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ANTICORRUPTION CONSTRAINTS AS A MANIFESTATION OF THE "COHERENT FORCE" OF HUMAN RIGHTS IN THE ACTIVITIES OF PUBLIC ADMINISTRATION ACTORS

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Abstract

The search for an optimal model for relationships between individuals and entities of public administration should go hand in hand with the statutorization of the guarantees of individual rights, freedoms and legal interests, including the principle of protection of legitimate expectations of individuals in their relations with public administration entities. The research provides grounds for believing that anti-corruption restrictions for entities of public administration are the components of the above-mentioned principle since they act as a manifestation of the binding force for the latter, emphasizing anthropocentric nature of their activity. It is the standardization of models for resource utilization in regard to the activities of public administration entities with the use of anti-corruption restrictions that makes the trust of an individual to public entities possible. It also makes the actions and decisions of the latter predictable, let alone enables unification of interpretation and application of national and international legislation. Using the resource of anti-corruption restrictions, which is aimed to make it impossible for public administration entities to get distracted from their main task of protecting and realizing individuals' legitimate expectations, a sound doctrinal analysis of the phenomena is advisable for establishing the new and consistent with the latest advances in the legal science basis for rule-making and legal enforcement in the sphere of relations between

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individuals and entities of public administration. Owing to the statutorization of the use of relevant anti-corruption restrictions as well as compliance with technicalities and proper response to modern challenges, the conclusion is made about a great potential for quality assurance of the anti-corruption law with its availability, intelligibility for all legal entities in the sphere of public administration, unification of its use and interpretation and hence the predictability of the decisions and actions of public administration entities, guarantee of realization and protection of the legitimate expectations of individuals in their relations with the latter.

Keywords:

Activities of public; anticorruption constraints; coherent force; corruption; freedoms and legal interests; human rights; legal energy; protection of the legitimate expectations; public administration; subject of public.

1. Introduction

In search of a new model of the interaction of a person and subjects of public administration, with focusing of activities of the latter on the maximum concentration of all efforts on ensuring implementation and protection of human rights, freedoms, legitimate interests, then normative (they are also called “legal” in juridical science) guarantees of such enforcement should take their prominent place. They also include the principle of protection of the legitimate expectations of a person in his/her relations with the subjects of public administration. In fact, it is the basis of mutual trust between a person and subjects of public administration, predictability of actions, decisions of the latter, person’s confidence in ensuring the implementation and protection of his/her rights, freedoms and legitimate interests. It can be achieved due to the normative regulation of models of actions, decisions of subjects of public administration, the formation of clear, comprehensible for a person, stable regulatory legal basis of relations between the latter and the subjects of public administration, unified practice of the application of such a basis. It is important not only to adopt new normative-legal (first of all, legislative) acts which would regulate new modern model of the interrelation of a person and subjects of public administration but also to guarantee viable possibilities for implementation and protection of rights, freedoms, legitimate interests of a person in the relations, to ensure the trust of the person to the subjects of public administration, which are meant to bring the legitimate expectations of the person to life. And in this respect, it is important not only to deal with the issue of “quality” of the above legal and regulatory basis of the relations between a person and subjects of public administration but also to unify the practice of its application. Thus, protection of legitimate expectations of a

person in his/her relations with subjects of public administration can be erroneously identified exclusively with legal certainty under no circumstances. Despite the fact that they are interrelated but not similar because “the former is oriented to administrative procedure within of which the certainty is ensured” (Sherstoboev, 2019, p. 25).

2. Research

Forming a new legal and regulatory framework for the relations between a person and subjects of public administration, it is important to define and consolidate those guarantees in detail and fully, if possible, the realization of which will ensure the trust of the person to the latter. Hence, it leads to his/her confidence in the implementation and protection of own rights, freedoms and legitimate interests in his/her relations with them. Absolute regulatory certainty of such guarantees “predetermines” the predictability of actions, decisions of the subjects of public administration and makes their multiple-option nature impossible taking into account the manifestation of subjective discretion of the subject of public administration, including “towards the use of the prohibition of the retroactive effect of legal norms” (Zommermann, 2016, p. 67) and, on the contrary, provides “the effectiveness and efficiency of relations between a person and the subjects of public administration” (Schmidt-Assman, 2006, p. 314). This also can be implemented due to the use of so-called anti-corruption (sometimes juridical science proposes another name – special) restrictions aimed at adjusting the activities of public administration subjects in order to eliminate any prerequisites for using the benefits of the public service in favour of their private interests and focusing their efforts on enjoyment and protection of the rights, freedoms, legitimate interests, ensuring the realization and protection of the legitimate expectations.

