

**Liability for illegal migration under the criminal legislation
of the post-soviet countries: comparative legal study**

Abstract: It is dealt with the peculiar features of regulating the criminal and legal measures aimed at fighting illegal migration and other violations of the state border crossing rules provided for by the criminal laws of the post-Soviet countries. The legislative approaches applied in various countries to establish criminal liability for illegal migration are set forth in this article. The comparative analysis helped to elaborate the propositions for making changes to the disposition of Article 332 of the Criminal Code of Ukraine. It is justified the necessity of criminalizing the violation of the process of entering the territory of Ukraine with the purpose of causing damage to the state interests.

Keywords: migration; criminal and legal protection; state border; displacement; interests of the state; criminal laws of foreign countries.

The legislative mechanism of criminal and legal measures to fight illegal migration and violation of the rules provided for entering the territory of the state (state border crossing procedure) requires a thorough evaluation in view of the recent social and political changes in Ukraine and in connection with the signing of the Ukraine and European Union Association Agreement in 2014, as well as the necessity of integrating the laws into its legal framework.

This comparative and legal study is based on the analysis of the provisions contained in the Criminal Codes of Azerbaijan [6], Armenia [7], Belarus [8], Kazakhstan [10], Kyrgyzstan [11], Moldova [14], Russia [15], Tajikistan [16], Uzbekistan [18], Georgia [9], Turkmenistan [17], Lithuania [13], Latvia [12], and

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Estonia [20] which provide for the liability to be imposed for illegal migration and violation of the state entry procedure.

The Criminal Code of Ukraine contains two articles providing for the stated crimes: Article 332 entitled “Violating the Procedure of Displacement across the State Border” and Article 332-1 entitled “Violating the Procedure of Entry to and Exit from the Temporarily Occupied Territory of Ukraine”. The first article criminalizes the illegal displacement of persons across the state border of Ukraine, the organization of illegal displacement of persons across the state border of Ukraine, and the management of the stated actions or inducement to commit them expressed in the form of advice, directions, funding or removal of obstacles. The qualifying features of this crime are as follows: commitment of the same actions in the way which can be dangerous for the life and health of the person illegally displaced across the state border of Ukraine or the same actions committed in respect of several persons or committed once again or in collusion with a group of persons or by an officer who abuses his office. The particularly qualifying features are committing the actions provided for in Parts 1 or 2 of Article 332 of the Criminal Code of Ukraine by an organized group or for financial gain.

Article 332-1 of the Criminal Code of Ukraine was introduced by the Law of Ukraine dated April 15, 2014 No. 1207-VII. The liability is imposed for the violation of the procedure of entry to and exit from the temporarily occupied territory of Ukraine with the purpose of causing harm to the interests of the state. The temporarily occupied territory is comprised of: 1) the dry land of the Autonomous Republic of Crimea and Sevastopol and the internal waters of Ukraine located in these territories; 2) the internal marine waters and territorial sea of Ukraine around the Crimean peninsula and the territory of the exclusive (marine) economic zone of Ukraine along the coast of the Crimean peninsula and adjacent continental shelf of Ukraine which are subject to the jurisdiction of the government authorities of Ukraine according to the international law, Constitution and laws of Ukraine; 3) the air space above these territories (Article 3 of the Law of Ukraine dated April 15) [4].

The corresponding provisions are contained in following structural parts of the Special Part of the Criminal Codes analyzed: “The crimes related to the protection of the state secret, integrity of the state borders, provision of the call up for military service and mobilization” (Section XIV of the Criminal Code of Ukraine), “Crimes against the administrative order” (Chapter 30 of the Criminal Code of Armenia, Chapter 34 of the Criminal Code of Azerbaijan, Chapter XL of the Criminal Code of Georgia, Chapter 32 of the Criminal Code of Kyrgyzstan, Chapter 33 of the Criminal Code of Belarus, Chapter 14 of the Criminal Code of Kazakhstan, Chapter 31 of the Criminal Code of Tajikistan, Chapter 32 of the Criminal Code of Russia, Chapter 25 of the Criminal Code of Turkmenistan, Chapter XV of the Criminal Code of Uzbekistan, Chapter XXII of the Criminal Code of Latvia, Chapter XLII of the Criminal Code of Lithuania); “Crimes against the public authorities and safety of the state” (Chapter XVII of the Criminal Code of Moldova); “Crimes against the state” (Chapter Two of the Criminal Code of Estonia).

Thus, in most Criminal Codes of the post-Soviet states the violation of the state border crossing procedure (entry to the territory) is considered to be an intervention with the administrative order. The legislative officer of Ukraine, Moldova and Estonia is thought to have defined the generic object of the stated crimes more specifically as illegal migration encroaches on the safety of the certain state in terms of violating the integrity of the state border.

