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CRIMINAL-LEGAL CONTENT OF THE «CORRUPTION» CONCEPT

Taking into account the provisions of the current national anti-corruption legislation, historical, international and foreign experience, the criminal-legal content of the «corruption» is clarified. It is established that in Ukraine the legal concept of «corruption» has only criminal-legal content and does not directly cover issues of administrative, civil-legal and disciplinary liability. In theory and in practice, there is no currently a universal and all-embracing notion of «corruption». In international anti-corruption conventions, the emphasis is made not on defining the notion of «corruption», but on its particular types (forms). In the criminal law of foreign countries, the definition of corruption is diverse and primarily covers two separate acts – active and passive bribery. The ways of improving the concept of «corruption» in the legislation of Ukraine are proposed.

***Key words**: corruption, concept, criminal-legal content, corruption crimes, anti-corruption conventions, foreign experience.*

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Кримінально-правовий зміст поняття «корупція»

З огляду на положення чинного національного антикорупційного законодавства, історичний, міжнародний і зарубіжний досвід, з'ясовано кримінально-правовий зміст поняття «корупція». Встановлено, що в Україні законодавче поняття «корупція» має виключно кримінально-правовий зміст та безпосередньо не охоплює питання адміністративної, цивільно-правової та дисциплінарної відповідальності. У теорії та на практиці наразі не існує ідеального й універсального поняття «корупція». У міжнародних антикорупційних конвенціях акцент робиться не на визначенні поняття «корупція», а на її окремих видах (формах). У кримінальному праві зарубіжних країн визначення корупції є різноманітним та насамперед охоплюють два самостійних діяння – активний і пасивний підкуп. Запропоновані шляхи удосконалення поняття «корупція» у законодавстві України.

***Ключові слова:** корупція, поняття, кримінально-правовий зміст, корупційні злочини, антикорупційні конвенції, зарубіжний досвід.*

А. В. Савченко

Уголовно-правовое содержание понятия «коррупция»

Учитывая положения действующего национального антикоррупционного законодательства, исторический, международный и зарубежный опыт, выяснено уголовно-правовое содержание понятия «коррупция». Установлено, что в Украине законодательное понятие «коррупция» имеет исключительно уголовно-правовое содержание и непосредственно не охватывает вопросы административной, гражданско-правовой и дисциплинарной ответственности. В теории и на практике пока не существует идеального и универсального понятия «коррупция». В международных антикоррупционных конвенциях акцент делается не на определении понятия «коррупция», а на ее отдельных видах (формах). В уголовном праве зарубежных стран определения коррупции разнообразны и прежде всего охватывают два самостоятельных деяния – активный и пассивный подкуп. Предложены пути совершенствования понятия «коррупция» в законодательстве Украины.

***Ключевые слова:** коррупция, понятие, уголовно-правовое содержание, коррупционные преступления, антикоррупционные конвенции, зарубежный опыт.*

Problem statement. From the scientific point of view, it would be interesting to analyze the concept of «corruption» as to how it relates to the provisions of criminal law, that is, what is the degree of its criminal-legal content. To this end, through the prism of criminal-legal assessment, it is viewed appropriate not just to address the norms of the current anti-corruption legislation of Ukraine, but also to analyze corruption from the standpoint of history, international and foreign experience. This approach would facilitate to develop objective understanding of corruption in the context of criminal law. In addition, the clarification of criminal-legal content of the concept of «corruption» has practical importance as it will influence the determination of the directions of further reformation and improvement of anti-corruption criminal legislation, proper application of the relevant criminal-legal norms, as well as appropriate interpretation of important criminal-legal terms and categories.

