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Criminal-law protection of land under the Criminal Code of Ukraine and the criminal codes of other CIS countries: a comparative legal study

Abstract: It is examined the characteristics of the criminal-legal protection of land in the criminal laws of the individual countries of post-Soviet space. The conclusion about the need to improve the criminal-law protection of land in the norms of the Criminal Code of Ukraine by establishing criminal liability for the registration of illegal land transactions.

Keywords: land; the land; the criminal-legal protection; legislation on criminalizing of foreign countries.

It is important significance has an issue of integrity and full-bloodedness of criminal-legal protection of the lands is provided by the norms of Section Eight of the Special part of the Criminal Code of Ukraine (further reads – the CC of Ukraine) “Crimes against the natural environment”, and also with the norms of other structural parts of the CC in condition of constant growth of intensity of using of land resources and the establishing a land market. As notes K.V. Obrazhiyev, one of the priority directions of the criminal-legal policy is to ensure the legislation’s system on criminal responsibility, its coordination with regulation of the public relations in other branches of the law (2, p. 192). Therefore, it is important to compare the CC of Ukraine with an appropriate system in the criminal codes of the states – participants of the CIS (further – the CC and name of a proper state). Taking into account the similarity of the legislation’s system and general recommendation act for the countries - Model Criminal Code (further – the Model CC) we were analyzed for

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comparatively-legal research the following CC: Azerbaijan (4), Armenia (5), Belarus (6), Kazakhstan (8), Kirgizstan (9), Moldova (10), Russian (11), Tajikistan (12), Uzbekistan (14), Georgia (7)¹ and Turkmenistan² (13) (1).

The first, we pay attention on which sections of analyzed CC are included the criminal-legal norms, which protect the lands of the proper states. The Model CC recommended concentrating them in one structural subdivision – the head 26 “Crimes against ecological safety and environment” of the chapter 9 “Crimes against ecological safety and environment”. This issue has been solved by the lawmakers of analyzed countries in different ways. Thus, the main part of the criminal-legal norms is placed in chapter 8 of the Special part of the CC of Ukraine “Crimes against the natural environment”. In addition, there is a land protecting norm in chapter 6 of the Special part of the CC of Ukraine “Crimes against property” (which is established a criminal responsibility for unauthorized occupation of land and unauthorized construction). In analyzed CC of the states-participants of the CIS the main part of these criminal-legal norms are placed as follows: “Crimes against ecological safety and environment” (the chapter 26 of the CC of Belarus; the chapter 24 of the CC of Tajikistan); “Crimes against safety of environment” (the chapter 27 of the CC of Armenia); “Crimes against protection of environment” (the chapter 36 of the CC of Georgia); “Crimes in sphere of environment protection and nature management” (the chapter 14 of the CC of Uzbekistan); “Ecological crimes” (the chapter 26 of the CC of Kirgizstan; chapter 11 of the CC of Kazakhstan; chapter 9 of the CC of Moldova; chapter 26 of the CC of Russia; chapter 28 of the CC of Azerbaijan; chapter 31 of the CC of Turkmenistan). We believe that the last name “Ecological crimes” is the most correct name of the researched group of the crimes. Since conception “ecology” is a considerable wider than notions “nature”, “environment” and “nature management”. In connection with this, we consider is to be possible borrowing from the experience of the indicated states of the CIS and in proper way to rename the section 7 of the Special part of the CC of Ukraine that will give an opportunity to take into account in

¹ Georgia withdrew from the CIS in 2009.

² Turkmenistan is an associated member of the CIS

the name of this section those facts of the crimes, the direct object of which is the ecological safety or nature.

As to recommendation of the Model CC about concentration of the criminal-legal norms, which provide guarding of the lands in one structural subdivision, it should note that only Kirgizstan's lawmaker went in this way. He included all criminal-legal norms ensuring a guard of the lands in the chapter 26 "Ecological crimes".

