

Constitutional Legal Grounds
For Clarification Of Subjects Of Criminal
Liability Intended To Combat Corruption

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In recent times, the problem of combating corruption has not only attracted close attention in the news media and among the general public, but has also become, at long last, a focus of professional analysis among Russian specialists. Two fundamentally different approaches have emerged in evaluating the effectiveness of legal mechanisms designed to combat corruption. On the one hand, there is the so-called “narrow” understanding of corruption, which reduces corruption to “venality” on the part of persons who have decision-making authority with respect to the distribution, first and foremost, of tangible assets and financial resources or who have the power to influence the decision-making process. Efforts to combat corruption within the framework of the “narrow” approach are viewed primarily from a punitive standpoint and entail the creation of a system of additional restrictions and prohibitions. These efforts are focused mainly on relieving the consequences of legal offenses that have already been committed.

Proponents of the “narrow approach” call for substantially broadening the range of persons who may be subjected to legal liability. To this end, they propose mainly that the pool of potential perpetrators of such legal offenses be expanded to include not only persons who perform administrative (i.e., authority-based) functions in the public legal sense of that term, but also persons who perform administrative (i.e., managerial) functions within the framework of private legal relationships. In this regard, the issue of potential perpetrators of these legal offenses requires further study. In principle, efforts to combat corruption in the “narrow” sense are regulated quite adequately by the existing statutory and legal foundation, which is in need only of individual clarifications.

For example, Chapter 30 of the Russian Federation Criminal Code, “Crimes Against State Authority and Against the Interests of State Service and Service in Bodies of Local Self-Government,” cites as one of the objects of such crimes the public legal relations arising in the exercise of official powers.

However, this object is not entirely consistent with the potential perpetrators specified in that chapter of the Russian Federation Criminal Code (see the note to Article 285 of the Criminal Code) because the potential perpetrators of the crimes set forth in the chapter include not only persons who perform the public legal functions of representatives of authority, but also persons who perform organizational-executive and administrative-economic functions in bodies of state authority or bodies of local self-government, in state and municipal institutions, and in the Russian Federation Armed Forces and other service branches and military formations of the Russian Federation.

As regards persons who perform organizational-executive and administrative-economic functions in state and municipal institutions (which do not constitute bodies of state authority or bodies of local self-government), it should be pointed out that a systemic interpretation of the relevant provisions of the Russian Federation Constitution, as well as of the federal laws “On the Principles of State Service in the Russian Federation,” “On General Principles Governing the Organization of Local Self-Government in the Russian Federation,” “On the Principles of Municipal Service in the Russian Federation” and the Russian Federation Civil Code, leads one to draw the following conclusions.

Pursuant to Article 3 of the Russian Federation Constitution, the possessor of sovereignty and sole source of authority (in its public legal aspect) in the Russian Federation is the people, who exercise that authority directly or through bodies of state authority and bodies of local self-government. Article 11 of the Constitution contains an exhaustive list of the bodies of state authority that have the right to adopt state-authority decisions (i.e., to exercise state authority) at the federal level and at the level of the Russian Federation’s constituent members. The official powers exercised by bodies of local self-government are also of a public legal nature, but they are not of a state nature since, in accordance with Article 12 of the Russian Federation Constitution, bodies of local self-government are not a part of system of bodies of state authority. The Russian Federation Constitution makes no provision for the exercise of official powers of a public legal nature by other subjects of law (besides the people directly, bodies of state authority and bodies of local self-government).

Attempts to confirm the lawfulness of assigning official powers to other subjects of law, such as, for example, state or municipal institutions, in particular by invoking Article 120 of the Russian Federation Civil Code, which recognizes as an institution any organization that is created by an owner for the purpose of performing administrative functions and that is financed by that owner wholly or in part, cannot be recognized as valid. The content of that article must be interpreted on the basis of the fundamental principles of the Russian Federation Civil Code. And Articles 1 and 2 of the Russian Federation Civil Code state that civil legislation is founded on a recognition of the equality of the parties to the relationships regulated by that legislation, on the autonomy of the will of these parties, and on their independence in terms of property ownership.

Article 2 of the Russian Federation Civil Code states explicitly that civil legislation does not apply to property relations based on the administrative or other subordination of one party to another, including tax and other financial and administrative relations. Consequently, Article 120 of the Civil Code envisions the possibility of institutions’ performing administrative functions exclusively of a civil legal character (i.e., management), while relations associated with the exercise of official powers are of a public legal nature and so cannot, in principle, be regarded as subject to legal regulation by civil legislation.

The unlawfulness of vesting official powers of a public legal nature in public associations, for example, is confirmed by the provision of Article 17 of the Federal Law “On Public Associations,” which prohibits public associations from interfering in the activities of bodies of state authority and officials thereof.

This approach is codified even more rigorously with respect to religious associations, since the Russian Federation, in accordance with Article 14 of the Russian Federation Constitution, is proclaimed to be a secular state in which religious associations are separate from the state. This basic constitutional principle is further developed in Article 4 of the Federal Law “On Freedom of Conscience and of Religious Associations,” which prohibits the state from charging religious associations with performing the functions of bodies of state authority, other state agencies and bodies of local self-government. Accordingly, official powers of a public legal nature may be exercised exclusively by persons who hold state positions and municipal positions within respective bodies of authority.

