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CRIMINAL-LEGAL ASPECTS OF CORRUPTION IN BOSNIA AND HERZEGOVINA

Abstract

The subject of this paper is the criminal-legal aspects of corruption in Bosnia and Herzegovina. The author's intention is to divert your attention and point out the legal and social specifics of corruption as legal and social phenomenon that under special attention of scientific, expert and general public for a reason. Respectfully, there is no area of human action or interaction that is immune to corruption. However, the institutional re- action of state to this criminality must be adequate and proportional to the needs of research and evidence in order to achieve desired results of criminal judiciary. Special attention is directed to the problem of defini- tion and understanding corruption with all its complex dimensions and the inability to coordinate one universal and comprehensive definition of this term. Also, this essay emphasizes problems of complexity of revealing the existence of these criminal acts and the aspect of verifying, i.e. proving the existence of these corruptive actions, while appreciating restrictive law conditions, materials and process.

Keywords: *corruption; crime; revelation; proving*

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Introduction: Corruption as a global social phenomenon

From the very beginnings, i.e. first primitive forms of organization and connection of people into certain collectives and foundation of certain rules and procedures in realization of rights, services and interests, up until today, corruption and corruptive behavior are faithful companions of human beings. In that sense, there were no significant changes on the current social scene where corruption is recognized as a legal and social phenomenon. The only change is in corruptive behavior as they change and adjust to conditions and specifics. The phenomenon of crime, both individual and social, becomes the subject of interests and research in the early 1800s. Today, it is in the focus of science and policies of repression of punishable behavior, but also in the focus of daily politics in home and international field². Corruptive behavior is not the plague of modern age; its roots can be traced back to ancient history and it is a part of destructive side of human history. In such context, we recognize certain attempts and intentions of gaining certain rights and achieving certain interests by means that are not allowed. That goes parallel with foundation and confirmation of certain rules and procedures within communities, where rights and interests are the focus. However, in every community, some of its members want to achieve some property or other benefits by using bribe³. In various periods of human history, corruption in its phenomenological sense has easily and quickly adapted to the political, economic, social, demographic, cultural and other conditions and specifics with the same goal. The perpetrators have tried to find the most suitable ways and modalities to perform criminal acts by “outsmarting” the law enforcement agencies in every historical era⁴.

Regarding corruption, it is necessary to point out that neither society nor state are immune to certain forms of corruption or corruptive behavior. Criminal law has the crucial and irreplaceable position in the policies of repression of crime, but its role is not to solve the problem. On the contrary, it is relative and has its limits⁵. Corruption is recognized as a negative and destructive social phenomenon even in the most developed countries which means this

2 Željko Horvatić, Davor Derenčinović, Leo Cvitanović, *Kazneno pravo*, Opći dio 1, Kazneno pravo i kazneni zakon, Pravni fakultet, Sveučilište u Zagrebu, 2016. p. 39

3 Filip Mirić, *Korupcija kao pravni i društveni fenomen*, Naučna konferencija: Finansijski kriminalitet i korupcija, 18-19. Oktobar, 2019, Vršac, Institut za uporedno pravo, Institut za kriminološka i sociološka istraživanja, Beograd, 2019. p. 135

4 Sadržaj Karović, *Krivičnopravno suzbijanje organizovanog kriminaliteta kao pravnog i društvenog realiteta*, Zbornik radova Pravnog fakulteta u Splitu, god. 55, broj 4, Split, 2018. p. 836

5 Zoran Stojanović, *Politika suzbijanja kriminaliteta*, Pravi fakultet, Univerzitet u Beogradu, 2016. p. 42

phenomenon is not strictly present only in the poor, underdeveloped states or disorganized systems. Even those economically developed and legally modeled states are facing multiple challenges in the combat against corruption and various forms of corruptive behavior⁶. Also, what is considered corruption in one community, does not hold the same meaning in the other one. For example, many countries like USA or India can provide a citizen with their passport if they pay the fee. Although these communities do not see it as a corruptive behavior, in other parts of the world it would be considered an example of corruption. As there is agreement that neither area of human actions is immune to corruption, we can only discuss if it is present more or less within certain fields (public administration, health, education, economy, industry, public procurement, business and so on). For corruption to exist, three elements must coexist. First, someone has to have discretionary power, i.e. the authority to create and conduct regulations. Third, legislative system needs to offer a probability of discovering or punishment low enough⁷.

