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Improvement of the mechanism of responsibility for committing a corruption offence

I. Rohatiuk*

Doctor of Law, Associate Professor, Senior Research Fellow, Chief Consultant of the Legal
and Anti-Corruption Policy Department of the Center for Security Studies
of the National Institute for Strategic Studies,
Kyiv, Ukraine
<https://orcid.org/0000-0002-3374-45977>

V. Komashko

PhD in Law, Head of the Legal and Anti-Corruption Policy Department of the Center
for Security Studies of the National Institute for Strategic Studies,
Kyiv, Ukraine
<https://orcid.org/0000-0003-1851-8548>

■ **Abstract.** The research presents proposals in the areas of legal and procedural regulation of the problem of criminal liability for crimes of corruption considering the necessity of preventing discrimination based on the committed socially dangerous act and guaranteeing constitutional rights and freedoms of a person. Changes in the legislation on liability for corruption crimes have demonstrated the attempts of the legislature to counteract the phenomenon of corruption in a particular way. Undoubtedly, this is the Law of Ukraine No. 1698-VII of October 14, 2014, according to which, to strengthen measures to combat corruption crimes, the following amendments were introduced to the Criminal Code of Ukraine, which restrict the possibility of applying for exemption from criminal liability, imposing a lighter sentence, exemption from punishment, replacement of the un-served part of the sentence with a lighter one to persons who have committed corruption crimes, etc. However, the question of whether it has achieved its purpose after six years of operation, in the author's opinion, remains rhetorical. The purpose of the research is to improve the specific features of criminal prosecution for corruption offences in Ukraine and, thus, to improve the prevention of such crimes. Methodology. To achieve this purpose, Aristotelian, system-structural, comparative legal and statistical methods were applied. Scientific originality. Having analysed the provisions of legislation and judicial practice, it was proposed to provide financial liability and punishment along with the current procedure of responsibility and punishment for corruption crimes, which allows committing a crime to become economically unprofitable. The proposals are based on the case law of the European Court of Human Rights. Conclusions. The particular result that the state will get from the such proposals is established: restoration of state interests, replenishment of the state budget and reduction of the burden on the penitentiary system

■ **Keywords:** corruption crime; responsibility; punishment; discrimination; European Court of Human Rights

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■ *Corresponding author

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■ Introduction

Each change of political leadership and which mostly occurs after the next elections in the country, witnesses the next statements of senior officials on strengthening or improving the fight against corruption. There seem to be some processes in this area. But, strangely enough, it is becoming increasingly complicated to calculate the results of this struggle, in particular, due to insufficient statistical reporting on criminal corruption. If the criminal law in Article 45 [1] defines a group of crimes as corruption, it is extremely problematic to trace or at least summarise such information. It refers to the number of criminal offences registered in the Unified Register of Pre-trial Investigations, closed proceedings, persons prosecuted for their commission, and, most importantly, the availability of convictions for such crimes [2]. For the state, and for the average citizen, the issue of the inevitability of responsibility is essential.

Unfortunately, over the past few years, there have been a lot of high-profile PR campaigns regarding the detention of corrupt officials, registration of criminal proceedings, and even quoting of sanctions of the article, which provide for long-term imprisonment [3]. However, loud statements during the investigation are sprayed into procedural dust. And only in some cases, individual proceedings on corruption crimes are brought to court. Thus, the number of such verdicts is negligible, the calculation of these crimes is impossible, as it is non-transparent, and, as a result, according to the corruption perception index, over the past five years, there has been no significant progress. Ukraine is at the bottom of the list on the corruption perception index in the world. According to the international organisation "Transparency International" (2015 – 142nd place in the ranking, 2016 – 131, 2017 – 130, 2018 – 120, 2019 – 126, 2020 – 117th place).

