



# PUNITIVE POLICY IN LIBYAN LAW NO. 19 OF 2010: COMBATING THE FACILITATORS OF ILLEGAL IMMIGRATION (A COMPARATIVE ANALYTICAL STUDY)

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**Abstract** *Illegal immigration crimes are among the most dangerous that the Libyan state is currently suffering from and a source of other serious crimes such as human trafficking and money laundering. This necessitated the intervention of the legislator with Law No. 19 of 2010. In this study, we followed the analytical and comparative approach, and it became clear that the punitive policy is weak considering these crimes as misdemeanors. Even in cases of aggravating the punishment, the penalties remain weak, in addition to not punishing the intermediary in the crime despite the seriousness of their role and the lack of corporate liability. The punishment for attempted crimes is less severe than for completed ones. We propose that the Libyan legislator should consider the crime as a felony, with the intensification of current penalties, punishment of intermediaries, establishment of corporate liability, and equal punishment for attempted crimes to that of completed ones.*

**Keywords:** *Exemption; Migrants; Penalties; Responsibility; Smuggling gangs*

## INTRODUCTION

### Introduction to the Study Topic

Illegal immigration poses significant dangers with its far-reaching impacts on the receiving nations' national security, economy, politics, social structure, and more. It also constitutes an affront to human dignity and freedoms, as enshrined in historical conventions. Such crimes often lead to or are associated with severe offenses like human trafficking, with the victims being metaphorically and sometimes literally adrift in 'boats of death'.

The financial gains from illegal immigration are frequently channeled into other dangerous activities, including illegal arms dealing, funding extremist groups, and furthering instability. This nexus of crimes extends to drug trafficking, money laundering, and terrorism financing, threatening the global community.

Despite humanitarian reasons that might drive individuals to opt for illegal pathways, the rising tide of illegal immigration has prompted global concern, necessitating a unified international response. This led to the establishment of the Protocol against the Smuggling of Migrants by Land, Sea, and Air, supplementing the United Nations Convention against Transnational Organized Crime, which came into effect on January 28, 2004.

In response, Libya enacted Law No. 19 in 2010, targeting illegal immigration. However, the law has not stemmed the flow, as evidenced by an August 2022 report from the International Organization for Migration in Libya, noting over 650,000 migrants of diverse nationalities. The persistent increase in numbers calls for a critical examination of the root causes enabling the continued proliferation of illegal immigration in Libya, despite legislative measures.

### -Significance of the Study

The study is significant due to the continued spread of illegal immigration in Libya despite legislative efforts to mitigate it. It seeks to inform the reader about the effectiveness of Libyan laws and their consistency with international positions on the matter, in the context of a shortage of recent comprehensive research on this topic in Libya.



## Research Problem

Given the severe implications of illegal immigration, this study focuses on the Libyan legislator's punitive policy effectiveness, in contrast to Egypt's updated legal approach reflected in the amendments of Law No. 82 of 2016 by Law No. 22 of 2022. This raises several critical questions: What penalties are prescribed by the Libyan legislator for basic and aggravated illegal immigration offenses?

Is the legislator effectively countering illegal immigration with the current fine penalties?

What are the penalties for attempting, facilitating, or being complicit in these crimes?

Are there penalties for legal entities involved in illegal immigration offenses?

What circumstances aggravate or mitigate penalties within Libyan law?

How successful is the exemption from punishment policy in addressing illegal immigration?

### - Objectives of the Study

The study aims to clarify the various penalties for crimes of illegal immigration, including primary and complementary punishments, financial and non-financial penalties. It also seeks to identify the penalties for attempts, intermediaries, and accessory involvement in illegal immigration crimes and the criminal liability of legal persons for such crimes, as well as the circumstances of aggravation in these crimes.

### - Methodology of the Study

To achieve the foregoing, we have adopted an analytical and comparative approach by analyzing punitive provisions in Libyan legislation to identify areas of weakness and adequacy, in comparison with Egyptian legislation.

### - Study Plan

First Section: Primary and Complementary Penalties.

Second Section: Individualized Punishment in Illegal Immigration Crimes.

## 1. Primary and Complementary Penalties

Crimes of illegal immigration are among the most dangerous challenges Libya faces. <sup>(1)</sup> To combat this, the legislator has established a range of primary and complementary penalties aimed at countering and mitigating their effects, which we will attempt to delineate as follows:

### 1.1 Primary Penalties

The Libyan legislator imposes penalties for crimes of illegal immigration, attempts thereof, and criminal involvement in such crimes with a set of sanctions, which we will attempt to elucidate as follows:

#### 1.1.1 Penalty for the Completed Crime and the Attempt Thereof

##### 1.1.1.1 Penalty for the Completed Crime

The Libyan legislator has classified simple cases of illegal immigration under Law No. 19 of 2010 as misdemeanors, with more severe instances constituting felonies. <sup>(2)</sup> By contrast, Egypt's Law No. 82 of 2016 treats such offenses as felonies per Articles 5 and 6. <sup>(3)</sup> We argue that Egypt's approach in categorizing even non-aggravated cases as felonies is more effective, given the significant threat illegal immigration poses in terms of safety, and the potential irreversible impact on a state's security, economy, and social fabric. Clearly, the nature and severity of penalties are crucial for deterrence. Criminal policy mandates proportionality between the crime's severity, its context, and the corresponding penalty to ensure the punishment serves its intended deterrent effect.

<sup>(1)</sup> Muhammad Amhamed Mohd Abu Zaid, "Illegal Immigration and Its Impact on National Security (2011-2017)," Master's Thesis, Faculty of Arts and Sciences, Department of Political Science, Middle East University, Jordan, 2019, p. 2.

