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DOI: 10.25108/2304-1730-1749.iolr.2017.52.171-194

**Problems of ensuring the rights of the individual
when applying criminal law in the field of land property**

Abstract: Despite the widespread prevalence of criminal law violations of property rights, use and lease of land, these circumstances and related issues of judicial practice, rights and legal interests of citizens have not been investigated in domestic legal literature.

Being the first attempt to study the general picture of the current situation in the country on the above issues, the paper, aims to highlight some important aspects of the problem directly related to the rights and legitimate interests of citizens. As a result of studying criminal cases examined over the past seventeen years, it became clear that there were various kinds of law enforcement errors and related violations of the rights of the accused persons. In some cases, discrepancy between judicial decisions and international legal acts was found. Based on the analysis of these and other issues, specific recommendations and proposals are formulated in the article.

Key words: property; land; crime; criminal code; municipality; citizen.

After the restructuring of the legal system of the Republic of Azerbaijan gained its independence, including over land resources, the numerous tasks associated with creating a new property regime was successful. In 1995, the popular vote, adopted the Constitution [1] of Article 13 of the property relations of the new system has determined that the land resources of the state, municipal and

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private property to establish their equal legal status and legal regime for creating a startup constitutional provision was. Constitutional norms and laws of the country in accordance with the international law of the land and land reforms carried out in the above-mentioned three categories of land distribution property provided. Legal regime for the protection of land for the violation of property relations on civil, administrative and criminal responsibility in accordance with accepted norms. In particular, the 1999 Criminal Code, the chapter "Crimes against property" under Article 188 on land property, use or lease rights that violated was identified as a separate crime structure.

The adoption of legislation in studying of the situation over the past years and the current situation, (especially in the state and municipal-owned lands) violations against property rights over the land on a massive scale shows that. The seriousness of the situation, the head of state has repeatedly been mentioned in speeches and debates in the National Assembly. A number of legal actions necessary to strengthen the fight against violation by state itself, including the responsibility for the crimes against property on land have pushed to tighten. The law dated September 20, 2015, Article 188 of the Criminal Code in the new edition of the compositions formulated qualification to these crimes, as well as 314-1, 314-2, 314-3 in paragraphs of said article tightened responsible for the official powers.

The original version of Article 188 of Criminal Code defined as action committed crimes which do not represent big public danger against land property rights and considered applied of corrective works for the term up to one year as serious crimes to such kind of action. The actions (arbitrary arrest, replacement or cultivation) organizing the objective aspect of the act was clear in terms of the definition, was being followed the correct lawful applying practice relating with their classification in connection with the investigation and court practice of previous years with some exceptions. The literature of national law, in particular The Commentary of the Criminal Code [5, p. 519-520] have given the purposed



explain of these actions, however, Plenum of the Constitutional Court of Azerbaijan Republic "On Interpretation of Article 188 of the Criminal Code" in its decision dated 30 March 2015 [3] the application of Article 188 of the Criminal Code on the key issues were clarified.

In this article is viewed some created difficulties and contradictory aspects both the previous edition and the new edition of the articles 188 of the Criminal Code in investigative and judicial practice. The main subject of said article is compact analysis a number of issues in accordance with the volume of work as correspondence to international law of definition, classified problems and the current judicial practice.

First in the previous edition of article 188 of the Criminal Code is considered in explain of the concept "cultivation" of legal literature and judicial practice I would like to draw attention. There are such kind of explain to those action in referred decision of Plenum of the Constitutional Court of Azerbaijan Republic and said The Commentary: Arbitrary growing is planting vegetation, courting them, and cultivating them without the consent of the owner of the land plot or other legal owner. Cultivation on the ground means bringing it to a suitable state for subsequent cultivation (cleaning of bushes, harvesting stones, etc.), plowing, sowing seeds and "as a set of action" [3; 5, p.520]. Thus, cleaning the land from stones, bushes, etc. is included in the concept of "cultivation", which, in our opinion, seems to be wrong. The explanatory dictionary of the Azerbaijani language interprets the word "cultivation" as "breeding, with the help of courtship, cultivation" [6, p.253].

It is obviously that is not only going to talking about here is the preparation of the soil for planting, but also planted seeds fed wood sapling in the soil. First, in accordance with the principles of lawful creativity, the common meaning of words in the language in which they must comply with the laws. Second, it needs attention on action of the nature and degree of public dangerous. The cleaning of



stones, bushes and other garbage of soil, if it yet actually begun the work of planting, adequate sanctions to comply with Article 188.1 of the Criminal Code cannot be considered. Rather, it is in certain cases (for example, in the conditions of cleaning garbage of unsanitary nature) may be considered socially useful action. Therefore, we considered that simply the action consisting of the clearing of the land, if the planting work does not exceed a particular case, should not be considered a crime, should be provided in the Code of Administrative Offenses. In terms of the formation of the composition of Article 188.1 of the Criminal Code must be as condition defined to begin cultivation in the soil (plowing or otherwise significant change in the landscape), it should be based qualification as crime of a completed action.