The above review of the legislation and practical application of anti-corruption laws demonstrates that this legislative and scientific debate will not be resolved quickly. And the undying interest in this subject among legal scholars is now in an active phase [4-6]. In different periods, the issue of combating corruption was explored by many lawyers, in particular: L.I. Arkusha, L.V. Bagriy-Shakhmatov, A.M. Boyko, V.I. Borisov, O.Yu. Danshin, O.M. Dzhuzha, V.M. Dremin, O.O. Dudorov, Z.A. Zaginei, S.A. Zadorozhny, A.P. Zakalyuk, A.F. Zelinsky, O.G. Kalman, O.O. Kvasha, V.M. Kirichko, M.G. Kolodyazhny, O.M. Kostenko, O.G. Kulyk, I.V. Kushnarev, O.M. Lozynskyi, I.E. Mezentsseva, M.I. Melnyk, D.G. Mykhalenko, A.A. Muzyka, V.O. Navrotskyi, E.V. Nevmerzhytskyi, D.O. Oliynyk, A.V. Savchenko, E.D. Skulysh, E.L. Streltsov, V.Y. Tatsiy, V.O. Tulyakov, P.L. Fris, M.I. Havroniuk, V.I. Shakun, O.V. Shevchenko, O.Y. Shostko, N.M. Yarmysh etc. Translated with DeepL However, the issues of the

current state of investigation of corruption crimes, criminal liability and punishment for these offences remain insufficiently researched.

The purpose of the study - define a precise procedure for criminal prosecution and punishment for corruption crimes, and compensation for damages caused to the interests of the state. Thus, it will prevent other persons from committing such crimes in the future.

■ Outline of the Main Material

The Constitution of Ukraine [7] declares that the rule of law is acknowledged and operates in Ukraine. A person, their life and health, honour and dignity, inviolability and security are the highest social values. Human rights and freedoms and their guarantees determine the content and trend of state activity. Affirming and ensuring human rights and freedoms is the main duty of the state (Articles 1, 3, 8).

Therewith, Articles 21 and 24 of the Constitution of Ukraine state that all people are free and equal in dignity and rights. Human rights and freedoms are inalienable and inviolable.

Citizens have equal constitutional rights and freedoms and are equal before the law. There can be no privileges or restrictions on any grounds.

According to Article 2 of Section II of the Final Provisions of the Law of Ukraine No. 1698-VII dated October 14, 2014, the Criminal Code of Ukraine [8] was amended to strengthen measures to combat corruption crimes, limiting the possibility of applying for exemption from criminal liability, imposing a lighter sentence, exemption from punishment, replacement of the un-served part of the sentence with a lighter one to persons who have committed corruption crimes. The procedure of serving the sentence, application of amnesty, forgiveness and removal of a criminal record has changed.

Article 45 of the Criminal Code of Ukraine [1] stipulates that corruption criminal offences under this Code are criminal offences under Articles 191, 262, 308, 312, 313, 320, 357, 410 in case of their commission through abuse of office, and criminal offences under Articles 210, 354, 364, 364, 365, 368-369 of this Code.

The provisions of Art. 45 of the CC of Ukraine, which provides for exemption from criminal liability in connection with effective repentance, and Art. 69 of the CC of Ukraine, which provides for the imposition of a lighter penalty than provided by law for a criminal offence, cannot be applied to persons who have committed corruption crimes. Such provision concerns the imposition of both the main and additional punishment.

In addition, Part 4 of Article 74 of the CC of Ukraine "Exemption from punishment and its serving" excludes this possibility for such persons.

By changing the content of Part 1 of Art. 75 and Part 1 of Art. 79 of the Criminal Code of Ukraine, the

legislator explicitly stated that the court may decide to release from serving a sentence with probation, except in cases of conviction for a corruption crime, including those committed by a pregnant woman or a woman with children under the age of 7.

Therewith, Part 2 of Art. 75 of the CC of Ukraine, which defines the conditions for release from serving a sentence with probation, in case of approval of a reconciliation agreement or plea of guilty, does not provide for such a prohibition.

