

## A question on the state supremacy over the law: the context of reforming Ukraine's criminal legislation

DR. YEVEN SHEVCHENKO

DEPARTMENT OF CRIMINAL LAW I  
YAROSLAV MUDRYI NATIONAL LAW UNIVERSITY  
61024, PUSHKINSKA STR., 77  
KHARKIV, UKRAINE  
E-MAIL: KRIMLOWI@NULAU.EDU.UA

**Abstract:** This paper represents an observational discussion on the essence of Criminal law, in the context of contemporary views on the body and its inter-relations with the state. By choosing a specific case of a particular country (Ukraine), this paper confirms that the academic debate on such a comprehensive subject can become as diverse as it can possibly be.

**Key words:** Law, Ukraine, Criminal law, state supremacy.

### INTRODUCTION

The very essence of law has been and remains the focus of modern legal and political thought. Even these days, conceptually, law could be considered one of the main categories not only within general theorising in the broad field that quasi-unifies philosophy and jurisprudence, but also an important subject of research in a high number of other academic disciplines. This is all due to the fact that the correct understanding of law, its essentiality as well as its direct 'product' (i.e. legislation) assists in formulating a set of basic premises for objective interpretation of different social as well as normative aspects of every-day life. In a specific case of a particular country – for our special example, this country is chosen to be Ukraine – the debate on such a comprehensive subject can become as diverse as it can possibly be. Especially, when it comes to inter-relations between the state and the law in Ukraine, as argued by Tyushka, “right after coming to power, political elites strive to adjust the basic constitutional norms in a way providing them broader scope of authority and, respectively, better control of the oppositional powers”<sup>1</sup>. Perhaps, this argument indirectly supports a suggestion that “the post-independence history of the Ukrainian Constitution can be conceived as a history of discussions about the Constitution”<sup>2</sup>. However, such theorising has been directly linked to the country's Supreme Law, the Constitution, underlining its objectively unique place in the grand debate. What about some other bodies of law, for example Criminal law?

Generally, the scholarship on the topic underlines that the criminal law's meaning is essentially associated with the body's sectoral characteristics, defining it as “a system of legal rules (indeed, laws), adopted by the *Verkhovna Rada*<sup>3</sup> [...] that designate those socially dangerous acts are considered as crimes and what kind of punishment will be applied to the person who committed it”<sup>4</sup>, or as a “branch of law that integrates the legal rules, which determine the act as a crime and the punishment for it, and other measures of legal influence to be applied to the person who committed

<sup>1</sup> Tyushka, A. (2016). ‘From Constitutional Volatility to Constitutional Stability: Any Chance to Reconcile Constitutionalism and Power Struggle in Ukraine?’ in *Historia i Polityka*, 16 (23), pg. 58.

<sup>2</sup> Chaban, N. and Vernygora, V. (2010). ‘Ukraine's Constitutional ‘Saga’: Ukrainian Media Reflections of the Constitutional Profess’ in *Trames*, 14 (64/59), 3, pg. 228.

<sup>3</sup> The *Verkhovna Rada of Ukraine* is the country's unicameral parliament that is composed of 450 members (commonly known as deputies).

<sup>4</sup> Baulin, Y. et al. (2010). *Criminal Law of Ukraine: General Part. Textbook* (Kharkiv: Pravo), 4th edition, pg. 12.

it, while determining the grounds for criminal liability as well as exemption from criminal liability and punishment”<sup>5</sup>. At the same time, such definitions are justified precisely because of the questions relating to the criminal law, which is a form of its legislative expression: in accordance with Part 2 of Art. 1 of the country’s Criminal Code, “[it] determines which socially dangerous acts are crimes and which punishments are applied to the persons who committed those acts”<sup>6</sup>.

Such understandings of Criminal law (with a great deal of similar definitions that could be allocated in the field), despite certain differences, are unified by a highly important distinguishing feature – they all determine the relevant body of law mainly through the description of the institutions that form it, matching or even equating Criminal law with a criminal law (or a law on criminal liability). However, this approach was commonly accepted during the dominance of the so-called normative theory of law, but in was in the times when Ukraine was an integral part of the former Soviet Union. These days, it seems to be obsolete and insufficient in the process of clarifying the essence of Criminal law, especially in the context of contemporary views on the body and its inter-relations with the state. Arguably, such a **misleading discrepancy** represents an academic problem, and, considering the above, this paper attempts at **drawing attention to this issue in the light of modern views on legal thinking**. In addition, while taking into account the main vector of the general legal thought’s development – at least, in some foreseeable years to come – where there is a likelihood for the process to be leaning towards the creation of an integrative legal concept, one could see a certain logic in intertwining this general debate with **an observational discussion** on Criminal law as well. Not only such a drive is reinforced by an academic desire to participate in developing the theory of Criminal law, but the aforementioned discussion’s outcome should be of immense assistance for law-makers.

