REVISTA SAN GREGORIO

Determination of the term "Government official" in the Context of the United Nations Convention against Corruption

Determinación del término "funcionario gubernamental" en el contexto de la Convención de las Naciones Unidas contra la Corrupción

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Abstract

The article deals with the problems of determining the concept of "public official" and definiteness of terms in the context of enforcement of the United Nations Convention against Corruption. The author carried out the analysis of the specified category, identified its attributes and features of the international legal enshrinement both in the text of the Convention, and in the text of other international legal acts in the field of anti-corruption, mainly of regional value. It is established that the definition of "government official" unified by the Convention makes it possible to clearly and unambiguously determine the range of subjects of corruption to which international legal influence of not only the Convention itself, but also the corresponding coordinated activities of international anti-corruption institutions and national governments of the states ratifying the Convention applies. At the same time, it is proved that there is a distinction between the concepts of "official" and its separate special type – "government official" at the level of international legal regulation, which is a shortcoming of the Convention. In particular, it is established that the Convention is limited by the category of only those civil servants who hold positions in public authorities financed from the state budget and perform state functions only. In this context, it is concluded that there is a need for significant terminological clarification of the legal regulation provided by the Convention through the implementation of the category of "local self-government officials". In addition, the article pays special attention to the issue of enshrining the concept of "government official" for the enforcement of the provisions of the Convention in the legislation of a number of countries that have ratified it. It is proved that most national legislations contain exhaustive features of a "government official" only in acts of criminal law. Most acts of national law do not contain the category of a "government official", but the set of concepts and categories of positions defined in such national lawfully meets the needs of the Convention, and is generally covered by this concept within the meaning of the Convention itself. But the need to prosecute individuals for corruption offenses committed not only by public authority officials explains the need for a broader interpretation of this definition at the level of national law. At the level of scientific discourse, the existence of stable trends to replacement of the category of "government official" with a broader category in its content –"public official" or the category of "public authority official". This corresponds to the general trend of changing the essence of public governance for a new paradigm – public administration, when public officials not only perform administrative functions, but also meet public needs by providing appropriate administrative services. In this context, the author also considers it necessary to amend the Convention.

Keywords: Corruption Offenses, Government Official, Public Authority Official, Public Governance, Public Administration, UN Convention against Corruption.

Resumen

El artículo trata los problemas de determinar el concepto de “funcionario público” y la definición de términos en el contexto de la aplicación de la Convención de las Naciones Unidas contra la Corrupción. El autor realizó el análisis de la categoría especificada, identificó sus atributos y rasgos de la consagración jurídica internacional tanto en el texto de la Convención, como en el texto de otros actos jurídicos internacionales en materia de anticorrupción, principalmente de valor regional. . Se establece que la definición de “funcionario de gobierno” unificada por la Convención permite determinar de manera clara e inequívoca el abanico de sujetos de corrupción sobre los que la ley internacional influye no solo de la propia Convención, sino también de las correspondientes actividades coordinadas de lucha contra la corrupción internacional. -Se aplica la corrupción de instituciones y gobiernos nacionales de los estados que ratifican la Convención. Al mismo tiempo, está probado que existe una distinción entre los conceptos de “oficial” y su tipo especial separado - “funcionario del gobierno” a nivel de regulación legal internacional, lo cual es una deficiencia de la Convención. En particular, se establece que la Convención está limitada por la categoría de solo aquellos servidores públicos que ocupan cargos en las autoridades públicas financiados con cargo al presupuesto estatal y realizan funciones únicamente estatales. En este contexto, se concluye que existe la necesidad de una aclaración terminológica significativa de la regulación legal proporcionada por la Convención a través de la implementación de la categoría de “funcionarios de autogobierno local”. Además, el artículo presta especial atención a la cuestión de la incorporación del concepto de “funcionario público” para la aplicación de las disposiciones de la Convención en la legislación de varios países que la han ratificado. Está comprobado que la mayoría de las legislaciones nacionales contienen características exhaustivas de un “funcionario de gobierno” solo en actos de derecho penal. La mayoría de las leyes nacionales no contienen la categoría de “funcionario del gobierno”, pero el conjunto de conceptos y categorías de cargos definidos en dicha legislación nacional satisface legalmente las necesidades de la Convención, y generalmente está cubierto por este concepto en el sentido de la Convención en sí. Pero la necesidad de procesar a las personas por delitos de corrupción cometidos no solo por funcionarios de la autoridad pública explica la necesidad de una interpretación más amplia de esta definición a nivel de la legislación nacional. A nivel del discurso científico, la existencia de tendencias estables a la sustitución de la categoría de “funcionario de gobierno” por una categoría más amplia en su contenido: “funcionario público” o la categoría de “funcionario de autoridad pública”. Esto corresponde a la tendencia general de cambiar la esencia de la gobernanza pública por un nuevo paradigma: la administración pública, cuando los funcionarios públicos no solo realizan funciones administrativas, sino que también satisfacen las necesidades públicas al brindar servicios administrativos adecuados. En este contexto, el autor también considera necesario modificar la Convención.

