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Corruption and the Concept of Human Rights

1. CORRUPTION AND HUMAN RIGHTS: HOW TO USE TOOLS?

The conventional definition of corruption as the «abuse of public office for private gain» is not fully adequate. [1] This definition is paying more attention to public administration and social services than to the judiciary or political institutions. From such a perspective, the problem is perceived as the individual problem of a person: an evil person that has a malicious intention. The definition is not functioning properly in every social and political context, nor when we investigate relations between corruption and some other social phenomena.

Rights and instruments and institutions for their protection –politics, judiciary– are inseparable. In a legal system, democratic state, market economy, corruption is harmful. It brings uncertainty: rights are not guaranteed and obligations are not fulfilled; political influence is bought and protection by influential people in the executive and judicial branch of the government and political parties is asked for. A public service is sold for a personal promotion.

Corruption is not the weakness of people, but of institutions. Institutions are created in order to serve as obstacles to human greed and to the temptation to use power to the disadvantage of the community. Once it seizes hold of institutions, corruption spreads and is a phenomenon that is difficult to eradicate. [2]

Corruption contradicts the fundamental values of human dignity and political equality. [3] The corruption, treated as a problem of social norms and

1 World Bank: «Helping Countries Combat Corruption: The Role of the World Bank», The World Bank, Washington DC, 1997 (available online at *www1.worldbank.org/publicsector/anticorrupt/corruptn/corrptn.pdf*); and Transparency International: «Frequently asked questions about corruption» (at *www.transparency.org/news_room/faq/corruption_faq*).

2 Josip Kregar: «Deformation of Organizational Principles», in Duc V. Trang (ed.): *Corruption and Democracy*, Institute for Constitutional and Legislative Policy, Budapest, 1994, pp. 47-61.

3 «Human rights are predicated on the belief in human dignity and political equality, and corruption corrodes both» (Cobus de Swardt: Transparency International, Cape Town / Berlin,

values, lead us to understand the problem it generates as a universal product of the social environment as a system. [4]

Responsible political leadership, good governance, independent and efficient judiciary are the prerequisite and the condition for the implementation of human rights. [5] But the relation is more complex. Three types, three intersections, three main issues of corruption and human rights are identified. These issues are:

- There is no justice, nor actual human rights in a corrupted society.
- The human rights principles are the prevention and therapy for a corrupted society
- Nor human rights protection neither anticorruption are the monopoly of the state institutions, but also the task of the society as a whole.

2. THERE IS NO JUSTICE OR HUMAN RIGHTS IN A CORRUPTED SOCIETY

Corrupt societies come to existence when formal legal rules are just a façade and mask of the real relations concerning rights and obligations, including human rights. For instance, the right to a fair trial (Article 6 of the European Convention on Human Rights) is only a formal proclamation if we have a corrupted judiciary. The mechanism of human rights protection –from the *ombudsman* to the judiciary, from international watch to local NGO activism– is paralyzed in a corrupted society. [6] In many societies, the deprivation of human rights is interconnected and interrelated with the corruption of political life and legal system.

The law and the state are the flip sides of the same phenomenon. There is no protection of the rights without a state, nor an implementation of the rights without a good governance.

The human rights are not only pure normative prescriptions, but also the force and project to implement normative standards, and they presuppose an efficient and good mechanism for their implementation. [7]

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9 December 2007). See also the Preamble of the African Union Convention on Preventing and Combating Corruption.

4 «Corruption in Eastern Europe is of a structural nature and it is therefore a part and a particle of regional cliental social structures. An analysis of corruption cannot be separated from understanding clientage» (Stephen Kotkin & András Sajó: *Political Corruption in Transition: A Sceptic Handbook*, Central European University Press, Budapest, 2002).

5 See also Josip Kregar: «Corruption in Judiciary», in Goranka Lalic (ed.): *Croatian Judiciary: Lessons and Perspectives*, Croatian Helsinki Committee, Zagreb, 2002, pp. 323-350.

6 And the opposite is also true: he who wants abuse of public office for private gain can do that only by abusing corresponding human rights.

7 For more information, see Chapter 2: «The Major Universal Human Rights Instruments and the Mechanisms for Their Implementation», in *Human Rights in the Administration of Justice: A*

Human rights are not a decoration for the legal system but a genuine necessity in order to realize the goals of any true legal system: the real protection of liberties and freedoms. Human rights cannot remain like mere letters on the paper, but have to be transformed by an active program to realize them via institutions. They cannot be a mere legal concept but have to become into a political and social goal.

