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Overcoming Democratic Deficit, Embedding Fundamental Rights: The Role of National Parliaments in EU Criminal Law

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Introduction

The place of national parliaments within the elaboration of EU criminal law and policy has been discussed before the adoption of the Treaty of Lisbon in order to show the lack of democratic process during the elaboration of the EU law and policy. It will be argued that the democratic deficit in the EU functioning will remain a significant challenge in the EU criminal framework until the national parliaments play an active role within the establishment of the EU security model. By “EU criminal law and policy”, the author of the paper refers to the EU law related to the principle of mutual recognition, measures concerning the definition of certain offences and sanctions related to serious crimes with cross-border dimension, measures promoting and supporting the action of member states, the role of Eurojust,² and the role of Europol.³

Previously to 2011, the cooperation in the area of EU criminal matter was based on an intergovernmental approach; i.e. a traditional international cooperation where states kept the full aspect of their sovereignty while carried out projects and plans of common interests. The Treaty

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² 2002/187/JHA: Council Decision of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime, OJ L 63, 6.3.2002, p. 1–13. [accessed 15 June 2013]. Eurojust is an EU agency promoting coordination between competent national judicial authorities

³ 2009/371/JHA: Council Decision of 6 April 2009 establishing the European Police Office (Europol). OJ L 121/37-66 [accessed 15 June 2013]. Europol is an EU agency promoting the police coordination.

of Lisbon brought a fundamental change concerning the functioning of the EU institutions, by institutionalising mechanisms more respectful of the full sovereignty of the EU citizens. The Commission shares the right of initiative with one quarter of the Member States. Also, EU citizens can empower to make proposal through the signature of at least one million citizens from a significant number of Member States in this field.⁴ The European Parliament has become co-legislator with the council of the EU.⁵ The role of national parliaments has been enhanced via different mechanisms⁶, including the enhancement of the dialogue between national parliaments and the EU institutions;⁷ the mission of national parliaments to ensure compliance with the principle of subsidiarity and proportionality;⁸ and their participation in the evaluation of mechanisms for the implementation of EU criminal policies and in the political monitoring of Europol and evaluation of Eurojust's activities.⁹ The new functioning of the EU shows that the question of sovereignty is not anymore only a governmental aspect, there is also a legislative aspect and, that national parliaments should be a significant actor within the elaboration of EU criminal law and policy.

⁴ Article 76 TFEU European Union, Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, 13 December 2007, 2007/C 306/01, available at: <http://www.refworld.org/docid/476258d32.html> [accessed 15 June 2013].

⁵ It means that the legislative procedure used to adopt the EU acts is the co-decision. Article 294 the consolidated version of the Treaty on European Union and the Treaty on the Functioning of European Union, of March 2010. This procedure gives the same weight to the European Parliament and the Council of the European Union. The Commission sends its proposal to Parliament and the Council. They consider it, and discuss it on the 1st reading. If the Parliament desires to improve the text by adding amendments, the Council has the opportunity to consider them. In case of a disagreement the Parliament has another reading where it can approve the Council's point or keep its amendments. After two readings, if they cannot agree, the proposal is brought before a Conciliation Committee composed by an equal number of representatives of the Council and Parliament. Also, the representatives of the Commission attend the meetings of the Conciliation Committee and contribute to the discussions. When the Committee has reached agreement, the text agreed upon is sent to Parliament and the Council for a third reading, so that they can finally adopt it as a legislative text. Even if a joint text is agreed by the Conciliation Committee, Parliament can still reject the proposed law by a majority of the votes cast.

⁶ Article 12 TEU European Union, Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, 13 December 2007, 2007/C 306/01, available at: <http://www.refworld.org/docid/476258d32.html> [accessed 15 June 2013].

⁷ Protocol 1 European Union, Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, 13 December 2007, 2007/C 306/01, available at: <http://www.refworld.org/docid/476258d32.html> [accessed 30 May 2013].

⁸ Protocol 2 European Union, Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, 13 December 2007, 2007/C 306/01, available at: <http://www.refworld.org/docid/476258d32.html> [accessed 15 June 2013].

⁹ Articles 70, 88 and 85 TFEU European Union, Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, 13 December 2007, 2007/C 306/01, available at: <http://www.refworld.org/docid/476258d32.html> [accessed 17 June 2013].

