The 'Qualities' of Criminal Law – Connected to National and European Law-making Procedures

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Abstract

According to distinguished literature, not only democratic legitimacy but also subsidiarity is a quality of criminal law strictly related to the principle of legality, and namely to the corollary of nullum crimen sine lege parlamentaria *as implemented in most EU member States. After the entry into force of the Treaty of Lisbon, the doctrine displays growing concerns that both of the qualities mentioned might be jeopardized in parallel with the transfer of criminal law competence from national legislators to the European Un*ion, *the legal system of which does not comply with the aforementioned corollary.*

The author disputes these concerns from a two-fold perspective: on the one hand, they seem to overestimate the capacity of national law-making procedures to respect, not just in theory but also in practice, the principles of the legality and subsidiarity of criminal law; on the other hand, they undervalue the aptitude of the EU institutional framework and legislative procedure, especially after the changes brought about by the Treaty of Lisbon, to adequately implement the same principles.

Accordingly, the possibility that the democratic and subsidiary standards of EU criminal law might, on occasion, be higher than the corresponding standards of purely national criminal law should not be excluded.

I. Democratic legitimacy and subsidiarity of criminal law as qualities related to the *nullum crimen sine lege parlamentaria* principle

When the 'qualities' of criminal law related to the principle of legality are discussed, one may immediately think about the so-called 'ahistorical' dimension of this principle, which includes, besides the corollaries of the non-retroactivity *in peius* and retroactivity *in melius*, the corollaries functional to the 'textual quality' of the law, and therefore the clarity and accessibility of the criminal provision.[2]

However, there are qualities of criminal provisions strictly connected to the 'historical' dimension of legality that provide for a selection of sources of criminal law and the related law-making process. In the majority of EU member States' legal systems, these qualities are safeguarded under the corollary of *nullum crimen sine lege parlamentaria*. As a matter of fact, the parliamentary law-making process is expected to endow the outcome, the legislative provision, with precise fundamental features.

First, given the representative nature of parliament and the involvement of minorities in the public debate, the outcome of parliamentary legislative procedure shall have a democratic legitimacy.

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[2] On the distinction between the ahistorical and the historical dimensions of the principle of legality see *F. Palazzo*, (Corso di diritto penale. Parte generale) Criminal Law Course. General Part, 2008, p. 96 et seq.

Secondly, according to distinguished literature, the parliamentary procedure shall endorse the need to limit resorting to criminal law by implementing the principle of *extrema ratio.* Franco Bricola, most of all, maintained that the ultimate *ratio* of the principle of *nullum crimen sine lege parlamentaria* under art. 25 para. 2 Italian Constitution, is namely the purpose to "restrain criminal law into the boundaries of strict necessity"[3], by limiting the number of sources and bodies legitimated to enact criminal provisions.

The aforementioned principle does in fact force the criminal law-making process into a long, complicated, perilous procedure, strewn with several "check-points" operated by political counterparts; a procedure regulated by meticulous parliamentary internal regulation, in respect of which the time for the passing of the bill is necessarily extended, and an open procedure, exposed to the mass media, thus making it easily subject to the pressure of public opinion. The criminal provision enacted as a result of such achallenging, prolonged, public parliamentary mechanism shall therefore boast the qualities of 'rationality and thoughtfulness'; and the very complexity of this mechanism and the rationality of its outcome shall help to accomplish the objective of the reduction (or, at least, the limitation) of criminal law, in conformity with the principle of *extrema ratio.*[4]

Ultimately, the parliamentary procedure shall provide criminal provision not only with democratic legitimacy, but also with the quality of *subsidiarity*, as a consequence of the rational and thoughtful nature of any legislative option of criminalization.

II. The development of EU competence in criminal matters as the origin of qualitative deterioration of criminal provisions: a prejudice to be removed

Provided that democratic legitimacy and subsidiarity are qualities of criminal law strictly related to the *nullum crimen sine lege parlamentaria* principle, the literature displays persistent concerns (even growing concerns after the entry into force of the Treaty of Lisbon) that such qualities might be jeopardized as a consequence of the development of EU competence in criminal law.

On the one hand, the democratic legitimacy of criminal law might be at risk as a result of the transfer of criminal law competence from national legislators to the European legislator, with the latter operating, in general, within a legal framework still characterised by a democratic *deficit* and, in particular, by means of a law-making process that deviates from the principle of *nullum crimen sine lege parlamentaria.*[5]

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[3] *F. Bricola,* (Teoria generale reato) General Theory of the Criminal Offence, Novissimo Digesto Italiano, 1973, p. 14. See also *G. Abbadessa,* (Dal 'diritto penale comunitario' al diritto penale della nuova Unione europea: problematiche dell'interregno) From EC Criminal Law to the Criminal Law of the New European Union: Transitional Problems, in Rivista trimestrale di diritto penale dell'economia (RTDPE) 2009, p. 459, p. 484 et seq.

[4] See *G. Fiandaca,* (Legalità penale e democrazia) Principle of Legality in Criminal Law and Democracy, Quaderni fiorentini per la storia del pensiero giuridico moderno (QF) 2007, p. 1251 et seq.; *F. Palazzo*, (Introduzione ai principi di diritto penale) Introduction to the Principles of Criminal Law, 1999, p. 205.

[5] See, *infra*, point III.

On the other hand, the reflective nature and subsidiarity of criminalization as an option open to the legislator may also be frustrated in parallel with the aforesaid transfer of competence, given that EU legislator is not careful enough in limiting the resort to criminal law alongside the standard of rationality and *extrema ratio*.[6]

Although the arguments supporting these concerns undoubtedly carry some weight, they do not, however, seem wholly persuasive.

Before criticizing these arguments, it is worth investigating in brief the methodological approach underlying them, which is also a recurrent theoretical background of most critical approaches to European legal integration.

As a matter of fact, the literature, especially in Italy, does not hesitate to emphasize the number of failings of national criminal law and its inconsistencies with several fundamental principles; and special attention is given to the unsatisfactory respect for the principle of *nullum crimen sine lege parlamentaria* (and its democratic *ratio*) stated under art. 25 para. 2 Const., and the standards of rationality, *extrema ratio* and subsidiarity of criminal law.[7]

Nevertheless, when it comes to considering the consequences of the transfer of competences in criminal matters from the national legislator to the EU legislator on respect for the aforementioned principles, the harsh criticisms levelled at national legislation are somehow suddenly forgotten, as though this transfer of competences did not involve the shifting of lawmaking powers from a national legislator that proved to be so careless in respecting the principles at stake, to a European legislator whose attitude to comply with the same principles has yet to be evaluated (for the very reason that EU substantial criminal law is still limited to a few acts); in other words, as if such a transfer would leave behind an ideal and infallible national criminal law system and would grant the *ius puniendi* to a European legislator patently not willing or, worse still, not capable of respecting those principles. This methodological approach should be possibly left aside, in order to evaluate with due neutrality the consequences of the strengthening of EU criminal competences on

[6] See, *infra*, point IV.

[7] The Italian literature on the crisis of the principle of legality, of the Parliament, and of the law itself is overwhelming. As for the criminal law literature on the crisis of the principle of legality, see, among others, *G. Insolera* (ed.), (Riserva di legge e democrazia penale: il ruolo della scienza penale) *Nullum crimen sine lege parlamentare* and Criminal Law Democracy: the Role of Criminal Law Doctrine, 2005, *passim*; *F. Palazzo*, (Legalità penale: considerazioni su trasformazione e complessità di un principio 'fondamentale') The Principle of Legality in Criminal Law: Remarks on the Transformation and Complexity of a Fundamental Principle, Quaderni fiorentini per la storia del pensiero giuridico moderno (QF) 2007, p. 1282 et seq. In the constitutional law literature, see *P. Caretti,* (La 'crisi' della legge parlamentare) The 'Crisis' of Parliamentary Law, Osservatoriosullefonti.it (on-line journal), n. 1/2010; *F. Modugno*, (A mo' di introduzione. Considerazioni sulla 'crisi' della legge) Introduction: Remarks on the 'Crisis' of the Law, in: F. Modugno (ed.), (Trasformazioni della funzione legislativa, crisi della legge e sistema delle fonti) Transformations of Legislative Function, Crisis of the Law and Law Sources System, vol. II, 2000, p. 38 et seq. As for the crisis of the rationality, subsidiarity and *extrema ratio* of criminal law see *C. E. Paliero*, ('*Minima non curat praetor*'. Ipertrofia del diritto penale e decriminalizzazione dei reati bagatellari) '*Minima non curat praetor*'. The Hypertrophy of Criminal Law and the Decriminalization of Minor Offences, 1985, p. 12 et seq., 83 et seq., 186 et seq. See also *G. Insolera,* (La legislazione penale compulsiva) Disordered Criminal Legislation, 2006, *passim*; *F. Mantovani,* (*Diritto penale*) Criminal Law, 2007, p. XLIII. On the crisis of the theory of "bene giuridico" ("Rechtsgut"), a fundamental instrument for the implementation of the principles of subsidiarity and *extrema ratio*, see *V. Manes*, (Il principio di offensività nel diritto penale) The *Nulllum Crimen sine Iniuria* Principle, 2005, p. 121 et seq.

the "qualities" of criminal provision and, in more general terms, on the respect of the fundamental principles of criminal law.

