
PERSPECTIVE

Regulation of Relations Related to Gift in the Public Service

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The aspects of regulation of issues related to gifts in the field of public service are accorded particular importance within the mechanism for preventing corruption. It is widely acknowledged in the practice of fighting corruption that a bribe is the most common form of corruption, and that it is mainly accomplished in two ways – “openly” or in a “masked” manner. In the case of masked bribery the following methods, acknowledged by law, are employed: royalties, bonuses, gifts, payment for two jobs, when actually performing one, consultations, lectures, donations, etc. Quite frequently, for some action or omission an official receives far a greater amount of royalties than what is due for the task that he asked to perform. This task is then done along with receipt of a prize, bonus, grant, precious gift, or higher than usual honoraria or lecture fees, or other forms of compensation. The most common form of “masked” bribery is a gift. Thus the regulation of this issue is of particular importance.

What do the International Community Organisations Offer with this Respect?

The Model Code of Conduct for Public Officials recommended by the Council of Europe¹ lists the requirements that should be taken into account when regulating rules for acceptance of a gift by a public official. According to this Code, a public official should not demand or accept gifts, favours, hospitality or any other benefit for himself or his family, close relatives and friends, or persons or organisations with whom he or she has or has had business or political relations which may influence or appear to influence the impartiality with which he or she carries out his or her duties, or that may be or appear to be a reward relating to his duties.

Under Article 18 of the Code the aforementioned prohibitions do not include conventional hospitality or minor gifts. Where the public official is in doubt whether he can accept a gift or hospitality, he should seek the advice of his superior. It is noteworthy that in practice a diversified procedure for the acceptance of gifts is provided based on an official hierarchy.

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¹ Model code of conduct for public officials Appendix to Recommendation No. R (2000) 10, 106th Session of the Committee of Ministers of the Council of Europe.

Article 9 of the International Code of Conduct for Public Officials, recommended by the UN General Assembly² provides recommendations related to various aspects of the acceptance of gifts or other favours.

It includes a mandatory regulation, under which “Public officials shall not solicit or receive directly or indirectly any gift or other favour that may influence the exercise of their functions, the performance of their duties, or their judgement”.

Thus, a public official is explicitly required not to accept any gift, related to his official status, which in itself is associated with performance of a certain action or omission by the latter.

It should be mentioned that in practice, not only a gift but the fact of offering a gift is also considered in the light of an act of corruption.

According to the Inter-American Convention against Corruption of the Organisation of American States³, an act of corruption is considered to be: “The solicitation or acceptance, directly or indirectly, by a government official or a person who performs public functions, of any article of monetary value, or other benefit, such as a gift, favour, promise or advantage for himself or for another person or entity, in exchange for any act or omission in the performance of his public functions”. “The offering or granting, directly or indirectly, to a government official or a person who performs public functions, of any article of monetary value, or other benefit, such as a gift, favour, promise or advantage for himself or for another person or entity, in exchange for any act or omission in the performance of his public functions” is also considered as an act of corruption.

What Are the Practical Aspects of Regulation of the Problem of a Gift?

The History and Present

In the various historical stages of state formation, aspects of regulation of relations arising from and with respect to gifts when performing official duties have always been pressing. Even *Plato* excluded the acceptance of gifts when performing duties. In his opinion “We must not take presents neither for good nor for evil actions”.

It is worth mentioning that even as far back as the 17th century the rules of Rome were criticised, which allowed public official to accept minor gifts. In the opinion of *Montesquieu*, a very bad law was one that gave the magistrates leave to accept small presents provided they did not exceed one hundred crowns in the entire year, as he believed, that “he who receives nothing expects nothing; they who receive a little soon covet more, till at length their desires swell to an exorbitant height”. Besides, it is much easier to convict a man who knows

² International Code of Conduct for Public Officials. Resolution 51/59, 51st Session of the General Assembly of UN.

³ Inter-American Convention Against Corruption – Adopted by The Organisation of American States at the third plenary session, held on March 29, 1996.

himself obliged to accept no present at all, and yet will accept something, than a person who takes more when he ought to take less, and who always finds pretexts, excuses, and plausible reasons in justification of his conduct.⁴

Montesquieu believed that it is morally unjustified legally to allow the acceptance of even a minor gift by an official, as far as human psychology and nature is such that when he is offered a little, it is not sufficient for him and wants more. Furthermore it is easier to prohibit a public official from accepting a gift by virtue of a law and consequently demand explanations than to call him to account for accepting gifts of greater value than was allowed by the law. Moreover he can always find justifying pretexts or excuses for accepting such a gift.

Taking account of modern reality, it is difficult not to agree with the above-stated opinion. Moreover, currently there is a diversified attitude towards gifts.

