Articles

The Importance of Core Principles of Substantive Criminal Law for a European Criminal Policy Respecting Fundamental Rights and the Rule of Law

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Abstract

The article discusses the conditions on which a rule-of-law abiding criminal policy may be exercised on a European level. The analysis is premised on the understanding that criminal law fulfils a dual role: on the one hand, it protects fundamental interests; on the other, it constitutes a yardstick of civil liberties. Hence, the very identity of substantive criminal law cannot allow it to be reduced to a mere procedural mechanism coordinating various legal orders of EU member States. The main part of the presentation is dedicated to affirming this position by transposing fundamental principles of criminal law traced in domestic legal orders to a broader European environment. The principles examined in this light are: the requirement of a fundamental interest worthy of protection; the ultima ratio principle; the principle of legality; the requirement of law enacted by Parliament; the lex certa requirement; and the principle of guilt. Each one among these principles is applied with a view to restraining counter-crime policy in a manner that respects civil liberties. Accordingly, it is shown that respect for these principles would effectively associate the nascent 'European criminal law' with the constitutional traditions of EU Member States, thus ensuring its compliance with the rule of law.

I. The identity of criminal law, the Stockholm Program, and the foundations of a European criminal policy in line with the rule of law

Criminal law is admittedly the harshest mechanism States employ to achieve social control. Criminal sanctions themselves – proscribed and enforced for lack of milder means in order to address serious violations of basic interests in legally organized societies – constitute counter-breaches of *inter alia* the liberty and property of those convicted. At the same time, the moral and social blame inherent in every criminal sanction remains firmly attached to the convicted criminal long after the sentence has been served.

Such being the identity of criminal law, it becomes apparent that it should not be viewed merely as an instrument to preserve legally protected interests, but also as a mechanism which curbs or even infringes on fundamental liberties of those which contravene it.[1] It has aptly been proclaimed[2] that a decision to criminalize any given

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conduct denotes the assumption of a requisite democratically legitimized responsibility for a form of State action associated with the bounds of constitutionally permissible interference with individual liberty. This is why any criminal justice system necessarily presupposes a set of *principles* and *restraints* to keep State countercrime activities in check.[3] In that sense, criminal law is closely linked to the protection of fundamental rights and the rule of law.

On the other hand, it is only reasonable that those very features of criminal law – apposite to the liberal tradition of democratic societies[4] – also constrain a supranational entity such as the EU Indeed, respect for human dignity, liberty, democracy, equality, the rule of law, and human rights (article 2 TEU) constitute cornerstones of the EU foundation and should thus characterize the initiatives of the Union in binding its Member States to adopt criminal law rules.[5] Disassociating criminal law from the protection of fundamental rights or even loosening such association – albeit for the sake of addressing transnational crime by means of enhancing judicial cooperation – is liable to emasculate elemental values inherent in democratic societies, which subject the exercise of State authority to the rule of law. Even within international entities, then, no legitimate approach to criminal law can ignore its dual nature as a means of protecting fundamental interests as well as a yardstick of civil liberties.[6]

It is not my intention at this point to appraise the EU's approaches to criminal law over the past few years.[7] Suffice it to say that a mere look at the action plans adopted by the EU after the Treaty of Amsterdam,[8] i. e. from the outset of its active involvement in the field of criminal justice, would demonstrate that the protection of and respect for fundamental rights of citizens and the rule of law first came on the scene in the Stockholm Program of 1 December 2009. This perspective is evident in the political priorities laid out by the European Council for the period

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[1] See, e. g., *I. Manoledakis,* General theory of criminal law [in Greek], 2004, pp. 26 et seq.

[2] See the decision rendered by the Federal Constitutional Court of Germany on the Treaty of Lisbon, 2 BvE 2/08, 2 BvE 5/08, 2 be 1010/08, 2 be 1022/08, 2 BvR 1259/08, 2 BvR 182/09 of 30. 6. 2009, section 356.

[3] In a noted passage, *F. von Liszt* has described criminal law "as an insurmountable blockade for crime policy" ["unübersteigbare Schranke der Kriminalpolitik"] (Strafrechtliche Aufsätze, Bd. 2, 1905, pp. 75 et seq., 80).

[4] See especially *I. Manoledakis*, The 'fundamental interest' as a core concept of criminal law [in Greek], 1998, pp. 34 et seq.

[5] See art. 83 of the Treaty on the Functioning of the European Union [hereafter TFEU] on minimum rules concerning criminal offenses and sanctions. Also note the newly-introduced competence of the EU to adopt criminal rules in its own right (i.e. without the co-operation of its Member States); on such competence see *H. Satzger*, Internationales und europäisches Strafrecht, 4th ed. 2010, pp. 100-102.

[6] See *supra* note 1, p. 29.

[7] See, e. g., *H. Fuchs,* Auf dem Weg zu einem Europäischen Strafrecht: Generalbericht, in 4. Europäischer Juristentag (ed.), Sammelband, Wien 2008, pp. 317 et seq., *M. Kaiafa-Gbandi*, Aktuelle Strafrechtsentwicklung in der EU und rechtsstaatliche Defizite, ZIS 2006, p. 521, *N. Pastor Munoz,* Europäisierung des Strafrechts und mitgliedstaatliche nationale Besonderheiten in der Europäischen Union. Zugleich: Einige Überlegungen zu den Grenzen und Grundlagen einer legitimen europäischen Kriminalpolitik, GA 2010, pp. 93 et seq., *Chr. Mylonopoulos,* Criminal law of the European Communities and general principles of EU law, Poinika Chronika 2010, 161 et seq [in Greek], *H. Satzger,* Trends und Perspektiven einer europäischen Strafrechtspolitik, in 4. Europäischer Juristentag (ed.), Wien 2008, pp. 207 et seq., *B. Schünemann*, Ein Kampf ums europäische Strafrecht-Rückblick und Ausblick, in Frankfurter FS für A. Scwarc, pp. 109 et seq.

[8] Tampere European Council (15/16 October 1999), Presidency Conclusions, 18. 10. 1999, PE 168.495, Hague Program (C 53 of 3. 3. 2005) and Program (C 115 of 4. 5. 2010, pp. 1-38).

between 2010 and 2014 with respect to the Stockholm Program. According to the Council, "[t]he challenge will be to ensure respect for fundamental freedoms and integrity while guaranteeing security in Europe", while "[i]t is of paramount importance that law enforcement measures and measures to safeguard individual rights, the rule of law, international protection rules go hand in hand in the same direction and are mutually reinforced".[9] In its Action Plan implementing the Stockholm Program, the Commission notes, also for the first time, that "[t]he Union must resist tendencies to treat security, justice and fundamental rights in isolation from one another."[10] According to the Commission, these "go hand in hand", and hence call for a comprehensive and coherent approach.

This latter position appears to signify the need to overturn a tendency that has permeated the practice of the EU in the field of criminal law for more than a decade:[11] so far, the focus has been on achieving security, absent a correlative assessment of the impact on civil liberties and principles emanating from the rule of law. Such inconsistency had prompted a number of criminal law professors in Europe to launch the so-called European Criminal Policy Initiative (ECPI),[12] as well as come up with a Manifesto on European Criminal Policy presented in late 2009.[13] The said group advocates that the exercise of crime policy through criminal law rules requires both democratic legitimization and respect for the rule of law to the utmost degree, while security itself can *only* be achieved alongside liberal principles. As alluded in the European Convention of Human Rights itself, these principles have sprung from the Enlightenment and have fueled both cultural development in Europe and the European unification process.[14] It is therefore high time that they came on the scene and restrained EU action in the field of criminal law.

Needless to say, it is one thing to highlight the goal of achieving respect for fundamental rights alongside preserving security in Europe, and a different thing to actually achieve such goal. The prevailing practices employed by the EU in its lawmaking activities, as well as the itemized approach to criminal law contained in the Stockholm Program *itself* do give rise to certain reservations in this regard. This is because the harmonization of criminal statutes is primarily targeted at facilitating the mutual recognition of judgments,[15] while focal policies against organized crime

[9] European Council 17024/09 of 2. 12. 2009, p. 3.

[10] See COM (2010) 171 final of 20. 4. 2010, Action Plan Implementing the Program, p. 3. Note, however, that the Council quite reluctantly took into account the Commission's Action Plan rather than adopt it, since it had failed to incorporate certain points of the Stockholm Program (the latter itself lacking in certain aspects), Press release 3018th Justice and Home Affairs Council Meeting, Luxemburg, 3. 6. 2010.

[11] Starting with the Tampere European Council conclusions in October 1999.

[12] The Initiative is comprised of 14 professors of criminal law from 10 law schools within respective EU Member States: see www.crimpol.eu and *H. Satzger*, Der Mangel an Europäischer Kriminalpolitik – Anlass für das Manifest der internationalen Wissenschaftlergruppe „European Criminal Policy Initiative", ZIS 2009, pp. 59 et seq.

[13] See ZIS 2009, pp. 697 et seq., where the Manifesto has been published in seven languages (English, French, German, Greek, Spanish, Italian, and Romanian); the Greek version can also be found in Poinike Dikaiosyne 2010, pp. 78 et seq.

[14] See *P.-A. Albrecht*, Die vergessene Freiheit, Strafrechtsprinzipien in der europäischen Sicherheitsdebatte, 2003.

[15] C 115 of 4. 5. 2010, part 3.1.1.

– with the exception of the policy against human trafficking – are utterly oblivious of EU initiatives to eradicate or mitigate the social causes of crime.[16] In the same vein, the Council has alluded to 'internal security' within the Union,[17] treated as a *fundamental right*, while describing all other fundamental rights in the Charter as mere 'guidelines' for the so-called "European Security Model".

Still, the noted change in attitude brought about in the Stockholm Program – albeit on a political and symbolic level – does denote an opportunity to realize the declared political priority to respect civil liberties and the rule of law in the Union; this in turn means that there is room for hope for EU citizens, which the ECPI aspires to actively nurture through its initiatives in the field of criminal law. It is thus imperative that the focus of the EU shift towards *principles*, which shall guide it in its reasonable effort to adopt and carry out a counter-crime policy; such policy cannot be exercised in a fragmented fashion, absent a systematic set of aims to facilitate reasonable and balanced action against crime, and definitely not without a complete understanding of the extent and depth of the impact which criminal punishment entails on citizens' fundamental rights, as has been the case with EU action in the field of criminal matters to this day.

Besides, the Treaty of Lisbon[18] has in fact helped shape a more fitting institutional environment to allow shifting the focus towards guaranteeing civil liberties.[19] Important steps have been taken towards that direction, including: enhancing the role of the European Parliament by extending the co-decision procedure in criminal matters; engaging national Parliaments already at the consultation stage preceding the adoption of European legal acts;[20] allowing for the safeguarding of fundamental criminal law principles of Member States through the so-called 'emergency break clause' established under articles 82(3) and 83(3); recognizing fundamental rights (article 6(1) TEU) and providing for the accession of the Union into the ECHR (article 6(2) TEU). Although the subject of citizens' rights in criminal cases has been scrutinized by publicists,[21] the need to preserve those rights in actual practice has

[16] Part 4.4.

[17] See Council doc. 5842/10 of 2. 2. 2010, at 9.

