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Corruption Factors and Discretion of the Law Enforcement Agency

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Abstract:

The article analyzes the corruption-generating factors enshrined in official legal documents – the Federal Law of the Russian Federation "On Anti-Corruption Expertise of Regulatory Legal Acts and Draft Regulatory Legal Acts" dated June 17, 2009, and the Methodology for Conducting Anti-Corruption Expertise of Regulatory Legal Acts and Draft Regulatory Legal Acts" approved by the Decree of the Government of the Russian Federation dated February 26, 2010. Particular attention is paid to such a corruption-generating factor as the wide margin of discretion (breadth of discretionary powers) of the law enforcement agency. In this regard, the discretion of the subjects of the law enforcement process is analyzed, the necessity, significance, as well as both subjective and objective limits of it are argued. With regard to the former, it is substantiated that the latter should be considered not as the legal consciousness or professional culture of the subjects of law enforcement, but their professional culture. Objective limits are determined by optional legal norms containing evaluative concepts. As an example, several provisions of the Criminal Procedure Code of the Russian Federation are cited, which necessarily presuppose the discretion of law enforcement agencies in the law enforcement sphere.

Keywords:

corruption-generating factors, law enforcement, subjective limits, objective limits, discretionary norms, corruption, evaluative concepts, subject of law enforcement, law, discretion.

I. Introduction

The relevance of this problem is generally determined by the need for the relevant government agencies to combat corruption. Among these measures, preventative measures play a special role, including organizational and legal methods for improving legislative activity, as enshrined in anti-corruption expertise. Domestic scholars have drawn attention to various aspects of this expertise, demonstrating its significance and necessity. Thus, Olga Aleksandrovna Slepkova believes that this type of expertise, regulated by the Federal Law of the Russian Federation "On Anti-Corruption Expertise of Regulatory Legal Acts and Draft Regulatory Legal Acts" of July 17, 2009, serves as a mechanism for enhancing the effectiveness of legislation and helps eliminate its defects that could give rise to corruption offenses. At the same time, the author, taking into account the systematic nature of the legislation, emphasizes that the Federal Law "On Combating Corruption" of 25.12.2008 No. 273-FZ, among the measures to prevent corruption, singles out anti-corruption expertise of regulatory legal acts and their drafts as a special category [1].

II. Research Methods

When preparing a scientific article, the following methods were used:

General Philosophical

1. (dialectical-materialistic), which is used in all social sciences;
2. general scientific (analysis and synthesis, logical and historical, comparisons, abstractions, etc.), which are used not only by the theory of state and law, but also by other social sciences;
3. special methods (philological, cybernetic, psychological, etc.), developed by special sciences and widely used for the knowledge of state and legal phenomena;
4. private scientific (formal legal, interpretation of law, etc.), which are developed by the theory of state and law.

III. Result and Discussion

3.1 The legal concept of corruption

It should be noted that corruption is a subject of research in various sciences: philosophy, political science, sociology, psychology, jurisprudence, criminology, etc. For the purposes of this study, the legal definition of "corruption" set out in Article 1 of this law should be used, according to which corruption is understood as a) abuse of official position, giving or receiving a bribe, abuse of authority, commercial bribery, or other illegal use by an individual of his official position contrary to the legitimate interests of society and the state in order to obtain a benefit in the form of money, valuables, other property or property services, other property rights for oneself or for third parties, or the illegal provision of such a benefit to the said person by other individuals; b) committing the acts specified above on behalf of or in the interests of a legal entity.

3.2 The purpose of anti-corruption expertise

A number of scholars, ignoring draft regulatory legal acts, see the purpose of anti-corruption expertise in preventing the potential for corruption only in regulatory legal acts [2]. Irina Nikolaevna Klyukovskaya asserts that the activities of experts in identifying, studying and eliminating corruption-causing factors present in legislative documents should be considered activities to prevent the potential for corruption in legislation [3]. Egor Vitalyevich Platov considers anti-corruption expertise as a preventive measure against corruption [4]. It is precisely thanks to this preventive measure that it is possible to exclude abuse of rights and arbitrariness on the part of officials, preventing the violation of the rights and legitimate interests of various entities [5]. In this regard, Nelya Nikolaevna Pestsova notes that the primary objective of this examination is to ensure a regulatory framework for the activities of state and municipal employees, and procedures for the exercise of rights and obligations by citizens and legal entities, that would deprive officials of the opportunity to abuse their powers, significantly complicate the conditions for entering into corrupt relationships, and thereby reduce the risk of committing corruption offenses [6].

