

## COMPARATIVE ANALYSIS OF CRIMINAL LAW OF UKRAINE AND ENGLAND ON LIABILITY FOR CRIMES AGAINST HUMAN PHYSICAL INTEGRITY THAT DO NOT CAUSE DEATH

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The article is devoted to the comparative analysis of criminal law of Ukraine and England on liability for crimes against human physical integrity that do not cause death. One of the priorities for every civilized country in the area of criminal law protection of the rights and freedoms of man and citizens should be protection of life, health and bodily integrity. The criminal prohibitions are concentrated in a single codified act (CC) in Ukraine, while the Criminal Law of England – the representative of the Common Law legal system, these prohibitions are in a large number of various legal acts, some of which are very outdated and formalized.

**Key words:** criminal legislation, criminal code, crime, liability for crimes, crimes against the person, physical integrity, death of the person.

Дудоров О.О., Сабдаш В.П. / СРАВНИТЕЛЬНЫЙ АНАЛИЗ УГОЛОВНОГО ЗАКОНОДАТЕЛЬСТВА УКРАИНЫ И АНГЛИИ ОБ ОТВЕТСТВЕННОСТИ ЗА ПРЕСТУПЛЕНИЯ ПРОТИВ ФИЗИЧЕСКОЙ НЕПРИКОСНОВЕННОСТИ ЧЕЛОВЕКА, КОТОРЫЕ НЕ ПРИЧИНЯЛИ СМЕРТЬ / Запорожский национальный университет, Украина

Статья посвящается сравнительному анализу уголовного законодательства Украины и Англии об ответственности за преступления против физической неприкосновенности человека, которые не причинили смерть. Одной из приоритетных задач для каждого цивилизованного государства в сфере уголовно-правовой охраны прав и свобод человека и гражданина должна быть защита жизни, здоровья и телесной неприкосновенности человека. В Украине, которая принадлежит к романо-германской правовой системе, уголовно-правовые запреты содержатся в едином кодифицированном акте – уголовном кодексе, в Англии же, представительнице англо-саксонской правовой системе, такие запреты содержатся в большом количестве разнообразных нормативно-правовых актов, некоторые из которых являются очень устаревшими и формализованными.

**Ключевые слова:** уголовное законодательство, уголовный кодекс, преступление, ответственность за преступление, преступление против личности, физическая неприкосновенность, смерть лица.

Дудоров О.О., Сабдаш В.П. / ПОРІВНЯЛЬНИЙ АНАЛІЗ КРИМІНАЛЬНОГО ЗАКОНОДАВСТВА УКРАЇНИ ТА АНГЛІЇ ПРО ВІДПОВІДАЛЬНІСТЬ ЗА ЗЛОЧИНИ ПРОТИ ФІЗИЧНОЇ НЕДОТОРКАНОСТІ ЛЮДИНИ, ЩО НЕ ЗАПОДІЮЮТЬ СМЕРТЬ / Запорізький національний університет, Україна

Стаття присвячена порівняльному аналізу кримінального законодавства України та Англії про відповідальність за злочини проти фізичної недоторканості людини, що не заповдіяли смерть. Відповідно до ст. 3 Конституції України людина, її життя і здоров'я, честь і гідність, недоторканість і безпека визнаються найвищою соціальною цінністю. Таке фундаментальне положення не виключає диференціації кримінальної відповідальності за різні за своєю соціальною спрямованістю та юридичною природою посягання на людину. Одним із приоритетних завдань для кожної цивілізованої держави у сфері кримінально-правової охорони прав і свобод людини і громадянина має бути захист життя, здоров'я і тілесної недоторканості людини. Останнім часом у вітчизняних кримінально-правових дослідженнях значна увага звертається на використання такого методу наукового пізнання, як порівняно-правовий (компаративістський) метод. Порівняння дає можливість правнику озброїтись ідеями та аргументами, які неможливо отримати навіть при бездоганному знанні права лише своєї країни. У кримінально-правовому контексті зіставлення законів різних держав потрібне для загального уявлення про суть відповідного законодавства, системного визначення його особливостей і можливого запозичення позитивного досвіду нормотворення, для з'ясування «точок дотику» національного і зарубіжного у сфері протидії злочинності. В Україні, що належить до романо-германської правової системи, згадані кримінально-правові заборони зосереджені в єдиному кодифікованому акті – кримінальному кодексі, в Англії ж, представниці англосаксонської правової системи, такі заборони зосереджені у великій кількості різноманітних нормативно-правових актів, деякі з них є дуже застарілі та формалізовані.