Palabras clave: Delitos de Corrupción, Funcionario de Gobierno, Funcionario de Autoridad Pública, Gobernanza Pública, Administración Pública, Convención de la ONU contra la Corrupción.

Introduction

The development of any state-building processes is always accompanied by such negative factors that are collectively called corruption. Corrupt practices are intended to benefit in any form, but in any case, by illegal methods and tools through the inefficiencies and shortcomings of the public administration system that exists in almost every state. The level of corruption has a negative impact on the socio-political and socio-economic situation, and therefore carries significant risks in all spheres of public administration influence, and mainly in the field of public administration itself. To actively combat corruption, the international community is constantly trying to develop and improve tools to combat it at all levels of public governance and in all subsystems: institutional, organizational, legislative, and so on. The result of such cooperation is the adoption of a number of international legal acts regulating the general principles of the fight against corruption, as well as a number of international organizations and coordination mechanisms designed to coordinate and cooperate international efforts in this area.

The fight against corruption begins with the definiteness of terms, unity and coherence of the system of international principles for combating corruption offenses. Such unity ensures the same approach to the qualification of corruption offenses, the definition of key determinants of corruption, which allows to combat corruption more effectively. Combating is manifested mainly in the unification of a number of key concepts at the legislative level, including the concept of the subjects of corruption offenses, as well as the concept of "government official." The actualization of the issue of achieving terminological unity is that today there is a trend when corrupt officials have the opportunity to evade responsibility in other countries, where they do not fall under the attributes of corruption offenses, and their actions – under the attributes of corruption under the local laws. All this determines the main goal of the study – to eliminate problematic aspects in the context of determining the concept of "government official", taking into account the requirements for this category by the United Nations Convention against Corruption. Achieving this goal involves the consistent achievement of a number of objectives:

- determine the essence and content of the concept of "government official" taking into account the requirements of the UN Convention against Corruption (hereinafter referred to as "the Convention");
- establish the key features and determinants of this category of person, which should be properly enshrined and unified in national legislation;
- search for ways to address shortcomings in definiteness of terms that remain at the international level of in accordance with the Convention.

Materials and methods

This study became possible due to the use of scientific and practical research, critical analytical materials on the problem of international legal anti-corruption regulation, including the text of the Convention. In particular, the works of Arnone and Borlini (2014), Brölmann and Radi (2016), Ferguson (2017), Ligeti and Simonato (2019), Rao (2013), Richwine (2012), Stewart (2006), Thijs and Hammerschmid (2018), Verheijen (2009), Volokh (2014), and others were widely used.

Attention was also paid to modern Ukrainian researchers on the problem of terminological support of combating corruption in the context of national lawmaking. In particular, we are talking about the works of Angelov (2011), Bashtannik (2010), Ilienok (2013), Karpa (2018), Nizhynska (2013), Petrashko (2011), Serkevych (2017) and others.

The texts of international legal acts themselves were studied: the 2004 UN Convention against Corruption; the Criminal Law Convention on Corruption of the Council of Europe of January 27, 1999; the Civil Convention on Corruption of the Council of Europe of November 4, 1999; the Inter-American Convention against Corruption of March 29, 1996.

Methodological support of research results is a combination of methods of structural and systemic analysis, taking into account the research objectives. The focus was made on the methods of hermeneutics and formal-logical methods, which allowed analysing the texts of international legal documents, and revealed the main determinants of the category of "government official". Methods of the comparative approach allowed determining the peculiarities of the implementation of the category of "government official" from the Convention in national legislation, including that of Ukraine.

