

CORRUPTION AND JURISDICTIONAL RELATIONS WITH FOREIGN COUNTRIES - A BETTER WAY TO FIGHT CORRUPTION

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Abstract

Nowadays Corruption is spread all over the world, in all the fields of life. Thus, the prevention of and efficient fight against corruption is more important than ever before. Fighting corruption has become a policy priority for the international development community over the past two decades. The United Nations Convention against Corruption, which entered into force on 14 December 2005, is the first legally binding global anti-corruption instrument. The United Nations Convention against Corruption provides all national, regional and multinational anti-corruption efforts with a single set of agreed-upon anti-corruption obligations and guidelines. Among others, it obliges States parties to prevent and criminalize corruption, promote international cooperation, cooperate for the recovery of stolen assets and enhance technical assistance and information exchange. One of the ways to fulfill these obligations is the jurisdictional relation of different states in the criminal process, because due to the globalization of the world and the extension of free movement, the crimes related to corruption may be presented in various complex and more organized forms, covering several states. This brings as a necessity the carrying out of investigating actions at the same time from various states. The thesis of this study is: **The jurisdictional relations with foreign states in the criminal process are a good possibility for interaction among various countries to have an effective fight against the crimes related to corruption.** This study will be based on a detailed observation, using scientific descriptive and comparative research methods, analyzing the Albanian legal framework of the jurisdictional relations with foreign states and the other successful instruments of foreign countries.

Keywords: *jurisdictional relation, criminal process, corruption, prosecution, foreign states.*

INTRODUCION

In this article will be treated the phenomenon of corruption as one of the major problems of our country. It will be set out in a detailed survey the causes of this phenomenon, distinctive elements and special features of corruption. Among other things, this theme will highlight legislative initiatives; instruments provided by law in the fight against corruption and the necessity of respecting and enforce the law. Corruption phenomenon emerged and was identified as such especially after 1997 in our country. In this context, our legislative institutions have an immediate need for assistance and support in the process of issuing laws to fight corruption. So, below we will discuss the interaction between countries, for a more effective fight against corruption. Also an important part of this article will be the analysis of the Albanian legal framework that provides sanctions for cases identified as corruption. Elements of criminal offenses of corruption will be treated in details, according to the Criminal Code of the Republic of Albania. In this article you will we ascertain the problems that corruption brings as a phenomenon, as a cause of non-functioning of the state apparatus. On the other hand, we will study human behavior opposite the phenomenon of corruption, how to identify it, involvement of the individual, or state employees in corrupt practices. Through legal analysis we will treat the legal gap that exists today in the treatment of the terms "bribery" and "gift".

Corruption in Albania and legal initiatives to combat corruption

Corruption is one of the wounds of our society. For almost two decades corruption as a phenomenon has constantly accompanied the political, social and legislative developments of our country. Albania as a country that came out lately from communist dictatorship was unprepared for the phenomenon of "corruption" and as such, it did not even know to identify it so it was impossible to address it as a problem. There have been undertaken many legislative initiatives or interest groups initiatives, but still it can not be said that we have a comprehensive legal framework which is effective in the fight against corruption. The fact is that for more than 10 years, international organizations such as the Organization for Economic Cooperation and Development (OECD), the Council of Europe (CoE) and the United Nations (UN) have helped Albania in such a way that it adopts legal measures to combat corruption, but anti-corruption campaigns often did not have the desired outcomes in reducing corruption. The fight against corruption has become policies priority for the international development community during the past two decades. United Nations Convention against Corruption, which entered into force on 14 December 2005, is the first instrument of anti - corruption global legally binding. It obliges States parties to prevent and criminalize corruption, promote international cooperation, to collaborate for the recovery of stolen assets, increase technical assistance and exchange information¹. One way to fulfill these obligations is the legal relationship of the various countries in the criminal process, because due to the globalization of the world and the expansion of free

¹ Ligj Nr.8778, dt.26/4/2001 Për Ratifikimin e “Konventës Penale për korrupsionin “

movement, crimes related to corruption can appear in different complex and more organized forms, covering several states This brings the necessity to conduct investigative actions at the same time from different countries.