Taliya Yarullovna Khabriyeva, noting that the goal of anti-corruption examination is to improve the quality and effectiveness of regulatory legal acts and their drafts, believes that the former cannot be considered solely as a means of identifying.

3.3 Corruption-generating factors

It is understandable that the scientific article pays special attention to corruption-generating factors, which will be discussed later. Here we note that the question of what should be understood by these factors still remains debatable in legal science. Thus, Anatoly Vasilyevich Nesterov points out that during an anti-corruption assessment, "corruption properties of a norm (provision) of a regulatory legal act or a draft regulatory legal act" can be identified [8]. Alexander Vasilyevich Kudashkin defines corruption-generating factors as defects in legal norms [9].

Elvira Vladimirovna Talanina and Vladimir Nikolaevich Yuzhakov interpret corruption-generating factors as "defects in norms and legal formulas that can contribute to the manifestation of corruption [10]. Olga Vladimirovna Barabash believes that corruption-generating factors are legal defects in legal norms and ambiguous linguistic formulas in the text of regulatory legal acts (draft regulatory legal acts), which create the preconditions for corrupt practices [11].

Sodnom Mikhailovich Budatarov, unjustifiably equating a regulatory legal act with a legal act, understands the corruption-generating factor somewhat differently, namely: “the actions of government officials provided for in a legal act (draft legal act) that do not correspond to the interests of society, or the absence in a legal act (draft legal act) of actions of government officials necessary for the proper protection of the interests of society” [12].

If we turn to the official definition of the term “corruption-generating factor” given in paragraph 2 of Article 1 of the Federal Law of the Russian Federation "On Anti-Corruption Expertise...", which states that corruption-generating factors are provisions of regulatory legal acts (draft regulatory legal acts) that establish unreasonably broad limits of discretion for law enforcement officials or the possibility of unreasonably applying exceptions to general rules, as well as provisions containing vague, difficult to implement and (or) burdensome requirements for citizens and organizations and thereby creating conditions for the manifestation of corruption, then we can come to the conclusion that a corruption-generating factor is understood to be a provision of a regulatory legal act or its draft that creates conditions for the manifestation of corruption.

In the Methodology for conducting anti-corruption examination of regulatory legal acts and draft regulatory legal acts, approved by the RF Government Resolution of 26.02.2010. N 96 [13], it is recommended to identify a greater number of corruption-causing factors, including those establishing unreasonably broad limits of discretion for the law enforcement officer or the possibility of unreasonable application of exceptions to the general rules: the breadth of discretionary powers - the absence or uncertainty of terms, conditions or grounds for making a decision, the presence of duplicate powers of state authorities or local government bodies (their officials).

In fairness, it should be noted that, according to scholars with whom one can agree, the specified list can hardly be called complete and exhaustive [14; 15]. In particular, from the position of Elena Viktorovna Stebeneva, insufficient legal regulation of regulations, procedures, and rules for certain types of activities; a low level of control over the activities of officials and the absence of relevant provisions and instructions; low transparency of the decisions they make; lack of regulation of the liability of officials for failure to perform and improper performance of their duties; conflicts of legal norms; violations in the procedures of legal technique, inaccuracy in the use of terms and an unclear line of authority increase the risks of corruption [16].

Taken together, these factors contribute to the commission of corruption offenses in the form of abuse by officials, circumvention of established requirements and norms by other participants in the relationship [17].

According to Yakub Lomalievich Aliyev, the absence or uncertainty of deadlines, inadequate legal regulation of official powers, and the lack of a clear delineation of competencies in regulatory legal acts lead to duplication and the combination of official duties of various departments, divisions, and services. Insufficiently clear delineation and poor specification of the regulations governing the duties of officials leads to the depersonalization of their responsibility and, as a consequence, to the poor performance of official duties, which entails violations of deadlines and the quality of tasks performed, violations of the law, accounting and registration discipline, and the commission of corruption crimes [18].

