COMPARATIVE ANALYSIS OF CRIMINAL LIABILITY FOR THE CRIME OF DESERTION IN UKRAINE AND IN THE INTERNATIONAL LEGAL ORDER

Компаративістський аналіз кримінальної відповідальності за вчинення дезертирства в Україні та в світі

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According to the Constitution of Ukraine, the protection of the sovereignty and territorial integrity of Ukraine, ensuring its economic and information security are the most important functions of the state and the business of the entire Ukrainian people. The defence of Ukraine, protection of its sovereignty, territorial integrity and inviolability are entrusted to the Armed Forces of Ukraine. One of the most important issues at the present stage (during the Russian-Ukrainian war) of our country’s development is the reform of the Armed Forces of Ukraine, transition to a new qualitative and professional level, to an improved legislative framework, which, in turn, requires a review of the current military legislation, the establishment of new military legal norms based on the rich experience of developed and promising modern countries. One of the important methods of scientific knowledge is comparative, which is most often used in criminal law research. Moreover, the use of the comparative legal method is extremely important given our country’s aspirations for European integration and full membership in the European Union. Among the fundamental social values protected by criminal law, an important place is occupied by the country’s defence capability, which is an important guarantee of the key attributes of the state: unity, sovereignty and independence. Desertion is a criminal offence and is considered by the military to be one of the most serious forms of breach of military duty. Desertion has also proved to be a controversial and emotionally charged socio-political issue. Although in peacetime desertion usually receives little attention, emotions can run high in times of conflict or crisis when a nation relies on its military to ensure peace or even to fight for its survival. This article provides a comprehensive analysis of criminal liability for the criminal offence of desertion under Article 408 of the Criminal Code of Ukraine, taking into account legislative changes that have been made to both the General and Special Parts of the current Criminal Code of Ukraine. The author also provides a comparative analysis of criminal liability for the crime of desertion under the Criminal Code of Ukraine, as well as an analysis of criminal liability for the said crime under the laws of other countries. The author also actively emphasises the unacceptably low number of scientific publications on the legal regulation of desertion as a war crime in Ukraine compared to the imposition of punishment and criminal liability for committing such a crime, especially during martial law. Key words: desertion; crime in the Armed Forces of Ukraine; crime in the army; military personnel; national legislation on criminal liability; foreign legislation on criminal liability; comparative studies.

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Military desertion is a global problem that, regardless of whether or not it is compulsory military service, is considered a criminal offence and is generally equated with treason, and therefore requires special research. For the most part, military personnel are driven to desertion by reasons related to social and psychological reasons, which are particularly acute during wartime. With the introduction of martial law in Ukraine, legal regime of martial law and the beginning of Russia’s large-scale military aggression against our country, special attention is paid to the criminal law component of military desertion, the qualifying features of which are enshrined in Article 408 of the Criminal Code of Ukraine and received some coverage in scientific works on the eve of the introduction of martial law.

An analysis of recent research and publications in which the solution to this problem has been initiated and on which the author relies. The issues that outline the focus of our research object were dealt with by M. I. Karpenko, who dealt with issues related to the investigation of crimes under Articles 407-409 of the CC of Ukraine; I. V. Zozulia and O. I. Dovhan, who can be said to have become coryphaei in the doctrine of criminal liability for the crime of desertion (Article 408 of the CC of Ukraine) under the criminal law of the Federation ceased to be in force in connection with the reunification of the GDR with the Federal Republic ceased to be in force in connection with the reunification of the GDR with the Federal Republic of Germany in October 1990. In the Democratic People’s Republic of Korea - the Criminal Code of 1950; in the People’s Republic of China - the Criminal Code of 1979, in Poland - the Criminal Code of 1961 is in force (previously, the Criminal Code of 1926, 1929, 1934, and the Criminal Code of 1942 were adopted); in the Democratic People’s Republic of Korea - the Criminal Code of 1961 is in force (previously, the Criminal Code of 1926, 1929, 1934, and the Criminal Code of 1942 were adopted); in the Czech Republic and Slovakia - the Criminal Code of 1961 (replacing the Criminal Code of 1950). The Criminal Code of the German Democratic Republic ceased to be in force in connection with the reunification of the GDR with the Federal Republic of Germany in October 1990. In the SFRY, the Criminal Code of the Federation was adopted in 1976, and in 1977 - the Criminal Codes of the six union republics (Bosnia and Herzegovina, Macedonia, Serbia, Montenegro, Slovenia, Croatia, and Montenegro) and two autonomous provinces

Statement of the problem in general and its connection with important scientific or practical tasks. Military desertion is a global problem that, regardless of whether or not it is compulsory military service, is considered a criminal offence and is generally equated with treason, and therefore requires special research. For the most part, military personnel are driven to desertion by reasons related to social and psychological reasons, which are particularly acute during wartime. With the introduction of martial law in Ukraine, legal regime of martial law and the beginning of Russia’s large-scale military aggression against our country, special attention is paid to the criminal law component of military desertion, the qualifying features of which are enshrined in Article 408 of the Criminal Code of Ukraine and received some coverage in scientific works on the eve of the introduction of martial law.