<sup>(2)</sup> Maumar Milad Abubakr Al-Tobashi, "Criminal Policy of the Libyan Legislator in Combating Illegal Immigration: An Analytical Study of the Law on Combating Unlawful Immigration," Legal Research Journal, Faculty of Law, University of Misurata, Libya, Issue 11, 2020, p. 20.

<sup>(3)</sup> Published in the Official Gazette, Issue No. 44 repeated (A), dated November 7, 2016.



### 1.1.1.2 Penalty for Attempted Crime

Under Law No. 19 of 2010, Libyan legislation does not address the punishment for attempting illegal immigration crimes, whereas Articles 60-61 of the Penal Code suggest the penalty for an attempt is less severe than for a completed crime. In contrast, Egypt's Law No. 82 of 2016 assigns the same penalty to an attempted illegal immigration offense as for a completed one. Consequently, initiating illegal entry incurs the full penalty of the completed crime, regardless of the attempt's outcome. <sup>(4)</sup>

The Egyptian approach arguably shows a greater recognition of the risk inherent in attempted crimes, acknowledging the intent and potential consequences, such as harm to individuals or state security. Furthermore, some illegal immigration-related acts, like possessing forged documents or concealing migrants, are continuous in nature and don't constitute an attempt in a legal sense. <sup>(5)</sup>

### 1.1.2 Accessory Involvement in Illegal Immigration Crimes

Law No. 19 of 2010 in Libya does not articulate specific provisions for criminal complicity. Article 101 of the Libyan Penal Code stipulates that "anyone who participates in a crime shall be liable to its penalty, except as otherwise provided by a specific legal provision," equating the penalties for accomplices and principal offenders in principle <sup>(6)</sup>. Yet, this legal equality does not necessarily translate to identical penalties in practice, as the circumstances of the accomplice may lead to different legal outcomes than for the principal offender <sup>(7)</sup>.

Egypt's legislation in Article 11 of Law No. 82 of 2016 equates the penalty for incitement to that of the principal offense, regardless of the incitement's outcome. This approach, valuing the gravity of illegal immigration crimes, arguably places Egypt's legislative measures above Libya's by imposing severe penalties for incitement, acknowledging the significant role inciters play in the commission of crimes. Often, illegal immigration offenses involve intermediaries, introducing complexity into the crime where the inciter, potentially the mastermind, can be as pivotal as the person directly committing the smuggling <sup>(8)</sup>.

Law No. 19 of 2010 in Libya lacks provisions for penalizing intermediaries in illegal immigration, unlike Egypt's Law No. 82 of 2016, which assigns the same penalties to intermediaries and principal offenders for migrant smuggling under Article 6. This approach by the Egyptian legislator, acknowledging the significant role intermediaries play in the commission of illegal immigration crimes, seems more effective. The intermediary is often integral to the crime's execution; without them, the illegal

migrant may be unable to connect with the networks facilitating unlawful entry. Furthermore, the United Nations Protocol against the Smuggling of Migrants urges member states to criminalize intermediary acts in smuggling within their domestic laws, reinforcing the need for provisions like those in Egypt's legislation.

### 1.1.3 Criminal Liability of Legal Persons

The primary motivation behind committing illegal immigration crimes is often the desire for financial gain. Therefore, there is nothing to prevent these crimes from being committed by legal persons. Indeed, many such offenses are carried out through travel and tourism companies acting as legitimate fronts for migrant smuggling networks. <sup>(9)</sup>

<sup>(4)</sup> Ramy Metwally El-Qadi, "Criminal Confrontation of Migrant Smuggling Crimes in Egyptian Legislation," *Law and Economics Journal*, Faculty of Law, Cairo University, Volume 39, Issue 2, 2020, p. 230.

<sup>(5)</sup> Thanaa Atef Fayez Ghabari, "The Attempt in Crime," Master's Thesis, Graduate College, An-Najah National University, Palestine, 2018, p. 45.

<sup>(6)</sup> Libyan Criminal Appeal June 21, 2005, Appeal No.: 1600/50 Q, *Supreme Court Journal*, Year and Issue: 3-4/40, p. 179.

<sup>(7)</sup> Mukhtar Abu Subaiha Al-Sheibani, "Penalty of the Partner in Criminal Crime According to Libyan Legislation," *Legal Research Journal*, Faculty of Law, University of Sirte, Issue Thirteen, 2022, p. 87.

<sup>(8)</sup> Kassari Mohamed El Amin, "Incitement to Crime," Master's Thesis, Faculty of Law and Political Science, Mohamed Boudiaf University of M'sila, Algeria, Academic Year 2014-2015, p. 1.

<sup>(9)</sup> Bashir Mohammed El Amin, "The Crime of Migrant Smuggling Under Algerian and International Legislation," Master's Thesis, Faculty of Law and Political Science, University of Abdelhamid Ibn Badis Mostaganem, Academic Year 2021-2022, p. 98.



Examination of Libya's Law No. 19 of 2010 reveals a lack of provisions regarding the criminal liability of legal entities in illegal immigration offenses. The Libyan Penal Code generally exempts legal persons from criminal responsibility. However, a shift in approach is seen with Law No. 24 of 2023, where deterrent penalties for legal entities are introduced in the context of combating the settlement of foreigners in Libya. <sup>(10)</sup>

Conversely, Article 14 of Egypt's Law No. 82 of 2016 articulates the criminal liability of legal persons for illegal immigration crimes. It decrees that "... the individual responsible for the actual management of the legal entity will be punished with the same penalties prescribed for the committed crime if any crime stipulated in this law is committed by one of the employees of the legal entity in its name and for its benefit, provided that the individual's knowledge of the crime is proven, and the crime occurred due to their failure to fulfill their job duties. The legal entity is jointly responsible for the payment of any financial penalties imposed..."