It is important to mention that social communities measure corruption differently. Many authors advocate for economic model. In the last years, there is a dramatic increase of micro-empirical research on corruption in the developing countries. An entire line of essays proved that basic economic concepts may apply to corruption. Researchers identified a few innovative ways to measure corruption and economic theory gives important guidelines on how to create policies against corruption⁸.

International community recognized corruption as an international or global phenomenon. However, despite all efforts of modern man and international community, the presence of corruption in all areas of human actions is evident as well as its destructive consequences that successively devastate society and state. The consequences of corruption directly or indirectly touch every layer and category of each society (retired, students, workers, children, etc.). The catalogue of activities where corruption finds fertile ground is extremely long, from the process of hiring or public procurement to health services or various public administrative services. That depends on specifics, conditions and factors of geography and community. It is almost impossible to quantify all the destructive effects and consequences of corruption, locally, nationally

6 Abhijit Banerjee, Sendhil Mullainathan, Rema Hanna, *Corruption*, National Bureau of Economic Research, Cambridge, 2012. p. 6

7 Arvind K. Jain, *Corruption: A review*, Journal of Economic Surveys, Volume 15, Issue 1, John Wiley & Sons, Ltd, 2008, p. 77

8 Olken A. Benjamin, Rohini Pande, *Corruption in developing countries*, Annu. Rev. Econ., 2012, 4.1: str. 506-507.

or globally. What is especially concerning is the fact that corruptive behavior by its nature is in direct relation to subjects and agencies of law enforcement.

The problem of definition of corruption

In everyday life and communication, we encounter the term corruption used in different context. It is mostly regarding various forms of misuse when gaining certain rights or benefits illegally. The noun corruption comes from Latin “*corrumpere*”, meaning to debase, deprave, debauch, demoralize, bribe or buy⁹. One of the most important documents of international law regarding prevention and fight against corruption is Civil Law Convention on Corruption by Council of Europe (Bosnia and Herzegovina being one of the signatories). They define corruption as requesting, offering, giving or accepting, directly or indirectly, a bribe or any other undue advantage or prospect thereof, which distorts the proper performance of any duty or behavior required of the recipient of the bribe, the undue advantage or the prospect thereof¹⁰. We can also add the definition of the term corruption by the World Bank where corruption is the abuse of public office for private gain¹¹.

There is a catalogue of various illegal activities that encompass giving or accepting bribe and other corruptive behavior in order to achieve certain rights, private gain, personal interest or any other benefit. In wider sense, any abuse by people from public office is indirectly or directly connected to corruption and corruptive activities. The expansion and diversity of forms of corruption in all areas of human actions make definition and determination of term corruption much more difficult.

Next problem about defining the term corruption is the multidisciplinary nature of corruption as a legal and social phenomenon, considering each science partially defines this term from its own perspective and research subject. From all of the above we can deduce that each scientific discipline persists in defining at least a certain aspect or segment of this phenomenon (i.e., sociologists give sociological definitions, economy encapsulates economic aspect of this phenomenon, legal definitions cover legislations, etc.).

The third problem of defining the term corruption is the difference in understanding and defining the term. Law follows legal determination of crimi-

9 Bogoljub Klaić, *Rječnik stranih riječi*, Zagreb, 1962. p. 809

10 Civil Law Convention on Corruption, (Official Gazette of Bosnia and Herzegovina, 36/01)

11 The World Bank Group, “Helping Countries Combat Corruption: The Role of the World Bank”, <http://www1.worldbank.org/publicsector/anticorrupt/corruptn/cor02.htm#define>, available on 19/08/2022.

nal act of corruption while other social sciences determine this term in wider sense. Corruption by its nature, its destructive consequences and other specifics, goes beyond criminal acts. In the context of etymology, general social surroundings determined by political, economic, demographic, cultural and other conditions is very important. Unfortunately, corruption in criminal law is treated through consequence of the existence of a certain criminal act. The agency for law enforcement usually disregards the cause of the corruption as a legal and social phenomenon.