In general, the research methodology provides the following sequence in achieving the objectives:

- analysis of the essential elements of the category of "government official" in the Convention, taking into account the needs of the anti-corruption system;
- analysis of regional regulations and mechanisms for implementing the provisions of the Convention in terms of terminological unification in national legislations;

- analysis of problems that arise due to inaccuracy or lack of unification of the conceptual framework of the anti-corruption system at the international legal and national levels;
- analysis of directions for eliminating the problems of terminological uncertainty, including at the international level.

Results

The concept of "government official" is traditional and objectively necessary for all countries in the world, as it defines the set of persons to whom the state entrusts or delegates the performance of state functions. Given the objectives of this study, the importance of unifying approaches to defining this category of positions is as follows:

- unified determination of a "government official" allows to clearly and unambiguously determine the range of subjects of corruption;
- the required level of distinguishing the concepts of "official" and its separate special type – "government official" is achieved;
- the goal of determining the scope and limits of international legal enshrinement of the range of subjects covered by international acts is achieved.

At the same time, we note a significant shortcoming of the Convention – it does not define the concept of "local self-government official", which, by their legal nature, are separated from public authorities and are independent of them in carrying out their functions. This can be proved through the analysis of the definition of "government official" of Art. 2 of the Convention. For the purposes of the Convention, a government official is:

- any person holding a position in the legislative, executive, administrative or judicial body of a State Party, appointed or elected, whose work is paid or unpaid, regardless of the level of hierarchy;
- any other person performing any public function, in particular for a public authority or public enterprise, or providing any public service, as defined in the domestic law of a State Party and as applicable in the relevant field of the legal regulation of that State;
- any other person defined as a "government official" in the domestic law of a State Party;
- any person who performs any public function or provides any public service (United Nations, 2004).

The latter definition is acceptable for the needs of anti-corruption activities and the implementation of anti-corruption policy, therefore, such a general approach characterized by the use of maxims "any person", "any function" means the need to maximize coverage of government officials to whom these provisions apply.

In general, the Convention is the result of long and complex negotiations, in the course of which many complex issues and problems in various sectors of public relations in the field of anti-corruption were resolved. It was necessary to create a tool that reflects all these issues, and therefore all countries had to be flexible in defining key terms. This means that in the future it is for the purposes of this Convention that countries should unify national legislation.

Thus, we confirm the hypothesis that the Convention limits itself by the category of only those servants who hold public office, i.e. hold positions in public authorities that are financed from the state budget and perform only the functions of the state and not local self-government. This is an important omission from the point of view of international legal support of anti-corruption activities.

It should be noted that this problem is not solved even by the Mechanism for the Review of Implementation of the United Nations Convention against Corruption (hereinafter referred to as "the Mechanism"), adopted in 2011, which includes a revision of the Convention in terms of improving the effectiveness of anti-corruption activities, but leaving such a category of persons as local self-government officials outside of its international legal regulatory influence (United Nations, 2011).

The adoption of the Convention was not only a powerful step towards the creation of a unified international system of anti-corruption activities, but also the next successive step towards intensifying rule-making processes in this segment of international cooperation. It should, however, be noted that the Convention is a consistent continuation of the process of cooperation between states in this area, which began at the regional level, and in particular at the EU level, marked by the adoption of the Criminal Law Convention on Corruption of the Council of Europe No. ETS173 (hereinafter referred to as "ETS 173") of January 27, 1999. If you look at ETS 173, you can see no term "government official", but only a set of terms: "official", "civil servant", "public official", "mayor", "minister", "judge", which are interpreted according to the content of determining the categories of positions in which the relevant person performs the functions of the state (Verkhovna Rada of Ukraine, 2007).The Civil Law Convention on Corruption of the Council of Europe of November 4,1999 contains similar provisions (Verkhovna Rada of Ukraine, 2005). Earlier in 1996, the Inter-American Convention against

Corruption was adopted, according to which "government official" is equated to such categories as "official of the state" or "civil servant" and means any official or servant of the state and its bodies, including those who are elected or appointed to perform functions on behalf of or in the service of the state at any level of government (Organization of American States, 1996).

