

Constitutions and Criminal Law Reform

JØRN JACOBSEN*

1. Introduction

In 2014, a major revision of the Norwegian Constitution was carried out, the momentum being the 200th jubilee of the Constitution and of Norway's independence in 1814. This was the first major revision of the Norwegian Constitution (the world's second oldest, only beaten by the US Constitution).¹ Almost ten years earlier, in 2005, a new criminal code had been enacted in Norway. In 2015, this code replaced the code of 1902.²

A thoroughly revised Constitution and a new criminal code are both major events in any legal order. One could therefore imagine that the Norwegian reforms were related to each other, but wrongly so. The criminal code reform was a long-lasting process, spanning over 30 years of preparations; the Constitutional reform, on the other hand, was carried out in much shorter time (2009-2014), after the criminal code was enacted.³

* Professor, Faculty of Law, University of Bergen, Norway.

I am grateful in particular to the members of Rettsstatsgruppen at the Faculty of Law, University of Bergen (February 2017), participants at the Theorizing Criminal Law Reform-conference at Rutgers Law School (April 2017), professor Douglas Husak in particular, and the anonymous peer reviewer, all for valuable comments to different versions of this text.

¹ It had, however, been subject to partial amendments, see Sejerstedt, *Det elastiske panser. Om utviklingen av den norske statsforfatningen 1814-2014* in *Tolkingar av Grunnlova. Om forfatningsutviklinga 1814-2014*, ed. Holmøyvik (Pax 2013) pp. 35-109. For an overview of the Norwegian constitution after the revision, see e.g. Aall, *Rettsstat og menneskerettigheter: en innføring i vernet om individets sivile og politiske rettigheter etter den norske forfatning og etter Den europeiske menneskerettighetskonvensjon*, 4th ed. (Fagbokforlaget 2015).

² For an outline of the code, see Jacobsen and Sandvik, *An Outline of the New Norwegian Criminal Code*, 3 (2) *Bergen Journal of Criminal Law and Criminal Justice* (2015) pp. 162-183.

³ The matter is a bit more complex. The criminal code enacted in 2005 contained the general part, whereas the special part of the code was added by amendments of this code of 2005, the last amendment in 2009 (the additional six years it took before the code was put into force was due to other factors).

Apart from the fact that the Constitution was sought respected in the criminal law reform, considerable interplay was not an aim. For instance, when the first white paper addressed some overarching themes for the criminal law reform (the leader of the Criminal Law Commission described it as ‘*a study of the principles of the most important questions raised by the reform work*’), the code’s relation to the Constitution was not one of them.⁴

This raises the questions: Should the Constitution have played a bigger role in the reform of the criminal code and in that case - how? And more generally: How could an optimal relation between a Constitution and a criminal law reform be achieved?

Historically, Constitutions and criminal law have been closely related.⁵ However, this relation has only more recently been the topic of a more general discussion.⁶ The literature on this theme first and foremost concerns (the usually rather narrow) Constitutional limitations on criminal law.⁷ Our subject is not disconnected from this, but it is still somewhat different: To what extent should the Constitution regulate criminal law and criminal law reforms? Should criminal law reform include a Constitutional perspective, and even a Constitutional reform perspective? What mandate should the legislator give a criminal law commission for its work?

When addressing this subject, one should be aware of the many Constitutional traditions in the world today. This diversity indicates that also the proper solution to the relation between Constitutions and criminal law reform may depend on the relevant legal culture. Thereby, it seems not possible to give a clear-cut answer to the problem we address in this article. In fact, within some legal cultures, framing this as a problem may in itself appear unfamiliar at best. This paper aims, however, to create a general, analytical

⁴ NOU (Norwegian Official Report) 1983: 57 *Straffelovgivningen under omforming*, the quotation from Bratholm, Penal Code Reform in Norway – The General Part in *Criminal Law Theory in Transition, Finnish and Comparative Perspectives*, eds. Lahti & Nuotio (Finnish Lawyers’ Publishing Company 1992) pp. 53–56, at 53.

⁵ See for instance Berger, Constitutional Principles in *The Oxford Handbook of Criminal Law*, eds. Dubber and Hörnle (Oxford University Press 2014) pp. 422-444, at 423 on how the criminal law ‘has offered itself as the paradigmatic place for working out liberal conceptions of justice. And so criminal law has been fused to constitutional law, with key constitutional themes expressing themselves through debates about criminal law, and traditional criminal law issues and debates entering a constitutional idiom’.

⁶ For the recent German literature, see e.g. Lagodny, *Strafrecht vor den Schranken der Grundrechte – Der Ermächtigung zum strafrechtlichen Vorwurf im Lichte der Grundrechtsdogmatik dargestellt am Beispiel der Vorfeldskriminalisierung* (Mohr Siebeck 1996). In Anglo-American literature, see for instance Dubber, *Toward a Constitutional Law of Crime and Punishment*, 55 *Hastings Law Journal* (2004) pp. 509-572; Fletcher, *THE GRAMMAR of Criminal Law – American, Comparative, and International, Volume One: Foundations* (Oxford University Press 2007) pp. 97-106 and Berger 2014. Also, more specific Constitutional challenges have been discussed, such as in Hörnle, *Shooting Down a Hijacked Airplane - the German Discussion and Beyond*, 3 *Criminal Law and Philosophy* (2009) pp. 111-131.

⁷ See e.g. Lagodny 2014.

tool that can claim relevance across legal cultures, and aims to be useful a) when studying how the relation between the Constitution and criminal law reform has been conceived in prior criminal law reforms, both in time and space, and b) when discussing what mandate or tasks for instance a criminal law commission should be given at a future criminal law reform.