The system of criminal-legal protection of the lands in the CC of Azerbaijan, Moldova, Belarus and Uzbekistan is built on the analogy with the CC of Ukraine. We can separately say that the system of criminal-legal protection of the lands in the CC of Azerbaijan is supplemented with a norm stipulated in the chapter 24 "Crimes against economic activity", which establishes responsibility for registration of the obviously illegal deals with a land, misrepresentation of the record data of the State Land Cadastre, and also intentional reduction of the payments for a land. The same norm in the same chapter's name is had the CC of Russia and Tajikistan. But in a contrast to the CC of Azerbaijan, there is no a separate article in the CC of these countries establishing the responsibility for unauthorized occupation of a land and unauthorized construction.

We believe that the crimes encroaching on the public relations in respect of the land protection should be recognized only those crimes, in which the lands are a subject of crime or appropriate relations are an additional direct object of the crimes. It should not be included in this group those facts of crimes, in which the public relations in respect of the lands protection are an optional direct object of the crimes as they are stipulated almost in each section of the Special part of the CC (for example, crimes against property, economical activity, official crimes etc.).

The norms, which would stipulated the lands as a subject of the specific facts of crimes and accordingly of the public relations were absent in the Model CC. Nevertheless, it recommended recognizing the public relations in respect of the lands protection as an additional direct object in such facts of the crimes as "Violation of the rules of ecological safety during works production" (art. 216); "Misrepresentation of information about environment pollution" (art. 217); "Not taking the measures on

elimination of the consequences of an environmental pollution” (art. 218); “Water pollution” (art. 222); “Marine pollution” (art. 224); “Land damage” (art. 225); “Violation of the rules of a guard and usage of the surface” (art. 226); “Illegal felling of the trees and bushes” (art. 231); “Violation of a regime of specially protected areas and natural sites” (art. 233).

In the CC of Ukraine the public relations in respect of the lands protection are the main direct object, and accordingly, the lands are called as a subject of such facts of crimes as “Pollution or damage of the lands” (art. 239), “Illegal occupation of the soil covering (surface layer) of the lands” (art. 239-1), “Illegal occupation of the lands of water fund in special big sizes” (art. 239-2), “Violation of the rules of a guard or and usage of the surface” (art. 240), “Intentional destroying or damage of the territories protected by a state, and the objects of the nature reserve funs” (art. 252), “Thriftless usage of the lands” (art. 254). At the same time appropriate public relations are an additional direct object in such facts of the crimes as “Violation of the rules of ecological safety” (art. 236), “Not taking the measures on elimination of the consequences of the ecological pollution” (art. 237), “Concealment or misrepresentation of information about ecological condition or sick rate of the population” (art. 238), “Violation of the rules of water protection” (art. 242), “Marine pollution” (art. 243), “Violation of legislation on the continental shelf of Ukraine” (art. 244), “Illegal felling of the forests” (art. 246). Accordingly, all crimes of this group might be classified into two subgroups: 1) the facts of crimes, in which the public relations in respect of the lands protection are the main direct object of crime; 2) the facts of crimes, in which appropriate public relations are an additional direct object. Just based on such classification, in further we will compare the proper criminal-legal norms of analyzed CC and suggest the ways of improvement of the CC of Ukraine in this part.

In respect of the CC of other countries of the CIS we note that the facts of crimes. In which the public relations in respect of the lands protection are the main direct object is differed as on quantity of the appropriate facts so and on legislative technique of a formulation of their features, and also on an order of placing in the sections (chapters) of the CC of these countries. And the facts of crimes, in which the

public relations in respect of the land protection are an additional direct object as in Ukraine so and in the CC of the countries-participants of the CIS are formulated on the basis of appropriate norms of the Model CC. Proceeding from the stated, we consider it necessary to analyze the facts of crimes of the first group.

