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PROBLEMS OF CRIMINAL LIABILITY FOR ILLEGAL AMBER MINING IN UKRAINE

Purpose. Critical analysis of the criminal law provision on illegal mining of amber, identification of its shortcomings, development of proposals for their elimination.

Methodology. The system of philosophical, general scientific and specific scientific methods and approaches, which have provided objective analysis of the subject under consideration, in particular, the method of systemic and structural analysis, specific sociological, statistical, comparative, formal-logical methods.

Findings. Shortcomings of the criminal law provision on illegal mining, sale, acquisition, storage, transfer, shipment, transportation and processing of amber, in particular, unjustified expansion of the criminal law prohibition under consideration, unsuccessful design of the main and qualified components of the criminal offense under review, as well as unjustified sanctions.

Originality. The authors have been among the first researchers in the domestic criminal law doctrine to provide a comprehensive critical understanding of the provision dedicated to the regulation of criminal liability for illegal amber mining, which has made it possible to develop scientifically based recommendations for improving domestic criminal law.

Practical value. Based on the research results, specific proposals addressed to domestic parliamentarians have been developed, which can be taken into account in the process of further lawmaking in terms of updating relevant provisions of the Criminal Code of Ukraine. It is argued that the improved Art. 240-1 should only cover illegal mining of amber. The main structure of the researched criminal offense is proposed to be designed as material. It has been proven, including through references to specific law enforcement materials, that sanctions of Part 1 of Art. 240-1 of the Criminal Code of Ukraine should provide for a fine as the only non-alternative main type of punishment, while referenced to alternative punishments in the form of a fine and imprisonment should be included in Parts 2 and 3.

Keywords: *minerals, amber, environment, illegal mining, criminal offense, criminal liability*

Introduction. In recent years, cases of illegal amber mining have become widespread in our country. Amber reserves in Ukraine rank second in the world, and the first in terms of quality. Destruction of the fertile soil layer, violation of the integrity of geological strata, depletion of amber subsoil, violation of hydrogeological conditions in the surrounding areas, water pollution due to usage of motor pumps, changes in the hydrological regime of swamps, forests and lakes, which are affected by microclimatic changes in "amber" regions – this is merely an open list of the devastating consequences of this negative phenomenon [1]. Such state of play is therefore increasingly recognized as a circumstance, which threatens or has even led to yet another environmental catastrophe in Ukraine.

Under such unfavorable circumstances, the state, represented by the Parliament, has responded to the mentioned violations of the legislation in the field of rational use and protection of subsoil by adopting the Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine to Improve Legislation Related to Mining of Amber and Other Minerals" on December 19, 2019 (hereinafter – the Law of December 19, 2019). Among the consequences of this Law was the amendment of the Criminal Code of Ukraine (hereinafter – the Criminal Code) with Art. 240-1 "Illegal mining, sale, acquisition, transfer, transportation, processing of amber", the existence of which, according to parliamentarians, had to contribute to the creation of a more effective mechanism of criminal counteraction to the analyzed socially dangerous acts. The mentioned order raises a number of questions for the criminal law science, one of them being justification of the final method of reflection of the relevant legislative initiative within the normative framework.

Literature review. Issues of criminal liability for illegal mining in general and amber in particular have been covered in the works of such researchers as S. B. Gavrysh, M. V. Komarnytsky, M. G. Maksimentsev, L. O. Mostepanyuk, A. A. Pavlovskaya, M. S. Plastun, G. S. Polishchuk, Yu. A. Turlova, L. S. Khmurovskaya, R. F. Chernysh, and some others.

Unsolved aspects of the problem. At the same time, despite the seriousness and, even at first glance, ambiguity of the rel-

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evant changes to the Criminal Code, such amendments have not yet been subjected to professional discussion due to their relative novelty. This has become the primary reason of our decision to make an effort in filling such gap in domestic legal research.

Purpose. In view of the above, the purpose of the article is to critically interpret provisions of Art. 240-1 of the Criminal Code, based on the results of which scientifically substantiated proposals should be developed in order to improve current criminal law.

