

Application of legal measures as part of the policy for prevention of corruption in public sphere: Kosovo case

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Abstract

This paper will address the application of legal measures as part of the policy of corruption prevention in the public sphere. At present, corruption offenses have become a very dangerous phenomenon for the stability and security of societies, undermining the institutions and values of democracy, ethical values and justice, and jeopardizing the essential development and the rule of law.

Knowing that these criminal offenses carry a high social risk and are conducted with high professionalism from people who have the state power, a greater focus should be placed on its prevention. Naturally, the criminal sanctions against criminal acts of corruption have their positive effect, punitive and preventive, but these are the last measures that the state should use.

The state of Kosovo in an effort to prevent corruption, has established in legal terms an advanced legislation in accordance with international laws and comparable to developed countries.

Keywords: Corruption, prevention, legislation, fight, crime.

Introduction

Corruption offenses are among the crimes that bring very large consequences for the society. Through these illegal actions, the legal benefits affect the core of every society, creating a state of general social insecurity and structural disfunctioning of the state mechanisms. The corrupted actions, in addition to severe consequences that they create, they bring into questioning the public confidence in state institutions, by producing irreversible consequences for the rule of law, democracy or market economy.

Therefore, the biggest concern is the seriousness of the problems and risks arising from corruption for the stability and security of societies, undermining the institutions and values of democracy, the ethical values and justice and jeopardizing essential development and the rule of law. The links between corruption and other

forms of crime, in particular organized crime and economic crime, including money laundering, has mobilized countries in the fight against this destructive phenomenon (United Nations Convention against Corruption, adopted by the UN on October 31, 2003).

Corruption cannot be restricted to giving and receiving bribes for jobs and activities related to official duties. Corruption as a phenomenon includes many other criminal actions which are directly related to the performance of official duties. Kosovo Criminal Code has regulated in Chapter 34 the offenses of corrupt nature, which as a chapter are named "*Official corruption and criminal offenses against official duty*", and includes the following offenses: Abuse of official position or authority; Misuse of official information; Conflict of interest; Misappropriation in office; Fraud in duty; Unauthorized use of property; Taking bribes; Giving bribes; Bribery of a foreign public official; The use of influence; Issuing unlawful judicial decisions; Disclosing official secrets; Falsification of official documents; Collection and disbursement; Unlawful appropriation of property during the raid or execution of judicial decisions and failure to report or falsely reporting property, income, gifts, other material benefits or financial liabilities.

Due to the high social danger posed by the phenomenon of corruption, offenses of this nature inevitably fall into the category of crimes that are more difficult to prove. The difficulties that accompany the process of verification for these acts, in addition to the high level of professionalism, are characterized by such elements that usually involved people who carry high state power and are empowered through legal authority, or the power and influence actually installed.

Efforts in the fight against corruption requires a general mobilization of society, by engaging all the society intelligence, starting from the family, schools, other educative institutions, different social groups, organizing various campaigns, and also the maximum commitment of the state mechanisms, starting by the police, other social institutions and other institutional framework to prevent and combat corruption.

As a general principle, prevention is better than taking repressive measures, and this is particularly efficient on the offenses of corrupt nature, since it is difficult to detect and prosecute the perpetrator after the action is done. Unlike from let's say crimes of violence, criminal acts with elements of corruption do not leave identifiable traces, such as blood stains or corpses. In many cases, perpetrators employ people that will hide tracks and will use technology to hide their corrupted activities and the income derived from them. (Ukawa, 2010, 7) In corruption it cannot be found any harmed party like individual rights violated, that would bring any damage to his physical integrity or moral. Since there are no victims to come in front of the law and to file a complaint, to have cooperative witnesses, eyewitnesses or other evidences relevant to the trial process, but even if so, different methods will be used in order not to leave the evidences to arrive at the prosecutor's office, or in the courtroom to be used as evidence in one or more trials for corrupted actions.

Obviously, criminal sanctions against criminal acts of corruption have their positive effect, punitive and preventive, but these are the last measures that the state uses (Elezi, 2013, 147).

