other hand, if the Union must enforce maximum protection of a fundamental right, each Member State could impose their own rights at European level, downgrading an autonomous foundation of such principles or rights at European level[11]. The maximum standard of protection is, finally, problematic because the maximum protection provided for a right may result in the minimal protection of another right also recognized in a state constitution. In this regard, the *Grogan* case[12] is very relevant. In the mid-1980s, members of student associations in Ireland began distributing propaganda on clinics established in the UK that allowed the practice of abortion. As a manifestation of the freedom to provide services, the distribution of propaganda raised questions of a breach with Article 40.3 of the Irish Constitution, under which the State acknowledges "the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right". The High Court submitted a preliminary question to the ECJ on whether Article 40.3 of the Irish Constitution was contrary to the freedom to provide services. The Court ruled that no incompatibility existed, given that there was a diffuse intra-community link between service companies settled in the UK and students who disseminated information. Supposing that the Court would have appreciated any intra-community links, a maximum level of protection (of the Irish system) to the unborn would have collided with other rights recognized in other States, for example, the woman's supreme right over her own body. Besides, if the maximum standard had also been enforced, that would have resulted in the imposition on the rest of the states of a very peculiar and characteristic philosophy of a human right acknowledged by some Member States[13].

In order to prevent such conflicts, some scholars have attempted to qualify the concept of *maximum standard of protection*. Thus, it is said that to substantially confer similar protection granted under the European Union to that which is provided under domestic law, does not mean an equivalent protection in every respect. However, such a Solomon solution presents a fundamental problem: Any comparison among different domestic laws of every Member State is extremely complex[14] and will be even more complex because of future enlargement of the European Union. Besides, it must be taken into account that criteria for determining the level of basic protection are a matter of judgement[15]. The Court of Justice of the EU has long been reluctant to conduct an in-depth comparative analysis of research in the field of human rights at national level. In fact, the constitutional laws of all Member

[11] *A. Bernardi* (fn. 9), p. 67.

[12] European Court of Justice (ECJ) 4.10. 1991, case C-159/90, (*The Society for the Protection of Unborn Children Ireland Ltd/Stephen Grogan and others*), [1990] ECR I-4685.

[13] *J. Martín y Pérez de Nanclares*, La protección de los derechos fundamentales en la UE: Cuestiones pendientes tras la Carta de Niza, in: Anuario jurídico de La Rioja: XXI Jornadas de estudio: Del Convenio Europeo a la Carta de los Derechos Fundamentales de la Unión Europea, Año: 20002001, Issues 6-7, p. 411.

[14] *A. Bernardi* (fn. 9), p. 67, and references to biblioghraphy in footnote 244.

[15] *M. Pi Llorens*, Los derechos fundamentales en el ordenamiento jurídico comunitario, Ed. Ariel Derecho, Barcelona, 1999, p. 77 et seq.

States have never been analysed. On the contrary, it has preferred to note that a specific principle or right is recognized by most Member States[16].

If arising issues are being moved from the arena of the maximum standard of protection to the principle of legality, it can be easily noted that it would lead to a "never before seen" principle of legality by any Member State. In that sense, it would be a principle of legality characterized by optimization of all its corollaries from the point of view of all Member States. Yet it would be impossible to arrive at such a principle of legality[17]. The impossibility is still more pronounced in the context of the legal reserve due to the requirement in Member States' civil law legal systems of adopting criminal provisions by the Parliament only. Nevertheless, that requirement could clash with the constitutional requirement of certainty. Full certainty can be only achieved through remissions to subordinate legislation[18]. No less problematic is the change which would imply such a consideration in constitutional traditions of the Member States regarding establishing the body that would be the most appropriate to provide criminal laws[19].

According to *common law* legal systems, if judges are considered to be best placed to provide criminal laws, constitutional traditions of *civil law* legal systems, i. e. the Spanish model, would be completely transformed. However, if the path is set out by civil law legal systems, then common law legal systems would also be completely modified. Besides, if a 'maximum standard' is considered to be used, the Spanish concept of legal reserve would have to be taken into account at European level. This would force all Member States to provide criminal laws through special legal instruments – i. e. the so-called *ley orgánica* (*organic law*) according to the Spanish Constitution – requiring a qualified majority of votes cast within national Parliaments.

Being impossible as it is to aspire to a maximum standard of protection, some scholars advocate the criterion of the *prevailing legal system*. Such a standard is particularly based on compliance with national legal systems and at the same time it provides for a high level of protection[20]. The standard of the *prevailing legal system* also has drawbacks. Firstly, although a comprehensive study of comparative law was asked for on a specific right or principle, it would be hard to determine the *prevailing legal system*. Secondly, respecting fundamental rights as they have evolved under constitutional traditions would not always be effectively guaranteed: the standard of the prevailing legal system would lead to a degradation of the level of protection in

[16] *E. Pagano*, I diritti fondamentali nella Comunità europea dopo Maastricht, in: Il diritto dell'Unione Europea, 1996, Issue 1, p. 175 with further references to case law in footnote 35.

[17] *A. Bernardi* (fn. 9), p. 69.

[18] *N. García Rivas*, El principio de determinación del hecho punible en la Doctrina del Tribunal Constitucional, Ministerio de Justicia, Madrid, 1992, p. 32: "(…) There are some commentators supporting the idea of a stronger legal reserve in criminal matters, but they finally conclude that no legislator is able to do so without resorting to lower legislation in order to detail a punishable offence, all the more since the matter to be regulated falls within the scope of Administrative Law (…)".

[19] *N. García Rivas* (fn. 19), p. 70.

[20] *E. Bribosia*, Les droits fondamentaux dans la Constitution de l'Union européenne, in E. Bribosia/M. Dony (eds.): Commentaire de la Constitution de l'Union européenne, Bruxelles, 2005, p. 127.

the case of the most advanced legal systems in the context of human rights[21]. Finally, this criterion should not be the most convenient to achieve European goals[22].

Regarding the principle of legality, the approach of the *prevailing legal system* could imply arbitrariness in order to identify what legal system should prevail over the rest. It is also important to count on persistent expressions of dissatisfaction coming from those other countries whose systems of human right protection are more extensive or offer more legal guarantees. Difficulties to evaluate and compare possible and different national solutions are also an issue[23].

On the other hand, the *minimum standard of protection* requires a profound review of drawbacks among different legal systems of Member States[24] and therefore a comparative analysis of Member States' constitutional traditions. Neither the Court of Justice nor the Court of First Instance of the EU has carried out such a detailed and scientific analysis[25]. It is also unsatisfactory from a functional perspective because it is not a suitable method to guarantee basic aspects of constitutional traditions of Member States. In fact, the *minimum standard of protection* tends to develop a weak regulation praxis concerning which both Luxembourg courts would not act effectively.

Situating all of this in the context of our topic, it can be said that given the complexity and the high degree of variation in the principle of legality in Member States, it would be extremely difficult to identify the corollaries in relation to the principle of legality. Secondly, this would be the case because their concept and different level of development vary in each country accordingly. Thirdly, it would also be complicated to consolidate the *lowest common denominator* accepted by every Member State. Last but not least, a principle of legality limited to its hard core would be unacceptable for some states.

Regarding the *better law* criterion, it is a question of implementing the most suitable standard for the EU[26]. Such a standard does not necessarily require the *lowest common denominator*. On the contrary, the *better law* standard concentrates on different values integrated into constitutional and legal systems of the Member States, on the one hand, whilst on the other, on those principles better suited for achieving European goals[27]. Through a range of sub-criteria being used by both

[21] *A. Bernardi* (fn. 9), p. 72 with further references in footnote 273.

[22] *A. Bernardi* (fn. 9), p. 73.

[23] *A. Bernardi* (fn. 9), p. 75.

[24] *S. Bellini*, La tutela dei diritti fondamentali nell'ordinamento comunitario secondo la sentenza Hauer, Rivista di diritto intenazionale, 1981, p. 321 and *H.G. Schermers/D.F. Waelbroeck*, Judicial Protection in the European Union, Kluwer 2001, p. 28.

[25] *A. Bernardi* (fn. 9), p. 78 and *L.S. Rossi*, "Constitutionalisation" de l'Union européenne et les droits fondamentaux, Revue Trimestrelle de Droit européen, vol. 38, nº 1, p. 41.

