

# Criminal Law & Populism – Is There a Place for Human Rights?

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Democracy in the modern world faced a new challenge – the populism movement. This political concept creates a lot of difficulties not only for traditional political parties but also for governments. Articulating categories such as “corrupt elite”, “true people”, “pure people” and “oligarchic power” they rebalance the common political establishment and provoke large masses to protest against the government. In case of some populist party winning the elections, they will try to implement their ideas into state policy. But intrinsic part of populist ideas is that they are attractive only when they remain ideas. Like a Cinderella’s coach, they will inevitably turn into a pumpkin once elections are over and it is time to implement them. Criminal law is among the victims of populist politicians. They make a negative impact on the quality of criminal statutes by violating the requirements of the legality principle.

The main hypothesis is that the populism movement makes a negative impact on the quality of criminal law statutes, which is one of the requirements of the legality principle in criminal law. Requirements of the stability and reasonable dynamism of the criminal statute are often not complimentary with the interests of a wide range of ordinary citizens. That is why the theory of prevention unjustified and inappropriate changes to the criminal statute are needed.

The methodology of this research is the following. The first step is to find a starting point – the common definition of populism and its features. The next step is to collect empirical data - legal texts and literature on populism and

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law, especially, penal populism. The latter is sufficiently studied in the works of American scholars. At that stage, the studies about the populists' movement in Ukraine will be of great importance.

The sub hypothesis is that the law-making rules as well as the complicated procedure for amending the Criminal Code, including the examination of draft laws may be an effective prevention mechanism from negative populism impact. I will analyse the last draft laws on amendments to the Criminal Code of Ukraine, explanatory notes to them, and conclude the habits of populism in draft law creation. The logical method is used to create a conclusion about populism's impact on the criminal legislature creation process.

### **1. Democracy and the rule of law as the underlying values of the legality in criminal law**

The historical and philosophical development of this principle allows us to conclude that freedom and individual autonomy, democracy, separation of power, and the rule of law are underlying values of legality in criminal law. Philosophers of the Enlightenment era (Montesquieu, Hobbs, Beccaria) have a huge impact on the development of these values. Their works can help us to find a modern interpretation of the meaning of legality.

The rule of law requires the arbitrariness of power to be limited by law. On this position, Dicey states that “the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government” (Dicey, 1965, p. 120-121). Tamanaha pointed out that at its core rule of law entails a set of minimal characteristics: law must be set forth in advance (be prospective), be made public, be general, be clear, be stable and certain, and be applied to everyone according to its terms (Tamanaha, 2009). The rule of law and democracy are fundamental values in democratic societies. It is strongly connected with the principle of the rule of law as a procedure of participation individuals in formulating the general will of the state, that allows self-determination of the community (Held, 2018).

Democratic procedures legitimise criminal statutes. Only society (or democratically elected representatives) can bring responsibilities to follow certain rules and be responsible for non-compliance with them. There is an old dis-

cussion between scholars about two types of democracy - procedural (when only compliance with democratic procedures matters) and substantive (when respect to human dignity is a matter as well). As this discussion is not the focus of this study, we will adopt the view of scholars, who combine the requirements of these two types.

The democratic legislative process also has its disadvantages. Gregor Fitzl states that in the wake of globalisation, the recent financial crisis, and the following austerity policies, the departure of political decisions into extra-parliamentary bodies provoke the erosion of the parliaments' power and exacerbates the crisis of democratic representation (Fitzl et al., 2018, p. 1). The institutions' weakness causes an increased risk of the development of populist political forces in the country and their coming to power.

## **2. The quality of criminal statutes as a requirement of the legality principle in criminal law**

*Nullum crimen sine lege certa* requires the law to be precisely defined so that foreseeability of the punishment and accessibility of the concrete penal norms can be established for individuals (Rauter, 2017, p. 20). The main idea of written law is to provide the orienteers for individuals to guide their actions. This concept makes huge stress on the quality of law.