[18] See C 115 of 9. 5. 2008, pp. 1 et seq. "Consolidated version of the Treaty on the European Union and the Treaty on the Functioning of the European Union". *Cf. CVRIA*, Press release No. 104/09, The Treaty of Lisbon and The Court of Justice of the European Union, *General Secretariat of the Council of the EU*, The Lisbon Treaty's impact on the justice and Home Affairs Council: More Co-decision and new working structure.

[19] On the Treaty of Lisbon's impact on criminal law matters see, e. g., *W. Frenz/ H. Wübbenhorst,* Die Europäisierung des Strafrechts nach der Lissabon-Entscheidung des BVerfG, wistra 2009, pp. 449 et seq., *M. Heger,* Perspektiven des Europäischen Strafrechts nach dem Vertrag von Lissabon, ZIS 2009, pp. 406 et seq., *A. Hinarejos,* The Lisbon Treaty versus standing still: A view from the third pillar, European Constitutional Law Review 2009, pp. 99 et seq., *M. Mansdörfer*, Das Europäische Strafrecht nach dem Vertrag von Lissabon- oder: Europäisierung des Strafrechts unter nationalstaatlicher Mitverantwortung, HRRS 2010, pp. 11 et seq., *A. Nieto Martin,* An approach to current problems in European Criminal Law, in L. Arrozo Zapatero/A. Nieto Martin (Dirs), European Criminal Law: An overview, pp. 43 et seq. *Cf. M. Kaiafa-Gbandi*, Die Entwicklung in Strafsachen, in D. Tsatsos (ed.), Die Unionsgrundordnung-Handbuch zur europäischen Verfassung, 2010, pp. 511 et seq., scrutinizing the draft EU Constitution which predated the Treaty of Lisbon but never came to fruition.

[20] Protocol no. 1, C 115 of 9. 5. 2008, pp. 203 et seq.

[21] See, e. g., the special issue of ZStW 2004 entitled "Die Europäisierung der Strafverfolgung-Rechtsstaatliche Voraussetzungen, Grenzen und Alternativen": especially see the contributions of *Th. Weigend, W. Hassemer, C. Nestler, H. Fuchs, B. Schünemann*. Also see *B. Schünemann* (ed.), Ein Gesamtkonzept für die europäische Strafrechtspflege,

especially grown after the Treaty of Lisbon. One need only consider the majority principle, to which the harmonization of criminal rules is now subject; the binding force of these latter rules *vis-à-vis* Member States; the increased competence of the EU in harmonizing criminal law where it is deemed a necessary means in order to implement a given European policy (article 83(2)); and also the question of supremacy of EU law.[22]

Such institutional environment, offering a better grip for fundamental rights, but also introducing new risks, calls for a reconsideration of the original principles under which the European Legislature might develop a balanced counter-crime policy ensuring that criminal law serve both its purposes: protect fundamental interests and be a yardstick of civil liberties. A set of principles is needed to determine when the European Legislature may require Member States to employ criminal law rules, and under which circumstances it shall define a criminal act and provide for the appropriate sentence. It is also of the essence to conceive of how *principles found in domestic systems can be transposed in a supranational environment*, and – conversely – how *EU law may complement domestic law*.

Before moving on to this subject, one final remark is in order. At first reading, the 'Manifesto on European Criminal Policy' appears inconsistent with the vast majority of EU initiatives, which concern criminal procedure, and especially judicial cooperation in criminal matters, as it focuses on substantive criminal law principles. Nonetheless, this has been a deliberate choice, the aim being to reverse the adverse tendency to *reduce substantive criminal law to a mere instrument assisting in the mutual recognition of criminal judgments* between Member States.[23]

The object of substantive criminal law – even in the form of minimum rules prescribed by the EU – is to define criminal acts and provide for sentences; however, the said object is hardly served when the elements of crimes conceal considerations pertaining to judicial cooperation in criminal matters as opposed to fundamental *substantive* principles, which have to be respected in every liberal, democratically legitimized expression of authority in defining crimes and penalties. Besides, the mutual recognition of judgments might better be served through harmonizing rules that do not contain precise elements of crimes, and would thus allow for flexibility in the respective definitions. For instance, the terms "corruption" or "sabotage" connote a whole range of different types of conduct proscribed in each Member State, thus facilitating judicial authorities. However, the use of similar terms – even by a supranational entity – would be far from satisfying the requirement of '*lex certa*', which ensures foreseeability and protects against abuse by the State. In addition, the

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München 2006, 1-61, pp. 240-254, as well as the conference proceedings of 4. Europäischer Juristentag, Sammelband, Auf dem Weg zu einem europäischen Strafrecht?, 2008, pp. 205 et seq. (contributions by *H. Satzger, M. Bonn, P. Asp, M. Kaiafa-Gbandi, H. Fuchs*).

[22] See the pertinent analysis of *L. Papadopoulou*, National Constitutions and EU law: The question of "supremacy", [Greek] 2009, pp. 260-261, 568 et seq., 687 *et seq*.: the author sets the foundations of a European legal order based on respect for democracy and human rights as a clear limit to the "supremacy" of EU law (pp. 570-571).

[23] See, e. g., *Kaiafa-Gbandi,* ZIS 2006, pp. 527-529 (esp. at 528), and *M. Kaiafa-Gbandi/Ath. Giannakoula,* Memorandum, in House of Lords-European Union Committee, 22nd Report of Session 2007-08, Initiation of EU Legislation, HL Paper 150, pp 151-152.

principles of proportionality and respect for the coherence of each Member State's domestic criminal law system are better served in the absence of a pre-fixed minimum level for the maximum sentence with regard to the harmonized criminal rules. In that respect also, mutual recognition appears to conflict with the said principles. A case in point would be the European arrest warrant as a measure of procedural constraint: by extending its scope of application to offenses punishable with a given sentence (see article 2(1) of the pertinent framework-decision), so as to be able to cover serious crimes, the European legislator has in effect led to the imposition of sentences of such a level to all Member States for the sake of facilitating judicial cooperation and in utter disregard of the gravity of each offense.

Restoring substantive criminal law to its true essence is the first step towards reorienting the EU in the direction of fundamental rights of citizens. What is necessary, in other words, is to make it clear *when and under which circumstances the Union may require its Member States to criminalize conduct*, even for the purpose of harmonizing the legislation of Member States to facilitate transnational judicial cooperation. The foundations of a foreseeable, reasonable, and balanced EU counter-crime policy, particularly one that is effectuated by means of criminal repression, can only derive from the very principles governing the introduction of substantive criminal law rules on a European level.

II. Fundamental principles of substantive criminal law and the lawmaking function of the EU in the context of the Treaty of the Lisbon

1. The requirement of a fundamental interest worthy of protection

The first issue of concern in employing criminal law on a European level is the requirement of a fundamental interest worthy of protection by criminal law means.

It would be erroneous to assume that the EU possesses a self-evident, 'intrinsically legitimized' power to intervene in the field of criminal law simply because the Union's primary law recognizes such competence. This is equally true whether EU organs establish minimum rules concerning the definition of criminal offenses and sanctions in the areas of particularly serious crime with a cross-border dimension under article 83(1) TFEU, or the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy under article 83(2) TFEU.

Even after it has been determined that the Union's competence in the field of criminal law may be exercised in a specific situation[24] – based on a narrow interpretation along the lines followed by the German Federal Constitutional Court in its pertinent judgment concerning the Treaty of Lisbon[25] – its activation would require answering a further fundamental question, related to the object of protec-

[24] The exercise of such competence would require either an empirical affirmation of the cross-border character of a type of crime (based on its particular features and effects) or exceptional empirical circumstances justifying criminal suppression as the only means to ensure the effective implementation of a policy of the Union: see BVerfG 2 BvR 2/08, BvR5/08, BvR1010/08, BvR1022/08, BvR1259/08, BvR182/09, sections 359, 361-362.

tion invoked. It would be worth considering that the notion of 'cross-border dimension' may comprise, for example, cybercrime, which is alluded to inter alia in the framework-decision on the European arrest warrant (see article 2(2)). However, one can only conjecture what would be the precise content of 'cybercrime' worth protecting by criminal law means. For instance, proscribing the dissemination of ideas via the worldwide web is in some cases liable to even lead to criminalization of one's thoughts (Gesinnungsstrafbarkeit). Is it conceivable for the criminal law to do so or address any problem – no matter how serious – occurring in the implementation of a Union policy absent harm of a different quality, i. e. simply as a means to ensure a duty of compliance to the law itself? In other words, what would be the positive element that could legitimize the use of criminal law by the European legislator, provided that the latter is already within the ambit of competence provided in the treaties?

The Manifesto on European Criminal Policy adopts a quite straightforward position on this matter: the legislative powers of the EU in relation to criminal law issues should only be exercised in order to protect fundamental interests if: (1) these interests can be derived from the primary legislation of the EU; (2) the Constitutions of the Member States and the fundamental principles of the EU Charter of Fundamentals Rights are not violated; and (3) the activities in question could cause significant damage to society or individuals.[26]

Such position takes into account both the long doctrinal debate concerning the legitimacy of criminalizing conduct in various Member States of the EU and principles of EU law itself. It embraces the common law tradition that has justified criminalization based on the "harm principle",[27] as well as the doctrinal proposition

[25] According to the Federal Constitutional Court of Germany, such narrow interpretation is called for because criminal law is not a mere tool for the enhancement of judicial cooperation in criminal matters but rather an invasive mechanism of social control which has to be democratically legitimized lest it severely affect fundamental civil liberties. Besides, the inclusion of the emergency break clause (see articles 82(3) and 83(3) TFEU) also attests –albeit indirectly- to the same conclusion: see BVerfG 2 BvR 2/08, BvR5/08, BvR1010/08, BvR1022/08, BvR1259/08, BvR182/09, section 358. For a favorable appraisal of the above decision –despite the fact that it could have come sooner- see *K. Ambos*, Erste Überlegungen zu den Konsequenzen des Lissabon-Urteils des Bundesverfassungsgerichts für das europäische Strafrecht, ZIS 2009, pp. 397 et seq., *St. Braum*, Europäisches Strafrecht im Fokus konfligierender Verfassungsmodelle, ZIS 2009, pp. 418 et seq., *H.-P. Folz,* Karlsruhe, Lissabon und das Strafrecht-ein Blick über den Zaun, ZIS 2009, pp. 427 et seq., *M. Kubiciel*, Das „Lissabon"-Urteil und seine Folgen für das Europäische Strafrecht, GA 2010, pp. 99 et seq., *B. Schünemann*, Spät kommt ihr, doch ihr kommt: Glosse eines Strafrechtlers zur Lissabon-Entscheidung des BVerfG, ZIS 2009, pp. 393 et seq. *Cf.* some criticism from an EU-law angle in *M. Böse,* Die Entscheidung des Bundesverfassungsgerichts zum Vertrag von Lissabon und ihre Bedeutung für die Europäisierung des Strafrechts, ZIS 2010, pp. 79 et seq., *F. Meyer,* Die Lissabon-Entscheidung des BVerfG und das Strafrecht, NStZ 2009, pp. 657 et seq., *K. Reiling/D. Reschke*, Die Auswirkungen der Lissabon-Entscheidung des Bundesverfassungsgerichts auf die Europäisierung des Umweltstrafrechts, wistra 2010, pp. 47 et seq., *J.-Ph. Terhechte*, Souveränität, Dynamik und Integration-making up the rules as we go along?, EuZW 2009, pp. 7245 et seq.