The analytical tool is created by differentiating between an ideal-typical ‘passive’ and an ‘active’ approach to the relation between criminal law reform and Constitutions. A central part of this article will consist of the elaboration of this distinction. However, to briefly introduce them, we may say that the approaches share the view that a Constitution is of higher order – *lex superior* – than the criminal law, and from the point of view of positive law, the latter must respect the boundaries set by the former. But when it comes to how one should relate to the Constitutional dimension of criminal law *in a reform process*, the two approaches diverge. In brief: The passive approach considers Constitutional limitations on criminal law to be (or that they at least should be) few, and believes that these should function as a *background framework* for a criminal law reform. The active approach adopts a more dynamic view of the Constitution, and considers criminal law reform as an appropriate opportunity for *reconsidering* also the Constitutional framework for criminal law.

In order to give more substance to this analytical distinction, some examples from existing Constitutions will be useful in order to provide us with a bigger ‘space of opportunities’ and also in order to demonstrate that comparative Constitutional/criminal law can be of great interest when examining ways to consider the relation between Constitutions and criminal law reform.⁸ Also, while acknowledging that the subject is dependent on legal cultural starting points, the article will provide some consideration on what the optimal relation between Constitutions and criminal law reform is within the constitutional tradition that most European countries have as their basis.⁹

The paper will start out in part 2 with some terminological clarifications. In part 3, some general remarks on the relation between criminal law reform and Constitutions will be made, before the two approaches, as previously mentioned, are further elaborated in parts 4 and 5 respectively. Some conclusions are drawn in part 6. In addition, in part 7 we will address the European Convention of Human Rights as a potential ‘semi-Constitutional framework’. Here, we will also return to Norway’s Constitutional reform which took place after the criminal law reform was completed.

⁸ On comparative constitutional law, see contributions in Rosenfeldt and Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012).

⁹ On the relation between the terms ‘Constitution’ and ‘constitution’/‘constitutional’, see the following section.

2. Some Terminological Clarifications

In the following, ‘Criminal law reform’ refers to a major revision of criminal law carried out by legislators, for instance the enactment of a new criminal code. A ‘major revision’ differs from and is less than a ‘revolution’, where basic ideas and the fundamental structure of criminal law are exchanged for new ones. I do not consider a revolution in criminal law as an option. Criminal law, as currently (paradigmatically) understood, is too closely related to the conventional political morality. A revolution in criminal law would require that we also exchange our basic constitutional values, which brings us beyond the scope of this article. On the other hand, a reform of criminal law may be less than ‘major’. Reform of only one specific field within criminal law (e.g. offences of dishonesty or the law of sentencing), will be termed a ‘sectorial’ criminal law reform.

‘Criminal law reform’ is thereby considered a task for the legislator, while revision by court practice is excluded. This is not a conceptual demarcation of how criminal law can be ‘reformed’. Indeed, court practice may amend criminal law, even if in many legal orders the courts’ competence is limited by (different conceptions of) the principle of legality.¹⁰ The exclusion of the court perspective is due to the identification of an adequate starting point for discussing the relation between criminal law reform and Constitutions. Judges must respect Constitutional rules. Also, by court practice even a sectorial criminal law reform must usually take place piecemeal.¹¹ A legislator may, on the other hand, carry out a major reform and also have (at least in many legal orders) the possibility to alter (at least to a certain extent) the Constitution as part of such a reform. This broader legislative competence makes the case more interesting, even if it may to some extent tip the discussion over to a European/Continental point of view. Still, the court perspective remains close at hand. The active/passive-distinction mirrors itself in (but is not the same as) styles of Constitutional legal reasoning *within positive law*, for instance in the distinction between a formal approach and a more dynamic approach.¹² Lessons may also be learned for instance from the jurisprudence of the Supreme Court in Canada, ‘one of the

¹⁰ Even if the principle of legality, as enshrined in the European Convention of Human Rights (1950), article 7, accepts to some extent both written and unwritten law, for instance the Norwegian Constitution § 96 first sentence only acknowledges written law as basis for a criminal conviction.

¹¹ See also for instance Dubber 2004 pp. 527-529 in regard to the US Supreme Court.

¹² ‘Formal’ would here to a large degree correspond to the ‘originalist’ approach in the interpretation of the US Constitution. On ‘Originalism’ versus ‘Living Constitutionalism’, see e.g. Waluchow, Constitutionalism, SEP (2014) pp. 1-48 (available at <<https://plato.stanford.edu/entries/constitutionalism/>> last accessed 22 September 2017) pp. 16-27.

leading jurisdictions in the world in applying constitutional provisions to the general part of criminal law.¹³

Another central terminological distinction to be made in the following, is the distinction between ‘Constitution’ and ‘constitution’ (or variations of these, such as ‘Constitutionalism’/‘constitutionalism’ and similar). The reader should pay particular attention to it, as grasping this distinction is decisive to the understanding of the points made in the following.

When the word ‘*Constitution*’ (capital ‘c’) is used in the following, it primarily refers to Constitutional codes, i.e. a specific constitutional document that concerns the basic structure and content of the legal order.¹⁴ Examples are the US Constitution (1787), the Norwegian *Grunnlov* (1814) and the German *Grundgesetz* (1949). Some legal order also have a more complex Constitutional structure, in the way for instance the US legal order contains a federal Constitution in addition to state Constitutions. Other legal orders do not have such a written Constitution. In Great Britain the legal order is basically constituted by a body of principles and law.¹⁵ A premise for the following reflections is that a Constitution is enacted, that Constitutional fragments are enacted, or that they at least could be enacted, in the mentioned, positive sense. It is also assumed that the Constitution is ‘effective’ as a legal framework, and not just as a ‘symbolic’ document.¹⁶

At the same time, the term ‘Constitution’ relates closely to ‘*constitutionalism*’. The latter term is sometimes used with reference to precisely Constitutions and the limitations

¹³ Fletcher 2001 p. 101. See also Brudner 2011 p. 867, who points out that ‘[o]f all common-law legal systems with written constitutions, Canada’s has perhaps gone furthest in raising unwritten principles of penal justice to the status of binding constitutional norms’. Berger 2014 pp. 424 ff. uses Canada as a ‘*a kind of case study*’. But see also Roach, *Mind the Gap: Canada’s Different Criminal and Constitutional Standards of Fault*, 61 *Toronto Law Review* (2011) pp. 545-578, at 552: ‘*the vast majority of the substantive criminal law remains unaffected by the Charter*’. According to Dubber and Hörnle, *Criminal Law – A Comparative Approach* (Oxford University Press 2014) p. 102, the Canadian Supreme Court has ‘*struck a balance between American and German approaches*’.