**Ключові слова:** кримінальний законодавство, кримінальний кодекс, злочин, відповідальність за злочини, злочини проти особи, фізична недоторканність, смерть особи.

According to Art. 3 of the Constitution of Ukraine a human being, his or her life and health, honour and dignity, inviolability and security are recognized as the highest social value. This fundamental provision does not preclude differentiation of criminal liability for attacks on humans that are different in their social orientation and legal nature. One of the priorities for every civilized country in the area of criminal law protection of the rights and freedoms of man and citizens should be protection of life, health and bodily integrity.

As corny as it may sound, life and health are the most important benefits granted to each of us by nature. The right to life and the right to health are fundamental personal rights that ensure the physical existence of any human as a biological being, a part of society and a subject of legal relations and without compliance (implementation) with which all other rights, freedoms, wealth, values, etc. are meaningless. Physical pain aggravates and destroys human life, depletes a person both mentally and physically, makes them suppressed, reduces physical abilities and power of man, has a negative impact

particularly on the normal functioning of the cardiovascular system, lungs and internal secretion bodies. However, health issues are associated with causing a person not only physical and property losses, but also mental sufferings, they detract from productive work, family, physical training, impede full communion, etc.

Recently, considerable attention is paid to the use of such method of scientific knowledge as comparative legal method in domestic criminal law research which is not surprising. Indeed, as noted by Mark Ansel, learning foreign law opens new horizons, allows scholars to learn more about the law of their own state, as specific features of this law appear very clearly when compared to other systems. Comparison enables the lawyer to arm himself with ideas and arguments that are impossible to obtain even with perfect knowledge of their native country law [1, p. 38]. In the criminal law context matching laws of different states is necessary for the overview of the nature of the relevant legislation, systematic determination of its characteristics and possible borrowing of positive rulemaking

experience to seek “common ground” between national and foreign in the field of combating crime [2].

As for Ukraine, criminal liability for crimes against human physical integrity that do not cause death, is mostly regulated by Title II of the Special Part of the Criminal Code (hereinafter – CC) of Ukraine, 2001, in which punishment for attacks on life is established as well – intentional and reckless homicides and incitement to suicide. The reservation is “mostly” do because liability for causing harm to human health is set in the CC of Ukraine not only by norms of Section II of its Special Section (the section name – “Crimes Against Life and Health of a Person”). Crime sets, socially dangerous consequences of which include damage to human health in its various manifestations, are placed in other sections of the Special Part of the CC of Ukraine (for example, “Crimes Against Property”, “Crimes Against Sexual Freedom and Sexual Inviolability of Person”, “Crimes Against Occupational Safety”, “Crimes Against Traffic Safety and Safety Of Transport Operations”).

Crimes against human physical integrity that do not cause death, include not only various bodily injuries (Articles 121-125, 128 of the CC of Ukraine) and separate from them beating and torture (Art. 126 of the CC of Ukraine) can be attributed to but also a lot other assaults specified in Chapter II of the Special Part of the CC of Ukraine (torture, infection with venereal disease, illegal abortion, inappropriate performance of professional responsibilities by medical or pharmaceutical worker, etc.). In order to determine the direction of our scientific research we consider it appropriate to clarify the concept of attack (assault)<sup>1</sup> and beatings (battery), which under the criminal law of England are considered the lowest common crimes against human physical integrity that do not cause death.

The fact that criminal prohibitions are concentrated in a single codified act (CC) in Ukraine, that belongs to the Romano-Germanic legal system, and the Criminal Law of England – the representative of the Common Law legal system is marked by high level of non codification – from a content point of view can not prevent the conducting of respective comparative study. The same applies to the traditionally casual nature of English law-making that is underlined by some authors [3, p. 10].