[26] *M.A. Dauses*, La protection des droits fondamentaux dans l'ordre juridique communautaire, Revue trimestrielle de droit européen (RTDE), 1984, p. 412 et seq.; *H. Kutscher*, Méthodes d'interpretation vues par un Juge à la Cour, Rencontre judiciaire et universitaire, September, 1976, p. 1 et seq.; and *K. Zweigert*, Der Einfluss des Europäischen Gemeinschaftrechts auf die Rechtsordnungen der Mitgliedstaaten, RabelsZ 28, 1964, p. 611 (see also from the same author: Les principes generaux du droit des Etats membres, in : G. vanderMeersch, Les novelles, Droit des Communautés Européennes, Bruxelles, 1969, p. 444 et seq.).

courts of the EU (the CFI and the ECJ), i. e. the *maximum flexible standard*, the *better law criterion* implies a "qualitative comparison" of protection systems in European Union countries which take into account the better suited standard towards the attainment of EU objectives[28]. Thus, solutions resulting from this approach could be based solely on the traditions of very few Member States, of only one or even none of them[29].

Despite being a beneficial criterion in terms of promoting the effective implementation of EU law[30], its inherent disadvantages have become increasingly apparent. The *criterion for the better law* leads to different interpretative approaches of a human right. In addition, it also faces the above-mentioned problems in the case of the *prevailing legal system*, i. e. the enormous increase in disputes between the EU and those Member States providing a more extensive right-based regime[31]. Moreover, the *criterion for the better law* is questionable in terms of legal certainty. It may lead national judges of the EU not to apply specific EU principles just because they are contrary to a principle or human right recognized under domestic law, but doing so they expose themselves to the success of the preliminary ruling before the EUCJ due to a situation of illegality owing to EU regulations or domestic laws[32].

Concerning the principle of legal reserve, the criterion also faces the aforementioned problems in the case of the *prevailing legal system*, i. e. risks of arbitrariness, a feeling of discontent in the most advanced Member States in matters of human rights. A further disadvantage is the fact that implementing a national system of human rights protection into an entity other than a State is a rare operation that must be rejected above all in the context of the principle of formal legality[33]. That is why judicial bodies in Luxembourg have just used this criterion alone in relation

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[27] See, among others, *A. Baratta*, Contro il metodo della giurisprudenza concettuale nello studio del diritto penale comunitario, in: Prospettive per un Diritto penale europeo, Cedam, Padova, 1968.

[28] *M.A. Dauses*, RTDE 1984, p. 412 et seq.; *H. Kutscher* (fn. 26), p. 1 et seq. and *K. Zweigert*, RabelsZ 1964, p. 611.

[29] That was the case, for example, of some judgements on an international cartel relating to the production and sale of quinine and quinidine and of their salts and compounds (see ECJ 15. 7. 1970, case 41/69 (*ACF Chemiefarma NV v. Commission of the European Communities*); ECJ 15. 7. 1970, case 44/69 (*Buchler & Co. v. Commission of the European Communities*); and *ECJ* 15. 7. 1970, case 45/69 (*Boehringer Mannheim v. Commission*), [1970] ECR 16, p. 702 et seq. Given the lack of provisions laying down in Community's regulations with regard to time limits, the appellant undertakings shared the view that time limits laid down by domestic law should be taken into account. The Court of Justice did not share this view for a number of reasons. First of all, because domestic rules on competition can not be transferred to the European Community. In that sense, only the requirements provided by Community law may be taken as a basis, as well as an awareness of the importance and function of the rules on competition under the EEC Treaty. Secondly, because the legal interest here protected, that is to say 'competition', which is more relevant in the case of the Community than in the case of Member States. Thirdly, because the Community law scope is also bigger and that leads to broader time-limits given the fact that it is much more difficult to ascertain infringements by companies at European level. Example taken from *A. Nieto Martín*, Fraudes comunitarios: Derecho penal económico europeo, Praxis, 1995, p. 114.

[30] Hence, the *criterion for the better law* is used by *A. Nieto Martín* in his proposal for a Regulation on a General part of a Community punitive law. See *A. Nieto Martín*, (fn. 30), p. 112: "The ECJ and the European Commission have some discretion in determining which principles must govern the regime of Community sanctions. They are not required to assume those principles existing at domestic level. As such, when they make the decision of adopting a regulation (…) containing a general part for imposing community sanctions, the European legislator will have discretion to chose those regulations which are better suited for achieving Community's goals".

[31] *A. Bernardi* (fn. 9), p. 75.

[32] *A. Bernardi* (fn. 9), p. 75.

to those corollaries of the principle less exposed to change, that is to say, the *accessibility*, *clarity* and *predictability* of laws. These corollaries of the legality principle have been so vastly developed by the European Court of Human Rights over recent decades while Member States have added little value.

This analysis of the various standards of human rights protection at European level shows that irrespective of the criterion used, all of them have drawbacks. The *maximum standard of protection* is the standard itself in proving to be the most disadvantageous to the case in hand. Not only for that reason must it be rejected, but also for being unfeasible: Recognition of a given right implies, in many cases, refusing another one. Recognition of the principle of legal reserve in a maximum degree would have negative consequences in the context of the corollary of "textual quality" of the law because no use of "blank penal laws" would be permitted. The standard of the *lowest common denominator* is also unsatisfactory because it does not seem to be the best solution for a European Union which seeks to become an international reference in human rights matters. Conformism is not a good ally for meeting important challenges and achieving a great deal. Just because a political union is desirable, *minimum standards* cannot be the approach to follow, and even less so when the key matter is Criminal Law, that is to say, when the *ius puniendi* is at stake. The *ius puniendi* is the "sharper sword of law" and this generates relevant human rights[34] issues.

There are two standards still to be taken into account: the *better law* standard of protection and the *prevailing system*. They have both two shortcomings: the one related to the previous comparative analysis and the one related to complaints coming from Member States whose human-rights regime is more advanced. It is true that the first shortcoming, the need of a previous comparative analysis, has not been mentioned in the case of the criterion of better law but it is indeed an implicit problem because a previous comparative analysis is unavoidable in a Union composed of twenty-seven Member States. Furthermore, in order to identify what standard is the most appropriate for achieving European goals, it is necessary to carry out a previous comparative law study. If the mission of the European legislator consists of discovering appropriate prevention and conflict resolution mechanisms, a comparative analysis is the only tool able to provide for a richer and broader view on the various options available[35] which are also capable of being categorised as the most appropriate from the EU point of view. All in all, the need for a previous comparative analysis is a natural and intrinsic disadvantage of the European process of integration. That is why such a comparative legal analysis must be interrelated as a parallel task. Only being aware of the situation and of multiple solutions to one

[33] *C. Gómez-Jara Díez*, Constitución europea y Derecho penal: ¿Hacia un Derecho penal federal europeo?, in: *S. Bacigalupo Saggese/M. Cancio Meliá*, Derecho penal y política transnacional, 2005, p. 199 et seq., and *A. Bernardi* (fn. 9), p. 76.

[34] *A. Nieto Martín* (fn. 30), p. 118.

[35] *H. Kötz*, Comparative Legal Research and its Function in the Development of Harmonized Law: The European Perspective, in: *N. Jareborg*, Trends in National, European and International Lawmaking, De Lege, Juridiska Fakulteten I, Uppsala, 1995, p, 21.

problem in each Member State, in other words, only when a critical analysis of the findings of the comparative study on the problematic situation has been drawn up[36], would it be possible to opt for the most suitable standard of protection, and consequently for the most suitable criminal policy, not forgetting under any circumstances that the lack of a previous comparative law study can lead to the imposition of a uniform law model of hegemonic nature[37]. This could eventually result in a breach of the EU motto 'unity with diversity' as the imposition of a hegemonic model of law has nothing to do with the meaning of a pluralistic unification and/or harmonisation of law[38].

The disadvantage of Member States complaints which have a more advanced human-rights regime is a drawback which regrettably is present in any possible option (even in the case of the *minimum standard of protection* because Member States being in favour could also complain about it and say that their legal tradition has not been respected). It is therefore necessary to accept it as is. We must then strive towards a criterion designed to prevent, as far as possible, disputes or problems from arising. This is exactly where the problem lies. How may we settle on a human rights standard of protection capable of achieving EU goals and ensuring the broad protection of human rights? How can a mechanism be established that is able to 'order the pluralism', that is to say, a system capable of 'ordering' the different notions of the principle of legal reserve in the twenty-seven constitutional traditions of the Member States and capable of achieving what *Delmas-Marty* refers to as 'ordered pluralism'?[39].

