Constitutions and Criminal Law Reform

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Theorizing Criminal Law Reform

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I) Introduction

Historically, Constitutions and criminal law have been closely related.[1] However, this relation has only more recently been the topic in a more general discussion.[2] This literature first and foremost concerns (the usually rather narrow) Constitutional limitations on criminal law.[3] Our subject it 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 in this regard?

This paper aims to create an analytical tool, by differentiating between a 'passive' and an 'active' approach to the relation between criminal law reform and Constitutions. In brief: The passive approach considers the Constitution as a *background framework* for criminal law reform, whereas the active approach adopts a more 'dynamic' view of the Constitution, and considers criminal law reform as an appropriate venue also for *reconsidering* the Constitutional framework for criminal law. This analytical tool may be useful when discussing criminal law reforms and Constitutions in legal orders in time and space. Some examples from existing Constitutions can also be useful to provide us with a bigger 'space of opportunities' when discussing this relation.[4]

The paper will start out in part II with some terminological clarifications. In part III, some general remarks on the relation between Constitutions and criminal law reform will be made, before the two approaches are further elaborated in parts IV and V respectively. Some conclusions are drawn in part VI.

II) Some Terminological Clarifications

In this paper, 'Criminal law reform' refers to a major revision of criminal law carried out by legislators, for instance by the enactment of a new criminal code. A 'major revision' differs from on the one hand, a 'revolution', where basic ideas and the ground structure of criminal law are exchanged for new ones, and on the other a 'sectorial' reform, where only a specific field of criminal law (*e.g.* offences of dishonesty) is reformed.

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[1] See for instance Appel (1998) s. 303-304 and Berger (2014) p. 423.
[2] From the German literature, see *e.g.* Appel (1998) and Lagodny (1996). In Anglo-American literature, see for instance Dubber (2004), Fletcher (2007) pp. 97-106 and Berger (2014).
[3] See *e.g.* Lagodny (2014).
[4] A comparative approach is beyond reach for this paper. On comparative constitutional law, see Rosenfeldt/Sajó (2012).

'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.[5] The exclusion of the court perspective is due to the identification of an adequate starting point for our discussion. Judges must respect Constitutional rules. Also, by court practice even a sectorial reform must usually take place in piecemeal.[6] 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 heel 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 styles of Constitutional legal reasoning, for instance in the distinction between a formal approach and a more dynamic approach.[7] Lessons may also be learned for instance from the jurisprudence of the Supreme Court in Canada, 'one of the leading jurisdictions in the world in applying constitutional provisions to the general part of criminal law'.[8]

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.[9] Examples are the US Constitution (1787), the Norwegian *Grunnlov* (1814) and the German *Grundgesetz* (1949). Now, not all legal orders have a written Constitution. In Great Britain the Constitution consists of a body of principles and law that constitutes the basic legal order.[10] A starting point in this paper is that a Constitution is enacted, that Constitutional fragments are enacted, or that they at least could be enacted, in

[5] Whereas 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.

[6] See also for instance Dubber (2004) pp. 24-25 in regard to the US Supreme Court.

[7] 'Formal' would to a large degree correspond to the 'originalist' approach to interpretation of the US Constitution. See *e.g.* Waluchow (2014) pp. 16-27.

[8] Fletcher (2007) p. 101. See also Brudner (2011) p. 867 and Berger (2014) p. 424 ff., somewhat different Roach (2011) pp. 544-578, p. 552. According to Dubber/Hörnle (2014) p. 102, the Canadian Supreme Court has 'struck a balance between American and German approaches'.

[9] See also Gardbaum (2012) pp. 169-185, p. 170. For a more comprehensive analysis of the word 'constitution' see *e.g.* Schmitt (2008) pp. 59 ff. The term is used differently for instance in Duff, Farmer, Marshall, Renzo, and Tadros (2013) pp. 1-3.

[10] See for instance Dicey (1982) pp. clx ff.

the mentioned, positive sense. It is also assumed that the Constitution is 'effective' as a legal framework, and not just a 'symbolic' document.[11]

The term 'Constitution' closely relates to 'constitutionalism'. The latter term is sometimes used with reference precisely to Constitutions and the limitations to political power that these contain.[12] 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.[13] 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. This 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.[14]

In both meanings, 'constitutionalism' is often related to the political philosophy of Locke.[15] The understanding of law that underpins this paper, which cannot be elaborated here, is closer to a Kantian legal and political philosophy.[16] However, both of these may be described as classical liberal projects.[17] For a 'constitutional paradigm' for this paper, it suffices to say that most Western legal orders are embedded 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 the private autonomy (the right to privacy, freedom of religion *etc*.).[18]

III) 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. The Norwegian Constitution of 1814 required in § 94 a new criminal code to be enacted, in line with European codification trends. One could even imagine a constitutional demand for a reform of criminal law every fifty years or so. The Constitution could on the other hand also possibly *forbid* criminal law reform.