The analysis indicates that Egyptian law more effectively establishes criminal liability for legal entities in illegal immigration offenses compared to Libyan law. Given that such crimes typically involve considerable organization, resources, and a criminal network, potentially led by a legal entity, the omission in Libyan legislation means such entities might not be held accountable. Punishing individuals while neglecting the liability of their associated legal entities overlooks the significant role and impact these entities have in the severity and consequences of the crime. <sup>(11)</sup>

## 1.2 Complementary Penalties

Within the framework of its punitive policy to combat illegal immigration crimes, the Libyan legislator, in addition to the primary penalties, prescribes a set of complementary penalties, which we will endeavor to elucidate as follows:

### 1.2.1 Fine as a Penalty

Fines in Libyan law act as the main penalty for misdemeanors and infractions, and as an additional penalty in felonies. These fines vary, encompassing both fixed amounts, where minimum and maximum limits are set by the legislator, and proportional fines, which judges determine based on a method that accounts for the crime's impact or the gain intended for the perpetrator. <sup>(12)</sup> Under Law No. 19 of 2010, fines are applied in illegal immigration offenses as outlined in Articles 3 to 7, functioning sometimes as the principal penalty or as a supplementary one, particularly in felonies where prescribed penalties are enhanced.

The Libyan legislation specifies a standard fine for illegal immigration crimes, varying from a minimum of one thousand dinars to a maximum of fifteen thousand dinars, occasionally setting a higher minimum of five thousand dinars. In contrast, Egyptian law under Law No. 82 of 2016 includes both fixed and proportional fines. This dual approach is likely more effective in achieving the penalty's goals, considering the severity of illegal immigration crimes and the potential for significant resultant harm. The limited range of Libyan fines may not suffice given the scale of damage these crimes can cause.

The proportional fine offers flexibility, allowing penalties to match the crime's specifics and its inflicted damage more closely than a static simple fine, which does not account for varying circumstances. <sup>(13)</sup> As financial gain often drives illegal immigration crimes, it is crucial that penalties negate this incentive. This is achieved when fines reflect the crime's proceeds, necessitating proportional rather than fixed penalties.

<sup>(10)</sup> Published in the Official Gazette, Year 2023, Issue No. 12, First Year.

<sup>(11)</sup> Bashir Mohammed El Amin, "The Crime of Migrant Smuggling Under Algerian and International Legislation," Master's Thesis, Faculty of Law and Political Science, University of Abdelhamid Ibn Badis Mostaganem, Academic Year 2021-2022, p. 98.

<sup>(12)</sup> Ramy Metwally El-Qadi, "The Penalty of the Daily Fine: A Comparative Study," *Legal and Economic Sciences Journal*, Faculty of Law, Ain Shams University, First Issue, Part Three, Fifty-Sixth Year, January 2014, p. 1128.

<sup>(13)</sup> Osmani Abdelrahman, Bouberqiq Abdelrahim, "The Proportional Fine and Corruption Crimes in Algerian Law," *Al-Ijtihad Journal for Legal and Economic Studies*, Volume 10, Issue 2, 2021, pp. 212-213.



Moreover, the upper limit set by Libyan law for simple fines falls short when compared to the gravity of illegal immigration offenses, potentially failing to deter the crime effectively. Considering the high profits made by smuggling networks, penalties must be substantial enough to disrupt the lucrative nature of these crimes.

### 1.2.2 Confiscation

The Libyan legislator, within Article 10 of Law No. 19 of 2010, dictates the confiscation, stipulating that "in all cases, the court shall order the confiscation of the amounts accrued from the crime even if they have been disguised or converted into legitimate sources. The court shall also order the confiscation of the means of transportation, or the items and tools used or intended for use in the commission of the crimes stipulated by this law unless it is proven that their ownership belongs to a third party acting in good faith."

Observably, under the general provisions of Libyan law, confiscation is classified as a financial measure, whereas Egyptian law treats it as an additional sanction. Confiscation encompasses not only the sums accrued from the criminal activity, even if they have been obscured, substituted, or transferred into lawful channels, but also extends to vehicles, objects, and instruments utilized or intended for use in perpetrating illegal immigration crimes.

Article 17 of Egypt's Law No. 82 of 2016 expands confiscation in illegal immigration offenses to encompass money, belongings, transportation means, or tools involved in the crime. In Libya, while the legislation mandates the confiscation<sup>(14)</sup> of objects and tools used or intended for use in such crimes, Article 10 specifies that items gained from the crime, provided by immigrants to smugglers in lieu of payment, are not subject to confiscation. Furthermore, Libyan Penal Code Article 163 requires confiscation upon a conviction or pardon, but not for indirect benefits offered by immigrants to smugglers, like securing facilitations in their home countries.

The Libyan legislator does not require a conviction for the imposition of confiscation in Article 10. It is also stipulated that for the confiscation of means of transport, objects, and tools, the ownership must not belong to a third party acting in good faith. A person of good faith is defined as someone who has no connection to the committed crime. This is also the case in Article 17 of the Egyptian Law No. 82 of 2016.<sup>(15)</sup>

## 2. Individualized Punishment in Illegal Immigration Crimes

The punitive policy against illegal immigration necessitates individualized punishment, meaning that the penalty for the crime varies according to the accompanying circumstances, in addition to exemption from punishment in other cases, which we will try to explain as follows:

### 2.1 Intensification of Penalties

The severity of penalties in crimes of illegal immigration is escalated due to various circumstances, which we will attempt to expound upon as follows:

#### 2.1.1 Circumstances Related to the Crime

##### 2.1.1.1 Aggravating Circumstances Related to the Method or Means of Committing the Crime

While the method of committing a crime is generally not a focal point for legislators in defining offenses or their penalties, there are exceptions where it becomes an aggravating factor.<sup>(16)</sup> The Libyan legislator has not amended penalties based on the methods used to commit a crime. In contrast, Egyptian law prescribes harsher penalties for crimes committed with specific means, such as carrying a weapon or using forged or wrongfully obtained identity documents. Article 6 of Law

<sup>(14)</sup> Muammar Milad Abu Bakr Altubashe, "The Criminal Policy of the Libyan Legislator in Combating Illegal Immigration: An Analytical Study of the Law Against Illicit Immigration," *Legal Research Journal*, Faculty of Law, Misurata University, Libya, Issue 11, 2020, p. 27.

