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CRIMINAL LIABILITY FOR STATE TREASON: DOMESTIC AND FOREIGN EXPERIENCE

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The article examines the issue of criminal liability for state treason based on the domestic and foreign experience of certain countries.

The conducted research allows us to conclude that the problem of state treason remains relevant in a number of foreign countries as well. However, for Ukraine, since the beginning of its modern formation as an independent state, amidst the ongoing war by the Russian Federation against Ukraine, and especially in the conditions of its full-scale invasion of Ukraine, the issue of state treason and the establishment of proper criminal responsibility for committing such a crime has become extremely acute.

Consideration of the issue of normative-legal regulation of criminal liability for state treason in Ukraine and certain foreign countries, such as the United States of America, the Federal Republic of Germany, the United Kingdom, Canada, Denmark, France, Sweden, Estonia, Lithuania, Latvia, Belgium, Spain, and Georgia, allows for further exploration of the effective counteraction to this crime.

Attention is drawn to the fact that in the criminal legislation of some countries, unlike Ukraine, there are no special grounds for exemption from criminal liability for state treason. In these cases, the legislator is either strict towards individuals who commit the respective crime or there is a possibility that exempting individuals from criminal responsibility may create a sense of impunity.

In order to avoid problematic issues in the application of Article 111 of the Criminal Code of Ukraine in practice and taking into account the existing real threats to the sovereignty, territorial integrity, inviolability, defense capability, state, economic, or information security of Ukraine, it is proposed to consider the possibility of expanding the objective side of state treason at the legislative level, namely the list of forms in which it can manifest and the list of subjects of state treason.

Key words: state treason; state security; national security of Ukraine; subjects of state treason; criminal responsibility; deprivation of liberty.

Formulation of the problem. Since the beginning of the modern formation of independent Ukraine, amidst the ongoing war by the Russian Federation against Ukraine, and especially in the conditions of its

full-scale invasion of Ukraine, the issue of state treason and the establishment of proper criminal responsibility for committing such a crime has become extremely acute. In order to improve domestic legislation, it is worth considering the foreign experience of several countries regarding the introduction of criminal liability for state treason.

Analysis of the study of the problem. Many scholars have devoted attention to the issue of criminal liability for state treason in both Ukraine and certain foreign countries in their works, including N. Konchuk, O. Bantyshev, Yu. Baulin, V. Hryshchuk, V. Tatsiy, O. Simonenko, A. Levchuk-Mykytiuk, S. Serhiyevsky, I. Servetsky, Yu. Kolomiets, Ye. Semenyuk, and others.

The purpose of the article is to study the issue of criminal liability for state treason through a comparative analysis of domestic experience and the experience of certain foreign countries, and to develop proposals for improving its legal regulation in Ukraine.

Presenting main material. Section I of the Criminal Code of Ukraine defines crimes against the foundations of national security of Ukraine [1].

In Part 1 of Article 1 of the Law of Ukraine “On National Security of Ukraine”, the legislator defines state security as the protection of state sovereignty, territorial integrity, democratic constitutional order, and other vital national interests from real and potential non-military threats. National security of Ukraine refers to the protection of state sovereignty, territorial integrity, democratic constitutional order, and other national interests of Ukraine from real and potential threats [2].

Among the crimes against the foundations of national security of Ukraine, state treason occupies a prominent place. Article 111 of the Criminal Code of Ukraine defines state treason as intentional actions committed by a citizen of Ukraine to the detriment of sovereignty, territorial integrity and inviolability, defense capability, state, economic, or information security of Ukraine. These actions include defection to the enemy during an armed conflict, espionage, and providing assistance to a foreign state, foreign organization, or their representatives in conducting subversive activities against Ukraine. Such actions are punishable by imprisonment for a term of twelve to fifteen years with or without confiscation of property. The same actions, committed during a state of war, are punishable by imprisonment for a term of fifteen years or life imprisonment, with confiscation of property [1].

