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THE CONSTITUTION AND THE CRIMINAL CODE OF UKRAINE: CORRELATION AND INTERACTION

This article is an attempt to make the frame analysis of the interaction between the Criminal Code and the Constitution of Ukraine. The author gives grounds for the presence of heterogeneous code in their communication. The new ways of understanding the principles of «ne bis in idem», «nullum crimen nullum poena sine lege» and the presumption of innocence with regard to the frame-based approaches are proposed in this article.

***Keywords**: frame analysis, the Criminal Code, the Constitution, «ne bis in idem», «nullum crimen nullum poena sine lege», the presumption of innocence.*

It is obvious that the Constitution and the Criminal Code of Ukraine have a whole front of interinfluence which is deployed in a particular format. However to set the conceptualization for this research it seems possible to identify some basic coordinates on this front.

First of all I would like to point out that in modern social studies it is very topical to refer to the so-called frame analysis (derives from «framing» – to establish a framework, and «to frame» – to choose certain aspects of reality, making them more visible in the communication context). Thus the main interest is to find out the format of interaction between the studied phenomena, the «fitness» of their existence in terms of communication when the content is revealed being implicated in a stable format of certain interinfluence.

From this point of view the attempt to perform the frame analysis of the constitutional and criminal «dialog», the «conversation» between the Criminal Code and the Constitution requires to find the answer to the question on what communicative code such communication has: a heterogeneous or a homogeneous one.

Traditionally we are used to the fact that the Criminal Code is a space fully saturated with quotations from the Constitution and that the aesthetics of their interaction is built on this over-citation; we perceive the Criminal Code to some extent as a set of constitutional quotes, as a certain «continuation» of the Constitution, and we consider that both the Criminal Code and the Constitution are «speaking» the same language, there is even a statement that «the Criminal Code is the Constitution with sanctions»[1].

At the same time, if to add a diachronic dimension to this understanding, we see that there is a contradiction laid in the interaction between the Criminal Code and the Constitution and it is associated with the nature of their development, with their code of «communication» being heterogeneous. If criminal law is the embodiment, the personification of authority, its clearest manifestation where the State declares its monopoly on violence, the constitution is historically emerged as a limiter of this power. It is designed to introduce the authority in certain limits, to prevent its overgrowth or usurpation, to organize social life in such way that it is able to protect the society from the tyranny of the State, to make the State be in service of the society. These are the two identities which seem to contradict each other, but at the same time they are linked into a single hard knot.

The authority and the influence operate when the power has its «embodiment»; the power should affect, otherwise it is not power. The authority should always be effective. It is obvious that the rights and freedoms can not completely wipe out the violence and coercion from the arsenal of the power. Still they can put them in the certain frames beyond which they can not get out. From this perspective the Constitution is a hypertext that is plaited into the Criminal Code between the lines and which determines the scope for possible expansion of the power hid-

[1] Туляков В. А. Генезис уголовного права и диалектика рекодификации / В. А. Туляков // Правове життя сучасної України : матер. Міжнар. наук. конф. проф.-викл. складу (Одеса, 20–21 квітня 2012 р.). Т. 2 / відп. за випуск д.ю.н., проф. В. М. Дрьомін ; Націон. ун-т «Одеська юридична академія». – Одеса : Фенікс, 2012. – С. 212.

den in the Criminal Code and each time forces to weigh the possibility of using the violence and its direct application.

And here we come to the analysis of the extremely important intention of the modern law development, namely to finding a balance between natural and positive aspects in it.

Apparently the said «authoritativeness» and «efficiency» of law stands on the normative foundation (normativeness is a «footing» of the law), but the so called landscape – that is the environment in which such architectural structure must be inscribed – is the «natural» basis of law. The architecture is fairly autonomous but at the same time it can not exist without the landscape, therefore the architecture and the landscape compose the modern geography of the criminal law. Imaginary polarity of positive and natural law are only an artificial opposition for the purpose of greater prominence.

