

A COMPARISON OVERVIEW BETWEEN INTERNATIONAL LEGAL INSTRUMENTS AND ALBANIAN LEGISLATION REGARDING THE FIGHT AGAINST CORRUPTION

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Abstract

The promotion and protection of human rights are at the core of legal systems worldwide. Human Rights serve as the basic standard of democracy and rule of law. Recently, human rights generations have been expanding, and it is understandable because of the theory of development and social changes. Right to a corruption-free society is at the core of human rights generations. This is because the enjoyment of numerous freedoms and human rights is strongly linked to a corruption-free society. Very important principles such as Equality principle and non-discrimination principle cannot be exercised in a corrupt society. The process of ensuring right to a corruption-free society and punishing corruption when it occurs is a scope of international legal instruments. Numerous legal instruments and legally binding instruments are helping to combat, prevent, and fight corruption as a transnational phenomenon which makes international cooperation essential. Albania has ratified most international instruments, even though it is a crucial case of corruption in Europe because of the high levels of corruption according to statistical data. Is the corruption in Albania caused by the implementation of legal framework? The right to a corruption-free society is part of our constitutional human rights. It is in the administrative law as well as a free-service principle. Also, it enjoys penal protection since penal law sanctions it as a criminal offence. In this research paper, it will be dealt with together with the international legal instruments compared to the three objects of the study of Albanian law (constitutional, administrative, and penal law). This analyzes their legal framework coming to the conclusion as to why the Albanian legislation is not effective in ensuring right to a corruption-free society.

Keywords: corruption-free society, international legal instruments, human rights, constitutional law, administrative law, penal law

Introduction

As our knowledge of the corruption phenomenon expands, we realize the extent of the harm it causes. International and domestic legal framework against corruption requires prosecution of corruption. However, first and foremost, the main goal is the prevention of corruption acts. Preventing corruption is as much important as harmonizing legislation against corruption, while corruption is recognized as a transnational crime. Institutions in Albania have established a legal and institutional framework to deal with corruption. Also, they have updated this framework many times due to the limited progress in the fight against corruption. Some steps have been taken to combat this phenomenon, starting from the adoption of certain laws and the short and long term strategies against corruption. In the last national strategy of the fight against corruption 2015-2017, the government is committed to uncompromising fight and zero tolerance against corruption. The government intends to undertake an effort to fight corruption which involves a three-pronged approach of preventive, punitive, and awareness. The Anti-Corruption strategy is under the field of the responsibilities of the Minister of the State on Local Government. Thus, the comparison of the international legal framework with the legal framework of the Republic of Albania is mainly related to the case of Albania as a state where the level of corruption is still very high. In the year 2013, Albania was ranked as the most corrupt country in Europe. In parenthesis, Albanian anti-corruption legislation is generally complete and is in accordance with international standards. Therefore, it is clearly evidenced as to why the implementation is not effective. Limited progress against corruption is due to impunity of corruption which is majorly a high-level official corruption. This does not refer to corruption offenses due to lack of public trust in institutions and lack of promotion or compensation for persons who have suffered damage because of corruption acts. For example, Civil Convention against corruption requires convention ratified by the Republic of Albania which is applicable directly.

2. LEGAL INSTRUMENTS AGAINST CORRUPTION

2.1 International Legal Instruments against Corruption

In this first part of the research paper, some of the conventions, treaties, and agreements against corruption will be dealt with. Consequently, these conventions will be grouped into three main groups: international legal instruments of the United Nations, international instruments of the Council of Europe, and international instruments binding on African states. In the tables below, we will group these conventions as well as the main purpose of their adoption and their role in controlling, preventing, and punishing

corruption. Synthetically, these conventions were adopted in order to achieve the prevention, awareness and punishment of corruption.

Conventions are equally important as they cover various aspects of corruption acts. In essence, these conventions are indicators of the complexity of corrupt practices. The first issue to be addressed in this study is the definition of “corruption”. While there is no widely accepted definition yet, an essential issue is in defining it. Regarding the definition of corruption, the object of the study by law and political science in the years 1960-1970 emphasizes corruption as a break of law. Thus, it is illegal as against public interest and it undermines public interests (Mark J.Farrales, 2005).

