

Preface

Fundamental rights are recognized and protected through a multiplicity of national and international norms and jurisdictions. This situation of concurrency of norms and courts has created a model of multi-level protection of fundamental rights, raising several relevant legal problems. The practical effects of these problems deserve to be the object of in-depth study, due to their complexity, novelty and importance. In particular, this model allows a varied content and scope to be assigned to fundamental rights in different States and under different jurisdictions. Within the framework of the federal or pluralist constitution, it hardly appears to prompt special reservations, as it constitutes a means of maintaining and respecting the different national sensitivities. The inverse should not, however, be forgotten (the shadow side of this model of multi-level protection in such a peculiar yet essential matter): on the one hand, it clashes with the universal character of fundamental rights, and, on the other, it generates legal insecurity and inequality in the juridical-constitutional status of national citizens according to the State or jurisdiction that may apply these rights.

This situation of concurrency of norms and jurisdictions affects Spain in a special way, and it is especially relevant for criminal law. It especially affects Spain, in the first place, because of its constitutional openness to international human rights law, as international conventions for the protection of human are integrated in the internal order and constitute a parameter for the interpretation of the content of the rights recognized in the Spanish Constitution (Art. 10.2 SC). In the second place, it impacts peculiarly on the Spanish legal order, because of the accession of Spain to a supranational institution: the European Union. Even though the Union originally lacked competence in matters of fundamental rights, these rights have gradually been included in its normative system—which has primacy over the national—firstly as general principles and more recently through the constitutionalization of the Charter of Fundamental Rights of the European Union.

This model of multi-level protection is of special theoretical importance for criminal law, because, on the one hand, the essential function of the latter is precisely the protection of fundamental social rights and values; on the other, it fulfils this function precisely through the restriction of the fundamental rights of the

accused and the convicted person; and, finally, it can only achieve this mission in a legitimate way in the framework of respect for specific principles and constitutional guarantees, which protect the citizen against the risks of excessive or arbitrary use of *ius puniendi* by the State. Therefore, the determination of the content and scope of each fundamental criminal right, principle or guarantee is an essential task for the delimitation of the legitimacy of criminal law. However moreover, the situation of multi-level protection of fundamental rights has, moreover, acquired an important practical relevance for the application of criminal law, because, in a strongly globalized world, the crimes and the criminals continually trespass national borders. So, their effective prosecution and sanctioning require permanent cooperation between the jurisdictions of courts from different States. This situation presupposes the recognition—not always constitutionally possible—in Spain of the judicial decisions of other States with different legal orders and with different standards with regard to their principles and guarantees in criminal law.

It is not by chance that two of the most relevant and well-known cases in which these problems of fundamental legal interaction emerge have been cases arising in the criminal jurisdiction. Indeed, the Melloni case, which resulted in the decision of the Spanish Constitutional Court ATC 86/2011 of 9 June 2011; the ECJ (GC) Judgment of 26 February 2013, Melloni (C-399/11); and the Constitutional Court Judgment STC 26/2014 of 13 February 2014, is a paradigmatic example of the problems presented by the disparity of standards of protection within the framework of the European Union, specifically when the standard of national protection offers greater guarantees than the international standard. And the so-called Parot case (STS 197/2006 of 28 February 2006), which gave rise to the series of judgements of the Constitutional Court initiated with STC 39/2012 of 29 March 2012 and the ECtHR Judgment of 21 October 2013, in the case of Del Río Prada, is a further significant example of this lack of uniformity of standards for inverse reasons: this time the internal standard offered fewer guarantees than the international one.

The book that we are now presenting, substantially, includes the result of a multidisciplinary seminary that was held at the Faculty of Law of the *Universidad Autónoma de Madrid* on 27 and 28 November 2014, in the framework of research project DER2012-33935 “La tutela multinivel de los principios y garantías penales” [Multi-level protection of principles and guarantees in Criminal Law], directed by Mercedes Pérez Manzano, in which Enric Fossas Espadaler, Susana Huerta Tocildo, Cristina Izquierdo Sans, Juan Antonio Lascaraín Sánchez, Marina Mínguez Rosique, Teresa Rodríguez Montañés and Ignacio Villaverde Menéndez all participated. The project had as its central objective both the identification of the similarities and the differences in the standards of protection applied by the different competent national and international courts with respect to principles and guarantees in criminal law and, whenever that was not possible, the proposal of common standards and criteria for their interconnection.

