CURRENT ISSUES OF PUBLIC SERVICE ON THE BACKGROUND OF ADMINISTRATIVE IMPROVEMENTS

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Public service is ranked among the state legal institutions which, in fact, being quite new and somehow in discord with local legal ideas in the terms of independent state, however, can be introduced as an established system with improvement trends. This institution plays a major role in due, professional execution of state functions, as well as ensuring of legal standards of democracy. At the same time, yet, we cannot exclude lack of adequate understanding of legal culture of some independent institutions, the reality of public service staff policy based purely on party affiliation, certain gaps in the process of employment of public servants, obstacles in professional skills and other similar practices.

Discovery of actual origins of such phenomena and outlining of more preferred ways of their overcoming is extremely important in the terms of practical point of view. In my opinion, analysis related to formation of areas and types of public service, evolution and future trends are the most valuable among proposed questions.

Currently the key issue of imperfection of the legal grounds of the public service is out of discussions; however, we are sure that the proposed methodology, the actual disproportionate situation of their perception behind the related scientific debate, still does not allow getting rid of the most fundamental obstacles, strictly understanding the vulnerable sectors of the local legal culture and at the same time outlining the improvements of such institute.

I believe the problem is partly dictated by the lack of professionalism in the field of law-making activities, particularly by perceiving contemporary democratic institutions as Soviet institutions. It is true that even five years after the adoption of the

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Constitution on July 5, 1995, which unequivocally stipulates that local self-government bodies are non-state bodies in their essence, a draft law "On public service" was circulated, which considered community service as a type of state service. *However, drafts of legislative acts circulated later outlined the two main directions of the public service — state and community*.

It is worth mentioning that the exact nature and status of local self-government bodies have not yet been fully reflected in the RA Constitution. Thus, as per Article 2 of the Constitution, local self-government bodies are the public administration bodies: the people shall exercise their power through local self-government authorities; meanwhile Article 18, which is dedicated to the protection of the rights of individuals before the state bodies mysteriously referred to 'the judicial, as well as other state bodies only. It turns out that people are deprived of effective remedies before local self-government bodies. Such legal regulations are still based on the false idea that local self-government bodies are not public administration bodies, which in its turn is conditioned by undue identification of terms "public" and "state".

Of course, the aforementioned problem has been solved by the current legislation, particularly by the Administrative Procedure Code, but the fact is that the country's constitutional law has ignored it. In terms of the new constitutional realities, I believe we should agree with all those authors who identify "representative democracy" with "representation of the people"[2].

In this regard legist G. Harutyunyan has given an accurate assessment to this: "Representative democracy is the execution of people's power through state government (Parliament) and local self-government bodies (Council of Elders and Head of Community), officials (elected President) provided by the Constitution"[3].

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2 Armen Jagaryan, Natalya Jagaryan, Public bodies of representative democracy and their place in the contemporary system of Russian local self-government, Comparative constitutional law, № 3(88)2012, pages 111-112.

3 Comments to the Constitution of the Republic of Armenia (joint edition G. Harutyunyan, A. Vagharshyan, Yer., Law, 2010, page 61.

For comprehensive identification of issues related to types of public service, we should make a possibly equivalent reference to the analysis of terms related to this legal issue. In these terms, the problem of definition of the public service related term has now obtained an unprecedented urgency. I think before undertaking scientific debate on definition of each term we should methodologically consider the fact that legislative definition of the terms may sometimes be insufficient basis for their definition on scientific standards[4]. The most practical, pragmatic issues are now set before the legislation and no definition proposed by legislative act can become the issue of scientific analysis, moreover of debate in the terms of current developments, where the legislation features with the most sophisticated system enriched with new institutions.

Besides, note that the terms mostly have practical importance in the legislative act in the frames of relations regulated by such legislative act, or a separate branch of legislation, at its best, which goes to show that in this case we deal with legal concepts perceived with conventional idea. Moreover, in some cases one or another term has the practical importance in the frames of particular section of the legislation only. Of course, it would be more practical if *in the terms of sufficient grounds* legal definition of certain terms should have legal meaning for other branches of the legislation, *i.e*. a universal character; but it should be accepted that this problem has not been yet practically solved; moreover, it has not been adequately understood due to a number of subjective reasons.

