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L. V. Podoroga,
Postgraduate student of the Department of Theory and History of State and Law, State Tax University
ORCID ID 0000-0001-9527-1169

THE DEATH PENALTY IN THE HISTORY OF UKRAINIAN CRIMINAL LAW IN THE FIFTEENTH AND SIXTEENTH CENTURIES

The problem of the article is the need to clarify the characteristics and main features of the death penalty, and also to identify the achievements of legal thought of the fifteenth – sixteenth centuries in the criminal law area, and the level of legal awareness of the legislator. The purpose of the article is to identify the main features of the death penalty, the grounds for its classification in the Ukrainian criminal law of the fifteenth – sixteenth centuries, and to clarify the factors which were characteristic of the Middle Ages and influenced the content of the death penalty. The methodological basis of the study is formed by the methods of philosophical dialectic, analysis, synthesis, generalisation, systemic, functional, comparative historical, comparative legal, formal legal methods. The reasons for the emergence and spread of the death penalty in the legal monuments of the period under study were the development of state-building and economic processes, vassalage relations, peculiarities of the political and social situation of the privileged segments of the population in the State, the influence of foreign law, and the need to implement intimidation as a purpose of punishment. The death penalty in the fifteenth and early sixteenth centuries was not significant, but during the sixteenth century its importance increased, which was reflected in the increase in the number of rules on the imposition of the death penalty, which referred to the imposition of simple and qualified death penalty, and the diversification of terminology. The simple death penalty was provided for grave crimes, and the qualified death penalty was imposed for particularly grave state, military, official crimes, crimes against justice, person or property, religion and morality. The research made it possible to identify general grounds for the death penalty, such as causing significant damage to the state, disrespect for the monarch, breaking the oath, intent, significant property damage to a person, mutilation, and shamefulness of the act. Specific grounds included the particular danger of the act, damage to the state, motive, cunning and shamefulness of the crime, the commission of an unacceptable sin, the possibility of mass death, kinship or family ties, and vassalage relations. A special place among the grounds was occupied by the social status of the murdered and the offender, and the death penalty was provided for by the feudal status principle of the right of privilege.

Keywords: *Ukraine, Lithuanian-Polish period, legal monuments, evolution, institution of punishment, murder, public punishment, Middle Ages, Lithuanian Statute.*

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Purpose of the article is to identify the main features of the death penalty, the grounds for its classification in Ukrainian criminal law of the fifteenth – sixteenth centuries, and to clarify the factors which were characteristic of the Middle Ages and influenced its content.

Statement of the problem. Among many historical and legal phenomena, today the study of the development of Ukrainian criminal law in the fifteenth – sixteenth centuries as an integral system which included certain structural elements (concepts, institutions, etc.) is of great importance. In this sense, it is important to conduct a study of the death penalty in Ukrainian criminal law in the fifteenth – sixteenth centuries. It should be noted that, to a greater or lesser extent, the established body of knowledge about the death penalty enshrined in the legal acts of the fifteenth – sixteenth centuries reflected not only the level of awareness of the legislator of its importance for achieving the purpose of punishment, but also testified to the state of criminal law protection of the objects of crime in Ukrainian criminal law of the period under study.

The study of the death penalty will make it possible not only to clarify its characteristics and main features, but also to identify the achievements of legal thought of the said period in the criminal law area, as well as the level of legal awareness of the legislator. Given this, we believe that this scientific issue is relevant and requires scientific study.

Analysis of recent research and publications. It should be noted that in the national historical and legal science, this scientific problem is not covered sufficiently fully. There are a number of scientific works by such researchers as: Y. Padokh, T. Koval, D. Liubchenko, P. Muzychenko, I. Boyko, Y. Senkiv, Y. Kopyk, M. Korolenko, B. Tyshchyk, S. Kudin and others. In the scientific work of these scholars, this problem is considered fragmentarily. We are talking about the study of the death penalty either in certain chronological periods (for example, at the end of the fifteenth century), or by individual legal monuments (for example, the Casimir's Judicial Code of 1468 or the third edition of the Lithuanian Statute), or without involving in the scientific study of all the norms of the wide and diverse legislative material of the fifteenth – sixteenth centuries; also, the justification of the criteria for dividing this punishment into types is insufficient.