Part 3 of Article 111 of the Criminal Code of Ukraine provides for exemption from criminal liability for a citizen of Ukraine if they have not taken any actions on the criminal assignment of a foreign state, foreign organization, or their representatives and voluntarily reported their connection with them and the task received to the authorities of state power.

In addition, the legislator supplemented Section I of the Criminal Code of Ukraine with Article 111-1 “Collaborationist Activity” and Article 111-2 “Assistance to an Aggressor State” [1].

In the Constitution of Ukraine, mention of state treason is only found in Article 111, which provides that the President of Ukraine may be removed from office by the Verkhovna Rada of Ukraine through impeachment in case of committing state treason or another crime. The decision to remove the President of Ukraine from office through impeachment is made by the Verkhovna Rada of Ukraine after the case is examined by the Constitutional Court of Ukraine and its conclusion is obtained regarding compliance with the constitutional procedure for investigating and considering the impeachment case, as well as obtaining the conclusion of the Supreme Court that the actions for which the President of Ukraine is accused contain signs of state treason or another crime [3].

The issue of state treason was so significant for the United States of America that its definition was directly included in the U.S. Constitution: state treason in the U.S. is considered as only waging war against them or adhering to their enemies and providing them with aid and support. No person can be convicted of state treason except on the testimony of two witnesses to the same overt act of treason or on their own confession in open court. Congress is empowered to establish punishment for state treason, but

the conviction for treason shall not work corruption of blood or forfeiture except during the life of the person convicted (Article 3, Section 3 of the U.S. Constitution). In addition to the Constitution, crimes against the state in the U.S. are also regulated by the Federal Criminal Code (Title 18 of the United States Code). Like in many other countries, crimes against the state in the U.S. are considered to be among the most serious offenses, and under the new legislation, they are subject to severe punishments, including life imprisonment and the death penalty. It is worth noting that the act can be classified as state treason regardless of whether the person is a U.S. citizen or not. The legislator also specifies that the responsibility for committing this crime can be both within the territory of the U.S. and beyond its borders [4, p. 9].

State treason in the U.S. is characterized by actions such as inciting military action against the U.S. and adhering to or giving aid/support to enemies of the U.S. As punishment for such actions, the penalty can be either death or imprisonment for up to five years with a fine of up to \$10,000, as well as the loss of the right to hold any office under the U.S. government. However, it is important to note that in the commission of state treason in the U.S., the perpetrator must have direct intent. Therefore, regardless of the harm caused to the state, an act that only incidentally benefits the enemies of the U.S. will not be considered as state treason [4, p. 10].

In the Criminal Code of the Federal Republic of Germany (FRG), over 10 provisions establish criminal liability for various forms of state treason. In particular, two provisions define the criminality of providing assistance to a foreign party. Both crimes are classified by the FRG legislators as non-serious offenses, with the prescribed punishment being imprisonment for up to five years or a fine. These sanctions are set out in § 87 of the FRG Criminal Code for espionage with the aim of sabotage on behalf of a foreign government, organization, or institution, and in § 99 of the FRG Criminal Code for carrying out espionage activities on behalf of foreign intelligence services, which involve the communication or transmission of facts, objects, or knowledge that do not contain state secrets. It should be noted that these provisions allow for more severe punishment in particularly serious cases, including imprisonment from one to ten years. A particularly serious case usually occurs when the guilty party discloses or transmits facts, objects, or conclusions held in secrecy by an official body or at its initiative, and when the guilty party abuses a responsible position that particularly obliges them to keep the secret or when this act creates a risk of serious damage to the FRG [5, p. 392].

Criminal liability for state treason in the United Kingdom is established not in the Criminal Code, but in various legislative acts and partially in common law. Overall, the legislative regulation of treason was first developed in the Statute of Treasons of 1351. This statute was enacted by the Parliament of England and legislatively codified the common law norms on treason that had developed at that time. In the United Kingdom, this statute, with significant changes, is still in force today. According to UK legislation, a person is guilty of treason if they engage in acts related to plans for the death of the sovereign or members of the royal family; violence against members of the sovereign's family; waging war against the king in his realm, adhering to his enemies, providing them with aid or services within his realm or elsewhere; or by giving aid or support to the enemies of the king by providing them with assistance or support in the kingdom or elsewhere [4, p. 11].

