

# Criminal Law Means for Counteraction to Corruption in Ukraine and Poland

## Similar and Distinctive Features

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*During the scientific research of any criminal-legal phenomenon or process, it is considered necessary to conduct an analysis of the origin of this phenomenon in a foreign country. This provides an opportunity not only to grasp the essence and understand the content of the subject of research, but also to develop effective countermeasures and borrow foreign experience. This becomes especially important in matters of combating corruption, when the criminal acts of officials reach not only domestic, but also international scales.*

*Scientists' positions, as well as the provisions of the current legislation in Ukraine and the Republic of Poland concerning the definition of the criminal law provisions for liability for corruption offenses are being researched, which is made on the relevant differences regarding the legislative enactment of the concept of "corruption" and its definition in the criminal law theory. Accordingly, a comparative approach to the methods of legislative consolidation of anti-corruption provides an opportunity to understand the social conditioning of the emergence of this phenomenon. Taking into account the integration processes in all spheres of life activity of society, the difference in the method of normative consolidation of actions forming such a phenomenon as corruption was revealed. This, in turn, not only indicates different forms of legislative fixation of the concept of the phenomenon, but also causes difficulties in the exchange of law enforcement practice, which causes a number of problems for both the relevant law enforcement agencies and ordinary citizens. A clear division and distinction between provisions on liability for corruption and corruption-related offenses was revealed.*

*Taking into account the position of the domestic criminal law doctrine, the analysis of the current Polish legislation provided an opportunity to formulate real options for borrowing foreign experience to solve the specified problems.*

**Keywords:** *corruption, corruption-related offenses, criminal law means, features, legislation*

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## Formulation of the problem

Among a number of ways to improve the criminal legislation of Ukraine, the use of the practice of carrying out this activity in foreign countries is recognised as an important condition. Undoubtedly, the experience of legal regulation of public relations in European states, compared to the domestic one, which is less than 30 years old (Ukraine gained independence in 1991), has a somewhat older history. For example, the criminal code of Germany is more than 100 years old, Italy is 80 years old, Switzerland is 70 years old, etc. The French Penal Code of 1992 replaced its predecessor, which had been in effect since 1810.

Scientists have repeatedly emphasised that issues of legislative establishment of liability for offenses should be based on the use of world experience, the most optimal legal solutions developed by the legal systems<sup>2</sup> and practice of other countries.<sup>3</sup> Valentyna Merkulova, for this reason, noted that this primarily concerns the regulation of liability for economic and service crimes, where countries with developed market economies have been polishing their own legislation for many decades in search of the most optimal option.<sup>4</sup> This is especially important in relation to issues of anti-corruption, because this dangerous phenomenon has no state and scientific boundaries, it absorbs with its influence almost all spheres of life, therefore, its study takes place comprehensively and consistently at the global level.<sup>5</sup>

## Analysis of recent research and publications

The theoretical and methodological basis of the article were the scientific works of domestic and foreign scientists which are dedicated to the separate issues of corruption as an illegal behaviour, the consolidation of which is reflected in the legislation of foreign countries, the solution of which is possible only at the international level. Among Ukrainian scientists, it is worth highlighting the works of Maria Gilevska, Taras Ilyenok, Ivan Chemerys, Mykola Kamlyk, Mykola Melnyk; Polish works by Marcin Samochuk, Zbyslaw Dobrovolskyi, Anna Levitska-Stzhaletska, Jozef Ploskonka, Lukasz Shveikovsky.

*The purpose of the article* is to study the provisions of the administrative legislation of the Republic of Poland, which regulates responsibility for offenses related to corruption, determination of the best options for solving the problems related to the regulation of such liability, as well as possible ways of borrowing them.

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<sup>2</sup> KHARCHENKO 2020: 112.

<sup>3</sup> KONOPELSKYI-MERKULOVA 2021: 148.

<sup>4</sup> KONOPELSKYI-MERKULOVA 2021: 302.

<sup>5</sup> KUBIAK 2003: 111.

## **Presentation of the main research material**

In general, by analysing foreign legal norms, it seems to find out more about one's own legal prescriptions. Accordingly, the comparison of legislative approaches to solving specific issues will give an opportunity to establish common and distinct features, identify gaps, and therefore take into account the most appropriate options for solving specific problems. A scientific analysis of foreign legislation in the area of anti-corruption will allow not only to compare them with domestic laws norms, as well as to identify better options and propose promising innovations in domestic criminal law.