Unfortunately, the restrictions in the very aspect of their consideration as a component of the principle of the protection of legitimate expectations of a person in the relations with the subjects of public administration have not been studied in juridical science. Nevertheless, there are papers (however, there are few cases) directly devoted to the range of problems of protection of legitimate expectations of a person (for example, papers of E. Schmidt-Aßmann, K.-P. Zommermann, O. Sherstoboiev etc.) either to restrictions in administrative law (for example, papers of A. Basov, V. Chorna etc.) or to anti-corruption restrictions in general (for examples, papers of K. Berdnikova, O. Shymon, R. Kukurudza, O. Dudorov, O. Mykolenko, O. Shtohrin etc.) which definitely should be taken into account in order to eliminate a particular gap in the scientific base of the modern rule-making activity aimed at consolidating the principle of protection of legitimate expectations of an individual in

his/her relations with the subjects of public administration. Observance with the principle of novelty (the formation of something new that is in line with the latest achievements of juridical science, in particular, of the scientific basis for comprehension of the real resource of anti-corruption restrictions as a component of the principle of protection of the legitimate expectations of a person in his/her relations with the subjects of public administration) will contribute to the effectiveness, efficiency of search of not only the optimal model of relations of a person and subjects of public administration but also to its regulation and ensuring its practical implementation.

First of all, it is essential to pay attention to the fact that in order to determine a component of the principle of protection of the legitimate expectations of a person in his/her relations with the subjects of public administration, the legislator also uses other related terms along with the term “restrictions” that, unfortunately, complicates the comprehension of legislative mandates both of a person and subjects of public administration. The legislator simultaneously uses several related concepts – “restriction”, “prohibition” in the “basic” anti-corruption act formulating a behavioural model of the latter that actually leads to a diverse interpretation of the relevant provisions of the legal act and their practical application. However, regardless of their interconnection, one cannot identify restrictions and prohibitions in no case because they define different volumes of possibilities of the subject of public administration (“the restriction is a “soft” prohibition”) (Sobolev, 2019, p. 79) and therefore of opportunities in relations with a person. If the prohibition stipulates the total impossibility of any actions or decisions, and the restriction involves the availability of “limits” of the subject of public administration to take actions, to make decisions, including those which are oriented towards the realization and protection of the legitimate expectations of a person. Its actions or decisions are illegal beyond the limits and stipulate the possibility of bringing it to legal liability. If the prohibition is a “taboo” (it is impossible in no account), the restriction is the identification of “limits” for the allowed and forbidden ones. It is important to realize the difference between prohibition and restriction for the adjustment of relations between a person and the subject of public administration in relation to the implementation and protection of the legitimate expectations of the former. Moreover, recently it has been extended significantly a related concept list which scholar lawyers use for the determination of different behavioral models of the subjects of public administration according to freedom degree – “limits”, “barriers”, restraints” etc. If it refers to the restriction, it is important to define the “limits” in a clear way in order to, on the one hand, ensure real opportunities for the realization and protection of the legitimate expectations of a person in the relations with the subjects of public administration and at the same time, on the other hand, to provide real opportunities for the subject of public administration for the

practical realization of its powers during “serving” public interest, realization and protection of the corresponding legitimate expectations of the person. In this context, it is quite justified the restrictions which are directly related to the elimination of the prerequisites for the use of the subject of public administration, benefits of the public service to meet own private interests and make racialization and protection of the legitimate expectations of an individual impossible. Those sorts of restrictions are aimed at eliminating the preconditions for corruption-related offenses and are quite diverse according to their external manifestations. The analysis of various sources allows speaking about restrictions different both in the content and external forms of manifestation, but among all their diversity the most common are as follows: a) restrictions on gifts receiving; b) restrictions on “external non-official” activities (regarding double job holding and overlapping of the main activity with other activities); c) restrictions on the work of close persons; d) restrictions upon termination of activities related to the exercise of state or local self-government functions (Villoria et al., 2010). A person’s trust in the subject of public administration is also based on the way of normative consolidation of advantages of the public service in the context of gifts receiving, powers implementation, “distraction” to “external” activities etc. The person’s trust in the subject of public administration is based on the following facts: a) whether anti-corruption restrictions in regulating relations between a person and public administration actors are used in general b) the level of normative regulation of these restrictions; c) degree of normative certainty of anti-corruption restrictions, and then d) unification and effectiveness of their application. With regard to the first three, it should be noted that for most countries of the world, the normalization of anti-corruption restrictions is typical, either at the level of individual “basic anti-corruption” legislative acts (for example, the Law of Ukraine “On Prevention of Corruption”, the Law of the Republic of Kazakhstan “On Fight against Corruption”, on the Law of the Republic of Georgia “On Conflict of Interests and Corruption in Public Service”, or “basic” legislative act on public service (for example, Federal Civil Service Act, the Law of the Republic of Moldova “Public Office and Status of Civil Servant”, Code of Conduct for the Senior Government Officers at the Federal Executive Branch of Brazil, however, with different degree of certainty and specification of their provisions in secondary legislation. Thus, for example, there are detailed fundamentals of relevant restrictions in Directive of the Office for Ethical Conduct for Employees of the Executive Branch (the Code of Federal Regulations 5 C.F.R. Part 2635as amended as of 76 FR 38547 (as amended and supplemented), Ethical Code of Officials and Public Administration Employees of the Czech Republic, Ethical Guidelines for Public Service of the Kingdom of Norway etc. In Ukraine, the similar provisions were consolidated in the Order of the State Fiscal Service of