## III. Functional Equivalence is not a Good Point of Departure Either

*Functional equivalence* is a concept of international law[40]. Though it was used for the first time by the OECD for harmonization in the area of corruption[41], the truth

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[36] *H.H. Jescheck/T. Weigend*, Lehrbuch des Strafrechts, Allgemeiner Teil, 5th ed., 1996, p. 45.

[37] *S. Manacorda*, Jus commune criminale? Enjeux et perspectives de la comparaison pénale dans la transition des systèmes, in : M. Delmas-Marty/H. Muir Watt/H. Ruiz Fabri (eds.), Variations autours d'un droit commun. Première rencontres de l'UMR de droit comparé de Paris (Paris, Sorbonne, 28 et 29 mai 2001), p. 330.

[38] *M. Delmas-Marty*, Réflexions sur l'hybridation en procédure pénale : nécessité du droit comparé à l'heure de l'internationalisation pénale », in : Les droits et le Droit, Mélanges dédiés à Bernard Bouloc, Dalloz, 2006, p. 321: « Comparative law will be more necessary than ever (…) to guide the hybridation process [of internationalisation] (…) » [Translated from French : « Le droit comparé sera donc plus que jamais nécessaire (…) pour guider le processus d'hybridation (…) »].

[39] *M. Delmas-Marty*, Le pluralisme ordonné, Les forces imaginantes du droit (II), Seuil, La Couleur des idées, 2006. See the Engligh short version *M. Delmas-Marty*, Comparative Legal Studies and Internationalization of Law, Course: The Relative and the Universal: Ordered Pluralism, 2004-2005, available at http://www.college-de-france.fr/media/int_dro_en/UPL46493_mdm_pt3_pluralism_2004_2005_RevD.pdf.

[40] The 'functional equivalent' was already used in the context of the sociological theory prior to the OECD. See *M. Luhmann*, Zweckbegriff und Systemarationalität. Über die Funktion von Zwecken in sozialen Systemen, 1968, p. 162 et seq. In the field of fundamental rights, the term 'functional equivalence' has already been developed by the European Court of Human Rights in a number of cases, i. e. *Bosphorus Hava Yollary Turizm v. Ticaret Anonim Sirketi v. Ireland*, Application no. 45036/98, Judgement 30 Juin 2005. See also how European conventions involving reforming the Treaties (i.e. with a view to the new Constitution for the European Union) could be interpreted as a 'functional equivalent' of the constitutional reform process at national level. See *E.O. Fossum/A. J. Menéndez*, The Constitution's Gift? A Deliberative Democratic Analysis of Constitution Making in the European Union, in: C.

is that it originally had nothing to do with human rights matters. *Functional equivalent* allows Member States to achieve the desired results based on an international convention "without requiring uniformity or changes in fundamental principles of the Party's legal system"[42]. By applying these considerations to the case at hand, this mechanism would serve to ensure the protection of the core of a fundamental right "without requiring uniformity or changes in fundamental principles of the EU legal system". The 'functional equivalence' concept is bound up with the idea of the '*national* margin of appreciation' reinterpreted as the '*European* margin of appreciation'. The EU is bound to respect fundamental rights but it is also free to decide how to protect them. The '*European* margin of appreciation' is also linked with the impossibility of transferring national concepts to supranational structures[43]. On the basis of this argument, whatever concept originated for and by the State becomes superfluous and useless[44] when it comes to implement them into more complex structures[45], i. e. almost federal structures[46]. That is why the European Union is better placed to provide itself with concepts that have a special impact on its own legal system and are compatible with its structure and goals. Concerning the principle of legal reserve, such a methodology, which is closed to the *better law* standard, would be sufficient to determine what role is played by the principle and what its basis is (i.e. separation of powers, expression of the general will)[47], so that afterwards a 'functional equivalence' could be established in EU law.

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Closa/J. E.Fossun (eds.), Deliberative Constitutional Politics in the EU, Arena, Oslo, 2004, p. 135. Taking a dogmatic approach, 'functional equivalence' has been used for ensuring criminal liability of legal persons by *Gómez-Jara Díez*, La culpabilidad penal de la empresa, Ed. Marcial Pons, Madrid, 2005, p. 53 and 228 et seq. (see also from the *same author*: La responsabilidad penal de las empresas y sus órganos directivos en la Unión europea, in: *M. Bajo Fernández (eds.)*, Constitución europea y Derecho penal económico, Ed. Universitaria Ramón Areces, 2005, p. 164 et seq. 'Functional equivalence' is also dealt with in both the Anglo-Saxon' models of conspiracy and the continental models of involvement in a criminal organisation. See *S. Manacorda*, La "parabole" de l'harmonisation pénale: À propos des dynamiques d'intégration normative relatives à l'organisation criminelle, in: M. Delmas-Marty/M. Pieth/U. Sieber (eds.), Les chemins de l'harmonisation pénale, Société de Législation Comparée, Paris, 2008, p. 280.

[41] See *M. Pieth*, "Funktionale Äquivalenz": Praktische Rechtsvergleichung und internationale Harmonisierung von Wirtschaftsrecht, Zeitschrift für Schweizerisches Recht 119, 2000, p. 477 et seq.

[42] Cf. Official Commentaries to the OECD Convention N.2 ; Preamble OECD Convention, last recital.

[43] *A. von Bogdandy*, Gubernative Rechtssetzung, Tübingen, 2000 (see also from the same author: Zur Übertragbarkeit staatsrechtliche Figuren auf die europäische Union, FS für Badura, 2004, p. 1033 et seq.); *F. Ost/M. van de Kerchove*, De la pyramide au réseau? Pour une théorie dialectique du droit, Bruxelles, Publications des Facultés universitaires Saint-Louis, 2002, p. 326 et seq. The last two authors are of the view that the principle of legal reserve shall not be required in a 'post-modern' legal system' with the same degree of rigour as in a 'modern' legal system.

[44] In this regard, it is becoming gradually accepted that democracy in the EU does not have to be organised in the same way as in a nation-State. Cfr. *J. Baquero Cruz*, The Legacy of the Maastricht-Urteil and the Pluralist Movement, EUI RSCAS, 2007/13, p. 16.

[45] *C. Lord*, A Democratic Audit of the European Union, Palgrave-MacMillan, 2004, p. 6 and 15: "Use of the state as an implied benchmark for a democratic EU is open to the objection that standards of democratic governance may be justifiably different between state and non-state political systems, national and trans-national ones. It is perfectly coherent to believe that one model of democracy is best for the state and a different one –or none at all- is best for the EU".

[46] On supranational federalism, see *A. von Bogdandy* (fn. 4), p. 1 et seq., p. 61 et seq.; and *J. Martín y Pérez de Nanclares*, El federalismo supranacional: ¿Un nuevo modelo para la Unión Europea?, Consejo Vasco del Movimiento europeo, 2003.

[47] *C. Grandi*, Nullum crimen sine lege parlamentaria y Derecho penal europeo, in: L.M. Díez Picazo/A.Nieto Martín (eds.), Los derechos fundamentales en el Derecho penal europeo, Civitas, 2010, p. 183 et seq.

The main advantage offered by *functional equivalence* is that it does not hinder the achievement of the EU goals. It is indeed a tool which makes it possible for the EU to adapt to national requirements. Secondly, fundamental and typical guarantees of fundamental rights are respected and no minimum standard of protection is implemented. The problem is that the enlightenment model of legal reserve, which has been used as a benchmark at domestic level in the case of criminal law, is currently submerged in a deep crisis. Hence, it shall not be considered appropriate to implement at supranational level a model in a state of crisis at national level. Neither shall it be considered appropriate to look for 'functional equivalences' of a model which is in fact flawed. It would be sufficient to have a look at the situation in Member States on how the legal reserve is dealt with and how legislative procedures work at national level with the increasing dominance of bureaucracies. All this together supports the idea that the principle of legal reserve is going through hard times at present.

Irrespective of how the principle of legal reserve is understood in *common law* countries, where case-law is an important source of criminal law, the principle of legal reserve which exists in civil law legal systems is not an absolute. The legality principle is recognized by most constitutions of Member States belonging to civil law legal systems and in their respective criminal codes. Where differences are noted is with regard to the kind of source of law used. With only minor exceptions (i.e. Spain), criminal law provisions can be adopted through legislative decrees (i.e. *décret-lois* in France or *Rechtsverordnungen* in Germany) or even by decree-laws (i.e. *décision présidentielle* in France or *decreto legge* in Italy), the use of which are increasing sharply. A total rupture with the principle is notable in France where regulations (*décrets*) are a source of law in the case of *misdemeanours* (*contraventions*)[48]. Spain is the only country where a legal reserve in criminal matters is at least theoretically absolute. Not only must criminal provisions be passed by laws but the criminal provisions are also passed by a special qualified law, the so-called '*organic law*', which requires an absolute majority by the Congress[49].