Below we try to separate in the systematic form public service type related legal grounds, including social and psychological obstacles:

1. No legislative act devoted to the legal regulation of public service clearly sets the exact scope of the term "public service". Particularly, Article 3(1) of the RA Law "On public service" defines as follows: "Public service is the execution of powers assigned to the state by the Constitution and laws of the Republic of Armenia, which

4 N. V. Varlamova, Typology of legal consciousness and contemporary tendencies of development of theory of law. Saint-Petersburg, Fenniks, 2010, pages 8-9.

includes the state service, community service, state and community offices". This definition implies that the "public service" includes not only state and community service, but also state and community offices; however, Article 5(1)(4) of the same Law stipulates the following: "Public servant – a person holding any position provided for by the list of positions for state and community service (except for temporarily vacant positions) or, in the cases and manner prescribed by law, being in the corresponding human resource reserve list for public service".

In other words, the legislation is based on obvious internal idea: on the one hand it is stipulated that public service includes also state and community positions, and on the other hand the term "public servant" does not include such official positions. It is natural that such terms could not have any other content, and undue confusion prevents full legal regulation process of other associated institutions.

2. In some cases, some legislative acts include such legal terms that simply do not regulate the given legal act. Essentially, we cannot exclude the phenomenon of definition of the same legal term in different legislative acts; moreover, we cannot exclude that they possibly may differ from each other in terms of content, as each legislative act regulates some definite relationship. Moreover, in such cases it is better to stress that definition of the given term is used only concerning the relations regulated by that law, while defining any term set out in the legislative act.

However, this permissible method expressly loses its original logical idea, when we attempt to fix a term related to another legislative branch through a legislative act. It is clear that such terms as "official", "public servant", "high-ranking official" and so on, are mostly related to public service, and make the components of the latter; however, the domestic legislation is full of legislative acts that have nothing with legal regulation of such service; they incorrectly reflect those terms and have features that are very different from each other. The pragmatism of such legislation is emphasized to such extent to ignore the basic requirements of law provisions.

Let us give a concrete example on the above-mentioned. Article

308 of the RA Criminal Code establishes criminal liability for the abuse of official powers, and at the same time gives definition to the term "official". The following is the definition of "official" as per the above article: "persons performing organizational-managerial, administrative-economic functions" in state bodies, local self-government bodies and the organizations thereof. Practically, no unified understanding has been developed on the term "organizational-managerial, administrative-economic functions", it is obvious that it will cause a number of serious legal problems. However, even more troubling is the fact that having recognized the officers of local self-government bodies and organizations thereof as "Officials", the legislator at the same time included abuse of official powers and similar crimes in the chapter "Crimes against the State Service". As I have mentioned above, I believe we are aware that the activities of local self-government bodies and organizations thereof cannot be identified with "state service"; however, I think we can state that we failed to form such a legal culture which clearly separates the above mentioned institutions, and while choosing materials of legislative regulation we should prefer more basic methodology.

What should be the exact behavior of the legislator to escape such misunderstanding? In my opinion, the solution of the problem is related to at least two tricks of legal technique: the first, it would refrain from regulating any of components of the public service by criminal code, since it is quite different from being subject of this field of legislation, and in this case it would be better to make a reference to appropriate norm of legislative act devoted to such public service. The second, it would be legitimate to consider by the Criminal Code such persons able to commit crimes against public (not state) service, using their status or position, without being public servants, hence they should be considered as subjects of crimes against public service.

In fact, it is not accidental that understanding of the need of the above mentioned issues led to making amendments to the Criminal Code in 2008, as a result of which "public servants not considered as

officials" and "persons using real or alleged influence for mercenary purposes" are recognized as subjects of similar crimes. Of course, these solutions are hard to be perfect ones (it is sufficient to notice that the term "public servants - non officials" itself is problematic, since the term "official" has never included public servants only), but awareness of the need of systematic solution to the problem is welcomed in this case.

However, the problem is not so much related to legal techniques, as to fixed undue and various state behavior towards some separate types and directions of public service itself. Particularly, the criteria used by the Criminal Code for separation of exclusively "state service" is unclear; why the entire public service has not been recognized as object of criminal defense?

I believe this is another phenomenon typical to the Soviet legal culture. Let's remember how the Soviet criminal legislation was regulating the criminal liability for encroachment on different types of property: sanctions set for crimes against personal property were incomparably softer than the same type of crime against state property.

This differentiated approach was revised only three years after the independence, but it was a technical review only, as a number of significant issues still have not got their solution. They just set a single sanction for theft irrespectively of the type of property.

The fact that the legal culture still bears the influence of Soviet legal ideas is motivated by the following facts: on April 18, 2003, ten years after the above legislative reviews mentioned by me, they have adopted a new Criminal Code, which was officially announced to be consistent with the contemporary standards of democracy and significantly differed from the previous version of the Criminal Code adopted in the Soviet period and slightly amended thereafter. However, here, in the same Code we can meet non-uniform legal protection of property types, as well as evidence samples of classification of a person, his life, honor and dignity to the class of property. Thus, in the terms of existence of an issue related to the recognition and protection of property right as stipulated by the

Constitution, it is at least unclear by what criteria is the Criminal Code guided in setting responsibility for inaccurate use of credit facilities given under international agreements, funds of the state or international institutions, particularly; why the problem of community property protection was ignored; why such acts which infringe on human life and health are still in the list of crimes against property (e.g. robbery and assault).