3.4 Broad margins of discretion (breadth of discretionary powers) of law enforcement as a corruption-generating factor

If we turn to the analysis of only one of the corruption-generating factors, namely: "the provisions of regulatory legal acts (draft regulatory legal acts) establishing unreasonably broad margins of discretion for the law enforcement agency" (Federal Law "On Anti-Corruption Expertise of Regulatory Legal Acts and Draft Regulatory Legal Acts"), in particular, "the breadth of discretionary powers" (Methodology for Conducting Anti-Corruption Expertise of Regulatory Legal Acts and Draft Regulatory Legal Acts), then it logically follows that, firstly, the legislator does not exclude discretion as such in the law enforcement process; secondly, we are talking about the discretion of the law enforcement entity, which, if the relevant limits are violated, will be considered one of the corruption-generating factors. Let us immediately clarify that "discretionary" means acting at one's own discretion [19]. In turn, discretion is interpreted as establishing, discovering, recognizing [20].

In legal science, there is no consensus on the understanding of discretion. For example, Boris Mikhailovich Lazarev viewed it as the volitional aspect of the relationship and legality [21]. Discretion is considered as expediency in the field of law [22].

Kuzma Ivanovich Komissarov understands judicial discretion as "a specific type of judicial law enforcement activity, the essence of which lies in granting the court, in appropriate cases, the authority to make, in accordance with specific conditions, a decision on matters of law, the possibility of which follows from general and only relatively specific indications of the law" [23].

Aleksey Prokopyevich Korenev believes that "discretion is a certain degree of freedom of the government body, limited by the framework of legislation, in the legal decision of an individual specific case, granted for the purpose of making the optimal decision on the case" [24]. Other scholars define the essence of judicial discretion differently: as freedom [25; 26], as a choice from several legal alternatives [27], as the authority to choose a solution [28], etc.

Despite various interpretations of discretion in law, the most optimal is the one according to which administrative discretion is understood as a certain degree of freedom of a state body in the legal resolution of an individual, specific administrative case, defined within the framework of legislation, which is granted for the purpose of making the optimal decision on the case, i.e., one that most fully ensures the achievement of the goals established by law [29].

Supporters of discretion in the law enforcement process substantiate its necessity and reality. Thus, Valery Vasilyevich Lazarev, speaking about the universality of the law and the

creative activity of law enforcement, emphasized that relatively broad opportunities remain for introducing the direction of law enforcement entities to the case, and especially during its consideration. The scholar further stated that such opportunities are quite significant in cases of legal clarification, overcoming legal gaps, and resolving issues with considerable discretion on the part of the law enforcement officer.

While agreeing that legal regulation implies strict regulation of procedural activity and that it limits the work of judicial investigators, the scholar emphasized that this does not mean that the latter are not free in their expressions of will, nor in choosing the means to implement their own activities, nor in their rational and effective organization. Such freedom is effectively expressed in the broad application of tactical techniques, their complexes, and combinations, and at the same time, it is implemented within the framework of legal requirements, is subordinated to its principles, and cannot extend beyond the operational requirements already formulated in the law [30].

A similar position was once held by Vladlen Aleksandrovich Dubrivny, who believed that "mandatory compliance with the law does not deprive the investigator of freedom in choosing actions and decisions, but in any case they must be consistent with the goals of the investigation and not violate the rights and legitimate interests of the participant in the preliminary investigation"[31].

3.5 Subjective limits of discretion of the law enforcement entity

Scholars, recognizing the possibility of discretion in the course of the law enforcement process, its necessity and significance, in contrast to opponents who believe that discretion is a consequence of the imperfection of legislation [32], often turn to the analysis of the interconnected and mutually complementary subjective (related to the personality of the law enforcement entity) and objective (enshrined in regulatory legal acts, other legal sources of law) limits.

In particular, the limits of judicial discretion are associated with the permissible scope of the court's powers to exercise the right to its discretion, established by authorized entities in the law and other sources of law, within the framework of which the law is applied [33]. In our opinion, subjective limits of discretion cannot, on the one hand, be considered in a very broad sense, understanding them as the moods and emotions of law enforcement entities [34], and, on the other hand, their significance cannot be absolutized or downplayed, since only a comprehensive study of the constituent limits of discretion, both its objective and subjective parts, will allow us to fully investigate this phenomenon [33]

In this regard, Mikhail Vasilyevich Romanenko quite rightly notes that "... the subjective factor is secondary in relation to objective conditions ... Being secondary, the subjective factor at the same time has its own content and its own logic of development, is relatively independent, and, in accordance with its nature, objective conditions can be realized in it in different ways. The reaction of different subjects to the same objective conditions may be different, since their impact on a person occurs through their inner world, moral values, and attitudes" [35].