The new functioning of the EU reveals an apparent progress in the reduction of the democratic deficit within the elaboration of the EU criminal law and policy. However, there does not exist empirical research to examine whether in reality the national parliaments' competence have been utilised to achieve aims for which they were originally set out. A particular interest should be paid to the contribution of national parliaments in the balance between protecting the safety and fundamental rights. The aim of this paper is to explain the importance of this research with regard to the future challenges within EU criminal matters. Firstly, it will be asserted that the EU aims at creating the EU security model. However, the clarification of the edge between transnational security and national security will be a significant issue for the EU integration. Secondly, it will be argued that national parliaments will have to enhance their integration in the EU functioning in order to decrease the democratic deficit. Finally, my methodology of my research will be presented.

I- The EU Security Model: Challenges in the elaboration of a Common Approach.

The concept of security has been the topic of prominent discussions in order to reach to a definition covering all the threats that states or international organizations must face.¹⁰ Depending on the threats, the policy objectives evolve.¹¹ Therefore, the examination of the concept of security with regard of the EU criminal agenda, aims at defining the policy objectives

¹⁰ E.g David Baldwin, "The Concept of Security", *Review of International Relations* (1997), 23, pp. 5-26; Lester Brown, *Redefining National Security*, Worldwatch Paper No. 14 (Washington, DC, 1977); Ullman, 'Redefining Security', *International Security*, 8 (1983), pp. 129-53; Joseph J. Romm, *Defining National Security* (New York, 1993); J. Ann Tickner, 'Re-visioning Security', in Ken Booth and Steve Such Thing as Society: Beyond Individualism and Statism in International Security Studies', *Review of International Studies*, 19 (1993), pp. 159-75; John Peterson and Hugh Ward, 'Coalitional Instability and the New Multidimensional Politics of Security: A Rational Choice Argument for US-EU Cooperation', *European Journal of International Relations*, 1 (1995), pp. 131-56; Arnold Wolfers, ' "National Security" as an Ambiguous Symbol', *Political Science Quarterly*, 67 (1952), p. 483; Barry Buzan, 'Peace, Power and Security: Contending Concepts in the Study of International Relations', *Journal of Peace Research*, 21 (1984); Stephen M. Walt, 'The Renaissance of Security Studies', *International Studies Quarterly*, 35 (1991), pp. 211-39; Emma Rothschild, 'What is Security?', *Daedalus*, 124 (1995), pp. 53-98; Buzan, Barry, "From international system to international society: structural realism and regime theory meet the English school", *International Organization*, 47(1993), pp. 327.

¹¹ David Baldwin, "The Concept of Security", *Review of International Relations* (1997), 23, p. 12

in this area and, then, having a better understanding of the meaning of transnational security. The EU has shared competence, with Member States, concerning transnational security. However, the border between transnational security and national security remains uncertain. The conceptualisation of the EU security agenda is a fundamental step to analyse the challenge of the EU competence in EU criminal matter. Security as a whole concept encompasses a broad range of issues depending on the “referent object”, the particular kind of threats, the values protected, the means devoted to this protection, and the time period considered to achieve this protection.¹² Most scholars agree that security is a “contested concept”.¹³ That is to say, the debates on the definition of this concept did not reach a common use of this term. However, there exists a fulcrum concerning security; it implies the existence of threats to core values. The disagreement concerns the level of analysis of the concept, i.e. whether the primary focus should be on “individual”, “national” or “international” security. Traditionally, the concept of security used to cover only military issues from a national perspective. Security was seen as a way to protect the integrity of the territory and the citizens of a state from foreign threats. The fundamental idea behind this concept was the survival of the state. After the end of the Cold War, the concept has widened to cover different sectors including, military, economic, political and environmental security.¹⁴ However, those sectors are inseparable of each other when security has to be defined as the whole concept. As to security related to the EU, it is first essential, to mention that the concept will be defined in an international relations perspective. It does not mean that the role of states will not be examined, but it will be asserted that the “referent object” is the EU i.e. the system which will be considered threatened and which is legitimate to be protected is the EU.

A- The EU Security Model.

1- The Existential Threats of the EU

¹² David Baldwin, “The Concept of Security”, *Review of International Relations* (1997), 23, p. 17

¹³ Booth, Ken. *Critical security studies*. Blackwell Publishing Ltd, 2005; Gallie, Walter Bryce. "Essentially contested concepts." In *Proceedings of the Aristotelian society*, vol. 56, pp. 167-198. The Aristotelian Society; Blackwell Publishing, 1955; Hänggi, Heiner. "Conceptualising Security Sector Reform and Reconstruction." *Reform and Reconstruction of the Security Sector* 6 (2004).