¹⁴ See also Gardbaum, *The Place of Constitutional Law in the Legal System*, in Rosenfeldt & Sajó (2012) pp. 169-185, at 170: ‘*the first and primary meaning is ‘big-c’ constitutional law: the law contained in a written, codified constitution or plausibly inferred from it*’. For a more comprehensive analysis of the word ‘constitution’ see e.g. Schmitt, *Constitutional Theory* [1928], Translated and edited by Jeffrey Seitzer: foreword by Ellen Kennedy (Duke University Press 2008) pp. 59 ff. The term is used differently for instance in Duff *et al.*, ‘Introduction – The Constitution of Criminal Law’, in the same (eds.), *The Constitution of Criminal Law* (Oxford University Press 2013) pp. 1-3, from the point of view within criminal law, speaking of ‘*how the criminal law is constituted and, more broadly yet, of the constitutive power of the criminal law*’.

¹⁵ See for instance Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed. [1915] (Macmillan 1982), pp. cxl ff., and Wade and Bradley, *Constitutional and administrative law*, 10th ed. by Bradley (Longman 1985) pp. 4 ff.

¹⁶ For this distinction, see Grimm, *Types of Constitutions*, in Rosenfeldt & Sajó (2012) pp. 98-132, at 106-107.

of political power that these contain.¹⁷ Other times ‘constitutionalism’ is used in reference to a certain political and legal philosophy underpinning such Constitutions, i.e. a set of legal values and principles that give (or should be) the normative basis for the legal order.¹⁸ By ‘normative basis’ it is referred to certain basic ideas that legitimises and guides the entire legal order. This ambiguity is useful to us. It reminds us not only of the close connections between these meanings, but also of the fact that Constitutional differences may cover constitutional similarities, i.e. a common set of value. A common set of value may allow us to find a certain common ground to address our subject. So, when the term ‘constitution’ is used (lower-case ‘c’), it refers to a paradigm of constitutional values, i.e. the latter of the two meanings mentioned.¹⁹

In both its meanings, ‘constitutionalism’ is often related to the political philosophy of Locke.²⁰ The understanding of law that underpins this article, which cannot be elaborated here, is closer to a Kantian than a Lockean legal and political philosophy.²¹ However, both of these may be described as classical liberal projects.²² For now at least, we don’t need to elaborate a more specific philosophical basis. It suffices to say that at least most Western legal orders are (normatively) anchored in and developed from the ideas of the ‘democratic *Rechtsstaat*’, i.e. a set of formal and substantial principles concerning individual autonomy, both in the sense of political autonomy (the right to democratic participation) and private autonomy (the right to privacy, freedom of religion etc.).²³ This will be the constitutional paradigm of this article.

¹⁷ See e.g. Waluchow 2014.

¹⁸ See for instance Allan, *Constitutional Justice – A Liberal Theory of the Rule of Law* (Oxford University Press 2003), preface: ‘I have sought to identify and illustrate the basic principles of liberal constitutionalism, broadly applicable to every liberal democracy in the familiar Western type’. A specific criminal law example here is Thorburn, Constitutionalism and the Limits of the Criminal Law in *The Structures of Criminal Law*, eds. Duff et al. (Oxford University Press 2011) pp. 85-105.

¹⁹ This word is thereby used with a somewhat different meaning than in Gardbaum 2012 p. 171 (‘the subpart of the aggregate body of rules, practices, and understandings determining the actual allocation of power in a polity (and the limits on it) that have formal legal status’).

²⁰ For references to Locke, see for instance Waluchow 2014 p. 1.

²¹ See Jacobsen, *Fragment til forståing av den rettsstatlege strafferetten* (Fagbokforlaget 2009), in particular ch. 7.

²² Some also relate Kant and constitutionalism to each other, see e.g. Koskenniemi, Constitutionalism as Mindset. Reflections on Kantian Themes about International Law and Globalization, 8 *Theoretical Inquiries in Law* (2007) pp. 9-36, and Thorburn 2011.

²³ For my account of the notion of the ‘democratic *Rechtsstaat*’, see Jacobsen 2009, in particular ch. 3.

3. Constitutions and Criminal Law Reform: General Remarks

The relation between Constitutions and criminal law reform can take many shapes. Constitutional provisions may for instance *require* criminal law reform. In fact, when the Norwegian Constitution was enacted in 1814, § 94 required a new criminal (and civil) code to be enacted, in line with European codification trends (e.g. Codé Penal 1810 and more).²⁴ One could even imagine a constitutional demand for a reform of criminal law every fiftieth year or so. On the other hand, the Constitution could also *forbid* criminal law reform.

However, most often, Constitutions constitute *limitations* on, and not obstacle to criminal law reform itself. This is usually a matter of individual rights which must be respected by 'ordinary' legislation. The typically acknowledged rights are fundamental standards such as the principle of legality²⁵ and the prohibition of death penalty.²⁶ The limits, however, do not necessarily only concern the side of the offender. The Constitution may also imply limits on reform projects in the sense of 'positive demands' on criminal law. A Constitutional demand for criminalization of abuse of or violence against children will imply an obstacle to attempts, for instance, to legalize such abuse or violence, or to regulate it within a different field of law.²⁷

As we will get back to, Constitutions as *limits* to reform is also the centrepiece of the perhaps most common approach to the subject, the one we may term the 'passive' approach. As said, this approach is characterized by considering the Constitution as a higher-order legal framework for the criminal law reform to respect (and only as this). Before we dig into this, it should be underlined that the two approaches we are to elaborate are 'ideal types' in the Weberian sense.²⁸ Their aim is not to fully describe existing phenomena, for instance existing opinions in a certain legal orders, but to describe two different, clear-cut positions on the subject and as such to provide an analytical tool.