The fourth problem of defining this term is the inability of systematization and determination of all illegal activities and the forms of corruption as a phenomenon. By analysis of legislative notes, we notice that the legislator proscribed acts of perpetration in objective sense which is justified and useful but is not comprehensive as a catalogue of all the forms of manifestation of this phenomenon. On the other side, from practical experience, judicial practice is filled with various forms of corruptive behavior that are impossible to systematize. Each corruptive act is a criminal act by its nature, operationalization and other determinants of criminal law, but is also specific and unique.

The above discussion provided a wide range of definitions of corruption and noted a variety of limitations with the definitions or the approaches they espouse. The discussion did not provide a comprehensive list of definitions of corruption, a task that would be impossible given the sheer number of definitions, instead it provided an overview of several important or popular approaches to anti-corruption. Of course, no definition will ever be perfect and somewhat inadequate definitions are not in and of themselves a critical weakness for understanding corruption. However, if each approach to corruption includes and excludes different kinds of behaviors then the abstract understanding of corruption is either inadequate or at least highly contextual. Moreover, such confusion provides ample space for public policy disagreements about the extent of corruption within any given region.

In order to test the adequacy of the definitions discussed above, this article presents a series of scenarios of behavior that might be thought of as corrupt. Each scenario is tested against the definitions discussed above in order to determine the extent of the variance between definitions in terms of the kinds of behavior that can be properly called corrupt. In the context of etymology, general social surroundings determined by political, economic, demographic, cultural and other conditions is very important¹². Therefore, corruption is a so-

12 John Warburton, *Corruption as a Social Process: From Dyads to Networks*, U: Peter Lar-mour, Nick Wolanin, *Corruption and anti-corruption*. ANU Press, 2013.

cial phenomenon and a social process. It is then necessary to observe corruption through its multidisciplinary nature in order to enable adequate, versatile and comprehensive perception of all aspects of this social phenomenon. Now we will give you a brief overview of the criminal-legal aspects of corruption in Bosnia and Herzegovina.

Criminal act of corruption of the corruptive criminal acts – the (material) aspects of criminal law

By analysis of criminal law on all levels of Bosnia and Herzegovina, we are unable to find an adequate definition of the term corruption in the sense of criminal law, that would make understanding and determination of this term easier. Qualifying certain behavior as corruptive and its possible moral judgement from the public differs from one country to another. It is not necessarily a criminal act by the national criminal law¹³. Generalization and putting certain forms of abuse or breaking the law into corruption automatically is not acceptable. In such case, each form of abuse would be labeled as corruption, without any selection based on certain parameters.

In accordance with all of the above, we will dedicate special attention to criminal acts of corruption or corruptive acts, so the legal determination of corruption would be properly understood. As mentioned before, criminal acts of corruption as autonomous and independent criminal acts have their own objective and subjective marks. However, in order to legally formulate and qualify certain illegal activities as a criminal act of corruption, it is necessary to fulfill restrictive legal conditions made by legislator. The legislator in Bosnia and Herzegovina did not proscribe a comprehensive catalogue of criminal acts of corruption, which is why scientists and experts have different opinions on which criminal acts belong to corruptive acts. This is why we do not have an adequate, comprehensive and versatile definition of the term corruption within the criminal law. In the sense of criminal law, corruption has been incriminated through various forms and shapes of abuse of public office or high positions, considering the corruption as a phenomenon has not been legally defined with precision and clarity¹⁴.