The second issue is the criminalization of corruption acts in domestic legislation. Corruption acts are criminalized in international and domestic legislation which provisioned some figures of corruption acts. Consequently, Penal Law guarantees punishment of active and passive subject of criminal acts. Albanian Penal Legislation has been amended several times attempting to provide punishing objective of the penal law. Corruption is not an issue of penal law, and it is strongly linked to administrative law. General principle for the professional conduct is set out in International Code of Conduct for Public Officials adopted by the General Assembly of the United States. Conflicts of interests, disclosure of assets, and the acceptance of gifts etc are guiding principles of public administration. The Republic of Albania established the legal framework according to international standards. Meanwhile, the public administration is highly politicized.

Table No 1. International legal instruments adopted by the General Assembly of the United States

Convention/Treaty	Adopted by	Aimed mainly to	Provisions of corruption
The United Nations Convention against Transnational Organized	The General Assembly in its resolution 55/25 of 15 November 2000	Fight against organized crime	Criminalization of the corruption of public officials.
United Nation Declaration against Corruption and Bribery in International Commercial Transactions	The General Assembly in its resolution 51/191 of 16 December 1996	To promote the criminalization of corruption and bribery in international commercial transactions	Criminalization of corruption and bribery in international commercial transactions
International Code	The	As a tool to guide	General principles for the professional

of Conduct for Public Officials	General Assembly in its resolution 51/59 of 12 December 1996,	the efforts against corruption	conduct of public officials, as well as principles concerning the prevention of conflicts of interest, the disclosure of assets, the acceptance of gifts, the handling of confidential information, and involvement in political activity.
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Table No 2. International legal instruments against corruption adopted by The Committee of Ministers of the Council of Europe

Civil Law Convention on Corruption	Represents the first attempt to define common international rules in the field of civil law and corruption. Effective remedies for persons who have suffered damage as a result of corruption. The Convention requires each party to provide an internal law for the right to bring civil action in corruption cases. Damages (material damages, loss of profits, and non-pecuniary loss). Reduced evidentiary requirements necessary in civil proceedings. The validity of contracts is also addressed.
Criminal Law Convention on Corruption (November 1998)	Coordinated criminalization of a large number of corrupt practices. Proportionate and dissuasive sanctions and measures are required, and criminal or non-criminal sanctions, including monetary sanctions. Setting up of specialized anti-corruption bodies, protection of persons collaborating with investigating or prosecuting authorities and gathering of evidence and confiscation of proceeds through international cooperation.
Model Code of Conduct for Public Officials (May 2000)	Set out general principles as: the conflict of interests; incompatible outside activities; how to react when confronted with problems such as offers of undue advantages, especially gifts; susceptibility to the influence of others; misuse of official position; use of official information and public resources for private purposes; and the rules to follow when leaving the public service, especially in relations with former public officials, the integrity of public officials, and the accountability of hierarchical superiors.
Agreement Establishing the Group of States against Corruption (GRECO ²⁴⁸) May 1999	Improving its members' capacity to fight corruption by monitoring their undertakings in this field, including their observance of the Twenty Guiding Principles for the Fight against Corruption and the implementation of it.

²⁴⁸ Albania is a member state of GRECO

<p>Twenty Guiding Principles for the Fight against Corruption (November 1997)</p>	<p>Fight against corruption must be multidisciplinary</p>
<p>Convention on the Fight against Corruption involving Officials of the European Communities or Officials of the Member States of the European Union</p>	<p>Criminalizing all corrupt conduct involving Community officials or member States’ officials. It sanctions active and passive corruption of Community officials and national officials, as well as the participation and instigation of such acts.</p>
<p>Convention on the protection of the European Communities’ financial interests. Protocol to the Convention on the protection of the European Communities’ financial interest. Second Protocol to the Convention on the protection of the European Communities’ financial interests</p>	<p>Constitutes the first agreement under the provisions of police and judicial cooperation in criminal matters of the Treaty on European Union. Aims to protect the European Communities’ financial interests by calling for the criminal prosecution of fraudulent conduct injuring those interests. Active and passive corruption. Jurisdiction’s criteria. Liability of legal persons.</p>

