

PROBLEMS OF CLASSIFICATION OF CRIMINAL OFFENSES RELATED TO CORRUPTION

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ABSTRACT

Description: The article deals with the problematic issues with regard to the criminal offenses related to corruption in terms of their concept and classification, given the current trends in criminal law of Ukraine.

Methodology: The system of general and special methods of scientific knowledge was used to achieve the goal of the article. In particular, the dialectical method, system and structural method, formal and legal method, logical and legal method, modeling method, method of analysis and synthesis were applied in the study.

Results of the Study: The necessity of enshrining legislative definition of criminal offenses related to corruption in the relevant provisions of the Criminal Code of Ukraine is emphasized; the features and types of these offenses are outlined. The axiom that corruption offenses and corruption-related offenses are completely different criminal law categories is justified.

Practical Implementation: It is proved that the consequences of certain corruption-related offenses need to be established in the criminal legislation. Furthermore, the Law of Ukraine “On Corruption Prevention” needs to be supplemented with the terms “requirements”, “prohibitions” and “restrictions”.

Value/Originality: The authors’ definition of the concept “criminal offenses related to corruption” is offered and justified.

Keywords: Criminal Offenses Related to Corruption, Concepts and Classification, Requirements, Prohibitions, Restrictions, Criminal Liability, Improvement of the Current Criminal Code of Ukraine.

INTRODUCTION

It follows from the provisions of the Law of Ukraine “On Corruption Prevention” (in particular, Part 1 of Article 1, Part 1 of Article 65) (Law of Ukraine, 2014) that liability arises in the case of commission corruption offenses and offenses related to corruption by a person specified in Part 1 of Article 3 of this Law. Corruption offenses in criminal law are criminal offenses under Articles 191, 262, 308, 312, 313, 320, 357, 410 of the Criminal Code of Ukraine, in case of their commission by abuse of office, as well as the criminal offenses under Articles

210, 354, 364, 364-1, 365-2, 368-369-2 of this Code should be understood as corruption offenses (the footnote to the Article 45 of the Criminal Code (Law of Ukraine, 2012).

The Law of Ukraine “*On Corruption Prevention*” currently uses another term—“*corruption-related offense*”, which should be distinguished from “*corruption criminal offense*”. Following the logic, the term “*criminal offense, related to corruption*” should be used in the context of criminal law. However, the current Criminal Code of Ukraine (Law of Ukraine, 2012) does not use this term at all (as does the above-mentioned Law of Ukraine), which calls into question the comprehensive implementation of anti-corruption legislation and criminal law policy of the State, as the mandatory existence of such a term is directly guided by the provisions of the Law of Ukraine “*On Corruption Prevention*”. Such a situation, in our opinion, should be recognized as a significant legislative shortcoming that needs to be addressed urgently.

Note that here and then we use the term “*corruption criminal offense*” instead of the term “*corruption offense*”, as, in accordance with the recently adopted Law of Ukraine “*On Amendments to Certain Legislative Acts of Ukraine to Simplify Pre-trial Investigation of Certain Categories of Criminal Offenses*” (Law of Ukraine, 2018), the term “*corruption offenses*” is replaced by another one “*corruption criminal offenses*”, which testifies to certain harmonization of the provisions of the Law of Ukraine “*On Corruption Prevention*” and the Criminal Code of Ukraine.

The analysis of recent research and publications, which initiated the solution of this problem, has shown that a number of domestic scholars have considered this issue, but the most scientific works include only point provisions on criminal offenses related to corruption, but none of them provides at least a general concept of such kind of offenses; the precise definition is not given at all, their signs and types are not defined. Currently, there are no comprehensive scientific studies in this regard, and recent scientific publications on this issue do not reveal the essence of criminal offenses related to corruption (Shestopalova, 2017).