Accordingly, among the general list of European states with a continental legal system, the choice is made on the Republic of Poland taking into account:

- geographical location: the influence of border contiguity on the formation of a common history of formation
- the latest legislation: due to the refusal of command and administrative management, the formation of the legal systems of both countries is somewhat younger compared to, for example, Great Britain, Germany, Italy, France, Sweden, etc.
- means of regulating of social relations: the transition to a market economy led to the need for the accelerated formation of a new array of Ukrainian and Polish legislative prescriptions for the regulation of civil law relations
- new types of illegal behaviour: the emergence of new spheres of social relations also led to new forms of abuse, the experience of which the law enforcement system of Ukraine and Poland did not yet possess
- a lawmaker, realising the impossibility of making further changes in the criminal and legal sphere, came to the conclusion to adopt a new criminal code that would combine the prescriptions of modern criminal law; accordingly, in 1997, the Criminal Code of the Republic of Poland came into effect, and a new codification of criminal legislation in Ukraine took place in 2001
- scientific and applied interest: the phenomenon of Polish successes has repeatedly drawn the attention of Ukrainian scientists and government officials as an example of a harmonious combination of economic, social and political reforms

The specified list of justifications determined the expediency of choosing the legislation of the Republic of Poland in the anti-corruption section, based on the similarity of temporal and spatial factors in the formation of the legal systems of both countries. The obtained results of the research will determine the need to adapt the most optimal options of foreign experience to the domestic legislation to solve certain criminal legal issues.

First of all, it should be noted the opinions of Polish scientists, whose scientific interest is directed at the criminal-legal protection of public relations from corruption. Bypassing the description of the perception of the phenomenon of corruption by

Polish scientists in the times of socialism, we will limit ourselves to the fact that despite the ignorance of the then authorities, the phenomenon existed both before the change of the state system and after it.<sup>6</sup> In particular, the latest forms of its implementation have led to the conviction of Poles (66% of those surveyed) in the general prevalence of the phenomenon.<sup>7</sup>

Taking into account the diversity of the phenomenon, the modern meaning of the term “corruption” includes a wide range of features, summarising which, Polish authors define corruption in a broad sense as the use of state resources or their disposal for the purpose of illegal personal gain.<sup>8</sup> A similar interpretation was proposed by Marcin Samochuk,<sup>9</sup> namely: “...abuse of public authority or managerial functions in the private sector for personal gain”. In his turn, Zbyslaw Dobrowolski<sup>10</sup> gives corruption the meaning of an illegal activity that consists in favouring private interests over state interests by using a special position to obtain political or economic benefit. Anna Levitska-Stzaletska<sup>11</sup> describes the phenomenon as the abuse of public office for individual or group benefit. The author distinguishes between corruption of the *higher* level, which is inherent in the top of the government, and the *lower* level, the participants of which are ordinary citizens when solving everyday needs.

Jozef Ploskonka defines two main types of corruption, namely:

- political – activities of individuals or groups of common interest, which occurs in providing material benefits to top-level officials in exchange for the creation of legal acts that benefit individual interested parties; the purpose of the described measures is to take control of the key levers of state administration
- administrative – bypassing or frivolous attitude of authorised persons to binding legal norms by using personal exceptions or favourable conditions for individual persons in exchange for obtaining the property benefit<sup>12</sup>

A more detailed classification of corruption was made by Lukasz Shveikovsky, distinguishing administrative, economic, electoral, political, legislative, territorial, concessional (creating artificial barriers), informational, in the sphere of public procurement and in the sphere of private procurement.<sup>13</sup>

In general, the following forms of committing corruption offenses are distinguished in the scientific literature:

- bribery, which is defined as giving, receiving or demanding property or personal benefit
- embezzlement or misappropriation of other people’s property

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<sup>6</sup> Act on the Prevention of Corruption of Ukraine of 14 October 2014 (editorial from 10/26/2022).

<sup>7</sup> CHEMERYS 2009.

<sup>8</sup> KOJDER 2002: 234.

<sup>9</sup> IYER-SAMOCIUK 2007: 347.

<sup>10</sup> DOBROWOLSKI 2006: 203–222.

<sup>11</sup> LEWICKA-STRZAŁECKA 2007: 212.

<sup>12</sup> PŁOSKONKA 2003: 112.

<sup>13</sup> SZWEJKOWSKI 2013: 10.

- paid assistance – cases of receiving property benefits in exchange for mediation and assistance in resolving issues
- abuse of official position to support relatives
- conflict of interests
- use of public funds in private interests
- waste of state funds<sup>14</sup>

The main difference between the everyday understanding of corruption and its definition in legal prescriptions is its legislative establishment, where the rule of conduct is clearly indicated in the hypothesis of a legal norm that is followed or, on the contrary, violated. The main domestic acts that regulate counteraction to this phenomenon are the Act on the Prevention of Corruption of Ukraine dated 14 October 2014<sup>15</sup> and the Criminal Code of Ukraine.<sup>16</sup>