Outline of the main material. It should be noted that in the Ukrainian criminal law during the XV–XVI centuries, the system of physical punishment was developing, and the death penalty was the main one among them. In our opinion, the reasons for its emergence should be considered through the analysis of the social structure of the state, legislative registration of new types of crimes and the subjective assessment by the legislator of the degree of danger of these acts, and the influence of foreign law.

For example, in the fifteenth century, the gentry became economically and politically distinguished, and received significant rights and privileges. To maintain their position, severe punishments were introduced. At the same time, due to the influence of the development of state-building processes, economic relations, vassalage relations, the formation of an extensive judicial system, and the peculiarities of the political and social position of the gentry in the state, the legislator regulates crimes that, in his opinion, have an increased public danger. Legislative consolidation of the norms on these crimes also required the provision of such punishment for their commission that, in the opinion of the legislator, could correspond to the gravity of the offence and serve as an intimidation.

The influence of foreign law, in particular Polish and German law, whose penal system was quite severe, is also significant. For example, such types of capital punishment as quartering, staking, death by torture, drowning were recycled from the Saxon Zerzal, Carolina, and in the twelfth to fifteenth centuries in Poland the death penalty was already a well-known form of punishment (according to the Polish Law, there was a death penalty by stoning).

It is worth supporting the opinion of S. V. Kudin on the reasons for the importance of the death penalty enshrined in the Lithuanian Statute for achieving the purpose of punishment. He argues that "in the sixteenth century, intimidation became the purpose of punishment. Therefore, the constant increase in the number of provisions referring to the death penalty and the diversification of its types with the publication of each new edition of the Lithuanian Statute contributed to the achievement of this purpose of punishment. The types of punishment that provided an element of intimidation were necessary, first of all, for the ruling nobility to consolidate its dominant position" [6, p. 174]. One can also agree with the view of Y. V. Kopyk, who notes that "In the second half of the sixteenth century, the idea of the severity of criminal law became integral to the very concept of law: the articles of the Statutes and judicial acts constantly emphasized the "severity of the Commonwealth law". The law was aimed at frightening the offender and other persons, so physical and moral punishment was carried out in public, often in places of the greatest gathering of people (markets, etc.)" [5, p. 108–109].

It should be noted that the introduction of the death penalty was gradual and in the period before the Lithuanian Statute it was not significant. Thus, the qualified death penalty was not widespread in the fifteenth century, the simple death penalty was represented by hanging, and the first references to it can be found in legal documents of the second half of the fifteenth and early sixteenth centuries.

In particular, the death penalty is mentioned in paragraph 3 of the Charter of King Casimir of 1457 [3, p. 5]. From the analysis of other acts – Kazimierz's Judicial Code of 1468, the District Royal Charter on the power and rights of the hetman during the campaign of 1507, the Statute of the Vilna Sejm on the national census of 1507, the District Royal Charter on the collection of taxes of 1507, Charter of the Kyivan Land of 1507, Charter of the Volyn Land of 1509, we learn that at that time there was only such a form of capital punishment as hanging ("to spend the neck") (Articles 1, 2, 13, 14, 15, 16) [3, p. 11–13; 1, p. 8, 18, 27, 28, 33, 34, 65].

The further development of this type of punishment was reflected in the Lithuanian Statute, which significantly increases the number of provisions on the death penalty. The legislator, according to D. I. Lyubchenko, "depending on the method, divides it into simple (beheading, hanging ("the offender shall be punished by the throat") and qualified (quartering, impalement, drowning, burning, death penalty associated with torture)" [7, p. 100], with the publication of each new edition, the number of norms referring to the imposition of both simple and qualified death penalty is increasing. This indicated a significant increase in the influence of such a purpose of punishment as intimidation.

For example, in the first edition there are 22 articles on the simple death penalty and 2 on the qualified death penalty, in the second edition there are 49 and 5, respectively, in the third edition there are 71 articles on the simple death penalty, the number of articles on the qualified death penalty increases almost 2 times compared to the second edition, and such types of punishment as quartering, impalement on a stake, and torture are added. We believe this was due to the fact that at the time of the publication of the third edition of the Lithuanian Statute, the feudal system with its class and estate division of society, which was built on the basis of gross oppression, exploitation and brutal violence with its slavery and serfdom, had evolved significantly.

