Book review: European Federal Criminal Law by Carlos Gómez-Jara Díez (Intersentia 2015)

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Aims

The Common Market Law Review is designed to function as a medium for the understanding and implementation of European Union Law within the Member States and elsewhere, and for the dissemination of legal thinking on European Union Law matters. It thus aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.
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This book, unlike many commentaries and treatises written by criminal lawyers, takes the process of European integration seriously. As the author states in the early pages, “the EU is not a federal State, yet it has the same problems as if it were”. In the context of EU criminal law,
these problems concern the protection of the EU’s genuine interests, the treatment of cross-border offences, the enforcement of EU policies and ensuring the protection of fundamental rights. Such relevant issues may be addressed by a useful combination of vertical federalism – which, as the author points out, promotes a form of interstate cooperation supported by an independent supranational structure, with a common code, common institutions and uniform rules – and horizontal federalism – which relies on cooperation without necessarily developing all the features mentioned above. The EU criminal law model stands somewhere in between, although it is characterized by a higher degree of horizontal federalism than its counterpart, the United States (US) model. In this sense, just as the interstate commerce clause has promoted vertical federalism in the US, the free movement of goods, through the principle of mutual recognition in the internal market, has encouraged horizontal federalism in the EU. The author navigates the intricacies of EU criminal law, and at each step of his analysis draws an interesting comparison with the parallel developments of the US system. The purpose of this comparison is to show us the main differences and similarities, thus indicating how, sometimes, similar problems may be addressed in a similar way. The analysis is rigorous and detailed, and it strikingly demonstrates that many features of the process of EU integration, which has often been depicted as *sui generis*, are simply not unique at all. It also clarifies that horizontal federalism has its assets and pitfalls. Although mechanisms like the European Arrest Warrant (EAW) and the *ne bis in idem* rule (or double jeopardy clause) are flexible enough and allow protecting individual rights in cross-border cases, individuals have no direct access to the ECJ. Far from suggesting that the direction of the EU model should be the same as the US model, the book does not hide its normative undercurrent. Its aim, in fact, is to point out that the need to protect the financial interests of the EU has become more urgent following the sovereign debt crisis and vertical federalism should be enhanced, for example by introducing the European Public Prosecutor’s Office, as indicated in the Treaty of Lisbon – hence the call for more vertical federalism.

The book has five chapters, addressing key elements of EU criminal law: a historical overview from the origins to the Treaty of Lisbon, the federal elements of criminal law, fundamental rights, and the sovereign debt crisis. In doing so, the book essentially follows the approach of the main federalist theories on the nature of the EU, according to which the EU is characterized by “dual government, dual sovereignty, and also dual citizenship” (Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law*, 2009; See also e.g. Lenaerts, “Federalism: Essential concepts in evolution – The case of the European Union”, 21 Fordham ILJ). The emergence of federalism gives rise to core interests that are essential for the survival of the EU. Vertical and horizontal federalism develop precisely to ensure the protection of those interests. From this perspective, the principle of mutual recognition in criminal matters, which has been for a long time the cornerstone of EU criminal law, is considered a form of horizontal federalism, not unlike the Full Faith and Credit Clause in the US. Both principles ensure the free movement of judicial decisions across the States. However, the Full Faith and Credit Clause does not pursue the aim of criminalizing specific interstate conducts and does not achieve the same degree of horizontal federalism which can be observed in the principle of mutual recognition. Moreover, the most relevant interests of the EU are, inevitably, financial interests, as they ensure the existence of the EU itself. It is not by chance that the first initiatives in the field of criminal law were taken in relation to the EU financial interests. This is why the most evident source of genuine European criminal law is, according to the book, the power of the EU to adopt the necessary measures for the prevention of and fight against fraud affecting the financial interests of the EU (Art. 325 TFEU). For this purpose, Article 83(2) TFEU, which confers criminal law powers for the effective implementation of EU policies, is important not only because it follows Article 83(1) TFEU, relating to serious cross-border offences, but also because it supplements Article 325 TFEU. Once again, the author argues, a parallelism may be drawn with the US model, in which the Necessary and Proper Clause supplements US federal powers in combating fraud. This argument is interesting, as it implies that a distinction exists between interests related to the fight against cross-border offences, or “shared common interests”, on the one hand, and “inherently European interests” or “direct federal interests”, on
the other. In the first case, the legal basis would be found in the provisions on judicial cooperation, whereas in the second case the legal basis would be found in Article 83(2) and Article 325 TFEU. In this regard, it must be noted that, while the European Commission’s draft Directive on the fight against fraud to the EU financial interests does not refer to Article 83(2) TFEU, but only to Article 325 TFEU as its legal basis, on the contrary the former provision, instead of the latter, was reintroduced in the European Parliament draft – for the reason that Article 83(2) TFEU is considered lex specialis.

Indeed, as indicated earlier, the author argues that the recent financial crisis has provided further incentives to develop a genuine European criminal law, not only through the Directive on the fight against fraud to the EU’s financial interests, but also through the Regulation establishing a European Public Prosecutor’s Office, pursuant to Article 86 TFEU. In other words, the EU should combine strict vertical federalism as regards “inherently European interests” and a more relaxed horizontal federalism as regards “shared common interests”. The EU should legislate more strictly in those areas which deserve “federal protection”, thus avoiding posing a threat to national identity and remedying the flaws of the US overly expansive model of criminal law. Instead, contrary to the author’s recommendations, the open-ended nature of the catalogue of offences enumerated in Article 83(1) TFEU encourages the expansive trend of the EU approach to criminal law. The author also perceptively claims that horizontal federalism compromises State sovereignty more deeply than vertical federalism, for example obliging Member States to follow EU standards even in local cases having no transnational dimension. He concludes, at the same time, that Member States cannot be trusted to ensure a proper use of the EU funds and more supervision and enforcement against misappropriation or mismanagement of EU funds should take place at the EU level.

While the book’s effort should be praised, as it promotes further dialogue between criminal lawyers and constitutional/EU lawyers, the case for the federal dimension of EU criminal law is not always clearly made. For example, whilst arguing that the EU is not a federal State, it also claims that it is a “sui generis system that, to a certain extent, is more federal than the US system”. It ignores other approaches to the EU phenomenon, such as those emphasizing the international cooperation dimension, or the heterarchical dimension. Moreover, it leaves out relevant links between EU criminal law and citizenship and fundamental rights, or EU criminal law and the internal market more generally, which – regardless of whether or not one adheres to the federalist view – explain many aspects of EU integration. The assumption seems to be that only one model of EU criminal law is worth promoting, and other options are marginalized. In particular, the post-Melloni case law shows that the EU system has more facets than those indicated. The comparison with the US federal system may also at times look forced, considering that the checks and balances rules do not exist in the EU or function in a very different way. Nevertheless, the book deserves a lot of attention for its insight and novelty, especially from those constitutional/EU lawyers who are not yet fully aware of this branch of EU law.

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