Analysis of recent research and publications. In legal literature of Ukraine there are a lot of recent publications devoted to corruption crimes and their large group – separate crimes in the sphere of official activity and professional activity related to the provision of public services. Scientists (in particular, P. P. Andrushko, Y. O. Busol, O. O. Dudorov, M. I. Khavronyuk, O. M. Kostenko, V. M. Kutz, V. M. Kyrychko, M. O. Lytvak, S. Y. Lyhova, O. K. Marin, M. I. Melnyk, V. I. Osadchyi, V. I. Tyutyugin, N. M. Yarmysh, O. N. Yarmysh) debate about criminal-legal characteristics of these crimes, the punishment for their commission, prevention, discharge from criminal liability and more. But, unfortunately, it's hard to find solid researches, which are devoted to issues of clarifying of criminal-legal content of the concept of "corruption", because most scientists-criminalists do not raise questions about it, considering the said concept as comprehensive, well-balanced and flawless. However, we have a somewhat different point of view, which we disclose within this scientific article.

The purpose of this article. The purpose of this article is to shape an objective imagery about the criminal-legal content of the concept of «corruption», taking into account the provisions of domestic, international and foreign anti-corruption criminal legislation, historical experience, modern scientific and normative positions.

Statement of the base materials. Corruption as a negative social phenomenon arose after the emergence of power and monetary relations. One of the early references to corruption was reflected in the oldest historical statehood monuments known to mankind – the archives of ancient Babylon. Corruption manifestations took place in ancient Egypt, Mesopotamia, India, China, that is, from the third to the second millennium BC, which is proved by religious and literary sources. Specific forms of corruption at that time were tributes to rulers, gifts, speculative actions, etc. Due to constant wars, lawlessness and abuses, corruption was also widespread in the Middle Ages. About its existence in the Ukrainian lands of that time mention the chronicles of the XIII century. In Rus, czar Ivan III was the first who legally restricted the spread of corruption, while his grandson Ivan IV (Grozny) introduced the death penalty for the manifestation of corruption [1, p. 5–6]. Corruption was also spread in Europe. For example, Hernando de Soto describes the then corruption in England as follows: «In 1601, a speaker in the House of Commons defined a justice of the peace as «a living Creature that for half of a Dozen of Chickens will Dispense with a whole Dozen of Penal Statutes» [2, p. 218]. In the capitalist period in Europe, the French Napoleonic Code of 1810 can be considered as a landmark, which introduced tough penalties facilitating combating corruption in public life. However, along with the development of society an attitude of mankind to corruption has evolutionized – from promotion to intolerance, from customs in the primitive society in relation to gifts to the priest or headman to the liberal ideology of the new time, which was based on the idea of «social contract».

As for Ukraine, in the days of the Soviet rule, the existence of corruption was absolutely denied. The definitions of corruption were provided by separate dictionaries (for example, «Short Dictionary of Foreign Languages» in 1943 determined corruption as «bribery; venality and vendibility of public political figures, as well as governmental officials and service officers») [3, p. 194]. Aftermath, the

notion of corruption was considered primarily criminological rather than criminal-legal, and represented a certain social and legal phenomenon characterizing the extent of official misuse of public administration [4, p. 124–127].

For the first time, legal definition of «corruption» in Ukraine appeared at the end of the last millennium. In Article 1 of the Law of Ukraine «On Combating Corruption» dated October 5, 1995, No. 356/95-BP the concept «corruption» refers to «the activities of persons authorized to perform state functions aimed at the unlawful use of the powers granted to them for obtaining material goods, services, privileges or other benefits» [5]. At the same time, such concepts as «corruption» and «corrupt acts» were separated. Fundamentally, such a definition of corruption gave rise to a rather broad understanding of its essence, considering the operation of the term «activity» and multi-vector character of its direction, as well as indications on various items. However, a significant disadvantage was that the legislator mentioned only one single form of corruption – the unlawful use of the powers granted in order to obtain the corresponding items.