<sup>(15)</sup> Ali Abdel Qader Al-Qahwaji, *Explanation of the Penal Code, General Section, Criminal Responsibility and Criminal Sanctions*, Al-Halabi Legal Publications, Beirut, First Edition, 2009, p. 230.

<sup>(16)</sup> Al-Reed, Mohammed Ahmed, "The Utilized Means and Its Effect on the Crime in the Algerian Penal Code and Islamic Criminal Jurisprudence," *Islamic Civilization Magazine*, Faculty of Human and Islamic Sciences - Ahmed Ben Bella University - Oran1, Algeria, Volume Sixteen, Issue Twenty-One, 2015, p. 455.



No. 82 of 2016, amended by Law No. 22 of 2010, <sup>(17)</sup> details these instances, including the misuse of ships in a way that contravenes their intended use or established maritime routes.

Furthermore, Article 7 of Law No. 82 of 2016 lists some circumstances: the commission of the crime by an organized criminal group, the use of drugs or medications or weapons, the use of force, violence, or threats thereof in the commission of the crime, or the exploitation of children by the perpetrator to commit the crime.

The Libyan legislator should have imposed stricter punishments for illegal immigration crimes, especially in cases involving children. Enhanced penalties would deter exploitation by criminal groups and prevent children from learning and being used in criminal activities, thereby protecting their rights. Additionally, it is unreasonable for punishments to be consistent regardless of whether the crime involves an adult or a child, given that children require more protection due to their vulnerability. <sup>(18)</sup>

#### **2.1.1.2 Circumstances Related to the Resultant Consequences of the Crime**

Article 5 of Law No. 19 of 2010 stipulates the intensification of punishment if the act of transporting an illegal immigrant results in permanent disability, with penalties ranging from imprisonment to a fine not less than twenty thousand dinars and not exceeding fifty thousand dinars. The penalty escalates to life imprisonment if the crime results in the death of the illegal immigrant.

In comparison, the Egyptian legislator escalates the punishment in Article 7 of Law No. 82 of 2016, to life imprisonment and a fine of no less than two hundred thousand Egyptian pounds and not exceeding five hundred thousand pounds or a fine equivalent to the value of the benefit that accrued to the perpetrator, whichever is greater, if the crime results in the death of the smuggled migrant, or causes them permanent disability, an incurable disease, or if the nature of the crime threatens the lives of the migrants being smuggled or endangers their health, or constitutes inhumane or degrading treatment.

The Egyptian legislator is praised for increasing penalties in cases where the illegal immigrant contracts an incurable disease, a detail the Libyan legislation overlooks. Given that an incurable illness can be as grave as a permanent disability, potentially leading to death, it seems inconsistent not to escalate penalties for such serious consequences. Notably, while Libyan law in Article 381 of the Penal Code treats permanent disability and an incurable disease similarly in cases of grievous harm, it fails to extend this rationale to more severe crimes like illegal immigration, where the stakes, including the risk to life, are significantly higher. Thus, the lack of a proportional penalty for causing an incurable disease in the context of illegal immigration is a point of contention.

Furthermore, the Egyptian legislator increases penalties if the crime endangers the lives of migrants being smuggled or exposes their health to risk or constitutes inhumane or degrading treatment.

Endangerment is established by placing an illegal immigrant in a situation where the likelihood of harm or death is significantly increased. <sup>(19)</sup> The Libyan legislator should have similarly increased penalties in such instances to bolster not just the protection of illegal immigrants but also to safeguard their families or dependents, considering that endangering the health of an illegal immigrant undoubtedly impacts their ability to work and thereby support their family. This could ultimately lead to the state bearing the costs of their welfare and medical treatment.

It is noteworthy that Article 6 of the Protocol Against the Smuggling of Migrants by Land, Sea, and Air explicitly obliges states to intensify penalties under such circumstances.

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<sup>(17)</sup> Published in the Official Gazette, Issue No. 14 Repetition C, dated April 11, 2022.

<sup>(18)</sup> Abdul Qader Aksasi, "The Criminal Protection of the Child's Right to Life and Physical Safety," Law and Society Journal, Law and Society Laboratory at Ahmed Draia University, Algeria, 2018, p. 181.

<sup>(19)</sup> Tabash, Ezzedine, "Endangering Others' Lives and Physical Safety in the Algerian Penal Code," Journal of Studies on the Effectiveness of Legal Rules, Research Laboratory, University of Béjaïa, Algeria, Volume Five, Issue Two, 2021, p. 11.



The Egyptian legislator prescribes life imprisonment and a minimum or relative fine, whichever is greater, whereas the Libyan legislator stipulates imprisonment for a period ranging from three to fifteen years in addition to a nominal fine.

The presence of the condition necessitates an escalation of the penalty for the perpetrator, as outlined in Egyptian legislation, due to the danger posed to the life of the illegal immigrant or their ability to live and work, which may also cause harm to the family of the illegal immigrant or their dependents.