Prevention, an important tool in the fight against corruption

Corruption offenses differ from other offenses, as they are always committed intentionally and deliberately. Knowing that these acts are committed by persons who have authority and state power, also require maximum commitment in fighting especially in eliminating many opportunities to start or complete such actions. Prevention is the best fight to stop these illegal actions.

Crime prevention policy requires that the phenomenon of corruption should be listed on the type of primary prevention, which requires improving the quality of life, the rule of law or respect for social institutions.

If we analyze practically for the purposes of this paper the phenomenon of corruption in Kosovo, we can observe that in addition to the overall strategy of prevention of crime, was drafted National Anti - Corruption Strategy 2013-2017. Successful implementation of the Strategy against Corruption has clearly determined which institutions should be held responsible for corruption in different areas, and the steps that different institutions are responsible to take in the context of prevention and fight against corruption. Anti - Corruption Strategy and Action Plan 2013-2017 are set in the context of the evolution of society in Kosovo, where the responsibility for preventing and fighting corruption does not belong equally to all.

However, every institution, sector or profession has its own tasks, while special responsibility lies on the authorities of law enforcement and prosecutorial and judicial authorities, commitment and performance of which have crucial importance for success in the fight against corruption in Kosovo. This, however, should not diminish the importance of prevention and education (Kosovo Anti - Corruption Strategy 2013 - 2017. Pristina, 2013).

Kosovo Anti - Corruption Strategy 2013 - 2017 is the first strategic document based on a thorough analysis and assessment of risk by institutions not only in perception or assessment by international actors. In order to be successful, implementation of the Strategy should be treated seriously and implies political will and financial commitment of the Government of Kosovo. For this effort may be required funds from the international community (Kosovo Anti - Corruption Strategy 2013 - 2017. Pristina, 2013).

The Convention of the United Nations against corruption in its efforts for effectiveness provides that "each state party, in accordance with the fundamental principles of its legal system, shall develop and implement or maintain effective, coordinated anticorruption policies that promote the participation of society and reflect the principles of the rule of law, proper management of public affairs, public property, integrity, transparency and responsibility. Each state party shall try to establish and promote effective practices which aim to prevent corruption. Each state party shall try to periodically evaluate relevant legal instruments and administrative measures with the purpose of determining their adequacy to prevent and fight against corruption. State parties, as appropriate and in accordance with the fundamental principles of their legal system, shall collaborate with each other and with international and regional organizations in promoting and developing the measures mentioned in this article. This cooperation may include participation in international programs and projects aimed at preventing corruption" (United Nations Convention against Corruption, article 5, para. 1, 2, 3 and 4).

Prevention of corruption in public administration

Public administration must be guided by the principles of professionalism, impartiality and merit. New democratic societies as we are, have highlighted problems in creating an administration that serves entirely for the public interest. Many interventions, change of political governance, nepotism, different connections with business and other elements, directly violate institutional impartiality and independence. For purposes of better treatment of this part, corruption in public administration should be tackled in matters affecting employment and promotion in public administration, remuneration of state officials, prevention of conflict of interest in performing public functions, declaration of gifts, conflict of interest after completing the task in the performance of a public function and the declaration of assets, revenues and their origin.

Employment and promotion in public administration

Corruption in public administration can begin from the acceptance of the administration officer to carry out public and state jobs and have authority and power of a public clerk. Usually, modern societies have created the maximum transparency in the recruitment of staff for public administration, as the source of all bad things starts from this point. In many cases, staff recruitment for public administration is done by partisan, ideological, group, regional, sectarian, religious, national and other trends. Consequently, the administration with these actions lead to doubt the objectivity and transparency the performance of common administrative tasks. It can not be excluded the possibility that in order to take a position in public administration, the candidate gives bribes and corrupts officials responsible for recruitment.