¹⁴ Buzan, Barry, Ole Wver, and Jaap De Wilde. *Security: a new framework for analysis*. Lynne Rienner Pub, 1998.

In March 2010, The European Council has approved the Internal Security Strategy elaborated by the Commission.¹⁵ This strategy defines the future threats of the security of the EU and the core values which must be protected. The five future threats listed are any type of terrorism¹⁶, organised crime, cross-border crime, cyber-crime, and natural and man-made disasters.

The term organised crime refer to a crime committed in a criminal organisation. The Joint Action¹⁷ on the participation in a criminal organisation gives a definition of “criminal organisation”. The organised crime encompasses a broad range of threats, including drug trafficking, economic crime, human trafficking (children and women), environmental crime, sexual exploitation of children and child pornography, violent crime, money laundering and forgery.¹⁸ Like the EU terrorism policy, those threats have specific policies, and except the drug policy, the Member States reached to elaborate a common definition of those offences and a minimum of the maximum of a sentence. However, different reports concerning those policies showed that the implementation of this minimum rules are not well implemented in the domestic law. The list of offences which has been criminalized under the EU organized crime policy is not exhaustive and can be extended to other cross-border crimes. This category can encompass a wide range of offences; including minor offences affected the everyday life of the EU citizens. This is a core challenge for the EU since the EU will Europeanize previous offences which used to be dealt only in a national level. The issue will be to justify that an offence affected the everyday EU citizens is a threat to the transnational security. In other words, the approximation of the definition of cross-border crimes and the level of sanctions will be only possible by finding a consensus on the edge between the national and transnational security.

Finally, the last threat mentioned in the Internal Security Strategy is natural and man-made disasters. This category deals with climate change in order to encourage all Member States to adopt comprehensive adaptation strategies; 'Climate-proofing' action at EU level and better

¹⁵ Doc. 5842/2/10 REV 2 JAI 90 of 23 February 2010, entitled "Draft Internal Security Strategy for the European Union: Towards a European Security Model" [accessed 15 June 2013].

¹⁶ Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism (OJ L 164, 22.6.2002).

¹⁷ Joint Action 98/733/JHA adopted by the Council on the basis of Art. K.3 of the Treaty on European Union, on making it a criminal offence to participate in a criminal organisation in the Member States of the EU, OJ No. L 351/1 of 29-12-1998.

¹⁸ In OJ C 124 of 5.7. 2000, recommendation 7, terrorism is also considered as an organised crime. But due to its importance in EU criminal policy, it has become a policy as a whole.

informed decision-making. The approach chosen by the EU is to enhance cooperation in order to reach a common approach in this area. The ISS does not clearly mention the criminalization of environmental offences.¹⁹ Therefore, it does not seem that this security issue will be dealt under the EU criminal framework.

2-The Core Values Protected by the EU

The objective of the ISS is to establish an EU security model based on the principles and values of the Union, i.e. “respect for human rights and fundamental freedoms, the rule of law, democracy, dialogue, tolerance, transparency and solidarity.”²⁰

Security is seen as a fundamental liberty. In this context, the term security must be understood as the right to live in safety and, the right to live without fear.²¹ The balance between the protection of security and the fundamental liberties of the EU citizens is a challenging feature of the EU security model since there is not a hierarchical order between the two values. Both of them are in equal importance. The EU aims at developing a model for the exchange of information which would permit to access to all EU databases relevant to security in the Union and to facilitate their interaction. The future challenge of this model will be to conciliate civil liberties such as, the right to protection of personal data and of privacy with the protection of EU citizens against the specific threats.

Another interesting feature of the EU values mentioned in the ISS concern the democracy principles including dialogue and transparency. The EU institutions publish regularly their works and, an effort has been made to publish reports with regard to the implementation of EU criminal policy; the implementation of the Charter of Fundamental Rights; and the implementation of the mechanisms institutionalized by the Treaty of Lisbon.* These reports are an important resource in order to analyze the progress of the EU functioning within EU law in general, including criminal matters. The democracy principle refers to the different components

¹⁹ The directive.... does criminalize a certain of acts: Article 3.