#### **2.1.1.3 The Transnational Character**

The Egyptian legislator enhances the penalty under Article 6 of Law No. 82 for the year 2016 if the crime has a transnational character. The Libyan legislator does not impose a harsher penalty under this condition. It is argued that an increased penalty was warranted given the gravity of the crime and the danger posed by its perpetrators in such scenarios, where the scope of damage is difficult to contain or predict. <sup>(20)</sup>

#### **2.1.1.4 Seizure or Destruction of the Illegal Immigrant's Travel Documents**

The Egyptian legislator intensifies the penalty in Article 7 of Law No. 82 for the year 2016 if the perpetrator seizes or destroys the travel documents or identity of the illegal immigrant. It would have been prudent for the Libyan legislator to enforce stiffer penalties under these circumstances to protect illegal immigrants from exploitation by human smuggling networks, which may threaten them and withhold their travel documents to maintain control over them and exploit them in various heinous ways. This also includes preventing the perpetrator from using the illegal immigrants' travel documents for other illicit purposes.

It is noted that Article 6 of the Protocol Against the Smuggling of Migrants by Land, Sea, and Air has emphasized the importance of intensifying the penalty when this condition is met.

#### **2.1.1.5 Benefitting from the Illegal Immigrant or Their Relatives**

The Libyan legal framework does not currently impose enhanced penalties for those profiting from crimes against illegal immigrants or their relatives, a gap that the Egyptian Law No. 82 of 2016 addresses by stipulating increased penalties when offenders benefit from their crimes. Adopting similar measures would not only deter human smuggling operations but also protect the victims of these crimes. Specifically, Egyptian law enacts a minimum imprisonment of five years and a substantial fine for such offenses, increasing the punitive measures in response to the crime's severity and the benefits reaped by the perpetrators.

It's evident that the Libyan penal policy is comparatively lenient, lacking both the scope and severity of the Egyptian model. Effective combat against illegal immigration requires punitive measures that target the orchestrators of human trafficking, not the desperate individuals they exploit. Such a change would address the increasing prevalence of illegal immigration in Libya and the current shortcomings in the penal policy.

Aligning with the more stringent Egyptian approach, which correlates penalties with the crime's benefits, could fortify Libya's legislative response to illegal immigration, ensuring the crime is not a profitable endeavor and acknowledging the desperation that often drives migrants to enter Libya illegally. <sup>(21)</sup>

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<sup>(20)</sup> Salem Sharmat, "The Concept of Transnational Organized Crime, Its Effects and the Obstacles to Combating It," *Academic Journal of Legal and Political Research*, Faculty of Law and Political Sciences, University of Amar Telidji, Laghouat, Algeria, Volume Five, Issue Two, 2021, p. 542 et seq.

<sup>(21)</sup> Belmiloud Mohammed Amin, Belarbi Ghania, "Illegal Immigration between Criminalization and Human Rights," *Tanweer Journal for Literary and Human Studies*, Ziane Achour University of Djelfa, Algeria, Issue Five, 2018, pp. 88-89.



## 2.1.2 Circumstances Related to the Perpetrator and the Victim

### 2.1.2.1 Circumstances Related to the Perpetrator

#### 2.1.2.1.1 The Perpetrator Working in Public Authorities or Agencies Combatting Illegal Immigration

Libya's Law No. 19 of 2010 stipulates increased penalties for those responsible for the security of ports, crossings, docks, or borders. In contrast, Egypt's Law No. 82 of 2016, under Article 6, broadens this approach, imposing higher penalties on any public official or person performing a public service who abuses their position to commit the crime. This difference illustrates the more extensive reach of the Egyptian law in holding officials accountable for exploiting their roles.

It is believed that the Egyptian legislator has been more successful than the Libyan legislator in addressing crimes of illegal immigration. The Egyptian approach accounts for individuals beyond those specified in Libyan law, including public employees across various government sectors such as the Ministry of Interior, Defense, Justice, or those within legislative or executive powers. Given that crime facilitation can occur through both overt and covert exploitation of authority or influence, it would be prudent for the Libyan legislator to adopt a more rigorous penal approach akin to Egypt's legislation.

In Libyan law, harsher penalties are automatically imposed for officials' misconduct, in contrast to Egyptian law where the severity of punishment is contingent upon the misuse of one's position to perpetrate a crime. This distinction underscores the rationale for increased sanctions when a crime is facilitated by the abuse of authority. However, when an offense is carried out without such abuse – for instance, an official responsible for land border security is involved in sea or air smuggling – there is no basis for heightened punishment.

#### 2.1.2.1.2 Joining Certain Groups by the Perpetrator

The Libyan legal framework, under Article 4 of Law No. 19 of 2010, prescribes increased penalties for individuals affiliated with organized gangs involved in migrant smuggling. This contrasts with Egyptian legislation, which escalates penalties not only for gang membership but also for founding, leading, or managing such criminal entities.

Libyan law appropriately addresses the gravity of the issue, underscoring the commitment to combat illegal immigration rings. <sup>(22)</sup>However, it narrows the enhanced penalties to mere gang affiliation, omitting the more severe offenses of establishing or leading organized crime syndicates dedicated to smuggling, as Egyptian law does.

The recommendation is that Libya adopts a more stringent penal policy akin to Egypt's, which would offer better safeguards for illegal migrants and intensify efforts against human trafficking. Given that initiating and directing trafficking networks pose a greater threat than simple membership, the absence of specific punitive measures in the Libyan Penal Code for such higher-level involvement is significant. It emphasizes the necessity for amendments to Law No. 19 of 2010 to address these gaps.

#### 2.1.2.1.3 Resisting Authorities by the Perpetrator

While the Libyan legislator does not factor in resistance against public authorities when enhancing penalties, the Egyptian legislation does, according to Article 7 of Law No. 82 of 2016, which calls for stiffer penalties if the perpetrator resists public authorities with force or weapons.

