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CRIMINAL LIABILITY FOR ILLEGAL MINING: ANALYSIS OF LEGISLATIVE NOVELTIES

Purpose. Critical analysis of the criminal prohibition provided by Article 240 of the Criminal Code of Ukraine, identification of its shortcomings, development of proposals for their elimination.

Methodology. The system of philosophical, general scientific and specific-scientific methods and approaches that provided for objective analysis of the subject (analysis, synthesis, induction, deduction, comparison, generalization, abstraction, sociological, statistical, formal-logical).

Findings. The shortcomings of the revised Article 240 of the Criminal Code of Ukraine, in particular, the uncertainty on the issue of the minimum cost of illegally mined minerals of national importance for recognizing an act as criminally unlawful, the lack of differentiation of criminal liability for illegal mining of minerals of national importance depending on the size (value) of the extracted items, the creation of an imbalance between the degree of severity of penalties in the form of a fine, enshrined in different parts of the prohibition under consideration, the groundlessness of constructing a sanction of Part 3, Article 240 of the Criminal Code of Ukraine as non-alternative.

Originality. The authors are the first in the doctrine of criminal law of Ukraine to carry out a comprehensive critical understanding of the updated version of the provision on the regulation of criminal liability for violation of the rules for the protection or use of subsoil, illegal mining, which made it possible to develop research-based recommendations for improving domestic criminal law.

Practical value. Based on the results of the article, specific proposals addressed to domestic parliamentarians have been developed, which can be taken into account in the process of further lawmaking to update relevant provisions of the Criminal Code of Ukraine. It has been argued that in the improved Article 240, the minimum value of illegally mined minerals of national importance should be determined in order to recognize the act as criminally unlawful, and the same criteria for the crime of illegal mining of minerals of local and national importance should be fixed. It has been substantiated that criminal liability for illegal mining of minerals of national importance should be differentiated depending on the size (value) of the mined items. It has been proven, including through references to law enforcement materials, that in the relevant sanctions, firstly, along with imprisonment for a certain period, an alternative main type of punishment in the form of a fine should be indicated, and secondly, the imbalance between the degree of severity of punishments, provided for in different parts of the provision under consideration, should be eliminated.

Keywords: *minerals, subsoil, subject of crime, illegal mining, criminalization, aggravating elements, punishment, sanctions*

Introduction. Criminal law provision provided for in Article 240 of the Criminal Code of Ukraine (hereinafter – the Criminal Code), holds an important place in the system of regulations designed to guarantee protection of public relations related to the extraction of minerals. This is evidenced not only by the study of academic literature [1], but also by the analysis of relevant law enforcement materials, which prove that the ban in question is widely used in practice. In particular, it implies the existence of numerous facts of negative impact on the natural resources of Ukraine in the form of violation of the established rules of protection or use of subsoil and illegal extraction of minerals. In certain cases, the connection of these torts with corruption and organized crime (in particular, international) can be traced, which, according to many experts, has significantly increased in Ukraine over the last decade [2, 3]. Organized crime is recognized as a global threat, which has gone beyond the boundaries of individual countries or regions [4], while corruption is recognized as a global problem that cannot be solved at the individual state level [5]. Organized crime and corruption are major determinants of the prevalence of illegal mineral extraction. It is impossible not to pay attention to the significant difficulties encountered by judicial and law enforcement agencies in the process of detection

and investigation of criminal offenses, provided for in Article 240 of the Criminal Code.

This provides ground for arguing about the need to improve Article 240 of the Criminal Code, which, despite numerous previous edits, still includes significant shortcomings.

In particular, as a result of yet another update of Article 240 of the Criminal Code, which has occurred as a result of the adoption of the Law of Ukraine “On Amendments to Certain Legislative Acts to Strengthen Liability for Illegal Mining” (hereinafter – the Law of July 15, 2021): 1) illegal extraction of minerals of local significance has been criminalized (previously only relevant actions in relation to minerals of national importance had been recognized as criminal); 2) this provision has undergone a number of other changes, primarily designed to ensure the implementation of the second component of the declared purpose of bill No. 3576 of June 2, 2020 (hereinafter – the bill) – strengthening liability for illegal mining. Given the seriousness of such legislative novelties, a need for their scientific understanding has emerged.

Literature review. The discussed issues have been covered in the works by such researchers as A. O. Wirt, S. B. Gavrish, D. O. Kalmykov, R. S. Kirin, V. M. Komarnitsky, M. V. Komarnitsky, M. G. Maksimentsev, V. O. Navrotsky, N. V. Nete-sa, G. S. Polishchuk, Yu. A. Turlova, and others.

