

CORRUPTIBILITY OF LEGAL RULES: THEORETICAL PROBLEMS

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Abstract: The article considers the problem of corruptibility of legal rules. The author proceeds from the fact that some legal norms stimulate illegal corrupt behavior of participants in public relations. The task is to explain how corruptibility affects the generally recognized properties of the legal rules. The author describes the distortion of such properties of a “healthy” legal norm as formal certainty, general obligatoriness, systemic interconnection and provision with the state coercion power. We analyzed the “Methodology for conducting anti-corruption expertise of regulatory legal acts and draft regulatory legal acts” approved by the Government of the Russian Federation. We established the correspondence of corruptibility factors given in the Methodology to negative modifications of the properties of a “healthy” legal norm. We specifically considered various aspects of systematicity in the

context of the concept of corruptibility. We revealed the interdependence of the properties of a corruptogenic norm. It is concluded that the primary textual uncertainty creates uncertainty in the consequences, destinations and systemic relationships of the corruptogenic norm, which is eliminated in the course of interaction between the corrupt person and the corrupt official. The corruptogenic norm, while not being essentially legal, continues to be provided by the state coercion power and remains connected with other norms and institutions that are part of the legal system until it is identified as corruptogenic, distorting their meaning and adoption purpose.

Keywords: corruption, corruptibility, properties of legal norms, consistency in law, legal expertise, defects of law.

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1 Introduction

Corruption is an urgent political, legal and economic problem for many states. By the beginning of XXI century, the impossibility of dealing with corruption only with the help of criminally repressive measures becomes obvious, since corruption is caused by many reasons [1, p. 75]. It is developed a certain set of administrative and preventive measures; however, the result of their application is also not absolutely successful. There is a need for the participation of civil society institutions in the fight against corruption and liberal reforms; however, these steps also encounter a number of objective obstacles [2, p. 1889]. These circumstances make it possible to suggest that the proposed measures oppose not so much corruption itself as its individual manifestations. Corruption itself is immanent to society as a whole and the legal system as one of the social subsystems [3, p. 707]. As a private consequence of this approach, one can consider the view according to which certain norms encourage participants in public relations to corrupt behavior. Such norms are called corruptogenic. At the same time, the legal science has not

yet developed a clear idea of what constitutes such a property as corruptibility, as it is associated with other properties of a legal norm. These circumstances make it useful the theoretical analysis of corruptibility as a property of the norms enshrined in the regulatory legal acts.

2 Methods

The methodological approach to corruptibility used in this article proceeds from the dual nature of corruptibility. First, corruptibility is based on some modification of the properties of a legal norm. According to our hypothesis, it is precisely the change in the properties of a “healthy” legal norm that leads to the fact that this norm stimulates the corrupt behavior of participants in legal relations. Corruptibility shall be understood in this context as the ability of the norm to be applied in such a way that there is a risk of corruption relations.

However, according to R.G. Valiev, it should be noted that any rule provides for a particular level of discretion of its addressees [4, pp. 1-3]. Thus, there is the problem of criteria for distinguishing between corruptogenic

and “healthy” discrete norms, which has not received a satisfactory doctrinal solution, in our opinion. This circumstance puts the practical solutions proposed by the legislator in the focus of analysis. This second aspect of corruptibility is its legal consolidation as a legal construct. Its critical analysis suggests the answer to the question of why certain features relate to the signs of corruptibility: is this a legislative decision of the legislator or a reflection of some underlying laws? This issue boils down to the problem of the adequacy of corruptibility reflection in the legislation.

3 Results And Discussion

The Federal Law No. 273-FZ dated December 25, 2008 “On Combating Corruption” defines anti-corruption expertise of regulatory acts and their projects as one of the measures to prevent corruption, the implementation of which is regulated by the Federal Law No. 172-FZ dated July 17, 2009 “On Anti-Corruption Expertise of Regulatory Legal Acts and Draft Regulatory Legal Acts”. The Decree of the Government of the Russian Federation No. 96 dated February 26,