[26] See ZIS 2009, pp. 707 et seq. *Cf.* Council conclusions on model provisions, guiding the Council's criminal law deliberations (doc. 16542/09, Brussels 23. 11. 2009): although there are guidelines concerning the forms of violations of a 'right' or 'essential interest' under the title 'Structure of criminal provisions', point (5), there seems to be neither a proper delimitation of the concept of "right" nor any identification of a minimum degree of seriousness of the harm involved, other than criminalizing conduct of 'abstract endangerment'.

[27] See *A. von Hirsch*, Der Rechtsgutsbegriff und das „Harm Principle", in R. Hefendehl-A. von Hirsch/W. Wohlers (ed.), Die Rechtsgutstheorie, 2003, pp. 14 et seq., where the author presents other widely accepted grounds for criminalization of conduct under common law, such as the so-called "legal paternalism" and "offense principle" (*id*., at 21 et seq.).

that a fundamental legal interest is the necessary prerequisite of criminalization as accepted in certain civil law jurisdictions.[28] Moreover, the above position also derives from the principle of proportionality, a cornerstone of EU law:[29] indeed, absent a fundamental interest worthy of protection against socially harmful conduct of a significant degree, no one (including the EU) may be justified in compelling resort to the most suppressive form of social control (i.e. penal repression), which could not be deemed either necessary or appropriate.[30]

The requirement of a fundamental interest as delineated above has a dual significance in terms of restraining the European legislator in defining offenses. First of all, it calls for respect for the same "threshold of legitimized criminalization" which binds the Legislature of each Member State guaranteeing fundamental civil liberties. Secondly, every attempt to introduce or harmonize criminal law rules should pay due heed to the constitutional traditions of Member States, so that resort to the emergency break clause of article 83(3) TFEU is averted. Put differently, the harmonization of criminal law on a European level cannot ignore the fact that Member States themselves will ultimately have to implement and enforce the rules adopted, thus importing their constitutional limitations as well as their own understanding concerning the object of protection. Moreover, it is self-evident that the fundamental interests protected by the European legislator can only derive from the primary legislation of the EU, which reflects its structural features, its values, as well as its objectives and limits as a supranational organization with powers conferred by its Member States (see articles 4(1) and 5(1) TEU).

On this basis, one might applaud, for instance, the EU's decision to adopt a framework-decision on combating trafficking in human beings.[31] As a form of labor or sexual exploitation of human beings either through deception or compulsion, trafficking constitutes a grave breach of multiple facets of one's liberty and, potentially, other important rights (including bodily integrity or even the right to life),

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[28] See, e. g., *W. Hassemer*, Theorie und Soziologie des Verbrechens- Ansätze zu einer praxisorientierten Rechtsgutslehre, 1973, pp. 100 et seq., *W. Hassemer*, in Neumann/Puppe/Schild (ed.) Nomos Kommentar zum Strafgesetzbuch, Band 1, Vor § 1, *R. Hefendehl/ A. von Hirsch/ W. Wohlers (ed.)*, Die Rechtsguttheorie- Legitimationsbasis des Strafrechts oder dogmatisches Glasperlenspiel?, 2003, pp. 119-196, *I. Manoledakis*, The 'fundamental interest' as a core concept of criminal law [in Greek], 1998, *D. Spyrakos*, The analytic function of the concept of 'fundamental interest', [in Greek] 1996, and *M. Kaiafa-Gbandi*, Ein Blick auf Brennpunkte der Entwicklung der deutschen Strafrechtsdogmatik vor der Jahrtausendwende aus der Sicht eines Mitglieds der griechischen Strafrechtswissenschaft, in A. Eser/ W. Hasemer/ B. Burckhardt (ed.), Die deutsche Strafrechtswissenschaft vor der Jahrtausendwende. Rückbesinnung und Ausblick, 2000, pp. 263 et seq. It is true, of course, that there is disagreement as to the exact content of the concept of 'fundamental interest'. Some think of them as objects, while others prefer to describe them as interests, functional units or cultural values (see Spyrakos, *op. cit.*, at 14). Whatever its precise content, as long as the notion of 'fundamental interest' remains attached to the empirical-social reality (*Kaiafa-Gbandi*, *op. cit.*, at 265 et seq.), it will constrain criminalization in a manner ensuring citizens' rights against State abuse.

[29] See art. 4(5) TEU and art. 49(3) of the Charter of Fundamental Rights. For a presentation of the case-law of the ECJ see *A. Klip*, European Criminal Law, pp. 70, 298-299; *Chr. Mylonopoulos,* Criminal law of the Eyropean Communities and general principles of EU law, Poinika Chronika 2010, 161; *cf.* art. 5(4) TEU as well as Protocol no. 2 on the application of the principles of proportionality and subsidiarity. For a critical approach to the principle of proportionality – as applied by the ECJ and the ECHR- see *P.-A. Albrecht*, Die vergessene Freiheit, pp. 83 et seq.

[30] For a description of the content and elements of the principle of proportionality see, inter alia, *S. Orfanoudakis*, The principle of proportionality [in Greek], 2003, pp. 62 et seq.

[31] Framework-decision 2002/629/JHA, 19. 7. 202, L 203 of 1. 8. 2002, pp. 1 et seq.

which are explicitly enshrined in the Charter of Fundamental Rights of the EU On the positive side, one should also mention that the EU has stopped short of dictating criminal action against the personal use or possession for personal use of narcotic drugs, confining itself to intervention in the field of illicit drug trafficking alone.[32] This evidences a certain degree of regard towards the constitutional tradition of those Member States which do not punish harm to oneself or condone any form of legal paternalism that would cancel out individual autonomy.[33]

Nevertheless, there are other examples demonstrating that the EU has yet to fully comprehend the importance of a requirement to rely on conduct causing significant harm to a fundamental interest when compelling action in the field of criminal law. This is clearly illustrated, for example, in the framework-decision on the fight against organized crime,[34] which in fact requires Member States to proscribe as a criminal offense either the participation in a criminal organization (article 2, sec. a) or the agreement with one or more persons to commit certain criminal acts (article 2, sec. b), modeled after the common law crime of 'conspiracy'. Any potential harmfulness of these acts is indeterminate, and hence there is no discernible legal interest worthy of protection. It is true, of course, that the underlying offenses should incur a minimum- maximum penalty of at least four years. However, the framework-decision remains silent as to the nature of these offenses. The only hint offered is the purpose of those taking part in a criminal organization, which should be to obtain, directly or indirectly, a financial or other material benefit. Even that element, however, only attaches to the motive behind the act as opposed to a concrete fundamental interest which is harmed by it. As a result, there are no concrete criteria to assist Member States in deciding what conduct to proscribe, other than the declared vague objective to fight organized crime, which is in stark contradiction to the latter's importance in the common area of freedom, security and justice. Such legal uncertainty is liable to allow the application of invasive, exceptional procedural measures designed for organized crime to other criminal acts completely unrelated thereto. In other words, the lack of a clearly identifiable object of protection might entail – does entail in fact – a cumulative negative impact on civil liberties.

The requirement of a fundamental interest that is harmed in a socially significant way would be of particular usefulness in determining when the EU shall be justified in employing criminal law means to effectively implement its policies under article 83(2) TFEU. In other words, it offers a method of distinguishing between criminal harm (which justifies the imposition of criminal sanctions) and administrative infractions which are nothing more than regulatory offenses. The Union's failure to draw a clear dividing line between the two is palpable in the Directive on the protection

[32] Framework-decision 2004/757/JHA, 25. 10. 2004, L 335 of 11. 11. 2004, pp. 8 et seq.

[33] On paternalism generally see *K. Chatzikostas*, Some thoughts on paternalism and criminal law with particular regard to the criminalization of the abuse and trafficking of drugs [in Greek], Poinike Dikaiosyne 2005, pp. 739 et seq., *K. Chatzikostas*, Introduction, in D. von der Pfordten/G. Ellscheid/U. Neumann/A. Von Hirsch, Paternalism in Law and Ethics [in Greek], pp. 19 et seq.

[34] Framework-decision 2008/841/JHA, L 300 of 11. 11. 2008, pp. 42 et seq.

of the environment through criminal law,[35] which compels Member States to criminalize even conduct that violates mere administrative regulations.[36]

Applying the said requirement in actual practice would mean that the any legislative initiative on the part of the EU shall follow the principle of good governance, i. e. outline the fundamental interests protected and ascertain that the proscribed conduct causes substantial harm to them. This is the only way for the Union to discharge its duty to set clear obligations for its Member States (as well as provide the rationale behind these obligations) in the context of what has aptly been portrayed as a European Sympoliteia [League of States][37] founded on transparency and the rule of law. It would also enable Member States themselves in their effort to transpose European legislation into their domestic legal order.

Last but not least, it is worth noting that the requirement of a fundamental interest worthy of protection under criminal law is not posed differently to the EU (as opposed to individual States); indeed, both the EU and its Member States are equally bound to establish substantive grounds for resorting to the harshest form of social control in a democratic society based on a concrete object of protection justifying criminal punishment.[38] That being said, one can identify certain special parameters surrounding the said requirement which are particularly relevant with the EU The first one is the source of the fundamental interests protected by the EU, which is identified with the Union's primary legislation. Besides, the latter has offered the ground for the inclusion of novel protected interests of the EU itself.[39] Another crucial question is whether it is possible for those fundamental interests protected by the EU to be imported into the domestic legal order of each Member State bearing its own legal and especially its own constitutional tradition. Absent a genuine possibility for such a transposition, opting for criminal suppression within a given Member State will inevitably run contrary to the rule of law, and thus lack legitimacy. Although this latter remark reveals the difficulty in satisfying the requirement under discussion, the regime established under the Treaty of Lisbon might offer a way to overcome such difficulty by virtue of its provisions governing consultation with national Parliaments in the Union's lawmaking function. Under-

[35] Directive 2008/99/EC, L 328 of 6. 12. 2008, pp. 28 et seq.

[36] For instance, art. 3 sec. c of the said Directive proscribes the shipment of waste when carried out without prior notification of authorities (art. 2, par. 35 sec. a of Regulation (EC) No. 1013/2006 on shipments of waste) or when such notification was not accompanied by proper documentation (art. 2, par. 35 secs. d and f (iii) of Regulation (EC) No. 1013/2006 on shipments of waste).

[37] For the conception of the EU as a European Sympoliteia see *D. Tsatsos*, The meaning of democracy in the context of the European Sympoliteia, [in Greek] 2007, pp. 107 et seq.

[38] See *R. Hefendehl*, Europäisches Strafrecht: bis wohin und nicht weiter, in B. Schünemann (ed.), Ein Gesamtkonzept für die europäische Strafrechtspflege, München, 2006, p. 211, affirming that the notion of 'fundamental interest' could artlessly be transposed on a European level, as it is not merely a product of national legislation but directly derives from social reality.

[39] As for example protecting citizens' interests by preventing and suppressing corruption within the EU apparatus. For a discussion of European fundamental interests see *N. Bitzilekis/M. Kaiafa-Gbandi/E. Symeonidou-Kastanidou*, Theorie der genuinen europäischen Rechtsgüter, in B. Schünemann (ed.), Ein Gesamtkonzept für die europäische Strafrechtspflege, 2006, pp. 222 et seq., *R. Hefendehl,* Europäisches Strafrecht: bis wohin und nicht weiter, o. a., pp. 214 et seq.

standing and overcoming similar difficulties is of crucial importance, as it touches upon the very rationale underlying the legitimacy of resorting to criminal law rules.