Formulation of the goals of the article (task statement). To carry out a legal and social analysis of criminal liability for the crime of desertion (Article 408 of the Criminal Code of Ukraine) under the Criminal Code of Ukraine and criminal legislation of other countries.

Presentation of the main research material. All foreign socialist and post-socialist countries have adopted and are operating criminal codes (hereinafter - CC), and in some countries several of them have been adopted. Thus, in Mongolia, the Criminal Code of 1961 is in force (previously, the Criminal Code of 1926, 1929, 1934, and the Criminal Code of 1942 were adopted); in the Democratic People’s Republic of Korea - the Criminal Code of 1950; in the People’s Republic of China - the Criminal Code of 1979, in Poland - the Criminal Code of 1969; in Romania - the Criminal Code of 1968; in Hungary - the Criminal Code of 1978 (replacing the Criminal Code of 1961); in the Czech Republic and Slovakia - the Criminal Code of 1961 (replacing the Criminal Code of 1950). The Criminal Code of the German Democratic Republic ceased to be in force in connection with the reunification of the GDR with the Federal Republic of Germany in October 1990. In the SFRY, the Criminal Code of the Federation was adopted in 1976, and in 1977 - the Criminal Codes of the six union republics (Bosnia and Herzegovina, Macedonia, Serbia, Montenegro, Slovenia, Croatia, and Montenegro) and two autonomous provinces
within Serbia (Vojvodina and Kosovo). The Republic of Slovenia adopted a new Criminal Code. However, criminal codes are not the only source of criminal law in a country. Provisions on criminal liability may be contained in other legislative acts. The vast majority of Western European countries have criminal codes. For example, in Germany, the Criminal Code of Germany was revised in 1987. Japan has the Criminal Code of 1907. Among the criminal codes of other Asian countries, the Indian Penal Code of 1860 can be mentioned.

The military aggression of the Russian Federation against Ukraine in 2014, which was accompanied by the occupation and subsequent annexation of the Autonomous Republic of Crimea, military operations in eastern Ukraine, in certain regions of Donetsk and Luhansk regions and a full-scale military invasion of Russia, which resulted in the proclamation of martial law in Ukraine on 24 February 2022, not only affected the criminal law statistics of crime in the country, but also dramatically affected the general state of both war crime in general and desertion in particular.

The legal literature states that the procedure for military service includes the procedure for the emergence of military service relations, terms of service, the procedure for their assignment, the rules for the certification of servicemen, the procedure for promotion and transfer, relocation, secondment and leave of servicemen, conditions and procedure for the termination of military service. In other words, these are any relations that arise in connection with military service, both for conscripts and contract servicemen.

As defined, in international law, a deserter is a person, in particular a military service member, who renounces national military service and military duties, whether for the duration of a military operation or permanently. This also applies to a person who leaves the armed forces to join the enemy forces [5].

The legal norms on desertion in the world are much broader and cover desertion as an intentional abandonment of a person’s duties, services or obligations, especially in relation to military service (US criminal law), English and Scottish family law (constructive desertion) or desertion by seafarers (maritime law). In accordance with the Recommendation on International Protection No. 10. Claims for Refugee Status on the Basis of Military Service in the Context of Article 1 A (2) of the 1951 Convention relating to the Status of Refugees and/or its 1967 Protocol, desertion means leaving a place of service or post without permission or resisting conscription.

Depending on national legislation, even a person of military age who has completed national service and been demobilised but is still considered liable for military service may be considered a deserter under certain circumstances. Desertion can occur in relation to service in the police, gendarmerie or equivalent security services; it also applies to those who desert from non-state armed groups.

Desertion may be for religious or ethical reasons or other reasons (para. 3). Such other reasons for desertion may include fear of military service or the conditions of such service, whether in peacetime or in armed conflict (para. 4). States may also impose sanctions on persons who desert or evade military service, unless their desertion or evasion is based on compelling religious or ethical considerations, provided that such sanctions and related procedures are in accordance with international norms (para. 5). If a person refuses to perform military service, other forms of punitive measures in response to draft evasion or desertion may be evident (Article 15). Amnesty may not be extended to all deserters and evaders (para 46).

The act of desertion or evasion may be an expression of political opinion or be perceived as such (para 52). In some societies, deserters may be perceived as a specific social group, given the general attitude towards military service as a sign of loyalty to the country and/or the different treatment of such persons (para. 58). In cases involving persons who have voluntarily enlisted or reported for military service as part of conscription and subsequently deserted, it is important to recognise that religious or other beliefs may evolve or change over time, as may the circumstances of military service (para 69).