²⁴ See further Sandvik and Michalsen (ed.), *Kodifikasjon og konstitusjon – Grunnlovens § 94s krav til lovbøker i norsk historie* (Pax 2013).

²⁵ See for instance Constitución española de 1978 art. 25 (1); Finlands grundlag 8 §; Kongeriket Noregs grunnlov § 96 (1); Grundgesetz (GG) art. 103 (2).

²⁶ See for instance Costituzione della Repubblica Italiana art. 27 (4); Finlands grundlag 7 § (2); Kongeriket Noregs grunnlov § 93 (1); Constitución española art. 15 (exception made for the war situation).

²⁷ See also on the German abortion case (BVerfGE 39, 1) in Dubber and Hörnle 2014 pp. 120-123 and pp. 137-138.

²⁸ For a brief description, see Turner, Beeghley and Powers, *The Emergence of Sociological Theory*, 7th ed. (SAGE 2012) pp. 205-207.

4. The Passive Approach

Coherence is a widely shared ideal for legal reasoning as for other intellectual enterprises. There are, however, somewhat different conceptions of what it is and of what kind of relevance it has in regard to legal reasoning.²⁹ Here, ‘coherence’ is understood as something’s ability to take part in a *system*. This definition assigns the foundational premises in the system a primary role. How ‘demanding’ it is for other premises to cohere with the system, depends on the character and precision of these foundational premises.

In law, the coherence of norms is manifestly important, in particular as concerns hierarchically ranked norms. As the Constitution is superior to the criminal law, the latter must respect the former. It is after all the Constitution that mandates the criminal law legislator in the first place. If the criminal law (in part) *violates* the Constitution, it would be void, and at least in some legal orders, for the (general or a Constitutional) court to strike down. However, this occurs rather seldom. The legislator usually seeks to respect the Constitution. Some Constitutional questions are debatable, but in such matters the legislator is usually ascribed a certain level of discretion, and the courts will often hesitate to override the legislator’s view (cfr. the German case of sibling incest³⁰). The result is usually a wide Constitutional free play for criminal law. A sectorial example may be the recent criminalization of preparatory acts in many countries. The competence of courts to strike down legislation will not be central to discussion in the following, as our focus point is the role of Constitutions in criminal law reform/legislation.³¹ However, we should not underestimate the importance of this question to preferences in choosing between the passive and the active approach. The latter is probably easier accepted where this kind of judicial review is not an option. In the following we will for the sake of argument presuppose that judicial review is an option.

The foregoing remarks is also the starting point for the ‘passive approach.’ Here, the Constitution is conceived of as a (hierarchical) background framework for criminal law reforms. The central question is ‘*under what conditions is creating substantive criminal law in accordance with the requirements of a national constitution (like the German Basic*

²⁹ See for instance Hage, Law and Coherence, 17 (1) *Ratio Juris* (2004) pp. 87–105.

³⁰ BVerfGE 120, 224. See further e.g. Lagodny, Basic rights and substantive criminal law: The Incest Case, 61 (4) *University of Toronto Law Journal* (2011) pp. 761-781 and Dubber and Hörnle 2014 pp. 123-130 and 139-140.

³¹ On this subject, see for instance the approach of the German *Verfassungsgericht* discussed in Lagodny 1996, for an outline, see Lagodny, The Case of Substantive Criminal Law before the Bars of Constitutional Law – An Overview from the Perspective of the German Legal Order, Vol 7 (3) *European Journal of Crime, Criminal Law and Criminal Justice* (1999) pp. 277-288. For a more general legal theoretical perspective on the subject, see Tuoiv, *Ratio and Voluntas – The Tension Between Reason and Will in Law* (Ashgate, 2011) pp. 241-283.

Law) or an international convention (like the European Convention on Human Rights)?³² For the passive approach, this is also the *only* role of the Constitution in regard to criminal law reform. It is not for the reform to question whether there is need for developing the Constitution in this regard.

This is paired with the view that the Constitution should have a restricted scope, limited to the most classical criminal law standards, such as the above-mentioned ones. According to this view, a wide-reaching Constitutionalisation of substantial criminal law principles, i.e. an inclusion of these as part of the Constitution, should be avoided, for several reasons. The passive approach emphasizes that the Constitution should in general concern only the most basic and preferably general, rights or principles, such as the freedom of expression. Inclusion of specific criminal law principles in the Constitution may easily result in a flood of such principles. (The same applies for other fields of law). The literature illustrates exactly how intertwined different criminal law standards are.³³ Sound as they may be, from a criminal law point of view, this approach gives rise to difficulties when it comes to extracting only a few such standards to be included in the Constitution. In this case, it would be highly questionable which principles that should be included and how these should be drafted. For instance, the entire general part of criminal law could easily be lifted into the Constitution (after all, criminal law theorists strive for intellectual *systems*). This threatens the overarching role of the Constitution, and thereby also the democratic role of the legislator and the principle of separation of power. The fact that the principles suggested in the literature are often both vague and debatable, gives additional reason to keep particular and substantial principles, for instance the harm principle, out of the Constitution. To the extent that specific criminal law principles *are* suited for inclusion in the Constitution, most suited are distinctly *formal* principles, such as the principle of legality.

Furthermore, the passive approach clearly separates Constitutional law from criminal law as different fields of law - '*each discipline has its own way of thinking and arguing*'.³⁴ This viewpoint is also adopted in reform projects, where a distinction between the 'common' legislator and the 'Constitutional' legislator is central. Criminal law legislation is considered as a 'technical' matter, as one of several subfields of law. Here, criminal law theorists may have a role to play. Constitutional reform however, is a more fundamental task, one where politicians and, if any, Constitutional theorists, should be the central fig-

³² Lagodny 2011 p. 761.