Methods. In order to achieve the above-mentioned goal, specific methodology tools have been chosen in order to provide an opportunity to objectively investigate decision of the Verkhovna Rada of Ukraine. Philosophical, general scientific and specific scientific methods were used during the coverage of the relevant issues. In particular, the method of system-structural analysis was used in the study on the relationship of the analyzed criminal law prohibition with other norms and institutions of the General and Special Part of the Criminal Code. A sample study on court decisions (specific sociological method) was conducted. The statistical method made it possible to analyze relevant quantitative and qualitative indicators. Comparative method was used to clarify approaches in other states to the regulation of liability for similar criminal offenses.

Results. We should start by pointing out that, although the enclosed documents to the relevant bill addressed counteracting the manifestations of "traditional" illegal amber mining, in Art. 240-1 of the Criminal Code, the legislator significantly expanded the content of the criminal offense by referring not only to the mining but also to the sale, purchase, storage, transfer, shipment, transportation and processing of amber, the legality of origin of which is not confirmed by relevant documents. With the help of this step (its necessity has been supported by some researchers [2]), the legislator tried to solve the issue of criminal assessment of the actions of persons who do not directly extract, but in every way contribute to the illegal amber mining.

Without denying public danger referred to in Art. 240-1 of the Criminal Code, at the same time we would like to draw attention to several points, which call the feasibility of such decision into question:

1) if actions specified in Art. 240-1 of the Criminal Code (other than mining) were promised in advance, they fell entirely under the definition of aiding and abetting and could therefore be classified as aiding and abetting (Part 5 of Article 27 of the Criminal Code) illegal amber mining;

2) if a person made acquisition, receipt, storage or sale of amber, which, on the contrary, were not promised in advance (there are no signs of complicity), then their actions could just as easily be qualified under Art. 198 of the Criminal Code, designed for such cases. At the same time, there is no reason to believe that taking appropriate actions with amber is significantly more dangerous than similar actions not only with other natural resources (for example, transportation of illegally removed soil, skins of illegally taken animals, fish resources), but also with any other items (sale of stolen phones, laptops, and so on);

3) in relation to the shipment, transportation and processing of amber which is specified in Art. 240-1 of the Criminal Code and at the same time not mentioned in Art. 198 of the Criminal Code, not promised in advance, the criminalization of the actions seems unfounded, given the obviously low degree of public danger of such actions. By the way, taking into account the fact that, in contrast to Art. 198 of the Criminal Code, Art. 240-1 of the Criminal Code does not refer to "knowingly obtained in criminally illegal way", but to "the legality of the origin of which is not confirmed by relevant documents", the question of the correctness of criminalization may arise in relation to other actions listed in the analyzed criminal prohibition. Thus, it is noted in the legal literature that the acquisition of amber may consist, inter alia, in the appropriation of the found property [3]. What is more, within the practice of applying Art. 240-1 of the Criminal Code, there have already been cases of convicting persons, who were accused of simply finding (from a legal point of view – purchased) amber, the legality of which has not been confirmed by relevant documents [4]. Logical and, apparently, rhetorical questions rise – whether such actions are inherent in such a degree of public danger, which is sufficient to declare them as criminally illegal, and whether, accordingly, the decision by which amber was actually withdrawn from civil circulation and thus "equated" in its legal status to weapons, drugs, etc. can be viewed as justified;

4) obviously, those lawyers are correct who pay attention to the fact that the use of the wording "legality of the origin of which is not confirmed by relevant documents" may, as in the infamous example of Art. 368-2 of the Criminal Code "Illegal enrichment", raise suspicion of this rule's unconstitutionality, since the burden of proving the legitimacy of the origin of amber is actually transferred to the defense [5]. Obviously, such wording usage greatly simplifies the process of proving the presence of criminal offense elements. At the same time, we are convinced that, in contrast to the above-mentioned article 368-2 of the Criminal Code (by the way, declared unconstitutional in accordance with the decision of the Constitutional Court of Ukraine of February 26, 2019), in our case, in particular, given the lack of reference to a special subject, even greater basis for adoption the relevant decision (labeling the ban as unconstitutional) exists.