Stating that an official must never accept a gift is a very simplified approach. Rejection of a gift by a high official may sometimes result in a quite embarrassing situation, moreover if it is a gift of the government of a foreign state, and as far as in many countries a gift is a social tradition that derives from national customs, rejection of a gift may be considered as a manifestation of disrespect. Thus, it is far more important to clarify who is the recipient of the gift.

In many foreign countries, the law provides for a special procedure, which allows officials to accept gifts of certain value, and of certain type. Officials are mainly authorised to accept gifts of nominal value in terms of symbolic gifts or souvenirs that are given within the framework of generally accepted hospitality, mutual respect, mutual reverence and benevolence, and are related to the demonstration of good will and generosity. It is accepted that a gift might be offered to a state or political officials in festival, protocol or special occasions, and is not related to fulfilment of an official duty of the official concerned.

Further fate of a gift accepted in violation of the above requirements varies depending on the specific situation. In certain cases, the state or public official is allowed to buy the gift that has been presented to him at a market price. It is permitted to receive remuneration for rendered services, which must then be transferred to the state budget. And finally, it is allowed to sell a gift through a public auction, or other accepted means of sale. As for as concerns the acceptance of a gift related to performance of an official duty, in many countries such an action is considered as a crime.

An important peculiarity of the procedure of acceptance of a gift by a public official is transparency. Primarily, legislative requirements with respect to acceptance of a gift involve a public declaration of the receipt of the gift by the official. The procedure for such declaration differs depending on the official hierarchy and is generally insured by a declaration procedure.

⁴ *Montesquieu*, Spirit of Laws, Tbilisi, 1994, 38.

For instance, in the United States of America particular attention is accorded to the legislative regulation of the above relations, and they are regulated by an entire series of laws. Special laws provide the general rule for the acceptance of gifts by federal public officials, as well as the procedure of acceptance of grants and other types of aids and royalties from the governments of foreign countries, the conditions for regulating any accepting payment for two jobs, when actually performance only one and the procedure of handing over a gift to a superior person, etc.

What Does Georgian Legislation Provide?

Proposals for Further Improvement

According to current Georgian legislation, relations arising from and with respect to giving “gifts” to public officials are regulated by the Law of Georgia on the Conflict of Interests and Corruption in Public Service, while disregarding such legal requirements is punishable under Article 340 of the Criminal Code.

Acceptance of gifts by an official “due to an official status” on a large scale covers all those possible cases, that are related to the motives for giving a gift to an official, be they a desire to earn the benevolence of the official or be granted a desired action in the future, to believe oneself to be obligated to the donator of a gift, to express gratitude for already done action, etc.

It is not easy to explicitly differentiate between acceptance of a gift prohibited by law and a bribe. Account should also be taken of the fact that if the motive for giving a gift is already known to an official, and there is an agreement with respect to this issue, that will result in the performance of a certain action or omission by the latter in favour of the donator of a gift, the gift already becomes “a bribe” and we are faced with a new type of crime – “acceptance of a bribe”.

It is mentioned in the comments to “The Responsibility for a State Crime”, that the essential difference between “acceptance of a bribe” and “acceptance of a gift prohibited by law” is that in the case of a bribe an official is well aware that he is to perform a certain action in exchange for the bribe or to refrain from the performance of a certain action. In the case of “acceptance of a gift prohibited by law”, an individual has free choice, and is not obliged to perform such an action. In this event, his actions are not conditioned by the handing over a gift.⁵

According to the Law of Georgia on the Conflict of Interests and Corruption in Public Service, a gift means any property transferred free of charge or under beneficial conditions, or release from any financial obligation, as well as services rendered by the person concerned under manifestly beneficial conditions, who generally receives remuneration for such a service. This definition demonstrates the manifold nature of a gift, as far as a gift means not only the transfer of money or other valuable things to a certain person, but also release from financial obligations to be performed, and services rendered under favour-

⁵ *Lekveishvili/Mamulashvili*, *The Responsibility for a State Crime*, Tbilisi, 2000.

able conditions, when in ordinary cases this service would be subject to the payment of compensation. Furthermore, the law provides for an exemption in cases when a grant, scholarship, prize or bonus granted by the state or an international organisation is not considered as a gift.

It is important to mention that current legislation provides for the right of an official or his family member to accept a gift. Article 12 of the Law of Georgia on the Conflict of Interests and Corruption in Public Service lists the requirements and conditions for accepting or prohibiting acceptance of a gift.

It is noteworthy that under the Law the “restrictions” related to the acceptance of a gift by an official person apply only to officials and his family members. They do not apply to his close relatives, who, excluding the family members of an official, include all relatives of ascending and descending branches, a stepchild, sister, brother, and stepchildren of parents and children.