According to the Act on the Prevention of Corruption of Ukraine, corruption – is the use by an official person of official powers or opportunities related to them for the purpose of obtaining an illegal benefit or accepting such a benefit or accepting a promise/offer of such a benefit for oneself or other persons or, accordingly, a promise/offer or granting of an illegal benefit to the specified person or at the request of other individuals or legal entities in order to induce this person to unlawfully use the official powers granted to him or the opportunities related to them. Considering the above, the Criminal Code of Ukraine does not specify the definition of corruption, instead it contains a list of corruption violations, namely:

- Art. 210. Inappropriate use of budget funds, implementation of budget expenditures or provision of loans from the budget without established budget allocations or exceeding them.
- Art. 354. Bribery of an employee of an enterprise, institution or organisation.
- Art. 364. Abuse of power or official position.
- Art. 364-1. Abuse of authority by an official of a legal entity of private law, regardless of the organisational and legal form.
- Art. 365-2. Abuse of authority by persons providing public services.
- Art. 368. Acceptance of an offer, promise or receipt of an unlawful benefit by an official.
- Art. 368-2. Illegal enrichment.
- Art. 368-3. Bribery of an official of a legal entity of private law, regardless of the organisational and legal form.
- Art. 368-4. Bribery of a person who provides public services.
- Art. 368-5. Illegal enrichment.
- Art. 369. Offer, promise or provision of an unlawful benefit to an official.
- Art. 369-2. Abuse of influence.

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<sup>14</sup> STAWNICKA 2013: 171.

<sup>15</sup> Act on the Prevention of Corruption of Ukraine of 14 October 2014 (editorial from 10/26/2022).

<sup>16</sup> Criminal Code of Ukraine of 05 April 2001 (editorial from 10/26/2022).

At the same time, in case of abuse of official position, the following crimes will also be defined as corruption offenses:

- Art. 191. Appropriation, waste of property or taking possession of it by abuse of official position.
- Art. 262. Theft, misappropriation, extortion of firearms, ammunition, explosives or radioactive materials or their possession by fraud or abuse of official position.
- Art. 308. Theft, embezzlement, extortion of narcotic drugs, psychotropic substances or their analogues or possession of them through fraud or abuse of official position.
- Art. 312. Theft, misappropriation, extortion of precursors or possession of them through fraud or abuse of official position.
- Art. 313. Theft, misappropriation, extortion of equipment intended for the production of narcotic drugs, psychotropic substances or their analogues, or taking possession of it through fraud or abuse of official position and other illegal actions with such equipment.
- Art. 320. Violation of established rules for circulation of narcotic drugs, psychotropic substances, their analogues or precursors.
- Art. 357. Theft, misappropriation, extortion of documents, stamps, seals, taking possession of them through fraud or abuse of official position, or their damage.
- Art. 410. Theft, misappropriation, extortion by a military serviceman of weapons, ammunition, explosives or other combat substances, means of transportation, military and special equipment or other military property, as well as taking possession of them by fraud or abuse of official position.

An appropriate definition of corruption has also been enshrined in the Polish legislation, where the main acts regulating the fight against this phenomenon are the Act on the Central Anti-Corruption Bureau of 9 June 2006 and the Criminal Code of the Republic of Poland. The first of them defined corruption as:

1. A promise, offer or gift made by any person, directly or indirectly, of any unjustified advantages to a person who performs public functions for him/her personally or for any other person in exchange for the performance or non-performance of his or her powers.
2. Demanding or accepting, by a person carrying out public functions, directly or indirectly, any unjustified advantages for himself or for any other person, or accepting an offer or promise of such a benefit in exchange for the performance or non-performance of their powers.
3. Actions taken in the process of carrying out economic activities, which involve the performance of obligations by a body or institution of public authority, which consists in the promise, offer or provision, directly or indirectly, to the person who manages the business entity, of any illegal benefits in exchange or

failure to fulfil his/her authority, which violates his/her duties and involves public harm.

4. Actions taken in the process of carrying out economic activities, which involve the fulfilment of obligations by a body or institution of public power and consist in a demand or acceptance by a person who manages a business entity that does not belong to the public finance sector or works in any other form in favour of such a subject, the offer or promise of any improper benefits, in exchange for the performance or non-performance of his powers, which violates his duties and contains public harm.<sup>17</sup>

Although the Criminal Code of the Republic of Poland does not contain a definition, it very clearly defines the phenomenon of corruption, reflecting its manifestations in the articles of Chapter XXIX *Crimes against the Activities of State Bodies and Local Self-government Bodies*, namely:

- Art. 228. Who, in connection with the performance of public functions, accepts a property benefit directly or its promise.
- Art. 229. Who provides or promises to provide a property or individual benefit to a person performing public functions in connection with the performance of that function.
- Art. 230. Who, referring to the influence of a state body, local self-government, international organisation, or a state or foreign institution endowed with public funds, or by causing the conviction of another person or by convincing him of the existence of such influence, carries out a property settlement in the jurisdiction of his promise.
- Art. 230a. Who provides or promises to provide property or individual benefit in exchange for mediation in a case in a state body, local self-government body, international organisation or a state or foreign institution, which is endowed with public means, which is illegal influence on the decision, action or inaction of a person who performs a public function in connection with the performance of that function.
- Art. 231. A public official who exceeds his authority or fails to perform his duties acts to the detriment of public or private interest.