13 Zoran Stojanović, Dragana Kolarić, *Krivičnopravno suzbijanje organizovanog kriminaliteta, terorizma i korupcije*. Pravni fakultet u Beogradu, 2020. p. 208

14 Sadmir Karović, *Krivičnopravni (materijalni) i krivičnoprocesni aspekti koruptivnih krivičnih djela*, Zbornik radova Fakultet pravnih nauka, Sveučilište/Univerzitet „Vitez“, Vitez, broj 5, 2013. p. 456

In a narrower sense, criminal offences of corruption include demands or accepts a gift or any other benefit or who accepts a promise of a gift or a benefit in order to perform within the scope of his official powers an act, which ought not to be performed by him, or for the omission of an act, which ought to be performed by him. Besides these criminal offences, the catalogue of criminal offences of corruption includes other criminal offences systematized in the *Chapter XIX – Criminal offences of corruption and criminal offences against official duty or other responsible duty*¹⁵. However, considering the complex structure of Bosnia and Herzegovina, material criminal legislature, except the state level, includes legislation on the entity level (Federation of Bosnia and Herzegovina and Republic of Srpska) and the Brcko district of Bosnia and Herzegovina level. On each level it includes legislation that covers criminal offences of corruption and criminal offences against official duty or other responsible duty. The general object of criminal law regarding the criminal offences from this chapter is to proper and lawfully conduct official duties and other responsible duties within the public authorities¹⁶.

When it comes to determining the catalogue of corruptive criminal offences, on May 13th 2015, High Judicial and Prosecutorial Council of Bosnia and Herzegovina (HJPC) adopted the List of Corruption Crimes which includes: Violating the free decision-making of Voters (by use of bribery), Disclosure of Secret Data, Trafficking in Persons (by the abuse of power or influence or a position of vulnerability, or by giving or receiving payments or benefits), Smuggling of Persons (by the abuse of power or influence or a position of vulnerability), Accepting Gifts and Other Forms of Benefits, Giving Gifts and Other Forms of Benefits, Illegal Interceding, Abuse of Office or Official Authority (and thereby acquiring a benefit to himself or to another person), Embezzlement in Office, Fraud in Office, Using Property of the Office and Violation of Law by a Judge.

However, manifestation of corruptive behavior, in the sense of phenomenology, by nature incorporates wide catalogue or a list of actions directed to acquire certain benefits, gains, rights, etc. Such manifestation practically adapts to conditions and surroundings that determine the ways of operationalization of criminal activities.

The aspects of criminal process – detection and attestation of criminal offences of corruption

15 For more details, see articles 217-229 of the Criminal Code of Bosnia and Herzegovina

16 Zvonimir Tomić, *Krivično pravo II, Posebni dio*, Pravni fakultet, Univerzitet u Sarajevu, 2007. p. 379

Criminal Procedure in Bosnia and Herzegovina is an extremely complex process that consists of a preliminary investigation, consideration of charges, legal proceedings as well as sentencing. The purpose of the Criminal Procedure is to investigate whether a crime has happened and who it has been committed by and how to resolve the matter in question. Adopting the Criminal Procedure Code on all four levels of authority in Bosnia and Herzegovina (state level – Criminal Procedure Code of Bosnia and Herzegovina, entity level – Criminal Procedure Code of Federation of Bosnia and Herzegovina, Criminal Procedure Code of Republic of Srpska and Criminal Procedure Code of Brcko District of Bosnia and Herzegovina) represents new, reformed and modern era of development of Criminal Procedure in Bosnia and Herzegovina¹⁷. Considering the legal nature and other specifics of the Criminal Procedure, it consists of the following four phases: preliminary investigation, consideration of charges, the main trial and the application of legal remedy¹⁸. The preliminary investigation and the consideration of charges are considered to be the part of the previous Procedure, while the main trial and the application of legal remedy are considered to be the main Procedure.

Detection mechanisms of criminal offences of corruption

The initial activity to start and conduct the investigation is the detection activity, i.e., detecting the existence of corruptive criminal offences. The detection and investigation of corruption pose particular challenges as corruption is often well-hidden and may require an insider to expose it. The systemic search for the basics of suspicion is a permanent assignment for the official authorities¹⁹. In theory, when discussing corruption, detecting mechanisms are not complex and demanding, but the practical experience point out many difficulties, dilemmas and challenges.