## I. OBSERVING THE DEBATE

Indeed, for most of the XX century, legal studies in Ukraine were based on a dogmatic interpretation of law (including the Criminal law), linking it to the set of rules and principles established by the ruling class. Without ‘dwelling’ too much on the socio-historic causes of this interpretation, it is worthwhile mentioning that it was connected with the following two factors. **On the one side**, there was an evident normative ‘visibility’ of the direct impact that the state-promoted communist ideology made on the correlation between the individual’s and the society’s interests, and, of course, on the state in itself that would always prevail over the former and the latter. **On the other side**, there was a centuries-long particular psychological ‘attachment’ to the phenomenon of faith that the Ukrainian people have always been known by. At first, it was a faith in higher powers; then – a faith in a good tsar, who will do everything in the right way; and, finally – a faith in the state that should help in realising or even realise any dream or desire.

However, since the collapse of the former Soviet Union and due to a number of fundamental changes in the country’s political, social and economic structures, the following features of the aforementioned dogmatic interpretation of law started being seriously questioned: **a)** the domination of one class over others in a modern society; **b)** the state-related origin of law as the phenomenon’s one and only origin; **c)** the supremacy of the state over law; **d)** the absolute level of sameness between law and the law.

---

<sup>5</sup> Naumov, A. ed. (1994). *Criminal Law of Russia. General Part* (Moscow: Jurist), pg. 10.

<sup>6</sup> *The Criminal Code of Ukraine*, current version with revisions on 11 January 2019. (2001). Accessible: <https://zakon.rada.gov.ua/laws/show/2341-14?lang=en>.

Without any intention to look down at the role that the old interpretation played in a certain period of the legal thought's development in Ukraine (some could argue that this role was significant), this paper underlines that the criticism of the previously dominating approach was not coincidental with the time when almost everything associated with past had been harshly criticised. Objectively, the critique was based on widespread societal disagreement with the doctrinised possibility for the legislator to continue being coupled with arbitrariness of the state, which essentially would continue following from the previous interpretation of law. Nor should one underestimate the change of ideological basis in the views on the state's predominant role over the society.

From the second half of the XX century, in the process of discussing the essence of law, the understanding of legal provisions and articles as 'cells' of law was criticized quite sharply as "narrow regulatory, normative, [and] positivist understanding of law"<sup>7</sup>. This critique was based on a fair reprimand of the inappropriateness of bringing law only to the texts of the laws, as this entails a separation from the practice of its implementation and diminishes (or does not sufficiently recognise) human rights and freedoms, as well as the moral principles of society.

Some of these scholarly comments are objectively relevant even today, in the sense that not only in the process of Criminal law enforcement, but also in theoretical doctrinal studies, there is still an existing tendency to be limited only to a range of comments on legal texts, without analysing any nature of their origin or societal perceptions on them. Indeed, the overwhelming majority of the provisions of the Criminal Code of Ukraine, migrating from one of its editions to another, are, so to speak, traditional, 'crafted' by centuries of history and, therefore, fully coincide with the notions of justice. However, recently, in the light of the actuality and its challenges, a range of new provisions are increasingly being introduced in the law – for example, the criminalization of extremist activity (Art. 110-1)<sup>8</sup>. The latter, in itself, while widely considered a dangerous phenomenon, however, due to the imperfection of legislative technique in describing it, as well as the appearance of notions like "social hatred" and "social affiliation", is perceived by society in a mixed way.

It is hard to counter-argue that the process of meticulous studying the actual texts of criminal legislation is one of the main stages of getting closer to the understanding of law. At the same time, the plain texts, being apart from the live social content, legal relationship-driven dynamics, guarantees for those texts to be implemented in reality, and without taking into account a degree of the society's legal consciousness as well as common traditions and law enforcement practices, do not assist much in preparation of substantiated proposals for the Criminal Code's improvement, not to mention that such a simplified approach can lead to a certain erosion of law and order. Therefore, treating the Criminal law (as well as any other law) merely as a 'conglomerate' of legal texts will not help in identifying the legal content of these acts, while 'drowning' in different requirements, declarations, and definitions. For example, how could one, being guided only by the text of the Criminal Code's Art. 2, Par. 1<sup>9</sup>, define the concepts and features of the "crime" outlining the legal grounds for criminal liability, or disclose the essence of the "criminal liability", or distinguish it from the "punishment"?

In addition, as it could be observed, the view on the legal texts as if they are "the state's order", which is one of the major postulates of normativism that links the regulatory function of law exclusively to the imperative method, could lead one towards an intriguing argument. It could be suggested that even if the law consolidates and enshrines the rights of citizens, it does not simply 'deliver' an important legal as well as positive command, but also it could be seen and treated as a

---

<sup>7</sup> Podvolotsky, I. (1923). *Marxist Theory of Law* (Moscow-Petrograd: State Publishing House), pg. 156.

<sup>8</sup> *The Criminal Code of Ukraine*.

<sup>9</sup> *The Criminal Code of Ukraine*.

restrictor of those rights “at least for the reason that only those rights are secured but not the other ones, and only those rights, but not the other ones are allowed to be exercised”<sup>10</sup>.