Unsolved aspects of the problem. However, due to the novelty of these changes, an in-depth analysis of the main (crimi-

nal law) component of the Law of July 15, 2021 has not yet been carried out in the domestic legal literature, with regard to which it has been decided to fill this gap in scientific research.

Purpose. In view of the above, the purpose of this article is a critical analysis of the provisions of the updated version of Article 240 of the Criminal Code, based on the results of which a reasonable conclusion should be made on the validity of legislative novelties, as well as the prospects for the development of criminal law in the relevant field.

Methods. To achieve the formulated goal, methodology was chosen, which includes the tools necessary for a critical analysis of the legislative decision made by the Verkhovna Rada of Ukraine. This is a set of philosophical, general scientific and specific scientific methods. In particular, the method of system-structural analysis was used to establish the links of the analyzed rule with other provisions of current criminal law. A study of case law (specific sociological method) was conducted as well. The statistical method provided opportunity to analyze identified quantitative and qualitative indicators. The dogmatic method was used to clarify certain criminal law term, and general scientific methods – in the development of official and scientific sources.

Results. First, one should pay attention to the change in the name of Article 240 of the Criminal Code, which now contains the following formula: “Violation of the rules of protection or use of subsoil, illegal extraction of minerals.” Such legislative decision deserves approval.

First, regulatory legislation (in particular, Part 2 of Article 5 of the Subsoil Code of Ukraine; hereinafter – the SCU) provides that the subsoil is the main but not the only location (occurrence, accumulation) of minerals. The latter can accumulate both in the subsoil and on the surface of the earth, in sources of water and gases, at the bottom of reservoirs. Since illegal extraction of minerals outside the subsoil is not excluded, the previous title of Article 240 of the Criminal Code, which mentioned the subsoil only, did not fully conform to the content of this prohibition.

Secondly, the term “alternative”, reflected in the current title of Article 240 of the Criminal Code as to a) violation of the rules of protection or use of subsoil and b) illegal extraction of minerals rightly takes into account that: 1) subsoil can be used not only for the extraction of minerals (Article 14 of the SCU); 2) the subsoil content is not limited to minerals.

Article 6 of the SCU as a basic legislative act in the field of mining relations, without referring to the term “common minerals” as known to the previous regulatory legislation, divides all minerals into minerals of national and local significance. Lists of minerals of national and local importance were approved by the Cabinet of Ministers of Ukraine (hereinafter – the CMU) of December 12, 1994 No. 827. The affiliation of illegally extracted substance to minerals of national or local importance has to be determined by experts [6].

Experts raise the issue of differentiation of legal regimes of surface (non-industrial) and industrial minerals of local importance and the corresponding formation of their lists [7]. *De lege lata*, the difference in the order of extraction of the specified minerals, reflected in the current regulatory legislation, which in this part is characterized as of colliding nature [8], has criminal law context as it is taken into account when deciding an issue of what extraction of minerals of local value from the point of view of incrimination of Article 240 of the Criminal Code should be declared illegal.

It should be noted that the main consequence of the Law of July 15, 2021 adoption was the criminalization of such an act as “illegal extraction of minerals of local importance in significant amount”. At the same time, it is necessary to make an important clarification – the above-mentioned actions could be considered criminally illegal even before the adoption of the analyzed Law, but only under one constitutional condition – creating danger to life, health or the environment, and therefore recognizing the act as a criminal violation of the es-

tablished rules of subsoil use (Part 2 of Article 240 of the Criminal Code). After all: 1) according to the list of types of subsoil use (Article 14 of SCU) extraction of minerals is one of such types; 2) violation of the rules of subsoil use forms the objective side of the crime under Part 2 of Article 240 of the Criminal Code, in terms of violation of the established rules of subsoil use. Such conclusions are confirmed by law enforcement materials.

Thus, labeling under Part 2 of Article 240 of the Criminal Code of actions of a person who, without a permit for the use of land for purposes related to the use of subsoil and a duly executed special permit for mining, without mining and a plan for the development of mineral deposits, conducted an unauthorized extraction of loose non-carbonate medium-grained sand, the pre-trial investigation body referred, among other things, to the conclusion of engineering and environmental expertise, which has established that actions of the accused person have created danger for the environment [9].

Rebutting the defense counsel’s statement that extraction of sand as a mineral of local significance does not entail criminal liability under Part 2 of Article 240 of the Criminal Code, the Criminal Court of Cassation of the Supreme Court in its decision of March 16, 2021 noted that violation of the established rules of subsoil use, if it has created a danger to life, health or the environment, may be considered criminally illegal also in the case of such subsoil use, which was manifested in the extraction of minerals of local importance [10].

