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ODPOWIEDZIALNOŚĆ KARNA ZA ZDRADĘ STANU W ASPEKTCIE PORÓWNAWCZO-PRAWNYM

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Adnotacja. Artykuł poświęcono analizie odpowiedzialności karnej za zdradę stanu w aspekcie porównawczo-prawnym. Za pomocą metody porównawczej przeanalizowano przepisy karno-prawne przewidujące odpowiedzialność za to przestępstwo w przestrzeni poradzieckiej, ujawniono ich charakterystyczne różnice w stosunku do odpowiednich norm przewidzianych w Europie Zachodniej i niektórych innych krajach. Na przykładzie Ukrainy, gdzie po zajęciu Krymu i poszczególnych rejonów obwodu donieckiego i ługańskiego przez Federację Rosyjską, zdrada stanu była powszechna, udowodniono potrzebę rozróżnienia odpowiedzialności karnej za różne formy zdrady stanu. Uzasadnia się konieczność zastosowania kary pozbawienia wolności, a także innych środków karno-prawnych.

Słowa kluczowe: zdrada stanu, przejście na stronę wroga, kolaboracjonizm, bezpieczeństwo narodowe, odpowiedzialność karna.

CRIMINAL LIABILITY FOR TREASON IN THE COMPARATIVE LEGAL ASPECT

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Abstract. The article is devoted to the analysis of criminal liability for treason in the comparative legal aspect. Using the comparative method, the criminal law norms that provide for responsibility for this crime in the post-Soviet space were analyzed, their characteristic differences from the corresponding norms provided in Western Europe and some other countries were revealed. On the example of Ukraine, where after the occupation of Crimea and certain districts of Donetsk and Luhansk regions by the Russian Federation, treason was widespread, the need to differentiate criminal liability for various forms of treason was proved. The necessity of application of punishment in the form of imprisonment, and also other criminal legal measures is substantiated.

Key words: high treason, joining the enemy, collaborationism, national security, criminal liability.

КРИМІНАЛЬНА ВІДПОВІДАЛЬНІСТЬ ЗА ДЕРЖАВНУ ЗРАДУ В ПОРІВНЯЛЬНО-ПРАВОВОМУ АСПЕКТІ

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Анотація. Стаття присвячена аналізу кримінальної відповідальності за державну зраду в порівняльно-правовому аспекті. За допомогою порівняльного методу проаналізовано кримінально-правові норми, що передбачають відповідальність за цей злочин, на пострадянському просторі, виявлено їх характерні відмінності від відповідних норм, передбачених у Західній Європі й деяких інших країнах. На прикладі України, де після окупації Криму й окремих районів Донецької та Луганської областей Російською Федерацією державна зрада була широко

поширеною, було доведено необхідність диференціювати кримінальну відповідальність за різні форми державної зради. Обґрунтовується необхідність застосування покарання у вигляді позбавлення волі, а також інших кримінально-правових заходів.

Ключові слова: державна зрада, перехід на бік ворога, колабораціонізм, національна безпека, кримінальна відповідальність.

Introduction. The protection of sovereignty, territorial integrity and inviolability is essential for every state. This is especially important in the post-Soviet space, where the aggressive actions of the Russian Federation towards Moldova, Georgia and Ukraine have already led to capture of the territories of these countries. In this regard, it becomes especially relevant research of problems of criminal-legal protection of national security of the state by establishing and applying criminal liability for treason.

In the study of this issue is fruitful to use comparative a method of scientific research that allows by comparing the legislation of many countries identify the advantages and disadvantages of one or another regulation of these relations on national level. As Rene David noted, “comparative law provides a better opportunity learn about national law and improve it. The legislator’s appeal to comparative law can expand in our time, when the law is not just expected ensuring the stability of the rule of law, and want new laws radically to transform society” (Davyd, Zhoffre-Spynozy, 1999: 11). In particular, it is considered expedient and useful to investigate the peculiarities of the formation of norms on liability for treason legislators in European countries, former Soviet republics, as well as in states facing domestic and geopolitical challenges such as those who appeared at the present historical stage before Ukraine. In conducting such a study, the use of Ukraine’s experience is fruitful, during and after the occupation of Crimea and parts of Donetsk and Luhansk regions by the Russian Federation, mass manifestations of treason took place.

Such authors have researched the issues of criminal liability for treason as H.Z. Anashkin, H.V. Andrusiv, O.F. Bantyshev, Yu.V. Baulin, V.M. Borovento, L.M. Demydova, V.R. Filipenko, N.S. Konchuk, V.H. Kundeus, Yu.V. Lutsenko, Yu.A. Ponomarenko, V.N. Riabchuk, M.I. Khavroniuk, V.M. Shamara, O.V. Zaitsev.

