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CRIMINAL LAW CONVENTION ON CORRUPTION AND ITS RELATION TO THE CRIMINAL CODE OF REPUBLIC OF KOSOVO

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Corruption is a global concern today and Kosovo is no exception. Consequences of corruption are evident in every sphere of society including the environmental damage that can be caused through corruption! As a matter fact, successful combat against corruption is a crucial condition that has to be met for every legal and a democratic state. For the Republic of Kosovo this means first of all establishing a consistent legal framework based on the general principals of the European Law. Aim of this research is to prove that in order to have a more successful combat against corruption, Kosovo has to take all measures that are foreseen from the Criminal Law Convention on Corruption, even though Kosovo has not signed this convention yet. With other words this paper does compare the domestic criminal offenses on corruption of the Criminal Code of Kosovo with the incriminations of the Criminal Law Convention on Corruption. After the war, Kosovo was found in chaotic situation especially its justice system. Therefore this paper includes also a historical review on corruption in Kosovo. Nevertheless the main attention of the paper is about the relation between the Criminal Law Convention on Corruption and the Criminal Code of Kosovo.

Key words: *Corruption, Criminal Law Convention against Corruption, Criminal Code of Kosovo.*

1. Criminal Law Convention against Corruption: Historical Circumstances

The history of Corruption on the European Continent has a reference to the Napoleon – French Criminal Code of the year 1810' which firstly presented some criminal penalties for combating corruption in public life. Since that time, states' interest in combating corruption more efficiently has grown steadily. Thus attention to corruption is thought to have peaked in the 1990s by the 1994s, when the European Ministers of Justice (further on as "the CM') held the 19th conference in the city of Valletta (Malta). It found that corruption presents a very serious threat to democracy, human rights, economy as well as other fundamental values of any society. Consequently, the fight against corruption had to go beyond the

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traditional and individual approaches of states that existed until then as the fight against corruption is expand beyond the borders of states. As a result of this conference Multidisciplinary Group on Corruption (further on as “the GMC”) was established which would be under responsibility of European Committee on Crime Problems (CDPC) and European Committee on Legal Co-operation (CDCJ).³ The aim of this group would be to investigate all appropriate measures, including the legal basis in force, against corruption, in order to create an international action plan for combating this phenomenon. The GMC in March 1995 drafted the “Anti-Corruption Action Plan” which was adopted by the CM at the end of 1996. Otherwise this ambitious document can be considered as the first concrete step towards the approval of the Criminal Law Convention on Corruption.⁴

On November 6, 1997, the CM in the session no. 101 adopted the “20 Guiding Principles for the Fight against Corruption”. These “Principles” were intended for the harmonization of national legislation in the field of the fight against corruption.⁵ This would give advantage, winning a battle in the anti-corruption war this way bringing closer the states policies in this field. Further on May 5, 1998, the CM in its session no. 102 through resolution no. (98) 7 approved the creation of “Group of States against Corruption” (GRECO). *This body aimed in monitoring and observation the implementation of the Anti-Corruption Guidelines and the implementation of the Anti-Corruption Action Plan.*⁶ In other words, the GRECO has been a support mechanism to increase the dynamics and efficiency of the fight against corruption.

As a result of all these developments, in February 1998 the GMC finalized the first draft of the Convention against Corruption. Whereas in November of the same year, the CM in session no. 103 adopted the Criminal Law Convention on Corruption and authorized the publication of “a Commentary” on it.⁷ The Convention entered into force in 2002 and has been ratified by 46 states.⁸

2. The Purpose, scope and content of convention

The Convention’s explanatory report states that the international fight against corruption today faces at least two (2) major challenges. The first deals the definition of a universally accepted unique definition regardless of the differences that may exist between domestic law. The second concerns international legal cooperation, which is often not only hostage to

³ CDPC and CDCJ are agencies of Council of Europe. For further information for CDPC see (<https://www.coe.int/en/web/cdpc/home>) and for CDCJ see (<https://www.coe.int/en/web/cdcj/home>) [07.11.2019].

