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## Features of Criminal Liability for Disclosure of Information Constituting a State Secret in Ukraine and Foreign Countries

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### Abstract

The relevance of the subject is largely conditioned upon the full-scale invasion of the Russian Federation, which, regrettably, does not exclude cases of criminal offences regarding the disclosure of information constituting a state secret. The purpose of the study is to analyse some aspects of criminal liability for disclosure of state secrets in Ukraine and to identify, based on positive foreign experience, proposals for improving this institution in Ukraine. The research methods were: analysis and synthesis, dialectical, comparative legal, Aristotelian and formal-dogmatic. In the process of analysis, it was identified that at the legislative level in Ukraine, the protection of state secrets is regulated in detail, lists of information that may contain state secrets, and cases when information cannot be a state secret, no matter what. In addition, the Criminal Code of Ukraine defines adverse consequences in the form of criminal sanctions that may occur for persons who disclose information constituting a state secret. It is determined that the analysis of the provisions of the Criminal Code of Ukraine, and its correlation with the legal provisions of other regulations, including the study of international legislation, allows concluding that the criminal law provisions defining liability for violation of the state secret protection regime should be transferred to another section. The materials of this study can be used in consideration of the problems of criminal law, in law-making activities in the development of provisions for improving criminal liability for disclosure of information constituting a state secret in Ukraine

**Keywords:** information space, the information constituting a state secret, secrecy, human rights, criminal offence

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## Introduction

Preservation of state secrets is always one of the most significant guarantees of independence of each state in the world, its inviolability and security. In this regard, the key objective of the state will be the protection of data or information constituting a state secret. To ensure proper protection of the state's interests, it is essential to establish an efficient system of protection and defence of state secrets, based on legislative acts and appropriate law enforcement measures.

Notably, the legislation of Ukraine is defined by a rather extensive system of regulations related to the protection and defence of state secrets, including appropriate criminal sanctions for criminal offences committed for violation of state secrets. Thus, the state protects the type of information under study by criminalising the relevant criminal acts in Section XIV of the Special Part of the Criminal Code of Ukraine "Crimes in the field of protection of state secrets, inviolability of state borders, conscription and mobilisation" [1].

An efficient system for the protection of state secrets is one of the guarantees for the preservation of the inviolability and integrity of any state, regardless of its location on the world map and the economic potential of the country. This subject is especially relevant considering the recent events of the armed aggression of the neighbouring state and therefore requires detailed analysis and research at the level of scientific developments and proper legislative regulation.

Considering that Ukraine uses positive international experience, therefore, one of the most efficient ways to perform the research is to analyse the system of criminal law protection of state secrets in foreign countries to identify the experience to be borrowed.

The analysis of recent studies and publications demonstrates the interest of scholars in the specific features of criminal law protection of state secrets both in Ukraine and abroad. Therewith, notably, publications and research: Yu. Kostyanaya [2] studied freedom of access to information and considered it one of the basic human rights. This law is enshrined both at the international level and in the national legislation of all countries. This law is defined as an opportunity for everyone to demand the provision of state information and to receive it from state bodies or officials. Relevant information on the actions and decisions of civil officers becomes publicly available. In addition, he noted that access to information has two levels, namely information with restricted access and information with free access. A. Basuchoudhary & N. Searle [3] explored, in their publication, the individual states for the existence of criminal liability for disclosure of top secret, secret and classified information. In addition, they proposed a mechanism to reduce the number of offences related to state secrets. In the work of Yu.A. Ponomarenko [4], it is determined that political battles and military conflicts are accompanied by active offences, which are expressed in the dissemination of information that may constitute

a state secret. In general, the scientist comprehensively examined the offences that may arise during martial law. M. Jurgielewicz and O. Jurgielewicz [5] analysed the information on regulatory and legal support for the protection of state secrets by the provisions of criminal law in the example of the Republic of Poland. The scientists provided statistical data on the number of offences committed in the studied area and reflected the dynamics of the constant increase in such offences.

The purpose of the study is to perform a comprehensive comparative analysis of cases of disclosure of information constituting a state secret and the specific features of criminal liability for committing such criminal offences in Ukraine and foreign countries.

## Materials and Methods

In the process of analysis of the chosen subject, three interrelated and successive stages were identified.

In the first stage, the system of regulations of Ukrainian legislation governing the protection of state secrets in Ukraine was examined. It was established that the legislation of Ukraine defines the lists of data (information) that may contain state secrets and cases when the code of information under no circumstances can not be a state secret, and identified adverse criminal sanctions that may be applied to offenders who disclose such information.