III. The democratic quality of criminal provision facing the transfer of competences from the national legislator to the European legislator

The concerns on the destiny of the 'democratic legitimacy' of criminal law, as a quality strictly related to parliamentary procedure, are rooted in the inveterate argument of the democratic *deficit* of the EU, and especially of the EU law-making process.

Notwithstanding an increasing agreement on the sufficient level of democracy of the EU law-making process[8], the issue of democratic *deficit* still enjoys widespread support in the European (criminal) law doctrine[9], it is repeatedly mentioned in criminal law handbooks[10] and it visibly pervades the reasoning of the *Lissabon-Urteil* by the German Federal Constitutional Court of June 2009[11].

It is not possible to cover all the arguments put forward in support of the democratic deficit thesis in detail here[12]. As such, the present analysis will focus on the major arguments that the criminal, constitutional and European law doctrines still uphold with reference to the legal framework implemented as a result of the Lisbon Treaty. In particular, many authors consider that, first, national parliaments are insufficiently involved in the so-called "ascending phase" of the EU law making process; and secondly, the role played by EU institutions without democratic

[8] See *A. Bernardi,* (I tre volti del diritto penale comunitario) The Three Facets of EC Criminal Law, Rivista italiana di diritto pubblico comunitario (RIDPC) 1999, p. 90 et seq.; *G. Grasso,* (La Costituzione per l'Europa e la formazione di un diritto penale dell'Unione europea) The Constitution for Europe and the Development of EU Criminal Law, in: G. Grasso/R. Sicurella (eds.), (Lezioni di diritto penale europeo) European Criminal Law Lessons, 2007, p. 706 et seq.; *S. Riondato,*(Competenza penale della Comunità europea. Problemi di attribuzione attraverso la giurisprudenza) European Community Competence in Criminal Matters. Issues of Attribution under the Case-Law, 1996, p. 228 et seq. In the German literature see *H. Satzger*, (Die Europaisierung des Strafrechts) The Europeanization of Criminal Law, 2001, p. 451 et seq.

[9] Among others, see *B. Schünemann,* (Presentazione) Foreword, in: B. Schünemann (ed.)/V. Militello (ed. of the Italian version), (Un progetto alternativo di giustizia penale europea, original title *Alternativentwurf europäische Strafverfolgung*) Alternative Project of Penal European Prosecution, 2007, p. 6 et seq.; *J. M. Silva Sanchéz,* (Principe de légalité pénale, législation pénale européenne: un croisement impossible?) The Principle of Legality in Criminal Law and the European Criminal Law: an Impossible Crossroad?, in: L. Arroyo Zapatero/A. Nieto Martin (eds), European Criminal Area: Current Situation and Future Perspectives, 2010, p. 63 et seq. In the recent Italian literature see *C. Paonessa,* (Gli obblighi di tutela penale. La discrezionalità legislativa nella cornice dei vincoli costituzionali e comunitari) The Obligations to Criminalize. Legislative Discretion under the Constitutional and Community Obligations), 2009, p. 15 et seq. For further references see *R. Sicurella*, (Diritto penale e competenze dell'Unione europea), Criminal Law and European Union Competences, 2005, p. 391, fn. 166. In the EC law doctrine, see *U. Draetta*, (Elementi di diritto dell'Unione europea. Parte istituzionale. Ordinamento e struttura dell'Unione europea) European Union Law. The Institutions. The Legal Framework of the European Union, 2009, p. 79.

[10] See, for example, *G. De Francesco,* (Diritto penale. I fondamenti) Criminal Law. Fundamental principles, 2008, p. 97; *G. Fiandaca, E. Musco,* (Diritto penale. Parte generale) Criminal Law. General Part, 2007, p. 63; *F. Mantovani, Diritto penale*, (fn. 6), p. 912; *G. Marinucci/E. Dolcini,* (Manuale di Diritto penale. Parte generale) Criminal Law Handbook. General Part, 2006, p. 34.

[11] BVerfG, cases 2 BvE 2/08 and others from 30 June 2009, available at http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html

[12] For an overview see *C. Sieberson,* The proposed European Union Constitution. Will it eliminate the EU's Democratic Deficit?, Columbia Journal of European Law (CJEL) 2004, vol. 10, p. 173 et seq.

legitimacy (Council and Commission) in conducting the core of EU law-making process is still predominant; and, thirdly, EU Parliament, in turn, only acts as a "negative legislator", or, at best, as a "co-legislator", deprived of the right of legislative initiative.

By contrast, under the internal legal system, the clear separation of powers between the Government and the Parliament – with the latter acting as the *deus ex machina* of criminal legislation, thanks to the *nullum crimen singe lege parlamentaria* principle and to the autonomous right of initiative – would endow criminal provisions with an adequate "democratic quality".

These arguments are disputable from a two-fold perspective: on the one hand, they seem to overestimate the capacity of national law-making process to guarantee the "democratic quality" of the criminal provisions (§ 1); on the other, they possibly underestimate the changes brought about by the Lisbon Treaty in terms of improving the EU democratic legitimacy (§ 2).

1. The presumptive democratic quality of national criminal law

From the first perspective, the democratic quality of national criminal law, enacted as a result of the internal parliamentary procedure, is threatened by a set of crisis factors affecting the principle of *nullum crimen sine lege parlamentaria*, which prevent this principle from implementing its democratic *ratio*. These factors are indeed vast and assorted and this article will focus on those that make the aforesaid critical arguments put forth against the democratic quality of European criminal legislation perfectly suitable for the national criminal legislation.

It is worth underlying that since the following analysis will conduct a comparison between the EU legal framework and the Italian national legal system, the outcome could be to some extent biased on the specific national perspective. A summary comparative analysis, however, shows that the same kind of crisis factors of parliamentary legislative procedure also operate in other member states and, as such, the conclusions of the investigation take on a more general scope.[13]

With this in mind the aforementioned factors shall be divided into two categories: (a)those concerning the (inadequate) implementation of the constitutional rules regarding the attribution of legislative competences in criminal matters; (b) those resulting in a patent violation of the constitutional rules that discipline the law-making process *inside* the Parliament.

[13] See *C. Grandi*, (Riserva di legge e legalità penale europea) *Nullum crimen sine lege parlamentaria* and the European Principle of Legality, 2010, p. 38. With particular reference to the crisis of the Parliament and the increasing influence of the Government on the overall legislation in the EU Member States, see *J. L. Diéz-Ripollés*, (La racionalidad de las leyes) The Rationality of the Laws 2003; *G. Ieraci*, (Governo e opposizione nelle arene parlamentari) Government and Opposition in the Parliamentary Arenas, in *Quaderni di scienza politica* (QSP) 2000, p. 165 et seq.; *A. Valero*, (El descontrol parlamentario como 'lógica' consecuencia del actual proceso de integración comunitaria) The Parliamentary Loss of Control as a Logical Consequence of the Current European Integration Process, *Revista de Derecho de la Unión Europea* 2002, n.3, p. 491 et seq.; *A. von Bogdandy*, (Gubernative Recthssetzung) Governmental Legislation, 2000, p. 266 et seq.

Regarding the first category, it is worth underlying that the full respect of national constitutional rules on the attribution of legislative competence between the different institutions and different sources of the law plays a crucial role in preserving the centrality of Parliament in the definition of criminal policy, thus guaranteeing that criminal provisions are *actually* the product of a democratic parliamentary law-making procedure. As such, a summary analysis on the real impact of the Italian Parliament and Government on criminal legislation shows that, in spite of the *nullum crimen sine lege parlamentaria* stated under art. 25 par. 2 Const., it is *right that in the national legal system* the representative body is relegated to the role of co-legislator, frequently in a subordinate position. On one hand notwithstanding the doctrine asserts the rigid and 'absolute' nature of the "riserva di legge" (*nullum crimen sine lege parlamentaria*) under art. 25 par. 2 Const. (meaning that governmental acts cannot, in principle, identify illicit behaviour), this corollary of the principle of legality has been implemented in the practice, with the *placet* of the Constitutional Court, to have a much less rigorous meaning. As is well known, the interaction between parliamentary laws and governmental regulations[14] is to some extent inevitable, as is the case in the criminal field too. In the Italian practice, however, such interaction has become remarkable, both in quantity and quality[15], to the extent that the literature has outlined a progressive "relativization" of the *riserva di legge* in criminal matters[16].

On the other hand, the intrusion of the Government in criminal legislation also occurs in a straightforward manner by means of governmental decrees having the same force of law, namely "decreti legislativi"[17] and "decreti legge[18]. Although the consistency of the use of these governmental decrees in criminal matters with the principle of *nullum crimen* stated under art. 25 para. 2 Const. is highly disputed in the literature[19], this is in now in regular use in the practice, again with the *placet* of the Constitutional Court. Nonetheless, the key-role the Parliament should play at least in the definition of the fundamental criminal policy guidelines would require that the use of such decrees was moderate and respectful of the rules and limits

[14] By means of the incorporation in the criminal provision of elements defined by the latter.

[15] See *V. Manes,* (L'eterointegrazione della fattispecie penale mediante fonti subordinate) The Integration of the Criminal Provision by Secondary Sources, Rivista italiana di diritto e procedura penale (RIDPP), 2010 p. 87 et seq, where the author underlines that the contribution of secondary sources to the definition of the illicit conduct is not at all limited to the specification of technical details, but it notably interferes with legislative discretion. See also *D. Notaro,* (Autorità indipendenti e norma penale) Independent Authorities and Criminal Provision, 2010, p. 83 et seq.