⁴ Council of Europe – Multidisciplinary Group on Corruption, Anti-Corruption -Action Plan, short version CM (96)133, Strasbourg, 1996, pg. 8. Link: <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=539992&SecMode=1&DocId=550744&Usage=2> [07.11.2019].

⁵ Committee of Ministers of the Council of Europe, Resolution no. (97) 24, “Twenty Guiding Principles for the Fight against Corruption”, Strasbourg, 1997, principles no. 2, 4 and 20. Link: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806cc17c> [08.11.2019].

⁶ Committee of Ministers of the Council of Europe, Annex to Resolution no. (99) 5, “Status of the Group of States against Corruption”, Strasbourg, 1999, art. 1 and 2.

⁷ Council of Europe, European Treaty Series – No. 173, “Explanatory Report to the Criminal Law Convention on Corruption”, Strasbourg, 1999, page 5.

⁸ Council of Europe, Official Web site, “Treaty Office – Criminal Convention against Corruption”. Link: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/173/signatures?p_auth=bkwAx2ku [04.10.2019].

bureaucratic obstacles but also to political interference⁹. Considering this, that the scope of the convention is quite wide, reflecting the great discrepancy that may exist between states in the fight against corruption.¹⁰ One of the main aims of the convention is through the establishment of basic principles regarding the material and formal issues of corruption to advance towards an universal definition of corruption as well as towards effective international cooperation against corruption.

Referring to the objectives of this research, the focus is mainly on the measures that have to be taken internally (Chapter II of the Convention). In this regard, the convention has defined some forms of corruption such as: *active and passive corruption of public officers, active and passive corruption in the private sector, corruption of foreign public officers, exercise influence, etc.* The convention defines two main elements for any form of corruption: a) *The obligation that state, through appropriate measures incriminates the action provided for by the domestic legislation.* (almost every article of chapter of the convention begins by defining "each Party shall adopt such legislative or other necessary measures in order to designate it as a criminal offense"); b) *Necessary elements that must include for that certain incrimination (criminal offense) (The Convention also sets out the necessary elements that contains an incrimination).* For example, the convention under Article 7 defines active corruption in the private sector as follows: *"Each Party shall adopt such legislative or other measures as may be necessary to designate it as a criminal offense under the domestic law, when intentionally, during the economic activity (business), promise, direct or indirect provision or reception, any advantage not attributable to any person who directs or works in any position, in private sector entities, for himself or for others to act or don't in contradiction of their duties".*

It can be said that the convention has left to the states a lot of discretionary space. This is only because of the relevant form of corruption, the convention only conditions the general elements that necessarily need to incorporate in case of incrimination of certain action at the internal level. While other specific elements such as guilty, the perpetrator, then qualifying and privileged form or other eventual elements, the state itself determines them.

The Convention also foresees three forms of corruption (active corruption, exercising influence and money laundering) for which legal persons must be held responsible under domestic law. For these forms, states are not required to define criminal penalties but may also define monetary measures (fines) that must be effective, proportionate and serve as coercive form.¹¹ Whereas Articles 20 to 23 of the Convention mainly refer to measures that States should take not to incriminate certain forms of corruption but to protect and prosecute violations of those offenses. Thus, Article 20 provides for the creation of specialized authorities to combat corruption within states. These authorities as such must be professional, independent and operate in accordance with the principles set out by the Convention.¹²

⁹ Explanatory Report to the Criminal Law Convention on Corruption, cit., pg. 6.

¹⁰ Ibid., pg. 6.

¹¹ Council of Europe, "Criminal Convention on Corruption", Strasburg, 1999, article 19. Link: <https://rm.coe.int/168007f3f5> [05.11.2019].

¹² Ibid, article 20.

