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**INSTITUTION OF OFFICIALS IN THE DRAFT OF CRIMINAL CODE OF UKRAINE,
PREPARED UNDER THE GUIDANCE OF PROFESSOR V. M. SMITIENKO**

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The article analyzes the provisions of the first draft of the Criminal Code of independent Ukraine, which had been prepared in the 90's of XX century under the guidance of Professor VM Smitienko, in terms of the institute of officials' regulation. Its comparison with the relevant provisions of the Criminal Code of 1960 and the current Criminal Code of Ukraine is made there.

It is traced the transformation of the institution of official in criminal law from the concept of official in the Criminal Code of 1960 to the concept of public official, which was limited to civil servants in the first draft of the Criminal Code of Ukraine and, finally, to the concept of official in the current Criminal Code of Ukraine. In contrast to the Criminal Code of 1960, the draft of the Criminal Code of Ukraine addressed the problem of liability for official criminal offenses in a new way.

It is established that the concept of official received significant changes with the adoption of the Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine on Liability for Corruption Offenses" of April 7, 2011 N 3207-VI, which the title of Section XVII of the Special Part of the current Criminal Code of Ukraine was set out as follows: "Crimes in the sphere of official and professional activity related to the provision of public services" and the Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine on Implementation of the Action Plan on Visa Liberalization for Ukraine regarding Liability of Legal Entities" of 23.05. 2013 № 314-VII, which supplemented the current Criminal Code of Ukraine with Section XIV1 "Measures of a Criminal Nature Against Legal Entities."

It is concluded that for the first time in the history of national legislation, it was introduced the concepts of public official and functionary instead of the concepts of official and employee which were existed in Criminal Code of 1960, in the first draft of the Criminal Code of independent Ukraine, prepared under the guidance of Professor VM Smitienko.

Key words: *public official, functionary, official, official criminal offenses, law on criminal liability; Professor VM Smitienko; the first draft of the Criminal Code of Ukraine; Criminal Code of Ukraine, criminal liability for official criminal offenses.*

Сийплові Микола, Нестерова Ірина. Інститут службових осіб у проєкті Кримінального кодексу України, підготовленому під керівництвом професора В. М. Смітєнка

У статті проаналізовано положення першого проєкту Кримінального кодексу (КК) незалежної України, підготовленого у 90-х роках ХХ століття під керівництвом професора В.М. Смітєнка, у частині регламентації інституту службових осіб. Здійснено його порівняння із відповідними положеннями КК 1960 року і чинного КК України.

Прослідковано трансформацію інституту службової особи у кримінальному законодавстві від поняття «посадова особа» у КК 1960 року до поняття «публічна посадова особа», коло яких обмежувалося тільки державними службовцями у першому проєкті КК України, та, зрештою, до поняття «службова особа» у чинному КК України. На відміну від КК 1960 року

у проєкті КК України по-новому вирішувалася проблема відповідальності за службові кримінальні правопорушення.

Установлено, що поняття «службова особа» отримало суттєвих змін із прийняттям Закону України «Про внесення змін до деяких законодавчих актів України щодо відповідальності за корупційні правопорушення» від 7 квітня 2011 року N 3207-VI, яким назву розділу XVII Особливої частини чинного КК України викладено у такій редакції: «Злочини у сфері службової діяльності та професійної діяльності, пов'язаної із наданням публічних послуг», а також Закону України «Про внесення змін до деяких законодавчих актів України щодо виконання Плану дій щодо лібералізації Європейським Союзом візового режиму для України стосовно відповідальності юридичних осіб» від 23.05.2013 № 314-VII, який доповнив чинний КК України розділом XIV¹ «Заходи кримінально-правового характеру щодо юридичних осіб».

Зроблено висновок про те, що вперше в історії національного законодавства у першому проєкті Кримінального кодексу незалежної України, підготовленому під керівництвом професора В.М. Смітєнка, було введено поняття «публічна посадова особа» та «функціонер» замість понять «посадова особа» і «службовець», які існували у КК 1960 року.