It is well known that Bodin, Locke, Spinoza and other thinkers of XVII–XVIII centuries formed the idea of social contract when the doctrine of the contract was extended to not then yet so called public law sphere; the doctrine made it more positive and turned it into sphere of coordination of social wills, the sphere of social in law. Thus historically the first conceptualization of distribution between private and public law belongs namely to the school of natural law. This deep comprehension of the genesis of these areas leads to an understanding that the public law turned out to be a kind of «superstructure» established by a public authority over private law for a purpose of its rational correction. Therefore the emersion of private elements in the modern public law area is a genetically directed act which only emphasizes that a strict division of these areas is impossible and that a contemporary blurring of boundaries between the public and the private in the continental legal tradition is nothing but a result of active convergence of modern world legal systems.

The public sphere as a social contract which is open to signing and the terms of which are subject to change – that is the frame that induces the current interaction between the Constitution and the Criminal Code.

In these crisis times of reviewing the social contract we often recall Cicero: «Inter arma leges silent». This is especially true for the public sphere, as objects of private-law regulation are more «natural» i.e. are given directly to people and do not disappear with the elimination of institutions of public authority (trade turnover does not disappear during periods of public breaks), while the objects of public-law regulation are largely a result of socio-powerful design and in this sense are «artificial» and given to its recipients only indirectly – through the institutions of public authority, and thus disappear with their liquidation[2].

It means that in times of a public contract the constant of the public law faces a devastating impact; the weak government institutions are trying to demonstrate their own strength enhancing the criminal legal instruments, shifting the constitutional frames that protect «normal» functioning of public entities. And the political compromise comes on stage; it is a notorious expedience which fills the vacuum left by the public law during the periods of social break. In turn the main positive role of such social revolutions is the birth of new constitutions with new paradigm followed by the new criminal codes that, as a marker, highlight the most important values in renewed society and form the core of a new version of the social contract. In other words it might be paradoxically but such situations cause changes in the law, it somehow tries to find answers to new challenges, offer new models of settlement of conflicts and in this reflection between changes and «stability matrix» of the law, including criminal one, discovers its new identity (which is always the reflection between changes and a constant) for the next quite long period of time (until new social shift) ensuring acceptable effective regulation.

[2] Михайлов А. М. Проблема деления права на частное и публичное: мифы и реальность / А. М. Михайлов // Теория и история государства и права. – 2015. – № 1. – С. 92.

Following the aforesaid in terms of constitutional reform and the search for an updated model of domestic criminal law, capable in the very pragmatic sense to protect constitutional values, it is necessary to re-think the issue on how these values are stratified and how the priorities in establishing vectors of criminal protection and regulation are placed. From this point of view it seems essential to remind the provision of Art. 3 of the Constitution of Ukraine stating that «a human's life and health, honor and dignity, inviolability and security are recognized as the highest social value in Ukraine.» This «trite» constitutional quotation can get a new breath within the criminal law dimension, if a new criminal law policy will be actually aimed at implementing humanistic values. How exactly this humanism in criminal law can be displayed? Definitely, first of all, it can be implemented by axiological «equalization» of the victim of crime with other members of the criminal law relations, providing him/her full membership in such relations which aims to provide compensation and restore his/her rights by relying on the perpetrator not only the obligation to bear liability to the State, but also to feel the effects of other means of responding to crime that stand next to the criminal liability and are aimed at legal ensuring the rights and freedoms of the victim.

Such frame and format of the existence of criminal law relations should provide the change of the concept of role dispositions of its participants. It has to lead to changes in the content of such relations, to expand the object because of which these relations are formed and to offer alternative means to respond to crime that eventually, one way or another, aim at comprehensive protection of fundamental constitutional values. Considering the above it is necessary to re-think the «ne bis in idem» principle (i.e. «No one shall be brought twice to legal liability of the same type for the same offense») set forth in Art. 61 of the Constitution and its application in the context of criminal law regulation.

No less important provision is the principle of the prohibition to apply analogy in criminal law, provided by p. 4. Art. 3 of the Criminal Code of Ukraine. In modern law science the discussion about the analogy as a mean of overcoming the

legal gaps is now enhanced. S. P. Pohrebniak when deeply researching this issue is persisting in opinion that the application of analogy can be even called as the prototype of using the principle of equality since the use of analogy is built on the concept of internal coherence of the law and on the presumption of coherence of the legislator: if the legislator had foreseen this case, he would have prescribed the regulation for it in the same way as he has already regulated the similar cases (what is equal or substantially equal must be treated equally in legal aspect).