Assault and battery are sometimes described together in English legal literature, though they have always been different crimes under common law. Their separate existence in statutory form is confirmed by Criminal Justice Act 1988, in which the terms “common assault” and “battery” are used [4, p. 591].

Therefore, the liability for the attack (assault) is currently governed by common law (these are legal norms that are set out in the judgments) and by norms of the Offences Against Person Act 1861. This legal act is mentioned by S.S. Yatsenko as an example of a partial codification of criminal law norms – both of statutory and case law [5, p. 18].

The essence of assault as a crime is not so much a collision of the body and crime tool, and therefore causing physical suffering as primarily in causing fear to the victim that he or she will be subjected to the influence of physical force. Assault can be committed only intentionally. Usually any body movement by the accused that makes another person believe that immediate physical violence will be used against him is considered an assault (by the way, the underlying crime is sometimes called physical attack for this reason).

To find an analogue of such attack among offenses described in Part II of the Special Part of CC of Ukraine is very problematic despite the fact that the concept of human health as the object of criminal protection also includes mental component (health as a set of mental processes, that are expressed in the spiritual state of human). It is clear that under certain

circumstances a crime similar to assault, can be considered threats of murder punishable under Art. 129 of the CC of Ukraine. The prohibited conduct is presented in a report by any means (including by means of gestures or symbols) to the victim information about offender’s intention to deprive victim of life. Criminal law in this case recognizes as a crime only such murder threats which gave the victim a real reason to fear for its realization. According to V.V. Shablysty, a personal security should be recognized as the object of murder threats since the real danger to life does not rise of the threats declaration of accused. A culprit seeks to intimidate a victim. Because of expressing information of intimidating nature the addressee receives negative emotions in the form of fear – insecurity in the following day may increase; that is personal safety is disturbed (such as the person’s mental state under which nothing threatens him [6, p. 9]).

It is also worth noting that cases of punishable threats, including death, are traditionally distinguished from non-criminal intent detection in the criminal law of Ukraine. It is believed that thoughts, desires, intentions, ideas not supported by actual criminal acts of a person can not cause harm to legally protected relations, and therefore exist outside the scope of criminal law regulation. The approach to immunity of identifying intention that is enshrined in the Criminal Code of Ukraine comes from recognizing only socially dangerous act as a crime – the act or omission (section 1, Art. 11 of the CC), is based on the Roman law theses *nullum crimen sine actus* (no crime without an action) *cogitationis poenam nemo patitur* (thoughts are not punished), taking into account provisions of Art. 34 of the Constitution of Ukraine on the right of everyone to freedom of opinion and speech, freedom of expression of one’s views and beliefs. However, in cases of criminally punishable threats (except Art. 129, these are in particular Articles 195, 266, 345, 377 of the CC of Ukraine) law provides liability not for dangerous thoughts, but for the completed socially dangerous act when the mere fact of the threat, discovered outside and the victim, brought to awareness of (its description in the Criminal Code of Ukraine should be unified) is recognized as an offence against person, his property, public safety, interests of justice and so on. We remind that M.S. Tagantsev as a staunch opponent of the introduction of criminal intent detection criminality noted on this occasion that the threat is punishable not as intent revelation, but as a separate criminal act by virtue of the anxiety and excitement that a threat or praise causes in the person or society that are threatened [7, p. 292].

Criminally punishable threat-act that is different from detection of intention either constitutes a complete offense connected to violation of mental integrity of a person (such as death threat described in Art. 129 of the Criminal Code of Ukraine), or is a feature that characterizes violent means of committing this or that crime – rape, robbery, extortion, coercion of transport employee transport not to perform his official duties, counteracting legitimate business activity and so on.

In the context of the comparison of criminal law prohibitions it should be mentioned that the purpose of intimidating the victim and others is described as a qualified feature of certain offenses against person's health (in particular Articles 121, 122 and 126 of the CC of Ukraine). This means that there is more severe punishment for causing respective body injuries, as well as to commit a strike, beatings or other violent acts, if it is accompanied with expressing by a guilty person of various kinds of threats against the victim (others) that (threats) are intended to intimidate the victim, persuade him to desired behavior, to certain beneficial acts in culprit’s favor, etc. Since such type of crimes involve actual infliction of physical harm to human health, it is inappropriate, to perceive analog of physical assault in English & Welsh Law.