The Libyan laws do impose stiffer penalties if the perpetrator's status is exploited in committing illegal immigration offenses. However, they overlook the scenario where such individuals assault employees of illegal immigration control agencies. This inconsistency raises the question: Why is the exploitation of position an aggravating factor, but assaulting an official based on that same position is not?

Therefore, it is argued that Libyan law should establish more severe penalties for attacks on public officials to fortify the safety of those combating illegal immigration. Offenders, often determined

<sup>(22)</sup> Maumar Milad Abubakr Al-Tubashi, *op. cit.*, p. 20.





to evade justice, pose a significant threat when they assault officials, constituting a direct attack on the integrity of both the function and the institution. <sup>(23)</sup>

#### **2.1.2.1.4 Multiple Perpetrators**

Crimes involving illegal immigration are often perpetrated by groups, yet individual actors can also be responsible. <sup>(24)</sup> The Egyptian law prescribes escalated penalties for collective offending, as detailed in Article 6 of Law No. 82 of 2016. It is recommended that Libyan legislation mirror this stance by enhancing penalties for crimes involving multiple offenders. Such scenarios typically bolster the offenders' criminal intent and diminish the victims' capacity to oppose the crime. <sup>(25)</sup>

#### **2.1.2.1.5 Motive for Committing the Crime**

Under Article 7 of Law No. 82 of 2016, the Egyptian legislation prescribes harsher penalties for crimes with a terrorist motive. In contrast, Libyan law does not currently enforce stricter penalties for such offenses, despite their severity and the imperative for a more rigorous punitive measure. It is pertinent to mention that, as per Article 3 of Law No. 3 of 2014, Libya defines a terrorist act as one undertaken with any terrorist aim. However, this does not inherently lead to heightened penalties under the specified conditions, which may be seen as a gap in the legislative response to terrorism.

#### **2.1.2.2 Circumstances Related to the Victim**

##### **2.1.2.2.1 Gender and Condition of the Victim**

Article 6 of Law No. 82 of 2016 in Egypt imposes harsher penalties for smuggling migrants who are women, children, individuals lacking legal capacity, or those with disabilities. This measure aims to offer greater protection to these more vulnerable groups among illegal migrants, acknowledging that they are often not the decision-makers in the act of migration, but rather subject to the will of guardians.

In contrast, the Libyan legislator does not provide equivalent protection, failing to relieve these migrants of criminal and civil liabilities and not acknowledging them as victims within the crime, a stance that differs from the Egyptian approach. <sup>(26)</sup>

##### **2.1.2.2.2 The Number of Illegal Migrants**

Article 7 of the Egyptian Law No. 82 of 2016, as amended by Law No. 22 of 2010, imposes a more severe penalty if the number of migrants exceeds three or includes women, children, persons lacking legal capacity, or individuals with disabilities. This suggests that the Libyan legislator should consider enhancing penalties as these conditions reflect the crime's gravity and potential harm. The penalty should not be static and ought to escalate with the seriousness and risk associated with the crime's circumstances.

#### **2.2 : Exemption from Punishment**

Punitive policy requires exemption from punishment in certain cases where the circumstances of the crime's commission warrant it, which we will attempt to explain as follows:

##### **2.2.1 Mandatory Exemption from Punishment**

Article 8 of Law No. 19 of 2010 exempts offenders from punishment if they proactively report to the authorities, leading to the crime's discovery before execution, reducing its effects, or aiding in the identification and apprehension of its perpetrators. Similarly, Article 19 of Law No. 82 of 2016

<sup>(23)</sup> Aqbaoui, Mohammed Abdel Qader, and Mansouri Al-Mabrouk, "The Impact of the Victim's Special Characteristic in the Occurrence of the Crime and Its Effect on the Punishment of the Perpetrator in Algerian Legislation: A Comparative Study," *Ijtihad Journal for Legal and Economic Studies*, Faculty of Law and Political Sciences, University of Tamanghasset, Algeria, Volume Seven, Issue Six, 2018, p. 225.

<sup>(24)</sup> Meghni, Dalila, "A Review of the Provisions of the Crime of Migrant Smuggling in Algerian Legislation," *African Journal for Legal and Political Studies*, Ahmed Draia University, Algeria, Volume Three, Issue One, 2019, p. 217.

<sup>(25)</sup> Ali Hamza Asal Al-Khafaji, Nafe' Takleef Majid, "The Legal Nature of Multiple Perpetrators: A Comparative Study," *Al-Muhaqqiq Al-Hilli Journal for Legal and Political Sciences*, Faculty of Law, University of Babylon, Iraq, Volume Ten, Issue Two, 2018, p. 276.

<sup>(26)</sup> Article 6 of Law No. 19 of 2010 in Libya and Article 2 of Law No. 82 of 2016 in Egypt.



also provides exemption for those who report offenses and their perpetrators before the authorities are aware, if it results in the arrest of other offenders and the recovery of proceeds. The Libyan legislation stipulates that for exemption to apply, the report must be made before any action towards committing the crime has begun, as the initiation is considered the start of its execution. For the exemption in Libyan legislation to apply, the information provided by the offender must lead to the discovery of the crime, the mitigation of its effects, the identification of its perpetrators, or their apprehension. Additionally, for the benefit of the exemption, the competent authorities must not have prior knowledge of the crime before its execution. Therefore, the offender does not benefit from the exemption if they report the crime before its execution and the competent authorities are already aware of it.

It could be argued that the approach taken by the Libyan legislator is correct as it encourages offenders to cooperate with authorities, especially given the serious nature of illegal immigration crimes and the difficulty in proving them on many occasions.<sup>(27)</sup> The authorities might be aware of a crime without being able to apprehend the perpetrators or without knowing all of them.