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2010 “On Anti-Corruption Expertise of Regulatory Legal Acts and Draft Regulatory Legal Acts” approved the Methodology for conducting anti-corruption expertise of regulatory legal acts and draft regulatory legal acts (hereinafter - the Methodology) in order to identify provisions conducive to the corruption conditions. The Methodology lists a number of factors that are called corruptogenic. They include: breadth of discretionary powers (absence or uncertainty of the terms, conditions or grounds for decision-making, duplicate powers); determination of competence by the formula “entitled”; selective change in the scope of rights of citizens and organizations at the discretion of state bodies; excessive freedom of by-law rulemaking (presence of blanket and reference norms); adoption of a regulatory legal act beyond the competence; filling legislative gaps with the help of by-laws in the absence of a legislative delegation of relevant authority; lack or incompleteness of administrative procedures; refusal of competitive (auction) procedures; regulatory conflicts; presence of excessive requirements for a person presented for the exercise of his/her

right; lack of clear regulation of the rights of citizens and organizations; legal linguistic uncertainty. Not all of these factors relate to the norm; some of them describe the corruptibility of a regulatory legal act as a whole. Other factors are associated not with the nature of legal norm, but with the social and logical conditioning of its content. This theoretical inconsistency, the result of which is the combination of factors of different significance in one list, emphasizes the practical orientation of the Methodology. However, from a theoretical point of view, the question can be raised more sharply.

Can a norm conducive to corruption be generally considered legal and retain its legal nature? Such a formulation of the question echoes the concept of a non-legal law developed within the framework of the natural-legal and libertarian types of legal understanding [5, p. 9], since the corruptogenic norms cannot provide an equal measure of freedom for all. The corruptogenic norm establishes not only unauthorized state arbitrariness from the point of view of the mentioned types of legal understanding, but the fundamental possibility of arbitrariness, which is used

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by the subjects of law administration and law enforcement. If this hypothesis is true, then a logical analysis of the correlation of signs of corruptogenic and legal norms shall reveal some discrepancies. The signs expressing the properties of legal norm include, among others, formal certainty, obligatoriness, state security, and systemic interconnection with other norms [6, pp. 224-231]. A norm that does not meet these criteria cannot fall under the concept of legal one based on the deduction rules. Corruptogenic factors have a negative effect on the listed properties of legal norms.

The most vulnerable seems to be such a property of legal norms as formal certainty. The corruptogenic norm, being formal (in the sense that it is fixed in the formal source of law), is not completely defined. Corruption is impossible without an unexpected measure of freedom of behavior for an official in the situation when it shall not arise. Such a factor as the lack of procedures destroys the rule of law, since there is always uncertainty as to whether the result of enforcement process was obtained as a result of legitimate activities of officials, and therefore it

remains the risk that the enforcement decision will be unstable to challenge. There is a dilemma between the stability of social relations, to which the law seeks, and the absolute nature of truth, on which such stability shall be based. It turns out that the corruptogenic norm, allowing for various interpretations, despite its textual consolidation, creates legal uncertainty in those areas of social life where the law-enforcement agencies sought to reduce it, on the contrary.

The corruptogenic norm is not generally binding. Generally binding means that the norm is designed for an indefinite number of applications. It is imperative in each of these cases. It is impossible to arbitrarily refuse to follow the rule fixed in the legal norm; this was also noted by J. Austin [7]. The corruptogenic norm allows for the possibility of refusing to follow the rules enshrined in it or not applying this norm to certain cases when it shall be applied based on the goals of its adoption. If everything remains equal before the norm, for example, of a fascist state, such a norm will be fulfilled in any case, no matter how arbitrary its content is [8, p. 2]; and there is complete uncertainty whether it will be applied in accordance

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with its purpose and meaning or not in case of corruptogenic norm, while the actual basis for unjustified exceptions from the traditional practice of applying the norm can be any: money payment, state of kinship or close friendship, common religion, etc. [9, pp. 198-205]. Unlike state arbitrariness, which advocates of the libertarian theory of law feared, the corruptogenic norm is suitable for rational use by legal entities, and in this sense, the application result of this norm gives rise to the obligation to recognize it as legitimate, and the basis for application remains dispositive and non-regulatory, since it is based on individual corruption agreement.

The rules of law are systematically linked to each other. Systematic legal norms mean, on the one hand, hierarchical dependence, according to which the rules are ranked by legal force (vertical systematicity), and on the other hand, it is expressed in the functional unity of different types of norms that can be recorded in various regulatory legal acts (functional systematicity). Two aspects of systematicity shall be considered with regard to corruptibility. Firstly, the corruptibility of a norm in individual

cases is due to its inadequate links with other legal norms, for example, in the case of incompleteness, conflict, lack of blanket or procedural norms or, conversely, their excessive presence. In this case, the corruptibility of the norm can be eliminated by establishing appropriate links with other norms and institutions.