Interestingly, since the late 90s of last century, English courts while hearing cases of attacks began to recognize as such not only relevant movements of the human body, but also simple pronunciation of words of threatening nature,

<sup>1</sup> the world “assault” is used to mean physical attack but in English law means specifically putting someone in fear of attack).

addressed to the victims. Assault began to be viewed as such also when victim does not see perpetrator, as he expresses his threats in the dark or by phone, and even if the offender while calling is silent on the phone – if the prosecution was able to prove that the perpetrator thus sought to intimidate the victim. For example, in one case it was found that the culprit who sent more than 800 letters to the victim, phoned her constantly, sometimes saying something, and sometimes being silent. Liability for certain types of such attacks is provided by the Protection of Harassment Act 1997.

In today's Ukraine the issue of criminal law response to the demonstrations of psychological violence that can not be combined with criminal acts of physical violence, but are able to cause serious harm to human health (various "jokes", for example, reports of close person death, "telephone terrorism", sound aggression, etc.) remains unresolved. Of course, legal assessment of such immoral behavior under Art. 296 of the CC of Ukraine "Hooliganism" or Art. 173 of the Code of Ukraine on Administrative Offences "Small Hooliganism" is not ruled out, but such qualification, while being forced, in our opinion, does not adequately capture the essence of the committed assault, and especially in view of the fact that according to Art. 32 of the Basic Law of Ukraine no one shall be subjected to interference with his personal and family life, except as provided by the Constitution of Ukraine.

It is sometimes possible to read in legal literature that under "other violent acts" punishable under Art. 126 of the Criminal Code of Ukraine "Beating and torture" should be understood as not only physical but also psychological violence [8, p. 7, 119, 162]. It is difficult to agree with such statement. The point is that under current version of Article 126 of the CC of Ukraine it is clearly indicated that committing violent actions has to cause physical pain. Of course, various demonstrations of psychological violence exercised by means of informational and non informational tools that can have harmful effects on human health (may cause nervous disorders, heart attacks, etc.), but they do not always cause physical pain as domestic criminal law requires. Solving this problem by changing definition of Sec. 1, Art. 126 of the CC of Ukraine as "Intentional strike, beatings or committing other violent acts which caused or could cause physical pain and did not cause bodily harm – is punished..." can not be considered satisfactory [8, p. 164]. Thus, the proposed revision of criminal law prohibition includes traditional "link" to physical pain, even though elective.

There is Art. 182 in the CC of Ukraine, which title ("Violation of privacy") creates impression that the criminal law prohibition is aimed at solving the issue at hand. But this is not so, because the objective side of the mentioned offense takes the form of only the following illegal acts: 1) collecting confidential information about a person; 2) its storage; 3) use; 4) destruction; 5) distribution; 6) changes. Due to the fact that the name of Art. 182 of the CC is not in accordance with its disposition, O.P. Horpyniuk's proposal to put this name as: "Violation of inviolability of personal information" deserves support [9, p.13].

It is worth noting that so far persecution as violation of privacy contained in criminal law of many countries (except until recently England, these are, for example, Denmark, Canada, Norway, France, Switzerland, some US states) remains unknown to the CC of Ukraine. This is disturbance of another person by repeated phone calls, letters or other actions that are annoying. Occasionally, such an event that can be result of mental disorders or jealousy, revenge, envy or other motives, is called stalking. Its victims are usually those who were once close friends (for example, ex-wife, children), colleagues or classmates and so on. The stalking (harassment) of celebrities by obsessive fans is frequently reported in the media but this is not just a problem for celebrities. Nor is this obsessive behavior entirely a creation of the modern age. We are convinced that the issue of criminalization of such conduct should be on

the agenda in Ukraine as well, and corresponding English experience (in the form of the Protection of Harassment Act 1997), by no doubt, could become useful.