At the same time such use of analogy is possible only if there is no impassable gap. The gap can be recognized as impassable when we are talking about possible significant limitation of the rights and freedoms of citizens resulting in application of such analogy. With that said the rules of public law can not be applied by analogy because in this case the balance in application of law can be met only in case of due functioning of the fundamental principle of legal certainty which becomes extremely important and of high price in terms of the possible use of the sharpest measures of state coercion to the person. From this perspective the observance of the «nullum crimen nullum poena sine lege» principle of criminal law fully complies with the requirements of Art. 19 of the Constitution of Ukraine, according to which «the legal order in Ukraine is based on the principles according to which no one can be forced to do something that is not required by law» (p. 1 Art. 19 of the Constitution of Ukraine)[3].

Following the aforesaid the issues on determining the interaction frames of the Criminal Code, the Constitution and the Convention for the Protection of Human Rights and Fundamental Freedoms seems to be scientifically attractive, as Art. 7 «No punishment without law» of the above Convention states that «No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at

[3] Погребняк С. П. Прогалини в законодавстві та засоби їх подолання [Текст] / С. П. Погребняк // Вісник Академії правових наук України : зб. наук. пр. / Нац. акад. прав. наук України. – Х. : Право, 2013. – № 1(72). – С. 47–49.

the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed»; meanwhile, p. 2 of this Article contains the exception to the principle of «no punishment without law» and stipulates that this principle «shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations». According to P.-A. Albrecht this requirement was included in the Convention to «treat the disease» of anti-democratic regimes and punish the «criminality enhanced by the State», and it is an extremely important example of direct application of the principles of law. It seems that the issue of future responsibility of those responsible for unleashing the war in the East of Ukraine should be «framed» with respect to the above provisions of p. 2 Art. 7 of the Convention.

And finally, another very important «footing» is a issue of the presumption of innocence as one of the cornerstones on which a connection between the Constitution and the Criminal Code of Ukraine is built (Art. 62 of the Constitution, p. 2 Art. 2 of the Criminal Code), and the understanding of the role play of this constitutional principle in modern criminal law.

Today we can often hear the slogan that narrowing the scope of the presumption of innocence in the criminal law and supplying it with the presumption of guilt in respect of certain crimes, such as corruption, shall lead to loosening of the constitutional foundations of the criminal law and the statutes.

If to consider this situation from the frame's point of view we have to remember that the Criminal Code and the Constitution have heterogeneous code of communication, i.e. they create a communicative circle in which different in its natural course vectors of influence face each other: a state authority trying to demonstrate its own power and efficiency in strict subordinate format and a frame that limits it, outlining the possible impact area. And this perspective reminds us that the presumption of innocence is intended to first of all protect the ordinary citizen from the tyranny of the State while the person who acts on behalf of the State and

embodies the State's authority in its activity must meet severe requirements that are able to limit its ability to step out of line; and this approach fully complies with the purposes of the Constitution. That is why the presumption of innocence remains valid and supplementing it in the Criminal Code with the presumption of guilt applied to certain state agents shall only contribute to the implementation of the constitutional functions.

Харитонова О. В. Конституція та Кримінальний кодекс України: співвідношення та взаємозв'язок

У статті здійснюється спроба фрейм-аналізу взаємодії Кримінального Кодексу та Конституції України. Обґрунтовується наявність гетерогенного коду їхньої комунікації. Пропонуються нові шляхи осмислення принципів «ne bis in idem», «nullum crimen nullum poena sine lege» та презумпції невинуватості з урахуванням фрейм-підходів.

***Ключові слова**: фрейм-аналіз, Кримінальний кодекс, Конституція, «ne bis in idem», «nullum crimen nullum poena sine lege», презумпція невинуватості.*

Харитонова Е. В. Конституция и Уголовный кодекс Украины: соотношение и взаимосвязь

В статье осуществляется попытка фрейм-анализа взаимодействия Уголовного Кодекса и Конституции Украины. Обосновывается наличие гетерогенного кода их коммуникации. Предлагаются новые пути осмысления принципов «ne bis in idem», «nullum crimen nullum poena sine lege» и презумпции невиновности с учетом фрейм-подходов.

***Ключевые слова**: фрейм-анализ, Уголовный кодекс, Конституция, «ne bis in idem», «nullum crimen nullum poena sine lege», презумпция невиновности.*