According to the Criminal Codes analyzed, the liability to be imposed for the stated crimes is differentiated in different ways. Thus, the liability for violating the state border crossing rules is provided for in the Criminal Code of Armenia (Article 329), Georgia (Article 344), Kyrgyzstan (Article 346), Uzbekistan (Article 223), and Turkmenistan (Article 214). Whereas the liability for violating the state border crossing rules and illegal migration is provided for in the Criminal Codes of the following states: Azerbaijan (Articles 318 and 318-1), Belarus (Articles 371 and 371-1), Kazakhstan (Articles 330 and 330-2), Moldova (Articles 362 and 362.1), Tajikistan (Articles 335, 335-1 and 335-2), Russia (Articles 322 and 322-1), Estonia

(Articles 81-1 and 81-2), Latvia (Articles 284 and 285), and Lithuania (Articles 291, 292 and 293).

Our opinion is that the illegal crossing of the state border of Ukraine should be criminalized in the Criminal Code of Ukraine. Imposing criminal liability for the stated crime was eliminated by the Law of Ukraine dated May 18, 2004 No. 1723-IV [17]. It was induced by the humanization of the migration laws and ratification of the Protocol against Smuggling of Migrants by Land, Sea and Air supplementing the United Nations Convention against Transnational Organized Crime (hereinafter referred to as the Protocol) by Ukraine in 2004. It is not applied to the criminal prosecution of migrants based on one and only circumstance: they are the subjects of the actions related to illegal migration (Article 5) [5]. At the same time, Ukraine has not assumed any international obligations to decriminalize the actions related to the violation of the rules of entry to its territory.

Taking into account the up-to-date political situation in Ukraine and the necessity of strengthening the state policy in relation to the protection of the borders of our country and liberalization of the visa regime with the EU states, it is necessary that the actions related to the illegal entry to the territory of Ukraine in any possible way omitting the Ukrainian state border checkpoints or through the Ukrainian state border checkpoints without the appropriate documents or permits should be criminalized. In addition to this, the obligatory feature attributive to this kind of crime should be its aim which is to harm the interests of the state. These legislative changes are induced by the necessity to provide for the equity of criminal and legal protection of the whole Ukraine, and not only of the Autonomous Republic of Crimea and Sevastopol. For the purposes of the stated UN Protocol, according to Part 1 of Article 332 of the Criminal Code of Ukraine, the liability occurs for both the illegal carrying of persons over the state border of Ukraine and for the organization and management of these actions or assistance in committing them. Pursuant to Article 332 of the Criminal Code of Ukraine, illegal migration applies to the foreigners, persons without citizenship, as well as to the citizens of Ukraine. The corresponding articles contained in the Criminal Codes of the post-Soviet countries provide for the

liability for the following actions which illegal migration is comprised of: 1) the organization of illegal migration (entry to, staying within and transit through the territory) (Criminal Codes of Azerbaijan, Russia); 2) the organization or management of or assistance in illegal migration (Criminal Code of Belarus); 3) the organization of illegal migration by providing the required vehicles or forged documents, or residential or other rooms, as well as by rendering any other services related to the illegal entry to, exit from and displacement within Kazakhstan to the citizens, foreigners and persons without citizenship (Criminal Code of Kazakhstan); 4) the organization aimed at obtaining a(n) direct or indirect financial or material benefit from the illegal entry to, staying within, transit through or exit from the territory of the certain state by the person who is neither a citizen nor a resident of this state (Criminal Code of Moldova); 5) the illegal displacement of the person across the state border (Criminal Codes of Estonia, Latvia); 6) the illegal carrying of a foreign citizen who has no permanent place of residence in the Lithuanian Republic over the state border of the Lithuanian Republic, the organization of these actions, as well as the organization of illegal migration of the citizens of Lithuania (Criminal Code of Lithuania); 7) the organization of illegal entry to or illegal transit of these persons through the territory of the Republic of Tajikistan (Criminal Code of Tajikistan).

We consider that the disposition of Part 1 of Article 332 of the Criminal Code of Ukraine complies with the international obligations to the fullest extent pursuant to Parts 1 and 2 of Article 6 of the Protocol, as the liability for illegal migration occurs for both the organization and the management of these actions or assistance in committing them. According to N. I. Khavroniuk, the specific nature of composing the disposition of Part 1 of Article 332 of the Criminal Code of Ukraine is that the person who organizes the illegal crossing of the border, manages this process or assists in committing these actions is considered to be the actual perpetrator of the crime, therefore these actions must be qualified pursuant to Article 332 with no reference to Parts 3 or 5 of Article 27 of the Criminal Code of Ukraine [2, p. 957].

