ADMINISTRATIVE LAW AND ADMINISTRATIVE PROCEDURE LAW: INSTITUTIONAL DIMENSION

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RESTRICTIONS ON THE RECEPTION OF GIFTS BY PUBLIC SERVANTS AS A MEANS OF CORRUPTION PREVENTION (IN TERMS OF THE IMPLEMENTATION OF FUNCTIONAL PURPOSE OF ADMINISTRATIVE LAW)

Summary

The paper analyses the problems of the influence of modification of functional purpose of administrative law on the relations regulation directly relating to gifts' reception by public servants. These relations have always been and will continue to be the subject of regulation of administrative law, shift of the priorities of the functional purpose of the latter one affects the regulation of «gift relations in the public service». The research illustrates key challenges, connected with the regulation of gift relations in the public service, in the format «question-answer», emphasizes essential changes of that sort of regulation. The author focuses on the priority-oriented consolidation of the basic models of «gift relations» in the legislation of countries across the globe, identifies peculiarities and substantiates the conclusion of the most effective modern model of «mixed» content which combines the fundamentals of prohibition and restriction as means of administrative legal influence. It is formulated the proposals for a procedural aspect of «gift relations» and the main priorities of its adjustment with the focus on achievement of modern branch legal science. The author identifies a control as an effective instrument of the rule of law and legitimacy in the sphere of «gift relations» in the public service and the main priorities of use of its resource in the modern conditions of state building and law building. It is outlined the bases of consolidation of modified protective function of administrative law in the field of public and service relations, in particular, their «gift» varieties. The author substantiates the expediency to use the recourse of «restrictions on gifts reception by public servants» as an effective mean to prevent corruption in its different manifestations in the field of public service.

Introduction

Increasingly, more attention of the interested community is concentrated on those issues that are traditionally considered as the subject of regulation of administrative law under the conditions of a radical reconsideration of the functional purpose of administrative law, the formulation of the provisions of the latest domestic administrative-legal science, the development and adoption of numerous acts of administrative law, the practice formation of its application with the focus on ensuring and harmonizing with the realities of modern period of the development of the state. In addition, a heightened interest is associated with the fact that even in the context of functional purpose of corresponding branch of law these issues need the further use of all armoury of instruments of branch legal regulation which has been developed for a long time. However, there is an emphasis on the modification of their resource in accordance with the requirements of real time.

Restrictions in public service law, which are considered as an effective instrument to prevent corruption in the public field, hold pride of place among that sort of issues. One of varieties of such restrictions is the restriction on gifts reception by public servants. Despite the fact that restrictions issue, in general, and specified variety, in particular, were investigated by legal scholars in the context of restrictions in public service law, topicality of the issues of public service law as a sub-branch of administrative law, issues of administrative legal regulation of corruption prevention in all its manifestations in the public service and, as consequence, there is a lot of research papers (for example, contributions of Berdnikova K., Nastiuk V., Bielievtseva V., Kolpakov V., Liutikov P. and others), and fundamentals of «gift relations in the public service» are regularized by many normative legal acts (for example, arts. 23, 24 of Law of Ukraine «On Corruption Prevention», the Decree of the Cabinet of Ministers of Ukraine «On the Procedure of the Assignation of Gifts Received as Gift to the State, the Autonomous Republic Crimea, Local Community, State or Municipal Institution or Organization approved» dated 16.11.2011 № 1195, Recommendations on Prevention and Settlement of Conflict of Interests Approved by the Decision of National Agency on Corruption Prevention of Ukraine dated 29.09.2017 № 839 etc.) and there is a practice of its appliance, unfortunately, it takes place insufficiently effective use of a resource of appropriate restriction, the prevalence of cases of non-compliance with the requirements of the law, and, consequently, the manifestations of corruption in the public service. Taking into account the change of guides in the functional purpose of modern administrative law, it is worth noting that the updated regulated and updated protection influence of administrative law (as a manifestation of two main (basic) functions of administrative law) should concentrate on the relations directly related to the restrictions on gifts reception by public servants. However, it is necessary to keep in mind those national best practices which have been successful in the process of practical application for a long time along with the novels of legal branch influence conditioned, in particular, by borrowed achievements of foreign branch legal science, rulemaking and law enforcement. It is possible to hope for an effective resolution of the issue connected with the use of the source of restriction on gifts reception by public servants to prevent corruption in all its manifestations in Ukrainian public service only due to the combination of positive doctrinal, rulemaking and law enforcement experience and

priorities of the modern development of branch legal science. All these things in aggregate actualize the significance of this paper and the formulation of its goal, which is to analyze the current topical issues of resource use of the above mentioned restriction in public service law and to formulate specific proposals for their solution by using armoury of administrative-legal regulation in the conditions of functional modification of the latter.