²⁰ Doc. 5842/2/10 REV 2 JAI 90 of 23 February 2010, entitled "Draft Internal Security Strategy for the European Union: Towards a European Security Model", p.3 [accessed 15 June 2013]

²¹ Doc. 5842/2/10 REV 2 JAI 90 of 23 February 2010, entitled "Draft Internal Security Strategy for the European Union: Towards a European Security Model", p.4 [accessed 15 June 2013].

of the sovereignty i.e. the balance of legislative and executive powers and the respect of national authority of the Member States. The democratic aspect of the EU decision-making within EU criminal policy has been improved by making the European Parliament a co-legislator for most of criminal matters. However, the competence of the EU to legislate in criminal matter remains a concern. The dialogue between the competent authorities, i.e. judicial, police authorities and the national parliaments is a fundamental aspect that the EU will have to enhance during the development of the EU security model.

The Union based its criminal policy on the principle of free movement. This is a core aspect of the EU values since it does affect all EU policies. The challenge concerning this value will be to protect the free movement to EU citizens and residents while regulating it, in order to counterbalance the negative effect of this right.²²

Finally, the last central value in the elaboration of the EU criminal policy is the principle of the unity within the diversity. That is to say, the EU policy aims at facilitating the cooperation between Member States to enhance the security of the EU citizens while respecting the different domestic systems. The objective of the EU security model is to define the threats affecting the EU –as it was previously explained the objective is not reached yet- and to elaborate a common approach to protect the EU. For this purpose, the EU encourages the exchange of information, the transnational training concerning security studies, and an operational cooperation. Therefore, the security model does not aim at harmonizing domestic criminal policy but to smooth the cooperation in order to protect the EU citizens.

3-The Means and the Period of Time to Secure the Union.

The EU security model represents an ideal based on the balance between liberty, security and Justice. The realisation of such model will be possible after the achievement of the different multi-annual strategy plans concerning the different EU criminal policies.*Thus, there exists two main period of time that need to be examined in order to understand the action of the EU in the fight against the existential threats against the EU core values, i.e. the multi-annual action plan based on a strategy of 5 years and; the ideal model which will be the outcome of the

²² It is also called the Spillover theory developed by Lindberg.

work accomplished during the previous periods. There exists four means to achieve the EU security model: the development of an EU expertise; the improvement of the democratic dialogue, the exchange of databases and the operational cooperation.

a- Development of an EU Expertise

The EU wants to develop an expertise in transnational security in order to establish a common approach to combat those threats and also to have “a wide and comprehensive approach to internal security”. For this purpose, the EU facilitate the gathering of information coming from EU bodies such as Europol, Eurojust, Cefpol²³, LIBE,²⁴ Crime²⁵, and national authorities. Those information are subject to reports in order to clarify the dangers, the challenges to combat them and how the cooperation in the EU level could improve the security in Member States. Those reports aims at showing the expertise of the EU in those security issues and legitimise the training in the EU level. The role of Cefpol is essential since it is the organization which elaborates the trainings of the professional from the national police authorities and judicial authorities concerning the transnational cooperation. Another mean to improve the knowledge of the internal security is to share the experience between national professionals who face the security issues. Therefore, by gathering the information in the EU level and then, by sharing the EU expertise through trainings, the EU will be able to create a common approach about the EU security.

b- Improving the Democratic Dialogue

²³ 2005/681/JHA: Council Decision of 20 September 2005 establishing the European Police College (CEPOL) and repealing Decision 2000/820/JHA. [accessed 15 June 2013].

²⁴ Civil Liberties, Justice and Home Affairs. It is the Committee of the European Parliament which deals with the Justice and Home Affairs issues.

²⁵ Organised Crime, Corruption and Money Laundering. It is a special committee of the European Parliament which deals with Organised criminality.

The exchange of expertise is possible by a dialogue between the different actors concerned by the internal security. Among those actors there are professionals who participate in the elaboration of the EU policy by sharing information and their experiences. It also includes civil society, i.e. associations dealing with civil liberties, national authorities –including members from the police and judicial system, and National Parliaments- and the EU institutions. The idea between the “democratic dialogue” is to improve discussions between each actors since each of them will be affected by the EU law and policy. Therefore, the EU wants to enhance the democratic accountability in the elaboration of the EU law and policy by giving to the different actors a voice. In each of the EU strategy plan the Union place the dialogue with the different actors as an important feature of the realisation of the objectives.