It is noteworthy that scholars often cite the legal consciousness of law enforcement entities as the subjective limit of discretion [36].

We believe that it is not the legal consciousness of law enforcement entities, which may be deformed [37], nor even their professional and legal culture, but professional culture itself that should be considered as the analyzed limits. The latter is understood as a certain fusion of such

interconnected and interacting components as professional and legal culture, moral, political, aesthetic, and others [38; 39].

In particular, Olga Ivanovna Tsybulevskaya, turning to an analysis of the moral qualities of government entities, believes that a steady trend of their decline is observed. As the scholar writes, moral and legal imperatives are not perceived and observed by many entities, and are often sabotaged by officials [40]. While agreeing with these provisions, attention should also be paid to the professional and psychological component of the professional culture of lawyers, especially those involved in law enforcement activities in the law enforcement sphere.

Alexander Ruvimovich Ratinov once rightly wrote that "... when solving complex cognitive problems, empirical experience is often insufficient. Thus, without serious psychological training, it is impossible to solve and successfully investigate crimes of an unobvious nature" [41].

We believe that poor psychological training is a chronic, painful flaw in the professional activities of law enforcement officers. Deficiencies in psychological training often lead them to use force, violence, threats, and other illegal measures. In today's environment, a deep understanding is required that specialized legal education without professional psychological training is a hidden and dangerous defect, which, in complex operational situations, can negate an employee's legal training and lead to breakdowns and errors [42].

Based on data from the All-Russian Research Institute of the Ministry of Internal Affairs of Russia, the results of public opinion polls of Russian citizens in 2024 were obtained and analyzed (the sample size for the survey of the population in 85 constituent entities of the Russian Federation was 47,159 people). The results of sociological surveys for the period 2020–2024 indicate a continuation of the trend of moderate growth in positive values for assessing the performance of the police by citizens of the Russian Federation in 2024. The indicator for assessing the level of citizen protection from criminal attacks in 2024 compared to 2023 increased from 59.0% to 60.1%, while trust in police officers in 2024 compared to 2023 increased from 53.3% to 54.8%.

The following sociological survey indicators for 2020 provide some insights into the professional culture of police officers. In the minds of Russians, the image of a police officer is rather positive. Choosing from several pairs of characteristics of opposite significance, our compatriots see the typical Russian police officer as neat (80 points on the police character index), brave (68 points), friendly (67 points), polite (67 points), strong and robust (67 points), literate and hard-working (66 points each) [43].

3.6 . Objective Limits of Discretion of the Law Enforcement Entity

Regarding the objective limits of discretion in law enforcement activity, we believe they are conditioned by the very content of the law. Vladimir Nikolaevich Dubovitsky once emphasized that "normativity, as the leading and defining characteristic of the legal form of regulation, also carries with it a multitude of evaluative categories ("valid reason," "if necessary," "based on needs," "in accordance with the circumstances," etc.), which inevitably lead to the application of administrative discretion"[44].

It appears that this provision requires clarification. In our opinion, the discretion of the law enforcement entity is possible when, in their professional activities, they operate (are guided by) optional norms, including those containing evaluative concepts. It is precisely such norms

that prescribe a particular course of conduct, but at the same time provide the entity with the opportunity, within the limits of legal means, to regulate relations at their own discretion.

Apparently, this is the kind of legislation that Sergei Sergeevich Alekseev had in mind when he made a figurative comparison, according to which "law resembles… not a matrix on which all possible variants of human actions are programmed and according to which people's behavior is "printed," but rather an extensive "frame" consisting of such programs and their cells, of various volumes and forms, always clearly defined, but always leaving space for the participants in social relations to conduct themselves"[45].

Keeping in mind the division of law into private and public, it should be noted that in the branches of private law, optional norms have a dominant significance [46;47]. Private law is literally permeated with the ideas of freedom and independence of individuals, which are so necessary for a truly democratic society. In pre-revolutionary Russia, the ideas of freedom were developed by the famous theorist and historian of private law, Iosif Alekseevich Pokrovsky, who, speaking of civil law, wrote that "here for the first time the concept of the individual as something legally autonomous and independent, even in relation to the state and its authorities, arose."