[16] Cfr. *F. Palazzo*, (Riserva di legge e diritto penale moderno*) Nullum crimen sine lege parlamentaria* and Contemporary Criminal Law, *Studium Iuris* 1996, p. 277 et seq.; *Palazzo*, (fn. 3), p. 233 et seq.

[17] See art. 76 Const.: "The exercise of the legislative function may not be delegated to the Government unless principles and criteria have been established and then only for a limited time and for specified purposes".

[18] See art. 77 Const.: "The Government may not, without an enabling act from the Houses, issue a decree having force of law. When the Government, in extraordinary case of necessity and urgency, adopts under its own responsibility a temporary measure, it shall introduce such measure to Parliament for transposition into law. (…) Such a measure shall lose effect from the beginning if it is not transposed into law by Parliament within sixty days of its publication (…). The official English translation of Italian Constitution is available at the Senate website, http://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf.

[19] For the negative thesis, see, among others, *Bricola*, (fn. 2), p. 39 et seq.; *Fiandaca/Musco*, (fn. 9), p. 54 et seq.; *Marinucci/Dolcini*, (fn. 9), p. 33 et seq. For the affirmative thesis, see, among others, *Mantovani*, (fn. 6), p. 52 et seq.; *M. Romano*, (Commentario sistematico del codice penale) Commentary to the Criminal Code, 2004, vol. I, p. 35.

stated under the Constitution. On the contrary, and especially in recent years in parallel with a trend characterised by the statistical majority of governmental decrees (with legal force over parliamentary laws[20], a significant number of criminal law reforms have been enacted in Italy by means of such decrees, and without due observance of the limits provided under arts. 76-77 Const.[21].

In short, as a consequence of the increasing percentage (nowadays the majority) of criminal provisions the definition and the enacting of which depends on discretionary choices of the Government, the predominant role of the Parliament in conducting criminal legislation is very questionable.

As to the second category, it must be stressed that the observance of the rules that discipline the law-making process *inside* the representative assemblies is essential for ensuring that the criminal provisions enacted by the Parliament effectively encompass those qualities that the legislative procedure is supposed to confer. With respect to this the scrutiny of Italian legislative practice shows the frequent violation of the constitutional rules (arts. 70 et seq. Const.) designed to guarantee the functioning of the democratic controls particular to such procedure: first of all, the control of the opposition on the (conjunct) legislative activity of the majority and the Government; and secondly the control of the majority itself on the bills ("disegni di legge") and decrees[22] put forward by the Government.

It is not possible here to examine, in-depth, all conceivable procedural practice capable of putting at risk the aforesaid fundamental democratic controls that the constitutional discipline of the legislative process is meant to ensure. The literature on constitutional law, however has focused the attention on the following:

- the frequent use of the "maxiemendamento", a mechanism by which the Government is able to avoid the public debate in the assemblies and the confrontation with alternative bills or amendments submitted by the opposition. In detail although the "maxiemendamento" is formally an amendment to only one article of the bill under scrutiny, it substantially replaces the whole text discussed so far in the public assembly with a new text; what is more, the *maxiemendamento* is put forward in a moment when further amendments and discussion are no longer possible according to the agenda. The Parliament (*i.e.* the majority) is therefore called to express a mere assent to a text the contents of which have been entirely drafted by

[20] See *D. Tega*, (Gli atti normativi primari del Governo nelle recenti tendenze) The Governmental Sources with Law-force: Recent Tendencies, in: A. Barbera/T. Giupponi (eds), (La prassi degli organi costituzionali) The Practice of Constitutional Bodies, 2008, p. 133 et seq.

[21] As for the "decreti legislative", increasingly used to reform entire sectors of national criminal law, the principles and criteria that the Parliament shall adopt under art. 76 Const., in order to limit the discretion of the Government, are usually rather vague and not very determined, in other words, not able to properly restrict such discretion; see, among others, *C. Cupelli*, (La legalità delegata. Spunti su riserva di legge e delega legislativa nelle tendenze attuali del diritto penale) The Delegation of Legality. Remarks on the *Nullum Crimen Sine Lege Parlamentaria* Principle and on the Law of Delegation in Recent Criminal Law Developments, *Critica del diritto* 2004, 104 et seq. As for the *decreti legge*, according to some studies, at best 20% of the decrees enacted in last decades are actually adopted following "extraordinary case of necessity and urgency" as prescribed under art. 77 Const.: see *Tega*, (fn. 19), p. 135 et seq.

[22] As a matter of fact, under arts. 76-77 Const. the Parliament can operatecontrol over the contents of both the "decreti legislative" (preventive control, by means of the law of delegation, art. 76) and the "decreti legge" (subsequent control, by means of the law of transposition, art. 77).

the Government.[23] The constitutional law literature asserts that the voting of a "maxiemendamento" disrupts nearly all the constitutional rules that distinguish parliamentary law-making procedure from the mechanism designed for the adoption of governmental acts through the consequent violation of the *transparency*, of the *publicity* and of the *involvement of minorities*, namely those "features of the parliamentary procedure that are essential in order to preserve the ultimate *ratio* of the *nullum crimen sine lege parlamentaria* principle"[24];

- the abuse of the "questione di fiducia" (vote of confidence), a mechanism by which the Government compels the Parliament to express an assenting and immediate vote on a specific governmental bill, excluding any proposal of amendments.[25] In other words, the Government imposes an *aut aut* on Parliament, making the leadership of the current cabinet subject to the passing of the bill. Should the assembly reject the bill, the Government will interpret the negative vote as the end of support (i.e. the "fiducia") by Parliament, and thus will consequently resign, opening up the possibility of new elections. The violation of the rules disciplining the legislative procedure becomes furthermore manifest when the "questione di fiducia" is placed on the passing of a 'maxiemendamento' in such (frequent) cases, the combined effect of these very questionable practices forces the Parliament to express an obligatory immediate and affirmative vote on a governmental bill, with no room for any discussion or amendments (including those proposed by the majority). The control of the Parliament on the legislative proposals of the Government is simply sterilized and the parliamentary nature of this procedure is more apparent than real.[26]

- the repeated misinterpretation of the internal regulations of the Chambers to the service of the majority and the Government. In other words, as the constitutional law literature has pointed out, the violations of the constitutional rules on the law-making process are not limited to the manifest abuses of "maxiemendamento" and "questione di fiducia"; on the contrary, such violations silently pervade the day-to-day activity of the Parliament. For instance, since the last five legislatures, the political majority holds the presidency of both the "Camera" (Chamber of Deputies) and the "Senato" (Senate)[27], therefore enjoying in both the assemblies the presidential powers on the application and interpretation of the internal regulation of the chambers. As a consequence, the majority can easily control not only the outcome of the parliamentary debate (and this should not be of any concern in

[23] *E. Griglio,* (I maxi-emendamenti del governo in parlamento) The *Maxi-emendamenti* of the Government in the Parliament, *Quaderni Costituzionali* (QC) 2005, p. 807 et seq.; *N. Lupo,* (Emendamenti, maxi-emendamenti e questione di fiducia nelle legislature del maggioritario) Amendments Maxi-amendments and Issue of Confidence in Recent Legislatures, in: E. Gianfrancesco/N. Lupo (eds), (Le regole del diritto parlamentare nella dialettica tra maggioranza e opposizione) The Rules of Parliament in the Dialectic between Majority and Opposition, 2007, p. 41 et seq.

[24] *Lupo,* (fn. 22), p. 74 (translation of the Italian text).

[25] See *M. Olivetti*, (La questione di fiducia nel sistema parlamentare italiano) The vote of confidence in the Italian parliamentary system, 1996, p. 1 et seq.

[26] *Lupo,* (fn. 22), p. 104.

[27] See, C. *Bergonzini,* (Presidenti delle Camere: quando l'imparzialità diventa potere) The Presidents of the Chambers: when Impartiality Turns into Power, Quaderni Costituzionali (QC), 2006, p. 545 et seq.

democracy) but it can also administer the list of contents of the debate, the related schedule and agenda, and any controversy over the interpretation of the internal regulations of both the chambers (and this may cause some concern).[28] This also offers a possible explanation of how some legislative bills, particularly significant for the Government, often enjoy preferential lanes.

The list of crisis factors that prevent the principle of *nullum crimen sine lege parlamentaria* from properly performing its democratic *ratio* could carry on.

Nonetheless, the set of factors briefly examined above appears sufficient to express doubts over the real democratic participation of the political minority to the parliamentary debate and over the efficacy of control of the Parliament on the legislative initiatives of the Government. So much so that the constitutional law literature talks about the "Government as the primary producer of legislative acts"[29], and about a "substantial shift of the legislative power to the Government".[30]So much so that, in the criminal law literature, authors like Francesco Palazzo and Giovanni Fiandaca explicitly proclaim the "democratic deficit" of national criminal law.[31]

2. The democratic quality of EU legislation in criminal matters

From the second perspective, in order to evaluate the democratic quality of EU law-making process as reformed under the Lisbon Treaty, it is convenient to examine the aforementioned theoretical grounds of the traditional issue of the democratic *deficit*, and namely: (a) the insufficient participation of national Parliaments (NPs) in the "ascending phase" of EU law-making process;(b)the predominance of the Council and the Commission in the core of the EU law-making process and the unsatisfactory role of the European Parliament therein; and (c)the lack of the right of legislative initiative in relation to the European Parliament itself.