In the light of the declared aspirations to strengthen liability for illegal amber mining, we would like to draw attention to the list of qualified elements, focused on by the legislator in constructing the crime under Art. 240-1 of the Criminal Code. The point is that in the latter, in contrast not only to the general Part 4 of Art. 240 of the Criminal Code and Art. 254 of the Criminal Code, updated on the basis of the Law of December 19, 2019, but also to majority of other provisions of Section VIII of the Special Part of the Criminal Code "Criminal offenses against the environment", does not provide for the differentiation of criminal liability for acts, which caused "other serious consequences." By referring to such acts, not only unlikely (as evidenced by case law) cases of serious injuries, mass illness, death, and others, but quite probable manifestations of serious harm to the environment could be qualified as well. As a result, we have a situation where, regardless of the consequences for humans and the environment, the person's actions in the "best" (for the offender – in the "worst") case (only when they are committed in significant amounts) can be qualified as a totality of the norms of other sections of the Special Part and Part 2 of Art. 240-1 of the Criminal Code, which provides for a sanction being less severe than the sanction established in Part 4 of Art. 240 of the Criminal Code "Violation of the rules of protection or use of subsoil", which is more general in substance.

From the point of view of the systematic analysis of the norms concentrated in section VIII of the Special part, the fact that Art. 240-1 of the Criminal Code does not provide opportunities for the differentiation of criminal liability for illegal actions with amber, committed on a large (especially large) scale, causes surprise. For example, in one of the cases the subject of a criminal offense was amber worth 586 thousand hryvnas [6]. Thus, the studied provision unfavorably differs from the recently updated Articles 246 and 254 of the Criminal Code, which differentiate liability depending on whether the acts caused significant harm (Parts 1 and 2, respectively) or serious consequences (Part 4), whose indicators, formalized in monetary terms, are fixed in the notes (explanations) to the mentioned articles.

In order to eliminate such defects, the updated version of Art. 240-1 of the Criminal Code should be constructed as follows: Part 1 – illegal amber mining, committed on a large scale, the indicator of which must be carefully substantiated,

in particular through appropriate empirical research; Part 2 – on a large scale, Part 3 – on a particularly large scale or the one which has caused "severe consequences" (or "other severe consequences"). Besides, the wording of the ban in this version (in particular, construction of the major set of a criminal offense as material) will allow overcoming the erroneous and widespread practice identified by researchers: when some judicial and law enforcement agencies create the appearance of "uncompromising" fight against "amber" crime and improve statistical data only by prosecuting the smallest (in functional terms) performers who have extracted just a few grams of mineral [7, 8], while leaving the actions of persons who extract tons of amber without proper legal response [9].

Some other domestic authors, in particular G. S. Polishchuk, support formalization of the consequences of illegal amber mining by quantifying the damage caused by a criminal offense. In addition, the lawyer insists on the need to criminalize such act as amber smuggling. According to this researcher, the lack of criminal liability for these actions indicates the omission of domestic criminal law in this part, which is proposed to eliminate either by supplementing the Criminal Code with a special rule, or by including amber in the list of items, smuggling of which should qualify, as a general rule, under Art. 201 of the Criminal Code [10]. The latter option of the Criminal Code improvement is also supported by D. S. Usov [11].