In addition to the specified section, the Criminal Code of the Republic of Poland also provides for criminal liability for corrupt acts that go beyond the scope of the activities of state bodies and local self-government bodies, namely:

- Art. 250a. Who, having the right to vote, accepts property or personal benefit or demands such benefit for voting in the specified manner (electoral corruption).
- Art. 296. Who, having an obligation specified in the law, a decision of the relevant body or a contract, to deal with the financial affairs or economic

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<sup>17</sup> Act on the Central Anti-Corruption Bureau of 9 June 2006.

activities of a natural or legal person, by exceeding authority or failure to perform duties with the aim of obtaining an illegal benefit causes significant property damage (management corruption).

- Art. 296a. Who, performing managerial functions in an institution that carries out economic activity, or being in an employment relationship with it, a contract for the performance of works or a contract, demands or accepts a property or individual benefit or its promise in exchange for the fulfilment of the obligations of the business an obligation that may cause property damage to the institution or constitutes an act of unfair competition or providing false preferences to the supplier or recipient of goods, services, benefits (corruption in the economic sphere).
- Art. 302. Who provides or promises to provide a creditor with a property benefit for actions that harm other creditors in connection with bankruptcy proceedings or bankruptcy prevention (creditor corruption).
- Art. 305. Whoever, with the aim of obtaining an unlawful benefit, obstructs the conduct of public auctions or colludes with another person, acting to the detriment of the owner of the property or the person or organisation for which the auctions are held (tender corruption).

It is worth noting that criminal liability for corrupt acts is also provided outside the Criminal Code of the Republic of Poland. In particular:

- Art. 128 of the Pharmaceutical Act dated 6 June 2001 – who, contrary to the law, within the limits of advertising of medicinal products, provides or promises to provide a material benefit to persons authorised to issue medical prescriptions or who deal in medicinal products.<sup>18</sup>
- Art. 54 of the Act on the Reimbursement of Medicines, Foodstuffs for Particular Nutritional Uses and Medical Devices of 12 May 2011 – who is engaged in the manufacture or circulation of medicines, special food products and medical goods to be funded from public funds, receives material benefits or receives material benefits or promise or demands such a benefit in exchange for conduct that affects:
  1. the level of circulation of medicinal products, special food products and medical supplies to be financed from public funds
  2. circulation or termination of circulation of specific medicinal products, special food products, and medical goods subject to public funding

Punishment is also subject to the following:

- who, having the authority to issue a prescription for medicinal products, special food products and medical products to be financed from public funds,

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<sup>18</sup> The Pharmaceutical Act of 6 September 2001.



- demands or accepts a financial benefit or its promise in exchange for issuing a prescription or withholding an order
- who supplies medicines, special food products and medical goods, or a person representing the supplier, demands or accepts a financial benefit or its promise in exchange for the purchase of medicinal products, special food products and medical products to be financed from public funds
  - who gives or promises to give a property benefit in exchange to carry out the above-mentioned actions<sup>19</sup>

Broad legislative consolidation of responsibility for corrupt actions became possible after the adoption of the Act dated 13 June 2003 on Amending the Penal Code of the Republic of Poland and other legislative acts.<sup>20</sup> The changes in the provisions of the criminal legislation were implemented in accordance not only with the anti-corruption policy, but also with the international commitments made in connection with the accession of Poland to the European Union.

In particular, one of the requirements was to impose a penalty of at least one year of imprisonment on a person guilty of a corruption offense. The relevant requirement eliminates the need to look outside the criminal law for norms that would provide for liability for corrupt actions.

## Conclusions

The foreign experience of Polish colleagues certainly deserves a deep theoretical research and practical implementation in the domestic anti-corruption policy. At the same time, borrowing and implementing the best practices of foreign countries and international standards requires unquestionable consideration of the specifics of the domestic features of state power, the legal system, and the functioning of the public relations sector in the context of military operations. Considering the revealed varieties of implementation of legal protection of public relations of the Republic of Poland from the studied phenomenon, it is considered appropriate to borrow experience regarding the regulatory increase in potential risks of corruption offenses. Therefore, legal protection of individual social relations will become a guarantee of resistance to possible forms of corrupt behaviour in the future.

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<sup>19</sup> Act on the Reimbursement of Medicines, Foodstuffs for Particular Nutritional Uses and Medical Devices of 12 May 2011.

<sup>20</sup> Act on Amending the Penal Code and other legislative acts of 13 June 2003.

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