On another level, irrationality is also a constant element in legislative procedures. The control exercised by bureaucracies has lead to a blurring of the features originally connected to Parliamentary Assemblies, such as pluralist and deliberative bodies where parliamentary minorities played a crucial role in bringing the parliamentary majorities under control[50].

It is for these reasons that the 'functional equivalence' must be rejected in shaping the principle of legal reserve in criminal matters at European level. Would it not be paradoxical to look for a 'functional equivalence' under these circumstances? Would it mean that the 'functional equivalence' should be encountered in the use of sources

[48] On the "relativization" of the legal reserve with a particular emphasis on Italy, see *C. Grandi*, The 'Qualities' of Criminal Law – Connected to National and European Law-making Procedures, EuCLR, 3/2011, 286 ss.

[49] Spanish *C*onstitutional Court (SCC), 11. 11. 1986, judgement 140/1986 and *SCC* 10. 12. 1986, judgement 160/1986.

[50] See, above all, *J.L. Díez-Ripollés*, La racionalidad de las leyes, Ed. Trotta, 2003, and from the same author: Presupuestos de un modelo racional de legislación penal, Doxa, Issue 24, 2001, p. 485 et seq.

of law other than laws passed by parliamentary assemblies? Or should it be found in any of the results achieved alongside national legislative procedures or in the increasing dominance of bureaucracies? Obviously, this would be meaningless. In fact, if the 'functional equivalence' were satisfactory enough, it would not be too difficult to find mechanisms at EU level capable of performing a task functionally equivalent or even 'better' than the one performed by the principle of legal reserve at domestic level because at EU level different sources of law are used in criminal matters (i.e. directives, former framework decisions) and the European Council and the European Commission seem to play a more important role than the European Parliament.

Thus, another part must be sought to change the paradigm of the principle of legal reserve at European and International level. What remains is to address the concept and evolution of the term *sovereignty*.

## IV. Sovereignty and its Changes as the Right Starting Point

### 1. Sovereignty as a pre-existing idea to the State and to liberal democracy

The term "sovereignty" has the honour of being one of the most essential attributes of the State and one of the most studied by the politicians, philosophers and, to a lesser extent, by jurists. 'Sovereignty' is an ambiguous term[51] which has changed and will continue to do so depending on a number of factors: mainly the changing shape of international relations, the specific characteristics of States[52], the body with powers (the monarch in a feudal society, the people as a whole), the limited or unlimited powers that the body has[53], its position –positive or negative- overall[54], etc.

The notion of sovereignty reached its maximum splendour with the French Revolution and the liberal state building. Nevertheless, the term itself comes prior to the arrival of the so-called liberal democracy. In fact, it was used before as a basis of power either in the Middle Ages[55] or the Old Regime, period in history which

[51] Vid. *J. Maritain*, The Concept of Sovereignty, The American Political Science Review, 1950, Vol. 44, Issue 2; *W. J. Stankiewicz*, The Validity of Sovereignty, in: W.J. Stankiewicz (ed.), In Defence of Sovereignty, 1969, London – Toronto, p. 291; *S.D. Krasner*, Sovereignty Redux. Reviewed Work(s): Re-Examining Sovereignty: From Classical Theory to the Global Age by Hideaki Shinoda, International Studies Review, 2001, Vol. 3, Issue 1, p. 134 and *L.E. Grinin*, Transformation of Sovereignty and Globalization, in: L.E. Grinin/D. D. Beliaev/A. V. Korotayev (eds.), Hierarchy and Power in the History of Civilizations: Political Aspects of Modernity, Moscow: Kd Librocom, 2008, p. 193.

[52] See, among other authors, *F. Kratochwil*, Of Systems, Boundaries, and Territoriality: An Inquiry into the Formation of the State System, World Politics, Vol. 39, Issue 1; *T. Mitchell*, The Limits of the State: Beyond Statist Approaches and Their Critics, The American Political Science Review, 1991, Vol. 85, Issue 1 and *L.E Grinin/A. V. Korotayev*, Political Development of the World System: A Formal Quantitative Analysis, in: S. Malkov/L. E. Grinin/ A. V.(eds.), History & Mathematics: Historical Dynamics and Development of Complex Societies, 2006, Moscow: KomKniga.

[53] *J.W. Garner*, Limitations of National Sovereignty in International Relations, The American Political Science Review, 1925, Vol. 19, Issue 1.

[54] *R.H. Jackson*, Quasi-states: Sovereignty, International Relations and the Third World, 1990, Cambridge.

Jean *Bodin* belongs to. Jean *Bodin*[56] published *Les six livres de la République*[57] in 1576 where he dealt first -and more seriously than his predecessors[58]- with the concept of sovereignty and proposed a systematic formulation of the terms. In the view of *Bodin*, the Commonwealth, here understood as State, was "the rightly ordered government of a number of families and of those things which are their common concern, by a sovereign power"[59]. Under 'sovereign power' he understands a power which is "necessarily perpetual and absolute"[60]. Sovereign power (*majestas*) is perpetual because who exercises it is not subject to any time limits or restrictions. It is also absolute because who wields such a power can do everything. 'Everything' means of course the capacity of making and breaking the laws without the consent of the subjects[61]. Such a capacity is included in the rest of rights and attributes of the sovereignty[62]. Sovereignty is indeed unique, indivisible and inalienable, simply because it is something more than the mere exercise of power at a certain point in time. Thus, the Salic law is a rule restricting, not the exercise of sovereignty, but the choice of the person who may exercise it. Who, then, wields the sovereign power according to *Bodin's* views? The prince (absolute monarch) does. Since he cannot be subjected to the decisions that he makes or to the decrees he issues, the prince is indeed above the law: "Those who are sovereign" –wrote *Bodin*- "must not be in any way subject to the commands of others". This is why the supreme authority is and can only be unique and absolute since the sovereign is not subject to his own laws but issues and abrogates them as he likes. Consequently, the legislative power cannot be shared with anybody within the territory of the State or with anyone outside the State. *Bodin's* theory of sovereignty leads to a clear dissociation between

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[55] On the sovereignty in the Middle Ages, see *O. Von Gierke*, Teorías políticas de la Edad Media, Centro de Estudios Constitucionales 1995; *M. David*, La souveraineté et les limites juridiques du pouvoir monarchique: du IX[ème] au XV[ème] siècle, Paris, Librairie Dalloz, 1954; *J. De Maistre*, Considérations et fragments sur la France. Essai sur le principe générateur des constitutions politiques. Étude sur la souveraineté, Lyon, Librairie Générale Catholique et Classique, Vitte et Perrussel, 1883; *O. Tixier*, Les théories sur la souveraineté aux états généraux de 1484, Paris, Chez Georges Bellais, 1899.

[56] On Bodin's work, and particularly on its own concept of sovereingty, see *F.J. Conde*, El pensamiento político de Bodino, Anuario de Historia de Derecho español, Issue 12, 1935, 96 ps. and *N. García Gestoso*, Sobre los orígenes históricos y teóricos del concepto de soberanía: especial referencia a los seis libros de la República de J. Bodino, Revista de estudios políticos, Issue 120, 2003, p. 301 et seq. and *P.T. King*, The ideology of order: A comparative analysis of Jean Bodin and Thomas Hobbes, Ed. Routledge, 1999, p. 47 et seq.

[57] *J. Bodin*, The Six books of the Commonwealth (1576). References made in this paper,, unless otherwise mentioned, refer to the Spanish edition of the book: *J. Bodino*, Los seis libros de la República, Tecnos, Madrid, 1985. For the English translation an online version has been used which is available at http://www.constitution.org/bodin/bodin_.htm.

[58] Notwithstanding, there were authors other than Bodino, as Marsilio De Padua (in the fourteenth century) or Niccolò Machiavelli (in the fifteenth and sixteenth centuries), which also dealt with the sovereingty and States concepts. For details see, amongs others, *J.R. García Cue*, Teoría de la Ley y la sobernía popular en el "Defensor Pacis" de Marsilio de Padua, Revista de Estudios Políticos, Issue 43, 1985, p. 107 and 148; *D. Quaglioni*, Aux origine de l'État laïque? Empire et papauté chez Marsile de Padoue, *G.M. Cazzaniga/Y. Charles Zarka (eds.)*, Penser la souveraineté à l'époque moderne et contemporaine, Edizioni Ets-Pise, Librairie Philosophique J. Vrin, Paris, 2001, Tomo I, pp. 11-25 and *T. Ménissier*, Principauté et souveraineté chez Machiavel, in : *G.M. Cazzaniga/Y. Charles Zarka (eds.)* (fn. 59), p. 27 et seq.

