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# CUESTIONES POLÍTICAS

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# Comparative analysis of the essence of abuse of power in international legal sciences and Ukraine

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## Abstract

The purpose of the research is to develop a comparative analysis of the essence of the abuse of the occupational (official) position within the framework of the science of criminal law. It is indicated that criminal liability for the abuse of the occupational (official) position in the performance of his duties has been established for certain specific offences under the Special Part of the Criminal Code of Ukraine. To achieve the stated objective and solve the stipulated tasks, general and special scientific methods were used, in particular, the structural system to analyze crime in the field of official activities and prevent it as a theoretical problem and holistic phenomenon throughout the process. The results obtained allow us to conclude that, in most countries of continental Europe there is a simplification of the qualification of the actions committed by an

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official in a single article, however, there is a clear link with the consequences caused in the form of pecuniary damage, which allows the prosecution to build much faster a causal component of the actions of a person within a single legal criminal corpus and pass evidence to the court.

**Keywords:** abuse of power; corruption; criminal responsibility; criminal analysis; international experience.

## Análisis comparativo de la esencia del abuso de poder en ciencias jurídicas internacionales y Ucrania

### Resumen

El propósito de la investigación es desarrollar un análisis comparativo de la esencia del abuso de la posición ocupacional (oficial) en el marco de la ciencia del derecho pena. Todo indica que, se ha establecido que la responsabilidad penal por el abuso del cargo ocupacional (oficial) en el desempeño de sus funciones se produce por ciertos delitos específicos en virtud de la Parte Especial del Código Penal de Ucrania. Para lograr el objetivo planteado y resolver las tareas estipuladas, se utilizaron métodos científicos generales y especiales, en particular, el sistema-estructural para analizar la delincuencia en el ámbito de las actividades oficiales y prevenirla como un problema teórico y fenómeno holístico a lo largo de todo el proceso. Los resultados obtenidos permiten concluir que, en la mayoría de los países de Europa continental hay una simplificación de la calificación de las acciones cometidas por un funcionario en un solo artículo, sin embargo, existe un vínculo claro con las consecuencias causadas en forma de daño pecuniario, lo que permite a la fiscalía construir mucho más rápido un componente causal de las acciones de una persona dentro de un solo corpus delictivo legal y pasar pruebas al tribunal.

**Palabras clave:** abuso de poder; corrupción; responsabilidad criminal; análisis penal; experiencia internacional.

### Introduction

Normative prescriptions on the application of criminal liability to officials are not a legislative novelty, as they have undergone quite a long phase of development and continuous improvement in the national legislation. Indeed, in this context, the Criminal Code of Ukraine has undergone significant changes in recent years, and it is reasonable to argue that the concept of responsibility of officials should be thoroughly

rethought; the established approaches to the issues of qualification of such acts, establishing the limits of responsibility for their commission and so on should be reviewed.

In the current context of the spread of corruption-related crimes, among which the abuse of power or official position occupies a special place, the problem of developing and implementing an effective mechanism to combat these criminal phenomena has become very crucial and urgent. The creation of such a mechanism presupposes the introduction of an effective system of counteraction to such crimes, reform of criminal and criminal procedural legislation, the possibility of applying urgent measures aimed at improving investigative and judicial practice.

Currently, the issue of criminal liability for crimes in the sphere of official activity is relevant and debatable. Liability for corruption and similar crimes should be detailed and logical, so the articles of the code, which provide for liability in the field of official activities, require a comprehensive, impartial analysis for compliance with the fundamental principles of criminal law. This requires a comparative analysis of the essence of abuse of occupational (official) position in foreign and domestic criminal law science.

## **1. Literature review**

Tiutiuhin V.I. notes that the obligatory feature of the crime of most of the acts provided for in Section XVII of the Special Part of the Criminal Code is the subject of the crime under Articles 368, 368-2, 368-3, 368-4, 369, 369-2 of the Criminal Code is an illegal benefit. The objective side of the crimes in question is characterized by the fact that some of them (Articles 364, 364-1, 365-2, 367 of the Criminal Code) can be committed either by acts or omissions; others (Articles 365, 366, 368, 368-2, 368-3, 368-4, 369, 369-2, 370 of the Criminal Code) can be committed only by active behavior - action (Law of Ukraine, 2001). An obligatory feature of the objective side of the vast majority of the crimes under consideration is the presence of a direct connection between the act of a person and his official activity or activity related to the provision of public services (Chernetskaya and Shilingov, 2009).

