

ЗАКОНОДАВЧЕ ВРЕГУЛЮВАННЯ ПРАВозАСТОСУВАННЯ

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THE CHALLENGES OF FIGHTING CORRUPTION IN UKRAINE

This research article analyzes corruption manifestations in Ukraine. The author underlined and described the nature of petty and business corruption. Particular attention was paid to the description of political corruption concept, where the corruption is used by ruling elite to seize and maintain the power, to nullify the political competitors by outwardly legal actions. There were found out the main difficulties in fighting corruption measures implementation faced by the corruption fighting competent agencies in Ukraine.

Keywords: corruption, public administration, corruption offenses, administrative liability, restrictions, limitations on the power, unlawful benefits, gift, conflict of interests.

As a social phenomenon, corruption emerged together with power and monetary relations among people. And since then, people have been trying to find out the reasons for corruption and the ways to mitigate it. As the matter of fact, the God gave us an anti-corruption commandment through Moses who wrote down the words he heard from the heaven: «Do not accept a bribe, for a bribe blinds

those who see and twists the words of the innocent» [1]. This citation draws people's attention to the evil of corruption and the need to fight it. The state is the only effective subject that can prevent such phenomenon, as a society and each certain person may only limit its influence and development to a reasonable extent. Social chaos arises in the environment of uncertainty in the government attitude to the methods of countering, inability to influence, the disappointment of society about the actions made by the state in that field, loss of moral postulates by people.

The purpose of this article is to show the main manifestation of corruption in Ukraine and to describe the main corruption types.

The certain Ukrainian corruption issues were studied in research works by such researches as A. Biletskyi, V. Bezrutchenko, T. Brus, V. Feshschuk, M. Kovaliv, O. Kuzmenko, S. Kushnariov, M. Melnyk, S. Nefiodov, O. Shapovalov, V. Chorna and others.

Modern social chaos in Ukraine mostly relates to the national-wide corruption schemes originating from bureaucracy relations and Ukrainian people's ability to tolerate the existing corruption rules and follow them to enjoy any services or benefits. So, there are two stimulation sides with the respective characteristics: the willingness to give and the willingness to take facilitates modern Ukrainian corruption growth. As soon as the existing legislation creates the environment where one cannot get necessary things in a legal way, and, at the same time, there are implemented ambiguous provisions approving a certain list of rights and obligations, and no liability (subterfuge or discrimination) for unlawful decision, that creates the best preconditions for corruption. Major population groups generally believe that corruption crimes make no harm to society, as in most cases, social groups select the corruption ways to resolve certain day-to-day issues. Habituation to corruption and its popularity creates tolerance to it at a simple level, and even if someone psychologically understands that it is not right, one cannot fight the inside conformity and go against the rules followed by others. It is so routine that became a national tradition.

Any official with powers to distribute certain resources and provide administrative services at his own discretion (civil servant, people's deputy, judge, policeman, teacher, doctor, etc.) tends to corruption. That is why, the main prerogative of the state is to moderate citizen's will to counter corruption not only with ideological and educational methods but also with repressive ones, in a lawful manner.

At a simple level, corruption is an abuse of power, official misconduct for personal enrichment. In the most destructive context, it is the relations system that allows to capital owners to get anything – benefits, influence, laws, beneficial decisions, protection, legislative and judicial power.

International legislation, and namely the UN Code of Conduct for Law Enforcement Officials, of December 17, 1979, defines corruption as: «...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» [2].

INDEM Foundation professionals also agree with that definition: «...corruption... is understood as the situation when an official makes an unlawful decision... and someone else benefits from it, ...and such official, in his turn, unlawfully benefits from that person». The similar definition of corruption is given in the Criminal Law Convention on Corruption adopted by the 103rd session of the Committee of Ministers of the Council of Europe on November 4, 1998 [3, p. 362].

