COMMON MARKET LAW REVIEW

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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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Establishment and Aims

The Common Market Law Review was established in 1963 in cooperation with the British Institute of International and Comparative Law and the Europa Instituut of the University of Leyden.The Common Market Law Review is designed to function as a medium for the understanding and analysis of European Union Law, and for the dissemination of legal thinking on all matters of European Union Law. It aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

Editorial policy

The editors will consider for publication manuscripts by contributors from any country. Articles will be subjected to a review procedure. The author should ensure that the significance of the contribution will be apparent also to readers outside the specific expertise. Special terms and abbreviations should be clearly defined in the text or notes. Accepted manuscripts will be edited, if necessary, to improve the general effectiveness of communication. If editing should be extensive, with a consequent danger of altering the meaning, the manuscript will be returned to the author for approval before type is set.

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Manuscripts should be submitted together with a covering letter to the Managing Editor. They must be accompanied by written assurance that the article has not been published, submitted or accepted elsewhere. The author will be notified of acceptance, rejection or need for revision within three to nine weeks. Digital submissions are welcomed. Articles should preferably be no longer than 28 pages (approx. 9,000 words). Annotations should be no longer than 10 pages (approx. 3,000 words). Details concerning submission and the review process can be found on the journal's website http://www.kluwerlawonline.com/toc.php?pubcode=COLA

Jannemieke Ouwerkerk, Judit Altena, Jacob Öberg and Samuli Miettinen (Eds.), *The Future of EU Criminal Justice Policy and Practice: Legal and Criminological Perspectives*. Boston/Leiden: Brill/Nijhoff, 2019. xiv + 262 pages. ISBN: 9789004367364. EUR 165.

This book, the inaugural volume in a new European Criminal Justice Series published by Brill/Nijhoff, represents a courageous and innovative first step toward a new interdisciplinary approach to shaping future European criminal law policies and procedures. To date, European criminal law has played an ancillary role *vis-à-vis* the Member States' national criminal law systems. But, now that it has achieved a certain level of maturity, EU criminal law policies and procedures must be considered on their own, which demands a new, rigorous scientific debate on the topic. The editors and authors of this book, criminal lawyers and criminologists, have eagerly waded into this new approach, with several chapters enthusiastically inviting legal scholars, policy makers, and practitioners to reflect – collectively – on the future of European criminal policies and procedures from an interdisciplinary perspective.

The book's general aim is, first, to critically analyse the past use of (or lack of) evidence-based policies in European criminal law policies and procedures and, second, to provide initial comments on, and suggest potential approaches to, the future of evidence-based policies in post-Lisbon EU criminal law. Indeed, the book's intriguing research questions are already outlined in its introduction, essentially asking: (a) to what extent is empirical evidence required to justify new EU legislation in the area of criminal law; and (b) what evidence is needed to justify such EU legislative intervention? The editors and contributors acknowledge that it is premature to offer solid answers to those questions, as they recognize that the debate is still in its infancy. Rather, the obvious hope is that this book will both stimulate and inform research, as well as policies and procedures, in the coming years. Indeed, future research will find this book to be an interesting and provocative source of inspiration.

The book's various chapters adroitly meld the different perspectives of their individual authors into a mosaic on the topic of European criminal law policies and procedures. In its first part, the book critically examines criminalization and decriminalization. With respect to the former, Peršak, in particular, expertly analyses several EU laws and other official documents in a desperate search for criminalization principles that support existing EU criminal law policies. Her quest leads to the disheartening conclusion that the so-called harm principle – an Anglo-American concept that has traditionally reigned over their respective criminalization processes – is, at best, inconsistently applied when it comes to EU-derived criminalization choices. In particular, she correctly observes that the very concept of "harm" – as that term is typically understood in the philosophy of criminal law in the light of *ultima ratio* – is not incorporated. Rather, she demonstrates how Article 83(2) TFEU proves that the latter concept of harm is unfortunately, and inextricably, linked to the effective implementation of EU policies instead of the actual harm to society at large or to the individuals. Moreover, she shows that the latter concept also ignores *Rechtsgut*, a common theory developed by German scholars and widely accepted in continental systems which theorizes that only the most select, prominent legal interests deserve criminal protection. She concludes with reflections on the need to develop an autonomous "European" harm principle or, perhaps, a "European *Rechtsgut* theory".

When addressing philosophy of law and cognitive approaches to criminal legislation, Cleiren and Ten Voorde rely on several Dutch cases to demonstrate how national criminal law historically developed to protect specific legal interests. They note that, when EU law

intervenes (i.e., it requires or authorizes the criminalization of certain conduct), the underlying legal interest being protected by that EU law might not correspond to the one initially identified by national legislatures, particularly when the EU input focuses on pre-existing criminal offences. National courts, they conclude, are thus forced to adopt flexible approaches to accommodate EU-derived legal interests without breaching their own duties.

Similarly, Ouwerkerk first acknowledges the importance of an evidence-based approach to criminal law policies and procedures before posing an important question: what exactly needs to be based on evidence to justify new EU substantive criminal law legislation? Impact assessments have been used as *ex ante* mechanisms to foster better regulation. However, in terms of empirical evidence, no common approach can be identified on what aspects of the specific criminal law initiative should be based on evidence. She also notes that a European-level articulation of public wrong is not easily reconcilable with the functional objective that underlies EU power to criminalize behaviour. Ouwerkerk's remarks find an echo in the subsequent chapter in the same part authored by Harding and Gutierrez. Their contribution focuses on the impact of EU criminal law legislation in both the UK and Poland and acknowledges the need for such an evidence-based approach. It further demonstrates the inordinate difficulty in obtaining such evidence.