Section 46(1) of the Canadian Criminal Code includes three types of treason that trace their roots to the legislative definition given by the law of the United Kingdom, the Treason Act 1351. In addition to the typical formulations regarding an attempt on the sovereign, treason in Canada is considered to include participation in military actions against Canada or in preparation for such actions; providing assistance to an enemy at war with Canada or to any armed forces against which Canada is engaged in military operations, regardless of whether the state to which these armed forces belong is at war with Canada or not. Subsection 2 of section 46 of the Canadian Criminal Code provides for criminal liability for the use of force or the application of violent methods with the intent to overthrow the government of Canada or one of its provinces; providing false grounds to a representative of another state of military or scientific information, drawings, plans, models, articles, notes, or other military or scientific documents; and facilitating access to such information if the person knew or ought to have known that this information

could be used by a foreign state to harm the security or defense of Canada; making an agreement with anyone to carry out an act defined as treason by the Criminal Code; or having the intention to commit any act that qualifies as treason [4, pp. 12–13].

Under Danish criminal legislation, a person is criminally liable for treason if they commit an act aimed at subverting the Danish state or any part thereof under the influence of foreign rules... (paragraph 98), as well as for preparing to provide assistance to an enemy during war, military occupation, or other military operations (paragraph 101), or for aiding the enemy by word or deed in their interests (paragraph 102) [6, p. 42].

In the French Criminal Code, criminal liability for treason is provided for in a separate chapter titled “Treason and Espionage” (Chapter I of Chapter I), which includes the surrender of any technology, facilities, or equipment intended for national defense to any foreign state, enterprise, or organization (Article 411-3); establishing connections with a foreign state with the aim of causing military actions or acts of aggression against France (Article 411-4); and the transmission of information on technologies, objects, or documents. At the same time, the transmission of relevant information or data that could harm the interests of the nation is punishable by imprisonment for a term of 15 years and a fine of 1,500,000 francs [6, p. 42].

The Swedish Criminal Code contains Chapter 19, dedicated to treason. It consists of sixteen articles (the provisions of the Swedish Criminal Code do not have continuous numbering, the sequence is only maintained within chapters). The articles contain various sanctions for treason, with a maximum punishment of life imprisonment. For example, Article 3 of Chapter 19 of the Swedish Criminal Code provides for a criminal punishment, up to life imprisonment, for a public official who “causes significant harm to the Kingdom through treason in negotiations with a foreign state”. Article 4 of the same chapter discusses a criminal punishment that applies to a person who “without permission from the Government allows themselves to be used in diplomatic matters relating to the Kingdom”. For “unauthorized conduct of negotiations with a foreign state”, a person is sentenced to imprisonment for slightly over two years. If the crime endangers the right of the Kingdom to self-determination or its peaceful relations with a foreign state, a prison sentence of up to six years must be imposed [4, p. 13].

According to Part 1 of Article 232 of the Estonian Penal Code, treason includes the following actions: 1) assisting a foreign state, organization of a foreign state, a foreigner, or a person acting at the request of a foreign state in non-violent activities aimed against the independence, sovereignty, or territorial integrity of Estonia; 2) assisting these entities in collecting information that is a state secret or other secret information of a foreign state, which has been notified to Estonia based on an international agreement; 3) collecting the mentioned information with the purpose of establishing communication or transmitting it to a foreign state, organization of a foreign state, or a foreigner at the request of a foreign state by a citizen of Estonia. These actions are punishable by imprisonment for a term of six to twenty years or life imprisonment. Additionally, Part 1–1 of Article 232 of the Estonian Penal Code establishes liability for the collection of information mentioned in Part 1 of Article 232 by a legal person, which is subject to a pecuniary punishment. Furthermore, for the criminal offense provided for in this part, the court may apply the confiscation of property or property acquired through the commission of a criminal offense [7, p. 181].