The phenomenon of corruption is difficult to understand and define mostly because of the existing combination of bipolar political, legal, economical, social and psychological factors, which is confirmed by the results of numerous recent researches [4]. For example, M. Melnyk in his monograph says that «Corruption is not only social, but also psychological and moral phenomenon. It cannot exist without people, their behavior, and activity. Corruption is the way of thinking determining the life style» [5, p. 27]. O. Shapovalov and S. Kushnariov explain that phenomenon from the other point of view, they understand it as natural fruitful cooperation among people, one of whom are in powerful government authorities, and others do not have administrative powers, but both parties wish to exploit governmental mechanism owned by society, for their personal purposes [6, p. 12].

Pursuant to Art. 1 of the Law of Ukraine «On Prevention of Corruption» [4], corruption is the use by a person of the authority or powers connected with them in order to obtain an unlawful benefit or the acceptance of such a benefit or the acceptance of the promise/offer of such benefit to himself or other persons or, accordingly, the promise/offer or provision of unlawful benefit to a person or his or her a requirement to other individuals or legal entities to incline the person to the unlawful use of the authority or

the powers attached to it. About that, we must admit, that the above definition is way too criminalizing, a law-maker does not refer to corruptive violations punishable mostly with administrative, disciplinary or civil law sanctions. And such violations are a real threat that creates a background for corruption crimes.

Ukrainian corruption has various manifestations. We may classify both petty and business corruption. Petty corruption, as a carcinoma gradually corrodes the society because it is tightly connected with the everyday life of common people dealing with civil servants who have powers related to private life privileges – health, education, recreation, accomodation, etc. Various gifts from citizens and services to officials and their families are the clear-cut example of petty corruption. Nepotism in public administration which is not corruption under the current laws also refers to that category.

Business corruption arises in cooperation between authorities and business in business and entrepreneurship activities of individuals and legal entities. It arises when one person wishes to get any material comforts or benefits generally inaccessible to such person, and ambition to become rich at somebody else's expense, on the other hand. For example, in business conflict, the parties may wish to get support from a judge to get a beneficial judgment. Businessmen complain that they faced the dozens of swindlers and in most cases, that cannot avoid the joining to the corruption scheme [1]. Corruption development also relates to the legal status of a certain official. Accordingly, today little or no principles have been elaborated or put in place about the idea of corporate solidarity, poor psychological training of that category of persons, which does not allow to resist the temptation of bribery, excessive conformism in relations with a direct leader who does not properly fight corruption, because he does not have collective responsibility for detected corruption crimes or violations associated with corruption, lack of life skills to overcome complex service and personal problems, not developed and not implemented psychology of adoption and implementation of solutions based on the standards of law, morality, and social justice, not produced a steady lack of desire to receive undue benefits and any other benefits and services for their work.

Political corruption, as the form of corruption in general, gathers threatening speed and is used by ruling elite to seize and maintain the power, to nullify the political competitors by outwardly legal, but the actually unlawful seizure of public resources to exploit them for

their own political aims in return of the future «dividends». The forms of such corruption include: lobbying, protectionism, favorable appointment to public office, investment of commercial structures at the expense of the state budget, management of civil servants, commercial structures through the appointment of relatives and folks in them, establishment of joint-stock companies based on state enterprises, granting of privileges, advantages, exceptions from general rules for «their» firms and companies, transfer of state property to joint-stock companies, non-transparent privatization (for example, the privatization of OJSC «Odessa Port Plant»), a fictitious bankruptcy, sending children to study abroad at the expense of sponsors, etc. [7, p. 7].

There are no any uncorrupted life spheres in Ukraine. It creates considerable threats to democracy, the rule of law, implementation and development of civil society. This phenomenon exists everywhere in social life. Today, there's a big gap between the country's huge opportunities and living conditions of its citizens.

At the same time, it is impossible to fight Ukrainian corruption only with repression. That phenomenon may be frightened by comprehensive social reforms under which faithful and honest conduct will become beneficial for society. Until then, all newly built government institutions will come to a standstill. The first step of counteractions is changing of Ukrainians' attitude to corruption, making them unwilling to give inappropriate benefits to corrupt officials. The results of numerous applied scientific researches show that the state, acting individually, without an active support of citizens and social society institutions cannot decrease the corruption level, moreover, it is just impossible [8, p. 111]. To do that, there must be implemented the set of measures to promote the understanding that corruption is not normal, but inappropriate and blatant phenomenon. The development and implementation of anti-corruption culture mechanism are one of the anti-corruption principles. Meaningful implementation of legal culture among citizens will considerably influence the arbitrariness of those in power [9]. It may be done through continuous educational seminars in schools, educational institutions, articles and videos in mass media, motivational stories, etc. Unfortunately, now that work is limited to two or three promotional billboards in the cities.