The qualifying features of illegal migration are as follows: the commitment of these actions in the way which is dangerous for the life and health of the person who

is carried over the state border illegally (Criminal Codes of Ukraine, Azerbaijan, Belarus); in respect several persons (Criminal Codes of Ukraine, Moldova); the treatment of persons in a rude or humiliating way (Criminal Code of Belarus); aiming at carrying on illegal activities (Criminal Code of Tajikistan); aiming at committing a crime within the Russian Federation (Criminal Code of Russia); the application of violence or threat of applying violence towards the person who prevents the crime from committing (Criminal Code of Estonia).

The particularly qualifying features are as follows: the commitment of the action in respect of five or more persons at a time (Criminal Codes of Ukraine, Latvia), crime repetition (Criminal Codes of Ukraine, Latvia, Tajikistan, Belarus, Azerbaijan); a previous concert of a group of persons (Criminal Codes of Ukraine, Belarus, Moldova, Tajikistan, Estonia) or an organized group (Criminal Codes of Azerbaijan, Kazakhstan, Russia); the commitment by an officer who abuses his/her office (Criminal Codes of Ukraine, Azerbaijan, Belarus, Kazakhstan, Tajikistan, Estonia, Latvia); for financial gain (Criminal Code of Ukraine); causing an especially large damage to the public interests or the legal rights and interests of natural persons and legal entities (Criminal Code of Moldova).

Based on the list of qualifying and particularly qualifying features of illegal migration, we consider it expedient to provide for the commitment of illegal migration involving a rude or humiliating attitude towards people (as stated in the Criminal Code of Belarus). This provision complies with Article 6 of the Protocol ratified by Ukraine [5].

According to the Criminal Codes analyzed, the crimes related to the illegal crossing of the state border are as follows: 1) the violation of the term of exclusion from the Republic of Belarus (Article 371-2 of the Criminal Code of Belarus); 2) the failure to fulfil the exclusion decision (Article 330-1 of the Criminal Code of Kazakhstan); 3) the violation of the State border regime (Article 336 of the Criminal Code of Tajikistan, Article 283 of the Criminal Code of Latvia); 4) the violation of the rules of staying within the Republic of Uzbekistan (Article 224 of the Criminal Code of Uzbekistan); 5) the fictitious registration of a citizen of the Russian

Federation at the place of staying or at the place of residence in a residential room within the Russian Federation and the fictitious registration of a foreign citizen or a person without citizenship at the place of residence in a residential room within the Russian Federation (Article 322.2 of the Criminal Code of Russia), the fictitious tax registration (Article 322.3 of the Criminal Code of Russia), 6) the concealment of personal identity (Article 281 of the Criminal Code of Latvia).

The liability for identical actions is provided for in the Code of Ukraine on Administrative Offenses (CUAO). Article 202 of the CUAO establishes administrative liability for violating the frontier regime, the regime applicable at the Ukrainian state border checkpoints or regime regulations at the inspection entry and exit points; Article 203 provides for the liability for violating the rules of staying within and transit through the territory of Ukraine by foreigners and persons without citizenship; Article 204 - for violating the procedure of employment, admission to educational facilities, provision of accommodation, registration of foreigners and persons without citizenship, as well as the execution of the required documents for them; Article 206-1 - for the illegal transportation of foreigners and persons without citizenship through the territory of Ukraine [1]. As the persons who enter the territory of Ukraine illegally must be expelled (deported) to the country where they come from, we consider that imposing criminal liability for these actions is inexpedient.

According to the results of analysis of the Criminal Codes of the post-Soviet countries, we may conclude that there are separate provisions providing for the liability for illegal migration almost in all the countries (Azerbaijan, Belarus, Kazakhstan, Moldova, Tajikistan, Russia, Estonia, Latvia, Lithuania, and Ukraine).

Using the positive experience of the legislative officer of Belarus, we think it necessary to make certain changes into Article 332 of the Criminal Code of Ukraine (in terms of fixing the qualifying feature of illegal migration related to the rude or humiliating treatment of migrants). These changes will be conducive to the implementation of the international obligations in the field of illegal migration by Ukraine.

In addition to this, the analysis of the Criminal Codes of the post-Soviet countries shows that all the countries, except for Ukraine, provide for criminal liability for the illegal crossing of their state border (the violation of the rules of entry to the territory of the state). As far as Ukraine is concerned, at present criminal liability is only provided for the violation of the procedure of entry to and exit from the temporarily occupied territory. Therefore, in order to provide for the equity of the criminal and legal protection of the state border, we consider it necessary to establish criminal liability for violating the procedure of entry to the territory of Ukraine with the purpose of harming the interests of the state in a separate provision of the Criminal Code.

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