Basic material

Coverage of the material should be presented in the format «questions-answers» with respect to several key outstanding issues. In particular, should relations, connected with gifts for public servants, be subjected to legal regulation in general as, traditionally, public-service (in its all manifestations) relations are accompanied by gifts exchange expressing respect, gratitude, the desire to maintain relations? Why should norms of administrative law regulate appropriate «gift relations», but not other branches of law?

Actually, as the analysis of historical sources shown, public-service relations had been accompanied by gifts change among «servants» since ancient times («presents», «gifts», «bribes», etc.). Today, «gift relations» are widespread in diplomatic relations, although they do not lose the importance at the level of all diversity of public-service relations, when a public servant receives a gift as a manifestation of respect for him for a professional, conscientious service, or when a public servant unlawfully enriched himself in a covert form using «gift relations». The relevant relations must be subjected to legal regulation emphasizing the fact that the subjects of granting and, above all, the subjects of gifts receiving are persons with a specific legal status, functional purpose. A public servant, the name itself confirms it, is empowered to represent, realize and protect public interests, so nothing should influence «purity» of his professional official activities. «Gift relations», as kind of public-service relations, should be subjected to the detailed legal regulation in order to eliminate all prerequisites for influencing the public service, public servants. Thus, for example, it is possible to mention a number of normative legal acts which had regulated this kind of social relations in past historical periods (Decrees «On Bribes and Promises Prohibition», «On Prohibition to Bring Gifts for Governor of Guberniia and Other Officials», «On Prohibition to Accept Presents by Chiefs from the Society» etc. [1, p. 10; 2]). Today, there are several basic approaches regulating this issue in the legislation of countries of the world. Predominantly, the issues of «gifts for public servants» are regularised by: a) individual articles, section of anti-corruption laws (for example, in Ukraine, Brazil); b) laws directly related to prevent and eliminate a conflict of interests in the public service (for example, Canada, Georgia); c) by-laws with detailed regulations of fundamentals on the types of gifts, the grounds for reception, the rules of conduction with them (for example, the USA). In addition, an individual by-law regulates the relations of reception of so-called «official gifts» (by official representatives of the state during official events, etc.) and this practice is typical for most countries of the world (Russia, the USA, Ukraine, Singapore, etc.). A gift for a public servant is not an encouragement for his conscientious activity or an incentive, an end in itself of his career, but only a possible symbolic expression of

respect, regard him, in view of this, established comprehension of its role should be consolidated at the level of legal regulation. Moreover, to eliminate the prerequisites for unlawful use of a gift as a means of influence on a public servant, «purity» of his official activities as well as a means of illegal enrichment of the public servant himself owing to gifts, there should be a detailed legal regulation of the model of «gift relations in the public service», the rules of dealing with them in different situations and the bases of legal liability for violation of the relevant legal regulations. Under such conditions, it is possible to achieve certainty, transparency of public-service relations and eliminate any threats of «a gift for the public service».

Traditionally, «gifts relations» are considered as a kind of public-service relations, thanks to which, the norms of administrative law have to regulate them. Analysis of the experience of countries of the world shows that the model of «gift relations» is predominantly defined in most norms of administrative law (for example, Code of Conduct for the Senior Government Officers at the Federal Executive Branch of Brazil, Law of Georgia «On the Conflict of Interests and Corruption in Public Service», Law of Japan «On Ethics of Public Servants» and suchlike). However, the grounds for a liability for breach of «gift rules» by public servants are regulated by both administrative and criminal (and sometimes only by the latter) law (for example, China, Denmark, Norway, Germany). Nevertheless, in the aspect of regulation of the principles of «gift relations in the public service» in terms of their basic model, official concepts, rules of conduct with gifts, including their different kinds, a leading role should belong to the norms of a branch, which is intended to determine the principles of public-service relations. For this very reason, the norms of administrative law should regulate «gift relations in the public service».