The critique to the insufficient participation of NPs in the production of EU acts had indeed solid ground with reference to the pre-Lisbon legal framework[32]. However, one of the most significant changes enacted with the Treaty of Lisbon is namely the increase of the role of NPs, as a way of compensating the transfer of competences from Member States to EU institutions.

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[28] *R. A. Dahl* considers the control on the agenda one of the fundamental mechanisms of democratic process (*On democracy*, (Sulla democrazia) On Democracy (original title), 2000, p. 41.

[29] *M. Calise,* (La terza Repubblica. Partiti contro presidenti) The Third Republic. Political Parties versus Presidents, 2006, p. 53.

[30] *A. Ruggeri*, (Stato e tendenze della legislazione) State of the Art and Developments of Legislation, *Rassegna parlamentare* (RParl) 1999, p. 179.

[31] *Palazzo*, (fn. 3), p. 235; *Fiandaca,* (fn. 3) QF 2007, p. 1268.

[32] Notwithstanding, since for many years EU institutions, Member States and the literature had been expressing their approval of the strengthening of the role of national assemblies for improving the EU democratic legitimacy, the only concrete step was the adoption of the Protocol on the role of national parliaments in the European Union, annexed to the Treaty of Amsterdam (*OJ* 1997 C 340/113): this protocol introduced nothing more than some duties of communication to NPs of the Commission consultation documents and proposals of legislation; what is more, the Preamble explicitly stated that "scrutiny by individual national parliaments of their own Government in relation to the activities of the Union is a matter for the particular constitutional organization and practice of each Member State".

As is well known, the general provisions regarding the democratic principles and the role of NPs stated in Title II TEU (in particular art. 12) are implemented by the detailed discipline of protocol I (on the role of National Parliaments in the European Union) and protocol II (on the application of the principles of subsidiarity and proportionality).

The first protocol, besides promoting cooperation between NPs, and between NPs and the European Parliament (arts. 9-10), strengthens the duties of information to NPs already in force under the homonymous protocol of 1997[33]. In more precise terms all drafts of legislative acts shall be submitted to the NPs (art. 2) and shall not be placed on the agenda for their discussion and adoption before an eight-week period from the day the submission has elapsed (art. 4). As is evident, this period shall allow NPs to examine draft EU legislation, in order to influence the position of the representatives of national Governments in the EU Council, and to send EU institutions reasoned opinion on whether the draft legislative act complies with the principle of subsidiarity, according to the discipline of the protocol on the application of the principles of subsidiarity and proportionality (art. 3).

Namely the second protocol confers NPs sharp control powers on the consistency of EU legislation with the two fundamental principles governing the distribution and exercise of competences between EU and Member States[34]. In particular, each NP (or any chamber of NP) can, within the aforementioned term of eight weeks, express reasoned opinion on the compliance of the proposal in question with the principle of subsidiarity (art. 6). Where at least one third of NPs express negative opinion the draft must be reviewed; under such a hypothesis, the institution that proposed the draft can maintain, amend or withdraw the draft by delivering the reason of the decision. It is worth emphasizing that, although the draft could also be maintained in opposition to the negative opinions of NPs, such opinions are likely to foretell negative guidelines by NPs to the member of national Governments designed to vote in the EU Council. Furthermore, when the draft is to be adopted under the ordinary legislative procedure[35] and the simple majority of NPs express negative reasoned opinions, the draft shall be maintained only as a result of a special procedure that requires the specific scrutiny of the "Union legislator" on compliance with the principle of subsidiarity "if, by a majority of 55% of the members of the Council or a majority of the votes cast in the European Parliament, the legislator is of the opinion that the proposal is not compatible with the principle of subsidiarity, the legislative proposal shall not be given further consideration" (art. 7.3 para. 2, lit. *b*).

NPs are also entitled to carry out an *ex post* control on the consistency of EU acts in keeping with the principle of subsidiarity. Under art. 8 of the second protocol, actions on grounds of infringement of the principle of subsidiarity by an EU

[33] See, *supra*, fn. 31.

[34] See art. 5 TEU.

[35] See art. 294 TFEU; such procedure applies to nearly all legislative acts of Title V (Area of Freedom Security and Justice), Chapter 4 (Judicial Cooperation in Criminal Matters).

legislative act shall be brought before the ECJ, in accordance with art. 263 TFEU, "by Member States, or notified by them in accordance with their legal order on behalf of their national Parliament or a chamber thereof".[36]

In addition to this general legal framework, the participation of NPs is furthermore reinforced with special reference to the legislation on the area of freedom security and justice. The broad provision of art. 12 TEU lit. c), concerning the role of NPs in the implementation of EU policy in such areas of law[37], is implemented by arts. 85.1 and 88.2 TFEU, which prescribe that the involvement of NPs (together with the European Parliament) in the evaluation of the activity of Eurojust and in the scrutiny of the activity of Europol shall be disciplined by means of regulations. Moreover, art. 7.2 of the second protocol, with specific concern to the legislative acts on judicial cooperation in criminal matters and police cooperation, reduce to one quarter (instead of one third) the threshold of the NPs negative reasoned opinion that make necessary the review of draft legislative act deemed to be inconsistent with the principle of subsidiarity.

This set of provisions seems to finally realize the longstanding (but never put into practice) purpose of increasing the participation of NPs in the EU law-making process, especially by strengthening the interaction with EU institution in the ascending phase. According to some commentators, the powers of control on the respect by EU legislative acts of the prerogatives and competences of national legislators make the NPs after Lisbon the "guarantor of a new pact between the EU and Member States on the distribution of legislative competences"[38].

To this end the different mechanisms of intervention of NPs never actually amount to a real *veto* power[39], given that, at the end of the day, the upholding of a legislative proposal always depends on the decision of EU institutions. The delivering of negative reasoned opinions on the compliance of the principle of subsidiarity does, however, not just outline a "preventive alert" of a possible negative vote of the national member in the Council, or a possible action before the ECJ under art. 8 of the second protocol alone such a mechanism also tangibly affects the legislative procedure, which can be slowed down, suspended and, in general complicated with supplementary controls and reviews. So much so that some authors have expressed worries that a disproportionate intrusion of NPs in the EU law-making process could jeopardize the timeliness of the procedure, and that the accomplishment of EU general interests could be hindered by the contrasting particular national interests that NPs inevitably tend to protect.[40]

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[36] Actually the provision at stake does not directly allow NPs to brought the action before the ECJ, since it leaves national legislation the duty to rule on the matter.

[37] "National Parliaments contribute actively to the good functioning of the Union: (…) *c)* by taking part, within the framework of the area of freedom, security and justice, in the evaluation mechanisms for the implementation of the Union policies in that area (…) and through being involved in the political monitoring of Europol and the evaluation of Eurojust's activities in accordance with Articles 88 and 85 of that Treaty".

[38] *C. Morviducci,* (Il ruolo dei Parlamenti nazionali) The Role of National Parliaments, Diritto pubblico comparato ed europeo (DPCE), 2008, p. 87 (translation of the Italian text).

[39] See, on the contrary, *Morviducci,* (fn. 37) DPCE 2008, p. 87.

The critique concerning the predominance in the EU law-making process of the bodies deprived of democratic legitimacy (Commission and Council) also had solid ground with reference to the pre-Lisbon legal framework. As is well known the core of EU legislation in criminal matters was enacted under the third-pillar, where the powers of the European Parliament were limited to the adoption of a non-binding opinion (art. 39 TEU). Moreover, under the first pillar[41] the powers of the European Parliament were extremely variable alongside the numerous applicable legislative procedures[42]. In synthesis, such powers were ranging from the procedure of consultation (under which the Parliament could deliver a mere consulting opinion), to the assent procedure (under which the Parliament enjoyed a power of *veto*, but not of amendment), to the cooperation procedure (art. 252 TEC, under which the Parliament could amend Council proposals or reject them, and in such cases the Council could add further amendments or uphold the proposal only by acting with unanimity to the co-decision procedure (art. 251 TEC, under which the act could not be adopted without a common position of the Parliament and the Council).

However, as is well known the creation of a single institutional framework after Lisbon has brought about a simplification of the system of EU law sources: the suppression of the third-pillar has actually answered the critics concerning the inadequate democratic legitimacy of the third-pillar acts (framework decisions above all). As a consequence, the "ordinary legislative procedure" has become the general law-making mechanism for EU legislative acts; on the one hand it largely reflects the features of the past co-decision procedure, which provides for the highest level of involvement of the European Parliament; on the other hand, its scope of application is now much broader, covering the field of judicial cooperation in criminal matter (arts. 82 TFEU et seq.).

It is also well known that under art. 83 TFEU the EU competences in substantial criminal law shall be exercised by means of directives, establishing minimum rules concerning the definition of criminal offences and sanctions, both for the harmonisation of national legislations in the areas of particularly serious crime with a cross-border dimension (namely those enlisted under art. 83 para. 1 TFEU); and for the

[40] See *A. Ruggieri*, (Fonti europee e fonti nazionali al giro di boa di Lisbona: ritorno al passato o avventura nel futuro?) European Sources and National Sources Facing Lisbon: Return to the Past or Jump into the Future?), *Diritto pubblico comparato ed europeo* (DPCE) 2008, p. 140 ss.