³³ As basis for this fear, see for instance Dubber 2004 p. 572: '*the basic principle of "dignity and self-determination" that underlies not only the Eighth Amendment's proscription of cruel and unusual punishments and the Fifth and Fourteenth Amendments' guarantee of due process, but the Constitution as a whole, guides the constitutionalization of all aspects of criminal law, including not only the definition of criminal norms (substantive criminal law), but also their application (criminal procedure) and the infliction of sanctions for their violation (prison law)*'.

³⁴ Lagodny 2011 p. 762.

ures. This separation secures Constitutional coherence, which would be threatened if the Constitution was allowed to be reformed by 'sectorial initiatives'.

The passive approach summed up: The Constitution should be kept limited. The relevance of it for criminal law reform is limited. The Constitution is a framework to be respected, and Constitutional reform is not a task for a criminal law reform.

5. The Active Approach

Also here, the Constitution is seen as a background framework for criminal law as part of positive law, in accordance with the requirement for hierarchical coherence within the legal order. However, from the active approach point of view criminal law reforms should still always consider the possibility also for reform of the Constitutional framework for criminal law. This approach thereby implies a shift from only considering whether, and in that case how the criminal law reform is regulated and limited by Constitutional provisions, to considering how one *as part of the criminal law reform* may secure an adequate '*criminal law constitution*'. The term 'criminal law constitution' refers to a system of rules and principles that represent a coherent and comprehensive principled framework for criminal law, adequately anchored in the Constitution - beyond the reach of ordinary legislation.

Thereby, the active approach seeks a more dynamic relation between criminal law reform and the Constitution. In doing so, the active approach emphasizes the constitutional dimension alongside the Constitution. The 'positivistic' conception of coherence underlying the passive approach is expanded to also include a call for *constitutional* coherence. Thereby, a tripartite relation emerges: the criminal code must cohere not only with the Constitution, but also with constitutional values. As both criminal law and society are subject to development, one may not rely on a Constitutional arrangement from the past. Instead, there is an ever-present risk of there being, from a constitutional point of view, an insufficient Constitutional framework for criminal law. As the Constitution is a means for effectuating the basic values of the legal order, significant discrepancies between the constitutional values and the Constitution should sometimes lead to amendments in the Constitution. These basic features of the active approach are in need of elaboration, before we in the following section will consider the validity of the two approaches and the claims related to each of them.

Legal trends may give reason to amend the Constitution. A trend towards criminalization of for instance passive presence in a fight, of family members that passively witness violence in the family and more, may create a need for a Constitutional stance for a too far-reaching criminalization of omissions. This could be done by enacting a Constitutional guarantee for the principle of individual responsibility, a principle that may be

said to be at the core of the constitutional basis for criminal law. More specifically, one could draft a Constitutional provision stating that ‘*Criminal responsibility is personal*’.³⁵ It may also be that a more general Constitutional standard for criminal law is called for: ‘*No one should be punished without guilt. One should only be punished according to one’s own guilt*’.³⁶ A more specific example of how criminal law can be regulated in the Constitution can be found in the Italian and Spanish Constitutions, which both contain the principle of rehabilitation as requirement to the administration of punishment.³⁷ Also, other societal changes may give reason for renewing the Constitutional framework. Misuse of information concerning individuals on the internet may *today* call for a Constitutional guarantee for effective legal means - i.e. criminalization - for securing privacy and for preventing such acts.³⁸

The active position does thereby not follow its counterpart in its reluctance to expand the Constitution. In particular the fear of ‘flooding’ the Constitution and the claim that substantial principles are too controversial to be included in the Constitution, are both viewed differently. First of all, inclusion of certain basic substantial *criminal law* principles, and not principles from other fields of law, can be defended with reference to the basic, fundamental role of criminal law in the legal order. It demarcates acts that can be dealt with ‘within’ the legal order from acts that violate the very presuppositions of the democratic *Rechtsstaat*. In this manner criminal law contributes to secure the basic position of the individuals and their respective spheres of freedom. This can motivate the inclusion of substantial criminal law principles in the Constitution, while omitting principles from other fields of law. Many Constitutions do, as illustrated, include more criminal law principles than principles from other fields of law.

To the claim that *formal* principles, for instance the principle of legality, are easier to include in the Constitution than substantial principles, the active position responds that

³⁵ See for instance Costituzione della Repubblica Italiana, art. 27 (1): ‘*La responsabilità penale è personale*’. The Constituição da República Portuguesa, art. 30 (3) prohibits *transfer* of criminal responsibility: ‘*A responsabilidade penal é insusceptível de transmissão*’.

³⁶ Examples of positive statutes concerning the principle of guilt, or the culpability principle, is not known to this author, but the principle is at least acknowledged in the jurisprudence of the Germany *Bundesverfassungsgericht* (BVerfG), derived from the basic principle of human dignity, the right to (free expression of) personality, and the *Rechtsstaat*-principle, see for instance cases in BVerfGE 20, 323, 331; 45, 187, 226, and; 123, 267, 413. See also e.g. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 2nd ed. (Duke University Press 1997) p. 308, Appel 1998 pp. 108 ff. and Dubber and Hörnle 2014 pp. 108-110.

³⁷ Costituzione della Repubblica Italiana, art. 27 (3); ‘*La pene non possono consistere in trattamenti contrari al senso di umanità e devono tendere alla rieducazione del condannato*’; Constitución española de 1978 art. 25 (2); ‘*Las penas privativas de libertad y las medidas de seguridad estarán orientadas hacia la reeducación y reinserción social y no podrán consistir en trabajos forzados*’.