In the second stage, a comprehensive analysis of foreign legislation in terms of ensuring the protection of information that may constitute a state secret was performed. In particular, four countries were identified for analysis: Germany, the United States of America, the United Kingdom and France. Thus, it was established that all the studied states mandatorily determine the levels of confidentiality (secrecy) of disclosure of the information using regulations, and measures for the protection and protection of such information are determined based on this. In addition, notably, the level of protection of information that is "top secret" is much higher than that of information that is secret or classified. In this regard, it is proposed to divide classified information into three blocks (levels), namely top secret, secret and confidential, following the example of France, based on positive foreign experience.

In the third stage, conclusions and proposals were developed for the current criminal legislation in the field under study. In particular, it is necessary to strengthen the punishment by raising its upper limit to thirty years. In addition, the necessity of transferring Article 328 of the Criminal Code of Ukraine "Disclosure of State Secrets" [1] and Article 329 of the Criminal Code of Ukraine "Loss of Documents Containing State Secrets" [1], which are placed in Section XIV "Crimes in the field of protection of state secrets, inviolability of state borders, conscription and mobilisation" [1], to Section I "Crimes against the national security of Ukraine" [1], is argued.

To perform a comprehensive analysis of the selected research subject, a complex of general scientific and special legal methods was used. Thus, the dialectical method provides the foundation for the study, as it is a general scientific method of cognition of legal phenomena in their development and interconnection; the systematic method was used to define varieties of state secrets in Ukraine and foreign countries; the comparative legal method in studying foreign legislation on criminal liability for state secrets offences; formal-dogmatic – when analysing the provisions of the Criminal Code of Ukraine [1] that contain a reference to secrecy; Aristotelian – served to identify deficiencies in the provisions of the Criminal Code of Ukraine [1] that contain a reference to secrecy. Notably, such methods of scientific research were used in conjunction with each other.

The following regulations were used to analyse the selected subject: the Criminal Code of Ukraine [1], the Law of Ukraine “On State Secrets” [6], the Law of Ukraine “On Information” [7], the Order of the Security Service of Ukraine “Report of Information Constituting a State Secret” [8].

### **Results and Discussion**

O. Reznik rightly notes the ratification by the Verkhovna Rada of Ukraine on June 27, 2014. The Association Agreement between Ukraine and the European Union [9] marked the state’s agreement to implement the obligations stated in this document. By the Agreement, one of the fundamental principles of cooperation is the rule of law and respect for human rights and fundamental freedoms, which should be ensured, in particular, by strengthening the judiciary, increasing its efficiency, and guaranteeing its independence and impartiality [10, p. 3].

In any legal democratic state, the primary objective is to protect the fundamental rights, freedoms and legitimate interests of a person and citizen, including from offences of public authorities or local self-government, including their officials [11, p. 3].

Analysis of the current situation will be simply impossible without determining its past, and the previous one without comparing it. It can be emphasised that it is necessary to refer to the information on the first mentions of the protection of state secrets. Thus, Americans are considered to be one of the first in the world who began to talk about the system of information protection at the level of legislation. D.P. Vasylenko noted that the current principles of the US state security policy demonstrate that this country defines state secrets as an essential component of national security and makes significant efforts to protect them and ensure their legal regulation. The US legislative system on information security is one of the most reliable in the world, which makes it almost flawless and the one that everyone should be equal to [12, p. 129].

Considering the strategic course of Ukraine towards full membership of Ukraine in NATO and the European Union, it is essential to enhance measures to

protect and defend state secrets. Among all types of information of specific interest are data on the activities of the authorities according to the criterion of high social significance and demand. It is explained by the very specific features of the functions entrusted to these institutions. The state apparatus processes and disseminates a significant amount of information to perform its rule-making, management and control functions. This information is the foundation for the preparation, adoption and implementation of government decisions [2].

Notably, the protection of information constituting a state secret is regulated by the Constitution of Ukraine [13], the Law of Ukraine “On State Secrets” [6], the Report of Information Constituting a State Secrets [8], international treaties ratified by the Verkhovna Rada of Ukraine and other regulations.

The Law of Ukraine “On Information” [7] in part 1 of Article 20 defines that “according to the order of access, information is divided into open information and information with limited access”. Part 1 of Article 21 of the same Law states that “information with restricted access is confidential, secret and official information” [7].