In the legal acts of the second half of the fifteenth and sixteenth centuries, the process of allocating a generalized term that reflected the concept of the death penalty – "to lose one's throat" – was enshrined. However, it was often used to refer to such a form of capital punishment as beheading, although in the period of the publication of the Third Edition a special term was formed for it - "to be beheaded". Special terminology for other types of death penalty was also formed (hanging was denoted as "hang", "must hang", burning – "punished by fire on the throat must be punished", drowning – "drowned in water", quartering – "will be punished by quartering", the death penalty with torture – "will be departed from this world with various severe torments".

The simple death penalty was provided for serious crimes, but which, in the opinion of the legislator, did not pose an increased public danger (i.e., were not particularly grave). These included some state crimes (high treason, attempts on the life of the monarch, flight abroad to a hostile state, attempts on the life or health of a person in the monarch's palace), war crimes (murder during military campaigns, "attack" on a military convoy causing death or injury), crimes against justice (murder of a judge, a carriage driver encroachment on the life or health of a person during a court hearing,) crimes against a person or his/her property (murder, mutilation, robbery, theft), crimes against morality (adultery, procuring, rape, III edition, Chapter I, Articles 3, 6, 9, 10, Chapter II, Articles 18, 21, Chapter IV, Articles 7, 11, 62, 63, Chapter XI, Articles 1, 3, 12, 29, 31, 32, 33, 35, 49, Chapter XII, Article 1, Chapter XIV, Articles 7, 10, 14, 22, 27, 30, 31).

The analysis of the Lithuanian Statute makes it possible to identify the general grounds for imposing the death penalty. In particular, for the commission of state crimes (I edition, I section, article 5; II edition, I section, articles 3, 13, 21; III edition, I section, articles 3, 9, 10, 16, 17, 21, 24), the fact of the special danger of the crime, which consisted in causing significant damage to society, the state, and gross disrespect for the monarch, was taken into account.

The death penalty could be imposed for certain war crimes, the commission of which also posed a particular danger due to the significant damage caused (I edition, II section, 12, 13, 16 articles; II edition, II section, 23, 26 articles; III edition, II section, 18, 21 articles).

The death penalty was also imposed in the case of dangerous crimes against the court, abuse of power by officials, which was seen as a violation of the oath taken before God, and neglect of the high trust of society (I edition, VI section, 12, 21 articles; II edition, IV section, 5, 35, 36, 39, 40, 41 articles; III edition, IV section, 7, 9, 11, 59, 62, 63 articles).

The death penalty was also envisaged for intentional crimes against human life and health (I edition, VII section, 1, 14, 15 articles; II edition, XI section, 1, 3, 10, 12 articles; III edition, XI section, 1, 3, 7, 8, 16, 17 articles). In some cases, the death penalty was imposed on persons who had injured or wounded another person. In this case, the motive or method of committing the crime, the relationship of dependence between the victim and the perpetrator, the severity of the crime in which the injury was inflicted, and the social status of the victim and the perpetrator influenced the imposition of the death penalty (I edition, VII section, 1 article; II edition, XI section, 1, 3, 15, 18 articles; III edition, XI section, 1, 3, 9, 16, 17, 49 articles).

Another ground for the death penalty was the commission of serious property crimes - robbery, theft, arson. Robbery, in addition to causing property damage to a person, resulted in significant damage to health, and therefore, for a combination of crimes, was punishable by death (I edition, VII section, 21 article; II edition, XI section, 23 article; III edition, XI section, 31, 32, 33, 34 articles). Theft by secret means of seizing property was considered to be a very shameful act (I edition, Chapter XIII, 1, 9, 10, 12, 15 articles; II edition, Chapter XIV, 2, 4, 7, 11, 12, 13 articles; III edition, Chapter XIV, 1, 3, 7, 10, 14, 15, 16, 17 articles). Arson was considered an act that caused not only great damage, but could also lead to significant loss of life (III edition, Chapter XI, Article 18).

The death penalty was also applied in the case of shameful crimes against the church, family, and morality, which were universally condemned by society: rape, adultery, pimping, incitement to convert from the Christian faith to another (I edition, VII section, 6 article; II edition, XI section, 8 article, XII section, 5 article; III edition, XI section, 12 article, XII section, 9 article, XIV section, 30, 31 articles).