According to Article 117 of the Lithuanian Criminal Code, a citizen of the Republic of Lithuania who, during a war or after the declaration of a state of war, joins forces with the enemy or assists the enemy in actions against the Lithuanian state, is punishable by imprisonment for a term of five to fifteen years. In accordance with Article 118 of the Lithuanian Criminal Code, a person who assists another state or its organization in activities hostile to the Lithuanian Republic – its constitutional order, sovereignty, territorial integrity, defense, or economic capacity, is punishable by imprisonment for a term of up to seven years. Article 117 of the Lithuanian Criminal Code establishes that the commission of a crime “during a war or after the declaration of a state of war” is a constitutive element of treason. Article 118 of the Lithuanian Criminal Code, which provides for liability for assisting another state or its organization in

activities hostile to the Lithuanian Republic, does not specify Lithuanian citizenship as a mandatory element of the mentioned criminal offense, although such an element is stipulated in Article 117 of the Lithuanian Criminal Code [7, p. 181].

Unlike the criminal laws of Ukraine, Estonia, and Lithuania, the Latvian Criminal Code does not contain a separate criminal offense of “treason”. Responsibility for certain actions that fall under the definition of treason in Article 111 of the Ukrainian Criminal Code is provided for in other articles of the Latvian Criminal Code, particularly in Article 81-1 of the Latvian Criminal Code, “Assistance to a Foreign State in Actions Directed against the Republic of Latvia”. This article establishes liability for a person who engages in activities with the aim of assisting a foreign state or foreign organization in actions against the national independence, sovereignty, territorial integrity, state power, or administrative order of the Republic of Latvia, punishable by imprisonment for a term of up to five years or temporary deprivation of liberty, or community service, or a fine with probation for a term of up to three years [7, p. 181].

It should be noted that in the criminal legislation of some countries, there are no specific grounds for exemption from criminal liability, particularly in Sweden, France, Belgium, Spain, and Georgia. This position may indicate that either the legislator is too strict towards individuals who have committed the respective crime or has taken into account the possibility that exempting individuals from criminal liability will create a sense of impunity and lawlessness [6, p. 44].

In Ukraine, from January to May 2023, the Office of the Prosecutor General opened over 2,300 investigations under the articles “treason” and “collaboration activities”. However, only about 11% of the cases were transferred to court. These data were obtained by the ChesNo. Movement in response to inquiries to the Office of the Prosecutor General. The highest number of cases related to treason was opened in March – 144. In total, from January to May 2023, 570 cases were opened, of which 55 were transferred to court [8].

A 37-year-old resident of Zaporizhzhia has been sentenced to life imprisonment with confiscation of all property for collecting information on the deployment of military equipment and passing it on to the enemy from March to October 2022 while working at a defense enterprise. Serhiy Spilnyk, the head of the Zaporizhzhia Regional Prosecutor’s Office, announced during a briefing on the criminal situation in the Zaporizhzhia region that this is the first sentence in Ukraine where a person has received life imprisonment with confiscation of all property under Part 2 of Article 111 of the Criminal Code of Ukraine (treason) [9].