Main part. However, these studies have not focused on the comparative legal aspect of criminal responsibility for this crime. It should also be considered that most of these researches do not take into account the changes in the geopolitical situation in the world that have taken place in the last decade.

The purpose of article is to conduct a comparative legal study of criminal liability for treason, its individual manifestations, which will identify the advantages and disadvantages of legal regulation of these relations and suggest ways to improve criminal law and practice.

Materials and methods. The study used criminal law of Ukraine, Germany, Switzerland, Sweden, Netherlands, Poland, Spain, Latvia, Lithuania, Estonia, Azerbaijan, Kazakhstan, Belarus, Russian Federation, China, Tunisia, Israel, statistical information and the practice of criminal liability for treason in Ukraine (2014–2020). The study was conducted using comparative, system-structural, dialectical methods of cognition, as well as methods of analysis and synthesis.

Results and discussion. The Criminal Code of Ukraine, like the vast majority of laws on criminal liability in post-Soviet countries, inherited the wording of the legal norm on liability for treason from the Criminal Code of the Ukrainian Soviet Socialist Republic. In particular, the disposition of Article 111 “High Treason” (Criminal Code of Ukraine, 2001) in a single list identifies three forms of the objective side of the crime: the transition to the enemy, espionage and providing assistance to a foreign state, foreign organization or their representatives in carrying out subversive activities against Ukraine. Apparently, the legislator points to the same social danger of these three forms, providing for a single punishment for different forms of the objective side of treason (which are in fact “physically” different phenomena) – imprisonment for a term of twelve to fifteen years with or without confiscation of property.

Also, almost identical wording of the norm on criminal liability for treason has been inherited from the Soviet era into the criminal codes of Azerbaijan, Belarus, Estonia, Kazakhstan, Moldova (Criminal Code of the Republic of Moldova, 2002). In all these countries, treason is classified as a particularly serious crime, the commission of which is punished as severely as possible. Thus, in Belarus, if treason is combined with premeditated murder, the perpetrator can be sentenced to death (Criminal Code of the Republic of Belarus, 1999). Article 165 of the Criminal Code of Kazakhstan also contains a sanction “death penalty”, which is given for committing treason in war-time (Criminal Code of the Republic of Kazakhstan, 2014). In Azerbaijan, the maximum penalty for treason is life imprisonment with confiscation of property (Criminal Code of the Republic of Azerbaijan, 1999).

In countries of non-post-soviet Europe, criminal law also provides for severe punishment for treason. In the Federal Republic of Germany (German Criminal Code, 1998), the Swiss Confederation (Swiss Criminal Code, 1937), the Kingdom of Sweden (Swedish Criminal Code, 1962), and the Kingdom of the Netherlands (Criminal Code of the Kingdom of Netherlands, 1994), the penalty for this crime may be life imprisonment. At the same time, in the criminal law of these countries there is a great variability of punishment for treason according to the circumstances of its commission, in particular – the form of the objective side of the crime. According to Konchuk, the difference between criminal liability for treason in the member states of the European Union is due primarily to the historical and national specifics of the legal language and technology, as well as the peculiarities of state and political system (Konchuk, 2019: 43). At the same time, in many cases the legislator does not use the term “treason”, but describes the composition of the illegal act, being in our understanding a form of treason.

Thus, Chapter 19 of the Swedish Criminal Code “On Crimes against the Security of the Kingdom” establishes criminal liability for treason, which is to facilitate the establishment of foreign rule over the Kingdom or part thereof (Article 1). Article 3 of Chapter 19 provides for criminal liability for treason in negotiations with a foreign state,

which causes significant harm to the Kingdom. Article 5 establishes liability for espionage – aiding and abetting a foreign state by providing information the disclosure of which could harm the Kingdom’s defense. The penalty for this crime is up to 6 years in prison. In this case, Article 6 provides that the commission of a crime described in Article 5 during the war, or a person who possessed certain information in accordance with his position in the public or private service, is punishable by four years to life imprisonment. In addition, criminal liability is established for aiding a foreign state in the form of illegal intelligence activities (Article 10) and obtaining foreign assistance in activities aimed at forming public opinion in a way that violates any of the foundations of the Kingdom’s government or other important Kingdom security issue. It should be noted that Article 15 establishes criminal liability for a person who fails to report the offenses provided for in Articles 1, 3, 5 and 6 of Chapter 19.