Conventions, treaties, and agreements of the Committee of Ministers of the Council of Europe have high importance regarding the international legal framework. However, they set out international standards of legislation or any other measures. The main purpose of them all is in establishing legal framework and mechanisms against corruption in “European Area”. Every single convention requires each party to provide its internal law, harmonizing law, and the rights of persons to ensure the right to a corruption-free society. Every time human right is violated, they have the right to bring the case before the court. The liability derived from corruption acts include civil, administrative, and penal. Civil Right which helps in bringing the case before a court is extremely important because it requires the States to provide legal remedies. Thus, this includes compensation for damages and for persons who have suffered damage as a result of acts of corruption. The Convention requires monitoring bodies as Group of State Against Corruption. The Civil Convention against Corruption is binding and no reservation may be made with respect to any provision of the Convention. The Convention under its 9 article requires whistleblower protection of

employees. A draft-law (2014) regarding whistleblower protection of employees in Republic of Albania is highly sensitive and debatable. Apart from political or public discussion, this law is evaluated to be essential in controlling and preventing corruption in public administration. Another main benefit of the Convention is the requirement of international cooperation, not only in joining or ratifying convention, but in harmonizing legislation. Thus, it is provided under its 13 article contracting parties in civil cases of corruption, including obtaining evidence abroad, jurisdiction, recognition, and enforcement of foreign judgements. Monetary sanctions and confiscation of penal proceeds as provided in Penal Convention against corruption, is one of the main benefits of penal convention. This is because in acts of corruption, the punishment is usually greater than the profits. Preventing corruption as a main objective of legislation against corruption, is possible when the penalty is greater than the corruption gain. Corruption will occur if the corrupt gain is greater than the penalty multiplied by the likelihood of being caught and prosecuted (Klitegard, 1998). Even at that, multidisciplinary approach and the involvement of various actors of public life in fighting corruption is very essential.

Table No 3. African legal instruments against corruption

African Union Convention in Preventing and Combating Corruption	Provisions that should guarantee access to information and the participation of the civil society and the media in the monitoring process. Ban the use of funds acquired through illicit and corrupt practices to finance political parties and the repatriation of the proceeds of corruption.
Economic Community of West African States Protocol on the Fight against Corruption	Strengthening effective mechanisms to prevent, suppress, and eradicate corruption in each of the States parties.
Economic Community of West African States Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping, and Security.	Called for the harmonization of the laws of member States in a protocol including extradition, financial disclosure and judicial processes, and for collaboration between public, private, and non-state actors, including a free and responsible Media.

The fight against corruption is a major challenge in African States. Africa is a party to a number of international and regional conventions that set out obligations to fight corruption. In addition, Africa has enacted domestic legislation in order to give effect to the commitments enshrined in these conventions. The main benefits of African conventions include: preventive and punishment objectives, participation of civil society, free and responsible media as a partner of fight against corruption, requirement of

effective mechanisms, and the necessity of harmonization of legislation against corruption.

2. Albanian Legal Instruments Against Corruption

The Republic of Albania has adopted the necessary legal framework which aimed at combating corruption. Not only does it ratify binding international legal instruments, it is directly applicable according to Albania Constitutional Law. As a consequence, it enables the national legislation to use international legal instruments. However, the proclaimed zero tolerance against corruption is reflected in strategies of 2008-2013 and 2015-2017 which gives the fight against corruption a status of a national emergency. Firstly, let us deal with the international legal instruments ratified by the Republic of Albania as in table no 4.