Having in mind the nature, the ways of operationalization of incriminating activities, the two-way interests of involved parties in the zone of culpability as well as other specifics of criminal offences, detection of corruption is

17 Sadmir Karović, Marina M. Simović, *Rasvjetljavanje i rješenje krivične stvari u krivičnom postupku Bosne i Hercegovine - raskol između normativnog i stvarnog*, Godišnjak Fakulteta pravnih nauka, Godina 10, Broj 10, Panevropski univerzitet „Aperion“, Banja Luka, 2010. p. 210

18 Haris Halilović, *Krivično procesno pravo, Knjiga prva: Uvod i temeljni pojmovi*. Fakultet za kriminalistiku, kriminologiju i sigurnosne studije, Univerzitet u Sarajevu, 2019. p. 30

19 Miodrag M. Simović, Vladimir M. Simović, Mladenka Govedarica, *Krivično procesno pravo II (Krivično procesno pravo – posebni dio)*, Peto izmijenjeno i dopunjeno izdanje, Pravni fakultet, Univerzitet u Istočnom Sarajevu, 2021. p. 21

complex and demanding without a doubt. The criminal offence of corruption incorporates the so-called “corrupt bargain”, the agreement between two sides directly involved in corrupt practice of criminal activity. The side intending to realize certain rights, interests, favors, etc. is by nature of this act involved in unlawful activities which automatically includes the existence of guilt. That gives no interest for these sides to make certain findings, data and information on criminal offence accessible. On the other hand, the side with entrusted public authority on conducting law, that is involved in a certain criminal offence from the catalogue of corruptive criminal offences, have no fear that the other side, that conducted unlawful behavior, would report them to police or prosecution office for enabling such activities.

The second problem of detecting mechanisms of corruptive criminal offences is the very nature of these criminal acts being unclear, not evident or visible unlike some other criminal offences (like property or violent crimes) where the consequences are very visible and recognizable after the act of criminal offence (robbery, theft, violent crime, corpse or blood traces after homicide). The corrupt faces of politics with their immoral activities against the law bring harm to their homeland and such offences are discovered with huge delay²⁰. While having in mind all of the mentioned so far, it is of utmost need to improve the existing activity of instructions and control in order to recognize, detect and identify risky behaviors in timely fashion.

The third problem of detecting mechanisms of corruptive criminal offences is the connection of these criminal acts with the specific forms of organized crime (human trafficking, crimes related to abuse of drugs, etc.) where corruption is used as a convenient method for operationalization of criminal goals (e.g., to obtain certain important files).

Corruption and corruption perception can be considered as cultural phenomena because they depend on how a society understands the rules and what constitutes a deviation. Indeed, it does not depend only on societies but also on personal values and moral vies²¹. Never mind how high the number of people (influenced by moral views and values) that would never participate in corruptive offences may be, the number of those that would never report corruptive offences is higher. Therefore, the number of corruptive offences depends in

20 Duško Vejnović, Petar Đukić, Boris Trivanović, *Mapa puta: Poglavlje 24, Pravda sloboda, bezbjednost*, Evropski defendologija centar za naučna, politička, ekonomska, socijalna, bezbjedonosna, sociološka i kriminološka istraživanja, Forum nevladinih organizacija, Banja Luka, 2022. p. 32

21 Natalia, Meglar, Máximo Rossi, Tom W. Smith, *The perception of corruption*. International Journal of Public Opinion Research, 2010, 22.1: p. 120-131

great part on the willingness of citizens to report corruption. Their perception of corruption is, above all, a social phenomenon.

Proving criminal offences of corruption – challenges, problems, dilemmas

One of the key components of investigation is to obey the law when gathering evidence of a specific criminal offence and the culpability of its perpetrator. When gathering evidence, it is important that this is not obtained through unlawful means, since this can affect the outcome of the investigation, be prejudicial for the case and amount to a criminal offence in some situations. The investigation is a central point to collect, collate, analyze and disseminate all available or sufficient evidences to satisfy the law and its regulated deadlines in order to apply actions of Criminal Procedure.