The idea of introducing independent criminal liability for illegal extraction of minerals of local significance (regardless of the consequences) implemented by the Law of July 15, 2021 is not new. In particular, we once wrote that initiatives of this nature have been repeatedly voiced in the legal literature and by the Verkhovna Rada of Ukraine (hereinafter – the Verkhovna Rada), as evidenced by a number of registered bills aimed at expanding the scope of Article 240 of the Criminal Code [1]. However, the initiative did not find unanimous support for a long period of time either in science or among parliamentarians. In particular, consistently opposing the initiative under review, N.V. Netesa primarily referred to the inability of such a criminal act (with a formal composition) to pose a great potential threat to public relations [11].

By partly accepting the approach by N.V. Netesa, at the same time we would like to ask the following question: why does the thesis of insufficient public danger, relating only to the illegal extraction of minerals of local importance, not apply to similar actions on minerals of national importance? To answer this question, we consider it appropriate to recall the textbook statements that even though all elements of crime are important in assessing public danger, the social aspect of criminalization is first and foremost expressed in the object elements of a particular offense [12].

The main direct object of illegal extraction of minerals of national importance is interpreted in legal literature as public relations, ensuring the implementation of the property rights of the Ukrainian people to minerals of national importance [1].

Therefore, a question arises: does the damage caused to the relations protected by Article 240 of the Criminal Code, depend on the legal status of illegally extracted minerals, namely whether the latter has national or local significance? Obviously not, because damage to the property rights of the Ukrainian people depends on one factor only – the value of illegally mined minerals.

Based on expert assessments of law enforcement officers (in particular, the prosecutor’s offices in Kharkiv, Kherson and Odesa regions), the legal literature provides data that there is mass illegal extraction of sand, which currently belongs to local minerals, in such regions. It is stated that the damage caused over the years is estimated at billions of hryvnias [13]. Developers of the bill appealed to a similar logic, noting the profitability of such business as the extraction of minerals of local importance, including sand.

No less, and perhaps more important, is the fact that the explanatory note to the bill has outlined the “environmental” component of the damage caused by the illegal behavior in question. Among other things, in the relevant accompanying activities it had been reasonably noted that the extraction of sand raw materials causes significant negative consequences for the environment, since unauthorized extraction, carried out without proper documents and permits, creates situations of dangerous sand quarries, requires programs reclamation of used sand quarries, requires considerable efforts to bring disturbed lands to a condition suitable for their exploitation.

Given the outlined arguments, we view the decision to criminalize illegal extraction of minerals of local importance as socially conditioned. We also consider establishment of criminal liability for manifestations of illegal mining of local significance, committed on a large scale, as justified. In addition to performing the “function” of increasing the level of public danger of the investigated act to such a point that it is sufficient to declare it criminally illegal, the analyzed legislative step has allowed avoiding new issues of delimitation of crime under Article 240 of the Criminal Code, from a similar offense under Article 47 of the Code of Ukraine on Administrative Offenses (hereinafter – the Administrative Offenses Code) “Violation of the right of state ownership of subsoil”, the possibility of which (problems) was pointed out by the opponents of the initiative.

However, a more careful analysis of the provisions of the Law of July 15, 2021 reinforces the negative impressions of its adoption. In particular, when adopting this law, parliamentarians decided not to “betray” traditions of clumsy legislation, approaching the solution of this problem not comprehensively and systematically, but in fragments and intuitively. As a result, while having solved one problem, the legislator has left out of their attention and at the same time created some other problems, the presence of which does not help with effective criminal law counteraction to illegal extraction of minerals.

Thus, having solved (whether successfully is another question) the problem of, so to speak, proper public danger of illegal mining of local importance (by pointing to a specific cost indicator), the legislator has for some reason not found grounds to solve a similar problem of minerals of national importance. By the way, this very shortcoming (fragmentation) is inherent in the position of M. V. Stelmakh, who stood in favor of adding Part 2 of Article 240 of the Criminal Code by the provision on illegal extraction of minerals of local significance in large quantities (300 and more “non-taxable minimum income” values (hereinafter – NTMI)) [14].