2. The *ultima ratio* principle

Due to its particularly invasiveness with respect to citizens' fundamental rights, the application of criminal law always has to rely on a 'limiting principle', lest it grows into a nightmare. Of all principles limiting criminal law, the least ambiguous one is the *ultima ratio* principle.[40] The concise adage "to the exceptional case the ultimate means"[41] denotes both a quantitative and a qualitative element,[42] since exceptional cases are limited in number and they concern serious breaches of fundamental interests.[43] It has aptly been said that the *ultima ratio* principle leaves room for criminal law measures in situations resembling a state of necessity, i. e. when something needs to be done and there is no other solution to be found by society or the State.[44]

From a normative perspective, the *ultima ratio* principle is closely linked to the principle of proportionality, which permits the adoption of legal means as necessary to achieve a certain goal; and indeed, in the absence of any other solution, the ultimate means would be necessary in that sense.[45] One notable difference is to be observed though: while the principle of proportionality presupposes a goal against which to evaluate whether the means chosen are proportionate ('ultimate means'), the *ultima ratio* principle as portrayed above claims a stake at describing the goal itself ('*to the exceptional case* the ultimate means').[46] It is thus linked to the justification of punishing conduct by criminal sanctions, a matter discussed in the previous section.

Associating the *ultima ratio* principle with the principle of proportionality also reveals that it is firmly founded on principles of EU law.[47] A Union which places the individual at the heart of its activities – as per the preamble of the Charter of Fundamental Rights – cannot possibly compel its Member States to criminalize conduct that can be addressed through milder means; this is because criminal sanctions are per se an infringement on fundamental rights of citizens, owing to their socio-ethical implications and the stigmatization they bring about.[48]

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[40] Compare with the "principle of subsidiarity" or even the so-called "fragmentary character of criminal law": see *C. Prittwitz*, Der fragmentarische Charakter des Strafrechts-Gedanken zu Grund und Grenzen gängiger Strafrecht-spostulate, in H. Koch (ed.), Herausforderungen an das Recht: Alte Antworten auf neue Fragen?, 1997, pp. 145 et seq.

[41] «Im äußersten Fall das äußerste Mittel»: *W. Naucke*, Strafrecht: eine Einführung, 6th ed., 1991, p. 53.

[42] *Prittwitz*, *op. cit.*, at 151.

[43] See *Naucke*, *op. cit.*, at 53 („bei besonderes schwerwiegenden Verletzungen"); *cf. K. Lüderssen*, Einleitung, in Lüderssen-Nestler-Tremel-Weigend (ed.), Modernes Strafrecht und ultima-ratio-Prinzip, 1990, p. 11 („bei schweren Delikten").

[44] See *K. Lüderssen*, Notwehrelemente in der Strafe-Strafelemente in der Notwehr. Ein vitiöser Zirkel oder Quelle neuer Einsichten in den Anachronismus der Strafe?, in Institut für Kriminalwissenschaften Frankfurt/M (ed.), Vom unmöglichen Zustand des Strafrechts, 1995, pp. 159 et seq., *Prittwitz*, *op. cit.*, at 166 („Staat und Gesellschaft sich nicht anders zu helfen wissen").

[45] See *supra* note 30.

[46] *Prittwitz*, *op. cit.*, at 158.

[47] See *supra* note 29.

Besides, there are also empirical grounds hinting towards an '*ultima ratio*-abiding' criminal law within the EU The lack of resources to enforce ever-expanding criminal statutes, the weakening of their deterrent force and effectiveness, as well as the emasculation of other mechanisms to address social problems[49] are all symptoms already apparent in Member States, which cannot be ignored by the Union when intervening in the field of criminal law.

With particular regard to the activities of the EU – especially after the Treaty of Lisbon, recognizing its competence in both harmonizing criminal law rules of Member States and establishing rules of its own[50] – it should be remarked that the application of the *ultima ratio* principle is anything but certain, particularly when it comes to the *approximation* of criminal law rules in Member States. Although approximation normally implies already existing rules within Member States, it might also entail the adoption of new ones so that certain Member States may fulfill their obligations vis-à-vis the Union. The stricter or broader a criminal rule is, the more pressing the need for justification – and indeed through empirical data – that criminalization was indeed the last resort. In that sense, the Council's allusion to the application of the *ultima ratio* principle "as a general rule" (declared in relation to the future lawmaking function of the EU in the field of criminal law),[51] albeit notable, cannot be deemed sufficient per se.

A case in point would be *crime with a cross-border dimension* (article 83(1) TFEU). The mere reference to "*particularly serious*" crime in the text of the said article is not ample to guarantee respect for the *ultima ratio* principle; indeed, even in the field of particularly serious crime (e.g. terrorism), one cannot exclude the possibility that there were other – milder – means, which were not employed in criminalizing the conduct in question. This is evidenced in the framework-decision 2008/919/JHA on combating terrorism, which extensively opts for the criminalization of a broad array of acts, including "recruitment" and "training" of terrorists through the Internet, as opposed to introducing restraints to those administering the respective websites. The said framework-decision directs Member States to adopt criminal law rules anticipating potential risks to fundamental interests, thus criminalizing conduct which merely generates or supports criminal intent of third persons; in so doing, it contributes to the establishment of a pre-preventive criminal law.[52] Such premature application of criminal rules, devoid of any discernible link to any risk of a fundamental interest[53] – even on an abstract level – runs contrary to the *ultima*

[48] *Cf.* the Appendix to Recommendation No. R (92) 17 of the Council of Europe, which clearly states that custodial sentences should be regarded as a sanction of last resort (B. 5 a).

[49] *Prittwitz*, *op. cit.*, 161 et seq.

[50] See *supra* note 5.

[51] See Council doc. 16542/09 of 23. 11. 2009, p. 4, which reads in relevant part: "As a point of departure the European Union should as a general rule adhere to the principle of use of criminal law as a last resort".

[52] See *M. Kaiafa-Gbandi*, Terrorismusbekämpfung in der Europäischen Union und das vor-präventive Strafrecht: Neue Vorgaben für strafbare Taten nach dem Rahmenbeschluss 2008/919/JI, FS für W. Hassemer, pp. 1165 et seq.; *cf. E. Symeonidou-Kastanidou*, "Violent extremism" targeted by the European Union [in Greek], Poinika Chronika 2009, p. 593, *F. Zimmermann*, Tendenzen der Strafrechtsangleichung in der EU-dargestellt anhand der Bestrebungen zur Bekämpfung von Terrorismus, Rassismus und illegaler Beschäftigung, ZIS 2009, pp. 2 et seq.

[53] *Kaiafa-Gbandi*, FS für W. Hassemer, pp. 1171-1172, 1176-1777.

*ratio*principle as well as the principle of proportionality as accepted in European law. To the extent that a given act does not pose a significant, clear risk to interests worthy of protection, criminal suppression thereof cannot find justification, much less when milder means to address the problem were overlooked. A similar argument can be made of the framework-decision on combating corruption in the private sector.[54] The latter contains no convincing grounds as to why obvious milder means to address corruption have been set aside, such as introducing a streamlined procedure for tort claims, or adopting broad measures of compliance in the workplace (inter alia the four eyes principle, staff rotation, etc.).

This need becomes even more pressing when the approximation of criminal laws and regulations of the Member States *proves essential to ensure the effective implementation of a Union policy* in an area which has already been subject to harmonization measures (article 83(2) TFEU). The recognition of such competence is in direct conflict with the *ultima ratio* principle, as the need for 'effective implementation' – particularly in the field of Union policies – is liable to produce a lack of self-restraint until other measures prove efficient. Still, the unique identity of criminal law cannot allow it to be reduced to a mere tool for the implementation of any policy. In order to use criminal law, as previously noted, an EU's policy should be about the protection of fundamental interests, and the problems arising during the implementation of such a policy should be no less than seriously harmful acts which cannot be addressed through any other means (as established empirically). It is only through conceiving of the need for a truly exceptional application of criminal rules that the approximation envisaged in article 83(2) TFEU can properly take place (based on the apt remarks of the German Federal Constitutional Court[55]). This is why the Directive on the protection of the environment through criminal law[56] has gone amiss, since it imposes the criminalization of regulatory offenses, even though administrative sanctions would be equally – if not more – effective to ensure the effective implementation of the Union's policy in this field.

That same logic would also apply to those areas where the EU possesses its *competence* to adopt criminal rules in its own right, as for instance in the case of fraud affecting the financial interests of the Union under article 325(4) TFEU.[57] Affording *equivalent protection* of these interests in Member States, i. e. the declared goal of cloaking the Union with such a competence, does not connote that such protection can only be achieved through criminal law, at least not unless milder means have proven unfit to achieve such equivalent protection in actual practice. Given that the democratic deficit of the Union subsists even after the Treaty of Lisbon, it is my

[54] Framework-decision 2003/568/JHA, L 192 of 31. 7. 2003, pp. 54 et seq.

[55] See BVerfG 2 BvE 2/08, BvR5/08, BvR1010/08, BvR1022/08, BvR1259/08, BvR182/09 of 30. 6. 2009, sections 361-362; for a doctrinal discussion of the decision see *supra* note 25.

[56] Directive 2008/99/EC, L 328 of 6. 12. 2008, pp. 28 et seq.; *cf.* (from a critical standpoint) *F. Zimmermann*, Wann ist der Einsatz von Strafrecht auf europäischer Ebene sinnvoll? Die neue Richtlinie zum strafrechtlichen Schutz der Umwelt, ZRP 2009, pp. 75 et seq.

[57] There are some who argue that the Treaty of Lisbon would permit the introduction of criminal rules even by virtue of Regulations (under articles 325 and 79 TFEU): see a presentation of this view in *Satzger*, Internationales und Europäisches Strafrecht, 4th ed., pp. 100-101.

opinion that the Union had better stop short of activating the said competence, particularly since the approximation of the national criminal law of Member States through the adoption of minimum European rules is suitable to achieve the equivalent protection of fundamental interests on a European level.[58]

It becomes perceptible that, when it comes to the EU, there is consistency in the essence of the fundamental *ultima ratio* principle. This only makes sense, since the said principle concerns the use of criminal law as a last resort regardless of the legislator, no matter whether his competence is exclusive or shared (in this case between the Union and its Member States). At the same time, the novel institutional framework introduced in the Treaty of Lisbon calls for even more caution with respect to the application of this principle. The EU has indeed assumed greater responsibility in ensuring that criminal law is used as a last resort, owing to its competence to impose minimum rules and provide for the requisite sanctions.[59] Setting minimum standards for criminal suppression to Member States presupposes that the Union has confirmed that these are a 'necessary evil', i. e. that there was no other way; otherwise, any step it takes will inevitably destabilize the foundations of a proportionality-based criminal law. Put differently, the fact that the EU now possesses the competence to bind its Member States as to the minimum standards of criminal suppression comes with a requisite burden to ensure that criminal law shall only be used as a last resort to protect fundamental interests. This would be equally true of those sectors where the Union is competent to adopt by itself criminal rules for protecting fundamental interests of its own.