3. The next issue is conditioned by inadequate awareness of international practice, its partial copying and legal culture of unreasonable attraction. Thus, I deeply believe that the RA Law "On public service" includes some legislative solutions related to the above mentioned institution of Germany.

Comprehensive study of international practice and the implementation process itself are welcoming, since there are no prototypes in the domestic legal systems. Nevertheless, it should be noted that serious flaws sometimes accompany implementation of international practice, in some other cases it turns to mechanical phenomenon only[5]. Moreover, while trying to separate the most significant arguments, we should have to stress neglect of specifications of formed legal culture and issues of the Constitution. There is another example: administrative legislation of Germany has adopted such starting point, according to which illegal regulative acts or activities of administrative bodies should at first be appealed in administrative order, by applying to the superior and only after that it has the legal opportunity to judicial complaints. But the problem is that these important legal features were not considered proportionally within the frames of local legislation. Besides, the fact that term "inactivity" in the same administrative legislation of Germany is identified with rejection of the claim or application. However, there is a real confusion in local legislation, as both activity/action and inactivity/inaction here equally became subject of legal regulation in separate sectors, and in some other sectors inaction was ignored. Another example: Article 68(3) of RA Administrative Procedure

5 Zorkin V., Challenge of globalization and world order legal conceptions. Constitutional justice, № 4(50)2010, pages 25-26.

Code states: “Through a claim for recognition the plaintiff may request to consider an interfering administrative act with no legal effect or action as illegitimate if the plaintiff is justifiably interested in recognition of the act or action as illegitimate”. About a year ago this legislative provision was appealed in the RA Constitutional court; it is interesting that on the stage of the initial discussion many people (I mean official responds of the National Assembly of the Republic of Armenia, the Court of Cassation of the Republic of Armenia) were sure that the above-mentioned legislative norm had no conflicts with the Constitution, as it repeated the rule of law in Germany and had passed a serious examination. However, partners need to focus on the fact that the German administrative law, as I have already said, adopted quite different legal settlements on the matter of this issue. Let me add, that the Constitutional Court made a unique decision on this issue, according to which term “action” should be understood in this Code with double meaning, it should also mean “inaction”. At the same time Article 114(1)(5) of the above-mentioned Code was acknowledged conflicting with the Constitution on the part where the administrative act[6] only was considered subject to appeal.

4. The next problem concerns the issue of reasonable use of facilities, including human resources. However, this issue has probably some inconsistency in the terms of the study of international practice. Particularly, the problem refers to the establishment of committees dealing with assessment of professional and administrative skills of public servers, as well as to organization of professional trainings. These questions almost do not cause any serious problems on state service, particularly on civil service, which is quite different on the matter of community services. In my opinion and unfortunately, our young scientists represent exceptionally superficial study of international practice and protect very logical

6 See Decision of the RA Constitutional Court SDVo-942 of February 22, 2011 on resolving the issue on the compliance of Article 68(3) of the RA Administrative Procedure Code with the RA Constitution on the basis of application of the Party “Republic”.

and reasoned conclusions by ignoring specific regional features while choosing thesis on improvement of community services; however, these are considered to be so at the first view only. Particularly, without any reservations they offer to include lawyers, economists with scientific degree in certification committees on obligatory basis. The problem is that the same professionals would not even envision what kind of huge and unrealistic costs are required in order to implement such recommendations. Another important factor: the effective legislation provides establishment of certification committees in every community. And now let us try to analyze and visualize what happens if at least one certified lawyer is included in such committee. I wonder if it is difficult to understand that in such cases the solution may develop at least in two directions: either there is a need to expand communities or establish certification commissions not in every community but in inter-community unions. Unfortunately, we have not yet experienced attempts to open inter-community unions up to now, which is quite different, but as much important. In any cases we feel lack of necessary practice and customs.

5. The next issue refers to the unity of legal settlements. This principle is recorded with the breakdown on civil service. I think speaking of a unified legal settlement in the terms of different, sometimes significantly divisible types of public service is at least unrealistic and unreasonable. But these extremes, which are currently recorded by various laws and regulations, are at least related to the constitutional principle of equality before the law for everyone but have the lack of effective administration logic. There is no explanation why public servants performing the same duties, having the same responsibilities and working under the same conditions, for example, should be paid taking into account the fact of being employed by different state authorities of different units of the same authority.