According to the Law on Civil Service of the Republic of Kosovo" civil service must be made by civil servants, impartial, professional, responsible and reflecting the ethnicity and gender equality too."¹ "civil servants are employed on the basis of merit upon passing the selection procedures as defined under this law and other relevant by-laws." Despite the legal regulation of this issue, the Progress Report for Kosovo for 2014 emphasizes that "in terms of public services and human resource management, political interference in public administration continues, both at central and local levels. Further efforts are needed to fully implement the relevant provisions for prevention of corruption and promotion of integrity in the civil service, especially by providing specific training for civil servants. Secondary legislation of laws on civil service is still missing. Waiting for the completion of job classification, there were further delays in the implementation of laws on civil servants and salaries of civil servants." (Kosovo Progress Report, 2014, p. 11)

Kosovo Anti - Corruption Strategy for the period 2013 - 2017 as strategic objectives has foreseen:

- Professional and non-politicized Public Administration;
- Enabling the discovery of irregularities in every public institution and providing protection in accordance with international standards;
- The implementation of ethical codes in public administration and the fight against nepotism;

¹ Law on Civil Service of the Republic of Kosovo, article 3, par. 1.

- Providing specific Anti - Corruption measures for health, education, taxes and environmental and spatial planning sectors.

However, despite the attempts by means of legal norms to regulate all possible actions to prevent nepotism, influence, and also corruption, of course it is a great challenge to achieve expected and encouraging results. The general situation and such trend has radically challenged the normal functioning of the state administration and in general the state mechanisms. It needs time to raise the level of general social awareness to prevent the negative trend in failure towards nepotism, corruption, influence and taking biased and non-transparent decisions. The reform must include most segments in which the challenges for establishing a professional management have been almost insurmountable.

Remuneration of state officials

One of the reasons that can turn a state official be corrupted can be the low salary gained from the job he/she performs in a state institution. Many state officials accept the job with a low salary, even though the salary does not cover the cost in his/her life, thus, he/she always seeks other alternatives to achieve his goal. Usually, positions that require dealing with parties are challenged to make concessions in exchange for various material favors and benefits that contradict the law. The misuse of official position and authority is not rare in our country. Already, many state officials have been convicted for such unlawful actions, a number of them are in litigation, while the majority of them still do not feel the hand of the state to respond to their illegal actions or inactions.

The work of civil servants is reimbursed through the payroll system. Wages they receive are considered to be low. In 2014, the Kosovo Government has decided to increase the salaries of all civil servants by 25%. A salary increased by 25% for all civil servants without any performance evaluation, as it was presented before general elections, is a big concern (Kosovo Progress Report - 2014, p. 11).

However, despite the increase of wages to compensate civil servants work, the trend of corruption acts still continues to happen. Wage growth must be made on the basis of merit. Long time ago, the state positions have not been attractive for many citizens who possessed high professionalism. Therefore, they aimed for private organizations, starting from banks, various corporations and other organizations which had their system of compensation for wages more favorable than state organizations. Consequently, other candidates who possessed less professionalism were interested to work in state bodies.

If we raise the hypothesis that higher salaries for public servants prevent corruption, or greatly reduce it, there would be pros and cons arguments. In this case it can be elaborated in three directions: a) the higher salaries in the public sector reduces cases for a public official to be caught in corrupt activities; b) Low salaries in the public service attract only incapable or dishonest applicants, which results in a corrupted, inefficient and nontransparent administration; c) When government positions are paid worse than other comparable jobs, moral corruption costs are decreased (Abbink, 2002, 1).

The decision-making institutions should see the wage's issue as a good opportunity to stop the state officials from the possibility of abusing with duty and being part of corrupted actions. A good salary is certainly the biggest and best opportunity to

prevent corruption. In many countries, prevention of public corruption is seen in the light of administrative reforms and its digitization. Replacement or change of public officials from one position to another for a certain period of time is seen as a good opportunity which does not create possibilities to abuse with official duty. Digitization of administrative services is also seen as a good option to eliminate the possibility for abuse of duty. Also, there are other reforms that could be recommended, for example General Auditor during various audits.