Regardless of where organizational-executive or administrative-economic functions are performed (in bodies of state authority, bodies of local self-government, or organizations), this activity is in essence of an “internal” character, since it constitutes administrative (managerial) activity within the framework of the body of authority (as a legal entity) or organization itself. This understanding is directly confirmed, in particular, by Note No. 1 to Article 201 of the Russian Federation Criminal Code, which recognizes a person who performs organizational-executive or administrative-economic duties within an organization as performing administrative functions within that organization. Consequently, persons who perform organizational-executive and administrative-economic functions in state and municipal institutions may not engage in the exercise of official powers of a public legal nature and, consequently, may not be classified as state or municipal officers. In this regard, defining such persons as potential perpetrators of crimes against state authority or against the interests of state service or service in bodies of local self-government is a highly dubious proposition, since in terms of their status they are in no way distinct from persons who perform administrative functions in other types of organizations, commercial and noncommercial alike. It would be more logical to treat persons who perform administrative functions in state and municipal institutions as potential perpetrators of the crimes set forth in Chapter 23 of the Russian Federation Criminal Code, “Crimes Against the Interests of Service in Commercial and Other Organizations.”

This proposal would also appear to be valid from the standpoint of Article 8 of the Russian Federation Constitution, which states that the recognition and protection equally of private, state, municipal and other forms of property constitute one of the basic principles of the constitutional order of the Russian Federation. In this regard, it would seem highly dubious to include persons who perform organizational-executive and administrative-economic functions in state and municipal institutions on the list of potential perpetrators of crimes against state authority or against the interests of state service and service in bodies of local self-government, but persons who perform similar functions in institutions of other forms of ownership on the list of potential perpetrators of crimes against the interests of service in commercial and other organizations, because this would entail stricter measures of criminal liability with respect to directors of institutions of state and municipal forms of ownership.

As concerns persons who perform organizational-executive and administrative-economic functions in bodies of state authority or bodies of local self-government, it should be pointed out that classifying such persons as potential perpetrators of the crimes set forth in the articles of Chapter 30 of the Criminal Code is unquestionably justified. This follows from the unique legal nature of bodies of state authority and bodies of local self-government (hereinafter referred to governmental authorities), since their legal status combines two principles—the public legal principle and the private legal principle. From the public legal standpoint, governmental authorities exercise official powers within their prescribed spheres of activity and in accordance with their competence as established by the Russian Federation Constitution, federal laws, other statutory legal acts of the Russian Federation, and statutory legal acts of the Russian Federation’s constituent members and of municipal entities. On the other hand, governmental authorities are rather active parties to civil relationships, a circumstance that allows one to speak as well of the private legal aspects of their status. As a rule, statutory legal acts that regulate the functions, purposes, rights and responsibilities of governmental authorities state that these authorities are legal entities. In terms of their content, then, statutory legal acts that define the status of governmental authorities are of a comprehensive nature and include, on the one hand, their powers of a public legal nature and, on the other hand, private legal characteristics that have to do with their legal capacity as legal entities. However, the status of legal entity relative to these governmental authorities is of a secondary nature and derives from their status as a subject of authority, since this status is assigned to them only in order to support the exercise of their official powers.

This conclusion is confirmed by the provision of the Russian Federation Civil Code establishing that governmental authorities may participate in private legal relationships within the framework of their competence as set forth in the acts that define the status of these authorities. Of key significance here is the reference to competence, because this competence is what establishes the bounds of the civil legal capacity of governmental authorities. Moreover, governmental authorities do not participate in civil legal relations on their own behalf; rather, they have the right to acquire through their actions and to exercise property and personal nonproperty rights and responsibilities, as well as to participate in legal proceedings in the courts, solely on behalf of the Russian Federation, a constituent member of the Russian Federation, or a municipal entity, respectively.

The exercise of official powers (as the public legal component of the status of governmental authorities) places special demands on the officers of these authorities who carry out responsibilities associated with the exercise of such powers. Their activities in this context are likewise of a public legal nature and differ substantially from activities carried out within the framework of labor-related legal relations. In this regard, the federal laws “On the Principles of State Service in the Russian Federation” and “On the Principles of Municipal Service in the Russian Federation,” as well as similar laws within the Russian Federation’s constituent members, state that such activity may be carried out only by persons who hold state or municipal positions, respectively, and this is what accounts for the public legal nature of the status of these persons.

Consequently, the public legal status of state (or municipal) officers makes it possible to classify them as potential perpetrators of the crimes set forth in the articles of Chapter 30 of the Criminal Code, regardless of what facet of the status of a governmental authority (the public legal facet or the private legal facet) is reflected by their activity, since in any instance of commission of the crimes set forth in Chapter 30 of the Russian Federation Criminal Code they act against state authority or against the interests of state service or service in bodies of local self-government. At the same time, it should be borne in mind that the aforesaid federal laws, for purposes of providing technical support for the operations of governmental authorities, provide for the potential inclusion within their staffing tables of positions that are not classified as state or municipal positions. The performance of these responsibilities takes place within the context of labor-related legal relations, a circumstance that presupposes the exclusion of this category of employees of governmental authorities from among the potential perpetrators of the crimes set forth in Chapter 30 of the Russian Federation Criminal Code.