Such an act is always: a) due to the official position of the subject or his official powers or powers to provide public services and b) is committed against the interests of the service or legal entity of private law or against the interests in the satisfaction and protection of which the person is endowed authority to provide public services during the performance of certain professional activities. It is worth drawing attention to the fact that the law expressly states that in the case of an offense committed by an official of a legal entity of public law (Articles 364, 365, 368, 369-2 of the Criminal

Code), such connection is manifested in the use by the subject of his or her official position, while in the case of its commission by an official of a private law entity or a public service provider (Articles 364-1, 365-2, 368-3 of the Criminal Code), the subject uses only his own (granted by law) official powers or authority to provide public services (Tatsiy, 2014).

Criticizing the corpus delicti provided for in Article 364 of the Criminal Code of Ukraine, M.I. Havronyuk notes that most criminal codes in European countries, except for the CIS states, do not provide for liability for abuse of power or official position and for exceeding power or official authority (Havronyuk, 2011).

## **2. Material and methods**

The methodological basis of the study are philosophical, general, and special scientific methods.

In order to achieve the set goal and solve the stipulated tasks, general scientific and special methods were used, in particular, *system-structural* - to analyze crime in the field of official activities and to prevent it as a holistic theoretical and applied problem throughout the work; *formal-logical* - in order to provide criminal law and criminological characteristics of abuse of power or official position committed by civil servants; *comparative* - to identify the features of preventing abuse of power or official position committed by civil servants in Ukraine and foreign countries, as well as to assess the possibilities of implementing foreign experience in domestic law enforcement practice; *modeling* - when formulating conclusions to the sections and general assessments, as well as proposals for improving criminological prevention and practice of its application.

## **3. Results and discussion**

In the criminal law of foreign countries, the rules that provide for criminal liability for abuse of power or official position, as well as for excess of power and official authority differ. This can be concluded by analyzing the articles of the Criminal Codes of foreign countries, which provide for criminal liability for crimes related to abuse or abuse of power or official authority.

The Criminal Codes of the following foreign countries were taken for comparison: the French Republic, the Republic of Latvia, the Republic of Lithuania, Georgia, the Republic of Estonia, the Italian Republic, Hungary, Croatia, the Swiss Confederation, and the Federal Republic of Germany.

The Criminal Code of the French Republic, which has been in force since 1994, devotes a significant number of articles to abuse of office. Their analysis shows that they can be divided into three groups:

- abuse of power, encroaching on the order of management (Articles 432-1 to 432-3);
- abuse of power committed against private persons (Articles 432-4 to 432-9);
- breach of official duties (Articles 432-10 to 432-16).

Thus, Article 432-1 of the Criminal Code of the French Republic provides for liability for acts committed by any person, who has public authority and exercises his powers to take measures aimed at obstructing the implementation of the law (Law of the French Republic, 1992).

The Latvian Criminal Code in Chapter XXIV of the Criminal Code of Latvia “Crimes committed in the structure of the public service”, as well as in Ukrainian legislation, provides for the liability of a public official, both for abuse of official authority (Article 317) and for abuse of occupational position (Article 318). The subject of this crime is a public servant, who has committed intentional actions that clearly exceeds the limits of rights and powers given to public officials by law, if these actions have caused significant harm to the state, administrative order and protected human interests (Law of the Republic of Latvia, 1998).

Article 316 of the Latvian Criminal Code sets out the following definition, representatives of state power are recognized as state officials, as well as any person who permanently or temporarily performs the duties of a public office or self-government and has the right to make decisions binding upon other persons or exercise supervision, control, inquiry, or punishment functions, or to dispose of property or financial resources of the state. In addition, the Latvian Criminal Code (Article 325) separately provides for the liability of civil servants for violating the restrictions imposed on a public official (entrepreneurial activity, combination of positions, receiving remuneration or exercising authority in a situation of conflict of interest), whereas in Ukrainian law the said offenses are not criminal and refer to administrative offenses related to corruption, responsibility for which is set out in Chapter 13-A of the Code of Ukraine on Administrative Offenses (Articles 172-4 to 172-9-2).