The Criminal Code of the Kingdom of Netherlands does not use the term “treason”. At the same time, criminal liability has been established for encroachment in order to transfer the Kingdom or part of it to a foreign state (Article 93), being punishable by a maximum of life imprisonment. A similar punishment is provided for liaising with a foreign state in order to encourage it to wage war against the Netherlands, to support its intentions to do so, to promote this goal, or to help prepare for it (97). It also provides for criminal liability for negotiating with a foreign state with intentional harm to the Netherlands (Article 99), entry of a Dutch citizen into the armed forces of a foreign state on the eve of war with it (Article 101), intentional aiding the enemy or harming the Netherlands in wartime (Article 102). It is important that Articles 101 and 102 apply in the event of an armed conflict except war and in which the State is involved for individual self-defense or for the establishment of international peace and security (Article 107a).

The legislator of the Swiss Confederation in Chapter XIII of Book II of the Criminal Code establishes liability for treason for acts using force aimed at amending the constitution, removal of constitutional state bodies, separation of territory from the Confederation or canton (Article 265). This disposition of treason does not coincide with the definition of the crime of “treason”, inherent in Ukrainian criminal law and the laws we have studied the criminal liability of other countries. However, Article 266 § 2 provides for the punishment of contacting a foreign government or its agency to wage war against the Confederacy. Article 266bis establishes criminal liability for supporting the actions and directions of foreign states against the security of Switzerland. Article 267 “diplomatic espionage” establishes the punishment for disclosing to a foreign state a protected secret of the Confederation; falsification, destruction, elimination or theft of documents on legal relations between the Confederation or the canton and a foreign state, which harms the interests of the Confederation or the canton; intentional communication with a foreign state to the detriment of the Confederation. Article 271 defines liability for prohibited acts in favor of a foreign state. A separate group of crimes, the objective side of which is to assist a foreign state to the detriment of Switzerland, is prohibited intelligence activities: political intelligence activities (Article 272), economic intelligence activities (Article 273), military intelligence activities (Article 274). Also, a person who conducts propaganda of a foreign state aimed at forcible overthrow of the constitutional order of the Confederation or canton is subject to criminal punishment (Article 275bis).

Chapter Two of the first section of the special part of the German Criminal Code “High Treason” establishes punishment for high treason against Federation (§81), treason of the against Land (§82), preparation of high treasonous undertaking (§83). §87 is acting as secret agent for purposes of sabotage on behalf of a foreign government, organization or institution. In the second section of the special part “Treason and endangering external security” in § 94 “Treason” is punishable for notifying a foreign state or disclosing a state secret in order to harm the Federal Republic or provide assistance to a foreign state. This section also contains rules establishing criminal liability for treasonous espionage or spying out state secret (§ 96), treasonous activity as agent (§ 98), intelligence service on behalf of secret foreign activities (§ 99), communication that threatens the peaceful coexistence of the FRG (§100), treasonous forgery (§100a). Also, criminal liability is provided for intelligence activities that threaten the security of the country (§109f).

Chapter I “On Treason” of Chapter XXIII of the Criminal Code of the Kingdom of Spain (Organic Law of the Penalty Code of Spain, 1995) contains a number of rules formulating the grounds for criminal liability for this crime. Article 581 provides for a sentence of 15 to 20 years imprisonment for inciting a foreign state to go to war with Spain or conspiring with a foreign state for the same purpose. Articles 582 and 583 establish criminal liability for various forms of aiding the enemy in the war with Spain or joining the enemy. These acts are punishable by imprisonment from twelve to twenty years. Article 584 provides for criminal liability for forgery, damage or disclosure of classified or secret information for the purpose of providing a service to a foreign state, international association or organization, if this may harm national security. This carries a prison sentence of six to twelve years.

The Baltic states address the issue of criminal liability for treason in different ways.

In the Estonian Penitentiary Code (Penal Code of the Republic of Estonia, 2019), the norm inherited from the Soviet past was transformed into 2 separate articles. Thus, § 232 “Treason” establishes criminal liability for assisting a foreign state, a foreign state organization, a foreigner or a person acting at the request of a foreign state in non-violent activities against the independence and sovereignty or territorial integrity of the Republic of Estonia, or collecting and transferring state secrets or classified information to a foreign party. In addition, § 2341 establishes criminal liability for supporting war against the Republic of Estonia or occupation.