Part 2 of the updated version of Article 240 of the Criminal Code does not establish exactly how many minerals of national importance a person must illegally extract in order for an act to be recognized as a crime. That is, formally illegal extraction of minerals of national importance of any, even minimal value, still falls under the elements of the crime described in Part 2 of Article 240 of the Criminal Code. Such situation is reminiscent of the unacceptable situation under Article 197-1 of the Criminal Code, in which liability for unauthorized occupation of “ordinary” land is associated with causing significant damage, while unauthorized occupation of land with a special legal regime is considered criminally illegal under any circumstances (regardless of the scale of damage) [15].

Of course, law enforcers in such situations can and will refer to Part 2 of Article 11 of the Criminal Code, labeling the act as insignificant. But we have already noted that legislative uncertainty about the minimum amount of illegally extracted minerals, firstly, can lead to different assessments of legally identical acts, and secondly, is a kind of “loophole” of corruption for law enforcement officers, because upon request any criminal proceeding can be closed in connection with the recognition of the act as insignificant [11].

In addition, from the standpoint of the systemic nature of the criminal law, it remains unclear why criminal liability for

illegal extraction of minerals of national importance (including amber) should occur regardless of the value of the extracted minerals and the consequences of such act, while, for example, illegal logging provided that such behavior causes significant damage, partially specified in the note to Article 246 of the Criminal Code.

The following is also worth mentioning. Given the fact that the illegal extraction of minerals of national importance can be regarded as one of the manifestations of unauthorized use of subsoil, we can conclude that the elements of an administrative offense under Article 47 of the Administrative Offenses Code “Violation of the right of state ownership of subsoil” should be seen in the criminal extraction of minerals of national importance. It turns out that a conflict continues to exist in this part between Article 47 of the Administrative Offenses Code and Article 240 of the Criminal Code with all the negative consequences that follow from this.

We find it most unfortunate that the legislator has “ignored” this problem, although at various stages of the bill discussion at least a few ways to overcome it were proposed, which generally correlated with our proposals to include the minimum value of extracted minerals of national importance as a constructive feature of the analyzed crime. First, the original version of the bill provided that only those manifestations of illegal mining (both national and local) that were committed to a significant extent should be considered criminally illegal. The disadvantage of this option was that it recommended differentiating liability for the significant (as well as large and especially large) illegal extraction of minerals of local and national importance. Secondly, A. P. Osadchuk, a member of the Parliament of Ukraine, advocated the unification of liability for the illegal extraction of minerals of national and local importance, which in both situations should: a) occur only for actions committed in a significant amount (drafted Part 2) (criterion of criminalization); b) intensify in the case of actions committed in a large amount (drafted Part 3) (criterion of differentiation).

However, reasonable proposals were eventually rejected, and in the end the Verkhovna Rada Committee on Law Enforcement put another, largely unsuccessful version of the bill, adopted as the Law of July 15, 2021, to the vote. We shall explain our opinion.

First, despite the warnings of scholars, as well as comments by parliamentary experts, various criteria have been established for the criminality of illegal mining of local (only significant) and national importance (regardless of size (cost)). It is difficult to disagree with the experts from the Verkhovna Rada, who criticized the bill, noting that to see the difference between public danger of, for example, illegal mining of loam at a value 100 times over NTMI, and the public danger of illegal extraction of peat of the same value. In addition, the same type of mineral in one case can be considered a mineral of national importance, and in another – a mineral of local importance.

Complete irrationality of the situation, which resulted from the adoption of the Law of July 15, 2021, can be demonstrated by the example of illegal mining of sand, which, like some other minerals, applies to the category of local or national importance, depends solely on the decision of the State commission on mineral reserves. It turns out that the qualification of illegal sand mining will depend only on the presence/absence of such a decision: if this decision exists, then such actions should receive a criminal assessment with reference to Part 2 of Article 240 of the Criminal Code, regardless of the value of the extracted minerals; otherwise, criminal liability for similar actions will occur only if the same sand is extracted in a significant (large) amount (Part 1 or Part 2 of Article 240 of the Criminal Code, respectively).

Secondly, despite the “proprietary” nature of the anti-public orientation of the discussed offense, the inclusion of four parts into Article 240 of the Criminal Code, the above-

mentioned proposals by scientists and the gradation of liability for illegal extraction of minerals of local value depending on the amount, as introduced by the Law of July 15, 2021, the updated Article 240 of the Criminal Code does not provide for different types of liability for illegal extraction of minerals of national importance depending on the size (value) of the extracted minerals. Absence of aggravating circumstances relating to the value of such illegally extracted minerals in the updated Article 240 of the Criminal Code is a serious shortcoming of the criminal law provision under review.

In addition to the analyzed updates relating to the subject, Article 240 of the Criminal Code has undergone a number of other changes, the validity of which we will try to investigate further.