> «In societies where formal economic and administrative models provide relatively accurate images of reality, it is practical to study the models, including, on the administrative side, laws and regulations, since these provide good evidence of practice, and changes in them are followed by corresponding changes in practice. But where the formal models are far removed from reality, such study of legal and administrative models becomes increasingly 'legalistic'; that is, it provides a less and less accurate picture of reality and an increasingly ineffective technique for changing it. Unfortunately, the more formalistic a system, the greater is the pressure for scholars to limit themselves to 'legalistic' studies. It is easier to read books or maps which purport to describe the world in simplified terms than to look directly at the highly confusing and heterogeneous fact themselves. It is simpler to test for knowledge of the formally prescribed than for an understanding of the more complex existentially real. What people actually do is often unpleasant, embarrassing and even dangerous to know, hence carefully concealed, whereas what is prescribed is usually what people in authority approve and everyone is exhorted to learn.» [8]

To illustrate the problem how corruption is dangerous for human rights, lets focus for a moment in the issue of corruption in the judiciary. [9] *Corruptio optimi pessima*, says the Latin sentence: «The corruption of the best is the worst». Corruption in judiciary puts clearly in danger human rights. Having a principled judiciary is crucial for the implementation of human rights. For instance: publicity of court proceedings is not a procedural principle but rather a demand for responsibility towards constitutional democracy and the rule of law. Autonomy and responsibility within the judiciary are inseparable requirements, and both are derived from certain human rights principles.

The independent and responsible judiciary is analyzed in theory, [10] but also defined in judicial decisions regarding human rights, even in the practice of the Strasbourg Court of Human Rights.

Manual on Human Rights for Judges, Prosecutors and Lawyers, United Nations, New York, 2003 (available online at *www.ohchr.org/Documents/Publications/training9Titleen.pdf*).

8 Fred W. Riggs: *Administration in Developing Countries: The Theory of Prismatic Society,* Boston, 1964, 18.

9 *Supra* note 5.

10 For example, John Stuart Mill: *On Liberty*, Appelton, New York, 1947, pp. 15-45; Roberto Unger: *Knowledge and Politics*, Harvard University Press, Cambridge, Ma., 1975; Peter Fitzpatrick & Alan Hunt: *Critical Legal Studies*, Blackwell, Cambridge, 1990, pp. 21-31; Richard A. Posner: *The Problems of Jurisprudence*, Harvard University Press, Cambridge, Ma., 1990, pp. 4-24. Actually, the requirement for limiting debates about court verdicts and status in courts is pointless for legal theory.

> «In cases [of corruption in the judiciary] of public indictment [occurring in stable and new democracies as well] judges must not be, nor must they believe that they are, excluded from any public criticism. They cannot present themselves as the guardians of freedom of public opinion and simultaneously misuse this status in relations with their critics. They must not repress public debate about the problems and restrict them to the judiciary, as is the case in some countries in which the debate about corruption in the judiciary has been raised.» [11]

According to Transparency International's Global Corruption Barometer 2009, judiciary was seen as a corrupt institution by half of respondents. Furthermore, in eleven of the countries sampled, respondents identified the judiciary to be the most corrupt sector. [12]

Corruption in the judiciary is a delicate subject, although it should not be so. Statements should not be taken as accusations. The analysis of corruption in the judiciary is not an accusation. This text is a mere analysis of the phenomenon how corruption in a particularly important field –in the judiciary– puts in danger human rights. Examples can be extensively cited.

Corruption operates in such a manner that no institution is safe from being spoiled. It is an unavoidable outcome of the professional and moral imperfection of humans who have the power to make decisions that affect various interests. It is a problem of values and norms, and not only an institutional problem. Corruption is said to be a problem of individual moral weakness, and the judiciary is not any different from its social environment. This frequently used colloquial statement is only partly true. It is true that court proceedings depend on many social, economic and political variables, and that the courts do not act in a socially neutral environment. Judges are people who act rationally. In the crisis of social values and norms, one cannot expect immaculacy and internal consistency of the professional, civic or human moral. Economic situation plays a very important role, to the point that insufficiently paid judges are prone to being bribed. [14] In crises, judicial institutions carry the burden of conflicts. [15] Politics is very influential. Authoritarian