By the provisions of Part 1 of Art. 65 of the CC of Ukraine, the general principles of sentencing are established, according to which the court imposes punishment: 1) within the limits established in the sanction of the article of the Special Part of this Code, which provides for liability for the crime committed; 2) by the provisions of the General Part of this Code; 3) considering the severity of the crime, the personality of the perpetrator and the circumstances mitigating and aggravating the punishment.

The above demonstrates that according to the mentioned provision, there are no specific features of punishment for corruption crimes that would prevent the application of Part 2 of Art. 75 of the CC of Ukraine.

The prohibition of imposing a lighter sentence and exemption from punishment or its serving may prevent the court from observing the individualisation of punishment for persons who have committed corruption crimes guaranteed by Article 61 of the Constitution of Ukraine.

Demonstrating a particular humanism, the legislator, considering the gravity of the crime, provides the convicted person, after serving a specific period of punishment, with the right to apply incentive rules (Articles 81, 82, 86, 87 of the CC of Ukraine).

Therewith, persons serving a sentence for committing corruption crimes of medium gravity are equated to persons who have committed intentional grave or reckless particularly grave crimes (Articles 81, 82 of the CC of Ukraine).

For persons who have committed corruption crimes, there is a specific procedure for applying the act of amnesty and forgiveness.

Such a selective mechanism in practice results in the fact that the above-mentioned institutions of criminal law are applied to any category of persons guilty of committing crimes (murderers, rapists, drug addicts, etc.), except for those who belong to "corrupt officials". For example, for committing crimes under the following articles: 110-2 (financing of actions committed for violent change or overthrow of the constitutional order or takeover of state power, change of borders of the territory or state border of Ukraine), 113 (sabotage), 115 (premeditated murder), 150 (exploitation of children), 152 (rape), 187 (robbery), 258 (terrorist act), 2585 (financing of terrorism) of the CC of Ukraine – the law does not

prohibit the application of the provisions of Articles 69, 75 of the CC of Ukraine in the case of punishment.

Under Part 3 of Article 50 of the CC of Ukraine, punishment is not intended to cause physical suffering or humiliation of human dignity. The legislator has defined the following principles of serving a sentence: legality, justice, humanism, equality before the law, and respect for human rights and freedoms (Article 5 of the Penal Code of Ukraine [9]).

Under Article 3 of the CC of Ukraine and Article 1 of the CPC of Ukraine [10], the legislation of Ukraine on criminal liability and criminal procedural legislation consists of the relevant codes, which are based on the Constitution of Ukraine and generally acknowledged principles and provisions of international law.

The general principles of criminal proceedings include the rule of law, which is applied considering the practice of the ECHR (Article 8 of the CPC of Ukraine) and legality, which imposes an obligation on a specific range of subjects to strictly comply with the requirements of the Constitution of Ukraine, international treaties ratified by the Verkhovna Rada of Ukraine, and the requirements of other legislations (Article 9 of the CPC of Ukraine).

The establishment of different rules for persons who have committed corruption crimes and those who have committed other crimes may indicate the application of discriminatory measures within the meaning of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (hereinafter the Convention [11]).

In particular, Articles 6 and 14 of the Convention state that everyone is guaranteed the right to a fair trial and the enjoyment of their rights and freedoms without discrimination on any grounds. In addition, it is stated in Part 2 of Article 1 of Protocol No. 12 to the Convention: no one can be discriminated against by any public authority on any ground.

In paragraph 53 of the ECHR judgment in the case of "... Sejdić and Finci v. Bosnia and Herzegovina" the Court noted, "... that while Article 14 of the Convention prohibits discrimination in the enjoyment of "the rights and freedoms outlined in the Convention", Article 1 of Protocol No. 12 extends the guarantees of protection against discrimination to "any right provided for by law"". Thus, it establishes a general prohibition of discrimination" [12].

The requirement to observe justice and not to allow discrimination in the process of applying criminal punishment is enshrined in other international human rights documents.