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[11] For this distinction, see Grimm, Types of Constitutions, in Rosenfeldt/Sajó (2012) pp. 98-132, pp. 106-107.
[12] See e.g. Waluchow (2014).
[13] See for instance Allan (2003), preface. A specific criminal law example here is Thorburn (2011) pp. 85-105.
[14] This word is thereby used with a somewhat different meaning than in Gardbaum (2012) p. 171.
[15] For references to Locke, see Waluchow (2014) p. 1.
[16] See Jacobsen (2009), in particular ch. 7.
[17] Some also relate Kant and constitutionalism to each other, see *e.g.* Koskenniemi (2007), pp. 9-36, and Thorburn (2011).
[18] On 'democratic *Rechtsstaat*', see Jacobsen (2009) ch. 3.

Most usually, however, Constitutions constitute *limitations* on, and not obstacle to criminal law reform itself. This is usually a matter of individual rights that must be respected by 'ordinary' legislation, such as the principle of legality[19] and the prohibition of death penalty.[20] 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 a limit to attempts, for instance, to legalize such abuse or violence, or to regulate it within a different field of law.[21]

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. Before we elaborate on this, it should be underlined that the two approaches presented in the following are Weberian 'ideal types'. They aim to describe two different, clear-cut positions on the subject.

IV) The Passive Approach

Coherence is a widely shared ideal for legal reasoning as for other intellectual enterprises. 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. As the Constitution is superior to the criminal law, the latter must respect the former. If the criminal law (in parts) *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, 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. The result is usually a wide Constitutional playing field for criminal law.[22]

The forgoing is also the starting point for the 'passive approach'. Here, the Constitution is conceived of as a (hierarchical) background framework for a criminal law reform. For the

[19] See for instance Constitución española de 1978 art. 25 (1); Finlands grundlag 8 §; Kongeriket Noregs grunnlov § 96 (1); Grundgesetz (GG) art. 103 (2).
[20] See for instance Costituzione della Repubblica Italiana art. 27 (4); Finlands grundlag 7 § (2); Kongeriket Noregs grunnlov § 93 (1).
[21] See also for instance the German abortion case - BVerfGE 39, and Dubber/Hörnle (2014) pp. 120-123 and pp. 137-138.
[22] See for instance the approach of the German *Verfassungsgericht* outlined in Lagodny (1999). For an example, see BVerfGE 120, 224, and also *e.g.* Lagodny (2011) and Dubber/Hörnle (2014) pp. 123-130 and 139-140.

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. A wide-reaching Constitutionalisation of substantial criminal law principles should be avoided, for several reasons. As a starting point, the Constitution should in general concern even more basic 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 literature illustrates how intertwined different criminal law standards are.[23] Sound as they may be, from a criminal law point of view, they give rise to difficulties when it comes to extracting only a few such standards in order for these to be included in the Constitution. It is highly questionable which principles that (in this case) should be included and how these should be drafted. Easily, for instance, the entire general part of criminal law could be lifted into the Constitution. 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 additional fact that the principles suggested in the literature are often both vague and the debatable, gives further reason to keep substantial principles such as the harm principle, out of 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'.[24] 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 figures. This separation secures Constitutional coherence, which is threatened if allowed to be reformed by 'sectorial initiatives'.

[23] As basis for this fear, see for instance Dubber (2004) p. 77.
[24] Lagodny (2011) p. 762.

V) The Active Approach

The Constitution is also here seen as a background framework for criminal law, in accordance with the requirement for hierarchical coherence within the legal order. However, criminal law reforms should still always consider the possibility also for reform of the Constitutional framework for criminal law. This approach implies thereby a shift from only considering whether and how the criminal law reform is regulated and limited by Constitutional provisions or not, to how one *as part of the criminal law reform* may secure an adequate '*criminal law constitution'*. This refers to a set of rules and principles that represent a coherent and comprehensive system of principles for criminal law, adequately anchored in the Constitution - beyond 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. 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 for, 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, such significant discrepancies should lead to amendments in the Constitution.

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 need for emphasizing and securing the principle of individual responsibility in the Constitution This could be done for instance by stating that 'Criminal responsibility is personal.'[25] It may also be that a 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.'[26] A more specific example of how criminal law can be

[25] See for instance Costituzione della Repubblica Italiana, art. 27(1): 'La responsibilità penale à personale'. In the Constituição da República Portuguesa, art. 30 (3) prohibits 'transfer' of criminal responsibility: 'A responsabilidade penal é insusceptível de transmissão.'

[26] The principle is acknowledged in particular by the Germany *Bundesverfassungsgericht* (*BVerfG*), see for instance BVerfGE 20, 323, 331; 45, 187, 226, and; 123, 267, 413. See also Appel (1998) pp. 108 ff. and Dubber/Hörnle (2014) pp. 108-110.

regulated in the Constitution can be found in the Italian and Spanish Constitutions. Both contain the principle of rehabilitation in the administration of punishment.[27]

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, are both viewed differently. First of all, inclusion of certain basic substantial criminal law principles (as opposed to principles from other fields of law) can be defended with reference to the basic, fundamental role of criminal law in the legal order. Criminal law contributes to secure the basic position of the individuals and their respective freedom spheres. This can motivate the inclusion of substantial criminal law principles in the Constitution, while omitting principles from other fields of law – as many Constitutions do.