[41] The various incidences of EC directives and regulations on national criminal law had been broadly investigated in the literature long before the milestone European Court of Justice (ECJ) decisions of 13. 9. 2005, case C-176/03 (*Commission v Council*), [2005] ECR I-7879, and of 23. 10. 2007, case C-440/05 (*Commission v Council*), [2007] ECR I-9097. See *Bernardi*, (fn. 7) RIDPC 1999, p. 333 et seq.; *S. Manacorda*, (L'efficacia espansiva del diritto comunitario sul diritto penale) The Extensive Effect of Community Law on Criminal Law, Foro italiano (FI) 1995, IV, p. 55 et seq.; *J.* Biancarelli/*D.* Maidani, (*L'incidence du droit communautaire sur le droit penal des Etats members*) The Incidence of Community Law on Criminal Law of the Member States, Revue de science criminelle et de droit compare (RSCDC) 1984, p. 225 et seq.; *C. Van Den Wijngaert*, (Droit pénal et Communautés européennes) Criminal Law and European Communities, *Revue de droit pénal et de criminology* (RDPC) 1982, p. 837 et seq.

[42] See *A. Cossiri*, (L'esercizio della funzione di produzione normativa nella democrazia sovranazionale: 'Europa diStati' o parlamento protagonista?) The Exercise of Legislative Functions in Supranational Democracy: a European Union of States or a Leading Role for the European Parliament?, in http://www.forumcostituzionale.it/site/images/stories/pdf/documenti_forum/paper/0032_cossiri.pdf.

approximation of national criminal legislation that proves to be essential to ensure the effective implementation of a Union policy in an area which has been already subject to harmonisation measures (art. 83 para. 2 TFEU).

In the first case the directives are always adopted under the ordinary legislative procedure; in the second case art. 83 para. 2 prescribes the adoption of "the same ordinary or special legislative procedure as was followed for the adoption of the harmonisation measures in question". The provision in question therefore leaves open the possibility of the adoption of a directive of criminal law harmonisation under special procedures, different and less democratic than the ordinary procedure. Nevertheless, it is worth stressing that such a possibility is quite unlikely to happen: first, the ordinary legislative procedure is far the most frequent for the adoption of legislative acts, so that the rule of "replication" of the same procedure (art. 83 para. 2, last clause) will make such procedure necessary in most cases for the adoption of criminal law directives too; secondly, in nearly all special legislative procedure, the Council acts by unanimity, so that the negative vote of just one member state would hinder the passing of the proposed directive. What is more, the special legislative procedure also provides for the involvement of the European Parliament, not always by means of a mere consultation (e.g. art. 81 TFEU), but sometimes by means of a binding consent as well e. g. art. 19 TFEU).

However, the adoption of a criminal law harmonisation directive under a procedure characterised by a clear prevalence of the Council over the Parliament is still an existing possibility. With the aim of ensuring an adequate democratic legitimacy to any EU legislative act in criminal matter, it would have been preferable to impose the ordinary legislative procedure for the adoption of all criminal law harmonisation directives, regardless of the procedure followed for the passing of the previous harmonisation measures.

All this considered, given that in the vast majority of the cases the adoption of criminal law directives will follow the ordinary legislative procedure, it is worth focusing on the role of the Parliament therein.

Under art. 294 TFEU, the Parliament and the Council are given basically equivalent powers: unless the two bodies agree upon a common position at first reading, or upon an amended draft at second reading or upon the joint text approved by the Conciliation Committee at third reading, "the proposed act shall be deemed not to have been adopted". More in details, the Parliament does not enjoy the mere faculty to approve or reject the proposal submitted by the Commission as amended by the Councilas a matter of fact, the provision in question provides the Parliament with the power to adopt at first reading a position on (*i.e.* to suggest changes to the wording of) the Commission proposal and to amend, at second reading, the text adopted by the Council at first reading.

Should there be any doubt on the effectiveness of the Parliament's influence on the proposal of the Commission, it will be important to underline that, according to the statistics, the amendments of the Parliament are mostly approved by the Council.[43] To this end, an in-depth analysis on the legislative procedure for the adoption

of the cCriminal Law Harmonisation Directive 2009/52/CE[44] has outlined the remarkable role played by the European representative body, the amendments of which have significantly affected several features of the harmonisation measures: for instance, the description of the illicit conduct and of the circumstances, the discretion to be left to the legislators of the Member States in the implementation of the directive and also the definition of the sanctions system in order to make it more consistent with the principle of proportionality.[45]

After all, one of the most disputed features of the European institutional architecture from the perspective of the democratic *deficit*, i. e. the lack of a relation of confidence ("rapporto fiduciario") between the executive body and the parliamentary majority, leaves the European Parliament much broader room for action in comparison with NPs, which often have their hands tied by the very nature of this relationship.

In this respect, it is worth emphasizing that, first, in the EU law-making process they do not operate those unsettling and barely legitimate mechanisms that, on the contrary, affect the autonomy and regularity of the parliamentary procedure in Italy, namely the (ab)use of the "maxiemendamento" and the "questione di fiducia" by the Government[46]: therefore, the European Parliament is, from this point of view, *more independent* from the executive body than some NPs.

Secondly, the highly criticized absence of real political coalitions of majority and opposition within the European Parliament[47], equivalent to those existing in national assemblies, is actually not a weak but a strong point of the EU representative body. As a matter of fact, the lack of a harsh ideologically biased confrontation helps the internal cohesion in the Parliament, in a way that it is not difficult to achieve the absolute majority necessary to reject or to amend the texts approved by the Council after the first reading of the ordinary procedure. Therefore the capacity of the representative body to counterbalance the executive power is *more incisive* at EU level than in some national legal systems, where the political confrontation between the majority and the opposition and the relation of confidence between the former and the Government make it easy for the cabinet to get the bills approved by the assembly. Thirdly, the idea that the democratic ratio of the *nullum crimen sine lege parlamentaria* could be satisfied only where the typically national scheme of the relation of confidence between parliamentary majority and Government operates, can be questioned from a double perspective. On the one hand, this

[43] See *M. Muñoz de Morales Romero,* (El Legislador Penal Europeo: Legitimidad y Racionalidad) European Criminal Law Legislator: Legitimacy and Rationality, 2010, p. 522, with further references.

[44] Directive 2009/52/EC of the European Parliament and of the Council, of 18 June 2009 "providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals", in *OJ* 2009 L 168/24.

[45] See *Muñoz de Morales Romero,* (fn. 42), p. 525 et seq.

[46] See, *supra*, point 1.

[47] See *J. Chofre Sirvent,* (El parlamento europeo y el déficit de partidos políticos) The European Parliament and the Lack of Political Parties, Revista de derecho constitucional europeo (RDCE), 2009, n. 11, p. 363 et seq.; *F. Raspadori,* (Il deficit di rappresentatività del Parlamento europeo: limiti e soluzioni) The Democratic Deficit of the European Parliament: Limits and Solutions, Studi sull'integrazione europea (SIEur)2009, p. 125 et seq.

idea underlies the methodological fault according to which European integration shall be tailored on the model of (a given) national institutional architecture, regardless of the peculiarities of the EU structure. On the other hand, this idea does not take into account that the relations between governments and parliaments are extremely variable throughout Europe, so that it is hardly possible, unless arbitrarily, to develop the European model of inter-institutional balance from national legal systems.

As for the critic based on the lack of the right of initiative placed upon the EU Parliament[48], the Treaty of Lisbon has not changed much to this respect; such power is still almost exclusively enjoyed by the Commission, regardless of the type of EU legal act and law-making procedure.[49] A comprehensive analysis of the allocation of the right of legislative initiative at EU level falls beyond the scope of the present study, which will therefore focus just on the right of legislative initiative within the area of freedom, security and justice. To this end, the absence of such a right in reference to the European Parliament does not appear to frustrate the democratic *ratio* underlying the principle of legality, which, on the contrary, should be deemed to be violated if the representative body was excluded from the mechanism of amendment and approval of criminal law harmonisation measures. In particular, when the allocation of the right of legislative initiative is at stake, two possible options are open:

- alongside a maximum standard of democracy, the legislative initiative in the field of criminal law is the sole reserve of the Parliament, with the exclusion of any room for governmental initiative; incidentally, such a solution is the contrary of what happens in many Member States, where the legislative initiative is carried out by the Government most of the time, as is the case in criminal law too;

- or, once the legislative initiative by the executive power is allowed in criminal law too, the lack of a parallel right of initiative upon the Parliament shall not be grounds for concern. As a matter of fact, such initiative leads to the introduction of a new criminal law act, and therefore to the expansion of criminal law and to the restriction of individual freedoms. If the right of initiative was therefore attributed (not only to the executive body but also) to the Parliament, there would not be any favourable outcome in terms of democracy or individual freedom; if this was the case, the executive power would still enjoy its own right of initiative and adopt its own proposals, and *in addition* to such proposals, there would be a (probably lower)

[48] See, *I. Fromm,* Supranational Criminal Law Competence and the Democratic Deficit of the European Union, Journal of European Criminal Law 2008, n. 2, p. 43 et seq.; *C. Magi,* (Attribuzione alla 'nuova' unione di poteri normativi in materia penale nonostante un persistente deficit democratico: possibile contrasto con il principio costituzionale di riserva di legge?) Attribution to the 'New' Union of Legislative Competence in Criminal Law notwithstanding a Persisting Democratic Deficit: a Possible Clash with the Constitutional Principle of *Nullum Crimen Sine Lege Parlamentaria*?, Diritto pubblico comparato ed europeo (DPCE) 2008, n. 3, p. 1554 et seq.; *C. Paonessa,* (La discrezionalità del legislatore nazionale nella cornice dei vincoli comunitari di tutela) The Obligations to Criminalize. Legislative Discretion under the Constitutional and Community Obligations, Criminalia (Cr), 2007, p. 396 et seq.