³⁸ The Constituição da República Portuguesa, art. 26 (2) seems to be an example of this: ‘*A lei estabelecerá garantias efectivas contra a obtenção e utilização abusivas, ou contrárias à dignidade humana, de informações relativas às pessoas e famílias*’.

certain substantial principles are generally acknowledged, and are to a great extent comparable to the principle of legality. Even if there are a number of viewpoints on it, there seems to be a wide acceptance of the principle of guilt, and of the fact that criminal law in Western legal orders is not fully comprehensible without it – even if exceptions sometimes are made. Furthermore, substantial criminal law principles, such as the mentioned right to rehabilitation in the administration of punishment, do not need to be neither particularly controversial nor more difficult to grasp than other Constitutional principles, such as for instance concerning the freedom of expression. In addition, also additional formal or procedural principles may be engaged. This could constitute a higher threshold for criminalization comparable to the higher threshold that many Constitutions apply to amendments of the Constitution itself, a procedure where the criminalization must be re-enacted after a certain period, or a proportionality principle of the kind found for instance in the jurisprudence of the German *Bundesverfassungsgericht*.³⁹

Which principles to include is not the decisive matter here. More important is it that the criminal law reform is, from an active point of view, considered a particularly appropriate setting in which to reconsider the constitutional framework for criminal law, and (if needed) to (further) develop a criminal law constitution. A new criminal code requires rethinking of the criminal law, in regard for instance to societal changes that have taken place in the time between the enactment of the existing code and the new reform process, but also rethinking of the Constitutional framework for criminal law. This rethinking may very well make it clear that the current Constitutional framework is insufficient to secure constitutional principles and values. To be able to acknowledge this it is required an internal perspective that the Constitutional law rationality does not easily embody. Whereas for instance a Constitutional lawyer would easily understand the reasons for and the importance of for instance the prohibition of the death penalty, to grasp the nature, reasons and the implications of the principle of guilt to criminal law, for instance, requires a deeper knowledge on this very subject. So, in criminal law reforms it should also be considered whether the overarching Constitutional framework for criminal law is adequate or not. (An alternative is of course to give the courts the mandate to

³⁹ See the overview in Lagodny 1999.

develop a criminal law constitution.⁴⁰ Judges may have the necessary competence, but they are on the other hand often generalists, and in court this perspective is often narrowed down. These factors indicate that courts are not the optimal venue for developing a criminal law constitution.⁴¹)

Thereby the active approach also downplays the distinction between Constitutional reform as a task for politicians and Constitutional law theorist, and the more specific, 'technical' reform of criminal law where criminal law theorists have a role to play. Instead, the active approach emphasizes the close constitutional connections in criminal law, and thereby calls on us to cut through the often too strong division between Constitutional and criminal law found in many legal orders. In a positivistic sense, it remains a valid distinction, but it should not restrict the legislative point of view.

6. Towards a Moderate Active Approach

Opinions on what approach to favour, will be coloured by historical experiences, institutional orders and other traits of legal culture. The passive approach will easily be favoured in legal orders with a high degree of reluctance to and/or high standards for Constitutional amendments. The active approach may be more attractive where Constitutional reforms are more frequent. The passive approach may however also for instance find support in legal orders where an adequate criminal law constitution already is in place. Also a well-founded opinion is in the end in need of a Constitutional theory, a conception of what a Constitution is or should be, *and* the similar for criminal law.⁴² For instance,

⁴⁰ See on the situation in Canada in Brudner 2011 p. 867, where the Supreme Court has adopted this role: *'There, the Supreme Court has construed its mandate under the written constitution to include the review of legislation touching the criminal law's general part - the part comprising criteria of culpability, justification, and excuse applicable to all criminal offences - in light of common-law principles of substantive justice. As a result, common-law fault requirements and defences have been transformed from presumptive limits on penal legislation defeasible by clear statutory language into binding ones subject only to emergency override or to the politically stigmatic notwithstanding clause. Thus, statutory constructive murder provisions and absolute liability offences carrying prison sentences have been struck down as a violation, of 'fundamental justice'; and the highly restrictive statutory defence of duress has been held accountable to the standard of its more liberal common-law counterpart.*

⁴¹ See for examples, e.g. Fletcher 2007 pp. 102 ff.

⁴² Whereas there for a long time have been many contributions to criminal law theory, the field of Constitutional theory has fewer contributions, see however, for a classical – and controversial – contribution, Schmitt 2008. Questions concerning specific Constitutional principles, such as the principle of separation of powers, have however been subject to much discussion. In recent years, Constitutional theory may seem to have received greater interest, see for instance contributions to Dyzenhaus and Thorburn (eds.), *Philosophical Foundations of Constitutional Law* (Oxford University Press 2016).

it will easily impact our subject whether one adheres to a classical, retributive conception of criminal law, where punishment is considered a distinct legal sanction, or to a more utilitarian conception, where punishment is just one of several means for the state to secure law-abiding citizens.⁴³ From the latter point of view, it seems easier to accept developments within criminal law, such as (the expansion of) use of corporate criminal responsibility. Thereby, it also seems reasonable not to tie the legislator to Constitutional solutions to matters such as this. The former will typically be more reluctant, for principled reasons, to corporate criminal responsibility. From this point of view, it will thereby also be worth considering Constitutional obstacles to developments such as this.

Given the complex set of background premises needed for a proper discussion of the adequacy of the two approaches, I will restrain myself to make some suggestions.

Constitutions should, I think, be developed in tandem with the development of criminal law. I do think that there is something attractive about the idea of a criminal law reform striving to establish a criminal law constitution – a system of principles for criminal law – which also is anchored in the Constitution, even if this must be done by a certain reform of the Constitution itself.⁴⁴ Why should the creation of such a criminal law constitution be considered important? There are several reasons for this, many of which are well known. Most important is the intrusive nature of criminal law, an alone sufficient reason for developing a more explicit criminal law constitution that contributes to at the same time limiting and legitimizing criminal law. Furthermore, developing an adequate criminal law constitution is not only about for instance preventing criminalization of certain acts. It is also a matter of coherence, and not only in the sense of absence of formal (logical, if you prefer) inconsistencies.⁴⁵ Normative coherence may be of far greater importance than what is often acknowledged. It is important for the justification of criminal law, but also for instance for the accessibility of criminal law for both lawyers and citizens, and for the general part and its core constituents with its central functions in modern criminal justice systems. Basically, a high degree of normative incoherence threatens basic aims of the rule of law ideology. Today we should consider steps to secure such coherence in the legal order, and in criminal law in particular. Requiring a criminal law constitution in the above mentioned manner may be one contribution to it.