In connection with arbitrary cultivation, it is necessary to consider the following question. In Articles 188.1-188.3 of this Criminal Code are considered repeatedly committed action are concerned to category of serious crimes by article 188.4 of Criminal code.

In the new version of the Criminal Code, the AR establishes specially qualified offenses foreseen by Art. 188.1-188.3 in accordance with which for repeated illegal cultivation on the land plot can be sentenced to imprisonment for up to eight years. However, this circumstance should not pertain to annual growing on a particular plot of land, since illegal cultivation, regardless of its type (perennial fruit trees, or annual truck farming) is an ongoing crime. The time of its commission is the moment of the actual commission of the first acts, which constitute the objective side of the crime. So, for example, if the accused began arbitrary cultivation in 2014 and continues these actions so far, his deed should be qualified with the application of Article 10.1 and Article 188 of the Criminal Code in the wording of 2014, provided there are no other circumstances mitigating the criminal liability.



Other problematic issues of the judicial practice are following on the work associated with unauthorized replacement of land fields.

The plenum of the Constitutional Court explains this “action” as follows: unauthorized replacement of land fields is said arbitrary substitute the land belonging to the person on the right of ownership (possession, use), a piece of land belonging to another person, without the permission of its owner. The substitution is also the case when a person acquires another piece of land in exchange for a plot reserved to him in accordance with the law" [3].

For Civil legislative mainly the exchange of land by a notary must be confirmed and must be registered in public authorities. In practice, in many cases, for clearly no distinguishing between the boundaries of the land are came across cases as adopting other fields, as well as illicit actions of relevant authorities because of other people's land, in whole or in part changes. It is clear that in such cases other person's land, not knowing illegally owned citizens, in the end, must be responsible before the law. So, first of all, between citizens, legal awareness work must be carried out that the land of any transactions passage tradition of legal registration should be strengthened. Second, in illegal transactions related land role received the relevant authorities about serious action sequence must be observed. Practice shows that there are direct participation in schemes of the relevant authorities in the conspiracy cases to the land ownership, in particular, citizens in rare cases, encroach to state or municipal property completely arbitrary.

Judicial practice shows that it is not uncommon for citizens to apply to the appropriate authorities for a clear definition of borders with neighboring owners, the authorities do not respond within the time limit established by law, or indicate boundaries improperly, due to negligence or for corrupt reasons.

For example, according to the sentence of the Siyazan court of October 9, 2006, citizens D. and M. were found guilty of illegal substitution of land and sentenced to a fine. The appellate complaint states that the actions of the accused



persons are not a criminal assault on someone else's property, since they have seized the disputed plot of land due to the vagueness of the borders. The appeal of the guilty to the municipal authorities with a request to clarify the boundaries of their legal land, remained without proper consideration. Instead, the late chairman of the local municipality gave an oral confirmation of the correctness of the borders, which gave confidence to the accused persons, in the absence of violation of the property rights of others. However, after the expiration of three years of the introduction of the economy, it turned out that the ownership of a certain part of the land plot belongs to the victim who recently acquired this right on legal grounds [9].

There are other similar examples that we have identified in the study of the judicial practice of land crimes. Legal ignorance of citizens and abuse of powers of local authorities often lead to similar facts when citizens, being confident in their right to own property own and use land, although in fact violate the property rights of other citizens, the legitimate interests of municipalities or the state. In practice, there are cases of fairly long unregistered legally owned land plots, as a result of which citizens are prosecuted, deprived of property and punished.

So, for example, the sentence of the court of Binagadi district on October 26, 2005, citizen H. was found guilty under art. 188 of the Criminal Code of Azerbaijan for the fact that in 1999 it illegally acquired a land plot of 69 square meters. meters, built a dwelling there and was engaged in gardening. The appeal, filed by citizen H., was not granted [13]. As seen from the decision of the Court of Appeal, since 1999, citizen X. with his family settled on a piece of land allocated to him with the consent of authorized officials of the executive power of Binagadi district, due to the fact that he was a forced migrant and was to be provided with housing or a site for building a home. In 2004, the local municipality sold the same piece of land to another citizen, as a result of which a dispute arose between them.



It should be noted that this verdict of the court not only contradicts the policy of the state in relation to the issue of refugees and internally displaced persons, but also the European Convention on the Protection of Fundamental Human Rights and Freedoms, ratified by the Republic of Azerbaijan. A vivid example of this is the case of "Oneryildiz against Turkey", considered by the European Court of Human Rights on November 30, 2004. The applicant (citizen Oneryildiz) defended his ownership of the land he acquired in 1988 on the state-owned territory on the outskirts of a landfill where the applicant built a house (slum) and lived with his family until the accident in 1993 case. The applicant pointed out that he lived in his house continuously and for a long period of time, with the knowledge and without the objections of the authorized bodies. This circumstance allowed him to assume that the state has a tacit agreement on his ownership of this piece of land.