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11 Jeremy Pope: *Confronting Corruption: The Elements of National Integrity System*, Transparency International, Berlin, 2000, p. 65 (available online at *www.transparency.org/publications/sourcebook*)

12 Available online at *www.transparency.org/news_room/in_focus/2009/gcb2009*

14 «It is the duty of the state to provide adequate resources to enable the judiciary to perform its functions properly. 'Adequate' salaries means a wage that ensures judges and prosecutors can support their families, remain loyal to their profession and, at least, have no economic 'need' for resorting to corruption [...] Where judges are paid a high salary, they are more likely to resist corrupting pressures» (Transparency International: *Global Corruption Report 2007: Corruption in Judicial Systems*, Cambridge University Press, Cambridge, 2007, pp. 49-50).

15 «As an official, a judge is obliged to decide impartially, and every judge and the public have an interest in that obligation being carried out […] A conflict of interest is abused –and transformed into true corruption– when the judge puts personal interest ahead of his or her obligation to the public.» (*Ibid*, pp. 26); «A conflict of interest occurs if an official, in the course of his or her duties of employment, is required to make a decision or participate in the making of a decision which significantly influences the economic interests of the official, his or her close

and non-democratic systems can hardly resist the pressure of external power and reject abiding by otherwise unjust laws, a major feature of the judiciary is that it is different and separated from society and is *simply* not a reflection of social processes.

The judiciary has a special normative and symbolic identity, its organization principles and institutions, daily operating routine, everything that is other than, and different from, the society which is its environment. Indeed, this very difference in relation to society characterizes the judiciary. When we say that it resembles or reflects society, we acknowledge that something must be wrong about its main characteristics, and that it has failed systemically.

The task of judiciary is not a mere administration of justice, but also the defense of individual human rights. Objective environment of the judiciary is not an excuse, it is rather the incentive for measures to change the image of the judiciary and reduce the challenge, opportunity and need for corruption. The proverb «Justice is slow but achievable» should be replaced by «Delayed law –denied law». As Lord Bolingbroke once said:

> «Introducing good new laws is simple, but making them effective is difficult; it is a big mistake to expect people to be perfect or think that laws will make them such, or consequently, a major skill of politicians is in their use of human weakness for the noble purpose of virtue.»

3. THE HUMAN RIGHTS PRINCIPLES ARE THE PREVENTION AND THERAPY FOR CORRUPTED SOCIETY

> «The basic human rights are guarantees for personal freedom and the rule of law. They are used to limit the arbitrariness of power and uncertainty of government. As Lord Acton said: "Power tends to corrupt, absolute power corrupts absolutely".» [16]

The very essence of human rights is that rights belong to everyone. Universality is the principle that is maybe more problematic for implementation in social and political context, but discriminative use is strictly forbidden and logically opposing to legitimacy of legal order.

The rules of the European Convention of Human Rights (ECHR) are implemented regarding all human beings without exception and discrimination, «as a common standard of achievement for all peoples and all nations». The political, social and cultural diversity can never alter the idea of universality. This is a

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relatives…» (Tom Beken, Brice Ruyver & Nathalie Siron: «The organisation of the fight against corruption in the member states and candidate countries of the European Union», Maklu, Antwerpen-Apeldoorn, 2001, pp. 144.

16 «I cannot accept your canon that we are to judge pope and king unlike other men, with a favorable presumption that they do no wrong. If there is any presumption, it is the other way against holders of power... Power tends to corrupt, and absolute power corrupts absolutely», (see *http://quotes.liberty-tree.ca/quotes_about/corruption*).

principle of legitimacy of the legal order. Equal treatment is a reason in itself, the main tool to legitimize the whole legal system. It is to say that democracy is not imaginable without human rights. The modern, rational and sane society as a standard has to proclaim, accept and defend human rights.