We support the legislator's decision to edit Article 240 of the Criminal Code in terms of expanding the range of aggravating elements of the analyzed crime by indicating its commission "by prior conspiracy by a group of persons", "organized group" and "official using official position". This step, in line with the achievements of criminal law, reflects the increased degree of public danger of the acts, looks systematic in the context of the fact, in particular, that almost all other similar articles of Chapter VIII of the Special Part of the Criminal Code provide such aggravator as "committed by prior conspiracy by a group of persons" (Part 2 of Article 239-1, Part 2 of Article 239-2, Part 2 of Article 246, Part 2 of Article 248 of the Criminal Code).

Calling the forms of group complicity described in Article 28 of the Criminal Code as the most successful criterion for differentiation of criminal liability for the commission of crime in question, we have justified our point by the fact that in a significant number of cases the commission of this tort is impossible or significantly complicated without uniting several persons in order to achieve a single criminal result. The degree of increase in public danger of illegal mining committed in complicity depends on the number of accomplices, the presence or absence of prior agreement between them, stability of criminal association, the presence or absence of hierarchical structure within such association, plan to commit a crime (crimes), their number and severity, and others. Later a proposal was made in Part 2 of Article 197-2 of the Criminal Code "Illegal extraction of minerals" to provide the aggravating circumstance "if they have been committed by prior conspiracy by a group of persons", and in Part 3 of this article – a special aggravating circumstance "if they have been committed by an organized group" [1]. As we can see, the legislator has generally adopted the stated theoretical approach.

It is worth mentioning that in the legal literature some important and convincing arguments have been presented in favor of inclusion of the aggravating element "commission of acts under Part 1 or Part 2 of this Article, by an official using his official position" into Article 240 of the Criminal Code [11], which is often accompanied by the involvement of organized criminal groups and the use of corrupt connections.

At the same time, from the point of view of systematization, it is the fact that when the Law of July 15, 2021 was adopted, the legislator did not consider it expedient to: 1) envisage such aggravating circumstance as "committed by prior conspiracy by a group of persons", in special (in relation to Article 240) criminal law prohibition – Article 240-1 of the Criminal Code, devoted to the regulation of liability for illegal amber mining and some other illegal actions with it, the need for which we have already noted [16]; 2) to enhance criminal liability for committing by an official with the use of official position of other similar in content offenses on the environment, provided for in Articles 239-1, 239-2, 246 of the Criminal Code.

We share opinions by experts of the Main Legal Department of the Verkhovna Rada on the inexpediency of the replacement, made on the basis of the Law of July 15, 2021, in Part 3 of Article 240 of the Criminal Code of repetition as a

describing element of special recidivism. In particular, the arguments that the concept of "recidivism" is narrower in scope than repetition, and therefore the new version of Part 3 of Article 240 of the Criminal Code eliminates such a qualifying feature as repetition, in the part that is not covered by the concept of "relapse". In the context of declaring increase in criminal liability for illegal mining by the drafters of the bill, such replacement seems illogical.

As a result of the adoption of the Law of July 15, 2021, sanctions of Article 240 of the Criminal Code also have been changed. Informally, such changes can be divided into two blocks.

We have repeatedly noted the need to revise the size of fines provided by the sanctions of Articles VIII of the Special Part of the Criminal Code, in the direction of their significant increase [17]. Therefore, our attitude to the conditionally *first* block of changes relating to the increase in the amount of fines established in Article 240 of the Criminal Code is worth approval. At the same time, it should be noted that in implementing this sound idea, parliamentarians once again have demonstrated inconsistency and disregard of developments in criminal law (in particular, that the upper limit of sanction for a simple crime should be lower than the limit of sanction for aggravated crime [18]), due to which the overall positive impression of legislative novelties is largely negated.

In particular, it is difficult for us to explain the following fact: if in Part 1 of Article 240 of the Criminal Code the fines were increased only by 1.6 times and only by NTMIs (from "from 300 to 600 NTMIs" to "from 500 to 800 NTMIs"), then in Part 2 of Article 240 of the Criminal Code, this increase has occurred by 7–7.5 times, due to which the minimum fine has been increased by 2,600 NTMIs, and the maximum – immediately by 4,300 NTMIs (starting with "from 400 to 700 NTMIs" and toward "from 3 to 5 thousand NTMIs"). As a result, an obvious imbalance between the degree of severity of punishment has been created, since currently provided for in the sanctions of Part 2 of Article 240 of the Criminal Code, the fines are six times higher than those referred to in the sanction of Part 1 of the analyzed article of the Criminal Code. In addition, this happened despite the fact that before the entry of the Law of July 15, 2021 into force, they were approximately the same.