MATERIALS AND METHODS

The system of general and special methods of scientific knowledge was used to achieve the goal of the article. In particular, the dialectical method made it possible to ensure the completeness, objectivity, comprehensiveness and specificity of the research results. The system and structural method was used in determining the requirements, prohibitions and restrictions related to public service, as well as the list of criminal offenses, which could be considered corruption offenses. The formal and legal method was applied to clarify the content of national legislation, which is the normative basis for the classification of corruption criminal offenses. With the help of logical and legal method the basic concepts of the article such as “*corruption-related offense*”, “*corruption criminal offense*”, “*requirements*”, “*prohibitions*” and “*restrictions*” were formulated. The modeling methods, as well as the method of analysis and synthesis were used to develop proposals for improving legislation, to identify the promising areas for the further improvement of regulation of the issue under consideration.

The studied materials are the legislation of Ukraine and international legal acts regulating the issue under consideration, namely: United Nations Convention against Corruption, Law of Ukraine On Corruption Prevention, Criminal code of Ukraine, Law of Ukraine On Amendments to Certain Legislative Acts of Ukraine Concerning Simplification of Pre-trial Investigation of Certain Categories of Criminal Offenses, as well as scientific works of foreign and domestic

scholars, who have considered the issue of corruption criminal offenses in general and the problems of their classification in particular.

RESULTS AND DISCUSSIONS

We believe that we should first turn to the analysis of the term “*corruption-related offense*”. According to Part 1, Art. 1 of the Law of Ukraine “*On Corruption Prevention*”, it is an act that does not contain signs of corruption, but violates the requirements, prohibitions and restrictions established by this Law, committed by a person specified in Part 1, Art. 3 of this Law, for which the law establishes criminal, administrative, disciplinary and/or civil liability.

Hence, the signs of an offense related to corruption are:

1. It is an act that does not contain signs of corruption;
2. Violates the requirements, prohibitions and restrictions established by the commented law;
3. Is committed by a person specified in part 1 of art. 3 of this law;
4. Provides for the establishment by law of four types of liability—criminal, administrative, disciplinary and/or civil.

At the same time, the Law of Ukraine “*On Corruption Prevention*”, unfortunately, does not enshrine the definition of the terms “*requirements*”, “*prohibitions*” and “*restrictions*”. The modern explanatory dictionary of the Ukrainian language states that the term “*requirement*”, in particular, means “*norms, rules to which one should obey*”. “*Prohibition*” is “*an order not to do something, not to let use something*”. Restriction means “*to limit, to set the boundaries of something, to bind with restrictive conditions, rules, a rule, instruction, statute, etc., which restrict someone’s rights, actions, etc.*” (Dubichynskyi, 2006).

The analysis of the provisions of the Law of Ukraine “*On Corruption Prevention*” made it possible to formulate an approximate list of requirements, prohibitions and restrictions, in particular:

1. Prohibition on the interference in the activities of the National Agency on Corruption Prevention for the performance of its duties and prohibition on the activities of political parties in the National Agency on Corruption Prevention (Article 9);
2. Prohibition on the disclosure of information with limited access obtained in connection with the performance of the official duties, except as provided by law (Article 13);
3. Prohibition on financing the National Agency on Corruption Prevention from any other sources (Article 17);
4. Requirements for the adoption of an anti-corruption program and its approval by the National Agency on Corruption Prevention (Article 19);
5. Restrictions on the use of official powers or their position (Article 22);
6. Restrictions on receiving gifts (Articles 23, 24);
7. Restrictions on combination the main work with other activities (Article 25);
8. Restrictions after the termination of activities related to the performance of the functions of State and local self-government (Article 26);
9. Restriction on joint work with relatives (Article 27);
10. Requirements for the prevention and settlement of conflicts of interest (Articles 28–36);
11. Requirements for the conduct of officials, compliance with the law and ethical standards of conduct (Articles 37, 38);
12. Requirements for the priority of interests (Article 39);
13. Requirements for political neutrality (Article 40);
14. Requirements for impartiality (Article 41);