Ukraine dated 01.12.17 No. 979 “On Adoption of the Rules for Ethical Conduct and Corruption Prevention in SFS Bodies” as well as clarification on the application of certain provisions of the Law of Ukraine “On Prevention of Corruption” regarding financial control measures approved by NAPC decision dated 11.08.2016 No. 3 that significantly impedes their comprehension, interpretation, application and hence, the predictability of decisions and actions of subject of public administration and the practical implementation of the principle of ensuring the implementation and protection of the legitimate expectations of a person in his/her relations with the subjects of public administration (fourth question).

Unfortunately, it is impossible to suggest about “qualitative” normative consolidation of anti-corruption restrictions as a certain “filter” for activities of the subject of public administration that, in turn, influences the state of realization of the principle of protection of legitimate expectations of a person in his/her relation with the latter. First of all, normative consolidation of the relevant restrictions is related to the gaps in fixation of the definitions the lack of which makes the consideration of restrictions resource impossible. For example, the restriction on gifts receiving is directly connected with the definition of “gift”, the restriction of “external” activities – with the definition of what kind of activity is “external” and, therefore, it is connected with positions combination and positions overlapping, restrictions on the work of close people – with the definition of “close people”, etc. It is important not to have this term but to consolidate its definition, interpretation and application that would make grounds for manifestation of discretion of the subject of public administration impossible and hence, the variability of the actions or decisions of the latter regarding the realization and protection of the legitimate expectations of a person in his/her relations with the latter. “Basic” definitions may be available (in the aspect of consolidation in generally binding pieces of legislation of national significance), comprehensible (even for a person who does not have special professional knowledge in jurisprudence), avoid evaluative phrases (words), “open lists” which would provide the diversity of interpretation and application depending on various circumstances of the cases, the specifics of the parties of legal relations etc. Thus, an analysis of the legislation of different countries regarding the consolidation of anti-corruption restrictions shows that different approaches to the definitions of “gift”, “external activity”, “close persons”, etc. are used. For example, in the USA, the gift for particular persons is “a monetary reward, omission of any actions or other actions or objects which may have a monetary expression” (Kolomoets, 2018, p. 14), in Ukraine – “cash, other property, benefits, privileges, services, intangible assets that are provided (received) free of charge or at a price below the minimum market” (Kolomoets & Kolpakov, 2019, p. 242). There is a visible identity of the approach to the formulation of the definition, however,

with varying degrees of specification of external forms of gift's manifestation. Although the definition of a gift enshrined in the Ukrainian anti-corruption legislation fixes its important feature which distinguishes it from unlawful benefits – obtainment for lawful actions. At first glance, the definitions, which are consolidated in the US and Ukrainian legislation, are quite comprehensible, intelligible, and actions of the subject of public administration regarding restrictions on gifts receiving are predictable. At the same time, on the other hand, the analysis of subordinate normative legal acts detailing the legal framework of anti-corruption restrictions highlights different approaches to the definition of “gift” for different subjects of public administration (for example, in the above Rules for Ethical Conduct and Corruption Prevention in SFS Bodies approved by the Order of SFS dated 01.12.2017 No 979, the definition of a gift is oversaturated by the types of services which can “mediate” the official activity of the subject) as well as the availability of definitions of a “gift” in the legislation, collision on their application and, therefore, different practices of use that, in turn, complicates the predictability of decisions and actions of public administration subjects in their relations with a person, support of implementation of the principle of protection of legitimate expectations of a person in relations with subjects of public administration. In addition, an in-depth analysis of “gift” legislation also shows the different approaches to the regulation of the issue of gifts categories. Thus, for example, in Ukraine, it is prohibited to receive gifts from subordinates; this prohibition is consolidated in “basic anti-corruption” legislative act. At the same time, the above order dated 01.12.2018 No 979 allows SFS employees to receive gifts from subordinates “on the occasion of special events that have personal or traditional importance, in the event of national or professional holidays” (para. 25 of Section IV). Fixing anti-corruption “filters” for subjects of public administration, it is incomprehensible why their certain group is subjected to “soft prohibition” which forms preconditions for varied (including secret) use of restriction on gifts reception, for complication of understanding and predictability of actions of public administration subjects.