What should be a model of «gift relations in the public service» and what administrative-legal regulation may be considered as the most effective for the regulation of relevant relations? Repetitively, it has already been noted in branch legal science that countries of the world have several basic models of «gift relations in the public service» [3; 4; 5]. It, above all, is prohibitive and restrictive models. However, they occur quite rarely in their classical comprehension, as a rule, there is either a base model with the national specificity of its normative regulation or a peculiar combination of elements of base models, once again with the national specifics of their normative regulation. For example, in Germany and Spain, public servants do not have the right to accept gifts at all and at the same time they must declare all the gifts (as well as from relatives) in order to ensure that there are no any violations of «gift prohibition» with regard to gifts directly associated with their professional service activities [6, p. 20]. China has introduced a common prohibition on gifts for public servants, with the exception of books, and in Canada it is not allowed to accept any gifts if their value can be determined by money equivalent. However, the prohibitive model is consolidated with certain adjustments. In particular, in France, servants are not entitled to accept gifts if they are provided with the aim to «influence their official activities», in Singapore – «with the obvious purpose to achieve a positive attitude on the part of a servant» [7, p. 248]. Majority of countries of the world have statutory restrictive model of «gift relations». For example, in the UK persons, who hold a post for the purpose, are allowed to receive

gifts which don't exceed 140 pounds sterling, in the USA – fifty dollars for servants, and two hundred and five hundred for senators and congressmen, in Georgia – three hundred lari, in Brazil – one hundred reais and suchlike. In addition, the restrictive model of «gift relations in the public service» uses the criteria for determining «gift source» («from one person», «during one official event», «from one source», etc.), «the time period of gift reception» («within one year», «in the period less than 12 months», etc.), as well as gift characteristics by using appraisal concepts (for example, in Ukraine, it is «within the framework of generally accepted notions of hospitality», in Spain – «...the framework of the common traditions of communication, the manifestation of courtesy», in Brazil – «signs of respect», in Canada – «...adoptable courtesy and hospitality»). It is also possible to find out some other criteria for detailing the model, namely: in Brazil – a gift should not be aimed at encouraging (rewarding) a particular official [8, p. 177] even at the time when he does not resolve issues related to his professional official activities directly. As a rule, restrictive model of «gift relations» involves a simultaneous establishment of several criteria as regard to a gift for a public servant (for example, in Ukraine – three, in Brazil – four, in Georgia – six), the absence, at least, one of them predetermines the prerequisites for recognition of specific «gift relations» as such that are subjected to prohibitive regulatory model. For this reason, it is a safe bet that actually, there is no restrictive model of «gift relations in the public service» in the «pure form». It is proved by detailed analysis of the legislative provisions of the countries which establish restrictions on gifts reception by public servants. These provisions are either before enumeration of the restrictions criteria or after them fix the provisions that all gifts that do not meet the specified characteristics are prohibited for public servants. Therefore, for example, art. 23 of the Law of Ukraine «On Corruption Prevention», which has a title «Restrictions on gifts receiving», fixes the restrictions in the second part, and the first part consolidates a general prohibition on gifts reception by public servants which are directly connected with their professional service activities or which are presented by persons, who are professionally connected with servants. Thus, in fact, there is a combination of prohibitive and restrictive models of «gift relations in the public service». And this practice is quite widespread in countries of the world. Moreover, so-called «mixed» character of the model is also confirmed by the fact that the same article of the Law of Ukraine consolidates the permission for gifts reception by public servants from relatives and those which are received as publicly available services, prizes, bonuses, winnings, discounts for goods, etc.

Consequently, we observe simultaneous use of several means– prohibition, restriction, permission, for branch regulation of corresponding relations. Which of them is most effective depends on how thoroughly the provisions are formulated, how absolutely variants of the behaviour of individuals are defined, how the use of appraisal concepts for eliminating the grounds for a variable interpretation in the process of law enforcement is minimized, as well as it depends on the effectiveness of sanctions provided for violation of the relevant provisions (compliance of their nature and degree of act harmfulness, educational, preventive and punitive effect). It is hardly possible to introduce a total prohibition taking into account the specificity of public-service relations in all their diversity, subjective content, and mixed one

(prohibitive – restrictive) is quite potential, moreover it has shown a positive performance in many countries of the world for a long time of existence, however due to securing clear, transparent, particular list of restrictive criteria for gifts reception by public servants as well as simultaneous implementation of binding declaring of all gifts received by them, specification of rules of conduct with different kinds of gifts (as an example, it is chosen Standards of Ethical Conduct for Employees of the Executive Branch, Codified in 5 C.F.R.), reinforcement of legal liability for violation of «gift rules in the public service».