This book is of a more limited scope as its objective is merely to analyse the state of the question with regard to one of the principles, the principle of legality in

criminal law. It concerns the most relevant of all the principles, and, probably, it is also the principle with the most extensive content, integrating a broad set of guarantees for the citizen. For this reason and because the decision by the ECtHR in the case of *Del Río Prada*, relating to the so-called Parot doctrine, constitutes, without doubt, a *leading case* that has aroused intense debate, we decided to organize a specific seminar at which to present the partial results of our research and to discuss those results with specialists in criminal law, constitutional law, the philosophy of law and international public law.

“Multilevel protection of the principle of legality in Criminal Law” is an abridged version in English of the publication “La tutela multinivel del principio de legalidad penal” (editorial Marcial Pons, 2016) in Spanish. References to the Spanish legal order have been removed, so as not to distract the reader’s attention from the global debate regarding the challenges raised by the simultaneous recognition and defence of fundamental rights by different courts.

The book has three separate parts. The first, composed of the contributions from Enric Fossas and Cristina Izquierdo, addresses some general questions: the analysis of little-known pronouncements by the European Court of Human Rights regarding the conventional limits (of the European Convention of Human Rights) on the national legislator (Enric Fossas) and the progress of the *Melloni* case both within and outside Spain, with the purpose of situating the problems of multi-level protection in the framework of the European Union (Cristina Izquierdo).

The second part centres on the examination of the principal guarantees tied to the principle of legality, so as to expound the concordances and discrepancies of national and international standards. Ignacio Villaverde analyses the mandate of determination; Juan Antonio Lascaraín deals with the strict subjection of the judge to legal definitions of offences and penalties; Mercedes Pérez Manzano examines the prohibitions on *bis in idem*, given that the Spanish Constitutional Court has situated material *bis in idem* under Art. 25.1 of the Spanish Constitution; and Marina Mínguez Rosique accompanies us on a tour through the case law of the Inter-American Court of Human Rights to present us with a panorama of the pronouncements of this Court on the principle of legality.

The third part is dedicated to the analysis of the judgements linked to the Parot doctrine. Fernando Molina occupies himself with the analysis of the judgement of the Spanish Supreme Court, analysing consistency in the interpretation of the norms of the Penal Code strictly from the perspective of the penal order. Susana Huerta and Teresa Rodríguez Montañés examine the internal judgements of both the Supreme Court and the Constitutional Court, from the viewpoint of the Spanish Constitution, on the principle of legality in criminal law (Art. 25.1 SC and 7 ECHR) and the right to liberty (Art. 17.1 SC and 5 ECHR). Juan Antonio García Amado centres his analysis on the question of the retroactivity of case law when this is favourable to the offender. And, finally, Argelia Queralt and Carlos Ruiz Miguel examine the problems of internal enforcement of the judgements of the European Court of Human Rights, in the wake of the Judgment of the European Court in the *Del Río Prada* case and the manner in which the Spanish Supreme Court decided to apply that decision in this and in other cases.

Any well-advised reader will be aware of an important gap in this book, as it contains no analysis of the principle of the nonretroactivity of unfavourable criminal norms, in the part dedicated to describing and analysing the national and international standard. It is not out of forgetfulness. Neither was it a decision taken because of abundant indirect analysis of the topic owing to the scrutiny of the Parot doctrine.

The gap is owing to the misfortune of the death of our beloved colleague, coresearcher and friend Susana Huerta, who was in charge of the task. Susana, not only the director but the heart and soul of the first research project on which we embarked, a group of professors of criminal and constitutional law, linked together by having acted as law clerks to the Constitutional Court and with an interest in continuing to share multidisciplinary debates. Susana was unable to attend the seminar on legality in November 2014, to both her and our own great sadness, as we know how much she would have enjoyed it and how much she would have enriched the other participants with the lucidity of her appreciations and the passion and the vivacity with which she expressed them. Susana was an exceptional penalist, a reference in the areas that she investigated and, among those, in the principle of legality, to which she dedicated a large number of works. During the autumn and the subsequent winter of 2014, Susana continued working on the task she had accepted, but was unable to finish it. As we were unable to imagine this book without her presence, we decided to request permission from the *Revista Jurídica de Cataluña* to reproduce her work on the Del Río Prada judgement here. We are grateful to the journal and especially to its director, Eugenio Gay, for the extensive cooperation extended to us, which has enabled us to include her work alongside our own.

Susana often stated that “the Constitutional Court never passes through the life of a penalist without leaving its mark”, expressing the evolution that her conception of criminal law and her priorities as a researcher had experienced since her first stage as a law clerk to the Constitutional Court. All of us who with Susana shared in the work at the Constitutional Court know that she was right, although she also modestly limited her remark to penalists: whatever your area of legal expertise, the Court never passes through your professional life without leaving its mark. This book is, without a doubt, evidence of that and a thankful testimony of another even more important mark: the indelible one that Susana Huerta has left among her friends and fellow colleagues.

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