However, the passive approach contains some insights that are worth bringing on. A certain division between Constitution and criminal law should be upheld, even in crim-

⁴³ See at this point also Appel 1998 p. 34 ff.

⁴⁴ See also for instance Ashworth, *Towards a Theory of Criminal Legislation*, 1 (1) *Criminal Law Forum* (1989) pp. 41-63, at 60-61: '*The need is for principles with names, principles that are given wide currency, and principles that are generally understood and accepted as ideals – a position that may be easier to reach in a country with a constitution or a charter of rights, although any country needs principles that are clearly referable to the issues raised in the formulation of new criminal laws*'.

⁴⁵ See also for instance Ashworth 1989 pp. 41 ff.

inal law reforms. At least to a certain extent, Constitutions should be raised above criminal policy matters, allowing the democracy the responsibility to decide on what kind of criminal law we want, i.e. to find a balance between the basic interests - the different freedom spheres - that are in play.⁴⁶ A too far-reaching ‘juridification’ of the matter is not necessarily a good thing. Nor is it desirable that a criminal law reform becomes too ambitious in regard to the Constitution. Reform projects that bring their conclusions into the Constitutional framework may both give these conclusions an unwarranted authority and hamper later reforms. Opinions on such matters change easily. The result may be that the Constitution loses its character of being that very stable framework that calls on us to respect it as a premise for the daily life of law and politics. To accept these arguments is not necessarily being indifferent in regard to constitutional values and principles. Democracy, i.e. the right to self-legislation, is in itself a constitutional value. Also, from a strategic point of view, it may be that the criminal law itself is a wiser means for securing such values. Here one avoids ‘*the translation of aspirational standards into mere minimums, with the consequent shift of attention from what is wise to what is permitted*’, which easily dominates the Constitutional perspective.⁴⁷ This may even become an obstacle to the development of a comprehensive principled framework for criminal law, which future Constitutions may nurture from.

To fully embrace the active approach may as such seem to be both naïve and unwise. So, we should consider to what extent the foregoing remarks may be merged. I think there are good opportunities for that. Then we may arrive at a *moderate* version of the active approach.

Some principles should clearly be of a Constitutional kind, due to their intimate connection with the basic constitutional ideas that the Constitution springs out from and is meant to secure. The principle of legality and the principle of guilt are such constitutive principles, and the same goes for instance for the prohibition of the death penalty. It is advisable that the criminal law reform includes the Constitutional perspective, and that it is given the opportunity to connect the criminal law constitution sufficiently tight to the Constitution, if needed by considering Constitutional reform itself. Constitutional engagement in the criminal law reform does of course in the end require the cooperation of the legislator, who must make the final decision on which of the reform proposals that are to be enacted. The inner coherence of the Constitution may be secured by specific procedures in this regard, for instance by preparations being carried out by a Constitutional committee. Anyhow, the considerations and suggestions from the criminal law

⁴⁶ See further Jacobsen, *Vitskap og demokrati i strafferettsutviklinga in Rett og politikk: nye perspektiver på demokratiets forutsetninger, utforming og grenser*, eds. Bernt, Holst and Stjernø (Pax 2015) pp. 272-288.

⁴⁷ Quotation from Berger 2014 p. 438. See also on the development of the fault standard in Canadian criminal law after the enactment of the Charter in Roach 2011.

reform will in the latter process be valuable, as they will represent a criminal law point of view that Constitutional reforms often seem to lack.

Another advantage of undertaking the active approach is that it also strengthens both the Constitutional *and* constitutional reflection in the criminal law reform itself. By mandating for instance a criminal law commission to also relate actively to the Constitution, it is likely that the commission will to a greater extent take basic principles into account when drafting the criminal code. This 'guidance function' that the Constitution and its values may have, may of course result in an 'overfulfilment' of Constitutional requirements in the criminal code. Consider for instance a criminal law commission that considered there to be no (need for a) Constitutional prohibition of corporate criminal responsibility, but that it still best coheres with the Constitution to sanction corporations by means of other kinds of sanctions. This should still be acceptable also to the passive approach.

As concerns the worries in the passive approach in regard to the too extensive Constitutional limitations on the legislator, principles such as the suggested ones do not usually function first and foremost as specific limitations for the courts to apply. Due to their vague character, their primary function is rather located at a discursive level, as they contribute to generating an adequate level of constitutional reflection in the legislative process. To include an overarching ideological principle for criminal law in the Constitution, such as the principle of guilt, is likely to contribute to secure that a future amendment of or addition to the criminal code respects this basic principle. The inclusion of such general principles in the Constitution gives in other words the legislator a heavier argumentative burden in criminal law reforms in regard to departing from this principle. A sceptic may reply that this discursive function will not constitute an obstacle to extensive and constitutionally unwarranted criminalization. This may be so, but it may suppress such criminalization, and is in any regard the soundest alternative in a legal order where the democratically elected body holds legislative power.

The worry for a Constitutional 'overload' is in itself warranted. However, whereas certain principles clearly belong in the Constitution, other principles may be claimed to be located at a lower level, i.e. to have more of a derivative character. For instance, the principle of proportionality in sentencing derives from the principle of guilt. Principles of criminalization, such as the harm principle, can also be related to the principle of guilt. While these are important pieces of the puzzle, we should be open to giving the criminal law constitution different expressions or entrenchment. To legal orders with a complex Constitutional structure that combines a general or federal Constitution and (more detailed) state Constitutions, inclusion of such principles in the latter may provide an alternative. In addition, the criminal code may itself be an appropriate venue for lower level principles. Modern criminal codes contain general parts, with general criteria for criminal responsibility, concerning for instance intent, attempt and complicity. There is

however nothing denying that they also can contain general principles that are central to the criminal law reform and its product(s), and to future (sectorial) reforms. Some codes already contain such principles. The German *Strafgesetzbuch* § 46 gives starting points for meting out punishment, in particular with reference to the offender's guilt.⁴⁸ Several such substantial principles could be included in a principled framework as part of the criminal code, which the general parts of the criminal codes after all in much resemble. In legal orders such as in Norway, where the *travaux préparatoires* have a prominent role in legal reasoning, even these documents may be an arena for highlighting central criminal law principles. This latter way of anchoring the principles is however less visible and less committing, and also more conditioned by legal culture: The high esteem for these documents in Norway is by no means a general trait of Western legal orders.