In general, such initiative deserves support. For example, according to the Administration of the State Border Guard Service of Ukraine, border guards seized 308,467 kg of amber in 2015, 205,107 kg in 2016, 515,275 kg in 2017 and 358,134 kg in 2018 [12]. The amount of annual income from the illegal sale of Ukrainian amber on the "black market" and its smuggling to other countries ranges from USD 300 to 320 million [13], which once again underlines social harmfulness of such offenses. At the same time, we deem it necessary to express concerns regarding the fact that:

- *first,* in the context of assessing the acts mentioned by lawyers, it is obviously not worth talking about the absolute omission of domestic criminal law, since most manifestations of this illegal behavior can be qualified under Art. 240-1 of the Criminal Code, the disposition of Part 1 of which contains a variable indication of the "illegal transportation" of amber. For example, actions of Person-1 have been qualified under Part 2 of Art. 240-1 of the Criminal Code. This person illegally, without documents confirming the legality of the origin of amber, transported processed amber stones, which they placed in four plastic bags, and by means of hitchhiking transported to the territory of the international automobile checkpoint "Porubne-Siret" of the Bukovyna customs, where customs officers *revealed* the fact [14];

- *secondly*, we cannot fully support the proposed method for introducing the relevant initiative into the normative material. The point is that instead of supplementing the Criminal Code with yet another criminal law novel (for example, Article 201-2) or a situational solution to the problem of smuggling by adjusting the subject of the criminal offense under Art. 201 of the Criminal Code, the legislator should consider the possibility of returning to the original (or similar) version of the criminal law prohibition on smuggling, provided that the need for such changes would automatically disappear, because: 1) it could be used to qualify the smuggling of not only amber, but of other goods as well, without having to refer to the articles placed in other sections of the Special Part of the Criminal Code, designed to ensure protection (mainly) of other legal relations; 2) provided that parliamentarians assess public harmfulness of certain types of smuggling as requiring criminal liability for their commission, regardless of the scale, it would be sufficient to supplement the list of specific items mentioned in the "universal" article of the Criminal Code with reference to relevant "new" items, including amber.

Legislative defects of Art. 240-1 of the Criminal Code are not exhausted by the above-mentioned concerns. Thus, sale, purchase, storage, transfer, shipment, transportation, and processing of amber, the legality of the origin of which is not confirmed by relevant documents, committed in the territories or objects of nature reserves (hereinafter – NR) has to be qualified under Part 2 of Art. 240-1 of the Criminal Code. However, literal interpretation of this criminal law provision reveals that such assessment is not excluded only in the case of committing described actions in the appropriate place. From the point of view of proper differentiation of criminal liability for "amber" offenses, the emphasis *de lege ferenda* should be placed on something else – on the specificity of the subject of the relevant actions, which is amber, illegally mined in the NR territories.

As noted above, the main purpose of the analyzed legislative provision was to enhance liability for committing illegal mining, sale, acquisition, transfer, shipment, transportation and processing of amber under Art. 240-1 of the Criminal Code. Given, on the one hand, public harmfulness of the relevant actions, and on the other – the threatening scale of the latter, the declared initiative of the people's deputies of Ukraine deserves support. Even more, taking into account the analysis of trends in the application of the rules provided for in Section VIII of the Special Part of the Criminal Code, we have developed scientifically sound and foreign-based experience (primarily European), recommendations for constructing sanctions:

- *first*, the sanctions imposed for the commission of unqualified *corpus delicti* of the investigated criminal offenses should provide for a single non-alternative main type of punishment – a fine;

- *secondly*, given the increased social danger of acts, which constitute qualified (especially qualified) components of criminal offenses against the environment, it was proposed to preserve references to such punishment as imprisonment for a certain period within appropriate sanctions.

At the same time, attention was focused on the fact that the desire to increase criminal liability for certain acts by securing imprisonment for a certain period as a single type of punishment can lead to the opposite effect, which is observed today, when instead of "real" serving a sentence for committing environmental offenses most persons are released from imprisonment for a certain period (the same applies to restriction of liberty). That is why, along with imprisonment for a certain period in the relevant sanctions, it was recommended to indicate an alternative main type of punishment in the form of a fine, which should allow practically implementing the principle of individualization of criminal liability, based, in particular, on the character of damage caused [15, 16].