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 certain substantial principles are generally acknowledged, and to an 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. Also, substantial criminal law principles, such as the mentioned right to rehabilitation in the administration of punishment, need to be neither particularly controversial nor more difficult to grasp than other Constitutional principles, 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 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 'test' of the kind found for instance in the jurisprudence of the German *Bundesverfassungsgericht*.[28]

Which principles to include is not the decisive matter here. More important is it that the criminal law reform is, from the active point of view, considered a particularly appropriate setting 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

[27] Costituzione della Repubblica Italiana, art. 27 (3); 'La pene non possiono consistere in trattamenti contrary al senso di umanità e devono tendere alla riedueazione 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.'

[28] See the overview in Lagodny (1999).

between the enactment of the existing code and the new reform process, but also of the Constitutional framework for criminal law. This rethinking may make it clear that the current Constitutional framework is insufficient to secure constitutional principles and values. To acknowledge this requires 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 implications of the principle of guilt to criminal law, for instance, requires deeper knowledge on this very subject. So, criminal law reforms should also take into account the overarching Constitutional framework for criminal law. (An alternative is to give judges the mandate to develop a criminal law constitution.[29] Judges are however often generalists, and in court the perspective is often narrowed down, so the courts are not the optimal venue for developing a criminal law constitution.[30])

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. The active approach instead emphasises the close constitutional connections in criminal law, and 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.

VI) 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 for instance easily be favoured in legal orders with a high degree of reluctance to and/or high standards for Constitutional amendments. 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.[31] For instance, 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

[29] See on the situation in Canada in Brudner (2011).
[30] For examples of this, Fletcher (2007) pp. 102 ff.
[31] For a classical contribution to Constitutional theory, see Schmitt, *Constitutional Theory* [1928] (Durham and London, 2008). In recent years, Constitutional theory seems to have received greater interest, see for instance Dyzenhaus/Thorburn (2016).

means for the state to secure law-abiding citizens.[32] The former will more easily acknowledge the importance of an active approach.

Here, I will restrict myself to some suggestions. Constitutions should be developed in tandem with the development of criminal law. There is something attractive about the idea of a criminal law reform striving to establish a criminal law constitution where the reform project is tied to the Constitutional framework, even if by a certain reform of the Constitution itself.[33] The most important reason for this is the intrusive nature of criminal law, an alone sufficient reason for developing a more explicit criminal law constitution. Furthermore, developing an adequate criminal law constitution is not only about for instance preventing criminalisation of certain acts. It is also a matter of coherence, and not only in the sense of absence of formal inconsistencies.[34] 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 criminal law in particular. Requiring a criminal law constitution 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 criminal law reforms. At least to a certain extent, Constitutions should be raised above criminal policy matters, allowing the democracy the responsibility to decide on the balance between the different freedom spheres that are in play. A too far-reaching 'juridification' of the matter is not a good thing. Nor is it desirable if a criminal law reform becomes too ambitious in regard to bring its conclusions into the Constitution, as opinions on some such matters easily change. 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 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,

[32] See at this point also Appel (1998) pp. 34 ff.
[33] See also for instance Ashworth (1989) pp. 41-63, p. 60-61.
[34] See also Ashworth (1989) pp. 41 ff.

with the consequent shift of attention from what is wise to what is permitted', which easily dominates the Constitutional perspective.[35] This may even become an obstacle to a comprehensive principled framework for criminal law, which future Constitutions may nurture from.

So, we should consider to what extent the foregoing remarks may be merged. 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 tightly 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 from 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 a Constitutional committee. Anyhow, the considerations and suggestions from the criminal law reform will in the latter process be valuable, as it will represent a criminal law point of view that Constitutional reforms often seem to lack.

Another advantages 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, that may result in an 'over-fulfilment' of Constitutional requirements in the criminal code, should 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 first and foremost function as a specific limitation for the courts to apply. Due to their vague character, their primary function is rather located at a discursive level. They contribute to secure

[35] 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).

constitutional reflection in the legislative process, and give the legislator a heavier burden to consider in the future how the criminal law should be formed. Such an overarching ideological principle for criminal law will also contribute to secure that a future amendment of or addition to the criminal code respects this basic principle. Even if this will not constitute an obstacle to extensive and constitutionally unwarranted criminalisation, it may suppress such criminalisation, 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 have a lower level, derivative character. The principle of proportionality in sentencing derives from the principle of guilt. Principles of criminalisation, 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. For lower level principles, the criminal code may be an appropriate venue. Modern criminal codes contain general parts, with general criteria for criminal responsibility. 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.

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 criminalisation principles such as the harm principle.[36] However, the legislator often makes a stand on controversial matters, such as whether buying sex should be subject to criminal responsibility. 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. Intrusion of the freedom of action by means of criminalisation 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.

[36] See for instance Dubber/Hörnle (2014) pp. 113 ff.

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 is constrained to *suggest* Constitutional amendments, we achieve the sought for dynamics between the criminal law perspective and the Constitutional perspective.

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