Ключові слова: публічна посадова особа, функціонер, службова особа, службові кримінальні правопорушення, закон про кримінальну відповідальність; професор В.М. Смітєнко; перший проєкт Кримінального кодексу України; Кримінальний кодекс України, кримінальна відповідальність за службові кримінальні правопорушення.

Problem statement. Counteraction to crimes committed by officials is an important issue in the process of becoming Ukraine as a democratic and legal state. The damage caused by such actions consists not only in material losses, but also in violation of human legal rights and interests, their distrust in the activities of state bodies, especially law enforcement and judicial, the prestige and authority of these structures undermining. The highest officials of our state have repeatedly stressed in speeches. The necessary to focus on the fight against corruption (in the broadest sense of the word as any abuse of officials and persons authorized to perform public functions, their position in their own interests) [1, p. 4].

The issue of criminal liability for official criminal offenses (criminal offenses in the sphere of official and professional activities related to the provision of public services, according to terminology of the current Criminal Code of Ukraine) has become relevant among scholars and there was a need for its comprehensive, systematic and thorough study only with adoption of the Criminal Code of Ukraine on April 5, 2001 (hereinafter – CCU).

Thus, the researcher Maksymovych R.I., the first in 2007 after the adoption of the current Criminal Code of Ukraine, considered comprehensively the concept of an official in the criminal law of Ukraine at the level of dissertation research. The scientist noted that "since Ukraine's

independence, this topic has not been considered in any dissertation research [1, p. 8]. Today, there are already a large number of scientific papers on this issue. However, some issues of historical and legal nature of the formation of the officials' institution in the national legislation of Ukraine need additional research.

Recent research and publications analysis. Issues of officials criminal liability, the concept of official were considered in the works of P.P. Andrushko, V.I. Borisov, V.D. Voznyuk, V.M. Gorshenev, N.O. Gutorova, O.O. Dudorov, K.L. Zasov, M.O. Ilichov, E.M. Kisilyuk, V.K. Kolomyts, R.I. Maksimovich, M.I. Melnyk, V.O. Navrotsky, O.S. Novakov, A.V. Petrishin, Yu.A. Petrov, A.G. Prokhorenko, O.V. Protsyuk, A.V. Savchenko, E.L. Streltsov, I.K. Sukhoplyuyev, S.V. Trofimov, M.I. Havronyuk, V. Shcherbinin and others. Paying tribute to the work of these scientists, we note that their scientific interest has overlooked the provisions of the first draft of CC of independent Ukraine, prepared by a team of authors led by Professor V.M. Smitienko, who for the first time in the history of national legislation proposed "the concept of a public official, which clearly limits the range of such persons only to civil servants who are endowed with certain functions specified in the law" [2, p. 10].

The purpose of the article is to analyze the provisions of the first draft of the Criminal Code of Ukraine in terms of regulating the institution of officials, comparing it with the relevant provisions of CCU of 1960 and the current CCU.

Presentation of the main material. Since 1992 in independent Ukraine the process of preparation of the new Criminal Code of Ukraine officially started. A working group was set up to prepare an official draft of the Criminal Code of Ukraine on behalf of the Commission of the Verkhovna Rada of Ukraine on law and order and fight against crime under the leadership of Professor V.M. Smitienko [3, p. 257]. As a result of the ongoing judicial and legal reform in Ukraine and the productive work of scientists, a draft of a new codified criminal legislation was appeared, which was differed from the previous one by leading ideas, concepts and provisions. This project was prepared by a working group led by V.M. Smitienko and considered on September 16, 1993 by the Presidium of the Verkhovna Rada of Ukraine, which took the project into account and noted the positive work of the Commission together with the author's team. At the same time, it was instructed to continue work on finalizing the CCU draft.

As rightly notes V.V. Kuznetsov, this document has significantly influenced the formation of modern criminal law. The leading ideas of the draft of Criminal Code of Ukraine are still being implemented today in the latest amendments to the criminal legislation, which testifies not only to the importance, originality and timeliness of many of its provisions, but also to the fact that it is well ahead of its time and requires proper both legal and social assessment [4, p. 197-201; 5, p. 49].