In our opinion, specific grounds for the imposition of the qualified death penalty should be highlighted. Thus, when imposing burning for forgery of documents, seals or the king's signature or coinage, the fact that the perpetrator committed this crime for mercenary motives while causing damage to the state was taken into account (I edition, I section, Article 5; II edition, I section, Articles 12, 13; III edition, I section, Articles 16, 17). In addition, forgery was considered a particularly shameful act in the period under study. Thus, this crime combined the following elements: damage to the state, motive, and shame.

Burning was also used in the commission of some other crimes (persuasion of Christians to convert to another faith) and was due to the fact that in the fifteenth and sixteenth centuries any non-Christian faith was considered heresy. Therefore, an order to convert to another faith was regarded as a great sin, which led to an increased degree of public danger. In another case, burning was considered as arson: not only was the cause of great damage taken into account, but also the possibility of causing death to many people.

In addition to burning, the II and III editions of the Lithuanian Statute contained drowning. It was prescribed for the murder of one spouse by the other or by one's parents (II edition, Chapter XI, Articles 10, 16; III edition, Chapter XI, Articles 6, 7). These crimes should be classified as a group of acts with increased social danger: even in the case of the murder of one of the spouses, when their children or relatives refused to file a lawsuit, the initiative to initiate a trial comes from the state. Attempts on the life of a close relative or a person whose marriage was sanctified by the church were considered particularly shameful and thus extremely dangerous.

Another type of qualified death penalty was quartering. It was provided for killing or wounding a servant of his master (III edition, XI section, 9 article). Such a crime was considered not only as an attack on the person, but also as treason against one's master, and therefore the legislator classified it as a crime of high public danger.

Quartering was also prescribed for the murder of a person for revenge with cold steel or by secret means, and if a nobleman was deprived of his life in this way by a commoner, he was punished by martyrdom, and if a nobleman killed, he was punished either by quartering or by being put on a stake (III edition, XI section, 16, 17 articles). Such acts were seen as shameful, insidious actions, and they were considered particularly dangerous crimes [8, p. 3; 9, p. 21, 155, 158, 167; 10, p. 17, 18, 287, 288, 289, 295, 296, 337].

In our opinion, it is important to consider the development of the legislator's views on the issue of imposing the death penalty on representatives of different segments of society. It is worth noting that in the legal acts of the second half of the fifteenth century and the I – II editions of the Lithuanian Statute we do not find any mention of the death penalty for the murder of a commoner. However, by the time the third edition was published, the views of its drafters had changed, and Chapter XII, Articles 1 and 2 provided for the death penalty. The main reason for such a change in views lies in the reality that existed at the time of the Lithuanian Statute of 1588. At that time, the common people suffered quite a lot from magnates and gentry, and even the payment of a head tax did not stop the perpetrators from killing, as stated in the legal memo: "they spill innocent human blood without shame and innocently in the hope of paying for it with money" (III edition, XII section, 1 article). Thus, the legislator's decision to introduce the death penalty for causing the death of a commoner was influenced by the real need for greater protection of their lives. This is evidence of a certain democracy (albeit in a limited form) of Ukrainian criminal law in the late sixteenth century.

As we can see, the death penalty was envisaged for all classes of the population, although there were significant differences in its purpose, which was influenced by the principle of right-privilege. For example, if a nobleman killed a commoner in a fight, the latter was to be executed "by the throat" only if he was caught at the scene of the crime. Otherwise, a complicated procedure of proving his guilt was envisaged. In the case of the same murder of a nobleman by several nobles, only one was subject to the death penalty, while the accomplices paid a fine and were subject to imprisonment. If the same crime was committed by several commoners, then three people were to be punished by death. Finally, if a commoner took the life of a nobleman out of revenge, he had to be quartered, and if vice versa, the perpetrator was subject only to cutting off his hand (III edition, XI section, 16, 29, 39 articles, XII section, 1 article) [10, p. 295, 306, 314, 333].

"The nobility was exempted from the death penalty, except in very rare cases. For although legally a nobleman was liable to death for the murder of even a commoner, in fact, in very few cases he could be sentenced to this punishment. In fact, the death penalty threatened mainly commoners, the death penalty was one of the ways in which the nobility protected its interests and took revenge on its enemies" [4, p. 156; 2, p. 192].