In studying the issue of the age at which criminal responsibility for treason can arise, A. Levchuk-Mykytiuk concluded that it already requires careful study and analysis in order to make changes to the Criminal Code of Ukraine to lower its lower limit, which would be adapted to the conditions of modern Ukrainian society. These drastic measures are primarily due to the situation of underage citizens of Ukraine who are directly or indirectly used by the militants of quasi-state entities – the Donetsk People’s Republic and the Luhansk People’s Republic – in the course of hostilities and are involved in militarized youth groups where they are taught to use and apply weapons against Ukrainian military and civilians. At the same time, lowering the age of criminal responsibility for treason is justified by the experience of developed foreign countries where the minimum age at which criminal responsibility can arise varies from 7 to 13 years. Additionally, in the study of the additional characteristic of the subject of treason – Ukrainian citizenship – it was found that the current legislation on citizenship contains controversial provisions regarding the loss of Ukrainian citizenship. Despite the established procedure for acquiring and losing Ukrainian citizenship, as defined by the relevant Regulation on the Commission on Citizenship under the President of Ukraine, the issue of classifying individuals who, while being citizens of Ukraine, have acquired citizenship of another state as subjects of the crime under Article 111 of the Criminal Code of Ukraine raises a number of contradictions. However, foreigners and stateless persons who, in accordance with the law, serve in the Armed Forces of Ukraine, as well as individuals of Ukrainian ethnicity who still use a passport of a citizen of the former USSR of the 1974 model and permanently reside in the territory of Ukraine, do not belong to the subject of the crime under Article 111 of the Criminal Code of Ukraine, which makes it impossible to hold them criminally liable for its commission

[10, p. 308]. Therefore, there is a need to regulate the issue of Ukrainian citizenship at the legislative level in order to eliminate the corresponding contradictions during the procedure for establishing the characteristics of the subject of the crime of “treason”.

According to I. Servetskyi, actions related to treason under circumstances that exclude the criminal unlawfulness of the act require detailed analysis and scientific clarification of the existing norms of criminal law, such as Article 43-1 on the performance of the duty to protect the Homeland, independence, and territorial integrity of Ukraine. A person is not subject to criminal liability for the use of weapons (armament), ammunition, or explosives against persons who commit armed aggression against Ukraine, or for damaging or destroying property in connection with this. Thus, treason is an especially serious crime against the state, society, and every individual, and a person who commits it is subject to criminal liability – deprivation of liberty for up to 15 years or life imprisonment. Additionally, the current criminal legislation should establish the limits of actions of individuals who have fallen into captivity, and they are subject to Article 40 of the Criminal Code of Ukraine (physical or mental coercion, etc.), in order to avoid criminal punishment in the future [11, p. 56].

The proposal by Yu. Yu. Kolomiets to divide criminal responsibility for treason into groups of subjects of the criminal offense seems reasonable. Specifically, it is believed that the most socially dangerous and deserving of more severe punishment is treason committed by the President of Ukraine, the Chairman of the Verkhovna Rada of Ukraine, a member of the Verkhovna Rada of Ukraine, the Prime Minister of Ukraine, a member of the Cabinet of Ministers of Ukraine, the Chairman or member of the Higher Council of Justice, the Chairman or member of the Higher Qualification Commission of Judges of Ukraine, the Chairman or judge of the Constitutional Court of Ukraine or the Supreme Court, or higher specialized courts, the Prosecutor General, the Director of the National Anti-Corruption Bureau of Ukraine, the Director of the Bureau of Economic Security of Ukraine, the Director of the State Bureau of Investigations, the Commissioner for Human Rights of the Verkhovna Rada of Ukraine, the Chairman or other member of the Accounting Chamber, the Chairman of the National Bank of Ukraine, or the leader of a political party.

In second place in terms of social danger is treason committed by servicemen of the Armed Forces of Ukraine and other military formations established in accordance with the laws of Ukraine, members of volunteer formations that were formed or self-organized to protect the independence, sovereignty, and territorial integrity of Ukraine, judges, officials who permanently, temporarily, or by special authorization perform the functions of representatives of authority or local self-government, and also hold positions permanently or temporarily in state authorities, local self-government bodies, state or municipal enterprises, institutions or organizations, and carry out organizational, managerial, or administrative-economic functions, or perform such functions by special authorization granted by a competent state authority, local self-government body, central executive authority with special status, competent authority, or authorized person of an enterprise, institution, organization, court, or by law.