Healed social society, economically and politically free, will be able to ensure independent control over corruption in public

administration area. That is why it is reasonable to regard civil control in terms of control over civil society institutions. Such actions of civil society institutions are aimed at increasing the efficiency of public authorities, as well as state and municipal organizations and institutions in the process of developing and implementing their public policy [7, p. 113]. The development of civil anti-corruption initiative will become an appropriate instrument to prevent that negative phenomenon in Ukraine. Now Ukrainian public users have numerous ways to participate creation and implementation of anti-corruption policy: advisory bodies have been set up and functioning, which include representatives of the public. The public is widely involved with donors who provide funding for implementing reforms and can somehow put pressure on Ukrainian authorities, and so on. According to the Ministry of Justice, there are registered more than 130 public organizations in Ukraine which in one or another way declare their intentions to fight the corruption, about 350 public associations which tasks are to protect civil rights and freedoms, and about 30 organizations aiming to facilitate civil servant screening processes in Ukraine. The new about those organization is that they are now created not only in Kyiv but also in regions [10]. But the imperfection of legislation on the definition of the rights and obligations of civic organizations, the desire of activists to earn in their activities, as well as the persecution of personal and political goals by the public play a negative role in the perception of society by the activities of civic organizations. Unfortunately, the scandals about «grant-wasting» in the media still do not subsist. From time to time there are news articles about corruption cases among public organizations. An important problem in the work of anti-corruption NGOs is the reluctance of the government to involve the public in participating in the formation of a state anti-corruption policy, which combines the resistance of both the authorities as a whole and their leaders in particular; lack of political will and unanimity in making important decisions. At the same time, public organizations complain that they cannot exist only for their own money, so they are mostly funded by national or international donors [11, p. 233] which makes them dependent, discriminatory and accountable.

Nevertheless, the state has been recently implementing anti-corruption mechanisms by anti-corruption laws and creation of anti-corruption agencies. We mean such Ukrainian anti-corruption laws as «On Anti-Corruption Principles in Ukraine (Anti-Corruption

Strategy)» for 2014–2017 No. 1699-VII; «On the National Anti-Corruption Bureau of Ukraine» No. 1698-VII; «On Prevention of Corruption» No. 1700-VII (came into force on April 26, 2015); «On Amendments to Certain Legal Acts of Ukraine about the Determining of Ultimate Beneficiaries of Legal Entities and Public Persons» No. 1701-VII. In addition, under the Decree of the President of Ukraine No. 808/2014 of October 14, 2014, the National Anti-Corruption Policy Council was created as an advisory body of the President of Ukraine, which activities are aimed at the full and effective implementation of its constitutional powers in that area.

The anti-corruption strategy covers all key legal relations segments arising both in anti-corruption professional activities of competent government agencies (including law-enforcement ones) and also during the implementation of preventive measures (i.e. prevention of crimes and corruption).

Ukrainian laws provide for the system of specially authorized anti-corruption bodies: prosecution bodies, the National Police of Ukraine, the National Anti-Corruption Bureau of Ukraine, the National Agency for Prevention of Corruption.

Its a shame that the above list does not include the Security Service of Ukraine, although Art. 2 of the Law of Ukraine «On Security Service of Ukraine» provides that the tasks of the Security Service of Ukraine include prevention, detection, termination, and investigation of organized crime activity and corruption in administration and economic field.