We agree with factors formulated in the Danish Government White Paper "Outlook on Legislation" that the following factors formulate the idea of the quality of law: legality, conformity with the Constitution, international treaties and the effectuation of general legal principles; effectiveness and efficiency; subsidiarity and proportionality; practicability and enforceability; harmonisation; simplicity, clarity, and accessibility (Arnscheidt et al., 2017, p. 78). Ukrainian legislator creates Rules for drafting laws and basic requirements of legislative technique. It consists of a system of established theoretical and applied rules, based on many years of law-making practice. These rules outline the means and methods of drafting and writing draft laws that ensure accurate and complete compliance with the provisions, their content, and purpose, comprehensive legal regulation, clarity and accessibility of legal material, etc. Unfortunately, they contain only part of the technical and legal requirements for the formulation of legal acts and do not pay attention to the substantive requirements for laws.

Substantive requirements to laws reflect its suitability, necessity, and usefulness, which ultimately determines its feasibility and effectiveness in achieving the objectives of this law. All of these requirements must be ensured through the legislative process. To this end, there are procedures for public debates, parliamentary hearings, and the involvement of experts in the law-making process.

However, there may be situations where the expert and scientific validity of the law are rejected in favour of other purposes.

### **3. Populism as an impact factor on the quality of the criminal statute**

Populism is an ideology “that considers society to be ultimately separated into two homogeneous and antagonistic groups, ‘the pure people’ versus ‘the corrupt elite,’ and which argues that politics should be an expression of the general will of the people” (Mudde, 2004, p. 543). There are two sets of factors that allow populism to influence democracy: First, institutional weakness provides an opening for the populist suffocation of democracy. Second, a huge resource windfall or clear success in overcoming acute, severe crises gives populist leaders massive support, allowing them to remove the remaining obstacles for an authoritarian concentration of power. When either one of these conditions is absent, populist machinations fail and democracy survives (Weyland, 2020, p. 2).

The populists’ rhetoric was always used by Ukrainian politicians. Populists in Ukraine and Europe are anti-globalist, directing their critic towards the International Monetary Fund and other international financial organisations. Populists everywhere use radical rhetoric against corrupt elites, the ‘liberal establishment’ and authorities (Kuzio, 2018).

The influence of populist politicians on the process of creation of criminal statutes is present on all levels of the legislative process:

- I. Legislative initiative. A study of empirical data reveals that members of parliament by submitting bills seek to increase their rating among the population. At the same time, they realise that this bill will be withdrawn or will never reach the Verkhovna Rada.
- II. Public discussion. The speed of adoption of laws eliminates the normal order of discussion with the expert community.
- III. Evaluation by external experts.

IV. Public hearings in the parliament. The possibility of amending draft laws “from the ground” eliminates previous procedures.

The populist rhetoric of Ukrainian politicians often concerns criminal law issues. Calls for increased or establishing criminal responsibility are usually made after certain tragic events or emergencies. For example, criminal liability for denying the Famine is proposed on the anniversary of remembrance, propositions about strengthening the responsibility for drunk driving – after a huge traffic accident.

The worst case scenario is the adoption of these scientifically unjustified changes to the criminal code by Ukrainian Parliament.

For example, Parliament imposed a life sentence for the falsification of medicines, which caused death of a person or other serious consequences, legalised the term “thief in law”, established criminal liability for the spread of criminal influence, and strengthened criminal liability for violation of quarantine rules. These examples clearly illustrate the willingness of politicians to use criminalisation as a means of increasing their ratings. Especially in Ukraine, where a mono-majority in the Parliament simplifying the parliamentary debates during the law-making process.

This is a general trend. John Pratt and Michelle Miao (one of the most famous criminologists) wrote that from the 1980s onwards, there has been a marked shift towards protecting the public – at the expense of individual rights – from those who would otherwise put this at risk. As this has occurred, criminal law has become more punitive, regulatory, and extensive. It no longer simply reacts to a crime but seeks to prevent it through initiatives backed by penal sanctions, even though no crime may have been committed (Fitzi et al., p. 47).

Since the beginning of the ninth convocation of the Verkhovna Rada of Ukraine, 62 bills on amendments to the Criminal Code of Ukraine have been submitted. Of these, only 4 laws were adopted.