[59] *J. Bodin* (fn. 58), p. 9.

[60] *J. Bodin* (fn. 58), p. 47.

[61] *J. Bodin* (fn. 58), p. 57.

[62] *J. Bodin* (fn. 58), p. 75.

civil and political society. His theory also lays the foundations for the future birth, sixty two years after the Peace of Westphalia was signed in 1658, of the modern nation-state. A third relevant issue in *Bodin's* theory is his way of conceiving political power in a completely profane style. He leaves untouched the monopolistic and absolute sovereignty of God but his thinking was ambiguous all the same: Political power becomes secular but the sovereign is a person endowed with an almost divine political power. Hence, he secularised the term but he does not break away from the essential characteristics of sovereignty present at that time: its absolute, unlimited and inalienable character, on the one hand, and the convergence of the power in the hands of one person or an institution, on the other hand.

After *Bodin*, the term 'sovereignty' splits up into two antagonistic directions: *Hobbes* and his *Leviathan*[63] (along similar lines to *Bodin's* beliefs i. e. the sovereign power is absolute, inalienable and indivisible and only the prince wields it), on the one hand, and *Altusio*[64], *Locke* and *Rousseau* where democracy was going to play a relevant role, on the other.

*Hobbes* tried to remove any popular rights by replacing the community right with the right to equality before the law. In this regard, he advocated the creation of an authority with unrestricted powers, the *Leviathan*, which represented the abstract notion of the state. In fact, he supported the establishment of a state dominance which monopolises the use of force to ensure the existence of a peaceful community. He postulated that each individual contributes, through social contract, to creating the sovereign power by waiving the right to govern themselves[65] and that they have to be submitted to the State simply because the State is the only body with sufficient ability to preserve their lives[66]. Thus, in his thinking, the prince did not wield the sovereign power, but the State[67]. As a holder of sovereign power, the State was "the image of a mortal God which absorbed the personality, the right to property and the conscience of its people"[68]. In the same term as *Bodin* indicated, the sovereign power was unlimited and indivisible.

The notion of 'sovereignty' changes with the birth of the liberal State. Sovereignty resides in the people but its exercise is delegated to the State. This view is already present in *Locke's* thinking[69]. Supreme power resides in the people. It is an

[63] References in this paper are made, unless otherwise mentioned, to the Spanish edition of the book *T. Hobbes*, Del ciudadano y Leviatán (Estudio preliminar y antología de Enrique Tierno Galván), 6th ed., Madrid, Tecnos, 2005. An online version has been used for the English translation (available at http://oregonstate.edu/instruct/phl302/texts/hobbes/leviathan-contents.html).

[64] On Althusios' theory of sovereignty, see *G. Duso*, La Majestas populi chez Althusius et la souveraineté moderne", in: G.M. Cazzaniga/Y. Charles Zarka(eds.) (fn. 59), p. 85 et seq.

[65] On Hobbes' thinking about sovereignty see *L. Foisneau*, Contrat social, souveraineté et domination selon Hobbes, in: G.M. Cazzaniga/Y. CharlesZarka (eds.) (fn. 59), p. 107-126.

[66] Hobbes' idea of taking part of the social contract as a need for preserve life is not surprising given the fact the he wrote its work in the midst of a terrible disorder caused by a civil war.

[67] *F.H. Hinsley*, El concepto de soberanía, Nueva colección labor, 1972, p. 124.

[68] *F.H. Hinsley* (fn. 68), p. 125.

[69] For a synthesis of Locke's thinking on the issue of sovereignty see *L. Simonutti*, La souveraineté comme problème chez Locke, in: G.M. Cazzaniga/Y. Charles Zarka (eds.) (fn. 59), p. 141-158.

inalienable right even though it could be delegated to the legislative and partly to the holder of the executive power[70].

It was in the eighteenth century with the French Revolution when these thoughts emerged more strongly. It was during this time that *Rousseau* published his work *The Social Contract*[71]. Since then, the concept of 'sovereignty' has been closely related to citizens: only they –the collective people within a state- can exercise the sovereign power. Through the social contract, each individual citizen delegates his aliquot part to the society composed of all men, under the condition that the other individuals also do so. This way, the whole society wields the sovereign power and, thus, any enacted law requires the participation of each member of the society. There is no other way to exercise power. The law is based on the relationship between the legislative power and the popular sovereignty[72]. Given the fact that the law is "the expression of the general will", he was in favour of the universal suffrage, of institutions of direct democracy and of the imperative mandate. It was afterwards that the concept of Abbot Sieyès on national sovereignty[73] gave way to representative democracy as such. National sovereignty is thus exercised not by an unorganized people in the state of nature, but by a nation embodied in an organized state. The principles of national sovereignty and representative democracy are thus two sides of the same coin: "the people speak, act, through their representatives". The problem is that the representative function is left to bourgeois elites, that is to say, to the most wealthiest and well-educated people. This leads to the inevitable conclusion that sovereignty was not as popular as theorists advocated. In any case, what is interesting to highlight is that connections between popular and national sovereignty, on one hand, and the establishment of constitutionalism and universal suffrage, on other hand, led to parliamentary sovereignty which is in turn the basis of the principle of legality in general terms and particularly in the context of criminal law: Any power exercised by public authorities must be restricted by democratically enacted laws by a popular elected parliament. What all this means is that the law is now enacted "according to a specific procedure by an organ of popular representation"[74], so to some extent recovering the German medieval idea of *consensus populi*[75].

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[70] *F.H. Hinsley* (fn. 68), p. 127.

[71] References in this paper are made, unless otherwise mentioned, to the Spanish edition of the book: *J.J. Rousseau*, El contrato social o Principios de derecho político, Estudios preliminar y traducción de María José Villaverde, 5th ed., Tecnos, 2007. For the English translation an online version has been used which is available at http://ebooks.adelaide.edu.au/r/rousseau/jean_jacques/r864s/.

[72] *R. Carré de Malberg*, La Loi, expression de la volonté générale, Collection "Classiques", Série politique et constitutionelle, Economica, 1984, p. 5.

[73] *E.J. Sieyès*, ¿Qué es el Estado llano?, Ensayo sobre los privilegios, Ced, Madrid, 1988, pp. 1-30.

[74] *I. De Otto*, Derecho constitucional. Sistema de fuentes, Ariel Derecho, 1989, p. 102.

[75] *E. García de Enterría/T. R. Fernández*, Curso de Derecho Administrativo I, 10th Edición, Civitas, Madrid, 2000, pp. 114-115.

## 2. Principle of legal reserve in criminal matters and enlightened sovereignty

The foregoing explanation has helped to state that the legal reserve in criminal matters was born within a historical context, the French Revolution, as a link between legislative power and popular sovereignty. In our field, criminal law, it has been understood since that time as an irremovable safeguard designed to protect individual liberty and make any exercise of power subjected to law, for example when determining which actions are punishable and what penalties should be imposed. In other words, criminal offences and criminal sanctions shall be determined by statute of Parliament as expression of the general will and as a way to avoid arbitrariness on the part of public authorities. To put it briefly, the principle of legal reserve in criminal matters took inspiration from the concept of enlightened sovereignty.

It is true that there is no controversy over the basis of the principle of legality in its most complete form which is deduced from the rule of law[76]. Neither is there controversy over the rest of its corollaries that it is divided into: the prohibition of custom practice, the principle of strict construction, the principle against retroactive application of criminal law, and the exclusion of analogy[77]. However, it must be kept in mind that criminal law doctrine has not been unanimous on the basis of the principle of supremacy of the rule of law in criminal matters. This discrepancy is in part due to the fact that legal scholars have often dealt with each corollary separately -an article written by *Arroyo Zapatero* published in the early 1980s being an example of this[78]. According to this legal scholar, there is no link between the principle of strict construction and the principle of legal reserve. In his opinion, a legislative act is sufficient for compliance with the principle of legal reserve in criminal matters considering that the most important thing is that the law is passed by the Parliament[79]. Opponents of this view argue that the basis for the principle is the requirement of legal certainty[80]. In other words, the basis lies in the need of citizens to know clearly and previously which behaviour is prohibited and which penalty can be imposed after its commission. The problem with this approach is that legal certainty can also be achieved through a regulation[81]. Thus, the principle of strict construction must not take part of the legitimacy safeguard: if drafting criminal provisions the legislator defines offences in an ambiguous way (i.e. using general clauses), it could be said that it is performing its task irrationally, but not that the democratic principle has been infringed[82]. In this regard, most scholars agree that

[76] *N. García Rivas* (fn. 19), p. 13.