Describing the structure of this project construction Andrushko A.V. noted its peculiarities, that in contrast to the Criminal Code of 1960, a special part of which was divided into chapters, a special part of the CCU draft was divided into sections, which, in turn, were divided into chapters. This approach, obviously, reflected the desire of the developers of this document to classify the objects of crime into generic and specific [6, p. 177].

Thus, the Special Part "Official Crimes" of CC of 1960 provided for a special subject of the crime – an official. In Article 164 "Definitions of terms used in the articles of this chapter" under officials are persons who permanently or temporarily perform the functions of government officials, as

well as permanently or temporarily hold positions in enterprises, institutions or organizations, regardless of ownership, related to the performance of organizational and managerial or administrative and economic duties, or perform such duties under special authority [7].

The General Part of the 1960 CC did not provide for separate provisions on the crime subject. In contrast to the Criminal Code of 1960, in the General Part of the CCU draft in Section III "Criminal Liability" of Chapter 6 "Subjects of Criminal Liability", it was first established that the subjects of a certain part of criminal offenses are not only physical but and also legal entities. Also the concept of a public official and a functionary was introduced for the first time instead of the notions of an official and functionary, which existed in the 1960 CC. This concept of a public official and a functionary was clearly limited exclusively to public servants.

Article 27 of the CCU draft¹ clarifies these concepts. Part 1 provides that public officials included representatives of public authorities and self-government, as well as other persons who permanently or temporarily hold positions in state or mixed with the state share property of enterprises, institutions or organizations related to the implementation of organizational administrative, advisory or administrative-economic duties, or perform such duties under special authority.

Officials are employees of state enterprises, institutions and organizations that are not endowed with the powers of public officials, as well as employees of the management sphere of non-state enterprises, institutions and organizations (Part 2).

Servicemen include persons who are on active military service in the Armed Forces of Ukraine, the Security Service of Ukraine, the National Guard of Ukraine, the Border Troops of Ukraine, the Internal Troops, the Civil Defense Forces and other military formations established in accordance with current legislation, and also as well as conscripts during their training or testing meetings and cadets of military educational institutions (Part 3) [8].

¹ In the previous version of this document, these provisions were provided for in Article 28 of the same content as in Article 27.

V.M. Smitienko noted that the need to introduce these concepts is caused by a contradictory and ambiguous definition of an official in the current legislation, the lack of clear specific features of such a person, which in practice has constantly caused and continues to cause different interpretations, errors in qualifications and ultimately there is a violation of the law. Throughout the existence of this institute, there has been a constant tendency to expand the range of entities classified as officials, at the expense of financially responsible persons, teachers, doctors, sellers, freight forwarders, etc. [2, p. 12].

In contrast to the CCU of 1960, the problem of liability for official crimes was solved in a new way in CCU draft. So, the chapter on official or official crimes was not included in its Special Part.

Professor V.M. Smitienko noted that official crimes in the current legislation do not have clear specific and legal features in relation to a particular area of criminal law regulation and do not contain the necessary characteristics that would allow the act individualizing. The absence of this chapter is compensated, on the one hand, by a clear definition in the General part of public official and official concepts and, on the other hand, by the fact that the grounds and possibility of prosecuting them in connection with official activities are specifically provided in a significant number of articles of Special part [2, p. 13].

Later, on the basis of the Law of Ukraine "On Amendments to the Criminal, Criminal Procedure Codes of Ukraine and the Code of Ukraine on Administrative Offenses" of January 28, 1994 N 3888-XII, Chapter VII was renamed from official malfeasance to official crimes, and the content Article 164 "The Concept of Official Crime and Official" received some minor editorial changes.

The author's team of one of the first scientific and practical comments of the Criminal Code of Ukraine of 2001 notes that CCU of 2001 uses the term "official", which in its content it is identical to the term "functionary" used in CCU of 1960. The title of the Special Part of CCU of 2001 Section XVII seems more successful than that of CCU of 1960 relevant chapter (Chapter VII of the CCU Special Part "Official Malfeasance"), because, firstly,

the subjects of certain crimes provided for in this section (bribery) may be non-officials, and secondly, a number of crimes that can be committed only by officials are outside of section XVII [9, p.908].