Is it worth considering the conduct with the gifts of public servants as a component of administrative-legal regulation? Should the modern priorities of administrative and legal regulation of procedural relations in general and in regards to this sphere be taken into account? It is certainly yes. Attention should be given to the issue of sequence of the implementation of obligatory actions of a public servant in the case of reception (identification, receipt) of a gift, their fixation as much as to the definition of what should be considered as a gift in general. Degree of detail of normative consolidation of these provisions of procedural content influences their compliance, the control over their implementation, the timeliness and the adequacy of reaction in cases of violations of legal requirements. The experience of countries of the world shows that there is a diversity of approaches of the legislator in resolving this issue – from excessively detailed approach (as it has already been noted, in the USA there are Ethical Standards that regularise conduct rules with various kinds of gifts of public servants in different life situations) with the regulation of all rules in a unified normative act, and up to the definition of the principles of conduct with gifts in the articles of a specialized legislative act on the prevention and resolution of conflicts of interest (for example, in Georgia), simultaneous regulation at the level of the articles of anticorruption law and a number of by-laws (for example, in Ukraine), and certain sub-legal acts (for example, individual Memos in Kazakhstan). Excessive sublegislative regulation of conduct rules with gifts of various types of public servants with the focus on a certain peculiarity of their public activities, existence of possible exceptions from general rules is not seem reasonably under the conditions of ensuring absolute certainty of procedural relations, the sequence of actions of all subjects, the specifics of their consolidation, strengthening the principles of public control over the compliance with established legal provisions, as it essentially complicates law enforcement. Unfortunately, there are rather common cases when by-law normative act on certain public servants stipulates exceptions to the mandatory «gift prohibition». It is fully justified to systematize all procedural and legal norms in the field of public service and separate, along with other procedures, in a unified procedural-systematized legal act of the provisions specifically devoted to conduct of public servants with gifts (distribution by type of gifts, grounds for their reception (detection) with an algorithm of necessary actions, control increase over compliance with relevant provisions). It is also important to identify the bases of use of control means over adhering to conduct rules with gifts of public servants in a unified classified procedural act. In this aspect, it is important to consolidate the obligation of the latter to declare all received gifts, in particular from their relatives, with the indication of their possible cost and source. This practice has already been in

many countries of the world for a long time and has proven to be an effective means to prevent corruption practices in the public sphere. For example, in France, Latvia, gifts declaring is obligatory for all public servants, in Poland – for those who hold an elective post at the local level and appointive public office [6, p. 15], in Georgia, a declaration must have the data on a person who received the gift, a person who gave this gift, the nature of relationship between the abovementioned persons, the type of gift, its market value (art. 15 of Law of Georgia «On the Conflict of Interests and Corruption in Public Service»). There shouldn't be any exceptions on gifts declaring by public servants. It deserves respect the experience of those countries of the world which regularise conduct rules with different types of gifts in details, for example: a) gifts on the occasion of «momentous» (important) events in the life of a public servant (although they are presented by persons with whom the public servant is in the service relationship and which are generally subjected to «gift prohibition», but they take place in the real life of servants and such regulation (with a clear indication of the list of such events) eliminates the veil of «gift relations in the public service»). This approach is enshrined in the US, Ukrainian legislation (however, this is only in relation to servants of the State Fiscal Service of Ukraine), b) «indirect gifts», that is, those which are provided to a public servant through his close relatives either on his instructions or consent to other persons, institutions. It is interesting in this aspect is the experience of those countries, which legislatively regulated restrictions on gifts reception by relatives of public servants with their simultaneous introduction of their obligation to declare all received (discovered) gifts. For example, in Georgia, art. 5 of the abovementioned Law clearly fixes that total price of gifts received by each member of the family (in addition, art. 4 of the same Law fixes the definition of family members, who should be understood as spouses, minors, stepchildren, as well as persons who permanently reside with a public servant) during the reporting period must not exceed one thousand lari, and gifts which are received simultaneously – five hundred lari, if these gifts are not received from one source [9].

The handling rules with gifts by public servants require detailed regulation as it helps to determine whether this gift is forbidden or restricted and at the same time to answer the question whether the public servant adheres to the legal principles of «gift relations in the public service». Specification of the content of provisions, clarity, logic, determinacy of the latter and their systematization in a single act (as the priorities of the modern procedural rulemaking) is the key to effective use of the restrictions resource (and sometimes prohibitions, mixed models) in respect to gift reception as a means of corruption prevention in the public service. And conversely, generalized approach of the legislator to the settlement of this issue, the overload of the provisions by evaluation concepts, the contradictory of the provisions' content create preconditions for unlawful acts related to the use of gift resource. For the majority of countries of the world, it is typical to regulate the handling rules of public servants with gifts in the case of direct contact with a donor person, which is quite justified in view of the popularity of such relationships. However, it should not forget about so-called «uncontrolled» relations (delivery of a gift by mail, its finding in an office premises, near the residence etc.) which, in fact, veil «gift relations in the public service». Without exaggerating the role and significance of any of the varieties