This only proves the hypothesis that criminal justice is now less autonomous than it was three decades ago, and more forcefully directed from the outside. A new relationship between politicians, the public, and penal experts has emerged in which politicians are more directive, penal experts are less influential, and public opinion becomes a key reference point for evaluating options. Criminal justice is now more vulnerable to shifts of public mood and political reaction. New laws and policies are rapidly instituted without prior consultation with the criminal justice professionals, and expert control of the

policy agenda has been considerably reduced by a populist style of policymaking (Garland, 2002, p.172).

Calls to social security rise a couple of problems related to law application practice by law enforcement agencies and - for the most part - judicial authorities. The most common problems related to populist rhetoric are calls for increasing terms of imprisonment - especially in sensitive types of criminal cases (corruption, sexual offences); interpretation of uncertainties in criminal law in favour of society, not the individual; psychological pressure on judges.

The above-mentioned factors necessitate the development of an effective system to prevent ill-considered changes in criminal statutes and their application, which we defined below.

## **Conclusions**

The principle of legality in criminal law, which is recognised in civilised countries, places several requirements on the quality of criminal law and its application.

The need to ensure respect for human rights leads to the study of the properties of quality criminal law, as well as factors that negatively affect it. One such factor is the deviation from the normal legislative process towards populism. This way has common features - the reason for changes in legislation are acute social events, an attempt to satisfy the "appetites of the public" by proposing such changes, lack of proper legal justification for amending the criminal law (inconsistency with the existing doctrine of criminal law).

To prevent this, a system of rules of legislative technique should be developed, which will include the following:

- complicated way of deciding on making changes to criminal statute (the special subject of legislative initiative);
- the temporary restriction on the possibility of making changes to the same article of the Criminal Code and to the Criminal Code in general (for example twice a year permitted to review the criminal statute);
- mandatory public discussions with the involvement of all stakeholders in the field of criminal law - scientists, practitioners;
- providing an opinion of a special institution on the compliance of amendments to the Criminal Code with its principles.

These recommendations are not comprehensive. Further research on the negative impact of populism on criminal law, as well as ways to reduce such an impact, should continue.

## **Bibliography**

### **Special literature**

- Dicey, A. V., & Wade, E. C. S. (1965). Introduction to the study of the law of the constitution. London: Macmillan.
- Held, D. (2018). Models of democracy. Cambridge, UK: Polity. 262–271.
- Fitz, G., In Mackert, J., & In Turner, B. S. (2018). Populism and the crisis of democracy: Volume 2.
- Rauter, T. (2017). Judicial practice, customary international criminal law and *nullum crimen sine lege*. Springer.
- Arnscheidt, J., In Rooij, B., & In Otto, J. M. (2017). Lawmaking for development: Explorations into the theory and practice of international legislative projects.
- Kuzio T. (2018) Populism in Ukraine and Europe: Similar but Also Different. CGP working papers. Populism in Europe: An Overview, 16-31.
- Mudde, C. (2004). The Populist Zeitgeist. Government and Opposition, 39, 4, 542-563.
- Weyland, K. (2020). Populism's Threat to Democracy: Comparative Lessons for the United States. Perspectives on Politics, 1-18.
- Fitz, G., Mackert, J., & Turner, B. S. (2018). Populism and the crisis of democracy. Volume 2
- Garland, D. (2002). The culture of control: crime and social order in contemporary society. Chicago, University of Chicago Press.
- Tamanaha, B. Z. (January 01, 2009). A Concise Guide to the Rule of Law. Relocating the Rule of Law, 3-15.

### **Practical material**

- Aparat Verhovnoi Rady Ukrainy (2014). Pravila oformlennia proektiv zakoniv ta osnovni vimogi zakonodavchoi tehniky (Metodichni rekomendatsii). [online] Available at [http://static.rada.gov.ua/site/bills/info/zak\\_rules.pdf](http://static.rada.gov.ua/site/bills/info/zak_rules.pdf) [Accessed 29 March 2021].

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