The new Law of Ukraine «On Prevention of Corruption» that came into effect on April 26, 2015, there was created the National Agency for Prevention of Corruption. As a special status central body, the Agency ensures creation and implementation of the national anti-corruption policy and is accountable to the Verkhovna Rada of Ukraine, and controlled and accountable before the Cabinet of Ministers of Ukraine. Public control over its activities is ensured by the Public Council at the National Agency, which, according to the requirements of Art. 14 of the said law, is created and formed by the Cabinet of Ministers of Ukraine from 15 persons according to the results of the competition. The Public Council will hear the information on the implementation of the plans and tasks of the National Agency, approve annual reports on its activities, provide conclusions on the

results of the examination of its projects, delegate to its National Agency a representative with the right of deliberative vote.

A significant obstacle to the fight against corruption in the activities of the National Agency for the Prevention of Corruption is the creation of obstacles in its work, and namely: insufficient material and technical base, lacking human resources, lacking territorial administrative bodies, lacking support from the Cabinet of Ministers of Ukraine, conflict with the Ministry of Justice of Ukraine, delayed election of the fifth member of the National Agency for the Prevention of Corruption, etc.

Repeated cases of delaying the registration process of regulatory acts adopted by the National Agency for the Prevention of Corruption, which greatly complicated the work of the agency. Thus, the lengthy and complicated process was the approval of the text of the document, which regulates the procedure for the control and complete verification of the declaration of the person authorized to perform the functions of the state or local government (on February 13, 2017, the Ministry of Justice finally registered the relevant decision of the National Agency for the Prevention of Corruption «On Approval of the Procedure for Controlling and Full Verification of the Declaration of the Person Authorized to Perform the Functions of the State or Local Self-Government» dated February 10, 2017, No. 56).

The National Anti-Corruption Bureau of Ukraine is the law enforcement agency of Ukraine with wide authorities in prevention, detection, termination, and investigation of corruption crimes committed by top officials.

The National Anti-Corruption Bureau of Ukraine was created on the basis of the Law of Ukraine «On the National Anti-Corruption Bureau of Ukraine» of October 14, 2014. Such experience is new to our country. Similar structures exist in USA, Poland, France, Singapore, Israel, and India. The task of the National Anti-Corruption Bureau of Ukraine is the prevention of criminal corruption offenses committed by top officials authorized to perform the functions of the State or local self-government and create threats to the national security.

The National Bureau is controlled only by the committee of the Verkhovna Rada of Ukraine competent in anti-corruption activities. In addition, the Director of the National Bureau notifies the President of Ukraine, the Verkhovna Rada of Ukraine and the Cabinet of

Ministers of Ukraine about the principal issues of the National Bureau and its departments and the progress of tasks assigned to it, including compliance with laws, rights, and freedoms of citizens.

In accordance with the Law of Ukraine «On Amendments to Certain Legislative Acts of Ukraine on Ensuring the Activities of the National Anti-Corruption Bureau of Ukraine and the National Agency for the Prevention of Corruption» of February 12, 2015, No. 198-VIII, amendments to the Law of Ukraine «On the Prosecutor's Office» were made. In accordance with the aforementioned Law, the General Prosecutor's Office of Ukraine created (on the rights of a structural unit) the Specialized Anti-Corruption Prosecutor's Office, which is entrusted with the following functions: 1) supervising the observance of laws during the pre-trial investigation carried out by the National Anti-Corruption Bureau of Ukraine; 2) maintenance of state prosecution in relevant proceedings; 3) representation of the interests of a citizen or state in court and related to corrupt or corruption-related offenses.

In accordance with Art. 8 of the Law of Ukraine «On the Prosecutor's Office» the function of supervising compliance with laws while carrying out operational-search activities and pre-trial investigation by the National Anti-Corruption Bureau of Ukraine is carried out exclusively by the Specialized Anti-Corruption Prosecutor's Office. Despite the fact that the head of the Specialized Anti-Corruption Prosecutor's Office is, at the same time, the Deputy Prosecutor General of Ukraine, the legislators virtually removed him from subordination to the latter, which actually created favorable conditions for the merger of the National Anti-Corruption Bureau of Ukraine and the Specialized Anti-Corruption Prosecutor's Office, and, as a result, their complete lack of control .