15. Requirements for competence and efficiency (Article 42);
16. Requirements for non-disclosure of information (Article 43);
17. Requirements for refraining from executing illegal decisions or instructions (Article 44);
18. Requirements for the submission of declarations of persons authorized to perform the functions of State or local self-government (Article 45);
19. Requirements for the timely submission of declarations (Article 49);
20. Requirements for additional measures of financial control (Article 52);
21. Requirements for (Article 53): non-disclosure of information about the whistleblower; providing conditions for notifications of violations of the requirements of this Law by another person, in particular through special telephone lines, official websites, electronic means of communication; consideration of anonymous messages; taking measures to stop corruption or corruption-related offenses; immediate written notice of corruption or corruption-related offense by a specially authorized entity in the area of anti-corruption;
22. A ban on the receipt of benefits, services and property by public authorities and local governments (Article 54);
23. Requirements for conducting special inspection (Article 56);
24. Requirements for the organizing special inspection (Articles 57, 58);
25. Requirements for transparency and access to information (Article 60);
26. Requirements for the prevention of corruption in the activities of a legal entity (Article 61)
27. Requirements for mandatory approval of the anti-corruption program of a legal entity (Article 62);
28. Requirements for conducting an official investigation with respect to the person who has committed a corruption or corruption-related offense (Article 65);
29. Requirements for illegal acts and transactions (Article 67).

Violation of the requirements, prohibitions and restrictions provided by the Law of Ukraine “*On Corruption Prevention*”, if there are grounds for this, entails liability for committing specific criminal offenses, and they should not belong to corruption.

Thus, the offenses, which have the following features, belong to the group of criminal offenses related to corruption:

Firstly, corruption criminal offenses, the list of which is given in the note to Art. 45 of the Criminal Code of Ukraine;

Secondly, criminal offenses committed by relevant officials or other persons if their actions violate the requirements, prohibitions and restrictions established by the Law of Ukraine “*On Corruption Prevention*”.

In our opinion, the “*corruption-related*” construction is also important. Logically, these are criminal offenses that do not constitute corpus delictum, but are as close as possible to them; are combined with them; contribute to their commission, and so on. In this case, an important role belongs to the relationship between corruption and non-corruption, and the latter, in relation to the former, should have “*the relationship between various factors, events, etc., which are interdependent*” (Aleksieiev, 1984).

The theory of criminal law (Tatsii, 2017) states that criminal offenses related to corruption may include more than twenty encroachments:

Quasi-corruption acts first of all, it should be noted that an exhaustive list of corruption related offenses is given in the note to Art. 45 of the Criminal Code of Ukraine. However, there are the offences, which are related to corruption, but do not contain its features and do not violate anti-corruption legislation. The concept of “*quasi-corruption offenses*” is purely theoretical; such actions do not contain the signs of corruption and do not formally violate anti-corruption legislation. The term “*quasi-corruption offences*” was used by Khavrniuk (2017) in the context of analyzing the crimes under Art. 210 and 369-2 of the Criminal Code of Ukraine. But, in our view, the assignment of these offenses to quasi-corruption ones is not correct, as in

accordance with the provisions of current criminal and anti-corruption legislation, they are full-fledged corruption crimes. We consider that quasi-corruption offenses are: illegal enrichment (Article 368-2 of the Criminal Code of Ukraine), which, however, was declared unconstitutional; legalization (laundering) of proceeds from crime (Article 209 of the Criminal Code of Ukraine); declaring unreliable information (Article 366-1 of the Criminal Code of Ukraine);

Other crimes in particular, the ones under investigation by the National Anti-Corruption Bureau of Ukraine (for example, intentional violation of the legislation on prevention and counteraction to legalization (laundering) of proceeds from crime or terrorist financing (Article 209-1 of the Criminal Code Ukraine); misleading the court or other authorized body (Article 384 of the Criminal Code of Ukraine); refusal of a witness to testify or refusal of an expert or translator to perform their duties (Article 385 of the Criminal Code of Ukraine); preventing the attendance of a witness, victim, expert in court, forcing them to refuse to testify (Article 386 of the Criminal Code of Ukraine); divulge information pertaining to a pre-trial investigation or initial inquiry (Article 387 of the Criminal Code of Ukraine); illegal actions in respect of seized property, pledged property or property that is subject to confiscation (Article 388 of the Criminal Code of Ukraine); concealment of a crime (Article 396 of the Criminal Code of Ukraine);