[77] On the historical development of the principle of legality as regards its corollaries see *V. Krey*, Keine Strafe ohne Gesetz, De Gruyter, 1983.

[78] *L. Arroyo Zapatero*, Principio de legalidad y reserva de ley en materia penal, Revista Española de Derecho constitucional (REDC), 1983, Issue 8.

[79] *L. Arroyo Zapatero*, REDC 1983, p. 12 et seq.

[80] *H. Jescheck*, Tratado de Derecho penal. Parte general. I (translation by Mir Puig and Muñoz Conde), Barcelona. 1981. p. 173 et seq.

[81] Cfr. *F. Bricola*, Legalità e crisi: l'art. 25 commi 2 e 3 della Costituzione rivisitato alla fine degli anni '70, La questione criminale, VI, 1980, p. 184.

since its original conception by the most representative authors of the Enlightenment, the principle of legal reserve has its basis in the central principle behind a democracy, that is to say, the distribution of powers.

The principle of distribution of powers ensures consensus on the social contract so that only the legislature as a direct representative of society (general will/*volonté générale*) and not the particular judge may rule on the limitation of individual freedom. Only the legislator has the monopoly of the *ius puniendi*. He is the only one who prohibits conducts (that is to say who defines crimes) and foresees penalties for such acts. Therefore, the law criminalizing or penalizing must emanate from the appropriate authority to produce it, or the legislature, being followed closely by the legislative procedure provided in the Constitution or equivalent standard[83]. Only then does criminal law has force and effect. This requirement, also known as *lex populi* or democratic principle, refers to the strength of the value of fundamental rights and liberal sense and guarantee of the rule of law. The criminal monopoly rests exclusively in the legislature because "the law is what the people order and establish" (*lex est quod populus jubet atque constituit*). In this sense, says *Muñoz Conde*, the rule of law "is that whoever holds state power can not punish people arbitrarily, and that its punitive power is linked to the law. By law it is to be understood "the one formally created by the popular representative body (parliament or National Assembly), as an expression of general will (…). In the area of criminal law, this means that offenses and penalties can only be established by popular representative bodies that reflect the popular will, or by Parliament[84]. All criminal laws not created under this procedure violate the spirit of the principle of legality"[85].

## 3. Changes in the Nation-State because of globalization and its implications for popular sovereignty and for the principle of legal reserve

The author has hitherto confined herself to dealing with one of the specific dimensions of sovereignty, the internal aspect, under which the sovereign is the political body with ultimate authority over society within its territory[86]. It should also be noted that, of the more specific issues covered in this paper, 'sovereignty' receives the greatest focus at a timely and crucial historical moment, the Enlightenment. At this historical moment, popular sovereignty was hailed as a way of expressing the general will of the people, manifested in turn by a body democratically elected by universal suffrage, that is to say, by parliament. In short, the paper has identified the obvious connection points between the birth of popular sover-

[82] *L. Arroyo Zapatero*, REDC 1983, p. 12 et seq.

[83] *N. Bobbio*, Il futuro della democrazia: Una difesa delle regole del gioco, Ed. Giulio Einaudi, 2005, p. 4.

[84] *C. Roxin*, Derecho penal. Parte General, Tomo I: Fundamentos. La estructura de la teoría del delito, Thomson-Civitas, 2006, p. 145.

[85] *F. Muñoz Conde*, Introducción al Derecho Penal, Barcelona, Bosch, 1975, p. 83 et seq.

[86] In addition to the internal side of sovereignty, the so-called external dimension of sovereignty is also distinguished under which there is no superior authority, alien to the State itself. This external dimension results in the principle of non-interference in domestic affairs. See *D. Held*, La democracia y el orden global. Del Estado moderno al gobierno cosmopolita, Buenos Aires, Paidós, 2002.

eignty and liberal state with the concept of legal reserve (in criminal matters) closely related to Parliament (*nullum crimen, nulla poena sine lege parlamentaria*). However, the term 'sovereignty' has not only been used throughout history as a form of popular democratic legitimacy in a given state. The different situations that society has gone through at each point in time and, especially now with the clear dependence of an increasingly globalized world, have a need to address sovereignty from other perspectives or categories. In this respect, Krasner[87] has conceptually recomposed the term 'sovereignty' by adding to its internal or domestic side three additional explanations: international sovereignty, Westphalian sovereignty and interdependence sovereignty. *International sovereignty* refers to practices associated with mutual recognition usually between territorial entities that have formal legal independence. *Westphalian sovereignty* is concerned, however, with political organization based on the exclusion of external actors in the structures of authority in a given territory. *Interdependent sovereignty* has to do with the ability of public authorities to regulate the flow of information, ideas, goods, people, capital, etc. beyond state borders[88]. Finally and as already noted, *domestic sovereignty* refers to the formal organization of political authority within a state and the ability of public authorities to exercise effective control within the borders of their community.

Almost all of these manifestations are of interest when studying the requirement of law for different reasons. In the case of the *Westphalian sovereignty,* this is because the exercise of power since the Peace of Westphalia has been theoretically attributed to the nation-state without being subjected theoretically to any interference by other states. In the case of *interdependent sovereignty* it is because if a state loses its ability to solve problems caused by migration, free movement of capital, goods, etc., it would then appear to be poised to join with other states or become part of international and supranational organizations as a way to rescue its sovereignty and to become efficient once again. Finally, in terms of *domestic or international sovereignty*, this is because as mentioned, after the triumph of liberal ideals of the French Revolution, one of the most important facets is related to the idea of legality, with the law as a manifestation of the general will and as an expression of popular sovereignty. The State is the one who exercises power within its territory without external interference (Westphalian sovereignty) and has *a priori* capacity to regulate the flow of information, people, goods, etc. Within the state, however, the executive, legislative and judicial power is distributed to public institutions (domestic sovereignty). If *Westphalian* and *interdependent sovereignty* lose weight or rather undergo major changes, it results in the fact that domestic sovereignty and, more specifically, popular sovereignty, will also be affected as a rule[89].

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[87] *S.D. Krasner*, Sovereignty: organized hypocrisy, Princeton paperbacks, Ed. Princeton University Press, 1999, p. 3 et seq. Further classifications can be found in *G. Agnew*, Globalization and Sovereignty, Rowman & Little Field Publishers, 2009, p. 1.

[88] This type of sovereignty is not admitted as *per se* "sovereignty" by, among others, *D. Philpott*, Usurping the Sovereignty of Sovereignty, World Politics, Vol. 53, Number 2, January 2001, p. 300.

[89] On the interrelationship among the four types of sovereignty, see *S.D. Krasner* (fn. 88), p. 4 et seq.

The Thirty Years War ended in 1649 with the signing of the Treaty of Westphalia[90], through which a new international order was introduced. This new international order was based on the nation state as the supreme authority or sovereign within its borders. In this sense, sovereignty is defined as an absolute power against which no appeal was possible. That means that any act carried out by a state is out of the question. Nevertheless, if another state does not agree, then it can resort to war with the aim of defending its claim[91]. The two supporting pillars of the Westphalian system, namely national sovereignty and autonomy of the States in matters of both domestic and foreign policies, have been at the harshness of several factors arising (or at least strengthened by) from globalization, and have had to conform to the guidelines of external actors or different legal systems. In this sense, *Held* remarked on several implications for state sovereignty because of the global system[92]; the first concerns the tension between international law and national sovereignty. At international level, there is a wide range of legal instruments recognizing fundamental rights whose observance can weaken the authority of states and erode and restrict their sovereignty[93]. Indeed, the signing and ratification of a convention on human rights not only implies legal recognition of the rights set forth therein and, therefore, the loss of state freedom to set their own rules about the treatment of subjects that are in their territories, but also implies submission to the jurisdiction of a court (ECHR ECJ, etc.) whose interpretation of fundamental rights is sometimes unpredictable and considerably so based on debatable criteria of political timeliness[94]. Secondly, the internationalization of the process of policy making undermines sovereignty because it influences the internal politics of states that are subject to the guidelines of international organizations. No less important is the decline of state sovereignty in defence matters given the fact that the decision of a country aiming to undertake a defence policy may contravene the policy of collective security alliances or systems of which it takes part[95]. A third consequence extracted from the global economic and financial world concerning state sovereignty is the state's inability or its loss of abilities in regulating and controlling capital flows and protecting domestic economy from the "comings and goings" of other states' economies. In this sense, speaking as a kind interdependent sovereignty it can

[90] On the Peace of Westphalia, see *L. Gross*, The Peace of Westphalia 1648–1948, The American Journal of International Law, 1948, nº 42, Issue 1.