To be sure, an assessment of legislative initiatives adopted by the EU demonstrates that there have been cases in which the EU managed to effectively discharge its duty to respect the *ultima ratio* principle. One pertinent example would be the Directive providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals:[60] under article 9 of the said Directive, the obligation to criminalize does not extend to the employment of illegally staying third-country nationals per se (id., article 3(1)), but requires an additional aggravating circumstance (e.g. continuous or persistent repetition of the act, simultaneous employment of a significant number of illegally staying third-country nationals, illegal employment of a minor, etc.). Another example would be the framework-decision on attacks against information systems,[61] which obliges Member States to criminalize the illegal access to information systems (article 2), illegal system interference (article 3), as well as certain forms of illegal data interference (article 4), all

[58] Prior to the Treaty of Lisbon, reservations had been expressed concerning the recognition of exclusive criminal competence of a supranational organization like the EU even when it came to protecting its own fundamental interests: see *N. Bitzilekis/M. Kaiafa-Gbandi/E. Symeonidou-Kastanidou,* Theorie der genuinen europäischen Rechtsgüter, in B. Schüneman (ed.), Ein Gesamtkonzept für die europäische Strafrechtspflege, 2006, pp. 230 et seq. On this question also see *infra*, under 3. a).

[59] On the function of 'minimum rules' in substantive criminal law see *M. Kaiafa-Gbandi*, Die Entwicklung in Strafsachen, in D. Tsatsos (ed.), Die Unionsgrundordnung, Handbuch zur europäischen Vefassung, 2010, pp. 520-521.

[60] Directive 2009/52, L 168 of 30. 6. 2009, pp. 24 et seq.

[61] Framework-decision 2005/222/JHA, L 69 of 16. 3. 2005, pp. 67 et seq.

the while excluding insignificant acts to avoid excessive application of criminal sanctions. Although it is dubious whether this is enough to actually forestall excessive criminalization, it is definitely an important step towards preserving the *ultima ratio* principle.

Full respect to this principle, however, would require a number of other important steps, even in those cases where criminal law does appear to be the last resort. Adopting milder means as a matter of priority, as well as justifying criminal suppression as a last resort based on empirical data are the necessary prerequisites to ensuring *genuine* respect for the *ultima ratio* principle, coupled with the principle of good governance.[62]

3. The principle of legality

The principle of legality (*nullum crimen nulla poena sine lege*) requires that crime be proscribed under *law*, and admittedly claims a central place among fundamental principles of criminal law, as it aspires to keep State power in check with respect to what exactly is punished and how.[63] It is no wonder, then, that it enjoys constitutional status in a number of legal orders. Beyond the description of the object of punishment, the principle is also linked to the legislative process.[64] Specifically, criminal rules are only then legitimized when they are passed by Parliament upon public discussion (*n.c. n. p. s.l. parlamentaria*).[65] This requirement connotes a public process involving the complete awareness of the potential consequences by the citizenry ("Demos"), as well as engages the participation of the citizens – represented by their delegates in Parliament – i. e. the ones who will ultimately suffer the consequences.

In the European context, the principle is enshrined in article 7(1) ECHR,[66] article 49(1) of the Charter of Fundamental Rights of the EU, and article 6(3) TEU,[67] which goes beyond the fundamental rights guaranteed under the ECHR, requiring respect for *the constitutional traditions common to the Member States*, which

[62] Concerning the use of such data see the conclusions included in Council doc. 16542/09 of 23. 11. 2009 under the title "Assessment of the need for criminal provisions", point (3).

[63] See inter alia *I. Manoledakis/M. Kaiafa-Gbandi/E. Symeonidou-Kastanidou*, Criminal Law-General Part (abridged), 7th ed.[in Greek], pp. 18 et seq., *P.-A. Albrecht*, Die vergessene Freiheit, pp. 47-48.

[64] *Cf. P.-A. Albrecht*, Die vergessene Freiheit, pp. 48-49, associating the principle with substantive criteria as to what may be punished by the State (not any conduct that is troublesome or risky may be criminalized; rather, criminal law should target conduct that constitutes denial of the fundamental rights of others, lest it itself become a liability for liberty). See a similar view in light of the Greek Constitution in *N. Paraskevopoulos*, The constitutional dimension of harm and guilt [in Greek], Yperaspise 1993 [in Greek], pp. 1254 et seq.; *cf.*, however, *I. Manoledakis*, The 'fundamental interest' as a core concept of criminal law [in Greek], pp. 50-51, at n. 4.

[65] See *N. Androulakis*, Criminal Law, General Part, A theory of crime [in Greek], 2000, p. 95, *G. Kasimates*, Constitution and ordinary legislation, in "The impact of the 1975 Constitution on private and public law", [in Greek]1976, p. 148; *cf. I. Manoledakis*, Article 7 of the Constitution, in G. Kasimates- K.-G. Maurias (eds.), Annotated Constitution of Greece, [in Greek] 1999, pp. 18-20.

[66] *Cf.* Recommendation No. R (98) 6 by the Committee of Ministers of the Council of Europe, sec. I. α. 1. Arts. 7(1) ECHR and 49, par. 1 of the Charter do not guarantee the principle to its full extent; unlike most Member States, they require criminalization by law, including customary law. For a critical survey of the case-law of the ECHR and the ECJ see *St. Braum,* Europäische Strafgesetzlichkeit, 2003, pp. 47-48.

[67] See *M. Kaiafa-Gbandi*, The development towards harmonization within criminal law in the European Union-A citizen's perspective, European Journal of Crime, Criminal Law and Criminal Justice 2001, p. 250.

tend to be more elaborate when it comes to legality. This parameter evokes an issue that merits our attention. Because the principle of *n.c. n. p. s.l.* constitutes the spring of a whole array of fundamental rights, the process of European unification cannot be permitted to shrink it to a 'least common denominator' traced in all Member States. This means that those Member States which do not attach so much importance to this particular principle cannot become a role model for the EU,[68] lest respect for the constitutional traditions of other members be compromised. In other words, the reference to constitutional traditions *common* to Member States in article 6(3) TEU should not be interpreted so as to denote that any given fundamental right should derive from the constitutional traditions of *all* Member States so as to be recognized on a European level; rather, it would suffice that the traditions in question be *common in some* Member States. Here lies the particular significance of article 6(3) TEU with respect to the principle of *n.c. n. p. s.l.* By alluding to fundamental rights emanating from constitutional traditions common in Member States, the said provision essentially guarantees a *maximum degree of protection* of those rights, drawn from a comparative appraisal of the various legal orders; thus, the constitutional traditions common in certain Member States are ample to engender protection of a fundamental right on a European level.[69]

Beyond the association with law enacted by Parliament, the substantive content of the principle discussed can be broken down into three separate requirements, addressed to the Legislature, the Executive, and the Judiciary, respectively. These are: the *lex certa requirement*, the *non-retroactivity requirement*, and the *prohibition of applying criminal rules by analogy*.[70] The first one is exclusively addressed to the Legislature, the second concerns all three branches, while the third is exclusively addressed to the Judiciary. This explains why this paper – just like the Manifesto on European Criminal Policy – is only concerned with the first two requirements, which are addressed to the European legislator, i. e. our main point of reference, as he is the one deciding on the European Criminal Policy. Adding to the picture, the main problems arising out of the application of the *n.c. n. p. s.l.* principle on a European level are related to the requirement of law enacted by Parliament and the "clarity" of criminal provisions; on the other hand, the non-retroactivity requirement and the concomitant principle of *lex mitior* do not appear to cause particular problems. Last but not least, the contemporary institutional framework within the EU entrusts Member States with the task of enforcing criminal law and meting out sanctions via their national court system; hence, the prohibition of applying criminal

[68] These would include, for instance, the United Kingdom and France: see *P.-A. Albrecht*, Die vergessene Freiheit, p. 58. Nonetheless, even common law now recognizes the principle (see LK/*Dannecker*, § 1 Rdn. at 5 et seq., at 43 et seq., *K. Lüderssen ,* Europäisierung des Strafrechts und gubernative Rechtssetzung, GA 2003, at 71 et seq.) with a few exceptions (see LK/*G. Dannecker*, § 1 marginal note 45).

[69] On this issue generally see *M. Kaiafa-Gbandi*, Memorandum, in House of Lords-European Union Committee, 10th Report of Session 2007-08, The treaty of Lisbon: an impact assessment, Volume I: Evidence, HL Paper 62-II, E 160. Also see *Chr. Mylonopoulos*, Criminal law of the European Communities and general principles of EU law, Poinika Chronika 2010, 168 [in Greek].

[70] For a presentation of the constituent elements of the principle see *P.-A. Albrecht*, Die vergessene Freiheit, pp. 49 et seq.

rules by analogy could not be transposable before organs of the EU, save perhaps for the ECJ when interpreting EU law[71] (e.g. in the case of a Directive establishing minimum rules concerning the definition of a crime).

a) The requirement of law enacted by Parliament (*n.c. n. p. s. lege parlamentaria*)

It has already been underscored that the principle in question requires the enactment of a criminal law by Parliament, because the most invasive form of State control should derive its legitimization *from the people as directly as possible*. In the EU context, there are admittedly problems regarding this principle, owing to the Union's democratic deficit,[72] which has been reduced but not completely eliminated by the Treaty of Lisbon.[73] In fact, there are some who argue that eliminating this democratic deficit by attempting to institutionally transform the European Parliament into a "full-fledged Parliament" will not work, until and unless an "identity of a European citizen" is developed with which the people of Europe could identify themselves in relation to a decision-making process on a European level.[74] In addition, it is often argued that the Union itself as a European Sympoliteia of both *States* and *nations*[75] seems to be premised on a unique structure, which could at best sustain equal lawmaking powers of the Council and the European Parliament.[76] One should also not neglect other matters, such as the interaction between EU organs in general, and in particular between the Council and the European Parliament, which delineate the problem on an empirical level; indeed, Member States appear quite reticent in giving up their influence over the supranational organization they have created in favor of an ever-stronger European Parliament.[77] It becomes apparent that the institutional regime introduced by the Treaty of Lisbon is here to stay for years to come; aside from its future improvement, then,

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[71] This field will gain increasing significance under the Treaty of Lisbon, since the ECJ now possesses the competence to give preliminary rulings on the interpretation of Union law in criminal matters as well without prior authorization by Member States (arts. 19(3)(b) TEU and 267 TFEU).

[72] See inter alia *R.-A. Lorz*, Das Problem des demokratischen Defizits, in D. Tsatsos (ed.), Die Unionsgrundordnung-Handbuch zur europäischen Verfassung, pp. 311 et seq.; for the application of the principle on a European level see inter alia *U. Sieber*, Die Zukunft des Europäischen Strafrechts, ZStW 2009, pp. 13-14, 50 et seq., 53 et seq.

[73] On the possibility of an act passing without a majority vote by the European Parliament in the course of ordinary legislative process, and its ramifications in the field of criminal law see *M. Kaiafa-Gbandi*, The Treaty establishing a Constitution for Europe and challenges for criminal law at the commencement of 21st century, European Journal of Crime, Criminal Law and Criminal Justice 2005, p. 500, and n. 79; *cf. B. Schünemman*, Ewigkeitsgarantien im europäischen Strafrecht-Ein Appell an die deutsche Volksvertretung, KritV 2008, pp. 12-13, *S. Weber*, Justizielle Zusammenarbeit in Strafsachen und parlamentarische Demokratie, EuR 2008, pp. 101-102. Also see the recent decision by the BVerfG 2BvE 2/08, BvR5/08, BvR1010/08, BvR1022/08, BvR1259/08, BvR182/09 of 30. 6. 2009, sections 276 et seq. *Cf.*, however, *H. Satzger*, Das Strafrecht als Gegenstand europäischer Gesetzgebungstätigkeit, KritV 2008, p. 25, adding certain reservations at p. 36. Also see criticism towards the decision of the BVerfG by *Böse* (ZIS 2010, pp. 82 et seq.), in relation to the democratic deficit in the EU; for a discussion of the problem before Lisbon see *H. Satzger*, Die Europäisierung des Strafrechts, 2001, pp. 128 et seq.