c- Cooperation Based on Data Exchange

The EU has created a number of databases in order to facilitate information flow important the internal security. It includes the Schengen Information System (SIS), for the use of national immigration, border control, police and customs authorities; the Visas Information System (VIS); the Customs Informed System; the Eurodac containing asylum-seekers’ fingerprints. Those databases concern the protection of the borders of the EU. In 2008, the Council adopted the “Prum Decision” which incorporates some of the provisions of the Prum Convention adopted by a group of Member States in 2005. This decision permits for the national authorities of a Member State to access to another Member States’ database about the fingerprints, DNA and vehicle registration information. The Prum Decision requires the establishment of such data concerning the information aforementioned in order to facilitate criminal investigation. If there is no data, the requested state must obtain it, if the law of the states permits it. Therefore, this Decision aims at enhancing the principle of availability of data information within the EU.

d-The operational Cooperation

The cooperation between national authorities, i.e. judicial and police authorities is important in order to achieve a common approach to combat EU security threats. For that purpose, two ways are used; the first one is to encourage transnational cooperation through Europol concerning investigation of crimes affecting different Member States and; the elaboration of a minimum of standard concerning the protection of rights during the trial. According to Guild and Carrera “This [the place of fundamental rights in EU criminal law and policy] will remain one of the main topics to address in the next phase of the AFSJ (Area of Freedom, Security, and Justice)”.

B-The Phenomenon of the Securitization: The need for the contribution of National Parliaments.

During the pre-Lisbon period more issues previously considered as national threats became Europeanized. The term “Europeanization” refers to the process of considering a national issue as a European issue. The EU criminal law and policy have been influenced by the phenomenon of securitization, i.e. a process of transformation an issue to a security threat. The fundamental idea is to notice that all EU threats cited above do not affect equally Member states. That is to say, terrorism attacks does not affect the national security of all Member States in the same way, or Human trafficking criminality is more present in the Eastern part of the EU.²⁶ However Member States agreed to establish common policies in those areas. The reason to accept a deeper cooperation in criminal matters can be explained by the use of the so-called “securitizing speech acts”,²⁷ i.e. the rhetorical method to transform²⁸ an issue to a security threat. This concept permits to give an understanding of the phenomenon of securitization. This process used in the EU institutions to dramatize and present an issue as a danger and which can only be stopped by a deeper cooperation in the EU level. The EU highlights the transnational aspect of the threats. For instance, Human trafficking is presented as “a complex transnational

²⁶ Report from United Nations Office on Drugs and Crime “Global Report on Trafficking in Persons 2012”, p.102.

²⁷ Michael C. Williams, *Worlds, Images, Enemies: Securitization and International Politics*, 2003, Vol 47, *International Studies Quarterly*, p511-531.

²⁸ The term “transform” is purposely used to show that the representation of an issue is totally different after it has been securitized.

phenomenon”²⁹ in the last report published in 2013, drug trafficking is considered “a highly profitable commercial activity and a core business for organised crime groups across Europe today”³⁰, and “The EU economy is already affected by cybercrime”³¹, etc. Nevertheless, the “securitization” theory does not mean that any issue can be considered as an EU threat. Indeed the specific structure of the “securitizing speech-act” permits both extension and its limitation. In other words, the issue considered an EU threat must affect several Member States and to be a potential threat to any of them.

The EU security represents an ideal. The project is to develop a common approach between Member States in order to fight against specific dangers, i.e. terrorism, organised crime, cross-border crime, cyber-crime, and natural and man-made disasters. The EU is a facilitator in the realisation of this project. That is to say, the Union is a mean to gather, share, and disseminate a common expertise, experience, information and training concerning internal security. This is why, the examination of the place of each actor of the EU functioning, during the development of this model, will permit to understand the challenge of a deeper integration within the EU criminal cooperation.

II-The Reduction of the EU Democratic Deficit: The New Challenge of National Parliaments.

In the EU level the concept of democratic deficit reveals a paradox between what appears as a democratic organization, despite the non-respect of the democratic principles. Before the Treaty of Lisbon, the democratic deficit existed because there was not any legislative body to counterbalance the power of the Council in the decision making procedure in EU criminal law. Since 2011, the role of the European Parliament has been enhanced. The role of the EU Parliament is fundamental. However, this EU institution cannot replace the role of national

²⁹ DG Home Eurostat, Working paper on Trafficking in Human being, p.15, available on http://ec.europa.eu/anti-trafficking/entity.action;jsessionid=7Q4gRnhcQjJwVJN3tstBh3r9vGQG7rv8LfGvwpp96Z4LpwG4z1xp!-2112079233?path=EU+Policy%2FReport_DGHome_Eurostat [accessed 30 May 2013].