Turning to analyses of the other above-mentioned crime against physical integrity of a person that does not cause death, under the criminal law of England – beating (battery), we should note that assault usually precedes battery, though sometimes they can be committed without any prior threats. A person is recognized guilty of beating if he intentionally or recklessly unlawfully uses physical force against another person. As noted in the literature, scholars and judges have not created a unified approach on the issue whether the character of touching the body of the victim while applying physical force should be hostile, offensive or aggressive [4, p.593]. The following actions are considered aggravated types of attacks and beatings: caused actual physical harm; committed with intent to resist lawful arrest; mean attack on a police officer, assault with intent to rob, sexual assault and assault on racial grounds.

It is quite clear that the group of criminal prohibitions that, among other things, includes attacks and beatings, under the criminal law of Ukraine and England differ significantly. However, traditional bodily injuries which liability norms (along with the norms of crimes against life and against property) constitute a "cradle" of modern criminal law, apparently, in any country can be recognized as the domestic analog of beating that has caused real physical damage.

According to the CC of Ukraine bodily injuries can be divided into three levels: severe, moderate and minor. In turn, minor bodily injuries may include those causing intermittent health disorder or a minor work disability, or those that do not lead to such consequences. Under the legal structure of relevant criminal law norms (Articles 121-125, 128 of the CC of Ukraine) different types of injuries are quite similar. The main criterion for classifying a specific injury to one of the kinds (and thus qualification of crimes) is a consequence that came or should have come according to the perpetrator's intent.

In Ukraine distinction between crime sets described in Art. 125 and Art. 126 of our CC Criminal is law issue pertaining to the aggravation of beating under the law of England beating that has caused actual physical harm. The main distinction between intentional infliction of minor bodily injury (Art. 125 of the Criminal Code of Ukraine) and beatings and torture (Art. 126 of the Criminal Code of Ukraine) is causing socially dangerous consequences in the form of health injury in the first case. Intentional minor bodily injury is a crime with the material set and is considered complete at the moment of relevant dangerous consequences realization, as opposed to beating and torture that is considered complete after the committing of any act (strike, beatings, committing other violent acts). In other words, according to the CC of Ukraine beatings and torture do not cause disruption of anatomical integrity or proper functioning of human tissues and organs, but definitely cause physical pain, and on this basis they differ from bodily injury. If strikes or beating caused bodily injuries of corresponding gravity to the victim then committed act should be aggravated by the consequences, without incriminating a culprit with Art. 126 of the CC of Ukraine. In the case when beatings and torture were separate episodes that are not connected internally with bodily injuries, wrongful acts should be qualified according to the rules of real crimes unity – under Sec. 1 or Sec. 2, Art. 126, and, for example, under Sec. 1 or Sec. 2, Art. 121 of the CC of Ukraine.

Another aspect of similarity of law in Ukraine and England in terms of criminal liability for crimes against physical integrity of person that do not cause her death is associated with the spread of xenophobic attitudes and criminal prosecution of "hate crimes". Xenophobia can be described as: obsessive fear regarding strangers or just something unfamiliar, unusual and outlandish; hatred, intolerance and hostility towards members of another race, nation, culture, religion, foreigners, and also something unfamiliar, unusual, alien. Because of this specific image of "others" – the

image of “the enemy” is constructed, which is attributed with negative stereotypes, often non-existent issues and anti-human qualities (aggression, hostility, secret motives, etc.), under which a specific individual may no longer be seen. This is such an underhuman (the term “*untermensch*” was widely used in Nazi Germany). The most serious and widespread revelation of xenophobia is considered racism. According to sociological research, Ukrainians reveal the highest level of xenophobia toward Indians, Caucasians, Asians, Africans, Arabs and Roma. Extremes of xenophobic ideology are so-called hate crimes, based on affiliation of one (usually injured) side to another race.

Under the Crime and Disorder Act 1998 British lawmakers have increased (compared to the existing offences) liability for the attacks exerted on racial grounds – from five to seven years of imprisonment. The crime is considered committed on racial grounds, if: while committing or immediately before or after this the criminal demonstrated hostility to the victim of a crime based on the fact that he (the victim) belongs (or so thinks the perpetrator) to a particular racial group; crime is motivated (wholly or partly) by hostility toward members of a particular racial group. Law understands a group of people defined by race, color, nationality (including citizenship), ethnic or national origin under such group.