Table No 4. International Conventions ratified by the Republic of Albania

Convention	Some main benefits of convention
The United States Convention Against Corruption (New York 31 st of October 2003) Ratified by the law No.9492 dated 13.03.2006	-Department of Internal Audit and Anti-Corruption in Council of Ministers for assisting other states in preventing corruption acts. -Ministry of Justice of Republic of Albania. -General Prosecution Office of the Republic of Albania Republic of Albania, according to article 44/6 recognises the text of the convention as a legal framework about extradition and cooperation between signatory states.
The Civil Convention Against Corruption Ratified by the law No.8635 dated 07.06.2000	State responsibility in taking legislative measures and any other necessity measure guaranteeing Effective civil remedies for damages caused by corruption acts.
Penal Convention Against Corruption Ratified by the Law 8778 dated 26.04.2001	Criminalization of corruption acts. Some figures of corruption acts offences. International cooperation is required. Legislative and any measure should be taken at national level.
Convention on Laundering, Search, Seizure, and Confiscation of the Proceeds of Crime (Strasbourg, 8 th of November 1990) ratified by law No.8646 dated 20.07.2000	According to Convention, measures to be taken at the national level include: confiscation measures, investigative and provisional measures, special investigative powers and techniques, legal remedies, laundering offences, and international cooperation which is required as well.
Convention of United States against international organized crime and two additional protocols, ratified by the law no 8920 dated 11.07.2002	The convention is mainly to organized crime i.e. international organized crime. In article 8,9 etc, it stipulates criminalization of corruption and measures against corruption (art 9). According to it, corruption is linked to organized crime.
Protocol of Penal Convention Against Corruption ratified by Law No.9245 dated 24.06.2004	Active and passive corruption of domestic and foreign arbitrators

<p>Resolution 97 (24) On the Twenty Guiding Principles for the Fight against Corruption</p>	<p>to take effective measures for the prevention of corruption. Thus, it aims to raise public awareness and promote ethical behaviour for the purpose of ensuring co-ordinated criminalisation of national and international corruption. Also, it helps in ensuring that those in charge of the prevention, investigation, prosecution, and adjudication of corruption offences enjoy the independence and autonomy appropriate for their functions. They are free from improper influence and have effective means for gathering evidence, protecting the persons who help the authorities in combating corruption, and preserving the confidentiality of investigations. It provides appropriate measures for the seizure and deprivation of the proceeds of corruption offences. It provides appropriate measures to prevent legal persons being used to shield corruption offences. It limits immunity from investigation, prosecution, or adjudication of corruption offences to the degree necessary in a democratic society. It aims to promote the specialisation of persons or bodies in charge of fighting corruption and to provide them with appropriate means and training to perform their tasks. It ensures that the fiscal legislation and the authorities in charge of implementation contribute in combating corruption in an effective and co-ordinated manner. This is attained particularly by denying tax deductibility, under the law or in practice for bribes or other expenses linked to corruption offences. Also, it ensures that the organizations functioning and decision-making processes of public administrations take into account the need to combat corruption, in particular by ensuring as much transparency that is consistent with the need to achieve its effectiveness. It ensures that the rules relating to the rights and duties of public officials take into account the requirements of the fight against corruption and provides appropriate and effective disciplinary measures. It promotes further specification of the behaviour expected from public officials by appropriate means, such as codes of conduct. It ensures that appropriate auditing procedures apply to the activities of public administration and the public sector. It endorses the role that the audit procedures can play in preventing and detecting corruption outside public administrations. It ensures that the system of public liability or accountability takes account of the consequences of corrupt behaviour of public officials. It adopt appropriately transparent procedures for public procurement that promotes fair competition and deter corruptors. It encourages the adoption by elected representatives of codes of conduct and it promotes the rules for the financing of political parties and election campaigns which deter corruption. It ensures that the media have freedom to receive and impact information on corruption matters, subject only to limitations or restrictions which are necessary in a democratic society. It ensures that civil law</p>
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	takes into account the need to fight corruption, and in particular, provides for effective remedies for those whose rights and interests have been affected by corruption. It encourages research on corruption in ensuring that every aspect of the fight against corruption, and the possible connections with organised crime and money laundering are taken into account. Thus, it is used for developing the widest extent of possible international co-operation in all areas of the fight against corruption.
Recommendation 2000 (10) of the Committee of Ministers to Member States on codes of conduct for public officials	Emphasizes the essential role of public administration and sets out guiding principles of public administration.