State of things regarding the consolidation of the definitions “close persons”, “other paid activity”, and “external activity” is similar. In defining close persons, there is a traditional person list with an emphasis on different kinds of kin relations or certain obligatory features the availability of which allows them to be considered such in the aspect of adherence to anti-corruption restrictions. Such an approach, on the one hand, is fully justified because it allows covering all the diversity of those persons who can be considered “close persons” and relationships with whom can “influence”, “impede” the implementation of the principle of protection of the legitimate expectations of a person in relations with the subjects of public administration. On the other hand, such an approach is effective only in the case of the

coverage of every single person who may be “close persons” in relation to the aforementioned subjects of public administration in terms of adherence to anti-corruption restrictions. And such a situation not always takes place. In particular, in the legislation of Ukraine, despite the fact that Art. 1 of the “basic” anti-corruption law consolidates a quite wide definition for “close persons” due to list of “close relatives”, “family members” as well as obligatory features to consider other persons as that kind, the legislator “forgot” about nephew, niece, uncle, aunt, fiancé and fiancée (Khavroniuk, 2018, p. 39). As the analysis of law enforcement practice in the mentioned sphere of social relations shows, there are frequent cases of concealing of breach of restrictions on work of close persons taking into account the above persons who are actually “close people”, however, the legislator didn’t consolidate restrictions on their work activity. Under such conditions, there are well-founded doubts about the real security of the principle of protection of the legitimate expectations of a person in the relations with the subjects of public administration, which are “complicated” by the participation of so-called undefined “close people”.

Actions and decisions of the subjects of public administration connected with their “distraction” to another paid (the legislation of many countries uses the term “external”) “outside” activities are unclear and therefore unpredictable for a person in his/her relations with them. The legislation of most countries doesn’t have the definition for such kind of activity. It is prevalent either prohibition on it or requirement to obtain a permit for its conducting or reference to the fact that it shouldn’t impede the main activity of the subject of public administration. The basis for this statement was the provisions of part 4 of Art. 7 of the UN Convention against Corruption, Recommendation Rec (2000) 10 of the Committee of Ministers to member states on codes of conduct for public officials of May 11, 2000 in relation to “the impossibility for public servants to take any positions, perform any activity, participate in any relations which are incompatible or impede the performance of duties ... or provide a notification (permit obtainment) for implementation of such activity” (Kolomoiets & Kushnir, 2018, p. 25). It is quite clear that such activity is “external” regarding the main activity of the subject and can influence it, its results in different ways as well as guarantee the principle of protection of legitimate expectations of a person in relations with the subjects of public administration. However, it is quite acceptable to combine the main activities of such subjects with academic, scientific activities for mixing theory and practice of public administration, training of personnel for the latter, etc. Under such conditions, it is important to determine what activity is “external” in relation to the main one and its “incompatibility” with the latter. Unfortunately, the analysis of the legislation of different countries in terms of fixing the restriction on “external activity” indicates a very simplistic

approach of the legislator to resolving this issue. Generally, there is a tendency towards the normalization of the prohibition on types of activities “incompatible with the main activity”, sometimes with “entrepreneurial” activities, “other paid activities” and, at the same time, enumeration (in different numbers and order sequence) of the types of activities permitted to be engaged in. Such an approach cannot be considered successful for ensuring apprehensibility, simplicity, predictability and, hence, the establishment of a “dialogue” between a person and subjects of public administrations as the above-mentioned evaluation phrases serve as prerequisites for different interpretations and, consequently, for law-enforcement. What can the provision of the principle of protection of the legitimate expectations of a person in his/her relations with the subjects of public administration be in the case of person’s “distraction” to another activity (even teaching, creative, academic, etc.) and, moreover, in the case of the lack of an official definition of what activity is “other paid”?