In third place is treason committed by professional journalists, scientists, and employees of educational institutions. It is through the actions of these individuals that the information security of Ukraine is threatened. In fourth place is treason committed by citizens of Ukraine who voluntarily hold positions associated with organizational and managerial or administrative-economic functions in illegal authorities created in temporarily occupied territory, including in the occupation administration of the aggressor state, or participate in the organization and conduct of illegal elections and/or referendums in temporarily occupied territory [12, p. 267].

In fifth place is treason committed by citizens of Ukraine who hold positions not associated with organizational and managerial or administrative-economic functions in illegal authorities created in temporarily occupied territory, including in the occupation administration of the aggressor state. And in sixth place is treason committed by activists and bloggers, as their activities can have a significant social impact, increasing the danger of the committed criminal offense. In seventh place is treason committed by citizens of Ukraine who do not belong to the aforementioned subjects [12, p. 267–268].

It is worth agreeing with the opinion that differentiating criminal responsibility for treason based on the characteristics of the subject of the criminal offense is not sufficient, and it is necessary to determine which actions, committed by which subjects, are the most dangerous for the state. For example, it may be necessary to establish separate legislation for the responsibility for active participation in an ideological war against Ukraine.

Conclusions. The conducted research allows us to conclude that the issue of treason remains relevant in a number of foreign countries as well. However, for Ukraine, in the conditions of a state of war, it arises particularly acutely. Examining the issue of normative and legal regulation of criminal responsibility for treason in Ukraine and certain foreign countries allows for further exploration of the effective counteraction to this crime. At the same time, in order to avoid problematic issues in the application of Article 111 of the Criminal Code of Ukraine in practice and taking into account the real threats to the sovereignty, territorial integrity, inviolability, defense capability, state, economic, or information security of Ukraine, it is considered appropriate to consider the possibility of expanding the objective side of treason at the legislative level, namely the list of forms in which it can manifest and the list of subjects of treason.

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КРИМІНАЛЬНА ВІДПОВІДАЛЬНІСТЬ ЗА ДЕРЖАВНУ ЗРАДУ: ВІТЧИЗНЯНИЙ ТА ЗАРУБІЖНИЙ ДОСВІД

У статті розглянуто питання кримінальної відповідальності за державну зраду на прикладі вітчизняного та зарубіжного досвіду окремих країн.

Проведене дослідження дає змогу зробити висновок, що проблема державної зради залишається актуальною також і в багатьох зарубіжних країнах. Однак для України з початку новітнього утворення незалежної України, розгорнутої війни російської федерації проти України, а особливо в умовах тривання її повномасштабного вторгнення в Україну питання державної зради і встановлення належної кримінальної відповідальності за вчинення такого злочину стало надвичайно гострим.

Розгляд питання нормативно-правового регулювання кримінальної відповідальності за державну зраду в Україні та окремих зарубіжних країнах, зокрема таких, як Сполучені Штати Америки, Федеративна Республіка Німеччина, Велика Британія, Канада, Данія, Франція, Швеція, Естонія, Литва, Латвія, Бельгія, Іспанія, Грузія дає можливість в подальшому розкрити питання ефективної протидії цьому злочину.

Звернуто увагу, що у кримінальному законодавстві деяких держав, на відміну від України, не передбачені спеціальні підстави звільнення від кримінальної відповідальності за державну зраду. В цих випадках законодавець або є суворим до осіб, які вчинили відповідний злочин, або ж передбачає ймовірність того, що звільнення осіб від кримінальної відповідальності може спричинити відчуття вседозволеності та безкарності.

З метою уникнення проблемних питань під час застосування статті 111 Кримінального кодексу України на практиці та враховуючи наявні реальні загрози для суверенітету, територіальної цілісності та недоторканності, обороноздатності, державної, економічної чи інформаційної безпеки України, пропонується розглянути можливість розширення на законодавчому рівні об'єктивної сторони державної зради, а саме переліку форм, в яких вона може проявлятися, та переліку суб'єктів державної зради.

Ключові слова: державна зрада; державна безпека; національна безпека України; суб'єкти державної зради; кримінальна відповідальність; позбавлення волі.