So, despite the fact that in accordance with part 5 of Art. 36 of the Criminal Procedure Code of Ukraine, higher prosecutors have the right, by their motivated decision, to entrust the commission of a pre-trial investigation of any criminal proceeding to another pre-trial investigation body in the event of its ineffectiveness; at the same time, the same norm prohibits even the Prosecutor General of Ukraine to entrust the pre-trial investigation of criminal offenses to the suspects The National Anti-Corruption Bureau of Ukraine, and other pre-trial investigation bodies. That is, actually allowed to detectives of the National Anti-Corruption Bureau of Ukraine conduct

a pre-trial investigation on the subjects they are investigating, and more precisely, on any matters that they have taken to its proceedings, not only ineffectively, but also at its discretion, also biased, in violation norms of procedural law and the rights of citizens, which contradicts the basic principles of criminal proceedings, listed in Art. 7 of the Criminal Procedural Code of Ukraine, including the rule of law, and accordingly the presumption of innocence, legality, equality of all before the law and the court, the provision of rights and freedoms and personal integrity, etc. [12].

The provisions of the aforementioned article of the Criminal Procedure Code of Ukraine are absolutely unacceptable and contrary to the very essence of the prosecutor's oversight of the observance of laws during the pre-trial investigation in the form of procedural guidance, and that detectives of the National Anti-Corruption Bureau of Ukraine «In order to prevent, detect, termination and disclosure of crimes attributed to his investigation, according to the decision of the Director of the National Anti-Corruption Bureau of Ukraine (which is absolutely legal inaccuracy and, in agreement with the prosecutor of the Specialized Anti-Corruption Prosecutor's Office (that is, by anyone and not necessarily its leader), may also investigate crimes that are attributed to the investigators of other bodies». In this sense, it is important that neither the Law of Ukraine «On the National Anti-Corruption Bureau» nor the Law of Ukraine «On Prosecutor's Office» contain provisions that would establish specific responsibility of the same leaders of the National Anti-Corruption Bureau of Ukraine and the Specialized Anti-Corruption Prosecutor for non-compliance requirements of legislation, including and the protection of the rights and freedoms of citizens, or the violation of their professional duties, which also can form a sense of irresponsibility in them in the aggregate [11].

So, the investigation authorities may not enjoy total independence allowing the limitation of individual rights. Such institutions are independent in case of their depoliticization. Actually, it is aimed at increasing the level of organizational and operational autonomy, guaranteed by institutional and legal mechanisms aimed at preventing unlawful political interference. In international practice, anti-corruption agencies are either accountable to and controlled by

the certain regime or have constitutional status equal to the ombudsman or judicial authorities.

One more serious gaps in anti-corruption activities in Ukraine are gaps in legislation in the sphere of qualification of corruption crimes. Vague legal definition of unlawful benefit or gift enables judicial authorities to qualify, at their discretion, a corruption crime subject to criminal liability to corruption offense subject to administrative liability. At the same time, courts are allowed to apply different types of penalties for an offense committed in connection with corruption that has different powers and the effects of punishment, fines also provide for one corruption violation of different sizes, given to the discretion of the judges who have the right to choose the limits of the punishment at their discretion, in fact, it is the leverage of the judge's influence on the citizen who committed the offense, which may lead to a judge's desire to obtain an unlawful benefit for the decision taken.

Also, it is doubtful that the concept of close relatives under Ukrainian laws do not include cousins, second cousins, nephews, nieces, godfathers, and godmothers. That creates certain difficulties in finding out the accountable relations among close relatives in public governmental and local authorities. Nepotism creates personal relations (secret agreements) that weaken the mechanisms of control and prevention of corruption.

The letter of the High Specialized Court «On the Prosecution of Certain Offenses Related to Corruption dated 05/22/2017» is an absolute manipulation of the terms «dismissal» and «termination of activity». According to the content of the letter, it is established that the term «termination» in the general rule (Art. 36 of the Labor Code of Ukraine) correlates with the term «dismissal» as an integral part, covering the latter. This follows from the analysis of the norms of other special legal acts, in particular the provisions of the Law of Ukraine «On Civil Service» (Art. 83), the Law of Ukraine «On the Status of a People's Deputy of Ukraine» (Art. 4), etc., where the specified terms cover each other. At the same time, that rule has exceptions. Thus, the Law of Ukraine of June 2, 2016, No. 1402-VIII «On the Judiciary and Status of Judges» (hereinafter – Law No. 1402) distinguishes between the terms «dismissal» (Art. 112–118) and «termination» (Art. 119–125), and therefore, delimits them, providing for different grounds for the occurrence of