3. The Relation of Convention with the Constitution of Republic of Kosovo.

Kosovo is not among signatory states of the Criminal Law Convention on Corruption.¹³ From this point of view firstly Republic of Kosovo has no legal obligation to implement this Convention. However, the Constitution of Republic of Kosovo states that "*the Republic of Kosovo respects international law*"¹⁴. Also the Constitution of Republic of Kosovo defines that "*The Republic of Kosovo participates in international cooperation for the promotion and protection of the right for Peace, security and other human rights.*"¹⁵

These provisions are quite extensive in terms of interpretation. While this is characteristic of almost all the provisions provided the Constitution of Republic of Kosovo due to its nature, it is quite difficult to determine what that means by respecting international law! The international cooperation issue remains a similar uncertainty. However, it should be emphasized that the constitution is the highest legal act in the Republic of Kosovo.

Consequently laws and other legal acts (including the Criminal Code of Republic of Kosovo – CCRK) must be in accordance with it.¹⁶ Considering the legal superiority of the Constitution of the Rep of Kosovo and its aforementioned stipulations that the Republic of Kosovo should respect international law and participate in international cooperation, we can conclude that *the Criminal Code of the Republic of Kosovo should be in accordance with the Criminal Convention on Corruption*. Certainly, such an interpretation of the provisions of the Constitution of the Rep. of Kosovo concerning the relationship between the CCRK and the Convention is merely a logical and deliberate interpretation.¹⁷ In other words, eventual conflicts between the CCRK and the Convention cannot be interpreted as constitutional violations. Thus, these eventual collisions cannot be used as a basis for accusing or not accusing people, as this would be a flagrant violation of the principle of legality. Another situation would be if the RKS had signed and ratified the Convention. Certainly then Article 19 of the CCRK would apply where it stipulates that international agreements ratified by the RKS apply directly and take precedence over the laws in force.¹⁸ Therefore, while the RKS is not a signatory to the Convention, in order to combat corruption and in accordance with international standards and for the purpose of harmonizing domestic and European legislation within the framework of goals for Euro-Atlantic integration, it remains to be concluded that the CCRK should be in harmony with the Convention but, eventual collisions are neither constitutionally sanctioned nor international law.

¹³ Council of Europe, Official Web Site, List of States, signatory of the Convention on Corruption. Link: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/173/signatures?p_auth=BzSabCR1 [13.09.2019].

¹⁴ Republic of Kosovo Official Gazette No. 09042008, Constitution of the Republic of Kosovo, April,09 2008, Pristina, article 16. Link: <https://gzk.rks-gov.net/ActDetail.aspx?ActID=3702> [13.09.2019].

¹⁵ Ibid., article 17 paragraph 2.

¹⁶ Ibid., article 16 paragraph 1.

¹⁷ The logical deliberate and interpretation in the present case starts from the fact that the RKS is determined for Euro-Atlantic integration. This is confirmed, among other things, in the preamble to the CRK which states "*With the goal of Rep of Kosovo to integrate in Euro-Atlantic processes*" Of course, the harmonization of the CCRK with the Convention is an indispensable obligation to achieve these integrative goals and to fight corruption, particularly.

¹⁸ Republic of Kosovo Official Gazette no. 2, 14 Janar 2019, "Criminal Code no. 06/L-074 of Republic of Kosovo", 2019, Pristina, article 19 paragraph 1 and 2.

4. The Relation of Convention with the Criminal Code of Republic of Kosovo

On April 16, 2019, the new Criminal Code of the Republic of Kosovo entered into force. This code, like the previous one, mainly deals with corruption offenses within the chapter "*Official corruption and offenses against official duty*". Regarding the relation of the Convention with the Criminal Code of Republic of Kosovo, we can generally say that the new Criminal Code is in line with the principles set forth by the Convention and from this point of view constitutes an advance from the previous Criminal Code. Thus, example Articles 2 and 3 that criminalize active corruption and passive corruption of public officers are in line with Articles 421 and 422 of the Criminal Code which determine the criminal offenses of bribery.

Further, Articles 7 and 8 of the Convention determines that states should criminalize active and passive corruption in the private sector. On the other hand, the Kosovo legislator has defined the criminal offenses through Articles 309 and 310 of the new Criminal Code. "*Accepting bribery in the private sector*" and "*giving bribery in the private sector*". *We consider that this innovation in criminal legislation is not only fully in line with the convention but also was necessary for a more effective fight against corruption in Kosovo*".