It is acceptable that the circle of persons to whom the “restrictions” related to acceptance of a gift apply is determined based on the aforementioned criteria, but the operability of the part of the current rule, which refers to a family member of an official, becomes questionable as due to the latent and mutually agreed nature of handing over a gift, no actual mechanism exists for recording these relations. And in the case of disclosure of such an action, committed by a family member of an official, the current law does not provide for any method of reaction, thus making the above rule a “still-born” one.

The Law prohibits an official or his family members from accepting a gift into their personal possession, if it was handed over by a state or local self-government authority or organisation of Georgia, or some other state or international organisation, or its representative or representatives, as well as persons under official supervision, i.e. persons who with respect to the act or action, issued or performed by the latter, the official concerned is entitled to issue a written direction on the removal of deficiencies of the issued act or performed action, suspend the enforcement of the act, implementation of the action, or to cancel the act.

Although the Law, on the one hand, prohibits a public official and his family members from accepting a gift in personal possession, on the other hand, it also allows for the acceptance of a gift by an official and his family members, if the value of a gift does not exceed half of the minimum subsistence amount (50 GEL).

It is important to regulate further the above considered legal provision. The fact, that the law sets forth the threshold amount of a gift is acceptable, but the transfer of a gift into personal possession solely according to the value of the gift, without any additional motivation, is not justified. Account should also be taken of the conditions of transfer of a gift, namely whether the above takes place during some protocol or other official event, or during an unofficial meeting. It should be clarified whether when a public official or his family members are allowed not only to keep a gift in personal

possession, but to accept a gift at all, so as not to overstep socially established traditions or the limits of mutual respect. A procedure is to be developed when special evaluation is required in order to establish whether a gift was made. It should also be established how to administer the relations concerning the acceptance of gifts. We consider it necessary to develop the procedure of giving a gift to an official by a person subordinate to him which would elaborate when acceptance of a gift by an official or his family member is allowed and permitted, as well as providing any necessary details. For example, in cases of a significant event in the life of a person – a jubilee, birth of a child, retirement, etc.

An official and his family members are entitled to accept gifts only in when the total value of gifts received during a year does not exceed five times the amount of minimum subsistence, i.e. 500 GEL per family member. However, gifts given to an official by a close relative, as well as printed publications donated by other persons, are not subject to restrictions except for the editions of historical or bibliographic value.

The Law also stipulates that if a close relative donates gifts to a public official and/or his family members, the total value of which exceeds ten times the minimum subsistence level during a year, the official concerned is required to report the type and value of the gifts donated, as well as the identities of the donators to the Bureau for Information on the Assets and Finances of Public Officials of Georgia.

The stipulation of a threshold amount for the total value of gifts received by an official and or his family member may be considered as a preventive measure that ensures the prevention of an offence of corruptive nature through setting the threshold value of gifts on the one hand, and through the setting of a threshold amount for gifts accepted during a year on the other. In addition it should be mentioned that the desired goal will not be attained without further improvement of the existing requirements and control mechanisms.

In particular, a gift is subject to declaration only if the value of the subject of donation is 1000 GEL, and total value of gifts received during a year exceeds 1000 GEL. And furthermore, if they are donated to an official and or his family member by a close relative, this considerably limits the circle of persons from whom an official is allowed to receive gifts. The above scenario totally excludes the possibility of establishing threshold values of gifts received by an official and his family members. Moreover, any information concerning receipt of a gift depends solely upon the good faith of a declarer, unless the transaction has been duly documented. It should as well be taken into account that donation as a legal relation arises on the basis of two correlative wills and is mainly of an oral nature, and thus it is documented only if the subject of donation is property – a land parcel, dwelling house, a motor vehicle, etc., with respect to which property rights arise in accordance with a particular format provided for by law. The declaration submitted by an official is the most important document in which the official provides information concerning gifts received, the identities of donors, his relationship to donors, as well as the type and value of gifts. In as much as the declaration is a public document, and any natural or legal person is entitled to report a violation

disclosed after having become familiar with the declaration, and after which to apply to the court or the Prosecutor's Office in compliance with established procedure. Thus the mechanism of reaction to the above violation is operable only on the basis of the will of a natural or a legal person. The fact that legislation does not provide for permanent state control over the receipt of gifts by public officials, as well as the absence of a necessary mechanism of reaction, actually excludes the possibility of further use of submitted information.

It should be mentioned that there is a certain legislative vacuum, not only with respect to acceptance of gifts by officials, but also with respect to the administration of issues related to the acceptance of gifts by public officials. The administration should cover the compliance with the requirements provided for by normative acts with regard to acceptance of gifts, control mechanisms, reaction to violations and respective responsibilities. Taking the aforesaid opinions into account, and based on established Georgian social tradition, in our opinion it will be possible to consider the admissibility of handing over of a souvenir or a symbolic gift to a public official under strictly defined circumstances, when the nominal values of the gift and possible cases of possible acceptance of gifts have been pre-established.