Offenses related to corruption in the sphere of official activity, under investigation of the internal control unit of the National Anti-Corruption Bureau of Ukraine (for example, exceeding of authority or official powers by law enforcement officer (Article 365 of the Criminal Code of Ukraine); official forgery (Article 366 of the Criminal Code of Ukraine; official negligence (Article 367 of the Criminal Code of Ukraine); provocation of bribery (Article 370 of the Criminal Code of Ukraine);

Certain corruption-related offenses under investigation by the State Bureau of Investigation or the National Police (violation of the procedure for financing a political party, election campaigning (Articles 159-1 and 160 of the Criminal Code of Ukraine); smuggling committed by an official using his official position (Part 2 of Article 201 of the Criminal Code of Ukraine); assistance to members of criminal organizations and concealment of their criminal activities committed by an official (Part 2, Article 256 of the Criminal Code of Ukraine); crimes of officials related to illegal transportation of persons across the State border of Ukraine (Part 2 of Article 332 of the Criminal Code of Ukraine), crimes of officials related to violation of entry-departure procedures with regard to the temporarily occupied territory of Ukraine (Part 2 of Article 332-1 of the Criminal Code of Ukraine); decisions, rulings or resolutions (Article 375 of the Criminal Code of Ukraine), illegal interference in the work of the automated document management system of the court (Article 376-1 of the Criminal Code of Ukraine) (Khavroniuk, 2019).

It seems that the above classification of criminal offenses related to corruption is not ideal, but reflects only the approach of individual authors, especially since it has many controversial points: from the presence of such offenses in the list, for which responsibility was recognized unconstitutional (Article 368-2 of the Criminal Code of Ukraine), or which should belong to the category of corruption, as required by international law (for example, legalization (laundering) of proceeds from crime (Article 209 of the Criminal Code of Ukraine)) and the use of funds obtained from illicit trafficking in narcotic drugs, psychotropic substances, their analogues, precursors, poisonous or potent substances or poisonous or potent drugs (Article 306 of the Criminal Code of Ukraine, as Article 23 “*Laundering of proceeds of crime*” of the UN

Convention against Corruption (UN General Assembly, 2003) directly defines these criminal offenses as corruption), and ending with a limited approach to the list of the analyzed offenses.

It should be noted that the legislator should include a number of other encroachments provided by certain articles of the Criminal Code of Ukraine to the list of corruption criminal offenses (rather than to criminal offenses related to corruption), in particular: illegal influence on the results of official sports competitions (Art. 369-3 of the Criminal Code of Ukraine); deliberately handing down an unjust verdict, judgment, ruling or decision by a judge (judges), if this criminal offense is committed for selfish motives (Part 2 of Article 375 of the Criminal Code of Ukraine), as such actions are clearly of corruption nature.

In our view, the axiom should be that corruption offenses and corruption-related offenses are completely different criminal law categories that should not coincide in content and list. Another key feature of criminal offenses related to corruption is that they should be recognized as such in the presence of a very important condition, namely, they must violate the requirements, prohibitions and/or restrictions of the Law of Ukraine “*On Corruption Prevention*”. Besides, the legislator should enshrine a clear definition of such offenses in the Law in order to consistently apply the relevant regulations. Just intentional acts should be attributed to criminal offenses related to corruption, which is guided by the logic of constructing the list of corruption criminal offenses, although, as noted above, some scholars do not deny that the list of the first includes negligent acts as well (including official negligence (Article 367 of the Criminal Code of Ukraine)).