The procedure elaborated below is the one for cognizable offences. The investigation includes all the procedures which are done by the police officer under the Code for the collection of evidence. After the conducted preliminary investigation and after all options and possibilities are exhausted, the evidences should give probable cause. The probable cause requires more than mere suspicion that a suspect committed a crime but not proof beyond a reasonable doubt. Probable cause is a reasonable belief in the suspect's guilt. Police officers summarize their investigations in reports and present those reports and related evidence to prosecutors. Prosecutors review the reports and decide what, if any, criminal charges to file. However, when the quality component of criminal charges is concerned, we notice certain issues. Inadequate estimation and irregular decision making on filing charges by prosecutors (when restrictive conditions of law are not satisfied) question the actual determination on efficient and energetic fight against crime²².

On the other hand, if all the energy and knowledge invested by the prosecutors' office in proving confirmed indictment results in the verdict of releasing the suspect, prosecutors are often exposed to criticism of badly constructing the court case and expected to be held responsible for the damage and expenses caused by the final verdict. They are often accused of contributing themselves to the failure of the indictment because inadequate factual descriptions and ungrounded conclusions on reckless and unlawful conduct of prosecutors are made²³. Another key problem of this process is determination

22 Sadmir Karović, Marina M. Simović, *Pravna priroda, kvalitet i efekti optužnice u krivičnom postupku BiH- (ne)efikasnost krivičnog gonjenja*, Izbor sudske prakse, br.5-6, JP Glosarijum Beograd, 2022. p. 68

23 Sabina Sarajlija, *Izazovi u procesuiranju predmeta organizovanog, privrednog kriminala i ko-*

of existence of subjective component by the perpetrator, i.e., the existence of premeditation.

The analysis of judicial practice points out the evident problem of difference in interpretation, understanding and applying the evidences in relation to the specific corruptive criminal offences, especially between prosecution and the court. Such incoherence by nature has extremely negative effect on the efficient leading and finalization of Criminal Procedure as well as reaching adequate results (verdict of release, etc.). The process of proving the criminal offence is central to the main trial and it represents the litigation or duel between confronted parties that are attempting to convince the court in the righteousness and lawfulness of the unveiling and resolving the criminal matter and bringing the proper and lawful decision by the court.

Conclusion

There is no doubt that corruption is a faithful companion of human beings from the ancient period till today. The intention of legislator in all reform processes is primarily focused on timely, efficient and lawful detecting and proving criminal offences of corruption by the responsible bodies, subjects and agencies for conducting law. However, till this day we still do not have one general, universal and comprehensive definition of corruption considering its multidimensional and multidisciplinary nature. There are numerous partial definitions that may incorporate certain aspect or segment of this social phenomenon depending on the subject of their research. Yet such partial definitions can not cover all aspects of this phenomenon neither by content nor structure, and thus remain limited. Corruption is recognized as a negative and destructive social phenomenon even in the most developed countries which means this phenomenon is not strictly present only in the poor, underdeveloped states or disorganized systems. There is no field of human existence that is immune to corruptive behavior.

This essay directs attention to the aspect of detecting and determining (proving) the existence of criminal offences of corruption. The intention of author is clear to indicate the complexity of conducting Criminal Procedure, which is to shed light on the specific criminal act and adopting the rightful and lawful court verdict. General public is dissatisfied with the results of criminal judiciary when it comes to the high-level corruption cases and that is with a good reason, considering that corruption is successively destructing the socie-

ty and the state. Especially concerning is the fact that in Bosnia and Herzegovina there is no big cases of corruption in the process and no convictions nor adequate sanctions for such criminal offences. However, besides the institutional reactions to these criminal offences, it is necessary to involve all possibilities, capacities and resources in the process of prevention, especially regarding the reporting of criminal offences of corruption. Corruption is a social phenomenon that cannot be exterminated, yet the intention of legislator and the state or society is to decrease its presence to the lowest possible measure. The independent international sources and numerous scientific researches on national level point out the alarming condition of the presence of corruption in Bosnia and Herzegovina. That should oblige responsible bodies, subjects and agencies for conducting law and entire national judiciary to invest all the available resources and capacities to suppress corruption.

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