Unlike the situation in Egypt, the application of exemption in Libyan legislation does not require that the provision of information to the competent authorities leads to the arrest of the perpetrators; it is sufficient if the report leads to another outcome, such as reducing the effects of the crime. This interpretation is derived from the conjunction, "or" which implies a choice rather than an obligation between the options before and after it.

The Libyan legislator should have stipulated that for the exemption to apply, the report must lead to the apprehension of the perpetrators, which aligns with the rationale for granting exemption—to assist authorities in capturing the offenders. The exemption from punishment is granted to the perpetrator in exchange for helping the authorities in identifying the remaining offenders.<sup>(28)</sup>

### **2.2.2 Discretionary Exemption from Punishment in Illegal**

The Libyan legislator does not establish discretionary exemption; conversely, the Egyptian legislator decrees discretionary exemption. Such exemption from the original penalty is discretionary before the court according to Article 19 of Law No. 82 of 2016, whenever a report is made after the authorities become aware of the crime, which results in uncovering the other offenders and seizing the proceeds derived therefrom.

The discretionary exemption applies solely to the principal penalties and not otherwise. The conditions for its application require that it is after the authorities are informed of the offense and that it leads to the identification and arrest of the remaining offenders and the seizure of the funds obtained from the crime; it is not applicable in other circumstances.

The Libyan legislator should have decreed a discretionary exemption to broaden the beneficiaries of the exemption. While the authorities may be aware of the crime, they might be unable to identify the perpetrators. Even if the authorities can detect the crime and identify the culprit, the exemption still holds value by encouraging offenders to provide information that leads to the arrest of other criminals involved in the offense or the recovery of funds derived from it. This is to prevent the perpetrator from profiting from these funds and to ensure that the crime does not become a source of illicit gain. The authorities' knowledge of the crime and its perpetrator does not necessarily mean they are aware of all the accomplices, intermediaries, and the proceeds of the crime, which the perpetrator may attempt to conceal.

It is not presumed that the establishment of discretionary exemption would harm criminal justice, given that it is left to the judge's discretion and its application is contingent upon the extent to which the competent authorities benefit from the information provided by the offender after becoming aware of the crime.

It may well be judicious for the Libyan legislator to have adopted a policy of mitigating punishment when the conditions for exemption are not met, provided that the information supplied by the

<sup>(27)</sup> Maumar Milad Abubakr Al-Tubashi, *op. cit.*, p. 23.

<sup>(28)</sup> Fawaz Bin Khalaf Al-Luwaehaq Al-Mutairi, "The Legal Exemption from Punishment in Criminal Proceedings in the Saudi System," *Journal of Jurisprudence and Legal Research*, Faculty of Sharia and Law, Damanhour, Al-Azhar University, Egypt, Issue 41, 2022, p. 1441.



offender, following the authorities' knowledge of the crime and the initiation of criminal proceedings, would have a significant effect in apprehending the other perpetrators and mitigating the impact of the offense. <sup>(29)</sup>

The broadening of the scope for penalty mitigation and exemption aids the authorities in uncovering the crime and its perpetrators and in tracing its consequences, especially given the severity and complexity of unlawful immigration offenses, which may be difficult to detect without encouraging offenders to cooperate with the authorities in revealing such crimes.

## CONCLUSION

### Findings

- a. The Libyan legislator punishes simple forms of illegal immigration offenses as misdemeanors and only considers them felonies in their aggravated form, while in Egyptian legislation, simple forms of illegal immigration offenses are considered felonies.
- b. The Libyan legislator punishes attempted illegal immigration offenses with a lesser penalty than the completed offense, whereas the Egyptian legislator punishes attempts with the penalty for the completed crime.
- c. The Libyan law on combating illegal immigration lacks any provision that punishes the intermediary in illegal immigration offenses or equates the penalty of the accomplice with that of the principal offender, contrary to the situation in the comparative Egyptian legislation.
- d. The Libyan legislator, unlike the Egyptian legislator, does not establish criminal liability for legal persons for illegal immigration offenses.
- e. The Libyan legislator decrees a minor fine for illegal immigration offenses, which is low and not commensurate with the seriousness of these crimes, while the Egyptian legislator decrees both a minor fine and a proportional fine equivalent to the benefit gained by the offender, whichever is greater.
- f. The Libyan legislator has not expanded the circumstances for aggravating penalties, and the penalties are weak even when current aggravating circumstances are present, unlike in Egyptian legislation where the legislator varies the aggravating circumstances related to the crime, the offender, and the victim, and prescribes severe punishments according to the latest amendment in Law No. 22 of 2022.
- g. The Libyan legislator decrees a mandatory exemption from punishment in illegal immigration offenses, with weak conditions for its application, while the Egyptian legislator decrees both a mandatory and a discretionary exemption from punishment, with logical conditions for its application.

### RECOMMENDATIONS :

- a. We recommend that the Libyan legislator always categorize illegal immigration offenses as felonies due to the seriousness of this type of crime.
- b. We suggest that the Libyan legislator impose the same penalties for attempted illegal immigration offenses as for completed offenses.
- c. We propose that the Libyan legislator punishes the intermediary and equalizes the punishment between the accomplice and the principal offender in illegal immigration crimes.
- d. We urge the Libyan legislator to establish criminal liability for legal entities in illegal immigration offenses to ensure the effectiveness of the current provisions, as illegal immigration crimes are often committed by legal entities rather than individuals.
- e. We propose that the Libyan legislator decree a proportional fine in addition to the nominal fine and increase the amount of the nominal fine, so that the penalty in illegal immigration offenses would be the nominal fine (after increasing its amount) or the equivalent of the benefit gained by the offender, whichever is greater, similar to the situation in Egyptian legislation.