Another important issue is who can commit a criminal offense related to corruption and under what conditions. We are convinced that the subjects of such offenses should be officials, although the commission of such offenses by common subjects is not excluded. It follows from the provisions of the Criminal Code of Ukraine that when committing certain criminal offenses, officials may:

1. Misuse their official position; the criminal offenses committed by such persons in this way belong to the category of “*corruption*” (in particular, the construction of “*misuse official position*” is mentioned in Articles 191, 262, 308, 312, 313, 320, 357, 364, 410 of the Criminal Code of Ukraine);
2. Use their position (in particular, the construction “*using his (her) position*” is mentioned in Articles 149, 157, 158, 158-2, 159, 169, 171, 176, 177, 189, 201, 205-1, 206, 206-2, 229, 248, 258-1, 258-4, 298, 298-1, 303, 332, 332-1, 343, 344, 376, 397, 447 of the Criminal Code of Ukraine). Such criminal offenses, in our opinion, can be attributed to the group of those related to corruption;
3. Commit offenses without the fact of their specific combination with abuse of office; such criminal offenses may also be classified as those related to corruption, if they are not criminal offenses under Art. 210, 354, 364, 364-1, 365-2, 368–369-2 of the Criminal Code of Ukraine, as according to the note to Art. 45 of this Code, they already belong to the corrupt.

As the matter of fact, the legislator identifies the terms “*abuse*” and “*use*”, which is obvious from the content of a number of articles of the Special Part of the Criminal Code of Ukraine. For example, “*abuse of guardianship rights*” (Article 167 of the Criminal Code of Ukraine) is disclosed through the term “*use*” in the disposition of this article (use of guardianship or custody for personal gain to the detriment of the ward). Even the “*abuse of power or official position*” (Article 364 of the Criminal Code of Ukraine), the legislator, given the disposition of Part 1 of this article, defines through the construction of “*use*”. But due to the fact that the construction “*in case of their commission by abuse of office*” in the relevant articles of the Criminal Code of Ukraine is one of the determinants in constructing the definition of corruption

offenses, we will assume that it is on this basis such offenses may differ from criminal corruption-related offenses.

It is interesting that the legislator can formulate different constructions regarding the designation of the use of the position by an official (in particular, in the context of encroachments on the voting rights of citizens (in one case the construction “*using his (her) official position*” (Article 158 of the Criminal Code of Ukraine) and in another one “*by an official with the use of power or official position*” (Article 158-2 of the Criminal Code of Ukraine)). Sometimes separate words may fall out of the discussed constructions (for example, Part 2 of Article 169 of the Criminal Code of Ukraine already deals with “*use of official position*”, and therefore there is no indication of the term his/her in this case). A separate issue is the use of related constructions by the legislator, when instead of the terms “*power*” or “*official position*” the relevant official only uses “*his/her powers*” (for example, Article 364-1 of the Criminal Code of Ukraine refers to the use of his/her powers by an official). A similar situation is with the Articles 368-3 and 368-4 of the Criminal Code of Ukraine.

It is important to emphasize that the legislator can designate criminal offenses committed by officials even more neutrally (for example, by using the construction “*committed by an official*” (Part 2 of Article 163), or simply “*official*” (Article 132). Intentional criminal offenses committed by officials can also belong to those related to corruption. In fact, the subject of a criminal offense related to corruption can be an official, if the sanction of the relevant article (part of the article) provides for an indication of such a punishment as deprivation of the right to hold certain positions or be engaged in certain activities for a certain period. We cannot exclude the possibility that the analyzed criminal offenses can be committed by general and special (but not officials) entities (a similar situation is typical for certain corruption offenses).

It seems that the public danger of criminal offenses related to corruption should be less than the public danger of corruption offenses, although this thesis is indisputable, given the exact opposite situation in some instances. For example, the public danger of abuse of power or official authority by a law enforcement officer (Article 365 of the Criminal Code of Ukraine) as a criminal offense related to corruption is much greater than the public danger of such a corruption offense as theft, misappropriation, extortion of stamps, seals, committed for profit or other personal gain (Article 357 of the Criminal Code of Ukraine). On the contrary, given the above provisions, the list of the former should be larger than the latter.