The scholar emphasized that civil law, due to its development, objectively demanded "the liberation of the individual from all fetters that bind him, demanded freedom of property, freedom of contracts, freedom of wills, etc." [48]. Soviet jurist Mikhail Mikhailovich Agarkov once wrote that civil law is "the realm of freedom and private initiative," while "private law is a personally free right."[49]

Furthermore, it should be noted that "many areas of legal regulation are losing their public-law character or significantly weakening it due to the strengthening of private-law principles..."[50], "...in a number of areas, the unconditional priority of private law is noticeable, which has supplanted public law and is even penetrating it."[51]

However, despite these valid observations, the presence and functioning of discretionary legal norms in both private and public law must be acknowledged. This, in one way or another, is recognized by many scholars. Thus, Ivan Sergeevich Lapshin believes that the scope of application of dispositive legal norms concerns most branches of both private and public Russian law [52], and Mizamir Akhmedbekovich Alieskserov believes that in any branch of law there are both imperative and dispositive elements of legal regulation [53].

If we speak in general directly about the dispositive norms of public law, it is noteworthy that even in Soviet legal science, scholars discussed the normatively determined initiative of not only private entities, but also public entities [54].

Bearing in mind the actions of dispositive norms of law, that dispositiveness, as Oleg Ernestovich Leist wrote (one of the expressions of which are dispositive norms. - Vladimir Valentinovich Kozhevnikov) is designated as the right (opportunity) to act differently than indicated by the norm, as the definition of only the goal that must be achieved by the use of "evaluative concepts", the content of which is revealed in the process of realizing the right (their content is revealed in the process of realizing the right) [55].

Evaluative concepts and terms, firstly, should be considered from two sides - objective (they are based on the actual properties of a particular phenomenon, the concept used by the

subject) and subjective (it is expressed in the fact that in the process of applying evaluative prescriptions, the subject invests them with a meaning corresponding to his personal ideas about the properties of a phenomenon); secondly, along with the features inherent in all concepts and terms, evaluative ones have a number of specific differences that allow them to be distinguished into a separate class, although their interpretation is very ambiguous.

Thus, according to Yakov Markovich Brainin, these are concepts that are not specified by the legislator and are clarified during the application of the law [56], and, from the position of Vladimir Nikolaevich Kudryavtsev, their content "... is largely determined by the legal consciousness of the lawyer applying the law... taking into account the circumstances of a specific case" [57].

Miron Iosifovich Baru emphasizes that evaluative concepts, firstly, are clarified in the process of law enforcement; secondly, they give the law enforcement body the opportunity for free discretion, a free assessment of the facts [58]. Viktor Vasilyevich Ignatenko adheres to a similar position, asserting that evaluative concepts are specified "... by means of an assessment within the framework of a specific law enforcement situation" [59].

Indeed, if we analyze, for example, the articles of the Criminal Procedure Code of the Russian Federation that contain optional rules and regulate the conduct of investigative actions, we can pay attention to such evaluative concepts as "in the presence of sufficient grounds (data) to believe" (Part 2 of Article 140, Part 2 of Article 153, Part 1 of Article 171), "if necessary" (Part 9 of Article 166, Part 4 of Article 223), "at one's own discretion (one's own initiative)" (Part 4 of Article 189, Part 3 of Article 192), "in exceptional cases" (Part 1 of Article 152, Part 5 of Article 165, Part 5 of Article 223), "in urgent cases" (Part 3 of Article 164, Part 2 of Article 176, Part 11 of Article 179), etc.

IV. Conclusion

It is important to emphasize here that discretion in law enforcement is a completely normal phenomenon, the recognition of which necessarily determines the definition of its limits. In this regard, one should agree with the point of view of Olga Vladimirovna Korablina, who asserts that "discretion is an integral element of law enforcement activity, an objectively existing and socially justified legal phenomenon that expresses the dynamism of the law, its adaptability to changing historical conditions and specific situations" [60].

The relevance of correctly defining both the objective and subjective limits of discretion in law enforcement activity is determined by the fact that their violation acts as a negative factor – arbitrariness, i.e., actions of the authorities or their individual structures that are not based on any norms, expressing the anti-social goals and subjective views of the "actors" themselves [61]. Or, in other words, in this case we are talking about one of the corruption-generating factors that can lead to corruption offenses.

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