The Criminal Code of the Republic of Lithuania (Criminal Code of the Republic of Lithuania, 2000) establishes criminal liability for treason (Article 117) in the form of joining the enemy or aiding the enemy during war. Article 118 establishes criminal liability for assistance to another state against the constitutional order, sovereignty, territorial integrity, defense or economic power of the Republic of Lithuania in peacetime. Article 119 “Espionage” provides for the punishment of a person, for the purpose of transfer to a foreign state, stealing, acquiring or otherwise collecting information that is a state secret of the Republic of Lithuania, or transferring this information to

a foreign state, its organization or their representative. Article 120 criminalizes the citizens of the Republic of Lithuania under the Collaboration: under occupation or annexation, assistance to illegal government structures to establish occupation or annexation, suppression of resistance by the Lithuanian population or other assistance to the illegal government to act against the Republic of Lithuania. It should be noted that “the problem of collaborationism and the search for opportunities against its solution is being reviewed in the focus of attention of the Ukrainian authorities (both executive and legislative) since the beginning of the temporary occupation of Ukraine. At the same time, in the process of forming state policy, it is still important to find the optimal model of legal response to persons who cooperate with the occupier” (Pysmenskyi, 2020: 52).

The crime of treason is absent in the Criminal Law of the Republic of Latvia (Criminal Law of the Republic of Latvia, 1998). However, Chapter X “Crimes against the State” contains section 81¹ “Assistance to a Foreign State in Action Directed against the Republic of Latvia”. A person who carries carrying out activities to help a foreign state or foreign organization take measures against national independence, sovereignty, territorial integrity, state power or administrative order of the Republic of Latvia may be punished by imprisonment for up to five years. Section 85 establishes criminal liability for espionage. The maximum penalty for a person committed an illegal collection of an official secret or transferred it to a foreign state or foreign organization, directly or through another person, may be imprisonment for up to twenty years.

In the Polish Criminal Code (Art. 129), the legislator does not use the term “high treason” (Criminal Code of the Republic Poland, 1997). Article 129 (Section XVII “Crimes against Poland”) criminalizes relations with the government of a foreign state or foreign organization to the detriment of the Republic of Poland. At the same time, only a person authorized to act on behalf of the Republic of Poland can be the subject of a crime. The punishment is an imprisonment from one to ten years. Also, without using the term “espionage”, the Polish legislator in Article 130 establishes criminal liability and punishment in the form of imprisonment from one to ten years for participation in the activities of foreign intelligence, in particular, providing intelligence of a foreign state with information, the dissemination of which may harm the Republic of Poland. Collecting, storing the specified information, entering the information system to obtain it to provide foreign intelligence, or a declaration of readiness to act in favor of foreign intelligence are also punishable acts. The punishment is imprisonment from 6 months to 8 years. Whoever organizes or directs the activities of foreign intelligence is punished with imprisonment for a term of at least 5 years or a punishment of 25 years in prison.

Thus, in the considered norms establishing responsibility for high treason in the countries of the Romano-Germanic system of law, the legislator, in most cases, singles out various forms of the objective side of this crime and formulates on their basis the corresponding dispositions of legal norms. The criterion for determining the sanction for one or another form of committing high treason is the level of their danger to the protected public relations (Zaitsev, Filipenko, 2018).

Similarly, the rules on liability for crimes against state security are formulated in the Special Part of the Criminal Code of the People’s Republic of China (Criminal Law of the People’s Republic of China, 1997). Thus, treason was identified by moving to the side of the enemy (Article 108), espionage – (Article 110), transfer of foreign secrets or confidential information to foreign structures or individuals (Article 111) and providing assistance to the enemy by conducting weapons, military equipment and valuables (Article 112). For these forms of crime, the legislator provided for various punishments: from three years to indefinite imprisonment. Punishment in the form of confiscation of property is also applied, and in the presence of certain qualifying features the death penalty is provided.

The Criminal Code of the Republic of Tunisia, a former French colony, formally adopted the traditions of the metropolitan legal system. Thus, in the chapter “Attempts against the external security of the state” in Articles 60 and 60bis set 8 forms of treason, mainly aimed at weakening the military power of Tunisia (Criminal Code of the Republic of Tunisia, 1913). However, the Tunisian legislator does not distinguish between the degree of public danger of these forms of the objective side of the crime and provides for any of them the only punishment – execution.

Given the protracted military-political conflict in Ukraine, the experience of the State of Israel is noteworthy, as its Criminal Code establishes many forms of treason related to the constant threat to security and even the very existence of the country. In Chapter “bet” “Treason” of the Section “Security of the State, International Relations and Official Secrets” of the Section “bet” “Crimes”, the legislator identified the grounds for criminal liability for treason.