Now, it can be responded that also the passive approach may recommend that such a criminal law constitution is developed as part of the reform, as long as the Constitution is left out of this process. However, I find this too defensive. This solution does not give the Constitutional perspective sufficient attention.

As regards what principles to acknowledge in this regard, it is true that there is no general consensus on for instance criminalization principles such as the harm principle.⁴⁹ However, the legislator often makes a stand on controversial matters, such as whether buying sex should be subject to criminal responsibility. One could even say that one of the fundamental tasks of criminal law legislation is to make decisions on how far our freedom of action should extend in such controversial matters. It seems fair to expect, as part of a reform of criminal law, that the legislator clarifies its principles in this regard. Intrusion of the freedom of action by means of criminalization should require a coherent justification, and in turn be related to the first principles of the Constitution. If the legislator has such a justification, it can be included in the legislation. If the legislator has not, it may be time to rethink the matter from a more principled point of view.

In this sense we may be able to arrive at a more nuanced solution in terms of a moderate active approach, i.e. assigning the criminal law reform the central task of providing a comprehensive skeleton or structure for criminal law. This should be derived from the constitutional level, mediated by the already established Constitutional framework, and implemented in respectively the Constitution and in the criminal code. Even if the criminal law reform in this regard is constrained to *suggest* Constitutional amendments, we achieve the sought for dynamics between the criminal law perspective and the Constitutional perspective.

⁴⁸ StGB § 46 (1): 'Die Schuld des Täters ist Grundlage für die Zumessung der Strafe. Die Wirkungen, die von der Strafe für das künftige Leben des Täters in der Gesellschaft zu erwarten sind, sind zu berücksichtigen.'

⁴⁹ See for instance Dubber and Hörnle 2014 pp. 113 ff.

7. The ECHR as a Criminal Law Constitution for European Legal Orders? The Norwegian Experience

The relevance of the European Convention on Human Rights and Fundamental Freedoms (ECHR) for criminal procedure law has been acknowledged for a long time. In the last few decades, not least due to the practice of the European Court of Human Rights (ECtHR), its relevance also to substantive criminal law has become evident.⁵⁰ To some European legal orders, the ECHR play the role of a 'semi-Constitution'. So we may ask: Can international law provide us with the criminal law constitution that we should strive for, so that we at the national level may be satisfied with maintaining (?) a passive approach? We only have room for a brief comment on this.

International instruments such as the ECHR may very well contain a sound constitutional regulation of criminal law. Applying this as a criminal law constitution may have pragmatic advantages in regard to unity and more. Still, an instrument such as the ECHR is in several regards limited. Despite a common constitutional paradigm, there remained cultural differences that limited the drafting of the ECHR, which also must be taken into account in ECtHR practice and its development of the Convention. It does therefore not necessarily provide us with the framework that a national criminal law reform invites us to develop. Rather, developing a criminal law constitution is the legislator's responsibility, as holder of penal power. So, it might seem unsatisfactory to submit to the judgement of an international body. What is lacking is the legislator's commitment to dig into the fundamental question: What limits are there to penal power and what principles should guide us there? Addressing this question should be a fundamental part of each and every criminal law reform and the legislator should commit to its answering this. This national engagement will, in turn, also be an important source for the ECtHR in developing the Convention.

The Constitutional reform in Norway in 2014 may illustrate this. Even if this reform was not a criminal law reform, criminal law was still a central part of the Constitutional reform. The Norwegian Constitutional legislators, including the Human Rights Committee, seem in this regard to basically have considered the ECHR as the solution to the need for a criminal law constitution.⁵¹ The Constitutional reform placed central articles of the ECHR into the Constitution, including the general presupposition that the courts would develop this in tandem with the ECtHR's development of the Convention. It there-

⁵⁰ See e.g. Appel 1998 pp. 245-302 and, more recently, Baumbach, *Strafferet og menneskeret* (Karnov 2014).

⁵¹ See Dokument 16 (2011–2012) *Rapport til Stortingets presidentskap fra Menneskerettighetsutvalget om menneskerettigheter i Grunnloven*.

by broadened the existing Constitutional regulation of criminal law.⁵² The paragraph that concerns specific criminal law standards, § 96, contains as before the principle of legality, but also the presumption of innocence (*in dubio pro reo*) and a prohibition of complete confiscation. In addition, § 93 contains a prohibition of the death penalty, as an addition to the right to life, the first and most foundational of the individual rights in the Constitution. Furthermore, § 93 contains certain other general rights of particular relevance to criminal law. This includes the prohibition of torture and inhumane or degrading treatment or punishment, in addition to a prohibition of slavery and forced labour. Also, in § 94 it contains a general requirement of proportionality in matters of deprivation of liberty. These are all clearly important rights for the individual.

From my point of view, as a criminal law theorist, I still think we should have managed better. A part of the problem – or at least a symptom of it - may have been the foregoing criminal law reform. A study that I have conducted as part of writing this paper shows how close the criminal law reform is to the passive approach.⁵³ Adopting more of an active attitude to the Constitutional dimension of criminal law in the foregoing criminal law reform could have delivered the premises we needed to achieve a better interaction in this regard. The foregoing appeal for a moderate active approach, with examples, may indicate in what way we could have approached the question.

⁵² For an overview, see Grønning, Husabø and Jacobsen, *Frihet, forbrytelse og straff – En systematiske fremstilling av norsk strafferett* (Fagbokforlaget 2016) pp. 58-89.

⁵³ See Jacobsen, *Konstitusjonelle dimensjoner ved den norske straffelovsreforma (1978-2015)*, 153 (2-4) *Tidskrift utgiven av Juridiska Föreningen i Finland* (2017) pp. 399–414.