DEBATES

Is legal framework compatible to international legal instruments against corruption?

After dealing with the international instruments against corruption, it is essential to compare international requirement in the fight against corruption with the Albanian legal framework. Consequently, a corruption-free society has made a limited progress. There are some guiding principles that is important to have a corruption-free society. In the table No 5 entitled “Compatibility of Albanian legislation to international legal instruments against corruption,” you will find the guiding principles as stipulated in international law and as guaranteed under Albanian law.

Table No 5. Compatibility of Albanian legislation to international legal instruments against corruption

Indicator	Yes/No	Legal framework ensuring it
Criminalization of corruption	Yes	Penal Law
Public Administration Status of civil servant	Yes	Law No.152/2013 “On civil servant”, adopted on 30.05.2013 and entered into force on the 1 st of October 2013
Prevention of conflict of interests	Yes	Law No.9367 dated 07.04.2005 “ On the prevention of conflicts of interests in the exercise of public interests.”
Code of Ethics	Yes	Law No.9131 dated 08.09.2003 “On code ethics in public administration.”
Gifts acceptance in public administration	Yes	Decision No.714 dated 22.10.2004 “For external activity and gifts acceptance during exercise of powers of officials.”
Internal and external audit in public administration	Yes	Several sectoral law and Law No.8270 dated 23.12.1997 “On Supreme Audit of the Republic of Albania.”

Liability of state for damages caused by corruption acts according to Civil Convention against corruption	Yes	Law No.8510 dated 15.07.1999 “On extra-contractual liability of public institutions.”
Asset Declarations for Public Officials as a tool to prevent corruption	Yes	Law No. 9049 dated 10.04.2003 “On asset declarations, financial charges of elected persons, and several public officials.”
Whistleblowing employee’s protection	No	Fragmented legislation,drafted law
Public participation in the fight against corruption Reward of corruption “whistleblowers”	YES	Law No. 9508 dated 03.04.2006 “On public cooperation in fight against corruption.”

Source: Comparison is done in comparing provisions of international legal instruments with domestic law as cited in the third column

What are the main causes of limited progress done against corruption in the Republic of Albania? Why are the limited progress that have been done against corruption?

Appreciating the applicable legislation of the Republic of Albania, the level of corruption should not and cannot be in this level. However, the causes of high levels of corruption in Albania have been the object of numerous studies. Furthermore, international organizations have ranked Albania to be the most corrupt country in Europe (Transparency International, 2013). European Commission’s Progress Report in recent years ranked corruption to be a major challenge. Regarding the implementation of Anti-Corruption Plan, the implementation of the Anti-Corruption Plan lacked proper monitoring and follow-up on the results (Nations in Transit, 2013). Thus, another high important issue to be addressed is the well-functioning of institutions exercising powers which are part of the anti-corruption strategies. The major challenge includes capacity, professional appointment criteria of their employers, de jure and de facto independence, and the political influence and effective measures to be taken. Consequently, the Anti-Corruption Task-Force is not protected from political interference in practice (Global Integrity Report, 2010). The Department of Internal Control and Anti-Corruption is another very important institution. Thus, there is the need to clarify DIACA’s role and enhance its capacity. In addition, there is a pressing need for effective reporting, policy coordination, and monitoring (European Commission’s Albania Progress Report, 2013).

Regarding the High Inspectorate of Declaration of Assets, there is still a need to improve HIDAA's audit capacity Well-functioning of HIDAA's provide prevention objective in the fight against corruption. The establishing of database on suspected corruption in public administration as agreed by the High Council of Justice and HIDAA in their memorandum of understanding is still pending. At least, the public administration in Albania suffers from weak institutional culture concerning the enforcement of legislation. This is the major cause of limited progress as much as Albanian law is compatible to international law against corruption. Considering the time of the adoption of these laws, some of them have an average of a decade entered into force. Thus, this is an example of the laws adopted which have not produced any consequences regardless of the de jure existence. Albanian legislation has failed to implement laws and the foremost Albanian institution has failed to exercise their powers in the fight against corruption.