of «gift relations», it is necessary to specify the legal principles of each of them consolidated the sequence of obligatory actions of a servant, time limits, their specifics of fixation, etc. Even non-standard situations should be identified when, for example, a public servant has no a real opportunity to forgo a gift (during a formal event, taking into account the specifics of the national traditions of gift exchange, out of courtesy etc.). For example, Brazilian legislation stipulates that received gifts, in the case of their non-compliance with the attributes of permission, as follows: taken out courtesy or in virtue of a diplomatic protocol, must be transferred to the state treasury or donated to «involuntary charity» [8, p. 177]. The legislation of Russia consolidates the distinction between gifts given to a public servant during official events as gifts to the state, and the gifts given to this person for their use during official events. At the same time, handling rules for these types of gifts differ significantly [10, p. 93]. In Singapore, Lithuania, the grounds for a possible reacquire of gifts received by public servants during exercising their professional duties are provided, although with observance of strict, regulatory requirements for approving this procedure with special state commissions [7, p. 246]. It is the non-compliance with procedural principles of «gift relations» should be considered as an integral part of the grounds for resolving the issue of non-observance of «gift rules» as a whole and bringing a public servant to legal liability.

Who should exercise control over the compliance with «gift rules» by public servants? Like any other kinds of public-service relations, these relations may be a subject of state (on the part of direct chief, entities of public service management, specially authorized actors of corruption prevention, etc.) as well as public (different institutions) control. Furthermore, the control can be over a direct «signal» regarding the compliance with «gift rules» by a public servant that can come from any person, including the public servant himself, if he has questions about the interpretation and application of the provisions of the law. The control can be carried out indirectly, in the process of solving other issues related to the public service (for example, during the annual evaluation of the performance of the person's official activity).

Under present conditions of the reconsideration of the functional purpose of administrative law, attention is drawn to the fact that its tortious component, connected with the protective function, should change due to the reconsideration of administrative offenses as grounds for administrative liability, administrative penalties as a reaction to commitment of the appropriate unlawful acts, simplification of the procedure of bringing guilty persons to responsibility. Are those response action to the violation of «gift rules in the public service», which are in force in the legislation of the countries of the world, quite effective? Is it advisable in Ukraine to borrow the experience of those countries which stipulate criminal liability for the violation of the appropriate rules?

The role of administrative law should involve not only determination of the principles of regulation of «gift relations in the public service», but also principles of responsibility for violation of «gift rules». Indeed, most countries of the world consolidate criminal liability for public servants for the violation of the «gift rules», it also causes by the fact that they do not have a distinction between the two types of legal responsibility that are traditional for domestic legal science and legislation.

Corresponding violations are considered as misdemeanor offense due to which the application of measures of criminal responsibility is stipulated. Taking into account the domestic practice to settle this issue, it should be noted that administrative liability is stipulated precisely for violation of restrictions on gifts reception by public servants, and criminal liability is for violation of the general prohibition on gifts directly related to professional activities and those, which are received from persons who are on professional terms with a public servant. Therefore, focusing on the principles of administrative-tort relations on the «gift rules» it can be argued that, in general, the grounds for administrative liability, in the case of detailed procedural aspects of «gift relations», are fully justified and response measures to violations of «gift rules» are adequate (especially that the practice of fines introduction for violation of the «gift rules» is fairly widespread in countries of the world).

Conclusions

Restrictions on gifts reception by public servants definitely can be considered as an effective measure to prevent corruption in its various manifestations in the field of public-service relations. Taking into account a significant role of the rules of administrative law in the regulation of «gift relations» in the public service, it is seemed expedient to use the developments of the newest administrative-legal science in relation to the modification of the functional purpose of the relevant branch of law as to the regulation of relations connected with the implementation of basic model of «gift relations» as to procedural relations, which are directly related to the handling rules of public servants with different kinds of gifts in different situations, and as to liability relations for violations of «gift orders». Distribution of the sphere of regulatory influence by combining the resource of prohibition and restrictions on gifts reception by public servants, the specification of legal principles of «gift relations» with the systematization of procedural rules in a single regulatory legal act with the highest degree of certainty, transparency, simplicity of such instructions, expansion of control principles, including public, in compliance with the «gift rules» and preventive and educational reaction of the state to their violation in the form of administrative liability measures, will promote the maximum use of the resource of this measure of corruption preventing in all its manifestations in the field of public service in order to achieve a positive result in the context of current conditions of state building and law-making.

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