In the Criminal Code of the Republic of Lithuania, in contrast to the Latvian Criminal Code, liability for crimes in the sphere of official activity (for the subject of the crime) is set out very briefly and is provided for in only 3 articles of Chapter XXXIII of the Code:

- bribery (Article 225).
- abuse (Article 228).
- failure to perform official duties (Article 229).

Separately, Article 230 provides for the concept of a subject of abuse of power, defining a civil servant or a person of equivalent status who is employed in the civil service in accordance with the Law on Civil Service (Law of the Republic of Lithuania, 2000).

These persons include politicians, officials working in state or municipal institutions or institutions, law enforcement agencies, courts, persons supervising and auditing state institutions, persons acting as government representatives or holding administrative positions, as well as official candidates for such positions (Leheza *et al.*, 2021).

Article 333 of the Criminal Code of Georgia provides for liability for excess of official authority (Law of Georgia, 1999). The subjects of this crime are officials, persons equal to them, vested with official authority, as well as persons holding public and political positions, whose actions resulted in violation of rights of natural or legal entities, lawful interests of society and state. It should be noted that the note to Article 332 of the Criminal Code of Georgia provides an exhaustive list of persons who are subject to the crime envisaged by Article 333 of the aforementioned Criminal Code. In particular, such persons include officials, persons equal to them, vested with official authority, employees of legal persons of public law (except for political and religious associations) exercising public legal powers, private performers, as well as all other persons who exercise public legal powers in accordance with the legislation of Georgia.

Thus, the Criminal Codes of the French Republic, the Republic of Estonia, the Republic of Lithuania, Hungary, Croatia, and Switzerland do not separately identify the offense of “Exceeding authority or official powers”; the relevant acts are qualified as abuse of office.

An interesting example of comparative analysis in terms of criminal liability for official crimes is the Criminal Code of Germany, a systematic collection of criminal laws, introduced in 1871 (Law of the Federal Republic of Germany, 1871). When formulating the dispositions of the articles (paragraphs) of the Special Part, the German legislator, in contrast to the techniques of the Criminal Code of Ukraine, does not proceed from the theory of punishment of the act, but from the theory of punishment of the figure. Thus, the disposition of each article begins with the words “one who <...>” or “an official who <...>” (Leheza *et al.*, 2020).

The German Criminal Code does not contain a classic understanding of the concept of “abuse of occupational position” or “illicit enrichment”, so there are no paragraphs (articles) that would directly provide for liability

for these acts. However, in the German Criminal Code, there is a similar provision under economic crimes, which provides for liability for bribery in business and reads as follows: “Whoever, as an officer or authorized person of a commercial enterprise in business dealings demands, agrees to accept or accepts a benefit for himself or a third person for what he would dishonestly prefer to others in the acquisition of competing goods or services shall be liable to imprisonment for up to three years or a fine” (§ 299) (Liutikov *et al.*, 2021).

In addition, the German legislator has distinguished between two separate types of the subjective side of the civil servant during the receipt of an undue advantage, namely the receipt of an advantage (Section 331) and venality (receipt of a bribe) (§ 332). A qualifying feature of paragraph 332 is the receipt by a civil servant of an appropriate benefit or service for what he has done or would do in the future and thereby violate or would violate his official duties, while paragraph 331 provides for liability simply for the performance of his duties without specific action in favor of the beneficiary.

Section 335 of the German Criminal Code also establishes liability for failure to perform an official act. The legislator notes that non-performance of an action is equated to the performance of an official action or a judicial action within the meaning of § § 331-335. Given that the subjective side of the criminal offense in this article is so broad and does not contain information on the possible forms of guilt of the subject in the form of direct or indirect intent or negligence, this gives us grounds to believe that depending on the actual circumstances of the event, the prosecution and the court at their discretion interpret the degree of guilt and the interest of the subject not to perform official duties. Thus, German Criminal Law does not have such concepts as “official negligence”, “abuse of power” and “abuse of occupational position”(Leheza *et al.*, 2021).

## Conclusion

In view of the above, it can be concluded that in most countries of continental Europe there is a simplification of the qualification of actions committed by an official under one article. However, there is a clear link to the caused consequences in the form of pecuniary damage, which allows the prosecution much faster to build a causal component of a person’s actions within a single statutory corpus delicti and pass evidence to the court, which, when sentencing by analyzing all the evidence provided by the prosecution and the defense, will come to the conclusion about the level of public danger and the damage caused to the public interest, which led to such acts.