such legal facts The above mentioned provisions of that Law totally correspond to Art. 126 of the Constitution of Ukraine which makes distinction between those concepts. A similar approach is used by the legislator to terminate the powers of the judge of the Constitutional Court of Ukraine and his dismissal (Art. 149¹ of the Constitution of Ukraine). The above explanation leads to the selectivity of responsibility, the formation of corruption schemes, the confusion of legislation, as in the first part stated that the determinants of «termination» and «dismissal» are correlated as integer and part, in the second part it is noted that this statement is not for everyone. Namely, the uncertainty of the essence of the term «termination of activity» and hypocrisy on the part of the judicial system makes it impossible (or, on the contrary, it does not allow, selectively) fulfilling the duty to those who performed the functions of the state and local self-government one year after the termination of activity, and this also avoids the identification of unlawful benefits.

The above listed gaps in legislation are only examples of the existing problems in bringing individuals to legal responsibility for corruption offenses.

And lastly, we would like to disagree with the idea of introducing an anti-corruption court in Ukraine, and, in accordance with the Constitution of Ukraine, this court is endowed with specialized, special powers that do not exist in the modern judicial system, as the very feature of its specialization does not coincide with the legal characteristics of existing courts in the country. And then the introduction of it as a court with general powers makes no sense in its creation. It would be more appropriate to allow all courts to hear corruption-related cases, which will allow creating the uniform anti-corruption system in courts. Instead, today we will be threatened to create a pocket court that will target ordinary citizens who are not able to defend themselves and will be convicted on the basis of illegally obtained, wrong, or violent evidence or the evidence obtained in the composition of the crime. That means that the effectiveness of the said court will depend on the number of sham cases, instead of the quality of anti-corruption measures directed to the punishment of large-scale corruptive scheme players.

At the same time, there's almost no any motivation mechanism allowing to detect corruption schemes and corruptive officials. Today, disclosers operate on their own altruistic motives and subjective

heroism. That is why it is necessary to introduce, at the legislative level, a percentage of the saved amount of funds (for example, 10–15 %) to each discloser.

Summing up the above, we believe that existing gaps in combating corruption can be eliminated by the gradual introduction of qualitative reforms, the creation of the anti-corruption culture of society, elimination of gaps in legislation, but the people should not be ineffective, they should be aware of their own role in counteracting this phenomenon. Its participation is necessary because there are many roles that society can play more effectively than any other institution.

Along with this, it is necessary to create a mechanism of deterrence and counterbalance, control (responsibility) of state power to society, transparency of the process of making major state decisions (including personnel).

Effectiveness improvement by: justified criteria for determining the optimal structure and size of executive bodies, since changes in their structure, status and functions are often corporate, not national interests; eliminating institutional reasons for a conflict of interests (for example, preventing the combination of functions of definition of rules, control and provision of public services in one body); decomercisation of state and municipal activities, including through the delegation of certain public social and legal services to non-state structures (for example, this process has long been taking place in the sphere of notarial activity); ensuring information transparency of the decision-making process of executive bodies (including access to financial documents of state bodies of non-governmental organizations and mass media); introduction of mechanisms of public influence on the activity of state departments (independent examination of public decision-making projects) [1].

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Проблеми протидії корупції в Україні

Здійснено аналіз корупційних проявів в Україні. Схарактеризовано дрібну та ділову корупцію. Особливу увагу приділено концепції політичної корупції, яку використовує правляча еліта з метою захоплення та підтримки влади, а також протистояння політичним конкурентам. Виявлено труднощі в контексті впровадження заходів із протидії корупції компетентними органами, які виконують цю діяльність.

Ключові слова: корупція, державне управління, корупційні правопорушення, адміністративна відповідальність, обмеження, обмеження влади, незаконні пільги, подарунок, конфлікт інтересів.