<sup>(29)</sup> Article 303 bis 36 of the Algerian Penal Code, amended on February 25, 2009.



- f. We appeal to the Libyan legislator to impose stricter penalties as in Egyptian legislation, considering the seriousness of these crimes and their perpetrators when those conditions are met.
- g. We recommend that the Libyan legislator reduce penalties with a discretionary exemption from punishment, requiring that the information provided by the offender before the authorities are aware of the crime leads to the arrest of the remaining offenders and recovery of the proceeds from the crime, to qualify for a mandatory exemption.

## REFERENCES

- [1] Aqbaoui, Mohammed Abdelkader, & Mansouri, Al-Mabrouk. (2018). The influence of the victim's special characteristic in the commission of a crime and its effect on the offender's penalty in Algerian legislation: A comparative study. *Ijtihad Journal for Legal and Economic Studies*, Faculty of Law and Political Science, University of Tamenghast, Algeria, Volume 7, Issue 6.
- [2] Aqssassi, Abdelkader. (2018). The criminal protection of the child's right to life and physical safety. *Journal of Law and Society*, Law and Society Laboratory, Ahmed Draia University, Algeria.
- [3] Al-Amin, Bashir Mohammed. (2021-2022). The crime of migrant smuggling under Algerian and international legislation. Master's thesis, Faculty of Law and Political Science, University Abdel Hamid Ibn Badis Mostaganem, Algeria.
- [4] Al-Amin, Belmiloud, & Ghania, Belarbi. (2018). Illegal immigration between criminalization and human rights. *Tanweer Journal for Literary and Human Studies*, Ziane Achour University of Djelfa, Algeria, Issue 5.
- [5] Al-Amin, Kasari Mohammed. (2014-2015). Incitement to crime. Master's thesis, Faculty of Law and Political Science, Mohamed Boudiaf University of M'sila, Algeria, Academic Year.
- [6] Al-Khafaji, Ali Hamza Asal. (2018). The legal nature of multiplicity of offenders: A comparative study. *Al-Muhaqqiq Al-Hilli Journal of Legal and Political Sciences*, College of Law, University of Babylon, Iraq, Volume 10, Issue 2.
- [7] Al-Mutairi, Fawaz bin Khalf Al-Loihaq. (2022). The legal exemption from punishment in criminal cases in the Saudi system. *Journal of Fiqh and Legal Research*, Faculty of Sharia and Law, Damanhour, Al-Azhar University, Egypt, Issue 41.
- [8] Al-Qadi, Rami Metwally. (2014). The daily fine penalty: A comparative study. *Journal of Legal and Economic Sciences*, Faculty of Law, Ain Shams University, Issue 1, Part 3, 56th Year, January.
- [9] Al-Qadi, Rami Metwally. (2020). The criminal confrontation of migrant smuggling crimes in Egyptian legislation. *Journal of Law and Economics*, Faculty of Law, Cairo University, Volume 39, Issue 2.
- [10] Al-Qahwaji, Ali Abdel Qader. (2009). *Commentary on Penal Law, General Section, Criminal Liability and Sanction*, Al-Halabi Legal Publications, Beirut, First Edition.
- [11] Al-Sheibani, Mukhtar Abu Subaiha. (2022). The penalty of an accomplice in criminal offenses according to Libyan legislation. *Legal Research Journal*, Faculty of Law, University of Sirte, Issue 13.
- [12] Al-Tobashi, Muammar Milad Abubakr. (2020). The criminal policy of the Libyan legislator in combating illegal immigration: An analytical study of the law against illegal immigration. *Journal of Legal Research*, Faculty of Law, Misrata University, Libya, Issue 11.
- [13] Ahmed, Larid Mohammed. (2015). The means used and its impact on the crime in Algerian penal law and Islamic criminal jurisprudence. *Islamic Civilization Magazine*, Faculty of Humanities and Islamic Sciences, Ahmed Ben Bella University Oran 1, Algeria, Volume 16, Issue 21.
- [14] Abu Zaid, Mohammed Ahmed Mohd. (2019). Illegal immigration and its impact on national security (2011-2017). Master's thesis, Faculty of Arts and Sciences, Department of Political Science, Middle East University, Jordan.



- [15] Dalila, Maghni. (2019). Reading in the provisions of the crime of migrant smuggling in Algerian legislation. *The African Journal of Legal and Political Studies*, Ahmed Draia University, Algeria, Volume 3, Issue 1.
- [16] Ghbari, Thanaa Atef Faiez. (2018). Attempt in crime: A comparative jurisprudential study. Master's thesis, Faculty of Graduate Studies, An-Najah National University, Palestine.
- [17] Osmani, Abdelrahman, & Bouberqiq, Abdelraheem. (2021). The proportional fine penalty and corruption crimes in Algerian law. *Ijtihad Journal for Legal and Economic Studies*, Volume 10, Issue 2.
- [18] Sharmat, Salem. (2021). Transnational organized crime: Concept, effects, and barriers to its combat. *Academic Journal of Legal and Political Research*, Faculty of Law and Political Science, Amar Thelidji University, Laghouat, Algeria, Volume 5, Issue 2.
- [19] Tabash, Azeddine. (2021). Exposing others' lives and physical safety to danger in Algerian penal law. *Journal of Studies on the Effectiveness of the Legal Rule*, Research Laboratory, University of Bejaia, Algeria, Volume 5, Issue 2.
- [20] United Nations High Commissioner for Refugees. (n.d.). Protocol against the Smuggling of Migrants by Land, Sea, and Air, supplementing the United Nations Convention against Transnational Organized Crime. UNHCR. [Online] Available at: <https://www.unhcr.org>