Prevention of conflict of interest in performing public functions

One of the important components in corruption prevention is the prevention of using conflict of interest in performing public functions. The legal basis for this is the Law on prevention of conflict of interest in performing public functions. The senior official should perform his work with integrity, impartiality and also should protect his authority of the senior and the institution and with his performance, he should increase the trust of citizens in institutions.² As per the law, the conflict of interest is the disagreement between public office and private interests by the senior official, when he has direct or indirect private interests, personal or property, which affect, might affect or appear to affect on his legality, transparency, objectivity and impartiality in the performance of public functions. Initiation of proceedings to assess the possible conflict of interest in performance of public office can be done by the Anti - Corruption Agency, with the request of supervisor or supervisory body, also with the request of the official himself, to inform about any other person or anonymous information. The Agency has so far made a number of decisions where a conflict of interest was found on the occasion of performance of public functions and other interests. According to statistics issued in 2009 by the Anti - Corruption Agency, a total of 47 cases of potential conflict of interest were recorded. In 15 cases, issued written warning for conflict of interest and it was requested from the officials to confront the facts, 27 cases after suspected for conflict of interest, and later reviewed by ACA, have resulted with no elements of conflict of interest and they were closed.³

Nevertheless, it is a known fact that the current legal arrangements allow many opportunities to influence the actions of officials of state institutions. The individual independence in performing the function of public officials, whether appointed or elected, whether permanent or temporary, whether paid or unpaid, irrespective of duration of service, is never producing institutional independence as the challenge is very frequent and sometimes even unbearable. Remarks from the various reports on the functioning of administration in our country, record many mistakes and violations when applying and respecting the legal provisions which deal with the prevention of corruption in public administration.

Declaration of gifts

According to the legal basis in our country, the public servant cannot accept gifts. Exceptionally, gifts are allowed during protocol meetings that happen between two

² Law on prevention of conflict of interest in performing public functions, article 7, paragraph 3.

³ <http://www.akk-ks.org/sq/parandalimi-i-konfliktit-te-interesit#indexmain>: accessed on: 14.02.2015.

delegations, which is regulated more in interstate diplomatic context, as an important element for strengthening friendship between state representatives. In case if the gift is specifically forwarded and got to the hands of the person who is taking the gift from the person who is giving the gift, the person who is taking the gift, a person possessing public authority, should immediately notify the public authority. Anti - Corruption Agency, according to the relevant law, must give a decision on receiving the gift and come up with conclusions if the gift has a personal character or a direct impact on the work that performs the public servant.

Our country, unlike many countries, does not allow the acceptance of gifts for public officials regardless of the value of the gift; such a thing is not allowed. While in specific circumstances, the receivement of the gift must be declared in the institution where he/she works and also in the Anti - Corruption Agency. Many states, however, allow up to a certain material amount the acceptance of gifts, under the condition that the gift should be extremely personal and it should not affect in the performance as a public official. To mention a few examples, the value of the gift should not exceed the sum of 10 dollars in Kazakhstan, 25 dollars in South Korea, 50 dollars in Japan and 125 dollars in Malaysia (Ukawa, 2010, 10).

Conflict of interest after completing the duty in public functions

Many public officials in performing their function in this duty, influence individuals and different groups, by creating in this way favors for himself or others. Usually the positions that are intended for political officials who take public positions, where in addition to the official appointed, is also a big team of people who land in the institution to carry out certain tasks. Such cases are used to create opportunities and favoring various individuals and organizations, based on some certain preferences to win and enjoy some goods which derive from public authorities. Such an example could be the creation of the favor for a company that is associated with an individual to make a road construction, or creation of any other possibility.

Such favors create the opportunity for public officials to enjoy a privilege from the business, individual, organization, or by someone else for the favor which he/she has done in performing his/her duties. In most cases, the creation of favors in this way requires also counter-favors before position is ended. Given the attention that a public official has during the exercise of public position, it may happen that counter-favors may be required after the completion of the duty. Such cases may be situations when a public servant is employed in the company in which during his/her mandate he/she had conducted any public work in the institution where he/she served; or if it is a politician, during an election campaign, a business finances his electoral, or other favors.