Regarding the legislative definition of “state secrets”, Article 1 of the Law of Ukraine “On State Secrets” [6] defines that “state secret (hereinafter – secret information) is a type of secret information, covering information in the field of defence, economy, science and technology, foreign relations, state security and law enforcement, the disclosure of which may harm the national security of Ukraine and which are considered in the order established by this Law, as a state secret and subject to protection by the state” [6].

In addition, no less significant is the “List of information constituting state secrets, which is developed by the Security Service of Ukraine based on decisions of state experts on secrets, which defines specific groups of information that may fall under the definition of state secrets” [8].

In addition, notably, the Law of Ukraine “On State Secrets” [6] defines the list of information that cannot be classified as a state secret, including:

- on the state of the environment, quality of food and household items;
- on accidents, disasters, dangerous natural phenomena and other emergencies that have occurred or may occur that threaten the safety of citizens;
- on the state of health of the population, its standard of living, including food, clothing, housing, medical care and social security, and on socio-demographic indicators, the state of law and order, education and culture of the population;
- on violations of human and civil rights and freedoms;
- on illegal actions of state bodies, local authorities and their officials” [6].

O. Shamsutdinov, exploring the signs of state secrets, highlights:

- material criterion (significance, as disclosure of such information, may harm the national security of Ukraine);

- formal criterion (provision of detailed information included in the concept of “state secret” using the definition in a specific regulation – the Code);
- restrictions on access to classified information and restrictions on their dissemination and material carriers;
- protection of such classified information by the state, that is, the establishment of a unified procedure for ensuring the protection of this information by state legal means based on the current legislation;
- the clear and precise definition of areas in which state secrets may exist (which may include: science and technology, foreign relations, defence and economy) [14, p. 23].

Concerning criminal liability for the disclosure of information constituting a state secret, notably, Article 329 of the Ukrainian Criminal Code [1], which establishes “liability for the loss of documents containing state secrets, provides for the loss of documents or other material carriers of secret information containing state secrets, and items concerning which information constitutes a State secret, by the person to whom they were entrusted, if the loss resulted from a violation of the statutory procedure for handling these documents and other material carriers of secret information or items”.

Thus, it can be concluded that at the legislative level in Ukraine the protection and defence of state secrets are regulated in detail, lists of information that may contain state secrets and cases when information cannot be a state secret are defined. In addition, the Criminal Code of Ukraine [1] defines adverse consequences in the form of criminal sanctions that may occur for persons who disclose information constituting a state secret.

In general, having outlined the key aspects of state secrets in Ukraine, the author of the research proposes to consider the legislation of individual states belonging to various legal families. Among them can be identified Germany and France, as the states of the Romano-Germanic legal family and the Anglo-American – the United States and Great Britain.

**Germany.** Thus, in the Federal Republic of Germany, hereinafter referred to as Germany, the key source of criminal law is the Criminal Code of Germany (dated 05/15/1871, as amended on 11/13/1998) [15]. It is in the second section of the Special Part of the Criminal Code of Germany entitled “Treason and Endangering External Security” [15] that there are legal provisions relating to criminal liability for “betrayal of illegal secrets” (Section 97a), “betrayal based on mistaken assumption that secret is illegal” (Section 97b), “revealing state secrets” (Section 95), etc. Thus, Section 95 of the Criminal Code defines that the disclosure of a state secret is granting an unauthorised person access to or public announcement of a protected state secret, which establishes a threat of causing serious damage to the external security of the Federal Republic [15].

In addition, Section 94 of the FRG Criminal Code [15] defines that any person who by the nature of service or work does not have the right to possess this

information is considered unlawful. Such a person can be considered a foreign citizen, if they do not correspond to the features of a special addressee, thus not a member of a foreign government or foreign intelligence [15].

Notably, to bring a person to criminal liability, it is imperative that the information that is disclosed and is a state secret was known to the guilty person. In the absence of such a requirement, the person will not be held criminally liable. In addition, the requirement that the suspect understands that the information is being transferred to an unauthorised person is quite essential. All this corresponds to the German doctrine, and the essence of intent defined by the Supreme Court of Germany: “Intent is the will to commit a crime with awareness of all its circumstances” [16, p. 212].