It will be hard to deny, even if it is going to be a denial of an abstraction, that if the Criminal Code does not consist of any norms on criminal responsibility for the murder, the society would be reacting on such a *status quo* with indifference, while waiting for the wise legislator to fix the issue. In fact, the state seems to only formalise the notion of the need to protect the most important of the relationships, universally recognised in society or necessary for its own existence. Or, sometimes, it provides for framing up an appropriate vector to form the aforementioned notion – for example, by criminalising one or another act. Depending on whether or not the act is perceived as conforming to the societal views on fairness and justice, the state determines its further fate (legal treatment) – the law can be amended accordingly or it can be abolished altogether.

However, such an overwhelming normativism on the nature and the way of exercising the citizen's rights could easily lead some scholars to a conclusion that the norm of Criminal law represents a formulated, secured and protected rule for the state to ‘behave’ accordingly<sup>11</sup>. For example, Naden<sup>12</sup> also argues that the whole essence of Criminal law is reduced only to the power of the state, and the nature of relations, which is framed up by this particular body of law, comfortably ‘dwells’ on such an understanding. Objectively, this academic vision dramatically reduces the comprehensive scope of Criminal law-bound relationships to become a ‘one-way road’, which they are not. In addition, should the multi-faceted notion of Criminal law be substituted, so the body of law becomes a function of the state, determining the state's essence, this will, with necessity, degrade the real significance of Criminal law by ‘pushing’ it towards adopting a status of a variety of the State law. In fact, it is rather intriguing to note that such an academic stand-point could be taken by a scholar who, in her monograph, dedicated plenty of space to disagree with the narrowly normativist understanding of law<sup>13</sup>.

In the context of this observation's topic, it is possible to make a step further arguing that the fact of treating the Criminal law only through the prism of the body's textual component, which presumably expresses the will of the state, represents – almost – an inborn distinguishing feature of the Ukrainian legislator's understanding of the issue. Unfortunately, the legislator's long-term stability in taking a ‘special care’ of the normative side of law, particularly in the part that concerns the ‘pure’ stately origin of law and the state's perceived as well as real supremacy over law, leads to a very common situation when the legislator merely embodies an exclusive role of ‘the creator’ of legal norms.

Moreover, taking into account issues of reflection of this definition in the consciousness of society (legal consciousness), the quality of the text of the law as a guarantee of the simplicity of the implementation of norms in relations between the relevant actors (legal relationships), and the dynamics of the practice of the functioning of the legal system in general (law and order) often ‘resides’ outside of the legislator's attention, becoming just a declarative component of the process.

## II. DISCUSSING THE OBSERVATIONS

This material does not have an academic intention to degrade the state-driven process of expanding the legislative regulation of issues related to the fight against crime – naturally, such an

---

<sup>10</sup> Nedbailo, P. (1965). ‘Issues of the Structure of the Soviet Legal Norms in Connection with Their Gradual Development into the Rules of a Communist Community’ in *Law and Communism* (Moscow), pg. 129.

<sup>11</sup> Naden, O. (2012). *Theoretical Foundations of Criminal Law Regulation in Ukraine* (Kharkiv: Pravo), pg. 110.

<sup>12</sup> Naden.

<sup>13</sup> Naden.

effort made by the state deserves to be welcomed, especially given the circumstances of Ukraine. However, a situation can only be considered objectively optimal should a new law on combating crime be a result of a comprehensive professional discussion on as well as testing of those legal ideas to be used in the new law. After all, the whole process should be all about harmonising the interests of the individual, society, and the state. Otherwise, it is difficult to even raise a question of the fairness of the requirement for ordinary citizens in regards of the application of the *ignorantia legis non excusat*<sup>14</sup> principle, since the volume of such changes and additions to the major segments of the Ukrainian legislation is so large that it requires from professional lawyers plenty of efforts to keep up with and even understand the process. It is also a concern that the legislator, sometimes, overuses the limitations of the standard rule for a new provision of the Criminal Code to enter into force. Although the possibility of enacting a new norm from the day of its official publication does not contradict Art. 4, Par. 1 of the Criminal Code<sup>15</sup>, this provision relates to a certain range of exceptional cases (such as a catastrophe or war, for example) and, therefore, it is not for systematic use, as is often the case today.

From this standpoint, one could argue that the amendments to the Criminal Code should not be so frequent, because it could raise a question on the legislator's level of competence – was the change really needed to be made, or was it a situation what the *Verkhovna Rada* made a serious error or misjudged something in the process of analysing the directions of societal development that it is now hectically trying to fix the issue by amending the already amended norm of the Criminal Code or/and adding some other norms in. Or, what if the highly sophisticated as well as strategic process of lawmaking in Ukraine is reduced to a something else – **either** an attempt to reach a set of narrowly utilitarian or lobbyism-driven or politically-motivated goals for the benefit of a small group of people, **or** a childish competition between different MPs or factions for a higher number of bills proposed during a single period. In the pre-revolutionary Ukraine (before 2013), there were more than 120 drafts on amendments to the Criminal Code formally submitted at the *Verkhovna Rada*, not to mention that, since 2001, it has been recorded a bit less than a thousand of different legislative proposals on the Code's 'improvements'. At the same time, if we take into consideration that the overwhelming majority of those proposals, usually, related not to one, but were focused on adjusting five, ten or even twenty Articles of the Criminal Code, then the total number of changes would not have been too far from several thousand.