In the following laws («On the Grounds of Prevention and Counteraction of Corruption» of June 11, 2009, № 1506-VI and «On the Grounds of Prevention and Counteraction to Corruption» of April 7, 2011, No. 3206-VI, that were repealed), in our opinion, the legislator significantly narrowed the meaning of the «corruption» concept. They contain very similar definitions of corruption that are corrected with what is currently in force (Article 1 of the current Law of Ukraine «On the Prevention of Corruption» of October 14, 2014, No. 1700-VII): «Corruption means the use by person specified in Paragraph 1 of Article 3 of this Law, the office powers or the related opportunities conferred to it for the purpose of obtaining of undue advantage or the acceptance of such advantage or acceptance of the promise/offer of such advantage to himself or other persons or, accordingly, the promise/offer or giving of undue advantage to person specified in Paragraph 1 of Article 3 of this Law or on its requirement to other physical persons or legal entities with the purpose to incline this person to the unlawful use of the office powers or the related opportunities conferred to it» [6]. However, it is difficult to miss that this transformation has led to the fact that the concept of «corruption» has obtained an exclusively criminal-legal meaning. This follows from the fact that virtually all key terms defining corruption (in particular, «use», «official powers», «undue advantage», «obtaining», «acceptance», «offer», «promise», «purpose»), are simultaneously used in the relevant articles of the Special Part of the Criminal Code (hereinafter – the CC) of Ukraine.

Nevertheless, it should be emphasized that corruption is not only corruption crimes, for which person who committed that is subject to criminal liability [7, p. 13–15]. In accordance with Paragraph 1 of Article 65 of the Law of Ukraine «On the Prevention of Corruption» for the commission of corruption or corruption-related offenses the persons specified in Paragraph 1 of Article 3 of this Law, are found liable not only in criminal plane, but also subject to administrative, civil-legal and disciplinary proceedings in the manner prescribed by law. Consequently, corruption is both a criminal offense (crime), and all sorts of other offenses. Unfortunately, the current definition of corruption does not even contain a «hint» that corruption is somehow concerns the plane of the norms of administrative and civil legislation or disciplinary rules. For example, how it can be seen in the «corruption» concept that it is a violation of the restrictions on moonlighting and combining with other activities, violation of legal restrictions on the receipt of gifts, violations of financial control requirements, violations of requirements for preventing and resolving conflict of interests, illegal use of information which became known to a person in connection with the performance of official powers? But these acts are «administrative offenses related to corruption» (Articles 172-4 – 172-8 of the Code of Ukraine on Administrative Offenses), that is they are mandatory components of corruption.

Thus, we can draw the following conclusion: the concept of «corruption», which exists in the national anti-corruption legislation, is «overburdened» by criminal-legal features and does not reflect the entire spectrum of areas that this negative phenomenon may spread.

Moreover, we can talk about other shortcomings of the «corruption» concept in the criminal-legal aspect, for instance:

– firstly, it focuses only on one item of crime – undue advantage, not mentioning the existence of other items of corruption offenses (crimes), which are defined in the CC of Ukraine, in particular another's property (Article 191), budget funds included in the State and Local budgets, regardless of the source of their formation in appropriate sizes (Article 210), firearm (except smooth-bore hunting), ammunition, explosive substances, explosive devices, or radioactive materials (Article 262), narcotic means, psychotropic substances, or analogues thereof (Article 308), precursors (Article 312), equipment intended for the manufacture of narcotic means, psychotropic substances, or analogues thereof (Article 313), opium poppy or hemp (Article 320), documents, stamps, seals (Article 357), assets of significant amount, legality of the grounds the acquiring of which is not proved by evidence (Article 368-2), weapon, ammunition, explosive or other combat substances, means of conveyance, military and special technology, or other military property (Article 410);

– secondly, it does not mention other forms of commission of corrupt acts (crimes) defined by the CC of Ukraine and may be related to both «unlawful advantage» (for example, «request to provide») and to other items (for example, «taking possession», «misuse» or «acquiring»);

– thirdly, it does not specify the range of social relations encountered by corruption offenses, does not concretize all subjects of corruption actions, does not mention the peculiarities of the manifestation of the subjective side of the above-mentioned crimes, etc.

In fact, if to treat the meaning of «corruption» content rather critically, it can be reflected only in certain provisions of the CC of Ukraine on liability for corruption crimes (in particular, Articles 354, 364, 364-1, 365-2, 368, 368-3, 368-4, 369, 369-2). However, the CC of Ukraine (Note to Article 45) determines as the corruption crimes those provided for by Articles 191, 262, 308, 312, 313, 320, 357, 410, in the case of their commission by abuse of office, as well as crimes stipulated in Articles 210, 354, 364, 364-1, 365-2, 368-369-2 of this Code. That is, many crimes that the CC of Ukraine recognizes as corruption can hardly be attributed to those with a corrupt component, given the definition of corruption in the Law of Ukraine «On Prevention of Corruption». Of course, this situation is unacceptable, since in the criminal-legal aspect the «corruption» concept in Ukraine has a narrow meaning.