[91] See *M. Zacher*, The decaying pillars of the Westphalian temple: implications for international order and governance", in J. Rosenau/E. Czempiel (eds.), Governance without government: order and change in world politics, Cambridge: Cambridge Studies in International relations, 1992, p. 20.

[92] *D. Held* (fn. 87).

[93] Of similar views is also, *H. Shinoda*, Re-examining Sovereignty: From Classical Theory to the Global Age, 2000, New York; *J. Chopra/T. G. Weiss*, Sovereignty is No Longer Sacrosanct: Codifying Humanitarian Intervention, Ethics and International Affairs 6, 1992.

[94] In the same way, see *B. Knapp*, L'État souverain en 2006: Théorie et réalité, in : L'État souverain dans le monde d'aujourd'hui, Mélanges en l'honneur de J.-P. Puissochet, Ed. A. Pedone, Paris, 2008, p. 146.

[95] Iraq, Somalia, Haiti and Bosnia are noteworthy examples on this regard. See, among others, *J. Mayall*, Non-Intervention, Self-Determination and the 'New World Order', International Affairs, Vol. 67, Issue 3, 1991; *A.A. Roberts*, New Age in International Relations?, International Affairs, Vol. 67, Issue 3, 1991, pp. 519–520; *G.B. Helman/S. R. Ratner*, Saving Failed States, Foreign Policy, Vol. 89, Winter, 1992–1993; *A. Rosas*, Towards Some International Law and Order, Journal of Peace Research, Vol. 31, Issue 2, 1994.

be said that the last decade of the twentieth century has shown the inability of national governments to solve global problems more complex than they were presented[96]. Many of these issues are exactly transnational crimes committed i. e. in cyberspace or within the framework of a criminal organisation.

All these factors have led to "a set of forces merging together to restrict the freedom of action of governments and states, diluting the boundaries of domestic politics, *transforming the conditions of the process of political decision making,* altering the institutional and organizational context of political communities" (emphasis added). Hence, "the operation of States in an increasingly complex international system limits their autonomy (in some areas dramatically) and progressively undermines its sovereignty"[97]. Once the State loses its sovereignty in 'Westphalian' and interdependent terms, domestic sovereignty also suffers, if not the most, in popular terms, since globalization is taking decision-making away from citizens. In this sense, globalization is not so dangerous by expropriating sovereignty of its traditional features of "absolute" and "everlasting" power, but by altering internal sovereign structures and by hindering, if not eliminating, the expression of democratic will of the people. That is why the decline of sovereignty entails "the annihilation of solid and core principles that, from the Renaissance to our day, provided the basis for giving meaning and coherence to the *vivere politico* (political life) of men on Earth"[98]. Globalization, says the doctrine, "eliminates democratic participation, promotes a stark technocratic decision-making and buries the most basic principles of publicity under the rule of the opacity and secrecy"[99].

In this globalized world stage with the consequent loss of power of nation states both from above (supranational level) and from below (sub-national level), not to mention the increasingly frequent side leakage (NGOs), the debate on sovereignty has resulted in very different opinions. Initial reviews that are also widespread within doctrine, takes for their motto: "the survival of nation states, but not of their sovereignty"[100], "the end of the State as holder of sovereignty", "the gap of state sovereignty"[101], "the State in the past"[102], "State at Bay"[103] or "the Twilight of State"[104]. All these authors evoke, then, that the idea of nation-states as sovereigns cannot be supported any longer. This thought, however, finds its counterpoint in

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[96] *H.G. Gelber*, Sovereignty through Interdependence, 1997, London, The Hague and Boston, p. 12.

[97] *D. Held* (fn. 87), p. 169.

[98] *P. De Vega*, La democracia como proceso: consideraciones en torno al republicanismo de Maquiavelo, Revista de estudios políticos, Issue 120, 2003, p. 38.

[99] *G. Pisarello*, Globalización, constitucionalismo y derechos: Las vías del cosmopolitismo jurídico, in: A. Del Cabo/G. Pisarello (eds.), Constitucionalismo, mundialización y crisis del concepto de soberanía. Algunos efectos en América Latina y en Europa, Publicaciones de la Universidad de Alicante, 2000, p. 32.

[100] In original version: "los Estados-nación sobrevirán, pero no así su soberanía". See *M. Castells*, La era de la información, Economía, sociedad y cultura, Vol. I: "La sociedad en Red", Alianza editorial, Madrid, 1999, p. 389.

[101] See, i. e. some Russian authors as *Kissinger*, cited by *L.E. Grinin* (fn. 52), p. 201.

[102] *A. Appadurai*, Modernity at Large: Cultural Dimensions of Globalization, Minneapolis, University of Minnesota Press, 1996, p. 19 and *K. Ohmae*, The End of the Nation State, New York, Harper Collins, 1995.

[103] *R. Wernon*, Sovereignty at Bay: The Multinational Spread of U. S. Enterprise, New York: Basic Books, 1971. This author analysed the power held by multinational companies and how their power has caused conflicts with nation-States.

[104] *W. Wriston*, The Twilight of Sovereignty, New York, Scribners, 1992.

another important argument supported by a considerable cast of commentators who strongly advocate the permanence of the nation state as the holder of sovereignty. In this sense, *Russel*[105] or *Grinin*[106] indicate that "the State will be the main political actor for a long time"[107]. Expressive in this regard have also been *Held*, by stating that "the era of nation-state is by no means exhausted"[108] or *Krasner*, who concludes that "it is too early to schedule a funeral for the system of sovereign states"[109]. The latter author reaches this conclusion by diverging from traditional conceptions. In his view, sovereignty is not being eroded, limiting or violating, but rather it has never achieved the necessary stability which it was supposed to have theoretically from the Peace of Westphalia. In other words, it is not that sovereignty no longer exists, but there was never enough sovereignty[110], and as such this has not led to the disappearance of the nation state.

If the sovereign state is not likely to disappear[111], this means that sovereignty will be conceived otherwise than it has been traditionally. This is where the way forward splits in two. First, sovereignty in the era of globalization can be conceived in a way that is necessarily divisible and shared[112]. In this view, the State is not losing sovereignty to participate in decision-making procedures in Europe and by extension at international level. On the contrary, it is through participation in these supranational and international procedures that it has the ability to perform functions it had lost at domestic level. It is in this sense, says Beck, that nowadays we are witnessing *a pooling of national* sovereignty or a "transfer of sovereignty that reinforces the sovereignty"[113]. This way of conceiving sovereignty does, however, present a major problem which is the *legislative offside*. Also know as policy laundering[114], it actually gives a new "twist" to the traditional argument about States' loss of sovereignty and demonstrates that such States come voluntarily to the international organizations, in particular to Brussels, to take decisions which they could not have adopted in their respective national parliaments. In other words, a *legislative offside* is

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[105] *R. Russell*, La globalización: situación y proceso, Ciclos, año VII, Vol. VIII, Issues 14-15, 1st September 1998.

[106] *L.E. Grinin* (fn. 52), p. 201.

[107] Of similar views is *H. Bull*, The anarchical society. A study of order in world politics, New York, Columbia University Press, 1977.

[108] *D. Held* (fn. 87), p. 121.

[109] *S.D. Krasner*, La soberanía perdurable, Revista de Colombia Internacional, Issue 53, September-December 2001, p. 26.

[110] *S.D. Krasner* (fn. 110), p. 24.

[111] This is, paradoxically, the wish of some anti-globalist authors as *T. Negri*, who was extremely expressive on his press article published in Libération.fr, 21st May, 2005. Negri supported the ratification of the Treaty establishing a Constitution for Europe with this motto: "Say "yes" just to make possible the disappearance of this "shitty" Nation-State".

[112] *J. Schawarze/R. Bieber (eds.)*, Eine Verfassung für Europa, Nomos, Baden-Baden, 1984, pp. 247-251.