Conclusions. The following conclusions can be drawn from the above.

1. The reasons for the introduction and spread of the death penalty in normative sources were the development of state-building and economic processes, vassalage relations, the formation of an extensive judicial system, the peculiarities of the political and social situation in the state of the gentry, the influence of foreign law, and the need to implement intimidation as a purpose of punishment.

2. The death penalty in the fifteenth and early sixteenth centuries was not of significant importance, but in each new edition of the Lithuanian Statute its weight increases, as evidenced by a significant increase in the number of provisions on the imposition of the death penalty, with the publication of each new edition, the number of provisions referring to the imposition of both simple and qualified death penalty, the diversification of terminology to reflect its various types increases. The simple death penalty (hanging, beheading) was envisaged for grave crimes, while the qualified death penalty (quartering; deprivation of life with torture; burning; drowning with torture) was envisaged for particularly grave state, military, official crimes, crimes against justice, person or property, religion and morality.

3. The analysis of the provisions of legal monuments of the fifteenth and sixteenth centuries makes it possible to identify a number of grounds for the death penalty. The general grounds included: causing significant damage to the state, disrespect for the monarch, violation of the oath, the form of guilt (intent), significant property damage to a person, mutilation, and shamefulness of the act. Specific grounds for the imposition of the qualified death penalty included the special danger of the act, causing great damage to the state, motive, cunning and shamefulness of the act, committing an unacceptable sin, the possibility of mass death, family ties, and relations of vassalage (between a master and a servant). A special place among the grounds was occupied by the social status of the murdered and the offender: the death penalty was envisaged on the principle of right-privilege (the murder of a commoner by a nobleman had to undergo a complex procedural form of proving guilt and was punishable by simple death or mutilation; if a nobleman was killed by a commoner, the latter was unconditionally subject to the qualified death penalty).

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Л. В. Подорога. СМЕРТНА КАРА В ІСТОРІЇ УКРАЇНСЬКОГО КРИМІНАЛЬНОГО ПРАВА XV–XVI СТСТ.

У статті досліджено зміст, основні риси смертної кари в історії українського кримінального права XV–XVI стст. Доведено, що причинами уведення та поширення в нормативних джерелах смертної кари були розвиток державотворчих та господарських процесів, васальних відносин, формування розгалуженої судової системи, особливості політичного та соціального становища в державі шляхти, вплив іноземного права, необхідність реалізації залякування як мети покарання. З'ясовано, що смертна кара у XV – на початку XVI ст. не мала істотного значення, але у кожній новій редакції Литовського Статуту її вага збільшується, свідченням чого є збільшення кількості норм щодо призначення смертної кари, зростання кількості норм, в яких говориться про призначення видів простої та кваліфікованої смертної кари, урізноманітнення термінології, яка відображала різні види страти. Визначено, що проста смертна кара передбачалась за вчинення тяжких, а кваліфікована – особливо тяжких державних, військових, посадових злочинів, злочинів проти правосуддя, особи чи власності, релігії та моралі. Аналіз норм правових пам'яток XV–XVI стст. дав можливість виокремити загальні підстави призначення смертної кари (спричинення істотної шкоди державі, неповага до монарха, порушення клятви, умисність, значні майнові збитки особі, каліцтво, ганебність учинку). До специфічних підстав призначення кваліфікованої смертної кари можна віднести особливу небезпеку діяння, заподіяння великої шкоди державі, мотив, підступність та ганебність діяння, скоєння неприпустимого гріха, можливість масового заподіяння смерті, родинні чи сімейні зв'язки, відносини між паном та слугою. Встановлено, що особливе місце серед підстав займав соціальний стан вбитого та злочинця: страта передбачалась за принципом права-привілею. Виявлено, що вбивство шляхтичем простолюдина мало пройти складну процесуальну форму доведення вини і каралось простою смертною карою або каліцтвом; якщо ж було убито шляхтича простолюдином, то останній безумовно підлягав кваліфікованій смертній карі.

Ключові слова: *Україна, литовсько-польський період, правові пам'ятки, еволюція, інститут покарання, вбивство, публічні покарання, доба Середньовіччя, Литовський Статут.*

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