We could somewhere consider such differentiated approaches fair if the legal solutions would have been conditioned by at least corruption risks, but this factor was not taken into account. Upon

deeper examination of the nature of the problem, we notice that the authorities have managed to get certain privileges set by the law, through lobbing and other ways while trying to make the service more attractive and competitive; however such privileges, in my opinion, are groundless.

Initiatives such as the so called off-budget accounts in state bodies authorized to ensure collection of fines and other obligatory payments from physical persons and legal entities are groundless and have nothing common with management improvements; 5% of such collections are deposited in the accounts, while 70% of amounts available thereon are given in the form of bonuses. This unreasonable policy raises many questions, but let us separate at least one of them: I wonder if activities of all these officials (including senior officials, members, etc.) that are not directly related to collection of fines and obligatory payments is less important and less paid.

Currently it should be clearly pointed out what specific issues need to contain definition of uniform approaches of legal settlement of service.

In fact, I believe, it is groundless to set such obstacles in the matter of replacement of officials in the field of civil service. Particularly, in the terms of such flexibility, ratios of officials of state service such restrictions are not realistic.

6. Given the underlined importance of problem of professional skills of public servants, the procedure of repeated participation of persons who “failed” on the competition within a short period of time is highly vulnerable. Most unacceptable is when the person who has repeatedly failed is given the possibility to participate in the competition within a short period of time and take responsible positions.

Let us refrain from making unequivocal statements about the existence of corruption in a given case, but it should be noted that such “forgiving” legislative regulations towards apparent lack of professional knowledge in conformity with legal practice cannot overcome the problems of public service.

Comprehensive analysis of international practice shows that the person who has failed should be given the next opportunity to participate in the exam at least six months later, it means he or she needs a reasonable period to obtain sufficient skills.

7. Finally, adoption of such approach, which results in the reduction of discretionary powers of public servants in anti-corruption matter, is very disturbing. In this matter, it is clear that initially unpromising factors of inadequate understanding of international legal standards are put in the origins of the reform. Particularly, the confusion is due to inadequate understanding of limitation principle of discretionary powers.

Thus, Article 6(2) of the RA Law "On the Fundamentals of Administrative Action and Administrative Proceedings" reads as follows: "In exercising discretionary power the administrative body shall be guided by the need of protection of human and citizens' rights and freedoms enshrined in the RA Constitution, by principles of their equal rights, proportionality of carrying out administrative action and prohibition of arbitrariness, as well as shall pursue other goals envisaged by law".

Note that in this case, the norm literally incorporated from administrative legislation of Germany marked the necessity of limitation of discretionary power rather than its reduction, it means the administrative authority may be vested with discretionary power; just while using it the administrative authority should be guided rather by certain standards provided by the law, including the predetermined purposes, than by arbitrariness.

Unfortunately, this simple legal problem, was practically considered with unnecessary distorted commentaries, as a result of which we have the dominant way of thinking, according to which we must do our best to minimize direct contact between officials and private persons. In this case it is unacceptable that we base on the idea that any official has undeniable tendency to allow abuse of power and arbitrariness. Instead of preventing entry of such persons into the public service, preference is given to the most sophisticated methodology: to prevent their communication to people.

We also do not rule out the necessity of limiting direct communication of individuals with officials and making such scope possibly reasonable, but we also cannot ignore that existence of certain discretionary powers is necessary for several reasons: a) it enables improvement of intellectual and practical skills of public servants as they are forced to be creative in their approach to solving tasks; b) it enables to identify the exact scope of truly empowered and able to promote officials as reasonable and intelligent choice among existence of a few options is considered the most reliable criterion for assessing official capacities; c) it makes possible to take into account the most true and concrete solutions among multi-nature functions performed by the public servant in proportional way, etc.

There is no doubt, the number of key issues in the field of the public sector still waiting for their comprehensive solution is too many; we have just tried to separate those, which, in our opinion, are the most actual. It should be added that slow moving in the field of public service improvement will have too expensive outcome on the general situation in the state management area; lingering in this case is at least unacceptable, especially when we are talking about the kind of decisions that will not require investment of additional financial or human resources, but on the contrary, intended to record major success with more modest means.

At the same time, having understood that the above approaches are not the ultimate truth, I would like these issues to become a topic of wide-range discussion, which would enable to have a number of approved solutions. In this regard, it is appropriate to recall and summarize the material with the following idea of B. Kistyakovski, the famous Russian scholar: "… no field of science has so many conflicting theories, as Jurisprudence has[7]".

7 Kistyakovski B. A., Social science and law. Features on methodology of social science and general theory of law. M., 1916, page 374.