Henceforth we turn to the international-legal practice of defining the «corruption» concept. It should be noted that there is a situation in which not every «anticorruption» convention directly explains what exactly should be considered corruption. This is probably due to the specifics of the language and technology used in the conventions, as well as the extreme debatable nature of the key term of «corruption». In particular, only the list of «the offences established in accordance with this Convention», but not the explicit definition of corruption, is limited by the United Nations Convention against Corruption of October, 31, 2003 (ratified by Ukraine on October 18, 2006). Such crimes include: bribery of national public officials (Article 15); bribery of foreign public officials and officials of public international organizations (Article 16); embezzlement, misappropriation or other diversion of property by a public official (Article 17); trading in influence (Article 18); abuse of functions (Article 19); illicit enrichment (Article 20); bribery in the private sector (Article 21); embezzlement of property in the private sector (Article 22); laundering of proceeds of crime (Article 23); concealment (Article 24); obstruction of justice (Article 25). The aforesaid Convention also emphasizes the need to establish: a) the liability of legal persons for participation in the offences established in accordance with this Convention; b) as a criminal offence participation in any capacity such as an accomplice, assistant or instigator in an offence established in accordance with this Convention [8].

In the similar way it goes with the Criminal Law Convention on Corruption (ETS 173) of January 27, 1999 (ratified by Ukraine on October 18, 2006), however, it provides a somewhat different list of «criminal offences established in accordance with this Convention» or «corruption offenses»: «criminal offences envisaged by this Convention» or «corruption offenses»: active bribery of domestic public officials (Article 2); passive bribery of domestic public officials (Article 3); bribery of mem-

bers of domestic public assemblies (Article 4); bribery of foreign public officials (Article 5); bribery of members of foreign public assemblies (Article 6); active bribery in the private sector (Article 7); passive bribery in the private sector (Article 8); bribery of officials of international organizations (Article 9); bribery of members of international parliamentary assemblies (Article 10); bribery of judges and officials of international courts (Article 11); trading in influence (Article 12); money laundering of proceeds from corruption offences (Article 13); account offences (Article 14) [9]. The specificity of this Convention is that the corruption offences mentioned in it are not collected in a single list, and the set of crimes isn't recognized neither complete nor closed.

As we see, the United Nations Convention against Corruption and the Criminal Law Convention on Corruption do not directly define the concept of «corruption», mentioning only the lists of relevant «criminal offenses», which differ in their content and do not completely match with each other. Instead, the Civil Law Convention on Corruption (ETS 174) of November 4, 1999 (ratified by Ukraine on March 16, 2005) refers to the concept of «corruption», but it is quite abstract: «requesting, offering, giving or accepting, directly or indirectly, a bribe or any other undue advantage or prospect thereof, which distorts the proper performance of any duty or behaviour required of the recipient of the bribe, the undue advantage or the prospect thereof» (Article 2) [10]. Hence, it is not entirely clear: what is the ratio of «bribe» and «undue advantage», what kind of person (subject) it is applied to and what is his legal status, how it is possible «to distort any behavior required of the recipient», etc.? Unfortunately, the Civil Convention on Corruption does not provide the answers to all the abovementioned questions. The above situation is complicated by rather poor translation of the text of all these international conventions into Ukrainian language.

Otherwise, for example, in Article VI «Acts of Corruption» of the Inter-American Convention Against Corruptions of March 29, 1996, states that it applies, among other things, to acts of corruption such as «omission by a government official in the discharge of his duties for the purpose of illicitly obtaining benefits for himself or for a third party» or «the fraudulent use or concealment of property derived from any of the acts contemplated in this Article» [11]. This approach shows a broad interpretation of corruption. However, in the current CC of Ukraine, corruption offenses are not considered the following crimes: firstly, certain specific types of omission of duties, which are subordinated to the purpose of illegal gaining (abuse of power or official position are not taken into account here); secondly, the acquisition not promised beforehand, or sale, or keeping of property known to be acquired by criminal means (Article 198), or concealment of a crime (Article 396).