In cases of acceptance of a "gift prohibited" by law "an official or his family member would be required to act in accordance with the requirements of the law from the moment of the handing over a gift, or from the moment he became aware being granted a gift, and would be required to hand the gift over to the state treasury within 72 hours. The particular public authority would be required secure the entry of data concerning the handover of a gift into public register".

This provision would require further legislative regulation. In particular, it would be required to provide a procedure for handing over a "prohibited gift" to treasury, as well as to clarify further the "fate" of the given gift. Moreover, it should be clarified what an individual is required to do in cases when it is deemed practically impossible to hand over a gift within the 72 hour period, e.g. in the case of a long term business mission abroad, etc. Acceptance of a "gift, prohibited by the law" by a public official or a person equal in status to such an official, would be grounds for criminal liability, and thus would be punishable under Article 340 of the Criminal Code of Georgia.

Acceptance of a "prohibited gift" is characterised by latency, meaning that generally it is of concealed and agreed nature, is confidential, and as a rule is not followed by a complaint, as the parties act on the basis of mutual agreement.

Under current legislation, exceptions related to the acceptance of a gift are envisaged only in the Law of Georgia on the Conflict of Interest and Corruption in Public Service and therefore apply to officials and their family members.

It is noteworthy that according to Article 2 of the above Law, the list of officials covers a particular circle of public officials, including state-political officials, and some categories of public officials who are listed in the Register of Officials.

Criminal liability on the grounds of Article 340 of the Criminal Code of Georgia arises only with respect to public officials and those with equal status to that of a public official. The law does not provide for the definition of a person equal in status to a public official, but it is an established category, and as such is defined in the comments to The Responsibility for a State Crime as a part-time servant, who performs duties of an official for a certain period, and as such is a substitute for a public official, or an acting public official.

The requirements of Article 340 of the Criminal Code of Georgia can not be applied with respect to those public officials who are not listed in Article 2 of Law of Georgia on the Conflict of Interest and Corruption in Public Service as "officials", as the provisions of the Law of Georgia on the Conflict of Interest and Corruption in Public Service apply to the latter, including the requirements of Article 12, which regulates when an official and his family members are prohibited from accepting gifts. Furthermore the Law on Public Service does not regulate issues related to the acceptance of gifts and thus, it does not regulate issues of acceptance of a gift by a public official.

It is an important fact that the relations concerning the giving of gifts in the Public Service are not duly regulated, thereby constituting an additional deficiency of the current legislation.

Actually, criminal liability of a public official arises on the grounds of Article 340 of the Criminal Code of Georgia only if the latter holds one of the offices listed in the register of officials, provided for by the Law of Georgia on the Conflict of Interest and Corruption in Public Service, i.e. it applies only to particular enumerated state officials.

Furthermore, neither the Criminal Code not the Code of Administrative Offences of Georgia provides for liability of a family member of an official with respect to acceptance of gifts prohibited by law. In such, cases questions of further action to deal with persons of this category remain beyond the scope of law.

It is worth mentioning that Article 340 of the Criminal Code of Georgia provides for general liability for "acceptance of a gift prohibited by law", and that there is no differentiation among individual actions prohibited by the Law. Whereas a higher level of impartiality would be guaranteed in the case of a differentiation within the term "acceptance of a gift, prohibited law" according to liability, such as violation of annual threshold of gifts accepted by an official; acceptance of a gift by an official in personal property through violation of the threshold value of the gift; acceptance of a gift by an official due to the official status of a an official concerned; acceptance of a gift by an official from a person, whose official performance was considered, is being considering or is already known, or that will be considered by the official concerned; acceptance of a gift by an official from a person, who is under official supervision of the official concerned, through violation of established procedure; violation of time frames, set forth for the return of gifts, prohibited by law, on the part of an official, etc. We consider it possible to apply administrative liability with respect to a certain part of such violations; moreover the exclusions of the Law would apply not only to officials, but also to their family members as well.

Furthermore, taking account of the aforementioned arguments, it is important to include the liability of state-political high officials as a separate category within Article 340 of the Criminal Code of Georgia, as the former do not fall within the category of officials according to the Law of Georgia on Public Service.

Thus current legislation, which regulates relations concerning gifts made to those in public service, does not conform to the requirements imposed on state officials.

In this light, we consider it important either to improve further the legal framework, or to develop a new normative framework that will regulate the following issues: further development of the procedure of acceptance of a gift by an official; special requirements for acceptance of gifts by officials, and including state-political officials; different measures of liability for the acceptance of gifts in violation of law, and the mechanisms for the further improvement of the process for declaration of gifts.