Although the number of actual amendments to the Code, which entered into force since 2001, is much lower if compared to the aforementioned 'avalanche' of proposals, – 'only' 471, – and the vast majority of them were concerning some editorial clarifications or criminalization<sup>16</sup>. Interestingly enough, 7 of those have already been eliminated, while 26 have been decriminalized on the ground of humanizing the current law<sup>17</sup>, some of them, nevertheless, are associated with systemic transformations that substantially change the generally accepted approaches and views, which have been formed within the Ukrainian legal doctrine centuries. Such novelties cannot always be considered indisputable. This argument can be applied, for example, to a number of legal norms adopted **a)** on the basis of a perception that fining represents one of the mildest types of criminal punishment, and, as a consequence, **b)** on the ground of a particular set of criteria, which

---

<sup>14</sup> Latin for "ignorance of law excuses no one".

<sup>15</sup> *The Criminal Code of Ukraine*.

<sup>16</sup> We are talking about 70 of newly recognised offences, where some of them have already been amended, with Art. 368 and 339 of the Criminal Code 'suffering' the changes for correspondingly 5 and 6 times.

<sup>17</sup> Tatsiy, V., Borisov, V., and Tyutyugin, V. (2013). 'Stability and Dynamism – Necessary Conditions for the Effectiveness and Quality of Ukrainian Legislation on Criminal Liability' in *Current Problems of Criminal Law Impact: Collection of Scientific Articles* (The Luhansk State University of Internal Affairs, Ukraine, and The Volgograd State University, Russia).

assist in classifying offences by their severity. For instance, the notion of ‘unlawful profit’ that was introduced by the laws on *On the Principles of Prevention of and Counteraction against Corruption* and *On Amendments to Certain Legislative Acts of Ukraine on Legal Charges for Corruption Offences*, adopted a more narrow conceptual connotation if compared to the notion of ‘bribe’, which is traditional for the Ukrainian legislation. Objectively, as argued, this situation does not help in reaching the state-promoted ultimate goal of strengthening the fight against corruption<sup>18</sup>.

This could be treated as a classic as well as actual example of the Ukrainian legislator’s ultimate misinterpretation of its very own direct function in the formalization of the Criminal law’s norms. Instead, the legislator substitutes the aforementioned comprehensive function by a questionable unilateral activity on defining the normative content alone, which is always a negative consequence of normativism, especially given the level of statehood’s development of statehood in Ukraine. Therefore, if the goal is to build a law-governed state in Ukraine, there is also an objective necessity to search for and find a new understanding of the Criminal law, which would confirm not only the state’s legitimacy, but also human rights as well as a custom of favouring the law before favouring the state.

On that basis, the idea of the broad understanding of law has been developed, and as its direct consequence, law has been distinguished from the law. According to this concept, as suggested, not only legal norms, but also legal relations as well as legal ideology and legal consciousness, were included in the concept of law<sup>19</sup>. Such a take on legal thinking makes it possible to overcome legal formalism; in addition, its democracy-bound idea is about legitimacy and justice to not only be proclaimed on paper (in the legal text), but also embodied through the state-originated practical activities and in strict accordance with the citizens’ legal conscience. However, at present, the stated concept of legal thinking is only partially used and appreciated in the Criminal law of Ukraine, and only in that part that relates to legal relations, as one of its qualities. And it happens at a time when the world’s academic thought went much further on. Therefore, it may turn out that, while theoreticians will continue ‘trying on’ different views on the legal understanding and its compatibility with the Criminal law of Ukraine, the practical field (especially, given the example of the EU) will begin removing the barriers between different legal systems, undermining basic foundations of legal pluralism. In fact, the process of creating a single international legal space has already begun and, from now on, the history of European law, as argued, is written in Brussels and Strasbourg<sup>20</sup>.

Within the framework of the contemporary intra-Ukraine academic debate, the scholarship started leaning towards contextualising Criminal law with discussions on legal relationships, legal ideology, and legal consciousness. For example, Kuznetsova and Tyazhkova believe that Criminal law – as a body of law as well as a legal sub-system – includes not only a system of norms adopted by the supreme authority, but also “criminal legal interactions related to law-making and law enforcement”<sup>21</sup>. In his turn, Pudovochkin offers an extensive definition of the Criminal law as an independent branch of law, which, while based on the [conceptual] ideas of legality, equality, guilt, justice and humanism, represents a system of legal norms adopted by the supreme body of representative power that determines [...] socially dangerous acts as crimes, by regulating them via prohibitions, obligations, permissions or incentives that arise on their basis from the moment when

---

<sup>18</sup> Kirichko, V. (2013). ‘Criminal Liability for Corruption’ in *Scientific & Practical Commentary* (Kharkiv: Pravo).

