

EUROPEAN FEDERAL CRIMINAL LAW

The Federal Dimension
of EU Criminal Law

Carlos GÓMEZ-JARA DÍEZ



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Dedicated to my son Máximo

PREFACE

There is no United States of Europe. There is no federal criminal law of the United States of Europe. This should be clear from the beginning. This book is not about trying to convince the reader of the existence of such institutions. The EU has not (yet) evolved into a federal state; and it may never turn into such a structure. Nevertheless, the development of the various treaties signals without a doubt a tendency towards federalism. Federalism has many faces, and so does federal criminal law. This book aims to shed some light into the federal nature of the current system of EU criminal law. In fact it will be argued that some EU institutions of criminal law are more “federal” than their counterparts in consolidated federal systems.

In this sense, the following pages must begin with a fair warning: the more the European discussion is reluctant to acknowledge the federal dimension contained in certain criminal law related institutions, the more the dangers embedded in the nature of federal criminal law are likely to appear and spread all over. An adamant recognition from the outset that the EU has similar problems to the ones faced by federal states will enable a better and more reasonable solution to these problems. Stressing the need for harmonization curtails the legitimate reasons of Member States for diverging national regulations; the lack of emphasis in a centralized EU system of criminal law protecting intrinsic EU interests deprives the EU of legitimate resources of law enforcement.

To be sure, the current system is at the same time too federal and not federal enough. It is too federal because certain institutions such as the EAW do not provide the necessary space for national diversity so that the national idiosyncrasy cannot be taken into account in such “intimate” fields as murder. It is not federal enough because the EU cannot by itself protect its own financial interests; Member States’ law enforcement authorities are supposed to provide that service. To the same extent that national authorities feel threatened by Brussels in traditional fields of criminal law, the EU feels threatened by the lack of enforcement by national authorities. Would not it be more reasonable for each of them to “take care of their own business”?

As the pages of this book were being written, the European Union was experiencing an age of turbulence. The turmoil caused by the financial crisis and the European debt crisis has questioned the true nature of the EU. In the face of a potential disintegration of the eurozone, a tendency towards integration and

sovereignty transfer to Brussels can be observed. This has not gone unnoticed or unquestioned. The EU is currently resorting to criminal law with the aim of protecting its financial interests. A Directive imposing criminal sanctions for market abuse or a Regulation establishing the European Public Prosecutor's Office are concepts that, prior to the crisis, seemed a distant future. In a way, the time has come for a substantial change in the area of European criminal law.

Additionally, the strong opposition of the UK to the Commission's newly appointed Jean-Claude Juncker on the grounds of the latter being an "arch-federalist" also shows that the federal debate is becoming more and more palatable in the political EU scene. The sheer fact of Prime Minister Cameron warning that if Juncker was elected the UK would opt out of the EU shows the nature of the controversy. It seems reasonable to conclude that under Juncker, the federal dimension of the EU will grow stronger. And this should have a notable impact on the conformation of European federal criminal law.

It might come as a surprise that the former European Commissioner in charge of Justice, Consumers and Gender Equality, Viviane Reding, relied on federal terms to justify the Proposal for establishing the European Public Prosecutor's Office in 2013: she noted that "A federal budget needs *federal protection*". The newly appointed European Commissioner for the same area, Věra Jourov, clearly signaled that she would continue the path initiated by Reding: "My main priorities are the European Public Prosecutor's Office (EPPO) and EU data protection". Though the debate is far from over, a tendency towards acknowledging the importance of federalism in the criminal law debate seems to be consolidating.

This book has two different goals: first, to convince the reader of the existence of certain federalizing elements in the current system of European criminal law; second, to provide certain guidelines for future action that, while acknowledging these federal elements, try to avoid the mistakes of the past. To achieve both aims, a comparative law approach is deployed. The US system of federal criminal law is one of the longest-standing and most effective systems in world. At the same time, it is polluted with unfairness and contradictions that ultimately lead to overcriminalization. The EU is clearly at risk of making the same mistakes and producing an inconsistent and unfair system of federalized criminal law like the American one. The longer it takes to recognize these federalizing elements, the greater the danger.

The book does not exhaustively review the various institutions of EU criminal law. Nor does it contain a detailed explanation of the institutions present in US federal criminal law. The learned reader will be rapidly aware of the deficiencies of this work from a purely European or American criminal law approach. A compromise has been reached in order to signal the core argument: the federalizing elements in certain institutions of EU criminal law. To be sure,

the easy response is to deny that the EU is a federal state and that there is no such thing as European federal criminal law. But if the underlying rationale behind certain EU institutions of criminal law resemble their American counterparts, would not it be more reasonable to finally acknowledge that the EU is slowly but steadily federalizing criminal law and that the grave dangers of over-expansive criminal law federalization should be taken into account?

ACKNOWLEDGEMENTS

This book is the result of over a decade of valuable discussions with many individuals. Coinciding with the debate over the “Constitution for Europe” I published my first paper in Spanish on European federal criminal law in 2004, many academics were reluctant to acknowledge any value to the comparison with the US system of federal criminal law. However, I would like to express my gratitude to some of the first people in Spain that took the comparison seriously into account – even if it was in the form of harsh criticism: Manuel Cancio Meliá, Jesús-María Silva Sánchez, Miguel Bajo Fernández and Adán Nieto Martín.

My stay at Columbia University brought me the opportunity to discuss much of the key findings of this book with one of the major experts in US federal criminal law: Daniel C. Richman. Noting the resemblances and divergences between the two systems provided a considerable amount of value to the overall goal. Also, having a close account of how the US system works thanks to conversations and discussions with Hon. Judge Jed. S. Rakoff proved to be extremely enriching. My subsequent practice in federal litigation certainly added some interesting perspectives.