That is, the Convention helped to clarify and generalize the conceptual framework which already existed in the international legal space, but was devoid of concretization for most countries. The implementation of such unification is entrusted to the Intergovernmental Working Group on the Implementation of the Convention, one of the tasks of which is to provide national governments with recommendations on the unification of national legislation, bringing it to a form that best reflects the interests and expands the possibilities of international cooperation in the field of anti-corruption (Ligeti & Simonato, 2019). Brölmann and Radi (2016) note in this regard that the terminological definiteness of the Convention has almost never been the subject of scientific discourse, and such a unique approach to the definition of terms is the result of a simple doctrinal conclusion made at the level of scientific support for the methodology of anti-corruption activities. This is due to the fact that most researchers point out that the effect of the Convention is determined primarily by the mechanism of wrongful conduct of a person, rather than his status, as the absence of such a status precludes wrongful conduct. Therefore, a corrupt act can only be corrupt if it is committed by a relevant official (Arnone & Borlini, 2014). In this context, the Convention is based on the attributes of an act, not on the attributes of the legal status of an official, which, in our opinion, also needs to be clarified.

In this regard, Ferguson (2017), supporting the position of Arnone and Borlini (2014), notes that they have proved the thesis that the main essence of the Convention is a combination of different socio-economic costs and institutional consequences of corruption, which creates a strong link between economic and legal spheres, and therefore the legal status of an official recedes into the background in comparison with the consequences of his action, and it is through these consequences that such an act can be defined as corrupt or not, as such acts will be defined as lobbying in the private sector (Ferguson, 2017).Thus, the Convention lays the foundations for the creation of global anti-corruption architecture, although its effectiveness and impact will depend on the implementation and enforcement of its provisions at the national level. The basis of this architecture is immediate access to prosecutors from different countries in the process of obtaining evidence abroad or extradition of government officials, including foreign government officials suspected of corruption offenses (Low, 2006). In this case, Petrashko (2011) points out that in the absence of a clear unified definition of the term "government official", such extradition activities are not possible, which in turn objectively reduces the level of effectiveness of international cooperation in combating corruption (Zinchuk, n. d.). Defining the category of "government official" for the purposes of the Convention, it is advisable to conduct a comparative analysis of the legislative recognition of the definition of such a person at the level of national legislation in some countries (Table 1). This will significantly increase the level of understanding of the problems related to the unification of national legislation as regards definitiveness of terms, if we establish a significant difference from the content of this category in national and international law.

Table 1. National level of definition of the category of "government official" (Source: Federal Ministry of Justice and Consumer Protection & Federal Office of Justice (n. d.), Official home of UK Legislation (1995) Savchenko (2007), Serkevych (2017))

Country (source)	Government official is…
United States (Model Penal Code)	public servant – any official, including jurors, as well as any person who performs the function of the state as an adviser (including political), consultant, performing their functions on a paid basis
United Kingdom (Civil Service Act of the Council of 1995 and Civil Service Act (Annexes) as amended in 2007)	civil servant of the Crown – a person who performs any functions that are authorized by the Crown, i.e. enshrined in the relevant acts of the Crown and does so in the manner prescribed by law. This category of employees includes all, without exception, persons performing public non-commercial functions (including employees of local self-governments)
Germany (German Criminal Code)	any person entrusted with the exercise of power
France (French Penal Code)	a representative of any public authority that performs the functions of the state; a person who performs special tasks of public authorities in the manner prescribed by law; a person elected to any public political

	position; manager or employee of a state enterprise or business entity with a share of state property of more than 50%; local self-government official;*
Switzerland (Swiss Criminal Code)	any person who performs public functions, performs the functions of the state, performs functions that are important and whose decisions are universally binding on the territory of individual municipalities, as well as any functions of an authoritative, imperative or administrative nature, and their implementation is associated with the issuance of relevant public (regulatory) acts
Italy (Italian Criminal Code)	a person who performs legislative, judicial or administrative state functions, i.e. functions regulated by the norms of public law, is characterized by the formation and expression of the will of public administration and is associated with authority
Japan (Penal Code of Japan)	a governmental, municipal official or deputy, or a member of a committee, or other officials who perform public duties in accordance with the law