Even without asking the rhetorical question of whether, for example, a violation of the established rules of subsoil use, which created a danger to life, health or the environment (Part 2 of Article 240 of the Criminal Code), is six times more dangerous than violation of the established rules of subsoil protection, which has led to identical consequences (Part 1 of Article 240 of the Criminal Code), we note that the adoption of the Law of July 15, 2021 has created a situation where, for example, the maximum fine for illegal mining of local significance in a significant amount (i.e. cost from UAH 37,215 to UAH 124,050) is 800 NTMIs, while the minimum fine for illegal extraction of minerals of national importance worth only UAH 1,000 makes up as much as 3,000 NTMIs. Similar issues arise in the context of comparing the size of fines provided for illegal extraction of minerals of local importance in a significant (Part 1 of Article 240 of the Criminal Code) and large (Part 2 of Article 240) size, because the increase in cost of illegally extracted minerals for only a few hryvnias (the limit between the significant and large amounts specified in the note of Article 240 of the Criminal Code) may increase the fine by six times.

Despite the critical remarks made above, we support the idea of increasing punishment (in terms of fines), implemented by the Law of July 15, 2021 (in contrast to the way this idea is implemented). Unfortunately, the same cannot be said about the conditionally *second* block of relevant changes, which relate to the adjustment of the sanction of Part 3 of Article 240 of the Criminal Code. Firstly, the alternative punishment in the form of restraint of liberty has been removed from

it, and secondly, the range of the term of non-alternative imprisonment has been increased from “2 to 5 years” to “3 to 6 years”.

The intentions of the authors of the bill in this case are obvious – realization of the declared goal of strengthening criminal liability for illegal extraction of minerals. A false impression can rise that the initiators of the analyzed legislative changes first studied the practice of applying Part 3 of Article 240 of the Criminal Code, further established active imposition of punishments both in the form of currently excluded restriction of liberty and imprisonment, the term of which has been extended, and also concluded that these punishments are unreasonably lenient and, accordingly, ineffective, and therefore need to be adjusted in the direction of strengthening.

However, having conducted our own study on judicial practice, we found the opposite: despite the presence (before the entry of the Law of July 15, 2021 into force) in the sanction of Part 3 of Article 240 of the Criminal Code, only two types of punishment, such as restriction of liberty and imprisonment for a definite term, over the past three years 37 % of criminal proceedings have ended with the imposition of a fine as a penalty not mentioned in this sanction (with reference to Article 69 of the Criminal Code “Imposition of a milder punishment than prescribed by the law”). We received no less information for reflection when we found out that in all other 63 % of cases the courts released the guilty from the imposed sentence of restriction of liberty or imprisonment for a certain period (with reference to Article 75 of the Criminal Code “Exemption from serving a sentence with probation”). Regarding the actually imposed punishment in the form of imprisonment for a definite term (the same applies to restriction of liberty), which was intensified on the basis of the Law of July 15, 2021, not a single (!) case of this sort (as a result of a study on decisions posted in the Unified Court Decision Database) could be identified. Therefore, in this case we also observe “the existence of a significant discrepancy between the legally established punishment of criminal offenses and the set of criminal law means, which courts actually use as punishment” [18].

We have already pointed out similar tendencies of judicial practice, when characterizing the sanctions provided for in Article 240-1 of the Criminal Code “Illegal extraction, sale, acquisition, transfer, shipment, transportation, processing of amber”. Among other things, it has been noted that out of 100 % of cases considered by the courts under this article of the Criminal Code, 95 % have ended with the imposition of a sentence of restriction or imprisonment for a certain period, all of which have been subsequently released under Article 75 of the Criminal Code. As for the “real” punishment, it was imposed only once [16]. Other scientists also drew attention to the excessive repressiveness of criminal sanctions imposed for illegal handling of minerals [19, 20].

Thus, we can predict that the desire of the legislator to increase criminal liability for acts under Part 3 of Article 240 of the Criminal Code, by enshrining imprisonment for a definite term as the only (non-alternative) type of punishment with a simultaneous increase in its term, obviously, will have the opposite effect, which is observed today, when guilty persons are sentenced to a fine, or, instead of “real” convicts are released from the sentence of imprisonment for a certain period. Therefore, in the relevant sanctions, along with imprisonment for a certain period, it is necessary to indicate an alternative main type of punishment in the form of a fine, the imposition of which, as evidenced by the statistics above, the courts consider the most adequate response to environmental offenses.