³⁰ MEMO/13/51, European Commission, EU drug markets report: key findings, 31 January 2013.

³¹ JOIN(2013) 1 final, Joint Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions, Cybersecurity Strategy of the European Union: An Open, Safe and Secure Cyberspace.

parliaments since they are the guardians of their own judicial system. The role of national parliament in the definition of offences and sanctions cannot be delegated to the European Parliament either to governments except for specific purpose.³² Therefore, the legitimacy of the EU to make secondary laws affecting the rights of EU citizens, including the freedom of movement, procedural safeguards, remains a concern.

The objective of the European security model is to establish a common approach and to respect the diversity of each justice system of Member States. The article 4 (2) of the Treaty of European Union (TEU) seems clear in that context:

“(t)he Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security (...).”

The EU criminal law is a specific kind of EU law. The European Parliament as a co-legislator is a necessary mechanism for the fulfilment of the democratic principle, i.e. the balance between the executive and the legislative power. Nonetheless, in the domestic law national parliaments have a particular mission concerning the elaboration of national security. That is why, the establishment of the EU criminal law and policy cannot disregard the importance of national parliaments as guardians of the constitutional identities.

The EU institutions take into account national parliaments in the elaboration of EU criminal policy. For instance, the EU committee on the organised crime, corruption and money laundering, of the European Parliament, has opened a discussion on the role and experiences of national parliaments in the fight against criminality which took place in Brussels the 7th May 2013. Since the Treaty of Lisbon, the EU institutions have tried to include national parliaments within the EU criminal policy. Therefore, the democratic deficit must be discussed with regard to the answer from national parliaments to the EU institutions. First of all, the examination of their answer will have to analyse the impact on the balance between the wish to protect the safety of their citizens and secondly, the political part of their answer. The fundamental objective of this

³² Jacob Öberg, EU Criminal Law, Democratic Legitimacy and Judicial Review of Union Criminal Law Legislation in the Wake of the Lisbon Treaty, 2011, Vol 16, Tilburg Law Review, p.60–82.

study is to have a better understanding of the challenge of a deeper integration in EU criminal cooperation.

The EU needs a deeper integration of Member States in the EU policy in order to create a common model. Buzan, Waever and de Wilde have disaggregated the concept of security into four components including the political sector which refers to any “existential threats” affecting the apparatuses of the sovereignty.³³ In other words, political security concerns any potential dangers to the legitimacy or recognition of the competence of states. In that context, the process of integration of Member States related to the EU criminal policy can be defined as an “existential threat” to the sovereignty of Member States. The analysis of the security objectives developed by the EU criminal policy can be seen as a source of threat that Member States have to control for the survival of the integrity of their authority, in a national security perspective. Furthermore, EU security within EU criminal framework can also be considered as a threat for the societal sector which encompasses any threats affecting the collective identities. The identities of Member States evolve depending on the internal or external changes. However, some changes can be considered as intrusive and deviating excessively the identity of the society. For instance, the harmonization of criminal procedures, the establishment of a minimum of common rules to facilitate cooperation between Member States of the EU can be seen as a threat of the domestic judicial system. The enhancement of the competence of national parliaments will permit to counterbalance this “potential threats”. The national parliaments will be able to protect their domestic judicial system while playing an active role in the creation of the EU security model.

III- Research on the EU Democratic Deficit: A Analysis Based on a National Perspective.

The research done during my first year of PhD has focused on the clarification of the subject of my thesis. For this purpose, a particular attention was made on the EU security model in order to understand the future challenge of the EU in criminal area. It is noteworthy, to notice

³³ Buzan, Barry, Ole Wver, and Jaap De Wilde. Security: a new framework for analysis. Lynne Rienner Pub, 1998

that the introduction of mechanisms in favour of National Parliaments have been considered as an important progress for the democratic process of the EU functioning. However, there was not any study on the real contribution of National Parliaments in this area since it is a new area of research. From this assertion, my research have decided to fill the gap and focus on the contribution of National Parliaments in the EU criminal law and policy in order to have a full understanding the actual EU democratic deficit affecting the emergence a transnational security model.