[49] See art. 17 para. 2 TEU: "Union legislative acts may only be adopted on the basis of a Commission proposal, except where the Treaties provide otherwise. Other acts shall be adopted on the basis of a Commission proposal where the Treaties so provide".

number of proposals by the Parliament.[50] What really counts for democracy is not an equal right of initiative upon the Parliament and the Commission[51], but the attribution to the former of effective powers in the procedure of drafting, amendment, and adoption of criminal law acts. These are actually the prerogatives that art. 294 TFEU grants, under the ordinary legislative, to the European Parliament, which enjoys the power of amending the legislative proposals and an insuperable power of *veto*.

In the light of the analysis of the actual democratic legitimacy of the criminal law-making process at national and EU level, the first set of concerns under scrutiny in the present work is arguably questionable; in other words, the idea that the transfer of competences in criminal matters from national legislator to EU legislator would jeopardize the democratic legitimacy of criminal policy (and, in particular, the democratic quality of national criminal law enacted in order to implement EU harmonisation measures) does not appear to have any solid grounds.

In conclusion, it is worth mentioning that, as a consequence of the crisis of the principle of *nullum crimen* at national level, authoritative opinions in the criminal law and constitutional law literature acknowledge, without restraint, the irreversible decline of the traditional centrality of the Parliament within legislative procedures. Such opinions, therefore, are not biased against the construction of new forms of legality at supranational level, capable of overtaking the original enlightenment model based on as much a rigid as mythological separation of powers between the institutional bodies.

From this perspective, some authors call for the relinquishment of 'myths' like "the absolute sovereignty of the assemblies", or "the law as the exclusive outcome of the parliamentary will", and the maintaining of parliamentary debate should be better perceived as a public arena wherein the *governmental* legislative options are transparently scrutinized under harsh confrontation between the majority, the opposition and the cabinet itself.[52]

Another doctrine, with reference to the construction of a new model of European legality, explicitly asserts that the traditional scheme of the separation of powers between the executive and the representative bodies is out-of-date from a legal-theoretical perspective, and it is not indispensable from a constitutional law perspective. The same doctrine emphasizes the advantages of the EU legislative

[50] From a different perspective, it would have been better to provide the European Parliament with an autonomous right of initiative for the amendment of legislation in force, in view of the modification (and/or elimination) of the existing obligation to criminalize.

[51] The possible attribution of a parallel autonomous right of legislative initiative in criminal matters to the Parliament underlies not a concern of democratic legitimacy but a security concern, as such a right would be exerted in order to provide the needs of protection from criminality stemming from European citizens with an answer. Under such a perspective, it is worth underlying the general provision of art. 225 TFEU, which confers on the Parliament the power of urging the Commission to put forward a legislative proposal.

[52] *N. Lupo,* (Costituzione e bilancio) Constitution and State Budget, 2007, p. 164 (translation of the original text). In parallel, other authors admit that the enlightenment model of the *nullum crimen* principle is no longer able to withstand comparison with the irreversible evolutions of inter-institutional relations: see *Palazzo,* (fn. 6) QF 2007, p. 1281. On the opportunity to overtake the traditional concept of *nullum crimen sine lege parlamentaria* principle, see also *Muñoz de Morales Romero,* (fn. 42), p. 433.

procedure, based on a dualism between the Council, formed of the representatives of Member States, and the Parliament as the representative of "European people".[53]

IV. The subsidiarity of EU criminal law: terminological remarks and delimitation of the analysis

With regard to the second set of the aforementioned concerns, related to the possible frustration of the principle of subsidiarity in parallel with the transfer of competence from national legislator to EU legislator, the analysis shall now focus on the alleged negligence of the latter in respecting the standard of rationality and *extrema ratio* in the use of criminal law.

Before embarking upon this, a comment in relation to terminology is necessary, since the term "subsidiarity" has different meanings in EU law and in criminal law. As is well known, under EU law, the principle of subsidiarity regulates the exercise of competences between the Union and the Member States, especially in the areas of shared competence (among which art. 4.2 lit. j TFEU enlists the "area of freedom, security and justice"), by legitimising EU intervention "in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States".

Under criminal law, it is a well established fact that the principle of subsidiarity, which underlies the idea of *extrema ratio*, prescribes a constitutional restriction to the adoption of criminal law. This restriction does not, however, operate a distribution of competences between different bodies, but it radically excludes the legitimacy of resorting to criminal sanctions by any competent authority, unless the standard of *extrema ratio* is respected[54].

All this considered, in order that an EU legal act in criminal matters meets with the principle of subsidiarity *tout court*, the requirement is double-ended; on the one hand, the adoption at EU level of criminal law harmonisation measures shall be *necessary*, in the sense that they shall be able to achieve an objective that cannot be adequately achieved by means of separate autonomous actions by the Member States (*i.e.* subsidiarity of EU action); on the other hand, the criminal law harmonisation measures shall observe the standard of *extrema ratio*, in the sense that any other available measure (civil and/or administrative sanctions) shall be inadequate to attain the objective at stake (*i.e.* criminal law subsidiarity *stricto sensu*). The second meaning of the principle of subsidiarity is enshrined at EU level in the principle of proportionality, as will be underlined later[55].

In this paper, the first meaning of the principle of subsidiarity will not be considered, not so much because the consistence of EU action with this aspect of

[53] *Von Bogdandy,* (fn. 12), p. 40.

[54] *M. Donini,* (Sussidiarietà penale e sussidiarietà comunitaria) The Principle of Subsidiarity in Criminal Law and in Community Law, Rivista italiana di diritto e procedura penale (RIDPP) 2003, p. 150.

[55] Cfr., *infra*, point 2. For an extensive analysis of the European principle of proportionality and its effects on criminal law see *Muñoz de Morales Romero*, (fn. 42), p. 331 et seq.

the subsidiarity has not been criticized in the literature[56], as because such aspect is not related to the law-making procedure, since it presupposes an assessment on the existence of EU competence *before* the initiation of the legislative process (or at the latest, during the ascending phase, under the aforementioned second protocol); on the contrary, the second aspect of the subsidiarity, more strictly related to criminal law, can be more easily affected by the law-making procedure itself. As a matter of fact, once the EU competence for the adoption of harmonisation measures is established alongside the (first meaning of) subsidiarity, the EU law-making procedure is required to confer on the options of criminalisation the qualities of thoughtfulness and rationality necessary to respect the standard of *extrema ratio* (and therefore of subsidiarity) of criminal law. This in no way differs from what shall occur in the Member States, according to literature which, on the basis of the differences between the legislative mechanism at national and European level, expresses concerns on the standard of subsidiarity/*extrema ratio* of EU legal acts in criminal matters. Focusing now on the contents of these concerns, three different theses held in Italian literature shall be analyzed.

First, the ultimate *ratio* of the principle of *nullum crimen sine lege parlamentaria* (*i.e.* the rational reduction/limitation of criminal law in the boundaries of the *extrema ratio*) can be satisfied only under a complex parliamentary legislative procedure such as the one detailed under art. 70 et seq of the Constitution. On the contrary, the obligation to criminalize adopted at EU level would be enacted within an institutional framework and after a law-making procedure not capable of limiting the resort to criminal law[57].

Secondly, some in-depth comments regarding the (ECJ) decision of 13th September, 2005[58], have outlined that the reasoning of the Court would legitimatise EU criminal law harmonisation measures on the mere necessity of ensuring the effectiveness of EU provisions and on the assumption that the other available measures would not be sufficient to guarantee compliance to EU rules. On the contrary, the legitimacy of such measures would not require an assessment on their necessity for the protection of fundamental interests[59].

According to other commentators, the same idea underlying the reasoning of this milestone judgment has been afterwards explicitly declared in the Lisbon Treaty, namely where art. 83 para. 2 TFUE makes the adoption of EU directives subordinate to the harmonisation of criminal law in an area which has been subject to previous harmonisation measures to the effect that "the approximation of criminal

[56] For some critics see *E. Herlin-Karnell*, Subsidiarity in the Area of EU Justice and Home Affairs Law – A Lost Cause?, European Law Journal (ELJ) 2009, n. 3, p. 351 et seq.; *M. Muñoz de Morales Romero*, (fn. 42), p. 363 et seq.

[57] See *G. Abbadessa*, (fn. 2) RTDPE 2009, p. 461, 489 et seq., 502, with further references.

[58] *ECJ, Commission/Council* (fn. 40).