<sup>19</sup> Piontkovsky, A. (1958). ‘On the Question of the Relationship between Objective and Subjective Law’ in *Soviet State and Law*, 5, pg. 25-36.

<sup>20</sup> Kovler, A. (2002). *Anthropology of Law. Textbook for Universities* (Moscow: Norma/Norma-INFRA), pg. 5.

<sup>21</sup> Kuznetsova, N. and Tyazhkova, I., eds. (1999). *The Treatise on Criminal Law: General Part. Volume 1* (Moscow: Zertsalo), pg. 1-2.

the crime was committed in the relations between the person who committed the crime and the state, which is represented by its competent authorities.<sup>22</sup>

However, this paper argues that yet another scholarly opinion on the issue – this time, it was offered by Navrotsky<sup>23</sup> – deserves a decent level of recognition, even though it could and, most probably, will be widely criticized by supporters of traditionalism. Navrotsky also supports the idea of differentiating and correlating the concepts of Criminal law and the law (criminal norms), but prefers to discuss the issue using the well-known “content vs. form” formula, while underscoring that the content can never exist without the proper form and the form cannot be in existence without any content<sup>24</sup>. Therefore, in his seminal book, he argues that the identification of Criminal law as [simply] the law and the treatment of the two as antipodes are extreme ways of debating on the issue<sup>25</sup>.

Unfortunately, Navrotsky does not provide his own definition of Criminal law. Instead, he contributes in underscoring the societal purpose and role of this particular body of law, distinguishing the latter from the functions and tasks of the Criminal Code. Therefore, Navrotsky describes the functions of Criminal law to be as follows: **a)** formulating the society’s requirements on determining the scope and features of a criminal offence and measures to respond to such acts; **b)** determining the circumstances, which prevent an act that is characterized by certain features of a crime from being recognized as such; **c)** determining the grounds for exemption from criminal liability and punishment<sup>26</sup>. Building on it, it is possible to argue that the described functions are exercised only within a framework of legal relationships, which is constructed in strict accordance with the society’s requirements of society. Thus, in general, the function of Criminal law, although related, but does not necessarily coincide with the function of the law.

In addition, regarding the range of objectives that Criminal law possess, it is not surprising that these are also differentiate from the objectives of Criminal legislation. While the Criminal Code’s Art. 1, Par. 1 outlines that the document’s objectives are about “legal protection of the most important social relations”<sup>27</sup>, the particular case of Criminal law underlines that the body of law’s main task should be based on achieving justice in the field of crime prevention, according to the following thesis: “everyone who deserves punishment for committing a crime has been subjected to criminal responsibility, and anyone who is not guilty was not brought to such responsibility”<sup>28</sup>. This remark is not indisputable, but if based, for example, on libertarian views on legal thinking – it has its logic.

Even though such an academically fruitful discussion on delineation of a particular body of law and the law has a sufficient theoretical justification, it can also enlighten the students of legal studies to a number of aspects that could be treated as angular for both the theory of Criminal law and the state-arranged actions of law enforcement. Most probably, one could quickly realize that, during its historical process, the world has come across a high number of legislative norms, but not many of them could be described as legal. For example, what can one say about eastern despotisms or different stages of the Soviet history?

Those and many other historic periods ‘produced’ legal norms that were objectively unfair, inhumane, and, therefore, would not meet societal requirements in principle. For example, what

---

<sup>22</sup> Pudovochkin, Y. (2005). In Malinin, V. ed., *Encyclopaedia of Criminal Law: the Concept of Criminal Law. Volume 1* (Saint Petersburg), pg. 182.

<sup>23</sup> Navrotsky, V., ed. (2013). *Criminal Law of Ukraine: General Part* (Kyiv: Yurinkom Inter).

<sup>24</sup> Navrotsky, pg. 25.

<sup>25</sup> Navrotsky.

<sup>26</sup> Navrotsky.

<sup>27</sup> *The Criminal Code of Ukraine*.

<sup>28</sup> Navrotsky, pg. 29.

would be a scholarly judgement on the December 1919-issued *Guiding Principles of Criminal Law of the R.S.F.S.R.*, which were in force in some parts of the modern day Ukraine – the document, firstly, outlined that “Soviet criminal law has the task, by means of repression, of protecting the system of social relations corresponding to the interests of the laboring masses, organized into the ruling class under the dictatorship of the proletariat in the transitional period from capitalism to communism”, and secondly, defined a crime as “an act of commission or omission dangerous for the given system of social relations, and makes struggle by governmental power necessary against the person (criminal) who perpetrates such acts or allows them to occur as a result of a failure to act”<sup>29</sup>.