The United Nations Convention against Corruption on "prevention of conflicts of interest provides giving restrictions, where appropriate and for a reasonable period of time, the professional activities of former public officials or on the employment of public officials by the private sector after resignation or retirement, if such activities or the employment is related directly to the functions held or supervised by those public officials during their tenure."⁴ In accordance with the above request, our legislation "the senior official who ends his/her function as a public officer, has not given the

⁴ United Nations Convention against Corruption, article 12, para. 2, point e.

right for a year to be employed or appointed to leadership position, or be involved in the control of public or private enterprises, if his/her duties during the two-year period prior to the completion of the duty as the public functions were directly related to the supervision or control of business enterprises."⁵ As such, the regulation in normative aspect is foreseen as an appropriate legal measure to establish some preventive barriers in eventual conflict of interest.

Many countries in the context of prevention of conflict of interest have different arrangements. States such as China and Hong Kong after completing the duties as a public servant for the next two years for any additional commitment, even for employment in any business, or similar, requires prior consent of the government, to allow it, in order to avoid conflicts of interest (Ukawa, 2010, 7). This is also applied to people who are retired and who have previously served as public servants.

Declaration of assets, revenues and their origin

"In order to fight corruption, each state party among others, shall promote integrity, honesty and responsibility for its public officials, in accordance with the fundamental principles of its legal system. Each state party, within its own institutional and legal systems, shall try, in particular, to implement the codes or standards of conduct for the correct, honorable and proper performance of public functions."⁶ (Another important way to control and prevent corruption, is also the declaration of assets, revenues and their origin. In terms of law in Kosovo this part is regulated very well. The applicable law in Kosovo, defines the obligations of senior public officials to declare property, income and origin.⁷ Public declaration of assets is seen as an opportunity to stop the public officials to get in the corruption actions and to be seen by the public eye for their property which they had at the beginning of this function, during the function and after it. Thus, it is a good opportunity to observe the mobility of their property.

According to the law "the data declaration of assets of public officials includes: name, surname, position, name of institution, address of the institution, the date of his/her nomination to the post, the date of submission of the form, functions or other activities performed by the official apart from the public function, real estate and its type, surface, origin, its value biased and whose ownership it is, the immovable property and its type, origin, year of profitability, its value biased, and whose ownership it is, shares in trading or in any other institution, possession of valuable papers, cash, financial liabilities that the official has, towards physical and legal persons and annual income, all these should be published on the Agency website within sixty (60) days from the deadline for the declaration of assets by public officials."⁸ From the public analysis presented, the declaration of assets in this way is seen as an opportunity to legitimize all property acquired illegally, since there is no independent body to investigate the origin and the way of acquiring such property.

⁵ Law on prevention of conflict of interest, article 17.

⁶ United Nations Convention against corruption, article 8, paragr.1 and 2.

⁷ Law no. 04/L-050 on declaration, origin and control of property of senior public officials and declaration, origin and control of gifts of all public officials.

⁸ Law no. 04/L-050 on declaration, origin and control of property of senior public officials and declaration, origin and control of gifts of all public officials, article 13.

Conclusions

Corruption is one of the most dangerous criminal phenomena in modern times. Links between corruption and other forms of crime, in particular organized crime and economic crime, including money laundering, has mobilized countries in the fight against this destructive phenomenon. The major concern is the seriousness of the problems and risks arising from corruption for the stability and security of societies, undermining the institutions and values of democracy, ethical values and justice and jeopardizing the essential development and the rule of law. Public bodies, through legal acts, are making their efforts to achieve effective results in the corruption.

Efforts in the fight against corruption require a general mobilization of society, by engaging all social intelligence, starting from the family, schools, and other institutions of education, different social groups, organizing various campaigns, and the maximum commitment of the state mechanisms, starting with the police, social institutions and other institutional framework to prevent and fight corruption.

Corruption offenses differ from other offenses, due to the fact that they are always committed intentionally and deliberately. Knowing that these acts are committed by persons, who have authority and state power, also requires maximum commitment in fighting and eliminating a number of opportunities to start or complete such actions. Prevention is the best fight to stop these illegal actions.

The public administration must be guided by the principles of professionalism, impartiality and merit. New democratic societies have significant problems in creating an administration that serves entirely to the public interest. Many interventions, the change of political governance, nepotism, different connections with business elements and others, directly violate the institutional impartiality and independence.

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