But apart from these guidelines and legal innovations, corruption conventions of the United Nations, the OECD and the Council of Europe have not shown to be effective, even though they are ratified by the Republic of Albania, they are not implemented in Albanian institutions on issues of corruption, institutions such as Trafficking Police Department in the Ministry of Interior, General Directorate of Customs, General Directorate of Taxation, etc..

According to statistics, Albania is ranked the 135th in the database of the World Bank study "Doing Business" (Doing Business) in 2007². In the same year it ranked the 105th in the Corruption Perceptions Index (Corruption Perceptions Index) of the Organization for International Transparency (IT).

The causes of corruption in Albania

Where can we seek for the causes of corruption in Albania? Corruption refers to not only the individual, but also to institutions. It is to be analyzed whether the corruption is caused by the failure of institutions or individuals. Regarding the failure of the institutions we take into consideration the non-functioning of the state administration, the legislative, and executive or judicial, what in itself implies a non-functioning state. With individual failure we mean a person's psychological tendency to be essentially 'mean'. These individualistic features are thought to influence morality and ethics of individuals and thus, in this way we can explain their corrupted behavior³.

In the current conditions of our country, the individual may feel 'forced' to ask for bribe, to be included in corruptive activities, as long as offering bribe remains the only way to solve problems or make progress in the lifestyle that you have built. In this way you can really justify the fact why corruption is part of everyday life for the majority of Albanians. In this way corruption continues to become more and more acceptable in society thus becoming an integral part of private life and in the end it can become a lifestyle phenomenon. All this makes corruption hard to combat and even more impossible to identify and to be denounced. It is a fact, that a considered number of government officials and senior officials have been accused of involvement in various corruption scandals. This situation suggests that corruption is involved in the Albanian political and state institutions. So here lies the problem: those who are supposed to fight corruption are those who practice it.

‘Accomplice in the crime of corruption is often our own indifference. "It's a phrase said by Bess Myerson and instead found widely in our society. The duty of every one of us is not to stay

² www.doingbusiness.org

³ Elezi, I. (2005), *Disa probleme në lidhje me Kodin Penal*, Një: Jeta juridike nr.1, Tetor 2005, Shkolla e Magjistraturës, Tiranë

indifferent to the phenomenon of "corruption" but to fight it by avoiding, identifying and reporting it. Private sector is now aware more than ever that the practice of bribery and corruption can be stopped especially when companies in a collective and categorically effort refuse to participate in corruption and bribery affairs. If all factors or actors that tend to engage in the ‘corruption phenomenon’ would become aware and would consciously avoid involvement in these affairs, the fight against corruption would be effective and would have positive outcomes.

Legal provisions in the Albanian legislation on corruption

In the Albanian legislation mainly in the Code of Criminal Procedure, are provided provisions for the criminal offense of corruption. The legislator has provided special protection for important legal relationships, such as those imposed from the state to ensure the normal functioning of state institutions and the protection of legitimate interests of the state and citizens from criminal acts or omissions. So in the Criminal Code, Article 244, is provided the criminal offense of "**Active corruption of persons exercising public functions**"⁴. This provision of the Criminal Code provides that direct or indirect proposal, offer, or giving, to a person, who exercises public functions, of any irregular benefit for himself or a third person in order to act or not act, that is related to his duty, is punished with a prison term of 6 months up to three years and a fine from 300,000 to one million Lek.

So, as shown by this provision, subject to this criminal act, is any person who has reached the age of criminal responsibility, promises, or give irregular profit to the person who exercises public positions. Through this provision are protected the legal relationships that provide regular and correct public administration and legal interests of citizens. The criminal offense provided for by Article 244 of the Penal Code, is consumed even if bribe receiver has not performed the desired action from bribe giver, although the latter has offered, proposed or given bribes. In Article 245 of the Criminal Code is provided the criminal offense of "**active corruption of high state officials or local elected representatives**"⁵. This provision of the Criminal Code provides that the direct or indirect proposal, offer, or giving, to high state officials or to a locally elected person, of any irregular benefit for himself or a third person in order to act or not act, regarding his duty, is punished with a prison term of 1 year to five years and with a fine from 500,000 to two million Lek.

So, as shown by this provision, subject to this crime, is any person who has reached the age of criminal responsibility, which promises, proposes or gives unfair profit to the person who exercises a public function or local elected representatives.