Article 197-1 of the CC of Ukraine provides for criminal responsibility for unauthorized occupation of a land or unauthorized construction. The responsibility for a similar crime is provided in the CC of Azerbaijan (art. 188), Belarus (art. 386), Moldova (p. 2 art. 193) and Uzbekistan (art. 229-1). Primarily, we point out on different approach of a lawmaker in respect of placing of the proper facts of crime in structural parts of the Codes analyzed. As in the CC of Ukraine, this crime is related to the crimes against property in the CC of Azerbaijan (chapter 23 “Crimes against property” of the section 9 “Crimes against property”). This issue was resolved in the CC of Belarus and Uzbekistan in other way. This crime is attributed to the crimes against order of management (the chapters 33 of the CC of Belarus and 15 of the CC of Ukraine “Crimes against an order of management”). In earlier acting CC of Ukraine of 1960 the similar fact of crime was also attributed by a lawmaker to the crimes against the management’s order. More suitable, from our point of view, is the last way of attribution of this crime since an authorized occupation of a land or unauthorized construction encroaches, first of all, to the public relations in respect of established by the legislation an order to possessing of the rights to property and/or the right to construction. According to the legislation, such decisions are in exclusive competence of the authorities and administrations (local authorities).

Being analyzed the facts of crimes of unauthorized occupation of a land plot or unauthorized construction, we point out those features of the crimes’ facts, with help of which they are criminalized: 1) a subject of crime – a land plot (the CC of Ukraine, Azerbaijan, Belarus and Uzbekistan), property of other (the CC of Moldova); 2) publically dangerous deed – an authorized occupation (the CC of Ukraine, Uzbekistan); an authorized occupation, replacement or seeding of a land plot (the CC of Azerbaijan); taking possession (the CC of Moldova). In addition, the CC of Belarus and Uzbekistan are provided an administrative prejudice, under presence of which begins criminal responsibility on appropriate articles (committing crime during

year after administrative penalty for the same crime – the CC of Belarus; after application of administrative penalty for the same crime – the CC of Uzbekistan). We think that it is not necessary to introduce an administrative prejudice in the article 197-1 of the CC of Ukraine since its presence contradicts of the constitutional principle – no one might be repeatedly convicted for the same offense; 3) a way of crime committing is used only in part 2 of article 193 of the CC of Moldova – through destroying or replacement of a landmarks. In addition, only CC of Ukraine is provided qualifying features of this facts of crime: committing crime by a person earlier convicted for the crime provided with this article, or by the group of individuals, or in respect of the lands plots especially valuable lands, the lands in protected areas, in zones of sanitary guard, sanitary guarding zones or special using regime areas. We believe that a lawmaker of Uzbekistan, Moldova, Belarus and Azerbaijan is reasonable to borrow this experience of the CC of Ukraine since the responsibility for an authorized occupation of a land plot or an authorized construction should be differentiated in order to take into account all typical signs increasing a public danger of this fact of a crime.

We also note that in the CC of Uzbekistan, Moldova, Belarus and Azerbaijan this fact of crime is formulated as a formal, and in the CC of Ukraine – as a material one. In the last case a criminal responsibility comes for an unauthorized occupation of a land plot, if in result of these actions was caused considerable harm to his legal owner or proprietor. Based on necessity to improve the criminal-legal protection of the lands in Ukraine, we consider it possible supplementing the article 197-1 of the CC of Ukraine with criminal responsibility for committing of this crime without socially dangerous consequences (following to the example of some analyzed CC). At the same time, causing of the harm to a legal owner or proprietor of a land plot should be stipulated as qualifying feature of this crime.

We also believe that to improve the criminal-legal norms provided in the article 197-1 of the CC of Ukraine, the fact of crime should be placed into section 15 of the Special part of the CC of Ukraine “Crimes against credibility of the bodies of public authorities, bodies of local governments and association of the citizens” (following to example of some CC of the countries of the CIS).