A- Methods of Research

When analysing the EU governance of crime and the evolution of human rights protection under this governance, there are two approaches: theoretical approach and historical approach.

The theoretical approach includes an analysis of the ideological current of Europeanization (Maria Green Cowles, Radaelli) as a means of understanding the way in which national institutions participate in the European criminal system. There will be an emphasis placed on the role of national parliaments. My thesis will also examine the links between the theories of “governmentality” (Foucault, Gordon and Miller, James N. Rosenau and Ernst-Otto Czempiel) and the theories of governance (Rhodes, Hirst) in order to achieve a complete understanding of these theories in relation to EU criminal policies. The concept of securitisation (Tsoukala) will also be defined to facilitate an argument that the EU governance of crime has facilitated securitisation at EU level. The concept of 'democratic deficit' (Bigo, Pech) will also be analysed in order to emphasise the importance of national parliaments within EU criminal policies. My second chapter will use a historical approach to discuss on the effects of the phenomenon of securitisation upon EU criminal law and policies, i.e. an analysis of the evolution of the theories and practices within criminal policies in order to illustrate how this phenomenon has affected criminal policies in EU member states and to discuss how securitisation has encouraged the Europeanization of security issues.

The analysis of the contribution of national parliaments to EU criminal law and policies will be based on the analysis of the data available and, a qualitative analysis of the reports of the EU institutions.

First, my thesis analysis will be based upon several data sources: the annual reports of the EU Commission regarding the implementation of the EU Charter of Fundamental Rights, and the annual reports on compliance with the principle of subsidiarity and proportionality. I will also examine the reports of two Parliamentary Committees; LIBE (Civil Liberties and Home Affairs) and CRIM (Organised crime, corruption and money laundry). LIBE is in charge of the majority of EU criminal legislative acts (Article 3 TEU), i.e. this committee examines the drafting of the EU criminal legislative acts from the EU Commission and the Council and proposes amendments for EU directives and EU regulations initiated by the EU Commission. Its objective is to improve the dialogue between the national parliaments and the EU during the decision-making process. CRIM was created in 2012 for a mandate of 18 months. The objectives of this Committee is to encourage the sharing of information on organised crime between international and EU organisations and national investigation and judicial authorities in order to establish an EU strategy on the fight against organised crime. Then, my thesis uses the reports from the aforementioned EU institutions because these institutions must encourage dialogue with national parliaments during the decision-making process for EU criminal law. Therefore, a qualitative analysis of these reports will highlight the contribution of National Parliaments to EU criminal law in order to decide if they prioritise the security or the human rights aspect of EU criminal legislative acts. However, the reports from the EU institutions do not explain the motivation behind the contribution of National Parliaments. That is to say, the political reasons which make fully understandable the position of National Parliaments in the EU functioning. This is why, my thesis will have to focus on the case study of three National Parliaments representing different tendencies in the construction of the Justice and Home Affairs policy. The comparison approach will be used to highlight the difference between Member States but also, the reasons of those differences. The three clusters will be chosen depending on the level of integration in the EU functioning –i.e. countries which have the possibility to opt-out, including Netherlands, United Kingdom and Ireland-, the domestic penal policy and the political background. A further research need to be done before to determine which countries will be the comparative clusters since it will be the central piece of my thesis.

B- Outline the progress to date

Since September 2012, I have completed the draft of my introductory chapter, “European Union Criminal Policies: Working towards a European Security Model”. This chapter examines the emergence of EU Justice and Home Affairs. A historical analysis of the evolution of EU legal framework was applied in order to illustrate the existence of a paradox, i.e. the reserve of the Member States to give up their sovereignty in criminal matter but, to move towards a deeper integration in this field. This chapter argues that the Treaty of Lisbon has made improvements in relation to the democratic process, the transparency of the decision making process and the protection of fundamental rights in European criminal policies. Continuing on from this, specific topics have arisen for chapter 2: the question of the democratic deficit, i.e. if European citizens have influenced EU criminal policies since the Treaty of Lisbon was passed and, the contribution of national parliaments to the protection of fundamental rights in EU criminal law. This chapter was drafted for October 2012 and then redrafted for December 2012. Thus, the proposal for this thesis is based on this redraft.