Among others, some of the human rights are especially important for anticorruption activities. They are –at least– those contained in Article 6 (right to a fair trial), Article 7 (no punishment without law), Article 9 (the freedom of thought, conscience and religion), Article 10 (freedom of expression), Article 13 (right to an effective remedy), and some other rights (such as right to free elections, anti discrimination, etc.) present in the UDHR. [17]

The United Nations Convention against Corruption begins with the statement that corruption can be prosecuted after the fact, but first and foremost, it requires prevention. An entire chapter of the Convention is dedicated to prevention, with measures directed at both the public and private sectors. These include model preventive policies, such as the establishment of anticorruption bodies and enhanced transparency in the financing of election campaigns and political parties. [18] States must endeavor to ensure that their public services are subject to safeguards that promote efficiency, transparency and recruitment based on merit. Once recruited, public servants should be subject to codes of conduct, requirements for financial and other disclosures, and appropriate disciplinary measures. Transparency and accountability in matters of public finance must also be promoted, and specific requirements are to be established for the prevention of corruption, particularly in critical areas of the public sector such as the judiciary and public procurement. Those who use public services must expect a high standard of conduct from their public servants.

Preventing public corruption also requires an effort from all members of the society at large. For these reasons, the Convention calls on countries to promote actively the involvement of non-governmental and community-based organizations, as well as other elements of civil society, and to raise public awareness of corruption and what can be done about it. Article 5 of the Convention enjoins each State Party to establish and promote effective practices aimed at the prevention of corruption. In the Preamble, the parties to this Convention expressed concerns about the seriousness of the problems and threats posed by corruption to the stability and security of societies, since corruption undermines the institutions and values of democracy, ethical values and justice, and jeopardizes sustainable development and the rule of law. Acknowledging the fundamental

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17 The strong interconnection between corruption and certain human rights has also been recognized by the International Council on Human Rights Policy (a non-profit foundation registered in Switzerland), who recently published a very interesting report on the matter: *Corruption and Human Rights: Making the Connection,* ICHRP, Geneva, 2009 (available online at: *www.ichrp.org/files/reports/40/131_web.pdf*

18 According to the Global Corruption Barometer 2009, the public identifies political parties as the institution most tainted by corruption (*vid. supra* note 12).

principles of due process of law in criminal proceedings and in civil or administrative proceedings to adjudicate property rights is therefore essential.

The Convention is an example of how the governments have to design national strategies, programs and action to fight corruption. Almost all measures are connected with human rights –criminal procedure, prosecution, adjudication and sanctions, freezing, seizure and confiscation of property, measures relating to the judiciary and prosecution services, obstruction of justice, liability of legal persons, protection of witnesses, experts and victims, bank secrecy– and they do have strong repercussions to human rights. The same happens with different anticorruption tools.

The best policy against corruption is an honest and efficient government. Therefore, priority has to be given to measures of prevention and reduction of the risks of corruption, and to measures that change the nature and the logic of a realistic political system and open up the need for a reform.

The means of political control of the authorities are not only those of a typically organisational nature (decentralisation, separation of powers, collectiveness). They are neither the elections nor direct democracy, but a series of new functional methods that are considered to be a standard component of democracy. [19] Their purpose is to increase responsibility and public control over political authorities. Therefore, the necessary reform of these instruments is not only a simple technical change of organisation, people or budgetary funds. It is not only a change of regulations, a deceptive measure of changing the names of bodies or positions, or a modification in the composition of staff. Substantial political reforms are needed, as it has been consistently requested by the EU in its successive reports and assessments of the level of democracy in accessing countries with severe corruption problems, like Croatia. We are not asked to introduce mere cosmetic changes, but to meet required benchmarks.

The concept of good governance is formulated as a programme of reform of the administrative-political system. Lately, this concept has been used as a lowest common denominator for a set of measures and procedures by which the state apparatus seeks to be modernised and made socially accountable. The idea of good governance, of course, has been formulated in all great reformist ideologies, but in its current meaning it is based upon particular, absolutely precise, principles, very similar as it was done for the concept of human rights.

Of course, the foundations of these principles can be found in the literature and administrative science, but here we are concerned only by the practical aspects of the interpretation of this concept by international associations. The concept of good governance has been elaborated even in the resolution 64/2000 by the United Nations Commission for Human Rights. [20] In this document, too, the principles of the impact of good governance are listed, and the need for transparency, responsibility and accountability and responsiveness to the needs of the people are especially emphasized. However, the most important document –at

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19 Max Weber: *Wirtschaft und Gesellschaft,* Mohr, Berlin, 1964, pp. 201-211.

20 See *www.unhchr.ch/developrnent/governance-01.html.*

least for the European countries– in which the principles of good governance are specified, is the one entitled «European Principles for Public Administration», adopted in 1998. [21] It presupposes the acceptance of democratic values, human rights and the respect for the rule of law.