Article 10 of the Universal Declaration of Human Rights of 1948 (adopted and proclaimed by Resolution 217 A (III) of the UN General Assembly of December 10, 1948) proclaims that everyone is entitled in full equality to a fair and public hearing in the determination of their rights and obligations and any

criminal charge against them by an independent and impartial tribunal [13].

The equality of all before the court is mentioned in Article 14 of the International Covenant on Civil and Political Rights of December 16, 1966 [14].

It corresponds to the recommendations contained in paragraphs 2.1, 2.2, and 2.3 of the UN Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules) adopted by UN General Assembly Resolution 45/110 of 14 December 1990 [15].

These rules apply to all persons subject to prosecution without any discrimination (paragraph 2.2).

Considering the provisions of Part 1 of Article 9 of the Constitution of Ukraine, these international acts are part of the national legislation of Ukraine.

The decision of the Constitutional Court of Ukraine No. 15-RP/2004 dated November 2, 2004 (case 1-33/2044) [16] states that a separate manifestation of justice is the issue of correspondence of the punishment to the crime committed; the category of justice provides that the punishment for a crime should be proportionate to the crime. Fair implementation of the law provides, first of all, a non-discriminatory approach and impartiality. It requires both that the offence and the penalty be consistent with each other, and that the penalty be fairly proportionate to the gravity and circumstances of the offence and the person of the perpetrator. The appropriate punishment for the gravity of the crime follows from the principle of the rule of law, from the essence of constitutional rights and freedoms of man and citizen, in particular the right to freedom, which can not be restricted, except as provided by the Constitution of Ukraine.

In addition, the Constitutional Court of Ukraine in its decision No. 9-RP/2012 dated April 12, 2012 (case No. 1-10/2012) [17] noted that equality and inadmissibility of discrimination are not only constitutional principles of the national legal system of Ukraine, and fundamental values of the international community, which is stressed in international legislation on the protection of human and civil rights and freedoms.

The equality of all people in their rights and freedoms guaranteed by the Constitution of Ukraine means the necessity to provide them with equal legal opportunities of both material and procedural nature for the implementation of the same rights and freedoms in content and scope.

Violation of international guarantees by the state can result in applications to the ECHR for violation of Articles 6 and 14 of the Convention and cause adverse consequences.

Thus, according to the Annual Report on the activities of the Commissioner for Human Rights of the European Court of Human Rights, 2020, as of 31 December 2020, a total of 62,000 cases against States Parties to the Convention were pending before the European Court, of which 10,400 cases were against Ukraine,

which is 16.8% of the total number of cases. In 86 cases against Ukraine, in which the European Court delivered judgments on the merits, the applicants claimed compensation in the total amount of about EUR 31,424,464.27. After reviewing the cases, and considering the positions of the Government, the European Court ordered Ukraine to pay 683,286.19 euros.

According to the annual reports on the results of the activities of the Commissioner for the European Court of Human Rights for 2008-2020 [18], the following amounts were paid from the state budget to execute the judgments of the European Court on the merits of complaints 1) 2008 – 20,434,375.53 UAH; 2) 2009 – 7,939,067.82 UAH; 3) 2010 – 29,174,853.54 UAH; 4) 2011 – 25,021,734.79 UAH; 5) 2012 – 39,002,553.75 UAH; 6) 2014 – 169817.7 UAH; 7) 2015 – 639,981,892.09 UAH; 8) 2016 – 612,294,315.54 UAH; 9) 2017 – 61,365.79 thousand UAH; 10) 2018 – 32 646 827,39 UAH; 11) 2019 – 44 987 585,14 UAH; 12) 2020 – 24 844,8 UAH.

Thus, over the past twelve years, Ukraine has paid about UAH 1 707 511492.