Certainly, one can assume some ideology-oriented operational logic in the then legislator’s argument that a handful years of the Soviet political regime’s existence was not enough to issue a corrected-by-history forecast on a range of possible criminal offences – there was simply no any historical analogy to 1917 – but the *Guiding Principles* would still hardly be treated as a societal requirement. Or let us take the so-called ‘seven/eight law’, known in history as the *1932 Law of Three Spikelets*, according to which no one was allowed to take any grain left in state farms without being qualified as a thief – the primary punishment for this crime, in accordance to this law, was execution by shooting, and no amnesty was allowed<sup>30</sup>. This law was issued during the Soviet famine of 1932–33, which in the Ukrainian context was compounded by the *Holodomor*<sup>31</sup>. Perhaps, few experts may find the ‘seven/eight law’ corresponding to some interests of the state, but, for the society of the former Soviet Union, the law was appalling.

Considering the above, the results of assessment of many current laws are not always equivocally positive. If not all of them meet the requirements of society, then how do we treat those that do not meet this criterion? This is only one of quite a few questions that arise not only in theory and practice, but also within society. That is why it seems to be objectively incorrect to exclude a social content from the law, turning this social dimension merely into a formality – in comparison with the conceptual meaning of Criminal law. Even more incorrect could be to employ a one-sided approach in the process of analysing the concept of justice, presenting it as an antagonistic battle between the society’s and the state’s understandings of the concept.

Arguably, if an individual and society have their own idea of the law conforming to their rights, the state, as a social entity, may also have relevant interests, which are extremely important for its sustainability or even survival but do not necessarily coincide with the notions of fairness celebrated by a narrow circle of individuals. For example, when it comes to such a crime as treason against the state in the form of a transition to the enemy’s side during the period of martial law or at a time of armed conflict, it can be committed by a person who disagrees with the state-run policies or dominating ideologies, and such cases were widespread during the World War II – not only in Ukraine, but also in Belarus, France, Russia, others. These discrepancies should be communicated and discussed within a given society, so a common ground is found. In fact, any legal system’s content is linked to history-originated legacies and history-bound legitimacy, and those are not always unambiguous or unquestionable. In general, historical experience shows that the ‘weight’ of positive law, which is created by a far-sighted state over time, can and should become an integral

<sup>29</sup> *Guiding Principles of Criminal Law of the R.S.F.S.R.* (1919). Accessible: <http://soviethistory.msu.edu/1917-2/state-security/state-security-texts/guiding-principles-of-criminal-law-in-the-rsfsr/>.

<sup>30</sup> The decree of the Central Executive Committee and the Council of People’s Commissars of the USSR, *About protection of the property of state enterprises, kolkhozes and cooperatives, and strengthening of the public (socialist) property*, 7 August 1932. Accessible: ‘The Law of Five Spikelets’ [http://memorialholodomor.org.ua/eng/zakon\\_pro\\_5/](http://memorialholodomor.org.ua/eng/zakon_pro_5/).

<sup>31</sup> The *Holodomor* was a man-made famine in the Soviet Ukraine in 1932-33, considered by the modern Ukrainian state to be an act of genocide. To date, 14 sovereign countries, 18 states of the U.S.A. as well as the United States Senate officially recognised the *Holodomor* as an act of genocide.

part of the society's conception of justice and, in the future, be considered in inseparable unity with the content of Criminal law. Therefore, it could be evidently argued that the Criminal law is an instrument, but not only of a society concerned – at the same time, it provides plenty of tools for the state regarding its perceptions on crime, punishment and related concepts. It is academically and practically inappropriate to see the two sides being counteracting in such a context.

Regarding the law in itself, it is solely a reflection of the state's understanding about the requirements of society in terms of arranging a process on combating crime and its expediency – from the practical side, the law is always formulated as successfully as the legislator is capable in achieving it. Therefore, 'nowhere' is the place where one could find only 'good law' and only 'bad laws'. In each legal system, there is one and the other, otherwise the students of legal studies should depart from the objective principle of the state-society' coexistence (not society within the state and not the state for the sake of society) towards an artificial construct of a non-excising benchmark-law that does not reflect the actuality.

From this point of view, of course, there must be a room for perfect models of legal acts and systems, developing universally-accepted principles, axioms and postulates of the Criminal law, advocating progressive and criticizing reactionary normative acts. As far as the law will meet these ideals, so the state will claim its legal form. With necessity, a professional lawyer, a given society, the state, and, especially, the citizen need to be on the same page: their wishes, beliefs, and thoughts will be remaining as an ideal model until the legislator 'converts' them into the law. Accordingly, the provisions of these laws should reflect the will of both the citizen and the state (objective interests of the state), but not the ruling elite's desire to get some arrangements framed up by legal norms. Therefore, the creation of representative (legislative) bodies, the Constitutional Court, the adoption of the Constitution of Ukraine is the only legitimate way to achieve the goal, although it is inappropriate to overestimate their significance without taking into account a certain level of legal awareness.