Conclusions. The conducted research allows drawing a conclusion about the substantive ambiguity of the changes introduced by the Law of July 15, 2021, which have affected Article 240 of the Criminal Code. The following decisions deserve high estimations: 1) clarification of the title of this article of the Criminal Code, which currently has the following formula: “Violation of the rules of protection or use of subsoil,

illegal extraction of minerals” harmonized with regulatory legislation; 2) criminalization of illegal extraction of minerals of local significance in a significant amount; 3) expanding the range of qualifying features of the analyzed crime by indicating its commission by prior conspiracy by a group of persons, an organized group and an official using their official position; 4) increasing punishment in the application of fines, are all worth approval.

At the same time, there are grounds to recognize as the serious shortcomings of the updated version of Article 240 of the Criminal Code: 1) uncertainty on the issue of the minimum value of illegally extracted minerals of national importance for the recognition of an act as criminally unlawful; 2) consolidation of various criteria of criminal nature of illegal extraction of minerals of local and national importance; 3) lack of differentiation of criminal liability for illegal extraction of minerals of national importance depending on the size (value) of the extracted items; 4) refusal from repetition as an aggravating circumstance in favor of a special recurrence; 5) formation of an obvious imbalance between the severity of penalties in the form of fines, enshrined in the sanctions of Part 1 and Part 2 of Article 240 of the Criminal Code; 6) groundlessness of the construction of the sanction of Part 3 of Article 240 of the Criminal Code as a non-alternative one.

Since it has been established that sanctions of the articles of the Criminal Code on liability for environmental crimes (along with imprisonment for a certain period) should appear as an alternative main type of punishment in the form of a fine, we consider finding the optimal parameters of such punishment as a promising area of further research.

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References.

1. Dudorov, O. O., Komarnytskyi, M. V., & Kalmykov, D. O. (2016). *Criminal liability for illegal mining in Ukraine: monograph*. Sumy: RVV LDUVS im. E. O. Didorenka.
2. Batyrgareieva, V. S., Babenko, A. M., & Kaija, S. (2019). Corruption in medical sphere of Ukraine: Current situation and ways of prevention. *Wiadomości Lekarskie*, 7(9 cz 2), 1814-1821. Retrieved from <https://pubmed.ncbi.nlm.nih.gov/31622272/>.
3. Cherniavskiy, S. S., Holovkin, B. M., Chornous, Y. M., Bodnar, V. Y., & Zhuk, I. V. (2019). International cooperation in the field of fighting crime: Directions, levels and forms of realization. *Journal of Legal, Ethical and Regulatory Issues*, 22(3), 1-11.
4. Golovkin, B., & Marysyuk, K. (2019). Foreign experience in countering (preventing) organized crime in the financial system: Special law enforcement bodies and strategic priorities. *Baltic Journal of Economic Studies*, 5(3), 25-36. <https://doi.org/10.30525/2256-0742/2019-5-3-25-36>.
5. Lutsenko, Yu. V. (2020). Combating crime in modern conditions. *Socio-legal studies*, 1(7), 79-84.
6. Krupka, Ya. A., Kraliuk, M. O., Kostenko, T. V., & Zavyalova, O. L. (2021). Crimes in the field of protection and rational use of subsoil: pre-trial investigation, forensic examination. *Expert: paradigms of legal sciences and public administration*, 3, 87-99.
7. Kirin, R. (2017). Legal regime of minerals of local significance: genesis, problem, prospects. *Entrepreneurship, Economy and Law*, 7, 46-50.
8. Lysiak, O. I. (2021). Legal analysis of issues related to subsoil use in Ukraine. *Collection of scientific works of H.S. Skovoroda Kharkiv National Pedagogical University “Pravo”*, 33, 46-51. <https://doi.org/10.34142/23121661.2021.33.06>.
9. Zarichanskyi, B., & Borysenko, O. (2018). Specifics of criminal law counteraction to violation of rules of protection and use of subsoil. *Bulletin of the Prosecutor's Office*, 7, 54-61.
10. *Review of case law of the Criminal Court of Cassation within the Supreme Court (current practice). Decisions entered to the USRCD in March 2021* (2021). Retrieved from https://supreme.court.gov.ua/userfiles/media/new_folder_for_uploads/supreme/Oglyad_KKS_03_2021.pdf.
11. Netesa, N. V. (2013). *Criminal liability for violation of the rules of protection or use of subsoil: monograph*. Kharkiv: Pravo.