I am currently undertaking research on the theoretical analysis concerning the evolution of the concept of security. The concept of security includes a broader meaning that limits the meaning of 'liberty', i.e. the liberty would be the right to live in a safe environment. The concept of security will not be studied as whole but it will be separate into its different components in order to facilitate the meaning of EU security within the EU criminal framework. Therefore, only a part of EU security will be the object of deep analysis. The fundamental idea behind this research is to understand the threats that the EU wants to combat, the value that it want to protect and the means to achieve it. By doing this, the chapter 2 will have a better expertise on the objective of the EU criminal policy. Depending on the the threats, the policy objectives evolve. Therefore, the examination of the concept of security with regard of the EU criminal agenda, aims at defining the policy objectives in this area and, then, to have a better understanding of the notion of transnational security. The EU competence in the EU criminal area have been enhanced and clarified. The EU has shared competence, with Member States, concerning transnational security. However, the border between transnational security and national security

remains uncertain. As it will be argued, the conceptualisation of the EU security agenda is a fundamental step to analyse the challenge of the EU competence in EU criminal matter.

The chapter will also examine the social changes in how to respond to crime and criminality. This will lead to a discussion on the phenomenon of securitization, i.e. the development of criminal policy based on the management of the risk for society and the re-emergence of punitive sanction and of expressive justice. I will argue that the objectives of criminal policy at a national level have evolved, and that this change has influenced the Europeanization of the security issues. It will be asserted that the phenomenon of securitization is not finished yet, since the EU aims at clarifying the EU threats especially the cross-border crimes which have not been limited yet.

C- Contribution

The objective of my thesis is to examine the democratic deficit after the adoption of the Treaty of Lisbon. It will be argued that, without the contribution of National Parliaments within the elaboration of the EU criminal policy, the EU democratic deficit will remain. This why, it is fundamental to analyse this concept in a domestic perspective in order to understand the future challenge concerning the integration of Member States towards the EU security model.

Since the passing of the Treaty of Lisbon, there has been a renewed interest in arguments concerning democratic deficit. The fundamental idea behind this concept is that the EU decision-making is complex and EU citizens do not have any influence during this process. Democratic deficit covers several realities. An historical reality, according to Pierre Verluise: "democratic deficit is the result of the political mode of production history of the European Economic Community and the European Union". A political reality, according to René Andrau: "European construction is not compatible with republican values: communities supersede the nation governance of popular sovereignty, the rights of the individual to human rights and

citizen”. A sociological reality, according to Olivier Costa and Paul Mignette: Europe would be "A Europe of elites".

The entry into force of the Treaty of Lisbon institutionalised mechanisms to improve the democratic aspect of the decision-making and the accountability of the EU policies. To evaluate the implementation of these mechanisms, the EU Commission publishes several annual reports on: The implementation of the EU Charter of Fundamental Rights, the application of the principles of subsidiarity and proportionality in the legislative process of the EU. It is noteworthy that these reports deal with all EU institutions (EU Commission, EU Parliaments and the Council) and cover all EU policies (agriculture, environment, etc.); i.e. these reports do not focus specifically on the EU criminal law and policies.

The purpose of the enhancement of the role of national parliaments is to improve the democratic accountability of the EU legislative acts in criminal matters. The “[i]nadequacy of participation of national parliaments in European Community affairs” (Neunreither) and the role that national parliament could play to decrease the democratic deficit (Harlow) was discussed before the Treaty of Lisbon. However, after an extensive literature review, it appears that the existing analysis on the democratic accountability of EU after 2011 does not focus on the role that national parliaments could play in this issue.

My PhD thesis discusses whether the national parliaments are actively participating in the elaboration of the EU criminal law and policy, in order to examine if the new mechanisms institutionalised to reduce the democratic deficit are in reality utilised. The approach of this research is to compare the aspirational objectives of the EU with the practice of national authorities and to have a full understanding of the democratic deficit existing within EU criminal law and policy.

Conclusions

The cooperation in criminal matters is based on a common interest between all Member States, i.e. improving the safety of their citizens. Nonetheless, it is still not certain how far the Member States will accept the integration in this field. The analysis of the contribution of national parliaments within the elaboration of the European security model will reveal the domestic aspects affecting the integration in criminal cooperation. The objective of this research is also to contradict the assumption that the question of the sovereignty is the only aspect which prevent from a deeper integration. The examination of the EU deficit democratic in a national perspective will highlight different variances and convergences between Member States. This thesis aims at showing how the convergence of the different political and cultural features will influence the transnational model and also will have consequences in the domestic judicial system of the Member States.