### III. CONCLUSION

To formulate a set of concluding remarks, it needs to be reiterated that the offered discussion was of observational nature. In general, Ukraine is still painting its 'legal portrait', and the country's Criminal law is also experiencing constant transformations reflecting on different *intra*-societal and international changes. Summarizing the above, it could be stated that, **firstly**, the argument on the objectively existing difference between Criminal law and the law is not baseless. Law is a broader concept, and, apart from the criminal law (the highest act of legislative power), it also includes legal relations (interactions), legal consciousness, and may cover other regulatory requirements.

**Secondly**, the distinction between the two phenomena can be found in their origin. The law is issued by the state, but Criminal law, as an integral body of law, precedes the law, because it directly arises from different societal or the state-related needs. Livshits argued that "[t]he state does not create law, [the state] must consolidate the ideas on justice formed in society"<sup>32</sup>. Yavich went further, recognizing law as "objective social relations [existing] even before their authorization by the law"<sup>33</sup>.

**Thirdly**, the difference between the two exists in their content as well. On this issue, Nersesyants underlined that law should not, of course, be confused with the various [legally]

<sup>32</sup> Livshits, R. (1989). 'Law and the law in a socialist Rechtsstaat' in *Soviet State and Law*, 3, pg. 17.

<sup>33</sup> Yavich, L. (1977). 'Law and Public Relations (A Methodological Aspect of the Problem)' in *Problems of the Theory of Socialist State and Law* (Moscow: USSR Academy of Sciences, Institute of State and Law), pg. 114.

binding acts – laws, decrees, executive orders, precedents, officially authorized practices and so on, in other words – with the officially established (so-called positive) law. In contrast to the law, law's inherent features are equality and freedom. [...] Where [...] there is no principle of equality, there is no law as such.<sup>34</sup>

Indeed, in accordance with the postulates of Criminal law, this thesis is fully reflected in the broad principle of “*nullum crimen sine poena, nulla poena sine lege, nullum crimen sine poena legali*”<sup>35</sup>, should the principle's content be interpreted in the following way: **a)** it represents equality – each and every punishment in its volume and content fully corresponds to the society's understandings and perceptions of the dangers associated with the committed crime; **b)** it represents freedom – no one can apply any appropriate measures of state coercion, except in the cases provided for by the Criminal Code; **c)** it represents both equality and freedom at the same time – all people are equal before the law and, and nobody should avoid criminal liability, if there grounds for that.

**Fourthly and finally**, the still prevailing view on the content of Criminal law in Ukraine through the positivist prism should be considered obsolete, since it does not satisfy the academic thought in the field of legal studies. Enhancing our conceptions of law, which forms the Criminal law as its body, should be holistically based on legal ideas, principles, norms, and social relations. Therefore, scholarly research in the field urgently seeks for new directions to extend the boundaries of integrative concept in the context of legal thinking.

## REFERENCES:

- Baulin, Y. *et al.* (2010). *Criminal Law of Ukraine: General Part. Textbook* (Kharkiv: Pravo), 4<sup>th</sup> edition. In Ukrainian: Баулін, Ю. та ін. (2010). *Кримінальне право України: Загальна частина: підручник* (Харків: Право). За ред. Сташиса В. та Тація В., 4-те видання, перероблене і доповнене.
- Chaban, N. and Vernygora, V. (2010). ‘Ukraine’s Constitutional ‘Saga’: Ukrainian Media Reflections of the Constitutional Profess’ in *Trames*, 14 (64/59), 3, 227–249.
- Guiding Principles of Criminal Law of the R.S.F.S.R.* (1919). Accessible: <http://soviethistory.msu.edu/1917-2/state-security/state-security-texts/guiding-principles-of-criminal-law-in-the-rsfsr/>.
- Kirichko, V. (2013). ‘Criminal Liability for Corruption’ in *Scientific & Practical Commentary* (Kharkiv: Pravo), 60-76. In Ukrainian: Киричко В. (2013) ‘Кримінальна відповідальність за корупцію’ in *НПК* (Харків: Право).
- Kovler, A. (2002). *Anthropology of Law. Textbook for Universities* (Moscow: Norma/Norma-INFRA). In Russian: Ковлер А. (2002). *Антропология права. Учебник для вузов* (Москва: Издательство Норма/Норма-ИНФРА).
- Kuznetsova, N. and Tyazhkova, I., eds. (1999). *The Treatise on Criminal Law: General Part. Volume 1* (Moscow: Zertsalo). In Russian: Кузнецова, Н. и Тяжковой, И., ред. (1999). *Курс уголовного права. Общая часть. Том 1: Учение о преступлении. Учебник* (Москва: ЗЕРЦАЛО).
- Livshits, R. (1989). ‘Law and the law in a socialist Rechtsstaat’ in *Soviet State and Law*, 3. In Russian: Лившиц, Р. (1989). ‘Право и закон в социалистическом правовом государстве’ в *Советское государство и право*, 3.
- Maltsev, V. (2000). *Introduction to Criminal Law* (Volgograd: VUI of the MIA of Russia). In Russian: Мальцев, В. (2000). *Введение в уголовное право* (Волгоград: ВЮИ МВД России).
- Naden, O. (2012). *Theoretical Foundations of Criminal Law Regulation in Ukraine* (Kharkiv: Pravo). In Ukrainian: Наден, О. (2012). *Теоретичні основи кримінально-правового регулювання в Україні* (Харків: Право).