Domestic criminal law develops in a similar manner. Thus, under the Law of Ukraine from November 5, 2009 “On Amendments to the Criminal Code of Ukraine about liability for crimes of racial, national or religious intolerance motives” six articles of the CC of Ukraine that punish most dangerous crimes against human life and health (murder, grievous and severe bodily injuries, etc.) were supplemented by such aggravating circumstance as committing crime on motives of racial, national or religious intolerance. To penalize this aggravating circumstance it has to be established that committed crime was caused by specific internal motives of the perpetrator, related to its negative attitude to the fact of real or imagined belonging of the victim to a particular race, nationality or religion (religious movement). Committing a crime on racial hatred motives is caused by the desire of the perpetrator to show his superiority, physical or mental disability of the victim due to his racial affiliation, thus expressing his hatred to the race, diminishing the honor and dignity of the victim.

As it has been rightly mentioned in the literature, in order to determine presence or absence of the motives of racial, national or religious intolerance in the committed act one should establish a subjective attitude of the perpetrator to his actions, reasons that caused the conflict and its dynamics, nature of the relationship between the perpetrator and the victim, circumstances describing the identity of the perpetrator, consistency and adequacy of the committed actions. People who commit crimes on such motives, not only cause physical or mental suffering to the victim, but also openly show contempt for people who are members of another race, nationality or religious denomination, neglect generally accepted ethical and legal norms of behavior, challenge both state and society. With this crimes exerted on motives of racial, national or religious intolerance must be

distinguished from criminal acts on hooliganism motives under which the perpetrator’s acts are committed action due to obvious disrespect for society, disregard of universal rules of coexistence and morality norms, as well as sometimes without any reason by using minor issue. Hooliganism motives are based on antisocial attitude towards people which expresses disrespect of offender not to the particular individual (of different race or ethnicity), but to society in general [8, p. 141-142].

It should be noted that in addition to crimes against life and health of a human committed also on motives of racial, national or religious intolerance, the CC of Ukraine provides liability for such crime as violation of citizens’ equality based on their race, nationality or religious beliefs (Art. 161 of the CC). From the objective side this crime can take the form of: 1) actions aimed at inciting national, racial or religious enmity and hatred, at humiliation of national honor and dignity; 2) offending feelings of people because of their religious beliefs; 3) direct or indirect restriction of rights based on race, color, political, religious and other beliefs, sex, ethnic or social origin, property status, residence, language or other characteristics; 4) establishing direct or indirect privileges on criteria mentioned above. The first two forms can be combined by a concept of “intolerance” and the last two – by the term “discrimination”.

While determining relation of Art. 161 to Articles 115, 121, 122, 126, 127, 129 of the CC of Ukraine it should be taken into account the fact that the phrase “under motives of racial, national or religious intolerance” refers to the attributes of the subjective side while deliberate actions inciting national, racial or religious hostility and hatred (Sec. 1, Art. 161 of the CC of Ukraine) – to the objective side. With that said, qualification of totality of crimes can occur when there is a real totality.

Apart from attacks and beatings discussed above, the Offences Against the Person Act 1861, also involves liability for a significant number of other crimes directed at causing harm to human health. Provisions in this part have distinctly casuistic nature including those related to providing transport security (in particular, intentional causing risk for rail transport passengers, throwing stones at such transport). As for Ukraine, current Criminal Code contains a system of rules on liability for transport offenses in this part. Their generic object is safety of traffic and safety of transport operations. This conclusion flows from the title of Section XI of the Special Part of CC of Ukraine, which is not about traffic offenses in general, but only about those acts that are related to safety of traffic and safety of transport operations. Safe transport operation is intended to prevent causing harm not only to a person but also to property, environment, public safety and more.

Being fully aware of the fact that the conducted comparative research is of a review nature and the issues of criminal law characteristics of crimes against physical inviolability of person that do not cause him death, have been mainly discussed in terms of staging under the law of Ukraine and England, the authors of these lines reserve the right to reveal certain aspects of the selected and partly highlighted topic in more details in their future publications.

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