Notably, by paragraphs 2.3 and 2.4 of the recommendations adopted by the UN General Assembly Resolution 45/110 of 14 December 1990, the UN Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules): “To provide greater flexibility, considering the nature and gravity of the offence, the personality and background of the offender, and to protect the interests of society and avoid the unnecessary use of imprisonment, the criminal justice system should provide for a wide range of non-custodial measures, from pre-trial to post-trial measures. The development of new non-custodial measures should be encouraged and closely monitored and their use systematically evaluated”.

Considering the obligation of the State to establish the prerequisites for reducing the number of applications to the ECHR, as defined by the Law of Ukraine “On the Execution of Judgments and Application of the ECHR Practice” [19], and replenishment of the State budget at the expense of the person who violated the law, it is proposed to consider this issue when drafting amendments to the legislation of Ukraine regulating this type of legal relationship.

In this context, the position on civil forfeiture outlined recently in the statement of the Prosecutor General's Office is interesting, which states that such an institution was introduced in Ukraine more than a year and a half ago, but its implementation is currently virtually absent. It should become not declarative but an efficient way to replenish the state budget [20].

Undoubtedly, the mentioned institution of recognition of unjustified assets and their recovery to the state revenue has a noble purpose – replenishment of the state budget. However, when applying it,

it should be noted that the requirements of the law should not contradict the provisions of the Constitution of Ukraine, as in this case the financial losses of the state in the process of applying to the court, including the ECHR, are possible again.

■ Conclusions

The particular result that the state will get from the proposed proposals is established: restoration of state interests, replenishment of the state budget and reduction of the burden on the penitentiary system.

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Удосконалення механізму відповідальності за вчинення корупційного правопорушення

I. В. Рогатюк

Доктор юридичних наук, доцент, старший науковий співробітник, головний консультант відділу правової та антикорупційної політики центру безпекових досліджень Національного інституту стратегічних досліджень,
м. Київ

<https://orcid.org/0000-0002-3374-4597>

В. В. Комашко

Кандидат юридичних наук, завідувач відділу правової та антикорупційної політики центру безпекових досліджень Національного інституту стратегічних досліджень,
м. Київ

<https://orcid.org/0000-0003-1851-8548>

■ **Анотація.** У статті викладено пропозиції щодо напрямів правового та процесуального врегулювання проблеми кримінально-правової відповідальності за вчинення злочинів корупційної спрямованості з огляду на необхідність попередження дискримінації за ознакою вчиненого суспільно небезпечного діяння та гарантії конституційних прав і свобод особи. Зміни законодавства щодо відповідальності за корупційні злочини засвідчили намагання законодавчої влади в певний спосіб протидіяти такому явищу, як корупція. Це, безперечно, Закон України від 14 жовтня 2014 року № 1698-VII, відповідно до якого з метою посилення заходів протидії корупційним злочинам внесено такі зміни до Кримінального кодексу України, що обмежують можливість застосування звільнення від кримінальної відповідальності, призначення м'якшого покарання, звільнення від покарання, заміну невідбутої частини покарання більш м'яким до осіб, які вчинили корупційні злочини, тощо. Однак питання, чи досягнув він своєї мети через шість років дії, на нашу думку, залишається риторичним. Метою статті є вдосконалення особливостей притягнення до кримінальної відповідальності за вчинення корупційних правопорушень в Україні та, завдяки цьому, поліпшення стану профілактики таких злочинів. Методологія. Для досягнення поставленої мети застосовано формально-логічний, системно-структурний, порівняльно-правовий і статистичний методи. Наукова новизна. Проаналізувавши положення законодавства та судової практики, запропоновано поряд із чинним порядком відповідальності та покарання за корупційні злочини передбачити фінансову відповідальність і покарання, завдяки чому вчинювати злочин стане економічно невигідно. Пропозиції висунуто з огляду на судову практику Європейського суду з прав людини. Висновки. Встановлено конкретний результат, який отримає держава від таких пропозицій: поновлення інтересів держави, поповнення державного бюджету й зниження навантаження на пенітенціарну систему

■ **Ключові слова:** корупційний злочин; відповідальність; покарання; дискримінація; Європейський суд з прав людини