The second aspect of systematicity is that any corruptogenic norm is part of the legal system until its corruptibility is proved. From the point of view of vertical systematicity, the status of corruptogenic norms is unclear and depends on whether its official corruption is established. From the point of view of the legislation, only prosecution bodies have the right to appeal against the corruption-generating norms [10, p. 105]; however, it is not directly spoken about their illegality; therefore, until the appeal procedure is completed, they continue not to contradict higher standards from the point of view of vertical systematicity, but are protected by security standards from the functional point of view. At the same time, other legal entities may be potential victims of corruption, and are interested in excluding the corruptogenic

norm from the legislation governing those social relations in which the entities are already participating or intend to participate. Therefore, it can be considered that the corruptogenic norms are subject to exclusion from the legal system as contrary to anti-corruption legal institutions, which shall occupy a higher place in the hierarchy of norms, along with the rules for establishing unlawfulness and unconstitutionality. Corruptogenic factors mentioned in clause 3 of the Methodology, such as lack of procedural rules, blanket and reference presentation model, regulatory conflicts, directly indicate a destructive effect of the corruptogenic norms on the legal system, as well as the inverse effect of distortions in the legal system on the possibility of corruption.

The distortion of the properties of certainty and general binding nature changes the meaning of the provision of norms with the state coercion power. The application result of the corruptogenic norm gives rise to the obligation to recognize it as lawful. However, the ambiguity of the rule contained in the corruption norm in a situation of corruption offenses is eliminated by methods not stipulated by the legal

system. The regulatory framework for enforcement is supplemented by an individual corruption agreement in which an official and an individual agree on a particular interpretation of the norm. Thus, not only the norm, but also the corruption agreement between the parties regarding binding nature or interpretation of such a norm becomes imperative and secured by state coercion. The rule of law begins to support the result achieved as a result of illegal actions as legitimate.

4 Summary

The corruptogenic norms lose their ability to be universally binding due to their uncertainty. These circumstances lead to the fact that the result of unlawful activity is ensured by the state coercion power, which negatively affects the entire system of law. It is possible to state a hypothesis according to which the corruptibility of the norm primarily arises due to its vague textual formulation. In this regard, subsequent legal uncertainty arises either in legal consequences, or in addressees, or in relations with other legal norms. As a result, the norm shall lose its legal nature and security with the state coercion

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power, which happens when its corruptogenic nature is detected. However, not being detected, the symbiosis of the corruption agreement that eliminates uncertainty, the law enforcement act and the legal norm continues to be protected by the entire system of law, negatively affecting its functioning.

In all likelihood, the corruptogenic norms can be considered a special type of defective norms, the understanding of the nature of which as legal or non-legal can vary depending on the type of legal understanding.

A brief analysis presented above shows that the corruptogenic factors enshrined in the Methodology, among other things, reflect the essential defects of the nature of the norms enshrined in the regulatory legal acts. More specifically, formal uncertainty is associated with such factors as determining competence according to the formula "entitled", incompleteness of administrative procedures, lack of clear regulation of the rights of citizens and organizations, as well as legal and linguistic uncertainty. Non-binding nature is expressed in the breadth of discretion, the selective change in the

scope of rights, the presence of excessive requirements for a person presented to exercise his/her right.

The vertical systematicity dysfunction is manifested in the excessive freedom of by-law rulemaking, adoption of a regulatory legal act beyond the competence limits, and filling in the legislative gaps with the help of by-laws in the absence of legislative delegation of relevant authorities. Functional systematicity suffers of the presence of regulatory conflicts and incomplete administrative procedures. It should be borne in mind that any corruptogenic norms are formally entered into the legal system, which means they give rise to legal consequences and have a systemic negative impact; therefore, as a result, state coercion provides not the original legal norm, but the norm modified by the corruption agreement.

5 Conclusions

We are inclined to believe that despite the lack of theoretical justification, the list of corruptogenic factors given in the Methodology reflects the essential features of the corruptogenic norms. The corruptibility

detection is a significant contribution to the further development of anti-corruption tools. Nevertheless, a theoretical study of this phenomenon shall be continued. In this article, a comparative analysis of the properties of a “healthy” and corruptogenic norm was carried out and significant differences between them were identified, which, in principle, cast doubt on the legal nature of such a norm and substantiate the need for efforts aimed at its identification.

The systemic effects, which, firstly, make the seemingly healthy norm inherently corrupt, and secondly, destroy the regulatory systems consisting of many norms, are of particular interest for further analysis. An important problem is the methodology for detecting the corruptogenic factors, the development of analysis procedures that increase its effectiveness.

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