CONCLUSION

In conclusion, the fight by Albanian and the international legislation against corruption is guided by the same objectives: prevention, punishment, and awareness.

The Republic of Albania has ratified majority of the international legal instruments. Therefore, according to article 5 of Albanian Constitution, The Republic of Albania applies international law that is binding upon it. Furthermore, article 116/1b of the Constitution stipulates that: "Normative acts that are effective in the entire territory of the Republic of Albania are ratified by international agreements."

The Republic of Albania has established the legal framework for combating corruption through the ratification of conventions, agreements, and the harmonization of national legislation.

National legal framework which should guarantee the right to a corruption-free society is a constitutional, administrative law, and a criminal law.

According to Albanian constitutional law, the right to a corruption-free society is guaranteed under article 18 which stipulated equality before the law and non discrimination principle.

The constitutional text referring to freedom and human rights stipulates "none," "everyone," and "all persons" regarding enjoyment of human rights, even though some rights have been violated due to corruption. The most violated human rights in Albania is the right to a fair trial, the right to private property, the right to health care from the state, the right to a lawful work, and the right to education. Hence, the constitutional provisions are in accordance with the international standards. However, what is the cause of this violation?

According to Albanian Administrative Law, the right to a corruption free society is guaranteed under the principle of legality, equality and proportionality, the principle of justice and fairness, accountability, the principle of non-payment of the service, and the principle of internal and external control. All the principles have been drafted in accordance with the constitutional principles. This makes up the basis and limits those who operate the public administration.

First and foremost, the right to a corruption-free society under administrative law is guaranteed under the principle of legality and non-payment of the service. The principle of non-payment of the service does not require the exclusion of administrative duties as article 104 of the Code of Administrative Procedure sanctions.

Corruption is a phenomenon associated with public administration and principles such as the avoidance of conflicts of interest and the application of ethics. Also, the disclosures of the assets of public official are issues that should be addressed by law enforcement agencies.

Albanian Penal Law punishes corruption offenses and prosecutes some figures of corruption acts. Penal Law is amended several times regarding corruption acts. The code of Penal Procedure was amended by law 99/2014 which is sanctioned and judged by the Court if there is a Serious Crimes corruption offenses committed by high officials, local elected officials, or any functionaries of justice.

Another high important matter that is to be addressed is about human resources in public administration. Integrity in public administration is required. As everyone knows, public administration in the Republic of Albania has been highly politicized. The requirement process of civil service is of crucial importance for the functioning of the civil service, its professional standards, impartiality, and its social credibility.

Detection of corruption offenses is not an easy task as they are carried out in complete secrecy with the consent of both parties (approval does not mean they will).

Also, the functioning of the High Inspectorate of Declaration and Audit of Assets and Conflict of Interests should be addressed. Well functioning of the institution creates the possibility for detection (given that the assets may be indicative of corruption acts). Administrative investigation of HIDAAC is essential in preventing and punishing corruption. In the year 2011, there are 28 cases of administrative investigation. Thus, 5 cases were brought before the Prosecution Office for the criminal offence provided by article 257/a/2 of the Penal Code. In the year 2013, the number of cases brought before the Prosecution Office was only two cases.

Generally, the domestic legislation is in conformity with international norms against corruption. Thus, it is necessary in closing the implementation gap. Regarding the civil servant status, it should be strengthened in ensuring independence and impartiality not only in appointment procedure, but during all the time of exercising his functions. Also, the role of criminal law should not be overestimated, and particular attention should be paid in reviewing the legislation under preventive approach. Since it is a large number of international instruments, the harmonization of domestic legislation regarding various terminology of the law in ensuring legal certainty is hereby recommended.

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