**USA.** As for the American system of protection of state secrets and criminal liability for its disclosure, notably, it is regulated by the US Presidential Order “Classified Information in the Field of National Security” [17]. According to this Order, there are three degrees of secrecy. Notably, US legislation in the field of information is a definite basis (benchmark) on which foreign states should be equal to build a decent basis for their information legislation. Thus, the legislative system of information security in the United States is considered one of the most efficient in the world and is almost perfect [12, p. 129].

According to the law, classified information in the US is divided into two types: defence (information about national security) and official (restricted information, for example, information about the scientific and technical potential of the US in the field of intelligence, communications, cryptographic system, information about operational activities of law enforcement agencies, human resources policy of a government agency etc.) [18, p. 449].

The US legislation defines a large number of criminal law provisions that provide for differentiated liability for violation of state secrets. Where such a criterion of differentiation can be, for example, the subject or object of the crime, the content of subjective factors [19, p. 92]. Thus, each category of official information is subject to a separate provision of federal criminal law. In particular, the US federal legislation provides for liability for intentional and negligent disclosure of state secrets in various provisions. The defining feature for distinguishing between the disclosure of state secrets and related crimes is the subject of the crime. In addition, there is a detailed description of concepts and terms related to state secrets. [12, p. 130].

Notably, the protection of state secrets is not restricted by criminal law and occurs in criminal proceedings. In particular, the current Criminal Procedure Code of Ukraine [20] provides for the implementation of procedural powers of its participants in criminal proceedings that require compliance with the procedure for ensuring the protection of state secrets. The administration of justice, which contains information constituting a state

secret, is generally regulated by the fortieth chapter of this regulation. However, notably, the procedural forms of protection of state secrets remain unregulated in cases where, during the pre-trial investigation, the information constituting a state secret becomes known to unauthorised persons (without access). During the period of profound developments in Ukraine, the issues of protection of state secrets are of particular relevance. After all, on the one hand, new threats to the security of the state may appear, and on the other hand, the protection of state secrets in Ukraine is not always performed properly [21, p. 180].

**Great Britain.** According to the current legislation of the United Kingdom [22], there are four degrees of secrecy of information with restricted access, namely “Restricted” (for official use), “Confidential”, “Secret”, “Top Secret” [23, p. 207].

Thus, restricted information “Restricted” can be defined as “information whose unauthorised disclosure would damage international relations, hinder the efficiency or security of British or allied forces; prejudice investigations or facilitate the commission of a crime; cause financial loss to individuals or entities, or complicate public sector management”. Secret information can be defined as “information whose unauthorised disclosure would raise international tensions; seriously damage relations with friendly governments; directly threaten life or cause significant harm to public order or individual security and freedoms; cause significant damage to the efficiency or security of British or allied forces, or intelligence operations; or cause substantial material damage to national finances or economies and commercial interests”. And “Top Secret” restricted information can be defined as “information whose unauthorised disclosure could threaten the internal stability of the United Kingdom or its friendly countries; result in significant loss of life; or cause significant damage to the effectiveness or security of British or allied forces or intelligence operations [19, p. 118].

Concerning criminal liability for the disclosure, Section 10 of the UK Criminal Liability Act [24], the main penalties are imprisonment with a potential term of up to 2 years, or a fine of up to £2,000, and, in addition, allow having both penalties applied simultaneously. In case of committing actions that facilitate the disclosure of information constituting a state secret, the types of punishment are similar to those mentioned above, only lesser; thus, the term of imprisonment can be up to 3 months, and the fine up to 2 thousand sterling. Notably, the Cabinet of Ministers of the United Kingdom is actively developing measures to prevent the leakage of classified information using the media, while applying the provisions of the law on state secrets, or the law on confidentiality, which is administrative. According to the law on confidentiality [24], the Cabinet of Ministers can request through the court (of the first degree) to prohibit the publication of specific information or materials, without specifying the persons in respect of whom such a ban is imposed [19, p. 118].

**France.** Considering the features of the French legislation in the field under study, notably, the legal framework for the protection and defence of state secrets in France was defined in 1960, at the time when the state became a member of the “nuclear club” – a group of nuclear powers [23, p. 207].

In the current French situation, restricted information is generally divided into three levels, as follows: “defence secret – information the disclosure of which would cause substantial harm to national defence and which may not be disseminated without authorisation from the relevant authorities, except in exceptional situations; extremely sensitive defence secret – information the disclosure of which is considered extremely dangerous to national defence, no organisation may hold, transmit, display or destroy information at this level of a secret without authorisation from the French Prime Minister or Secretary of National Defence; sensitive defence information – information the disclosure of which is deemed to be potentially dangerous to national defence or which could result in the disclosure of information classified at a higher security level. Notably, in France, information is divided into appropriate levels in ascending order, namely: confidential, for employees; confidential, for junior employees; dissemination limited, dissemination limited by the administration [25].