Criminal responsibility for crime similar provided in the article 239 of the CC of Ukraine “Pollution or damage of the lands” is had in the CC of all countries analyzed. This fact of crime is designed with usage of the following signs: 1) socially dangerous deed: pollution or damage of a land (the CC of Ukraine, Uzbekistan); poisoning, pollution or other damage of a land (the CC of Azerbaijan, Armenia, Georgia, Kirgizstan, Kazakhstan, Tajikistan, Russia and Turkmenistan); pollution of the soils (the CC of Moldova); violation of the terms of land’s usage, bowels of the earth, or requirements on their protection (the CC of Uzbekistan), destroying of the fertile layer of soil or non fulfillment of re-cultivation of the lands or pollution of it committed during a year after imposing administrative penalty provided for such offenses (the CC of Belarus); 2) socially dangerous consequences of a deed: the mass human disease, death of the animals, birds or fish or other grave consequences (the CC of Uzbekistan); considerable infliction of harm to the health of people or environment (the CC of Azerbaijan, Armenia, Kirgizstan, Russia, Georgia); danger for life, health of people or environment (the CC of Ukraine), harm to the health of a man or environment, deterioration of the natural properties of the earth (the CC of Kazakhstan); infliction of a harm to the environment or agriculture (the CC of Turkmenistan); a harm: to a health of population; environment; agricultural productions (the CC of Moldova).

We think that the most successful formulation of the objective side of this fact of crime is in the CC of Uzbekistan (art. 197), which provides responsibility for violation of the terms of the lands usage. From our point of view, just this socially danger deed should be provided in article 239 of the CC of Ukraine.

Qualifying signs of the fact of crime provided by the article 239 of the CC of Ukraine – murder of people, their mass illness or other grave consequences. In other CC: committing crime in zone of an emergency or dangerous ecological situation (the CC of Azerbaijan, Russia); committing crime in area of ecological disaster or emergency ecological situation or infliction on imprudence harm to a health of a man (the CC of Armenia, Turkmenistan, Tajikistan); committing crime in an area of ecological disaster or emergency ecological situation or infliction of a loss on

especially large scale (the CC of Belarus); committing crime on a territory with emergency ecological situation (the CC of Kazakhstan); committing crime in an area of emergency ecological situation or in a zone of natural disaster; death of a man (the CC of Moldova, Uzbekistan). We note that death of a man is as especially qualifying sign of this fact of crime in the CC of Azerbaijan, Armenia, Kazakhstan, Kirgizstan, Turkmenistan, Russia and Tajikistan; removing the lands from agricultural use in an area of emergency ecological situation or in zone of ecological disaster – in the CC of Kirgizstan; committing crime in an area of ecological disaster or zone of emergency ecological situation or causing intentional or on imprudence the infliction a loss in especially large scale (the CC of Belarus); commission of a crime during an ecological emergency or in a zone of ecological disaster causing a damage of considerable area of a land (the CC of Georgia).

Based on comparative analysis, we believe the reasonable to use an experience of Kirgizstan and foresee in the article 239 of the CC of Ukraine a separate qualifying sign – removing the lands from agricultural turnover in area of emergency ecological situation or in zone of ecological disaster. We note that a presence of this sign will help to differentiate deeper the criminal responsibility for pollution or damage of the lands on the CC of Ukraine and it will help to bring perpetrators to responsibility for such socially dangerous deeds causing of the above indicated consequences. Since today, it is impossible actually to bring to responsibility of the individuals committing such crimes

Article 240 of the CC of Ukraine provides the responsibility for violation of the rules of protection or use of the bowels of the earth. Similar fact of crime has almost all analyzed CC of the countries of the CIS. Article 226 of the Model CC provided responsibility for violation of the rules of use and protection of the bowels of the earth under projecting, placing, reconstruction, liquidation, commissioning or an exploitation of the mining enterprises or underground structures, and also an authorized construction at the locations of the minerals, which caused considerable damage. Such norm was reproduced by the article 298 of the CC of Georgia, article 286 of the CC of Kazakhstan, article 225 of the CC of Azerbaijan; article 291 of the CC of Armenia; article 275 of the CC of Kirgizstan, article 229 of the CC of

Tajikistan and article 255 of the CC of Russia. Article 271 of the CC of Belarus established responsibility for violation of the rules of the subsoil. Article 197 of the CC of Uzbekistan is established for violation of the terms of the rules of the subsoil or the requirements on their protection. Article 228 of the CC of Moldova is established for violation of the requirements of protection of the minerals or other resources of the bowels of the earth, unauthorized construction of the areas of the mineral deposits or placing on them toxic waste. Based on comparative analysis, we consider that a lawmaker of Ukraine most fully formulated this fact of crime with objective side that allows providing thorough protection of the subsoil. Therefore, it is reasonable for the lawmakers of the CIS countries to borrow this experience of the CC of Ukraine