[74] See *Lorz*, *op. cit.*, 343.

[75] See *D. Tsatsos*, The meaning of democracy in the context of the European Sympoliteia, [in Greek] 2007, pp. 98, 103-114.

[76] See *Tsatsos*, *id.*, at 1110-1112.

[77] See *Lorz*, pp. 343-344.

the attention should also shift towards expanding the democratic legitimization within the margin presently allocated, at least with respect to sensitive areas, such as criminal law.

Under these circumstances, question remains as to whether and how the EU can satisfy the basic requirement of a criminal law enacted by Parliament in those fields where it possesses the competence to intervene.

At this point, one should once more recall the types of criminal competence assigned to the EU: on the one hand, the Union may establish minimum rules concerning the definition of criminal offenses and sanctions through directives which shall then be transposed into the domestic legal order (article 83 TFEU);[78] on the other, it has the authority to establish criminal rules even by itself under such provisions as article 325 TFEU.

As regards the former, there does appear to be a footing for the application of the requirement of a law enacted by parliament. Although some scholars point out that the participation of the European Parliament in the ordinary legislative procedure (articles 289 and 294 TFEU) – under which minimum rules concerning the definition of criminal offenses and sanctions are established through directives – does leave some democratic deficit (at least in the sense certain scholars perceive of the notion of 'democratic deficit' in relation to the EU's competence in the field of criminal law[79]), requiring the partaking of national Parliaments already at the consultation stage[80] is concededly an important step.[81] As long as national Parliaments remain active in actual practice and their input is taken into account, the directives produced will attain a higher degree of legitimization as opposed to those issued under a simple co-decision procedure involving the European Parliament alone. Such legitimization would indeed derive from the European citizenry, represented in their respective Parliaments. Needless to say, the procedure adopted for the involvement of national parliaments remains rather loose compared to lawmaking in the domestic context. Some have suggested the adoption of national rules binding the representatives of each Member State to vote for or against a Directive establishing minimum rules concerning the definition of criminal offenses based on a prior determination by their respective national Parliament.[82] This

[78] Note the narrow interpretation proposed by the BVerG in view of the democratic deficit: 2 BvE 2/08, BvR5/08, BvR1010/08, BvR1022/08, BvR1259/08, BvR182/09 of 30. 6. 2009, sections 358-363.

[79] *Supra* note 73; *cf. F. Meyer*, Demokratieprinzip und europäisches Strafrecht, 2009, pp. 122 et seq.

[80] See Protocol No. 1 on the role of national Parliaments in the European Union. It is true, of course, that National Parliaments may submit a reasoned opinion on whether a draft legislative act complies with the principle of subsidiarity under article 3 of the said Protocol. However, it would be erroneous to deduce that the role of national Parliaments are confined to these 'reasoned opinions' alone. Otherwise Art. 12 a TEU on the active contribution of national parliaments referring to their information by institutions of the EU on draft legislative acts would have no meaning. Even absent an explicit clause, a proper reading of the Protocol would lead to the conclusion that national Parliaments are not precluded from submitting their opinion on any draft; indeed, such broadening of the consultation process is likely to expose problems justifying resort to the emergency break clause.

[81] *Cf. Satzger,* KritV 2008, pp. 25, 36, *Schünemann,* KritV 2008, pp. 12-13.

[82] See *Satzger,* KritV 2008, pp. 36 *et seq.*, *Schünemann*, KritV 2008, pp. 13-15, and BVerfG, 2 BvR 2/08, BvR5/08, BvR1010/08, BvR1022/08, BvR1259/08, BvR182/09 of 30. 6. 2009, section 365. At the same time, it is argued that exceptional circumstances may occasionally warrant departure from the decision made in the national Parliament (e.g. due to political considerations weighed during negotiations leading to the adoption of a given directive); in those

would indeed contribute in satisfying the requirement of a criminal law enacted by Parliament, since the binding effect of each directive would be democratically legitimized through the participation of national parliaments.[83] It is of course true that a single Member State can now be bound by a Directive even when it has voted against it, due to the majority principle. Thus, the only way for a Member State to free itself of the pertinent obligation is to claim that a draft directive would affect fundamental aspects of its criminal justice system, hence invoking the emergency break clause of article 83(3) TFEU. Although the allusion to "fundamental aspects" of a criminal justice system is somewhat vague,[84] one could identify at least one circumstance calling for the invocation of the emergency break clause without a doubt: breach of one of the fundamental principles of criminal law outlined above, as well as of those that will be presented further on.

In conclusion, it could easily be argued that, when it comes to the criminal competence of the EU with a view to the approximation of national laws, respect for the requirement of *n.c. n. p. s.l. parlamentaria* hinges on the degree of involvement of national Parliaments in the consultation process. Accordingly, the EU should make sure to encourage such involvement based on *the principle of good governance*. National Parliaments, on their part, should not hesitate to actively engage in the function assigned to them, while Member States would be wise to examine the possibility of linking their vote in the Council to prior decision by their Parliament, at least in the field of criminal law. Moreover, the emergency break clause of article 83(3) TFEU can be interpreted so as to safeguard fundamental principles of criminal law, and is thus crucial for democratic legitimization; and indeed, the said clause in effect insures against the adoption of binding criminal law rules that would only be legitimized on the EU level – hence insufficiently – and would contradict fundamental aspects of a Member State's criminal justice system.

That being said, more serious problems are likely to arise if and when the *EU sets about to adopting criminal rules by itself*. Even with certain improvements, such as linking votes in the Council to a prior determination by the respective national Parliament,[85] the co-decision procedure does not seem fit to accommodate autonomous criminal competence, at least not as long as the European citizenry ("Demos") finds itself *in statu nascendi*.[86] Put differently, as long as the EU falls short of a

cases, it is suggested that the representative in the Council modify his/her Member State's position subject to subsequent ratification by the Parliament: see *Satzger*, *op. cit.*, at 36.

[83] *Cf.* the objections expressed by *Böse,* ZIS 2010, p. 83, as well as the lower threshold accepted by *Sieber* (ZStW 2009, p. 55) with respect to the democratic legitimization of criminal rules in the EU

[84] See *H. Satzger*, Internationales und europäisches Strafrecht, 4th ed., p. 124.

[85] For instance, linking votes in the Council to a prior determination by national Parliaments would appear plausible in another case where the *ordinary legislative procedure* applies, namely art. 325 TFEU concerning fraud against the financial interests of the Union. Nonetheless, the principle of majority on the one hand and the non-applicability of the emergency break clause on the other indicate that Member States cannot absolve themselves of the rules adopted by the EU even if they invoke fundamental principles of theirs. Besides, applying the emergency break clause by analogy in those cases is refuted based on arguments related to functional differences between directives and regulations: see *Satzger*, Internationales und europäisches Strafrecht, 4. Aufl., pp. 125-126.

[86] See, e. g., *Meyer,* Demokratieprinzip und Europäisches Strafrecht, pp. 123-124, *Schünemann*, KritV 2008, pp. 12-13. With respect to art. 325 TFEU see *Sieber,* ZStW 2009, p. 59.

community where citizens feel they belong, its exercise of sovereign authority cannot genuinely derive from the people. Notwithstanding the competence entrusted with it in the Treaty of Lisbon, I believe the EU should confine itself to the context of regulatory offenses and abstain from adopting criminal rules by itself until such time as the institutional evolution brings about a further improvement of the democratic deficit.[87] Whenever the exercise of criminal competence appears to be necessary as a last resort, the approximation of criminal laws of Member States via directives would emerge as a viable alternative.[88] Indeed, nothing in the Treaty of Lisbon precludes that option; quite the contrary, both the provision on fraud affecting the financial interests of the Union (article 325 TFEU) and the one on trafficking in persons (article 79(2)(d) TFEU) allude to *measures in accordance with the ordinary legislative procedure*, thereby implying, inter alia, the adoption of directives.

b) The "*lex certa*" requirement

This particular facet of the principle of *n.c. n. p. s.l.* requires that a criminal rule contain a precise description of the objective and subjective elements of an offense as well as the sanction to be imposed. It also requires that every offense be comprised of a human act, hence disallowing punishment for one's thoughts. Besides, the description must be clear enough so that the citizen can predict which actions will make him criminally liable. Absent such *foreseeability*, the principle of legality would indeed be rendered moot.[89]

It goes without saying that the '*lex certa*' requirement would apply without any distinction to criminal rules introduced by the EU itself, i. e. without the need of transposition by Member States, as provided for certain cases in the Treaty of Lisbon.[90] That being said, the main type of criminal competence provided in the latter is the one to be exercised through directives establishing minimum rules concerning the definition of offenses and sanctions (article 83(1), (2) TFEU). Therefore, the '*lex certa*' requirement acquires in this case a more intricate character, owing to the two distinct stages of criminalizing conduct (a European and a national one).

A mere look at the case-law of the ECJ[91] (predating the Treaty of Lisbon) would indicate that the Court has indeed followed the ECHR in requiring that the

[87] See *P.-A. Albrecht*, Die vergessene Freiheit, p. 167, arguing that the EU should confine itself to means outside criminal law. Also see *Braum*, Europäische Strafgesetzlichkeit, pp. 473-474, criticizing the abuse of criminal sanctions for the sake of efficiency.

[88] For an analysis of the institutional regime before Lisbon see *N. Bitzilekis/M. Kaiafa-Gbandi/E. Symeonidou-Kastanidou*, Theorie der genuinen europäischen Rechtsgüter, in B. Schünemann (ed.), Ein Gesamtkonzept für die europäische Strafrechtspflege, pp. 230 et seq.; see, however, *R. Hefendehl*, Europäisches Strafrecht: bis wohin und nicht weiter?, in B. Schünemann (ed.), Ein Gesamtkonzept für die europäische Strafrechtspflege, pp. 214 *et seq.*, advocating for a European criminal law free from intervention by Member States (though stopping short of discussing the democratic legitimization of the rules produced). In that same vein, see the proposals of the program 'Ein Gesamtkonzept für die Europäische Strafrechtspflege', in B. Schünemann (ed.), 2006, pp. 59-60.

[89] See, e. g., *P.-A. Albrecht*, Die vergessene Freiheit, pp. 49-50. For a discussion of the principle under the Greek Constitution requiring a clear description of the elements of crimes see inter alia *I. Manoledakis*, Article 7 of the Constitution, in G. Kasimates/ K. G. Maurias (eds.), Annotated Constitution of Greece, 1999.