However, as being traditional for the process of updating criminal law provisions, recommendations of scientists have been ignored. As a result, in addition to the fine mentioned in Part 1 of Art. 240-1 of the Criminal Code sanctions in the form of liberty restriction and imprisonment have been once again provided, and Part 2 of this Article of the Criminal Code, contrary to the warnings, established a single basic non-alternative punishment in the form of imprisonment for a term of 4 to 7 years. This, according to the legislator's plan, should have led to the maximum strengthening of liability for relevant violations. But did it really take place?

In order to get an answer to this question, we decided to investigate sanctions of Art. 240-1 of the Criminal Code, and trends in case law on its application. After analyzing these trends, we have been forced to state that the changes adopted by the Law of December 19, 2019 led to completely different results than those expected by the legislator: out of 100 % cases considered by the courts under Art. 240-1 of the Criminal Code, decisions on which had been entered to the Unified Court Decision Registry, a staggering number of 95 % cases

(20 of 21) ended with the imposition of punishment in the form of restriction or imprisonment for a certain period, from which they had been subsequently released under Art. 75 of the Criminal Code. As for the "real" punishment, it was imposed only once – by Dubrovytskyi District Court of Rivne region, which had found Person-1 guilty of committing a criminal offense under Part 1 of Art. 240-1 of the Criminal Code, and had sentenced them to a fine of 51 thousand hryvnias [17]. In our opinion, this only court decision remains the most adequate response by the state to the commission of the analyzed criminal offense, because, on the one hand, the interests of the state had been most fully taken into account and its violated right had been partially restored (by paying a fine). And on the other hand, goals of punishment, declared in Art. 51 of the Criminal Code, had been achieved to the maximum level as the actual payment of the mentioned large fine is much higher than the release from probation, it encourages prevention of new criminal offenses by both convicts and other persons (special and general prevention).

While concluding the coverage of the relevant issues, we would like to note that attention is drawn on the pages of the legal literature to the fact that illegal amber mining should be understood not as just a set of individual cases involving some miners, but as a full-fledged business and multi-million industry, which functions as a large mechanism and includes thousands of persons. Activities of all these individuals are managed by oligarchic structures in conjunction with organized crime members, the influence of which allows ensuring the smooth operation of diggers in almost all parts of Ukraine [18]. The correctness of the stated judgments is confirmed both by the information of experts that one of the most characteristic criminal law elements of illegal amber mining is its commission in complicity [19], as well as by our analysis of practice of application of Art. 240-1 of the Criminal Code, which states that a significant number of persons who were prosecuted for illegal amber mining, acted within organized crime groups. For example, one of the courts found that three persons, acting as part of an organized group, were engaged in illegal mining and storage of amber stones, the legality of which was not confirmed by relevant documents. In particular, the organizer and leader of the organized criminal group developed a single plan of criminal activity, known and approved by all members of the group, according to which he distributed the functions aimed at achieving a common criminal goal. According to the plan of criminal actions and distribution of roles, the leader of the established criminal group created and headed by him coordinated the actions of the members of the organized group and took measures to conceal criminal activities of the group. In addition, he ensured the organization of illegal amber mining by determining the time and place of mining, purchase and provision of appropriate means and tools (motor pumps and equipment for them), coordinated inspection of amber to determine its size (fraction), quality and value, as well as the illegal sale of amber, distributed money received from illegal activities among members of the organized group. Part of the proceeds from the illegal sale of amber was directed to the purchase of equipment, fuel and lubricants as well as other materials needed to ensure further illegal amber mining [20].

In our opinion, it is obvious that given these circumstances, Art. 240-1 of the Criminal Code should provide for increased liability for illegal amber mining committed by an organized group. However, despite the above-mentioned arguments, current version of Art. 240-1 of the Criminal Code does not provide for differentiated criminal liability of persons who have committed relevant acts not only as part of an organized group, but also in general by prior conspiracy by a group of persons. We are convinced that such construction of the prohibition in question does not contribute to effective criminal law counteraction to organized crime in the field of illegal amber mining, and therefore Art. 240-1 of the Criminal Code needs to be improved accordingly.