In the French CCM, criminal liability for desertion is differentiated by the legislator and is provided for in 23 articles. Thus, they establish liability for desertion committed within the country, combined with flight abroad, as part of an organised group, combined with defection to the enemy, during an enemy threat, when there is a real threat of capture, or when a person is already in captivity, or during combat, with weapons. In addition, the CCM stipulates that incitement to desertion and concealment of desertion are criminal offences.

Desertion within the country committed in peacetime is also recognised as desertion: 1) the absence of any serviceman without the permission of his command in a unit, base, ship, military or civilian hospital, or in a penitentiary (prison) institution where he was previously arrested after six days of recorded absence; 2) the failure of any soldier acting independently to report to a unit or unit whose assignment, leave or discharge will end in two weeks; 3) the absence of a soldier without permission at the time of departure of a warship or a naval vessel to which he is assigned or on board which he is on board, if he does not report to the place of service after the end of the postponement. In addition, the French CCM provides for specific
Desertion is one of the most serious military crimes, including disobedience; failure to obey an order; resistance to a superior; unauthorised leaving of a military unit or place of service, etc. A complete list of such military crimes is provided in the relevant articles of the Criminal Code of Ukraine, where crimes against the order of military service are grouped in Articles 407-409 according to the direct object.

It should also be noted that Article 407 of the Criminal Code of Ukraine separately identifies as a military offence the unauthorised leaving of a military unit or place of service or failure to report for service without valid reasons. However, the actual difference lies in the content of the subjective side – the definition of desertion under Article 408 of the Criminal Code is exclusively the complete evasion of military service as the purpose (mandatory feature) of such unauthorised abandonment of a military unit or place of service or failure to report for service.

Currently, Article 408 of the Criminal Code of Ukraine has received a complete criminal law qualification in the scientific and practical comments of Karpenko M.I [8, p. 95] and other scholars. It is quite natural that with regard to the problem of desertion, since the beginning of the military aggression of the Russian Federation against Ukraine, the domestic media and the General Staff of the Armed Forces of Ukraine have been using data exclusively on Russian troops, which continue to suffer losses, have great problems with manning combat and support units, the number of cases of desertion and refusal of the Russian Armed Forces to participate in the war on the territory of Ukraine is increasing [5].

This was said in early March – desertion among the Russian military is becoming massive - the invaders are fleeing the army even on the way to Ukraine, many are fleeing even while travelling, no one says anything to anyone. Even the armed forces are against it.

We are threatened with 7 years in prison, this is the only thing that keeps us going [7], and at the end of May 2022 - the moral and psychological state of Putin’s soldiers remains very low. Russian soldiers increasingly do not want to fight, and therefore flee the battlefield [9]. In general, in the same March 2022, it was reported that some Syrian mercenaries consider participation in the war in Ukraine on the side of Russia as an opportunity for further desertion and illegal migration to the EU countries [7].

According to Article 408 of the Criminal Code of Ukraine, desertion, i.e. unauthorised leaving of a military unit or place of service with the intention of evading military service, as well as failure to report for service for the same purpose in case of appointment, transfer, business trip, leave or from a medical institution, is punishable by imprisonment for a term of two to five years. Desertion with weapons or by prior conspiracy by a group of persons is
punishable by imprisonment for a term of five to ten years. The act envisaged by parts one or two of this Article, committed in conditions of a special period, except for martial law, shall be punishable by imprisonment for a term of five to ten years. An act provided for in paragraphs one or two of this Article committed under martial law or in a combat situation shall be punishable by imprisonment for a term of five to twelve years.

Conclusion. Desertion is now classified as a serious crime in domestic criminal law as an intentional act of increased public danger; some sanctions have been changed. The reporting by the courts on the status of desertion cases as part of crimes against the established order of military service (war crimes) was strengthened, and responsibility for possible desertion of military personnel was imposed on their commanders. Since 2017, deserters have been excluded from the personnel records of military units after the expiry of the period stipulated in the instructions.

Military desertion under the international legal framework depends on national legislation. The legal norms on desertion in the world are much broader than in Ukraine and cover desertion as a deliberate refusal of duties, services or obligations of a person, especially in relation to military service. With the ongoing hostilities to counter Russian aggression, the problem of military desertion is becoming increasingly relevant, while domestic criminal law on crimes against the order of military service requires urgent improvement. The option for military commissariats to ask citizens to search for deserters has not led to the expected results, and the provision for suspension of military service for deserters needs to be further developed during martial law. Thus, a comparative legal study of criminal liability for offences against the against the procedure of military service under the laws of Ukraine, Germany and France showed that the Criminal Code of Ukraine has many successful legislative solutions in this part. However, there are legislative provisions that need to be adjusted.

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