Criminal offenses related to corruption may be committed by an official through “*use of official position*” and without it, but provided that the criminal offense violates the requirements of the Law of Ukraine “*On Corruption Prevention*”, prohibitions and/or restrictions, as well as by general or special entities (not officials), and if there is a connection between these and corruption offenses, which determines their relationship. Under such conditions, the presence of a set of relevant criminal offenses is not excluded, which may be a typical situation in law enforcement practice. For example, a customs official receives an improper benefit (a criminal offense) and organizes smuggling of relevant items using his position (a criminal offense related to corruption). Although, actually, criminal offenses related to corruption can be committed as isolated encroachments (for example, an interested person commits just bribing a witness (Article 386 of the Criminal Code of Ukraine), without committing any other corruption offense or criminal offense, related to corruption).

Therefore, first of all, Ukrainian legislator should determine exactly where (in which article or in the note to it) and how criminal offenses related to corruption will be indicated in the

Criminal Code of Ukraine. Another key point, along with the introduction of the concept (list) of criminal offenses related to corruption, is the issue of criminal consequences of their commission, i.e. an adequate response of the State to such a specific manifestation of criminal conduct. Therefore, it is important to clearly define the types of outlined consequences, their scope and content, the degree of regulation by specific provisions of the Criminal Code of Ukraine, otherwise the very meaning of the existence of the investigated category of criminal offenses is lost. Along with this need to expand and clarify the provisions of Article 96-3 “The grounds for the application of measures of criminal law to legal entities” of the Criminal Code of Ukraine, the relevant rules on liability for criminal offenses related to corruption should also be added to it. Clearly, it would be the easiest way to abandon such a complex category of “criminal offenses related to corruption”, but it is unlikely that the legislator and society will take such steps.

CONCLUSION

Summarizing the above, it is necessary to draw the following conclusions and formulate the proposals of theoretical and applied nature:

1. The need for enshrining the provisions on criminal offenses related to corruption in the Criminal Code of Ukraine is due to the direct requirements of Part 1, Art. 1 and Part 1, Art. 65 of the Law of Ukraine “*On Corruption Prevention*”, as well as the existence of the concept (list) of corruption offenses related to corruption in this Code.
2. Unfortunately, the current Criminal Code of Ukraine does not use the term “*criminal offenses related to corruption*” and this situation is a significant shortcoming, which directly threatens the implementation of anti-corruption legislation and criminal policy.
3. The terms “*requirements*”, “*prohibitions*” and “*restrictions*” should be defined in Part 1, Art. 1 of the Law of Ukraine “*On Corruption Prevention*” for a comprehensive understanding of corruption-related offenses in general and criminal offenses related to corruption, in particular.
4. The concept of criminal offenses related to corruption is proposed to be formulated as follows: “*Criminal offenses related to corruption, according to this Code are criminal offenses under Articles 149, 157, 158, 158-2, 159, 169, 171, 176, 177, 189, 201, 205-1, 206, 206-2, 229, 248, 258-1, 258-4, 298, 298-1, 303, 332, 332-1, 343, 344, 376, 397, 447, in case of their commission by the use of power (position) by the official, any other criminal offenses provided by this Code, where the subject of the offense can be official, and also criminal offenses provided for in Articles 384, 385, 386, 387, 388, 396, 159-1, 160, if any of these criminal offenses violates the requirements, prohibitions and/or restrictions established by the Law of Ukraine “On Corruption Prevention”*”. It seems that this definition is adjusted accordingly with the list of corruption offenses and most fully reflects all possible options for committing corruption-related offenses.
5. The legislator should determine the specific criminal consequences of criminal offenses related to corruption in the relevant articles of the General Part of the Criminal Code of Ukraine.

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