[59] See *G. Mannozzi/F. Consulich,* (La sentenza della Corte di giustizia C-176/03: riflessi penalistici in tema di principio di legalità e politica dei beni giuridici) The European Court of Justice judgement C-176/03: the Effects on Criminal Law with regard to the Principle of Legality and the Policy of Protection of Fundamental Interests, Rivistra trimestrale di diritto penale dell'economia (RTDPE) 2006, p. 926 et seq.; *C. Sotis,* (Il Trattato di Lisbona e le competenze penali dell'Unione Europea) The Lisbon Treaty and the European Union Comptences in Criminal Matters, Cassazione penale (CP) 2010, p. 336.

laws and regulations of the Member States proves essential to ensure *the effective implementation of a Union policy*". As such, it has been underlined that the requirement of "essentiality" of criminal law approximation is not linked to the protection of a "bene giuridico" ("Rechtsgut") but to the effectiveness of an EU policy, and therefore to the protection of a *system of rules.* Consequently, the role of the *"bene giuridico",* worthyofprotectioninthe selection of the behaviour to be punished by means of criminal sanction (a role that is coessential to the implementation of the principle of subsidiarity), would be lost at European level.[60] *A survey on the actions undertaken by EU legislator in criminal matters would indeed provide evidence of such a theory.*[61] *Having considered all this,* the transfer of competences from national legislator to European legislator would entail a further crisis of the role of "bene giuridico", the deterioration of the subsidiary nature of criminal provisions and a tendency that would see the expansion of criminal law.

From a third perspective, the mechanism of EU obligations to criminalize, once they are implemented by means of national criminal laws, would bring about the collateral effect of depriving national legislators once and for all of the discretion to decriminalize, which is an "essential factor of the constitutional principle of *nullum crimen sine lege*"[62]. The exclusion of any room for reassessing previous incrimination options would then implement a "one-way" criminal system, wherein new offences are introduced in compliance with EU harmonisation measures, but they are impossible to eliminate, with the result of aggravating the hypertrophy of criminal law in violation of the needs to limit it in the boundaries of *extrema ratio*. The exclusion at national level of any further discussion on the opportunity to adopt alternative measures to criminal sanctions is cause for particular concern given the remarkable and increasing incidence of EU (also criminal) law in the regulation of economy, an area where the search for the most adequate type of punitive measures shall be continuous and flexible.[63]

Although the aforementioned theories, just very briefly outlined in the present work, have been convincingly upheld and underline worries that are not at all baseless, they do not appear sufficient to support the idea that the transfer of competences from the Member States to the European Union would *ipso facto* entail a deterioration of the reflectiveness, rationality and, above all, subsidiarity, of criminal law. This idea, in fact, displays the same kind of failings already underlined with reference to the previously examined opinions on the deterioration of the democratic legitimacy of criminal law. In particular, such an idea does not seem to pay sufficient attention to the real rational and subsidiary quality of national criminal law on one hand, whilst on the other, it is much too severe in evaluating the capacity of the EU legal framework and law-making process in respect of the criminal law fundamental principles at stake.

[60] *Sotis*, (fn. 58) CP 2010, p. 335. See also *C. Sotis,* (Il diritto senza codice. Uno studio sul sistema penale europeo vigente) A Legal System without a Code. A Study on Current European Criminal Law, 2007, p. 70 et seq.
[61] Cfr., *infra*, point 2, fn. 83.
[62] *Sotis,* (fn. 58) CP 2010, p. 337 et seq.
[63] *Sotis,* (fn. 58) CP 2010, p. 339 et seq. See also *Abbadessa*, (fn. 2) RTDPE 2009, p. 471 et seq.

1. The uncertain rationality and subsidiarity of national criminal law

Under the first perspective (capacity of legislative procedure to limit the resort to criminal law), the present work in no way aims to argue the authoritative doctrine that ascribes to the principle of *nullum crimen sine lege parlamentaria,* (also) the function of hindering the expansion of criminal law[64]. However, the actual procedures for the adoption of national criminal legislation do not seem to let the aforementioned principle fulfil that function.

Should the alleged capacity of the national law-making process to limit the resort to criminal law be vested in the representative/democratic nature of the Parliament[65], it can be argued that such capacity is jeopardized by the aforementioned factor of crisis of the *nullum crimen sine lege parlamentaria* principle, a crisis that affects both the central role of the Parliament in the production of national legislation and the real democratic quality of parliamentary procedures[66].

Conversely, should the capacity in question be related to the technical features of the parliamentary procedure and therefore different from its democratic quality (namely complexity, length of time, publicity, transparency, all elements capable of limiting the irrational resort to criminal law)[67], it can be argued that the same factors affecting the democratic quality of such a procedure are also capable of accelerating the passing of the acts, restricting the debate in the assemblies and reducing its publicity and transparency, with negative effects on the thoughtfulness given to the adoption of criminal law.

Yet besides the remarks on the crisis of the national representative body and the alteration of the parliamentary procedure, what really stands out here is the reality of criminal legislation in Italy, where new criminal laws are almost continually introduced, often by means of governmental decrees approved as a result of a pressed and hurried parliamentary debate. In brief, resorting to criminal law has become the regular, cheap and symbolic answer to the increasing (but not always rational) request for "more security", the complete opposite of what the standards of rationality, *extrema ratio* and subsidiarity would require.

From the second perspective (key-role of the "*Rechtsgut"* in the selection of criminal behaviours, as an instrument to implement the principle of subsidiarity), it is not even possible to summarize in the present work the *d*ebate in the Italian literature on the theory of "bene giuridico" and its actual stance on being the polar starof criminal policy[68]. *Let it suffice* to underline that the practical role of the aforementioned theory in legitimising resorting to criminal sanctions and in contrasting the tendency to the hypertrophy of criminal law is very limited under the Italian legal system[69]. The same could be said about the principles of *extrema ratio*

[64] See, *supra*, point I.

[65] From this perspective, the Parliament is perceived as the most careful institution to the restriction of individual freedoms, ans therefore the most motivated in the limitation of criminal law.

[66] See, *supra*, point III.1 lit. a).

[67] See, *supra*, point III.1 lit. b.)

[68] See, also for comprehensive references, *Manes*, (fn. 6), p. 41 et seq.

[69] See *Manes*, (fn. 6), p. 121 et seq. See also *Fiandaca/Musco*, (fn. 9), p. 16 et seq.; *Mantovani,* (fn. 6), p. 211 et seq.

and subsidiarity: notwithstanding the doctrine and the Constitutional Court[70] does not question their constitutional grounds, it is well-known that the legislator has not been complying with such principles, as the doctrine itself acknowledges by denouncing the irrationality and hypertrophy of many areas of national criminal laws[71].

Neither has the Constitutional Court effectively implemented the principles of *extrema ratio* and subsidiarity: as a matter of fact, in the same decision where the constitutional ground of such principles were stated, the Court also declared that whether to criminalize or not is an 'ideological and political' option, falling by its very nature outside the scope of a question of constitutional legitimacy, so that the violation of the principle of subsidiarity in criminal law can be very narrowly reported by the Court itself[72]. As a consequence, in spite of its constitutional grounds, the principle of subsidiarity has not endorsed any constitutional case-law aimed at quashing the number of purely internal criminal offences barely consistent with the principle at stake.

From the third perspective (risks of a "one-way" criminal law system as a result of the proliferation of EU obligation to criminalize), the concerns expressed in the literature are beyond any doubt well-grounded: while the national legislator is free to reassess its own criminal policy and, in particular, to amend (and also repeal) national criminal law, such freedom is very much compressed when the criminal provisions have been introduced in order to comply with an obligation to criminalize imposed by the EU legislator, in fact, if the national legislator repeals the provision in question, an infringement procedure shall be initiated.

Although this mechanism entails the risk of aggravating the hypertrophy of criminal law, as will be mentioned later on, the EU legal framework is endowed with the instruments to prevent this risk from occurring.

2. The rationality and subsidiarity of EU legal acts in criminal matter

With regard to the supposed inability of EU legal acts in criminal matter to meet the qualitative standards of rationality and subsidiarity of criminal provisions, the attention shall focus on: (a)the alleged inadequacy of the EU law-making process; (b) the alleged inconsistencies of the development of EU criminal law in respect of the theory of "bene giuridico", as a selective filter in the adoption of criminal law measures, and (c) the previously mentioned risk of a 'one-way' criminal law system as a consequence of the proliferation of the obligations to criminalize.

Regarding the alleged inadequacy of the EU law-making process to limit resorting to criminal law, in a similar vein the national legislative procedure, an analysis of the practicexis of the (past) co-decision procedure and (actual) ordinary legislative

[70] See, among many, *Constitutional Court (C. Const.)*, dec. of 18. 7. 1989, no. 409/1989, Cassazione penale (CP) 1990, p. 781 (all the decisions of the Italian Constitutional Court are available at http://www.cortecostituzionale.it/actionPronuncia.do).

[71] See, *supra*, fn. 6.

[72] See *C. Const.*, dec. no. 409/1989 (fn. 69), § 4. In the literature see *M. Romano*, (fn. 18) p. 23.

procedure, allows this assumption to be challenged. It has already been underlined that, on the basis of the real powers enjoyed under such procedures, the role of the European Parliament in the drafting and adoption of legislative acts is more incisive and independent than the limited role of some NPs. As a consequence the length of time, publicity and transparency of the debate in the European assembly is sometimes more effective, given that the aforementioned unsettling and barely legitimate mechanisms affecting the national parliamentary procedure[73] do not operate at EU level.