Criminal-legal protection of the lands of the natural reserves and other nature protected use in criminal legislation of Ukraine is provided by establishing of responsibility for intentional destroying or damage of the territories protected by the state and the objects of natural reserves fund (article 252 of the CC of Ukraine). The responsibility for this crime is provided in the most analyzed CC of the CIS countries (excepting the CC of Kirgizstan). The Model CC recommended formulating disposition of this article in such way: “Violation of a regime of the reserves, sanctuaries, national parks, natural monuments and other especially protected by the state natural objects that on imprudence entailed the substantial loss” (article 233). This formulation was borrowed by a lawmaker of Azerbaijan (art. 261 of the CC), Armenia (art. 298 of the CC), Georgia (art. 305 of the CC), Belarus (art. 264 of the CC) and Tajikistan (art. 236 of the CC). Article 293 of the CC of Kazakhstan is established the responsibility for violation of a regime of especially protected natural territories causing the considerable loss. Article 235 of the CC of Moldova is established responsibility for violation of a regime of management and protection of the natural territories protected by the state, creating threat in big scale or causing a loss in big scale, and article 204 of the CC of Uzbekistan is established responsibility for violation of a regime especially protected natural territories causing the considerable loss or other grave consequences.

Proceeding from the comparative analysis, we think reasonable to use an experience of other CIS countries and establish in the CC of Ukraine the criminal responsibility for violation of a regime of the territories management and protection taken under the state protection, and the objects of the natural reserves fund and entailing of the considerable damage causing. Wherein, an intentional destroying or damage such territories might be as qualifying sign of this fact of crime (as in the CC of Kazakhstan).

The CC of Ukraine has such distinctive facts of the crimes encroaching on the public relations in respect of the lands protection as illegal occupation of subsoil cover (surface layer) of the lands (art. 239-1), illegal occupation of the water fund's lands in especially large scales (art. 239-2), a thriftless usage of the lands (art. 254). "Distinctive" facts of the "lands" crimes are contained in the CC of analyzed CIS countries: registration of obvious illegal deals with a land, misrepresentation of the record data of the State Land Cadastre, and also intentional reduction of the payments' sizes for a land if these deeds were committed from mercenary or other personal interest of an official person using his official position (art. 191 of the CC of Azerbaijan, art. 261 of the CC of Tajikistan, art. 170 of the CC of RF). According to the CC of the appropriate countries, such encroachment belongs to the crimes against economic activity. According to the article 1 of the Law of Ukraine from 7 July 2011, No. 3613-17 "On the State Land Cadastre" the State Land Cadastre is a unified state geo-informational system of the data about the lands, located within the state boarder, their intended purpose, restrictions in use of the lands, and also the data about quantitative and qualitative characteristics of the lands, their assessment, distribution of the lands between owners and users (3). Due to formation of the legislative base for full-bodied functioning of the land market and carrying out an active work on formation and filling with the data of the State Land Cadastre, we believe that in order to improve a system of criminal-legal protection of the lands in the CC of Ukraine, it should be fixed a separate criminal-legal norm in which will be established a responsibility for registration obviously illegal deals with the land, misrepresentation of the record data of the State Land Cadastre, and also intentional reduction of the payments' sizes for a land. We think that using the experience of

Russia, Azerbaijan and Tajikistan it should be established the responsibility for this crime in section 7 of the Special part of the CC of Ukraine “Crime in sphere of economical activity”.

Consequently, the comparative analysis of the criminal-legal norms providing the lands’ protection, gives an opportunity to determine the particularities of the system approach to this issue in the CC of the countries-participants of the CIS. This shows an absence of a proper full-bodied system of the lands protection as in the CC of Ukraine so and in the CC of other CIS countries. We believe that using positive experience of a foreign lawmaker should be made certain alternations in appropriate articles of the CC of Ukraine, which directed on improvement of the criminal legislation, and also a practice of the enforcement in this sphere.

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