In the Code of Conduct for Law Enforcement Officials (Resolution 34/169 of the General Assembly of the United Nations of December 17, 1979), corruption refers to the commission or omission of an act in the performance of or in connection with one's duties, in response to gifts, promises or incentives demanded or accepted, or the wrongful receipt of these once the act has been committed or omitted, as well as an attempted corruption [12]. Consequently, this Code: a) links corruption with action and inactivity; b) ranks gifts, promises and incentives the items of corruption; c) equates corruption with attempts to commit it. The Model CC of the EU (original name – «Corpus Juris») also mentions corruption, defining: a) those who are a European official and a national official; b) what means passive and active corruption that harms the EU's financial interests (Article 5). In addition, the mentioned Code stipulates for criminal prosecution for: misappropriation of funds (Article 6); abuse of office (Article 7); disclosure of secrets pertaining to one's office (Article 8) [12]. It should be noted that the offences provided for in Articles 5 – 8, according to this Code fall into a group of offences committed by officials (herewith, direct corruption is only a kind of such offences).

In the theory of criminal law corruption is defined and classified differently, for example: supply versus demand; grand versus petty corruption; conventional versus unconventional; public versus private; systemic versus individual or isolated; by commission versus by omission; by the degree of coercion used to perform the illegal act; by the type of benefit provided, etc. [14]. It is also possible to distinguish the following types of corruption: bureaucratic and political; national and international; coercive and co-ordinated; centralized and decentralized; in the broad and narrow sense; criminal, administrative, civil-legal, etc. Various forms of

corruption found its sufficiently complete formulation and interpretation in the Glossary of Corruption prepared by the U4 Anti-Corruption Resource Center [15].

Given the experience of certain countries in the world, the criminal-legal content of the concept of «corruption», as compared with Ukraine, may be narrower or wider. For instance, a legislator of the Kyrgyz Republic significantly restricts the meaning of «corruption», considering it only within the framework of the national law on criminal liability. «Corruption» (Article 303 of the CC of the Kyrgyz Republic) is recognized only as a type of official crime (Chapter 30 of the Special Part of this Code) and means intentional acts consisting in the creation of an unlawful sustained link between one or more officials holding powers and individuals or groups for the purpose of illegal obtaining of material, any other benefits and advantages, as well as providing by them with these benefits and advantages to individuals and legal entities, which endangers the interests of society or the state. Along with this, certain official crimes that do not directly belong to corruption are considered: abuse of office; excess of official authority; torture; illegal use of budget funds; illegal enrichment; extortion of bribe; obtaining a bribe; mediation in bribery; giving a bribe; official forgery; service negligence, etc [16].

In Chapter XV of the Special Part of the CC of the Republic of Moldova, both passive (Article 324) and active (Article 325) corruption requires prosecution which is part of a group of crimes against proper order of work in the public sphere (this group of crimes also includes: obtaining benefits from influence; abuse of power or of official status; exceeding of power or of official duties; official negligence; violation of the regime of confidentiality of information contained in the declarations of property and personal interests; illegal enrichment; fraudulent receipt of means from the external funds; appropriation of means of external funds). In addition, this Code distinguishes a group of corruption crimes in the private sector (Chapter XVI of the Special Part), which includes: obtaining a bribe; giving a bribe; abuse of office; falsification of accounting documents [17]. «Corruption crimes» are also mentioned in the titles of relevant chapters of the Special Parts of the CC of the Republic of Azerbaijan and the CC of the Republic of Kazakhstan, although in fact those refer to official and related acts.