Furthermore, an overview of the pre-legislative process provides evidence that, before the Commission adopts a proposal, a number of consultation mechanisms operate[74], providing any legislative initiative with preliminary, careful and thoughtful impact assessment that have no comparison in many national legislative procedures. On the contrary, some authors have expressed concern that the pre-legislative phase of consultation could be so complicated to the extent of being 'choked' by the participation of too many institutions, especially considering that this phase is slowed down by the participation of NPs in compliance with protocols I and II of the Lisbon Treaty[75].

As for the critics of the inconsistency of EU legislation in criminal matters with the theory of "bene giuridico", they are indeed persuasive, yet probably too severe. It is not the aim of this study to contend the previous in-depth comments regarding the ECJ judgement in the environmental case and in reference to art. 83 para. 2 TFEU[76], both of which have outlined that the aforementioned judgment and provision make the legitimacy of EU directives for the approximation of national criminal law subject to the necessity of ensuring an effective implementation of a EU policy, instead of the necessity to protect fundamental interests. However, one cannot automatically infer on the basis of these remarks that EU criminal law will develop, leaving the latter necessity completely out of consideration altogether.

It is true that art. 83 para. 2 TFEU connects the essential attitude of the approximation of national criminal law with the need to ensure the implementation of EU law, and not to protect a fundamental interest. Yet it is also true that art. 83 para. 1 (1) TFEU limits the adoption of directives for the harmonisation of criminal law in the areas of "*particularly serious* crime". Correspondingly, the ECJ case-law, only very recently developed on the subject, when considering the legitimacy of criminal law harmonisation measures, has immediately (since the environmental case) made use of expression like "*necessary*" or "*essential*" measure "for combating *serious* environmental offences".[77]

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[73] See, *supra*, point III.1

[74] E.g. white papers, green papers, expert auditions, including academics, comparative law surveys, consultations of European citizens by means of public dossiers and questionnaires, *et cetera*. See *Muñoz de Morales Romero*, (fn. 42), p. 490 et seq.

[75] See, *supra*, point III.2.

[76] See, *supra*, point IV.

[77] *ECJ, Commission/Council* 13. 9. 2005 (fn. 40) § 48; *ECJ, Commission/Council* 23. 10. 2007 (fn. 40) § 66.

There is therefore no reason to exclude that the reference to the essential attitude of the harmonisation measures for the implementation of a EU policy (art. 83 para. 2 TFEU) entails just a *first* and *not last* test of legitimacy, among other requisites necessary to justify the adoption of the directives in such matters; in other words, once the necessity of such directives in order to effectively implement a Union policy has been proved, a further requisite shall be met, namely the need to protect fundamental interests.

This thesis is also supported by an *argumentum a contrario*. As has been said, there are no doubts in the Italian doctrine that the principles of *extrema ratio* and subsidiarity have constitutional grounds. This assumption has never been questioned, notwithstanding the complete lack of any textual reference to these principles in the Constitution, which in no way gives mention to expressions such as 'subsidiarity'[78], 'proportionality', 'necessity of criminal sanctions', or "bene giuridico".

Why, then, should the transfer of competences from national to European legislator automatically obscure the polar star of the "Rechtsgut", just because under art. 83 para. 2 TFEU the requisite of the "essentiality" of criminal law harmonisation measures is only referred to the need to ensure the effectiveness of a policy? Why so, when under the national Constitution there are no textual references at all to the principle of subsidiarity and to the concept of "bene giuridico"?

On the contrary, in the EU legal framework there seem to be the conditions for a much more effective implementation of the principle of subsidiarity than in the national legal system.

First, in the Treaties there are a number of explicit references to the contents of such principles, which, as has been said, are enshrined at EU level in the principle of proportionality, stated under art. 5.4 TEU. According to the abundant ECJ case-law in criminal matter, the principle of proportionality includes the corollaries of appropriateness, necessity and proportionality in the strict sense[79]. The second corollary – which requires the EU legislator to adopt (among the measures deemed under the first corollary to be adequate in achieving the objective in question) the least onerous measure for citizens' rights and freedoms – perfectly endorses the *ratio* of the principle of (criminal law) subsidiarity, since it entails the restriction of resorting to criminal sanctions in the boundaries of *extrema ratio.*

A further obligation to such restriction is stated in the European Charter of Fundamental Rights, which, as it is well-known, according to art. 6.1 TEU "shall

[78] Unless under arts. 117, 118, 120, which discipline the distribution of competences between State and Regions and do not concern the principle of subsidiarity in criminal law.

[79] *ECJ* 13. 11. 1990, case C-331/88 (*Fedesa*) [1990] ECR *I-04023, § 13*: *"In accordance with the principle of proportionality, which is one of the general principles of Community law, the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question, it being understood that when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued";* see also, among others, ECJ 5. 10. 1994, joinedcasesC-133/93, C-300/93and C-362/93 *(Antonio Crispoltoni vs Fattoria Auonoma Tabacchi* and *Giuseppe Natale and Antonio Pontillo vs DonatabSrl),* [1994] ECR, I-04863, § 40. In the literature, see*Muñoz de Morales Romero*, (fn. 40), p. 281 et seq., 295 et seq., with further references.

have the same legal value as the Treaties". In fact, art. 52.1 of the Charter prescribes: "Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law (…). Subject to the principle of proportionality, limitations may be made only if they are *necessary* and genuinely meet objectives of general interest recognised by the Union or the need to *protect the rights and freedoms* of others".

What is more, it has already been said that the Italian Constitutional Court has not successfully implemented the principle of subsidiarity in criminal law[80]. The same cannot be said about the control of the ECJ on the consistency of national sanctions adopted by Member States for the enforcement of Community law regarding the European principle of proportionality, in particular in relation to the corollaries of necessity and proportionality in the strict sense. For many years now and over the course of a number of judgements, the ECJ deemed these sanctions to be inconsistent with the aforesaid corollaries, as they were disproportionate (*i.e.* excessive) in comparison with the nature and seriousness of the violation.[81]

Eventually, the need to respect the principle of *extrema ratio* and subsidiarity in line with the theory of "bene giuridico" is unequivocally declared in the Stockholm Program[82]: "Criminal law provisions should be introduced when they are considered essential in order for the interests to be protected and, as a rule, be used only as a last resort" (§ 3.3.1).

In conclusion, the principle of subsidiarity of criminal law, which is corollary of the fundamental principle of proportionality, enjoys more explicit legal basis and more effective case-law implementation within the EU legal framework than under the national legal system, where this principle, as developed in the literature, does not have an explicit textual basis in the Constitution, has not been suitably implemented by constitutional case-law and is frequently violated by the legislator.

All this considered, it should be acknowledged that certain EU legal acts in force or under preparation, do not sufficiently meet with the principles of *extrema ratio* and proportionality[83]. They can be understood, nonetheless, as single deviations from the principles in question that any national or supranational legislator may encounter. In other words, these deviations should not affect the general evaluation on the attitude of the European legal system to respect such principles, especially having considered the rigorous control of the ECJ on the proportionality of national (as well as criminal) sanctions adopted for the enforcement of Community law[84].

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[80] See, *supra*, point IV.1

[81] See, among others, *ECJ* 26. 2. 1975, case 67/74 (*Donckerwolcke*), [1976]ECR 1921. In the literature, see *A. Bernardi*, (L'armonizzazione delle sanzioni in Europa. Linee ricostruttive) The Harmonisation of Sanctions in Europe. Guidelines, Rivista italiana di diritto e procedura penale (RIDPP) 2008, 111 et seq.

[82] *OJ* 2010 C 115/1.

[83] For some critics on the consistency with the principle of proportionality of the Framework Decision 2008/919/JHA, "amending Framework Decision 2002/475/JHA on combating terrorism", OJ 2008 L 330/21, and of the Directive 2008/99/EC "on the protection of the environment through criminal law", OJ 2008 L 328/28 see *European Criminal Law Initiative*, available at http://www.crimpol.eu/; *Muñoz de Morales Romero*, (fn. 40), p. 326 et seq. See also *Donini*, (fn. 53) RIDPP 2003, p. 162 et seq.; *Mannozzi/Consulich*, (fn. 58) RTDPE 2006, p. 918 et seq.

[84] Cfr., *supra* fn. 80.

Shouldn't we expect a control as rigorous on the consistency of the EU legislative acts in criminal matter with the principle of proportionality, now that the Treaty of Lisbon has extended the ECJ full jurisdiction on the area of freedom, security and justice?

As for the risk of a "one-way" criminal law system as a consequence of the proliferation of the obligations to criminalize, it has been said that the worries about the collateral effects of depriving national legislators of the discretion to decriminalize are well-founded.

On the other hand, once an EU competence in criminal law is established under certain conditions and in certain areas, the effectiveness of such competence would be jeopardized if the national legislator was left full discretionary legislative power on the same areas.

The only way to prevent the risk from occurring in matters from occurring is a further development of the "skills" of EU legislator. As a matter of fact, following the significant extension of EU competence in criminal law, from the ECJ decision in the environmental case to the Treaty of Lisbon, the EU legislator is now expected to make proper use of every available instrument of criminal policy. In particular, this expectation not only calls for a careful and rational preventive selection of the fundamental interests the protection of which legitimize the harmonisation of criminal law at EU level, but also for the ability and willingness to reassess (and possibly repeal) obligations to criminalize that which has been previously adopted; in short, the competence and the power to criminalize necessarily include the ability and the *duty*, where necessary, to decriminalize.