One of the other measures that states must take according to the Convention is the establishment of special authorities who are capable and independent in fighting (efficient) against corruption. Since the war ended in Kosovo, several authorities were established in the name of fighting corruption. Today we can count: *The Agency against Corruption, Special Task Force for Anti-Corruption, National Anti-Corruption Coordinator, National Anti-Corruption Council, Special Prosecution Office for the Rep. of Kosovo, etc.*

However, in the case of Kosovo there is a conviction that the large number of anti-corruption agencies turned out not to be the best solution! Referring to Transparency International's Corruption Perceptions Report for 2018, Kosovo ranks 93rd out of 180 most corrupted countries in the world.

So we consider it necessary to start dealing with the qualitative aspect rather than the quantitative one! In other words, those anti-corruption agencies that have no relevance in the fight against corruption should stop functioning to give space to those who will develop the fight against corruption efficiently and in accordance with the international standards. In any case, the effective fight against corruption can only take place when incrimination and incriminating policies are in full compliance with the Criminal Law Convention on Corruption.

5. Conclusion

Corruption as a form of criminality today has managed to attract the attention of many international organizations including the Council of Europe. This is argued by the fact that while the consequences of corruption damage the states values, then fighting corruption is not enough to be done only within the respective sovereignty but to move to the international domain.

However, when it comes to fighting corruption in European law, the Convention is certainly the most serious initiative in this area. This is not only because of the relatively large

number that has signed it (50 states) but also because of the principles it has managed to consolidate in the name of efficiently combating corruption. Although the Convention failed to draft a unique definition of corruption, it failed to take a major step towards harmonizing the internal rights of states amongst themselves and consolidated serious international mechanisms to combat corruption such as the *GRECO*.

From the perspective of the RKS, it should be noted that even close to 20 years after the war, the perception of corruption is very high. This is also confirmed by the most credible international organizations such as "Transparency International" thus placing Kosovo for 2018 in 93rd place among the 180 most corrupted countries in the world. So according to this organization there is a perception that in 2018 only 87 countries in the world were more corrupted than Kosovo!¹⁹

On the other hand, the state and society of Kosovo are determined on their path to Euro-Atlantic integration. However, in order to achieve these goals, it is necessary, among other things, to fight against corruption in Kosovo. It is therefore necessary for RKS to fully implement the European standards that the Convention has consolidated.

Although the criminal prosecution of perpetrators of corruption and the competent institutions in their prosecution do not fall within the scope of the CCRK, the research also highlights this aspect. In particular, the Convention in Article 20 stipulates that a state with internal legislative measures should establish a professional, independent and efficient authority to combat corruption. It has been identified that the RKS has failed to implement this measure effectively. This is due to the fact that a large number of institutions have been established in the name of combating corruption, but the results have left much to be desired!

As explained above in this research paper, the RKS is not a signatory of the Convention. Thus, eventual collisions between it and the CCRK cannot be interpreted as a violation of international law or as a violation of Kosovo's Constitution'. However, based on the research done and the findings, we consider that these recommendations should be taken seriously when amending the CCRK or issuing a new CCRK:

- In accordance with Article 20 of the Convention, establish or designate one of the existing authorities as a professional, independent and effective authority for combating corruption in Kosovo. At the same time, other unnecessary authorities shall stop functioning because of the confusion they have created on their efficiency (inefficiency).
- Take all necessary measures such as the training of competent officers or the engagement of outside experts, with the aim fully implementation of Articles 309 and 310 of the Criminal Code of Rep. of Kosovo, as incrimination's of corruption for the first time in Kosovo in the private sector.
- To seriously consider all legal and political means for adherence of Convention in RKS, in the name of international co-operation toward combating corruption in general and in fighting corruption particularly in RKS.

¹⁹ Transparency International, Official Website "Corruption Perceptions Index 2018". Link: https://www.transparency.org/news/feature/corruption_perceptions_index_2016?gclid=EA1aIqobChMlyuKP08qi2AIVFZ4bCh0BnQD8E AAYASAAEgJrFPD_BwE [14.09.2019].

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