[90] Note, however, the reservations expressed in the previous chapter.

criterion of foreseeability emanates from the text of the rule itself.[92] In the field of criminal law, the Court has emphasized also that the obligation of Member States to interpret the law in accordance with a directive[93] (or a framework decision[94]) cannot lead to the establishment or aggravation of criminal liability. This would appear to imply that it is the national criminal rule that should abide by the principle of *n.c.s.l. certa* rather than the legislative act by which the EU has compelled its adoption.[95]

However, that kind of reasoning would fail to take into account certain factors affecting EU law, particularly after the Treaty of Lisbon. Through its directives addressing cross-border crime or ensuring the effective implementation of its policies, the EU seeks to establish *a minimum content of the definitions of crimes*, which shall *bind* Member States[96] under threat of sanctions in the event of failure of incorporation into the domestic legal order.[97] Such minimum content should clearly derive from each legislative act of the Union, despite the fact that it is up to each State's Legislature to specify the elements of crimes for the purposes of its criminal justice system. In contrast, the sanction to be imposed need not be determined by the European legislator; that latter task could indeed be performed more aptly on a domestic level, in accordance with the principle of proportionality and the particularities of each criminal justice system.[98]

Requiring the EU to clearly delimit a minimum core of the conduct to be proscribed consists in two important parameters. First of all, lack of such clear delimitation would pose a dilemma to national legislators: either to unilaterally adopt a precise definition and risk diverging from the actual objective of the EU, which the European legislator did not adequately describe; or fail to give a clear description of the offense, thereby violating the principle of *n.c.s.l. certa*, which would amount to a breach of the Constitution in a number of Member States. It becomes evident that the '*lex certa'* requirement is addressed to *the European legislator as well*, inasmuch as the latter may bind Member States to adopt minimum elements of an offense. Otherwise, it would become impossible for national legislators to abide by their obligation to transpose EU law without violating the '*lex certa*' requirement.[99] Even worse, fear of possible sanctions might lead Member States to opt for transposing pertinent directives verbatim, which would constitute an out-

[91] See extensively *A. Klip*, European Criminal Law, 2009, pp. 167 et seq.

[92] See *Klip*, European Criminal Law, p. 169, Case C-76/06 (2007), *Chr. Mylonopoulos,* Criminal law of the European Communities and general principles of EU law, Poinika Chronika 2010, 161 [in Greek].

[93] See *Klip*, European Criminal Law, p. 168, Cases C-74/95 and C-129/95, 12. 12. 1996, par. 22, C-384/02, 22. 11. 2005, par. 30.

[94] See *Klip,* European Criminal Law, p. 168, Case C-105/03, 16. 6. 2005, par. 45.

[95] See *Klip,* European Criminal Law, p. 171.

[96] For a discussion of the function of 'minimum rules' in substantive criminal law see *Kaiafa-Gbandi*, European Journal of Crime, Criminal Law and Criminal Justice 2005, pp. 498 *et seq*.

[97] See art. 260 TFEU.

[98] According to the case-law of the ECJ, the principle of legality does not require that EU law provide for a specific penalty for each offense: see *Klip*, European Criminal Law, p. 172, Cases C-238/99 P, C-244/99 P, C-250/99 P to C-252/99 P and C-254/99 P, 15. 10. 2001.

[99] See *Klip,* European Criminal Law, p. 172, n. 650, referring to specific examples of EU legislative acts causing problems, and suggesting the *annulment* of the act as the only solution in these cases.

right breach of the principle of legality.[100] Besides, absent a clear delimitation of a minimum core by the EU, neither national Parliaments nor States' representatives would be able to contribute in the consultation process or appraise the proposed norms in light of the fundamental principles inherent in their respective criminal justice systems, as the vagueness of the content may conceal serious deficiencies. In turn, this would drastically diminish the potential ambit of the emergency break clause provided under article 83(3) TFEU. Since the consultation process and the emergency break clause are both associated with the democratic principle, one can easily perceive a link between the latter and the '*lex certa*' requirement.

Aside from indirectly furthering the principle of *n.c. n. p. s.l. certa* within a national context, introducing specific directives regarding the minimum content of criminal rules to be adopted by Member States also concerns the European citizens as such. This is because the directive itself, coupled with the national piece of law implementing it, can shed light on what exactly is punishable, thus ensuring foreseeability. Of course, this does not mean that the directive – or at least one interpretation thereof – can lead to the establishment or aggravation of offenses that the national legislator has not proscribed as such by virtue of domestic rules.

A much more pressing need to preserve the '*lex certa*' requirement arises when a European piece of legislation compelling Member States to criminalize conduct refers to other provisions of EU law.[101] This kind of situation might bring about practical problems, as the '*lex certa*' requirement must be observed with respect to every single provision involved. Otherwise, it would become unfeasible to adopt national rules incorporating EU law in a sufficiently unambiguous manner.

Evaluating the practice of the EU in light of the principle in question – which also applied by analogy to framework decisions issued under the third pillar, considering that they too aimed at binding Member States as to the result to be achieved – would churn out conflicting examples (as was the case with the other principles discussed above). For instance, where the EU wishes to proscribe any type of conduct occurring within a certain field, it does so through detailed descriptions of offenses covering virtually every imaginable situation, such as in the case of drug trafficking[102] or the protection of the euro against counterfeiting.[103] Regrettably, these examples constitute evidence of the exception rather than the rule. The latter is expressed in such cases as the framework decision on combating corruption in the private sector, by virtue of which Member States are bound to

[100] On the adverse effect of international law on the principle of legality in general see *B. Jähnke*, Zur Erosion des Verfassungssatzes „Keine Strafe ohne Gesetz", ZIS 2010, pp. 463 et seq., esp. at 469-470, *M. Kaiafa-Gbandi*, Die allgemeinen Grundsätze des Strafrechts im Statut des Internationalen Strafgerichtshofs: Auf dem Weg zu einem rechtsstaatlichen Strafrecht der Nationen?, in FS für H.-L. Schreiber, pp. 204 et seq., *S. Gless*, Strafe ohne souverän?, ZStrR 2007, pp. 436-437, 442-443, *Chr. Mylonopoulos,* Criminal law of the Euroepan Communities and general principles of EU law, Poinika Chronika 2010, 166-167 [in Greek]. See more generally *Chr. Mylonopoulos*, Internationalisierung des Strafrechts und Strafrechtsdogmatik. Legitimationsdefizit und Anarchie als Hauptcharakteristika der Strafrechtsnormen mit internationalem Einschlag, ZStW 2009, pp. 68 et seq.

[101] On this issue see *Satzger*, Internationales und Europäisches Strafrecht, 4. Aufl., pp. 131 et seq., *Zimmermann,* ZRP 2009, p. 76.

[102] Framework-decision 2004/757/JHA, L 335 of 11. 11. 2004, pp. 8 et seq.

[103] Framework-decision 2000/383/JHA, L 140 of 14. 6. 2000, pp. 1 et seq.

criminalize both "active" and "passive" corruption.[104] The central element of the offense is that a person employed in the private sector requests or receives an undue advantage in exchange for breaching his/her duties. Nonetheless, such breach of duty is only vaguely circumscribed under article 1, sec. b and has to "cover as a minimum any disloyal behavior constituting a breach of a statutory duty, or, as the case may be, a breach of professional regulations or instructions […]". Thus, the framework decision would apply to breach of duties arising out of contractual arrangements or even mere orders in the workplace. Since the uncertainty emanates from the framework decision itself, Member States are bound to get entangled in it. Although article 2(3) of the framework decision allows the Member States to limit the scope to conduct involving a distortion of competition in relation to the purchase of goods or commercial services, this does not address the vagueness related to the breach of duty.[105] Similar flaws have surfaced in other EU legislative acts:[106] another case in point would be the proposed directive on combating the sexual abuse, sexual exploitation of children and child pornography.[107] Article 2, sec. b (iii) of the said proposal alludes to visual depictions of any (adult) person appearing to be a child, in disregard of the fact that no criterion in law can possibly determine when an adult would "appear to be a child", since appearances may in fact vary significantly from person to person (an eighteen-year-old could easily appear to be seventeen, whatever this may mean). It becomes evident, then, that stipulations of this sort cannot satisfy the requirement of foreseeability, and should therefore be left outside the criminal law realm.

In conclusion, the EU still has a long way to go towards ensuring actual respect for this facet of the principle of legality as well.

c) The prohibition of retroactive application of criminal laws and the principle of lex mitior

Last but not least, it is in order to examine yet another facet of the principle of legality, namely the requirement of non-retroactivity and its corollary, i. e. the principle of *lex mitior*. The obvious import of the said requirement is that criminal rules establishing offenses or introducing aggravating circumstances thereto shall not apply to acts committed prior to their adoption, as this would indeed violate the very core of the principle of legality, i. e. 'no punishment without law'.[108] The

[104] Framework-decision 2003/568/JHA, L 192 of 31. 7. 2003, pp. 54 et seq.

[105] On the problem of transposing this framework-decision into the Greek legal order see *M. Kaiafa-Gbandi*, Punishing corruption in the public and the private sector: the legal framework of the European Union in the international scene and the Greek legal order, European Journal of Crime, Criminal Law and Criminal Justice 2010, 178 et seq.

[106] See the framework-decision on combating certain forms and expressions of racism and xenophobia by means of criminal law, 2008/913/JHA, L 328 of 6. 12. 2008, pp. 55 et seq., as well as the directive on the protection of the environment through criminal law, 2008/99/EC, L 328 of 6. 12. 2008, pp. 28 et seq. See pertinent comments in Manifesto on European Criminal Policy, ZIS 2009, p. 711.

[107] COM (2010) 94 final, 29. 3. 2010.

[108] With regard to European law see, e. g., *Klip*, European Criminal Law, pp. 173 et seq, *Chr. Mylonopoulos,* Criminal law of the European Communities and general principles of EU law, Poinika Chronika 2010, 161 [in Greek].

requirement is explicitly contained both in article 7(1) ECHR and article 49(1)(a) of the Charter of Fundamental Rights of the EU, which has now attained binding status.[109] Accordingly, under no circumstances may the EU require its Member States to apply their criminal laws retroactively.

The requirement of non-retroactivity knows of one notable exception, which – albeit not always constitutionally guaranteed – can be found in virtually every domestic legal order:[110] criminal law provisions not only can but actually should apply retroactively when they benefit the offender (i.e. either render the act not punishable or mitigate the sanction). This is explicitly provided under article 49(1)(c) of the Charter of Fundamental Rights of the EU, under which the Union may not compel States to apply the law in force at the time of the offense, as long as it was amended thereafter (until the decision is made final) in a manner favorable to the defendant. To the extent the Charter is binding on Member States, this exception is also to be applied by the Legislature and Judiciary of all Member States. Thus, the principle of *lex mitior* enjoys *a more elevated status* on a European level compared to certain Member States, presenting an excellent example of the way in which a more comprehensive protection of fundamental rights within the EU can be achieved.

This analysis demonstrates, first and foremost, that the principle of legality in all its aspects presents certain particularities on EU level from an institutional perspective, calling for the contribution of Member States in order to leave the core of the principle intact. At the same time, the application of the principle in actual practice (active involvement of national Parliaments in the lawmaking process before EU organs, faithful application of the '*lex certa*' requirement with respect to the transposition of minimum rules concerning definitions of offenses and sanctions) as well as its future institutional form (*lex parlamentaria*) requires further support. Guaranteeing the principle of legality indeed turns the spotlight on the citizen, as it serves to limit the power of government to impose criminal sanctions and safeguards civil liberties. In that sense, the principle of legality provides the citizen with security as well.[111]

4. The principle of guilt

The principle of guilt is another cornerstone of every liberally oriented criminal justice system.[112] Individual guilt for one's act is indeed an absolute prerequisite legitimizing the imposition of any criminal sanction. According to this principle, a

[109] Even before the Charter attained binding status, the ECJ had recognized the principle in joined cases C-387/02, C-391/02, C-403/02 (Berlusconi), pars. 69, 75, and 78.