V.V. Serhiichuk [26, p. 164], analysing foreign experience, identified the positive aspects of the French experience. Thus, consideration should be given to amending the Law of Ukraine “On State Secrets” [6] and establishing a list of classified information at the level of the Law, in particular, to include the terms of protection and classification according to the degree of secrecy of each type of information that constitutes a state secret. In addition, it is advisable to amend the Criminal Code of Ukraine [1], in particular: to strengthen (according to the French experience) the punishment for crimes in the field of protection of state secrets, for which punishment in the form of imprisonment for up to thirty years may be applied, to harmonise the general part of the Criminal Code of Ukraine [1]. In addition, considering the necessity of Ukraine’s development in the field of defence, the author of the research considers it essential to systematise, following the example of France, the list of classified information in the field of defence, dividing it into three levels: confidential defence, secret defence, top secret defence [27, p. 164].

## Conclusions

Exploring the provisions of the Law of Ukraine on Criminal Liability of Ukraine, and its correlation with the provisions of other regulations, including foreign legislation, notably, legal provisions, which define responsibility for violation of the regime of protection of state secrets should be excluded from Section XIV “Offences in the sphere of protection of state secrets, inviolability of state borders, securing conscription and mobilisation” of the Criminal Code of Ukraine and be incorporated

into Section I “Offences against the foundations of national security”, since they are of particular relevance to national security.

Without considering the difference in the legal regulation of the protection of information constituting a state secret, it allows concluding that the US and UK regulations describe and distinguish between the categories of information that may contain a state secret in a rather detailed way. It is explained by the fact that the case law system is specific to the Anglo-Saxon system. Thus, the legislative protection of information constituting a state secret in the United States is quite close to the British one, namely in terms of differentiation of liability based on the category of information disclosure.

Analysing the legislation of France and Germany, notably, “disclosure of state secrets” belongs to the category of “crimes against the state”. Thus, it can be stated that the identified specific features of international legislation should be considered by the legislator when developing amendments. In addition, it is advisable to strengthen the responsibility for the disclosure of state secrets by amending the current criminal legislation. The Ukrainian legislator should amend the Criminal Code of Ukraine, namely: Article 328 “Disclosure of State Secrets” and Article 329 “Loss of Documents Containing State Secrets” to be placed in Chapter 1 of the Criminal Code of Ukraine “Crimes against National Security of Ukraine”.

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## Особливості кримінальної відповідальності за розголошення інформації, що становить державну таємницю в Україні та зарубіжних країнах

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### Анотація

Актуальність теми значною мірою зумовлено повномасштабним вторгненням Російської Федерації, що не виключає випадків вчинення кримінальних правопорушень щодо розголошення інформації, яка становить державну таємницю. Мета дослідження – здійснити аналіз окремих аспектів кримінальної відповідальності за розголошення державної таємниці в Україні та виокремити на основі позитивного зарубіжного досвіду пропозиції щодо удосконалення такого інституту в Україні. Методами дослідження стали: аналіз та синтез, діалектичний, порівняльно-правовий, формально-логічний та формально-догматичний. З'ясовано, що на законодавчому рівні в Україні досить детально регламентовано охорону та захист державної таємниці, визначено переліки інформації, що можуть містити державну таємницю, випадки, коли інформація не може бути державною таємницею, незважаючи ні на що. Також Кримінальний кодекс України визначає негативні наслідки у вигляді кримінально-правових санкцій, що можуть наступити для осіб, які розголошують відомості, що становлять державну таємницю. Визначено, що аналіз норм Кримінального кодексу України, а також його співвідношення з правовими нормами інших нормативно-правових актів, зокрема дослідження міжнародного законодавства, дає змогу зробити висновки, що кримінально-правові норми, що визначають відповідальність за порушення режиму охорони державної таємниці повинні бути перенесені до іншого розділу. Матеріали цього дослідження можуть бути використані під час розгляду проблем кримінального права, у законотворчій діяльності для напрацювання положень щодо удосконалення кримінальної відповідальності за розголошення відомостей, що становлять державну таємницю в Україні

**Ключові слова:** інформаційний простір, відомості, що становлять державну таємницю, секретність, права людини, кримінальне правопорушення