*there is no definition of "government official" in all French law, but the determination of such persons is based on the position he holds

Thus, summarizing the above, we draw the following important conclusions:

- most national legislations contain an exhaustive notion of "government official" only in criminal law, which is explained by the need to prosecute persons for corruption offenses;
- most national laws do not contain a clear category of "public official", which means the need to expand the boundaries of determining the legal status of a person prosecuted for corruption offenses. Instead, it usually contains a list of officials who fall into this category depending on the positions they hold;
- most national criminal laws refer to the category of persons who are subjects of corruption offenses as well as local self-government officials, which once again proves the need to expand the conceptual framework of the Convention by adding the appropriate definition of "municipal official".

Thus, we come to the main conclusion that the Convention, as a result of the application of the maxim "any person performing any functions of the state" seeks to significantly expand the possibilities of national legislation of the countries in order to maximize the effectiveness of international anti-corruption activities. That is, it is the Convention that seeks to incorporate the existing determinants of the categories of public officials, civil servants, and persons authorized to perform state functions – that is, any group of persons who are already in one way or another classified in national legislations as persons covered by anti-corruption legislation.

Discussion

Eliminating the shortcomings of international legal regulation of relations in the field of anti-corruption, by clarifying the terminology, as well as defining the new essence and content of the category of "government official", given the expansion of models and methods of corruption – all this is a priority of modern scientific and analytical research in the segment of anti-corruption activities as a holistic direction of public policy.

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Nizhynska (2013) notes that the evolution of international legal regulation of anti-corruption activities has eventually reached the required level of generalization of those characteristics of an official who is authorized to perform state functions and in respect of whom anti-corruption activities, including criminal liability, should be introduced. Obviously, the researcher makes this conclusion on the basis of an integrated analysis of the concepts contained in the above-analysed Conventions, including the Council of Europe Convention. Instead, we insist that limitation by the public sector significantly limits international anti-corruption activities.

Ilienok (2013) points out in this regard that the main achievements of the Convention are the establishment of requirements for government officials, in particular their controllability, as well as the control of state institutions of the public and parliament; openness and transparency of decision-making by such officials at all levels of

government. This means that in addition to the law, government officials are subject to the influence and supervision of civil society institutions, and determining the range of persons controlled by civil society leads to the conclusion that their number should be expanded to include all persons whose functions are financed from any budget that is part of the State Budget of Ukraine. That is, the source of funding of the government officials' activities should be determined as an additional determinant of the category.

Thijs and Hammerschmid (2018) use a similar approach based on the source of financing of civil servants' activities, stating that there are several categories of civil servants in the EU, but they all receive salaries from the budget: civil servants in state administrations of the national level; local civil servants of the substate level; employees of state institutions, establishments, organizations, etc.; other employees financed from the state budget. The main problem with this definition is that it does not include local self-government officials. Therefore, it is more logical to speak of such a category as "official in the civil service system", which traditionally means "a civil servant who holds a position provided by regulations, performs official functions, is endowed with public authority, bears legal responsibility for the failure to perform or improper performance"(Angelov, 2011). The uniqueness and uniformity of this definition relates to public functions, and therefore fully reflects the needs of the definiteness of terms of the Convention itself.

Stewart (2006) indicates a rather interesting determining feature to the category of civil servant, who points out that the civil service is permanent, and civil servants do not change with the political change of government. A person employed as a civil servant performs administrative, not political functions. Stability of work, independence from the political course – all these are important attributes of the essence of the civil service and the category of "government official". Stanley (n. d.) does not agree with this statement, believing that a government official is any person who is in public service, i.e. service that is associated not only with the performance of public duties or functions of the state, but also service associated with the taking of the oath, including if the person holds office as a result of the implementation of representative democracy processes. Such a statement is not covered by the notion of financing costs, acquisition of administrative functions, imperative mandate and the possibility of imperative influence on public relations, but has an extremely important aspect – service as a procedure for exercising powers delegated by the state or people as a bearer of sovereignty.

Civil servants should act within the limits of their powers, but according to the content of such powers, it is more reasonable to use the term "public servant", the essence of which will consist of a set of organizational, legal and social features. Moreover, public service is considered as a separate type of professional activity of persons holding state political positions, positions in public authorities, which are intended to perform the tasks of the state and taking into account the needs of society (Karpa, 2018).