This book would have never seen the light without the great efforts and assistance of Nathan S. Wilson. Not only did he review and edit much of the content, but he also introduced much more than what can be expected from a research assistant. His keen sense of legal reasoning and his outstanding research skills made it possible to navigate through the tangled mess of comparative law.

Last but not least, I wish to express my sincere gratitude to Intersentia for accepting this book in their prestigious series. Though the initial version of this work dates from 2013, the (then) imminent approval of new European legislation that could impact its content cautioned some delay.

Madrid, 1 April 2015

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FINDINGS

Time is a scarce resource. It pays to outline for the quick reader some of the findings resulting from the comparative law analysis conducted in this book:

1. The EU is not a federal state, yet it has the same problems as if it were. The federal nature of the EU is heavily debated, but, at least from a criminal law perspective, the EU is dealing with the problems associate with criminal law in a similar fashion as most federal states.
2. These common problems could be synthesized as follows: (i) how to protect the Unions' genuine interests; (ii) how to address serious interstate criminality; (iii) how to enforce the Unions' policies; and (iv) how to ensure equal protection of fundamental rights. In order to address this common problem, the US has resorted to vertical federalism, while the EU has resorted to horizontal federalism.
3. As a consequence, the US system of criminal justice shows a high degree of vertical federalism and lower degree of horizontal federalism. The EU system of criminal justice shows a high degree of horizontal federalism and a low degree of vertical federalism.
4. There is a power struggle between the Unions' government and state sovereignty. In the US case, this debate has been shaped by the Tenth Amendment of the US Constitution (the anti-commandeering clause) which resembles Article 4(2) TFEU.
5. Interstate commerce has fostered US vertical federal criminal law through the commerce clause of the US Constitution. The internal market has fostered EU horizontal federal criminal law through the principle of mutual recognition.
6. The technical equivalent of the EU principle of mutual recognition is the US Full and Faith and Credit Clause. The US concept has little impact in the field of criminal law while the EU counterpart has triggered an array of EU criminal legislation. This is probably due to the fact that the EU principle of mutual recognition has its origin in the internal market, while the US Full Faith and Credit Clause has no connection to interstate commerce.

7. Both Unions have a tendency to address matters concerning interstate criminality through federal criminal law (vertically in the US and horizontally in the EU). The greatest dangers of overfederalization are located at this level.
8. The list of criminal matters in which the EU has expressly conferred (horizontal) powers, i.e. Article 83(1) first paragraph TFEU, are all addressed by US (vertical) federal criminal law. The criterion for enriching that list, i.e. serious cross-border criminality, has triggered abundant criminal legislation in US federal criminal law. The expansive nature of this criteria forecasts more future EU criminal legislative action in those areas.
9. The US Necessary and Proper Clause has its EU counterpart in criminal matters in Article 83(2) TFEU. Experience shows that when the conferred powers in criminal law matters are not evident, the Unions resort to this clause to legitimate (vertical/horizontal) federal action.
10. The first proposed federal criminal laws in both Unions are related to protecting the Unions' financial interests: the Revenue Fraud Act of 1789 in the US and the proposed Directives to protect the financial interests of the EU. Though the US proposal was quickly adopted, the EU proposal was not enacted and it has recently been readdressed.
11. The debt crises triggered in both Unions an acute awareness of the need to use federal criminal law to protect the interests of the Unions. The protection of taxpayers' monies raises awareness at the federal level in both Unions.
12. The greater degree of horizontal criminal law federalism in the EU allows less national diversity in criminal matters compared to the uniform law mechanisms of the US system of criminal justice.
13. The greater degree of horizontal criminal law federalism in the EU provides fewer opportunities for individuals to question the extent of (horizontal) federal legislation in the EU. Direct access to the federal jurisdiction in the US enables citizens to question the degree of criminal law federalization.
14. The greater degree of horizontal criminal law federalism in the EU has created the mechanism of the European Arrest Warrant which is more federal than the US mechanism of interstate rendition.
15. The greater degree of horizontal criminal law federalism in the EU provides greater protection in cross-border cases than in the US. Article 54 of the Schengen Treaty establishes a prohibition on double jeopardy in cases that the US may prosecute under the dual sovereignty exception.

16. The greater degree of horizontal criminal law federalism in the EU forces EU Member States to reform their national legislation, while the US equivalent, i.e. uniform law and interstate compacts, is voluntary rather than mandatory.
17. The federalization of fundamental rights has taken place in the EU through similar mechanisms as the ones deployed in the US: incorporation of rights through the case law of the ECtHR and ECJ. Future development of this tendency will greatly depend upon the terms of the EU accession to the ECHR.
18. The current development of EU criminal law concerning fundamental rights, though, shows a horizontal federalism mechanism which has little resemblance in its US counterpart: directives harmonizing fundamental rights. Some of them are already in place and some are currently under discussion.
19. The sovereign debt crisis has stressed the importance of EU criminal law in protecting the financial interests of the EU. Since the beginning of the crisis, the EU has been keenly aware of the need to set up a system that effectively protects taxpayers' monies.
20. The European Public Prosecutor's Office will constitute the landmark institution in the protection of EU financial interests. The current debate among EU institutions and Member States shows a reluctance to fully deploy the mechanism available in the Lisbon Treaty.
21. There is a perceived need to foster the vertical federalism approach to ensure effective enforcement of EU legislation protecting the EU financial interests. As the crisis wanes, the current tendencies support horizontal federalism solutions in which Member States retain considerable control over the enforcement of such legislation.