Otherwise, bribery and corruption are criminalized in France by different criminal offences, all contained in the French Penal Code. In accordance with the provisions of this Code, one should distinguish between: 1) domestic bribery, which includes passive (Article 432-11 (1)) and active (Article 433-1 (1)) corruption; 2) bribery of foreign public officials, which also includes passive (Articles 435-1 and 435-7) and active (Article 435-3) corruption; 3) trading in influence that includes domestic passive (Article 432-11 (2)) and active (Article 433-1 (2)) varieties; 4) commercial bribery, which provides for passive (Article 445-2) and active (Article 445-1) corruption; 5) similar legislation that could affect a foreign company doing business in France (conflict of interests – Article 432-12, favoritism – Articles 432-14, money laundering – Article 324-1, etc.) [18].

Australian lawmakers understand the concept of corruption very widely. The Crime and Corruption Act of 2001, Queensland (Commonwealth of Australia), focuses on defining the content of «corruption behavior», which includes a wide range of actions and inactivity, ranging from a disciplinary breach and ending in a criminal offense (in particular, abuse of public office, bribery, extortion) [19]. On the contrary, the German CC refers only to bribery. «Corruption» is not a legal term in this state. Only major offenses related to bribery should be considered, and not those that can be understood in the wider context of «corruption» (e.g., fraud, money laundering, embezzlement, etc.). Recently, the most comprehensive reforms of German anti-corruption legislation have led to the introduction of criminal liability for bribing delegates and doctors in private practice, as well as the extension of criminal liability for bribery in the private and public sectors. Currently, the basic provisions on liability for bribery in the German CC are: 1) bribery in the public sector (Sections 331, 332, 333, 334, 335, 335a and 336); 2) bribery in the private/commercial sector (business transactions) – Sections 299 and 300; 3) bribery in the healthcare sector (Sections 299a, 299b and 300); 4) bribing voters (Section 108b); 5) bribing delegates (Section 108e) [20].

Conclusions. On the basis of the above, one should draw the following conclusions:

1. Currently, in theory and in practice, there is no flawless and universal notion of «corruption». Neither definition of corruption will be equally accepted in each particular country and society. The specificity of international anti-corruption conventions is that they emphasize not the definition of the concept of «corruption», but its individual types (forms). The exception is the Civil Law Convention on Corruption (ETS 174) dated November 4, 1999, where Article 2 defines the notion of «corruption», but it is abstract and contradictory. In criminal law the problem of determining the concept of «corruption» refers to: a) its essence and content; b) filling it with concrete specific features; c) direct indication by legislators to this concept within the limits of national criminal codes or separation instead of certain groups of acts – corruption or office (service) crimes. Definition of corruption in the criminal law of foreign countries is characterized by diversity and it may have a narrower or wider meaning. First of all, corruption (bribery) covers two separate but inextricably linked acts – giving bribes and obtaining bribes (respectively, active and passive bribery).

2. In Ukraine, the legal concept of «corruption» has only criminal-legal content, since its key terms are used primarily in the national CC. Such a situation is unacceptable, since the definition of corruption does not directly cover the issue of administrative, civil-legal and disciplinary liability, although according to the Law of Ukraine «On the Prevention of Corruption» dated October 14, 2014, No. 1700-VII, these types of liability for committing corrupt acts are foreseen. In the CC of Ukraine corruption appears in corruption crimes, a list of which is given in the Note to the Article 45, which do not completely coincide with the list of crimes in sphere of service activities and professional activities involving the rendering of public services. In addition, corruption crimes can affect relations in following areas: property; economic activity; public safety; the sphere of turnover of narcotic means, psychotropic substances, analogues thereof, or precursors; prestige of government authorities, local self-government bodies, and associations of citizens; the established procedure of performing military service. At the same time, comparing the national and international systems of corruption crimes, we can assert that they completely do not coincide.

3. Taking into account international and foreign experience, two most appropriate ways of improving the concept of «corruption» in Ukrainian legislation can be distinguished: a) it is necessary to fill the current definition of corruption with detailed descriptive categories that would expand and clarify the boundaries of its items, acts, consequences, etc., or b) it should be clearly described the violation of which particular criminal, administrative or civil-legal norms, as well as disciplinary rules, will form corruption. In any case, the notion of «corruption» should be comprehensive, rather than gravitating towards one or another type of offense, in particular criminal one.

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