In apparent recognition of newness of the combination of topics traditionally assigned to criminal law and the criminal procedures linked thereto and topics typically perceived as criminological, the editors, as mentioned in the book's introduction, subjected the book's contents to rigorous peer review before its publication. Thus, it is particularly striking that such peer review appears to have left untouched Buisman's suggestion that breaches of sales contracts should be criminalized at a supranational level. Buisman's dubious proposition is made without any reference to basic principles of criminal law (e.g., the harm principle or the *Rechtsgut* theory, both of which are highly scrutinized in the book's other chapters). Moreover, Buisman's sole focus is on the effectiveness of EU policies as a rationale for further criminalization. As such, it seemingly discounts the long and painful history of trying to separate criminal law from breaches of civil law concepts. His suggestion calls to mind the debtors' prisons made famous in Charles Dickens's novels!

Mitsilegas, on the other hand, in his contribution on decriminalization, observes that the constitutionalization of the Charter of Fundamental Rights provides myriad opportunities and impetus for setting strict parameters for the criminalization of any behaviour. Focusing on decriminalization, and in sharp contrast to Buisman, he suggests that any shift in the focus of European criminal law policies and procedures should result in the Commission systematically considering potential decriminalization at every opportunity, not just as method of eliminating hindrances to EU law enforcement, but as a form of compliance with the fundamental rights protected by the Charter and other EU documents.

In the second part of the book, different chapters examine the "quality" of current EU criminal law. On the one hand, Geelhoed, in an engaging exposé, applies cognitive science theories – relying mostly on Aristotelian categorization, Wittgenstein's family resemblance, and Eleanor Rosch's prototype theory – to shed light on the complex offence of fraud affecting the Union's budget, which represents the very heart of the material scope of the future European Prosecutor. He poignantly describes the amorphous nature and lack of detail imbued in the EU's so-called PIF Directive (2017/1371), which can only make its implementation more difficult, if not impossible. He also draws the reader's attention to, and warns of, the far-from-ideal consequences of the prosecutorial discretion that inexorably results from the lack of precision in EU criminal legislation. Lima, on the other hand, uses her bully pulpit to criticize the lack of a precise definition of the basic elements of "organization" and "participation" in the EU's initiatives related to organized crime. According to her, by adopting a predominantly financial understanding of the concept of participation, the EU's approach leaves its respect of the rule of law in doubt, particularly with respect to its very strict interpretation of the principle of legality in criminal matters.

Finally, the third part of the book discusses the criminological perspective. Tilley's chapter on the role of regulation and research regarding crime prevention is highly accessible to all

readers and will be equally appreciated by experts and novices in criminology and empirical research. He emphasizes the importance of the context in which crime occurs and how altering the immediate situation in ways that make it less conducive to criminal behaviour is effective in reducing crime. As an example, he recalls Hans Rosling who highlights the exacerbating role EU regulation played in the tragic drowning of numerous Syrian refugees because its regulations obliged airlines to bear the cost of returning customers to their original place of departure if they lacked proper entry documentation. Tilley highlights how EU administrative regulation "can inadvertently create crime opportunities".

While the book, as a whole, is an excellent first attempt at addressing EU criminal law issues in an interdisciplinary manner, it demonstrates the shocking lack of relevant empirical data. In his chapter, Elholm asserts that the development of EU criminal law has led to an increase of repression; based on the data available to him, he concludes that EU law has criminalized previously licit behaviour and resulted in a significant rise in criminal sanctions. His statements, however, lack corroboration across the EU – a fact that he himself recognizes! – because there is a lack of similar assessments despite the obvious need therefor and importance thereof. One can only hope that Elholm's finding in this book will incite others to make such assessments in other Member States (his study only covers northern European countries), backed by rigorous empirical research.

Finally, in the book's last chapter, Öberg reviews past and present of European criminal procedure and makes an eloquent plea for additional, evidence-based research in this important area. In that regard, he questions how the EU has exercised its competence in the field of criminal procedure thus far, in particular in relation to victims' and defence rights. He suggests that it may have failed to respect the limits of its authority enshrined in Article 82(2) TFEU (i.e., any measure it adopts should facilitate mutual trust or present a cross-border dimension).

This provocative inaugural volume in Brill/Nijhoff's new series, published under the conscientious direction of several highly respected scholars from different legal backgrounds, provides a ground-breaking and compelling read on a number of under-researched areas of EU criminal law that persuasively encourages both EU criminal law experts and criminologists to examine further. The magnitude of the challenges this book brings to light is evident: some of the very principles on which current EU criminal law is based fly in the face of many of founding principles of criminal law and negatively affect human rights! The harsh and resounding clash of principles and rights – so eloquently demonstrated in the pages of this volume – demands further, in-depth analysis of the issues at stake, particularly in the EU's multilevel legal order. Largely ignored in the current literature, they must command our attention; as this book demonstrates, it is high time for legal and criminological perspectives on criminal law policies and procedures to come together to better shape future initiatives in the field.

Silvia Allegrezza
Luxembourg

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