⁴ Elezi, I., Kaçupi, S., Haxhia, M. (1999), *Komentari i Kodit Penal të R.Sh.*, SHBLU, Tirane.

⁵ Elezi, I. (2001), *Komentari i shitesave dhe ndryshimeve ne Kodin Penal me ligjin nr.8733, dt.24.01.2001*, albin, Tiranë, neni 245

In Article 245 /a of the Criminal Code is provided the criminal offense of " **the exercising of unlawful influence on public officials**⁶ ". This provision of the Criminal Code provides that the direct or indirect proposal, offer, or giving an irregular benefit, for himself or a third person, to the person who promises and guarantees that he is able to exercise illegal influence on the accomplishment of the duties and on taking of decisions by the Albanian or foreign public functionaries, no matter whether the influence has been actually exercised or not and no matter whether the desirable consequences have occurred or not, is punished with a prison term from 6 months up to two years and a fine from 300,000 to one million Lek. The direct or indirect soliciting, receiving, or accepting whatever irregular benefit for oneself or a third person, by promising and confirming the ability to exercise illegal influence on the accomplishment of the duties and on adoption of decisions by the Albanian or foreign public functionaries, no matter whether the influence has been actually exercised or not and no matter whether the desirable consequences have occurred or not, is punished with a prison term of 6 months up to four years and a fine from 500,000 to two million Lek.

In reference to the provision of the Article 245/1-2 of the Criminal Code, in order to deal with this criminal offense it is required that the subject of criminal offense to deliberately undertake unlawfully active and socially dangerous actions, which consist of proposal, offer, or giving any irregular benefit for oneself or a third persons associated with him, to the person who promises to influence the person who exercises public function. Proposing, offering, or giving is done with the purpose that a person to unlawfully influence the person who exercises public function so that he perform or abstain from doing an act that is related to his duty or his public function. Soliciting, receiving, or accepting a bribe may be done directly or indirectly, through a third person. Bribe giver, through his actions, lets the person (that has an impact on the person who performs public functions) understand that he wants to give something (to pay) to obtain the performance or non-performance of an action he wants. The proposal, the offer or provision can be done before, during or after the commission or omission of any act by public official. According to Article 245/1/2, criminal offense is considered consumed even if bribe receiver has not performed the desired action by the bribe giver, although the second one has promised, proposed or bribed; therefore the offense is considered consumed from the moment of submission of the promise or the proposal, ***fulfilling in this way all subjective elements that seek to fulfill the criminal offenses provided for by Articles 244.245 / 1-2, 248 and 259 of the penal Code***⁷.

Thus: In reference to the provision of Article 259 of the Penal Code, provides criminal offenses.

⁶ Elezi, I. (2001), *Komentar i shtesave dhe ndryshimeve ne Kodin Penal me ligjin nr.8733, dt.24.01.2001*, albin, Tiranë, neni 245/a

⁷ Elezi, I. (2005), *Disa probleme në lidhje me Kodin Penal*, Në: Jeta juridike nr.1, Tetor 2005, Shkolla e Magjistraturës, Tiranë.

“Passive corruption by public officials”⁸. According to this provision, soliciting or receiving, directly or indirectly, by a person who exercises public functions, of any irregular benefit or of any such promise for himself or for a third person, or accepting an offer or promise deriving from an irregular benefit, in order to act or not act in the exercise of his duty, is punished with a prison term of two to eight years and a with fine from 500,000 to three million Lek. To deal with this criminal offence provided from this provision it is required that the subject of criminal offense to deliberately undertake unlawfully active and socially dangerous actions, which consist of soliciting, receiving, or accepting whatever irregular benefit for oneself or for a third person. Soliciting, receiving or proposing in order to act or not act in the exercise of his duty or public function to the subject of criminal offense, soliciting or receiving may be done directly or indirectly, through a third person. The subject of criminal offense, through his actions lets the person understand that he should give something in order to be performed or not the action he wants. The criminal offense provided by Article 259 of the Penal Code also is considered consumed even if *mitmarrësi* has violated or not the rules and duties of his public functions. In the following Continue the provisions of Article 260 of the Criminal Code, is the criminal offense. **“Passive corruption by High State Officials or local elected officials”**⁹. According to this provision, soliciting or taking, directly or indirectly, by a high state official or a local elected official, of any irregular benefit or of any such promise for himself or for a third person, or accepting an offer or promise deriving from an irregular benefit, in order to act or not act in the exercise of his duty, is punished with a prison term of four years up to twelve years and a fine from one to five million Lek. In order to deal with this criminal offence provided from this provision, it is required that the irregular benefit to consist of soliciting, receiving and accepting of any irregular benefit or proposal that comes from such a profit, for oneself or for others. Soliciting, receiving or proposing in order to act or not act in the exercise of his duty or public function to the subject of criminal offense, soliciting or receiving may be done directly or indirectly, through other persons. Irregular benefit may be in the form of valuable gifts, free trips, etc. The subject of criminal offense is special, high state officials, as MP, elected local representatives of the Municipality, the Commune etc.