12. Panov, M. I., Kharytonov, S. O., & Haltsova, V. V. (2021). Object of criminal offense: modern interpretations. *Journal of the National Academy of Legal Sciences of Ukraine*, 28(4), 262-269. [https://doi.org/10.37635/jnalsu.28\(4\).2021.262-269](https://doi.org/10.37635/jnalsu.28(4).2021.262-269).
13. Maksimentsev, M. H. (2019). *Combating crime in the field of subsoil use: monograph*. Kharkiv: Pravo.
14. Stelmakh, M. V. (2017). The problem of qualification of illegal mining of minerals of local importance. *Young scientist*, 12, 323-327. Retrieved from http://nbuv.gov.ua/UJRN/molv_2017_12_77.
15. Movchan, R. O. (2020). *Criminal liability for crimes in the field of land relations: legislation, doctrine, practice: monograph*. Vinnytsia: TOV "Tvory".
16. Movchan, R. O. (2020). Criminal Law Counteraction to "Amber" Offenses: Analysis of the Latest Legislative Novels. *Scientific Herald of the National Academy of Internal Affairs*, 4, 53-60. <https://doi.org/10.33270/01201174.53>.
17. Dudorov, O. O., & Movchan, R. O. (2020). About directions of improvement of the mechanism of criminal and legal protection of environment (to attention of developers of the new Criminal code of Ukraine). *Bulletin of the Association of Criminal Law of Ukraine*, 1, 92-125. <https://doi.org/10.21564/2311-9640.2020.13.204733>.
18. Ponomarenko, Yu. A. (2020). *General theory of Criminal Offenses' punishability determining: monograph*. Kharkiv: Pravo.
19. Turlova, Yu. A. (2018). *Ecological crime in Ukraine: criminal law and criminological principles of counteraction. monograph*. Kyiv: Znannia.
20. Turlova, Yu. A. (2015). Problems of penalization of crimes against the environment in Ukraine. *Journal of National Jurisprudence: Theory and Practice (National Legal Journal: Theory and Practice)*, 2/1(12), 120-125.

Кримінальна відповідальність за незаконне видобування корисних копалин: аналіз законодавчих новел

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Мета. Критичний аналіз кримінально-правової заборони, передбаченої ст. 240 Кримінального кодексу України, виявлення її недоліків, розроблення пропозицій щодо їхнього усунення.

Методика. Система філософських, загальнонаукових і конкретно-наукових методів і підходів, що забезпечили

об'єктивний аналіз розглядуваного предмета (аналіз, синтез, індукція, дедукція, порівняння, узагальнення, абстрагування, соціологічний, статистичний, формально-логічний).

Результати. Виявлені вади оновленої ст. 240 Кримінального кодексу України, зокрема, невизначеність із питання щодо мінімальної вартості незаконно видобутих корисних копалин загальнодержавного значення для визнання діяння кримінально протиправним, неможливість диференціації кримінальної відповідальності за незаконне видобування корисних копалин загальнодержавного значення залежно від розміру (вартості) видобутого, утворення дисбалансу між ступенем суворості покарань у вигляді штрафу, закріплених у різних частинах розглядуваної заборони, безпідставність конструювання санкції ч. 3 ст. 240 Кримінального кодексу України як безальтернативної.

Наукова новизна. Автори першими в доктрині кримінального права України здійснили комплексне критичне осмислення оновленої редакції норми, яка присвячена регламентації кримінальної відповідальності за порушення правил охорони або використання надр, незаконне видобування корисних копалин, що дало змогу розробити науково обґрунтовані рекомендації щодо удосконалення вітчизняного кримінального закону.

Практична значимість. За результатами написання статті 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 редакції ст. 240 Кримінального кодексу України має бути визначена мінімальна вартість незаконно видобутих корисних копалин загальнодержавного значення для визнання діяння кримінально протиправним, а також закріплені однакові критерії злочинності незаконного видобування корисних копалин місцевого й загальнодержавного значення. Обґрунтовано, що кримінальна відповідальність за незаконне видобування корисних копалин загальнодержавного значення має бути диференційована залежно від розміру (вартості) видобутого. Доведено, у тому числі за допомогою посилань на правозастосовні матеріали, що у відповідних санкціях, по-перше, поряд із позбавленням волі на певний строк варто вказати на альтернативний основний вид покарання у вигляді штрафу, по-друге, має бути усунутий дисбаланс між ступенем суворості покарань, передбачених у різних частинах аналізованої норми.

Ключові слова: *корисні копалини, надра, предмет злочину, незаконне видобування, криміналізація, кваліфікуючі ознаки, покарання, санкції*

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