In this context, the conclusion of Obolensky (2014) that today the concept of public governance is completely replaced by the concept of public administration is quite important. Bashtannyk (2010) also notes such a transformation. The essence of such a change is revealed through the content of the activities of a public servant, which is to provide public services, the main task of which is to meet the public interest. If we approach the problem in this way, then it is quite logical to conclude that the Convention itself already to be improved and is outdated because it does not meet the existing needs of socio-political development, including the needs of anti-corruption policy, because analysing the category of "public servant" we come to the conclusion that it covers both government officials and local self-government officials, who are also subjects of corruption and should be subject to anti-corruption legislation. In many countries, including Ukraine and the EU, local self-government officials are equated with government officials by national law, and in particular by criminal law, but are not fully identified.

In this regard, Verheijen (2009) notes the independence of the process of appointing officials, because only in this way they will achieve the objective of performing public functions aimed at meeting public rather than individual political interests and needs. In turn, Rao (2013) emphasizes that a public figure is primarily a staff that advises, develops and implements public policies and programs, as well as daily influences the functioning of the state through his administrative acts. It is the reference to daily nature and the introduction of appropriate standards of administrative activities that leads to the fact that the category of public servants includes all, without exception, officials in public institutions, organizations and state enterprises, or those directly involved in governance.

Büthe (2004) also concludes in his research that the concepts of "public politician", "civil servant" have a fairly low level of coverage of the number of employees who perform state functions. Therefore, the scholar speaks of "non-government actors" who

determine public policy. These include, in particular, persons holding influential political and elected positions, including mayors of large cities of the state.

Frank and Lewis (2004) also mentioned the so-called civil servants. They note that the performance of public functions in one way or another takes place in the system of public administration relations, which consists of all bodies and institutions of public administration (including local self-governments). However, in the context of the utilitarian application of the provisions of the Convention in national anti-corruption legislation and practices, another question arises as to how one should be governed by the Convention in cases of corruption offenses committed by non-governmental sector officials. In particular, we are talking about the management of large corporate companies, which also perform government functions and have a monopoly on management decisions, but in the private sector.

In particular, Richwine (2012) pointed out to this problem and raises the issue of the correlation of remuneration for the functions performed by civil servants and employees in the private sector. The researcher considers this disproportion in relation to the private sector the root cause of corruption. Volokh (2014) draws attention to the same problem, but the researcher does not ask himself a question about the extension of the provisions of the Convention to the private sector, but about the need to take measures to equalize incomes in both sectors.

By the way, this position fully reflects the references that the Convention extrapolates to the public and private sectors – obtaining undue advantage, as the essence of the corruption offense is a consequence of social inequality of employees.

Conclusion

Summarizing the above, we come to the following important conclusions. First, the Convention defines a "government official" as any person who holds a public or non-governmental position, but who in one way or another is entrusted with the functions of a state, and who ensures the performance of state tasks in his activities. All this narrows the circle of officials who fall under the Convention only to those who receive salaries from the state budget and perform functions delegated or assigned in one way or another by the state. This definition lacks the local self-government sector, as local self-government officials do not directly perform the functions of the state, but ensure the exercise the local community's right to local self-government. Besides, their activities are financed from local budgets. This limitation of the Convention creates the first of the risks – the expansion of corruption in the field of local self-government, even if they are reduced in the public administration sector. That is why we propose to actualize the issue of amending the Convention by introducing the term "local self-government official" or "municipal official". This will significantly increase not only the quality and clarity of definitiveness of terms, but also the effectiveness of international legal regulation of anti-corruption activities.

Second, the current trend of doctrinal knowledge of the essence of the category of "government official" tends to establish a new category of employees – "public official" or "public authority official". This term is much broader in its utilitarian determination of the range of persons who are subjects of criminal offenses under the Convention. In general, if we talk about the function of the Convention and ensuring the achievement of its goals, we should understand that corruption has spread not only to the public governance sector, but also to the public administration sector and even the private sector. All this requires further actualization of scientific discourse and international cooperation in improving the quality of the Convention's mechanisms in the field of anti-corruption.

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