Article 97 – damage to the sovereignty or integrity of the state, in particular by annexing the territory from the sovereignty of the state or transferring it to the sovereignty of a foreign state. Punishment – execution or life imprisonment. Article 98 – The conduct of hostilities against Israel. Punishment – execution, fifteen years or life imprisonment. Article 99 – aiding the enemy in the war against Israel, including the transfer of information with the knowledge that it may reach the enemy. Punishment – execution or life imprisonment. Article 100 – Detection of treason is punishable by 10 years in prison. Article 101 – Service in the enemy armed forces is punishable by 15 years in prison. Article 102 – Assistance to a prisoner of war is punishable by 10 to 15 years in prison. Article 103 – Defeat agitation with the intention of causing panic in society by disseminating information during hostilities that may undermine the morale of the military and the people of Israel in their confrontation with the enemy is punishable by 5 to 10 years in prison (Dorfman, 2010).

In the context of the military-political conflict in which Israel has been for more than 70 years, the legislator’s approach to determining the grounds for criminal liability for treason and punishment for a crime seems justified. The purpose of these legal norms is to protect the sovereignty, territorial integrity and defense capabilities of Israel.

Conclusions. A comparative legal study of criminal liability for treason showed that such actions are recognized as criminally punishable in all the states we have considered. Simultaneously, in the post-Soviet space states, all

forms of high treason are recognized as an especially grave crime, and long terms of imprisonment are established for their commission. In other states of the Romano-Germanic law system, there is a significant differentiation of criminal liability for various forms of high treason. This way allows for less severe penalties to be applied for those involved in collaborationism. This approach is more in line with criminal law principles and makes it possible to resist crimes against national security effectively.

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FUNKCJE REGULACJI SPOSOBÓW OCHRONY OSOBISTYCH PRAW MAJĄTKOWYCH MAŁŻONKÓW PRZEZ KODEKS RODZINNY UKRAINY

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Adnotacja. Artykuł analizuje przepisy Kodeksu Rodzinnego Ukrainy i Kodeksu Cywilnego Ukrainy, regulujące sposoby ochrony subiektywnego prawa cywilnego i rodzinnego. Ujawnia się różnica między rodzinnym i prawnym sposobem ochrony praw majątkowych małżonków a prawami cywilnymi. Przez rodzinną ochronę praw majątkowych małżonków należy rozumieć zestaw środków przewidzianych przez prawo rodzinne, procesowe, stosowanych w związku z naruszeniem tych praw i mających na celu przywrócenie lub ochronę interesów posiadacza tego prawa. Stwierdza się, że w kontekście sądowej ochrony praw majątkowych małżonków dość kontrowersyjna jest normatywna regulacja stosowania przepisów Kodeksu Cywilnego Ukrainy do regulacji stosunków rodzinnych (art. 8 Kodeksu Rodzinnego Ukrainy) wyłącznie do stosunków majątkowych. Stwierdza się, że określone w Kodeksie Cywilnym Ukrainy warunki pozbawienia prawa do obrony w sądzie prawa cywilnego w pełni powinny obejmować ochronę praw majątkowych małżonków. Zgodnie z przepisami Kodeksu Rodzinnego Ukrainy nie jest dopuszczalne stosowanie analogii prawa, w szczególności cywilnej instytucji samoobrony, do regulacji sposobów ochrony praw niematerialnych małżonków. W kontekście prawa człowieka do samoobrony, określone w artykule 55 Konstytucji Ukrainy proponuje się uzupełnienie Kodeksu Rodzinnego Ukrainy instytucją samoobrony praw i interesów rodzinnych ze wskazaniem charakterystycznych cech samoobrony, które proponuje autor.

Słowa kluczowe: sąd, prawo procesowe, sposoby ochrony, prawa niemajątkowe, prawa podmiotowe.

FEATURES OF REGULATION OF THE FAMILY CODE OF UKRAINE METHODS OF PROTECTION OF PERSONAL NON-PROPERTY RIGHTS OF SPOUSE

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Abstract. The article analyzes the norms of the IC of Ukraine and the Central Committee of Ukraine, which regulate the methods of protection of subjective civil and family law. The difference between the family law method of protection of non-property rights of spouses is revealed. Family law protection of non-property rights of spouses should be understood as a set of means provided by family, procedural law, which are used in connection with the violation of the rights and are aimed at restoring or protecting the interests of the holder of this right. It is concluded that in the context of judicial protection of non-property rights of spouses, quite controversial regulation of the application of the regulation of family relations of the Central Committee of Ukraine (Article 8 of the IC of Ukraine) exclusively to property relations. It is concluded that the conditions of deprivation of the right to protection in civil court defined in the Civil Code of Ukraine should fully apply