The court found the following: "The house built by the applicant and family residence in this house had the necessary economic interest for them. The state authorities for a long period of time patiently treated this fact, which serves as the basis for considering this property as "property" within the meaning of the first article of Protocol No. 1 to the Convention "[8, p.65-66].

The widespread practice of inactivity of authorized bodies, when the law requires immediate intervention and suspension of illegally initiated work, is a serious problem. The study of judicial practice shows that a significant part of criminal cases is the result of just such inactivity. In some cases, the authorized bodies intervene not at the beginning of construction work on illegally acquired plots, but after their completion or even after a long period of residence of citizens in illegally constructed dwellings.

Further, Article 188.3 of the Criminal Code provides for the commission of acts specified in Articles. 188.1 and 188.2, in respect of agricultural land, as a qualifying element of this crime. In accordance with Article 12 of the Land Code, lands designated for land use planning for agricultural purposes are considered



agricultural land. Such lands include agricultural land (arable land), forest land, agricultural roads, communications, marshes, ponds, which are important for agriculture [4].

Other categories of land in many cases have a direct and unclear boundary with agricultural land, which is fraught with errors of offenders in relation to the object of the crime. Especially in rural areas, the boundaries of agricultural land and other land categories are often unclear. The question arises, how to know citizens in what category is the land plot?

In our opinion, in order to prevent mistakes in relation to the object of the crime and to prevent unfairly severe punishment in this regard, in each specific case it is necessary to thoroughly clarify and prove the fact that the accused was previously aware of the relevance of the land plot to agricultural land. And to fix this issue at the legislative level, we are invited to state art. 188.3 of the Criminal Code in the following edition:

“188.3. Acts provided for in Articles 188.1 and 188.2 of this Code, committed knowingly for agricultural land”.

The study of judicial practice shows that a significant part of criminal acts are committed precisely in relation to agricultural land that is on the balance of either municipal authorities or the state. However, the authorized bodies do not always or not respond in time to encroachments on municipal or state lands. Most criminal cases are caused by the fact that natural or legal persons acquiring land plots legally, discovering the facts of illegal possession or use of these plots, first try to eliminate the facts of arbitrary use of peaceful ways, and when the peaceful approach does not yield results, it sometimes comes to criminal prosecution.

It is thanks to this provision (the failure of the relevant bodies to properly perform their functions, not to prevent encroachments in advance, for negligence or for other reasons) that violations of land legislation have become widespread. It seems unconvincing that the toughening of punishments for acts against land



ownership may have a desirable preventive role in the fight against crimes of this kind. Our position on this issue is that complex measures are required to restore the legal regime in the field of land ownership.

It should be noted that the criminal codes of some post-Soviet republics (Russia, Kyrgyzstan [12], Turkmenistan [13], etc.) do not provide for analogies of Art. 188 of the Criminal Code of Azerbaijan Republic. Other republics have decided the issue of criminal liability in various ways. For example, Art. 201 of the Criminal Code of the Republic of Kazakhstan establishes responsibility for "illegal seizure of someone else's land" [11]. Article 229-1 of the Criminal Code of Uzbekistan provides for the criminal punishment of such acts (seizure of land), provided that they are committed not for the first time, but after applying an administrative penalty for the same action, and the maximum penalty for such an act is arrest up to six months [14]. The Criminal Code of the Republic of Belarus has resolved this issue somewhat differently. Thus, according to Art. 386 of the Criminal Code of Belarus unauthorized occupation of a land plot is punishable if it occurs within a year after imposing an administrative penalty for the same violation [10]. If the act is repeated after one year, then it is considered a repeated administrative violation, and not a crime.

The real situation is that a huge amount of land resources have long been seized by illegal owners. If it is a question of criminal liability, then Article 188 of the Criminal Code is applied to them in the old version, and not a new one. On the other hand, arbitrarily long-term ownership of land plots, known to authorized bodies, is interpreted according to the European Convention as tacit consent or tacit acceptance by the state of the right of ownership of citizens to these plots, and accordingly such plots are equated to property, according to Article 1 of Protocol No. 1 to the Convention. Hence, in such cases there is the possibility of appealing the decisions of state courts to the European Court of Human Rights.



On the basis of the foregoing, the following conclusions and proposals can be formulated for the restoration and strengthening of the legal regime in the field of land ownership:

- a comparative analysis of the criminal legislation of the post-Soviet republics shows the excessive punishment under the Criminal Code of Azerbaijan for crimes against land property, which may indicate the expediency of applying administrative responsibility for encroachments on landed property made for the first time;

- the interpretation of the term "cultivation" by the Plenum of the Constitutional Court is incorrect and therefore subject to revision;

- Unclear borders between agricultural land and other categories of land fraught with errors of offenders in relation to the object of the crime, and can serve as the basis for unfair judgments;

- we propose to supplement art. 188.3 of the Criminal Code by the term "knowingly for the guilty";

- mechanisms should be developed to address the problems associated with long and arbitrarily populated land, taking into account the requirements of the European Convention for the Protection of Fundamental Rights and Freedoms and other international instruments.

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