The subjects of the criminal offense in a general sense are the people who have reached the age of criminal responsibility and are responsible under the law for the offense committed. In particular, the provisions of Articles 245/1/2, 248 and 259 of the Penal Code, the subject must be special, someone who exercises the duty a public official, who uses this position to commit the crime, acting in violation with the law and fulfillment of duty, which s/he is imposed. The law does not define which person falls into the category of the people who perform public functions. For this purpose must be referred to the criteria defined in the Convention "On Corruption",

⁸ Elezi, I. (2001), *Komentari i shtesave dhe ndryshimeve ne Kodin Penal me ligjin nr.8733, dt.24.01.2001*, albin, Tiranë, neni 259

⁹ Elezi, I. (2001), *Komentari i shtesave dhe ndryshimeve ne Kodin Penal me ligjin nr.8733, dt.24.01.2001*, albin, Tiranë, neni 260

adopted in 1999 in Strasbourg (which defines the term "civil servants")¹⁰, Albanian law "On the status of civil servants", 8549, dated 11.11.1999, the theory of Albanian criminal law and judicial practice. In conclusion it can be said that generally, as public employees would be categorized each person whose work activity is regulated by public law, it is an expression of administrative will and is materialized in authoritarian competence, probationary or issuance of authorization, licenses or other corroborating documents. According to most international studies about the perception of corruption in Albania, as in most developing countries, "bribery" often is confused with the "gift". Three conditions could assist law enforcement officers in Albania (and prosecutors who must decide the difference between bribes and gifts) to understand the difference between bribes and gifts in non-criminal matters. A "payment" (a cognac bottle or a packet of chocolate) is not regarded as corrupt practice as long as:

- Gifts not connected with the performance of a particular service by civil servants
- this service is a citizen's right or users of public services
- civil servant could not predict before performing service that would receive a gift in return if these conditions are met then "payment" is not considered a corruptive practice for performing a particular service. Certainly a fixed rule against accepting gifts would be easier to be implemented because the foregoing conditions would require special consideration. Existing legislation against corruption in Albania does not include the difference in concepts of bribery and gifts: bribe as taking and gifts as offer. Under these conditions, our legislation, referring even to international practices should make a clear definition of the legal provisions to punish corruption, if we are dealing with the criminal offense of corruption when official state receives a gift. Implementation of laws faithfully and effectively in Albania has been and remains a major problem, which is often associated with subjective factors. Even if this Criminal Code is in force, or will be adopted a new one, one of the challenges of the Albanian state remains real implementation of legal provisions, among which those in the fight against corruption.

From the entire frame, emerges the fact that in our criminal law, in its special section, are provided a series of disposition that predict crimes against corruption which follow somewhat harsh punishment politics for entities involved in corruptive practices. So it is not lacking a legal framework that punishes corruption, but problems still exist in effectiveness of these provisions. In one hand it should be raised the awareness of citizens and on the other hand public officials should increase their responsibility in the exercising their duties and functions. Cases of impunity should be increased and corruption cases must be identified. Furthermore it is essential the interaction between countries in the perfection of legislation in the fight against corruption and the exchange of experiences between countries for a more effective fight against corruption phenomenon.

¹⁰ Konventa Penale e Korrupsionit e Këshillit të Evropës (Nr. 173, 1999)

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