[110] See, e. g., art. 7, par. 1 of the Greek Statute, which enshrines the requirement of non-retroactivity but stops short of guaranteeing the principle of lex mitior (the latter introduced in art. 2 CC).

[111] See *P.-A. Albrecht*, Die vergessene Freiheit, p. 53.

[112] The principle of guilt has so far withstood every doctrinal objection against it: see *P.-A. Albrecht*, Die vergessene Freiheit, pp. 65 et seq., *N. Paraskevopoulos*, Thoughts and guilt in criminal law [in Greek], 1987, pp. 118 et seq. On the content of the principle of guilt see BVerfG 2 BvE 2-08, BvR5-08, BvR1010-08, BvR1022-08, BvR1259-08, BvR182-09 of 30. 6. 2009, section 364, as well as an interesting approach by *K. Günther*, Schuld und kommunikative Freiheit, 2005, pp. 245 et seq., associating the principle of guilt with a democratic State abiding by the rule of law in such a way as to bar non-democratic States from affirming guilt.

criminal sanction can be imposed when a criminal act has affirmatively been proven to be the product of a 'guilty mind', i. e. it was carried out voluntarily (with the requisite *mens rea*).[113] Only then shall the individual deserve to bear the blame expressed through punishment. Such substantive content of the principle evidences its association with the principle of proportionality, as well as its function as a limit to the deterrent and/or the rehabilitative orientation of punishment. Penalties are incurred to address acts committed with "a guilty mind", hence they should be proportionate to the "guilt" and never exceed it for any reason.[114] Thus, the principle of guilt becomes a constraint of State power, protecting against otherwise unbridled deterrent policies, ensuring respect for the human being as an individual, and constituting an expression of respect for human dignity.

On a European level, and in particular relation to criminal law, the said principle derives from article 48 of the Charter of Fundamental Rights of the EU, encompassing the presumption of innocence in the following words: "everyone who has been charged shall be presumed innocent until proved guilty according to law"; moreover, article 1 of the Charter proclaims the inviolability of human dignity.[115] It becomes evident, then, that the EU subscribes to the principle of guilt to its full extent.

It follows that the EU is bound to abstain from compelling its Member States to introduce strict liability crimes or introduce them itself.[116] Another ramification of the principle of guilt is the difficulty of transposing in those cases where legal persons are responsible for violating fundamental interests in the course of their activities. This is because a number of Member States reject criminal responsibility of legal persons on the grounds, inter alia, of its incompatibility to fundamental principle of guilt.[117] Consequently, the EU had better respect each State's right to choose whether it will introduce criminal liability of legal persons or not (based on their own understanding of the principle of guilt, which varies according to each people's culture), as has been the case with every framework decision or directive on responsibility of legal persons so far.[118]

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[113] *Cf.* BVerfG. Even if the affirmation of guilt inevitably entails an evaluation, the ontological foundation of guilt, i. e. the actual expression of the offender's mental state vis-à-vis the act, which can only be approached by the judge based on empirical evidence, constitutes a guarantee for the citizen (see *Paraskevopoulos*, *op. cit.*, at 124; on approaching dispositive concepts based on empirical evidence see esp. *W. Hassemer*, Die Freiwilligkeit beim Rucktritt vom Versuch, in Lüderssen (ed.), Vom Nutzen und Nachteil der Sozialwissenschaften für das Strafrecht, Tb 1, pp. 243 et seq.). On the limits set to approaching the concept of guilt through empirical sciences by due process rights see *P.-A. Albrecht*, Die vergessene Freiheit, pp. 67 et seq.

[114] See *N. Androulakis*, Article 79 CC, in Systematic interpretation of the Criminal Code [in Greek], p. 1038, *M. Kaiafa-Gbandi*, in M. Kaiafa-Gbandi/N. Bitzilekis/E. Symeonidou-Kastanidou, The law of criminal sanctions [in Greek], 2008, pp. 298-299, *N. Paraskevopoulos*, in L. Margarites-N. Paraskevopoulos, Penology [in Greek], 7th ed., p. 325.

[115] The case-law of the ECJ attests to this conclusion, requiring the affirmation of guilt for the enforcement of administrative sanctions: see *Klip*, European Criminal Law, p. 189.

[116] *Cf.*, however, *Klip*, European Criminal Law, p. 189, not excluding the compatibility of strict liability offenses with EU law.

[117] See, e. g., *M. Kaiafa-Gbandi*, Ein Blick auf Brennpunkte der Entwicklung der deutschen Strafrechtsdogmatik vor der Jahrtausendwende aus der Sicht eines Mitglieds der griechischen Strafrechtswissenschaft, in A. Eser/W. Hassemer/B. Burkhardt (ed.), Die deutsche Strafrechtswissenschaft vor der Jahrtausendwende, München 2000, 277 ff.

Having recalled the self-restrained practice of the EU with respect to the principle of guilt, one should also take note of the fact that the Union's legislative acts so far steadily associate criminal responsibility with a requisite *mens rea*, and in fact require intent. Beyond rejection of strict liability, this also evinces the EU's reticence to uphold criminal negligence, insisting on intent as the basis of criminal responsibility. This position is affirmed by the *ultima ratio* principle – as delineated above – which only leaves room from crimes of negligence in exceptional cases, i. e. when the significance of the interest harmed and the gravity of the act render them a necessity.[119]

Nevertheless, there are other examples indicating lack of respect for the principle of guilt on the part of the EU For instance, one should mention article 1, par. 4 of the PIF Convention on the Protection of the European Union's financial interests, which provides that "the intentional nature of an act or omission […] may be inferred from objective, factual circumstances". This tends to oversimplify the dispositive nature of intent, which cannot be automatically inferred from 'objective circumstances' connected with the act alone. Likewise, article 3 of the said Convention concerning the criminal liability of heads of businesses provides that "each Member State shall take the necessary measures to allow [these persons] to be declared criminally liable in accordance with the principles defined by its national law" in cases of fraud affecting the European Communities' financial interests when a person under their authority is acting on behalf of the business; however, this provision does not seem to require the ascertainment of a criminal omission or subjective elements, despite the fact that the crime of fraud affecting the Union's financial interests requires intent on the perpetrator's part.

Similar problems arise under a number of EU legislative acts which fail to associate the principle of guilt with proportionality. Indeed, absent a requirement of 'personal guilt', there is no measure by which to evaluate the penalty to be imposed. There are other examples,[120] including the framework decisions on terrorism and organized crime, which require Member States to significantly broaden criminal suppression and should therefore be in line with the principle of guilt. At this point, suffice it to mention an example derived from the proposal for a directive on trafficking in human beings.[121] Under article 4(2)(c) of this proposal, Member States are called to ensure that pertinent offenses are being punished twice as harshly, inter alia, if the offence was committed "within the framework of a criminal organization" (i.e. by penalties of a minimum-maximum of at least ten years of imprisonment as opposed to five years in the ordinary cases). Such aggravation of the penalty to be imposed is unjustified. Indeed, if the person committing trafficking in persons

[118] See indicatively arts. 5 and 6 of the framework-decision on organized crime (2008/841/JHA, L 300 of 11. 11. 2008, pp. 42 et seq.), as well as arts. 5 and 6 of the proposal for a directive on trafficking in human beings, COM (2010) 95 of 29. 3. 2010.

[119] *Cf.* Council conclusions on model provisions, guiding the Council's criminal law deliberations, doc. 16542/09 of 23. 11. 2009 under the title 'Intent', points 6-8.

[120] See the Manifesto on European Criminal Policy, ZIS 2009, pp. 711-712.

[121] COM (2010) 95 of 29. 3. 2010.

is a member of a criminal organization (so that his acts are committed "within the framework of a criminal organization"), the aggravated conduct would constitute two distinct offenses,[122] namely trafficking in persons and participation in a criminal organization (the latter being separately punished as per the EU's dictates). Thus, employing participation in a criminal organization to *also* aggravate the penalty for trafficking would amount to being punished twice on account of the same circumstance in disregard of the principles of guilt and proportionality.

These conflicting (positive and negative) examples from the practice of the EU concerning the principle of guilt reveal that one cannot count on the Union's commitment in posing restraints to suppressive measures in the form of minimum rules to be adopted by States in the field of criminal law. As long as this remains so, the security aspired within the common European area cannot be attained in a way that respects liberty and justice.

III. Conclusions

The above analysis allows us to deduce the following general conclusions:

Even within an international or supranational environment, such as the EU, criminal law will always retain its particular nature, since it constitutes the sternest mechanism of social control, which deeply affects fundamental civil liberties.

Highlighting such particular nature does not aim at sustaining an anti-European sentiment or insulate Member States' criminal justice systems from the EU's legal order. On the contrary, the goal is to underscore the importance of *fundamental principles of criminal law* in *restraining counter-crime policies* so that they are implemented in a manner that respects civil liberties and benefits citizens. The EU ought to apply these principles without altering their substantive content, as it subscribes to the same values as the ones that gave rise to these principles in the first place.

At this point in history, *the institutional identity* and political agenda of the EU as outlined after the Treaty of Lisbon *present an opportunity that should not be missed*, particularly since guaranteeing fundamental rights of citizens already emerges as a declared goal of the Union. The practical difficulty, of course, is to move from verbally guaranteeing civil liberties to ensuring respect for them in actual practice, an endeavor often proven quite arduous for Member States themselves.

True safeguarding of fundamental rights, a task primarily focused on the sensitive field of criminal suppression, hinges on *the EU's day-to-day activities*, and especially on its legal tools, by which it imposes its decisions to criminalize various types of conduct on Member States. The long and winding path towards preserving civil liberties within a common European area – pursued thus far with the preservation of 'security' in mind – can only be traversed if the *liberal fundamental principles* governing

[122] The aggravation of the conduct consists in the breach of public order or, alternatively, the fact that criminal organizations tend to be more harmful towards fundamental interests.

when and under which circumstances the State may impose criminal punishment are placed at the center of attention.

These fundamental principles, as presented in the Manifesto on European Criminal Policy and scrutinized above, *should* – according to my opinion – *be explicitly codified in a detailed manner in the primary legislation of the EU*,[123] to the extent this is not already the case. Europe's historic and cultural tradition, inspired by the Enlightenment, enables it to implement a "zero tolerance policy on breaches of fundamental rights" as opposed to a mere "zero tolerance policy on crime", thus achieving better results. However, this would presuppose turning its declared goals and political willpower into actual policies, which shall infiltrate its legislative initiatives binding Member States in the field of criminal law.

[123] See *M. Kaiafa-Gbandi*, À la recherche d' une compétence communautaire en matière de répression pénale-Un tournant essentiel des développements du droit pénal dans le cadre de l' Union européenne, in M. Kaiafa-Gbandi (ed.), Compétence communautaire et imposition des sanctions pénales pour la violation du droit communautaire, 2004, p. 32, *J. Pradel*, Avis sur la sanction des violations du droit communautaire par le droit pénal, in M. Kaiafa-Gbandi (ed.), Compétence communautaire et imposition des sanctions pénales pour la violation du droit communautaire, 2004, pp. 39-40.