<sup>34</sup> Nersesyants, V. (1997). *Philosophy of Law* (Moscow: Norma/INFRA M), pg. 22.

<sup>35</sup> Latin for “no crime without penalty, no penalty without a law, no crime without a legal punishment”.

- Naumov, A. ed. (1994). *Criminal Law of Russia. General Part* (Moscow: Jurist). In Russian: Наумов, А. ред. (1994). *Российское уголовное право. Общая часть* (Москва: Юристъ).
- Navrotsky, V., ed. (2013). *Criminal Law of Ukraine: General Part* (Kyiv: Yurinkom Inter). In Ukrainian: Навроцкий, В., ред. (2013). *Українське кримінальне право. Загальна частина* (Київ: Юрінком Інтер).
- Nedbailo, P. (1965). 'Issues of the Structure of the Soviet Legal Norms in Connection with Their Gradual Development into the Rules of a Communist Community' in *Law and Communism* (Moscow). In Russian: Недбайло, П. (1965). 'Вопросы структуры советских правовых норм в связи с постепенным перерастанием их в правила коммунистического общежития' в *Право и коммунизм* (Москва).
- Nersesyants, V. (1997). *Philosophy of Law* (Moscow: Norma/INFRA M). In Russian: Нерсесянц, В. (1997). *Философия права. Учебник* (Москва: Издательство Норма/ИНФРА М).
- Piontkovsky, A. (1958). 'On the Question of the Relationship between Objective and Subjective Law' in *Soviet State and Law*, issue 5. In Russian: Пионтковский, А. (1958). 'К вопросу о взаимоотношении объективного и субъективного права' в *Советское государство и право*, выпуск 5.
- Podvolotsky, I. (1923). *Marxist Theory of Law* (Moscow-Petrograd: State Publishing House). In Russian: Подволоцкий, И. (1923). *Марксистская теория права* (Москва-Петроград: Государственное издательство).
- Pudovochkin, Y. (2005). In Malinin, V. ed., *Encyclopaedia of Criminal Law: the Concept of Criminal Law. Volume 1* (Saint Petersburg). In Russian: Пудовичкин, Ю. (2005) в Малинин, В. (отв. ред.), *Энциклопедия уголовного права: Понятие уголовного права. Том первый* (Санкт-Петербург).
- Resolution of the Central Executive Committee of the Soviet Union and the Council of People's Commissars of the USSR. (1932). 'About Protection of the Property of State Enterprises, Kolkhozes and Cooperatives, and Strengthening of the Public (Socialist) Property', 7 August (Collections of Laws of the USSR), issue 62. In Russian: Постановление ЦИК и СНК СССР от 7 августа 1932 г. 'Об охране имущества государственных предприятий, колхозов и кооперации и укреплении общественной (социалистической) собственности' (Собрание законов СССР), выпуск 62.
- Tatsiy, V., Borisov, V., and Tyutyugin, V. (2013). 'Stability and Dynamism – Necessary Conditions for the Effectiveness and Quality of Ukrainian Legislation on Criminal Liability' in *Current Problems of Criminal Law Impact: Collection of Scientific Articles* (The Luhansk State University of Internal Affairs, Ukraine, and The Volgograd State University, Russia), 71-84. In Russian: Таций, В., Борисов, В., и Тютюгин, В. (2013). 'Стабильность и динамизм – необходимые условия эффективности и качества законодательства Украины об уголовной ответственности' в *Современные проблемы уголовно-правового воздействия: межгосударственный сборник научных статей* (ЛГУ ВД им. Э.А. Дидоренко, Украина, и Волгоградский Государственный Университет, Россия), 71-84.
- The decree of the Central Executive Committee and the Council of People's Commissars of the USSR, *About protection of the property of state enterprises, kolkhozes and cooperatives, and strengthening of the public (socialist) property*, 7 August 1932. Accessible: 'The Law of Five Spikelets' [http://memorialholodomor.org.ua/eng/zakon\\_pro\\_5/](http://memorialholodomor.org.ua/eng/zakon_pro_5/).
- The Criminal Code of Ukraine*. (2001). Current version with revisions on 11 January 2019. Accessible: <https://zakon.rada.gov.ua/laws/show/2341-14?lang=en>.
- Tyushka, A. (2016). 'From Constitutional Volatility to Constitutional Stability: Any Chance to Reconcile Constitutionalism and Power Struggle in Ukraine?' in *Historia i Polityka*, issue 16 (23), 57–71.
- Yavich, L. (1977). 'Law and Public Relations (A Methodological Aspect of the Problem)' in *Problems of the Theory of Socialist State and Law* (Moscow: USSR Academy of Sciences, Institute of State and Law). In Russian: Явич, Л. (1977). 'Право и общественные отношения (методологический аспект проблемы) в *Проблемы теории социалистического государства и права* (Москва: Академия Наук СССР).