[113] *U. Beck*, Re-inventing Europe: A cosmopolitan vision, Ub-Cccb, 2006. Among experts in Criminal Law, see *U. Sieber*, The forces behind the harmonisation of Criminal Law, in: M. Delmas-Marty/M. Pieth/U. Sieber (eds.) (fn. 40), p. 413.

[114] It must be borne in mind that the policy laundering is from the author's point of view a narrower concept. On the legislative offside, see *M. Muñoz de Morales Romero*, ¿Transposición de obligaciones comunitarias o fuera de juego legislativo?: Sobre los "atajos" fraudulentos para adoptar normas (penales), Contribution presented to the II Congreso de Jóvenes Investigadores en Ciencias penales, organized by the University of Salamanca, 27-29 June 2011, available at Social Science Research Network: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1886398.

the legislative and intentional misuse by national governments to global and regional structures to evade democratic controls still existing at domestic level. More specifically, States seek to jump the democratic defences of their national parliaments, to shoot at the goal –in the Council of the European Union or in another international institution- and to score a goal -the adoption of a framework decision, directive or convention- despite having been achieved in an offside position. Tacitly accepted by the States because it brings great benefits, the legislative offside places the sovereignty conceived in popular terms and therefore subject to the principle of legal reserve (in criminal matters) in a complicated situation. Thus, sovereignty cannot end or be emptied of content.

Some authors like *Sassen* have highlighted in general terms that rather than popular sovereignty that "sovereignty is still a feature of the system" with the peculiarity of being located "in a variety of institutional environments: emerging private transnational legal regimes, new supranational organizations (…) as well as the various bills of human rights. What is happening is "a splitting of sovereignty as it has been conceived for centuries (…)". She adds that contemporary people at a particular time are not able "to capture imminent fundamental changes", so that what we see today is "the collapse of sovereignty as we know it". However, "rather than an erosion of sovereignty, as a result of globalization and supranational organizations, it is a transformation of sovereignty, a sovereignty that has not disappeared (…)"[115]. The theme along these lines of thought could endorse the simile of energy so that "sovereignty is not extinguished or destroyed, but transformed". The problem is that sovereignty can and perhaps should become, secure, but no transformation is possible or acceptable at the expense of a legitimation crisis. The key and the basis of the transformation of sovereignty and, hence, of the reform of the concept of legal reserve is not only the inability of states to cope with the new risks provoked by globalization, but in particular the importance of not slipping into a crisis of legitimacy.

Growing discomfort and concern about the current crisis in the model of legality in criminal matters and, more broadly, about the crisis of legitimacy should be solved through a proposal for recasting the principle of legal reserve at supranational level, the main interest of which is to introduce procedural criteria of legislative rationality.

There are two starting points: *input* legitimacy and *output* legitimacy. The first links the lack of legitimacy of decisions to the law making process itself. This focuses on getting a similar intervention of the European Parliament to that of their counterparts at national level in the so-called 'ascending phase'[116], on establishing the rule of unanimity for making decisions, on the intervention of national parliaments in the 'downturn phase' and/or on a sum of some of these variables. Mean-

[115] *S. Sassen*, ¿Perdiendo el control? La soberanía en la era de la globalización, Epílogo de Antonio Izquierdo, Ed. Bellaterra, Barcelona, 2001, pp. 46, 47, (original version: Losing Control?: Sovereignty in an Age of Globalization. Columbia University Press, 1996).

[116] On this 'ascending phase' at European level, see *C. Grandi* (fn. 49), p. 288 et seq.

while, the output legitimacy affects the fact that the policies developed within the EU are aware of the interests of stakeholders. Thus, the *output* legitimacy detects the source of the problem in the outcome itself that the decision achieves[117], in other words, in the quality and efficiency of the decision.

Neither one nor the other serves separately as valid models of formal legality. Tools or parameters of the new model of legality (in criminal matters) will be sought, therefore, in the sum of integral elements of *input* and *output* forms of legitimacy.

## V. Conclusions: A Sketch of a Possible Model of Legal Reserve for the European Union

This paper has served to confirm that the *principle of precondition of a statutory basis*, also called *requirement of law* or *principle of legal reserve*, is traditionally and worryingly lacking in democracy and also in transparency. As has been seen, each State has opted for a different model of legal reserve in criminal matters and each different model of legal reserve does not ensure a rational outcome. All reasons already mentioned lead to rule out the 'functional equivalence' as a way of setting up a fundamental right –the principle of legal reserve in criminal matters- at supranational level. The historical development of the sovereignty concept has also served to demonstrate that it has been subject to multiple interpretations and how it has changed because of globalization. However, this transformation can only be supported as long as a crisis of legitimization occurs. In order not to fall into such a crisis, it has been concluded that neither *input* legitimacy nor *output* legitimacy are, themselves alone, sufficient to consider the Union as a legitimate political community[118].They cannot therefore be taken into account individually for setting up a model of supranational principle of legality in criminal matters.

In light of all of the above, the key to an appropriate model to be implemented in the Union is the need to create a "European criminal law in a democratic EU and accepted by all, through a process that legitimizes the rules adopted and make them applicable in the States"[119]. This procedure will be legitimate when argumentative discourse among all stakeholders plays a relevant role in law-making process. In pursuit of this procedure it will be necessary to focus on models designed specifically for international organizations.

It is not possible to cover all features of this proposal for a model of legal reserve in detail here[120]. As such, the following step will be restricted to a brief comment on its major elements or characteristics. The *Gubernative Rechtsetzung* model of the

[117] On the difference between input and output legitimacy, see *F. Scharpf*, Governing in Europe. Effective and Democratic?, Oxford, 1999, Oxford University Press.

[118] Hence, *J. Habermas*, So, why Europe needs a Constitution?, New Left Review, p. 5 et seq.

[119] *F. Miró Linares*, Cooperación judicial en materia penal en la Constitución europea, in: V. Garrido Mayol/S. García Couso/E. Alvarez Conde (eds.), Comentarios a la Constitución Europea, Vol. 3, 2004, p. 1212.

[120] For an overview see *M. Muñoz de Morales Romero*, El legislador penal europeo: Legitimidad y racionalidad, 2011, Cívitas, p. 550 et seq.

German *Armin von Bogdandy* or the thesis of (good) governance can be cited as the starting point for the new model. Even though some of their assumptions are necessary for the development of supranational law, it must be anticipated that both models are incomplete and need to evolve and be developed. In terms of their progress and development, the model of deliberative democracy, whose most representative and significant author is *Jürgen Habermas* with his work *Between Facts and Norms*[121], is methodologically useful. This model of democracy states that only after a symmetrical discussion and deliberation, those citizens concerned with a particular norm are in position to agree to accept it. In this sense, decision-making procedures should ensure a consensus without coercion or at least, negotiations from the point of view of equity. Deliberative democracy highlights the *input* side of the model of legality in criminal matters. The *output* side, however, will be manifested through the establishment of other tools, such as *accountability* to citizens. Deliberative democracy and accountability are, thus, indispensable tools for solving the crisis of legitimacy at an internal and supranational level. Both tools make up the *input* and the *output* side of legitimacy and, more specifically, of legality. However, for these tools to be successful, they must be accompanied by some basic elements or assumptions such as transparency, duties of motivation and legislative assessment techniques. In short, the model must ensure rational outcomes through the law-making procedure. All of these elements set the tone that seems to prevail in the Lisbon Treaty and other political documents such as the *Stockholm Programme*[122], the *Council conclusions on model provisions, guiding the Council's criminal law deliberations*[123], and the most recent Report of 24 April 2012, on an EU approach on criminal law[124]. This model does not aim, and it must be made very clear from the beginning, to reduce the basic democratic guarantees, but to improve them even though they respond to a non-traditional logic. Last but not least, although the proposed model with appropriate adjustments and adaptations could serve as the legal basis for other international organizations or even for national states themselves, it should be remembered that it is intended to be used in relation to the EU.

[121] *J. Habermas*, Between Facts and Norms, MIT Press, 1996 (here used the Spanish version Facticidad y Validez, Trotta, 1998, p. 234).

[122] The Stockholm Programme – An open and secure serving and protecting citizens (2010/C 115/01) [OJ C 115, 4. 5. 2010].

[123] Council Conclusions on model provisions, guiding the Council's criminal law deliberations, Justice and Home Affairs Council meeting Brussels, 30 November 2009.

[124] Report on an EU approach on criminal law; 24 April 2012; Committee on Civil Liberties, Justice and Home Affairs, Rapporteur: Cornelis de Jong [2010/2310 (INI)].