In the criminal law of foreign countries, there is practically no difference between abuse of power or official position and excess of power or official authority. This distinction is more characteristic of the criminal law of post-Soviet countries and is mainly related to the mass violation of the constitutional rights of citizens by law enforcement officials during the pre-trial investigation, in connection with which the legislator introduced a separate rule in the form of a law enforcement officer.

In our opinion, in the domestic criminal legislation the list of criminal acts is prescribed quite qualitatively and meticulously, however, there are cases when the direct link of the current version of Article 364 of the Criminal Code of Ukraine to the amount of material damage does not allow involving an official in committing a number of illegal acts contrary to the interests of the service, in the interests of third parties, as not always the damage can be calculated (for example, illegal transfer of subsoil for use), and the negative effects of decisions can occur over a long period of time.

### **Bibliographic References**

- CHERNETSKAYA, Olena; SHILINGOV, Volodymyr. 2009. "Legal comparative studies as an independent legal scientific discipline" In: Comparative legal research. No. 1, pp. 23-28. Consultation date: 15/03/2021.
- LAW OF UKRAINE. 2001. Criminal Code of Ukraine: Law of Ukraine of April 5, 2001 N° 2341-III. <https://zakon.rada.gov.ua/laws/show/2341-14>. Consultation date: 17/03/2021.
- TATSIY, Vasyl. 2014. Crimes in the field of official activity and professional activity related to the provision of public services: teaching practice. way. Pravo. Kharkiv, Ukraine.
- HAVRONYUK, Mykola. 2011. Why in Europe do not understand the proverb «do not swear». Ukrainian truth. Available online. In: <http://www.pravda.com.ua/articles/2011/10/6/6642959>. Consultation date: 19/03/2021.
- LAW OF FRENCH REPUBLIC. 1992. Criminal Code of the French Republic. Available online. In: <https://constitutions.ru/?p=5859>. Consultation date: 19/03/2021.
- LAW OF REPUBLIC OF LATVIA. 1998. Criminal Code of the Republic of Latvia. Available online. In: [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=198833](http://www.wipo.int/wipolex/en/text.jsp?file_id=198833). Consultation date: 16/03/2021.
- LAW OF REPUBLIC OF LITHUANIA. 2000. Criminal Code of the Republic of Lithuania. Available online. In: <http://www.law.edu.ru/norm/norm.asp?normID=1243877>. Consultation date: 16/03/2021.

- LAW OF GEORGIA. 1999. Criminal Code of Georgia. Available online. In: <https://matsne.gov.ge/ka/document/download/16426/143/ru/pdf>. Consultation date: 16/03/2021.
- LAW OF FEDERAL REPUBLIC OF GERMANY. 1871. Criminal Code of the Federal Republic of Germany. Available online. In: <https://constitutions.ru/?p=5854>. Consultation date: 16/03/2021.
- LEHEZA, Yevhen; DOROKHINA, Yuliia; SHAMARA, Oleksandr; MIROSHNYCHENKO, Serhii; MOROZ, Vita. 2021. "Citizens 'participation in the fight against criminal offences: political and legal aspects" In: *Cuestiones Políticas*. Vol. 39. No. 69. Pp. 212-224.
- LEHEZA, Yevhen; FILIPENKO, Tatiana; SOKOLENKO, Olha; DARAHAN, Valerii; KUCHERENKO, Oleksii. 2020. "Ensuring human rights in ukraine: problematic issues and ways of their solution in the social and legal sphere" In: *Cuestiones políticas*. Vol. 37, No. 64, pp. 123-136.
- LEHEZA, Yevhen; ODYNTSOVA, Iryna; DMYTRENKO, Natalia. 2021. "Teoría y regulación legal del apoyo informativo de los procedimientos administrativos en Ucrania" In: *Ratio Juris UNAULA*. Vol. 16, No. 32, pp. 291-306.
- LIUTIKOV, Pavlo; SHEVCHENKO, Mykhailo; PRYIMACHENKO, Dmytro. 2021. "Judicial review of the exercise of discretionary powers: case-law of European court of human rights and experience from Ukraine" In: *Journal of law and political sciences*. Vol. 26, No. 1, pp. 400-425.



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