There are four main dimensions of the evaluation of good governance:

1.– Reliability and Predictability, which is an obvious consequence of the principle of the rule of law, that is, the strict observance of the legality and constitutionality and the guaranteed procedures of human and personal rights protection; the principle of legal competence, which means the legal principle that the competence should be established only on the basis of law and that the limits of competence must not be exceeded; the free evaluation of evidence (discretion), which is also interpreted as the obligation for the realisation of the objective of a regulation; proportionality, which is, as a principle, adopted in the interpretation of the European Convention on Human Rights and is a remedy for rough bureaucratic implementation of regulations; procedural fairness, which is also taken over from the judicial practice along with the Article 6 of the European Convention on Human Rights, and timeliness in decision-making and decisions by the government, which is relating to both the measures (general acts) and the limitation of the deadline for individual act enacting.

2.– Openness and Transparency [22] is the principle by which the government institutions are bound to ensure the public character of their operation. Therefore, the government must inform the public about its activities in a timely manner, in detail, accurately and to the full. Everyone has the right to obtain information from public authorities. What is not a secret should be available to the public –this is introduced as the principle of the operation of public authorities and means that the public can be denied access only to information that is legally proclaimed as secret, i.e. information protected as private by the law. The above-mentioned principles have been elaborated in the Recommendation 2 by the Council of Europe (21 February 2002), which is relating to public activity in political decision-making, public administration (both central and local) and judiciary. This recommendation of the state guarantees the right to have an insight into documents of public bodies to everyone. Possible restrictions on publicity are listed in a restrictive manner: state security and defence, public security, prosecution of crime, privacy, economic interest, equality before courts and tribunals, control over the workings of the Civil Service, exchange rate, preparation of

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21 «European Principles For Public Administration», *Sigma Papers* No. 27 (1999); cnm/Sigma/Puma(99) 44/Revl, OECD; 22-Nov-1999. p. 27.

22 International Association for Public Participation: *The IAP2 Core Values for Public Participation*, IAP2, Thornton, Co., 2000 (available online at *www.iap2.org/associations/4748/files/CoreValues.pdf*).

decisions. The rule (developed on the basis of a critique of the English practice) that in the case of a conflict between principles and rules, the public interest has prevalence, the right of the public to know («unless there is an overriding public interest in disclosure») has quite a revolutionary significance.

3.– Accountability, which implies the necessity of the existence of clear procedures for the exercise of democratic control over political officials and the possibility of their recall and resignation, and the protection of individual rights for all those who are responsible within the state hierarchy.

4.– Efficiency and Effectiveness, which means that there is the obligation that the objectives of public authorities are accomplished with as lower costs as possible, that there is the effectiveness (real efficiency) of the activities by the government.

4. HUMAN RIGHTS PROTECTION AND ANTICORRUPTION ARE THE TASK OF THE SOCIETY

The main question in accomplishment of human rights is: Who is entitled to be concerned for this? State and their bodies? Definitely yes, but the experience has demonstrated that such a narrow concept of the rule of law is not adequate for the promotion and defense of human rights. All citizens and associations should feel responsible. And the same happens with the issue of corruption. Numerous organizations, mainly from civil sector, locally as well as globally, are monitoring, influencing, promoting and actively fighting against corruption and for human rights.

This is a truth for both activities: the human rights movement and the move against corruption. Although the anticorruption movement started with a delay of no less than two decades, with a mobilization of the civil sector, there are significant similarities between these two fights: human rights as well as anticorruption fight enjoy a long intellectual and theoretical tradition. An additional similarity is that global and international network of organizations appear, and that those organizations do have a partnership relation with state bodies (when the government is cooperative) or (indeed often!) they fight for rights mobilizing people, media and political actors. Yet another similarity has to do with their extensive use of media and other campaigns. For both activities the raising of public awareness and civic education is crucial. All the institutions of moral education –from the school to the church, from interest groups to associations that fight for human rights– have to provide support to this. Finally, both movements succeeded in international standards to regulate the rule of law.

These similarities are not random. The logic for both movements is in the fundamental changes required in modern societies. The classical notions of state sovereignty, the belief in bureaucratic administration of justice, dominance of

political parties in political life, the focus on hard legislation is in question. In the new society, globalized society, the issues such as human rights and anticorruption, both, are in the focus of attention.

Corruption and human rights are interconnected. The only difference is that we fight against corruption and for human rights. But this is a same struggle.