The distribution of “legal energy” of anti-corruption restrictions is also complicated by legislator’s use of numerous (it allows formulating provisions about certain “oversaturation” of valuable provisions in defining these restrictions) evaluate provisions in defining the restrictions. Such a situation negatively affects both “quality” of the legislation on anti-corruption restrictions and its interpretation, application, unification of the latter, as well as its predictability for a person. Thus, for example, determining the limits for “gift” relations the legislator consolidates the requirements for the gifts, which can be received, and distributes as follows: a) requirements for their value (“binding” to a specific amount (for example, the USA, the Netherlands, Germany, Italy, etc.) or for the set value (for example, in Ukraine, tax-free minimum income for able-bodied persons); b) revenue source (for example, “from one source during the year”, “one time from one source”); c) compliance with certain features (for example, “... the generally accepted visions of hospitality” in Ukraine; “... within the limits of accepted courtesy and hospitality” in Canada; “... within the limits of the ordinary traditions of communication or courtesy expression” in Spain, etc.). It is quite possible to comprehend the provisions in relation to the first two requirements, to ensure their unified interpretation and application, and as regards the latter – there are all reasons for a maximum manifestation of the subject of public administration in their interpreting, applying. Under such conditions, one can talk about the possibility of “secret” gifts in the relations between a person and subjects of public administration and, consequently, about the corresponding implementation of the principle of protection of the legitimate expectations of a person in his/her relations with the latter.

A similar valuation phrase is typical for the normative model of fixing the restriction on “external” activity. It’s not clear what activity is “other” in

relation to the main, “paid” (receipt of profit or reward for the work done). Unfortunately, the legislator, proposing the list of activities which can be carried out, sometimes doesn’t formulate its official position towards what is considered to be a particular type of activities or priori stipulates a need to refer to other normative legal acts for clarification these provisions. The situation is complicated in the case of simultaneous availability of several legislative or subordinate legal acts that fix the definition of such activities. Whether it is worthwhile, in such cases, to talk about the intelligibility of such provisions for a person, their clarity (the availability of various collisions of normative legal acts, rules for their solution), the predictability of decisions, actions of subject of public administration in relation to the protection of the legitimate expectations of a person in the relations with the latter. There are grounds for “distraction”, “interest” of the subjects of public administration in “external”, “outside” activities, use of advantages of the main activities for “external” activities with a threat for the legitimate expectations of a person in relations with them. There are similar approaches in the normative definition of “permissible” areas of work with close people, as well as “permissible” spheres of work upon the termination of activities related to “serving” to the public interest.

It is important not only the “quality” of the legislation, which establishes appropriate anti-corruption restrictions but also the unification of the practice of its application (comprehensibility, clarity for a person) as well as its predictability (that is, the retrospective and perspective aspect of interpretation and law enforcement, their unification take place). Only under such conditions, the optimal distribution of “legal energy” of anticorruption restrictions in the aspect of protection of the legitimate expectations of a person in the relations with the subjects of public administration is possible.

3. Conclusions

Thus, the search for an optimal modern model of relations between a person and subjects of public administration should simultaneously take place with the normative consolidation of the system of guarantees of the implementation and protection of the human rights, freedoms and legitimate interests, among which there is the principle of protection of the legitimate expectations of a person in the relations with the subjects of public administration where anticorruption restrictions should be considered as its component. Due to the very normalization of the models of the distribution of “legal energy” of anti-corruption restrictions, there is potential trust in the relations of a person with the subjects of public administration, the predictability of their decisions and actions, unification of the interpretation and application of the legislation. Using the resources of “legal energy” of

anticorruption restrictions, which are aimed at preventing the “distraction” of public administration subjects from the implementation and protection of the legitimate expectations of a person, it is expedient to have a thorough doctrinal analysis of their phenomenon in order to form a new scientific basis, which is fully in line with the latest achievements of modern legal science, scientific basis for rulemaking and law enforcement in the sphere of relations of a person and subjects of public administration. Due to the normalization of the fundamentals of the use of the appropriate restrictions with the observance of all requirements of the legislative technique, taking into account the modern challenges, it is possible to ensure “high quality” of anti-corruption legislation, its comprehensibility, clarity for all subjects of legal relations in the sphere of public administration, unification of the practice of its interpretation and application and hence, the predictability of decisions, actions of the subjects of public administration, ensuring the implementation and protection of the legitimate expectations of a person in the relations with the latter.

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