Conclusions. Taking into account the arguments set out in the article, it should be concluded that the method chosen by the legislator and implemented by the Law of December 19, 2019 to improve the mechanism of criminal law counteraction to illegal amber mining is not successful. Critical analysis revealed that Art. 240-1 of the Criminal Code should be improved as soon as possible, in particular due to: firstly, the instructions in it only on the "illegal mining" of amber; secondly, the presentation of the main composition of the criminal offense provided by it as a material and differentiation of liability depending on the size of the extracted amber and its consequences (including environmental); thirdly, in case of keeping liability not only for illegal mining, but also for others listed in part 1 of Art. 240-1 of the Criminal Code acts, differentiation of responsibility for their commission should be associated not with the place of these acts (NR territories), but also with the place, where illegal amber mining has been carried out; fourth, the provision in the sanction of Part 1 of the only non-alternative main type of punishment – a fine, and in Part 2 and Part 3 – an alternative punishment in the form of a fine and imprisonment; fifth, the provision of enhanced (within Part 3 of Article 240-1 of the Criminal Code) liability for illegal amber mining committed by an organized group. At the same time, inexpediency of supplementing the Criminal Code with a special norm on amber smuggling has been proved; such problem should be resolved through the general provision (Art. 201 of the Criminal Code) enhancement.

Analyzed issues are not limited to the issues discussed above. Promising areas of scientific research in this area can include: feasibility of a special Art. 240-1 of the Criminal Code along with the general prohibition in Art. 240 of the Criminal Code; the need to differentiate liability for illegal amber mining, committed by a group of persons with prior conspiracy; establishment of scientifically substantiated quantitative parameters of criminally forming and qualified features of the investigated structure of a criminal offense, and others. These issues should be addressed in the course of further academic research.

Name and number of the project within which the research project has been conducted. This article has been written within the framework of the complex theme of the Department of Law of Berdyansk State Pedagogical University "Scientific support of the development of Ukrainian legislation in a functioning market economy" (State registration number: 0116U008838).

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Проблеми кримінальної відповідальності за незаконне видобування бурштину в Україні

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Мета. Критичний аналіз кримінально-правової норми про незаконне видобування бурштину, виявлення її вад, розроблення пропозицій щодо їхнього усунення.

Методика. Система філософських, загальнонаукових і конкретно-наукових методів і підходів, що забезпечили об'єктивний аналіз розглянутого предмета, зокрема, метод системно-структурного аналізу, конкретно-соціологічний, статистичний, компаративістський, формально-логічний методи.

Результати. Виявлені вади кримінально-правової норми про незаконне видобування, збут, придбання, зберігання, передачу, пересилання, перевезення та переробку бурштину, зокрема, невиправдане розширення змісту досліджуваної кримінально-правової заборони, невдале конструювання основного та кваліфікованих складів аналізованого кримінального правопорушення, а також необґрунтовані санкції.

Наукова новизна. Автори першими у вітчизняній кримінально-правовій доктрині здійснили комплексне критичне осмислення норми, яка присвячена регламентації кримінальної відповідальності за незаконне видобування бурштину, що дало змогу розробити науково обґрунтовані рекомендації щодо вдосконалення вітчизняного кримінального закону.

Практична значимість. За результатами роботи були розроблені конкретні, адресовані вітчизняним парламентаріям пропозиції, що можуть бути враховані у процесі подальшої правотворчості щодо оновлення відповідних положень Кримінального кодексу України. Аргументовано, що в удосконаленій ст. 240-1 має йтися лише про незаконне «видобування» бурштину. Основний склад досліджуваного кримінального правопорушення пропонується сконструювати як матеріальний. Доведено, у тому числі за допомогою посилань на конкретні правозастосовні матеріали, що в санкції ч. 1 ст. 240-1 Кримінального кодексу України має бути передбачений єдиний безальтернативний основний вид покарання – штраф, а в ч. 2 та ч. 3 – встановлено альтернативні покарання у вигляді штрафу й позбавлення волі.

Ключові слова: *корисні копалини, бурштин, довкілля, незаконне видобування, кримінальне правопорушення, кримінальна відповідальність*

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