The current Criminal Code of Ukraine, as well as the CCU first draft in the structure of the General Part contains Section IV "Person who is the Subject to Criminal Liability (Subject of Crime). However, the Criminal Code of Ukraine did not mention the criminal liability of legal entities in any way. Only later on the basis of the Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine on Liability for Corruption Offenses" of April 7, 2011 N 3207-VI, the title of Section XVII of the Special Part of the current CCU was stated in the wording: "Crimes in the Sphere of Official Activity and Professional Activity Related to Provision of Public Services" and the Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine on Implementation of the Action Plan on Visa Liberalization for Ukraine Regarding Liability of Legal Entities" of 23.05.2013 № 314-VII, the current Criminal Code of Ukraine was supplemented by Section XIV¹ "Measures of Criminal Law Nature against Legal Entities", where in the note to Art. 96-3 "Grounds for the Application of Measures of Criminal Law Nature to Legal Entities" states, «Authorized persons of a legal entity should be understood as officials of the legal entity, as well as other persons who in accordance with the law, constituent documents of the legal entity or contract have the right to act on behalf of the legal entity".

At present, the analysis of the provisions of the Special Part of the current CCU allows us to conclude that an official may be the subject of corruption offenses: first, as an official in Art. 191, 210, 262, 308, 312, 313, 320, 354, 357, 366, 367, 370, 410 of CCU; secondly, as an official of state and communal enterprises in Art. 364, 368, 369 of CCU; thirdly, as an official of private law legal entity, regardless of the organizational and legal form in Art. 364⁻¹, 365⁻², parts 3 and 4 of Art. 368⁻³ of CCU.

Thus, in the current Criminal Code of Ukraine there are obviously several concepts of "official" and some differentiation in the Special Part of CCU, which indicates

the criminal liability delimitation. Thus, in Part 3 of Art. 18 of CCU, the legislator determines that officials are persons who permanently, temporarily or by special authority perform the functions of government or local government, as well as permanently or temporarily hold positions in public authorities, local governments, enterprises, institutions or organizations related to the performance of organizational and administrative functions, or perform such functions under special authority, which a person is endowed with an authorized body of state power, local government, central government with special status, authorized body or authorized official of an enterprise, institution, organization, court or law.

According to item 1 of Art. 364 of CCU, officials in Articles 364, 368, 368⁻⁵, 369 of this Code are persons who permanently, temporarily or by special authority perform the functions of representatives of government or local self-government, as well as hold positions permanently or temporarily in state authorities, local governments, at state or communal enterprises, institutions or organizations, related to the performance of organizational or administrative economic functions, or perform such functions under special authority, which a person is endowed with an authorized body of state power, local government, central state body management with a special status, authorized body or authorized person of an enterprise, institution, organization, court or law.

For the purposes of Articles 364, 368, 368⁻⁵, 369 of this Code, state and communal enterprises are equated to legal entities in

the statutory fund of which, respectively, the state or communal share exceeds 50 percent or is a value that provides the state or territorial community the right to decisive economic influence.

As for the criminal offenses provided for in Art. 364⁻¹, 365⁻² and Parts 3 and 4 of Art. 368⁻³ of CCU, its subject is an official of a legal entity of private law, regardless of organizational and legal form.

As E.M. Kisilyuk notes when characterizing these categories of officials, it should be noted that in accordance with the Civil Code of Ukraine, legal entities, depending on the order of their creation, are divided into legal entities of private law and legal entities of public law. The concept of "legal entity of public law" is not defined in any law of Ukraine [10, p.95-96].

Conclusions. Based on the above, we can conclude that for the first time in the history of national legislation, the draft Criminal Code of Ukraine, prepared under the leadership of Professor V.M. Smitienko, provided for the concept of public official and functionary instead of the concepts of official and employee, which was existed in the CCU of 1960. The notion of public official proposed by the draft was limited to public servants who were endowed with certain functions specified in the law. Finally, the draft of CCU for the first time proposed the application of criminal liability to legal entities. It should be noted that the current amendments to the Criminal Code of Ukraine already partially take into account the principled positions of this bill on the institution of officials.

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