

The fight against corruption - a new human right

Introduction

Over the past decade, the phenomenon of corruption has assumed a primary position of interest in public opinion. The developing countries are accused of widespread corruption, which destroys their attempts to make progress. The States of the former Soviet Union, particularly the fledgling democracies of Central Asia, appear to be being plundered by dangerous gangs of racketeers which seize any newly created wealth in these countries. And the traditional western democracies, including Greece, are being shaken by profound crises of confidence due to charges of corruption levelled at elected and non-elected public authority bodies.

Corruption may be defined briefly as the use and abuse of public power for personal gain. Under this definition, which confines the phenomenon to the public service domain and concerns activity of a financial nature, corruption is recognised internationally as a cancer affecting both national States and the international community. In the age of the globalised economy, corruption is a phenomenon that is of interest world-wide.

Numerous international texts define corruption and organise international cooperation to fight it. The Treaty on European Union, as it relates to the fight against corruption involving officials of the European Communities or officials of Member States of the European Union (Council Act of 26 May 1997), draws a distinction between active and passive corruption and defines the former as the conscious act whereby any sort of benefit is promised or given to an official directly or via another person so that the official takes or does not take action in accordance with his or her duty or acts in conflict with his or her official duty. The European Convention on the fight against corruption signed within the framework of the Council of Europe contains the following definition of corruption: corruption is the direct or indirect demand for or offer or provision or acceptance of a sum of money or any other unwarranted benefit or prospect of benefit which undermines the regular performance of any duty or conduct required of the recipient of such a benefit.

An attempt will be made hereafter to demonstrate that the fight against corruption is so closely linked to the defence of human rights that the fight against corruption can even be considered to be a demand made by the individual on society and, correspondingly, a positive obligation on the part of the State vis-à-vis the individual that is as fundamental as classic human rights. The first section deals with corruption as a threat to the fabric of human rights. The second clarifies the legal nature of the fight against corruption as a positive obligation on the part of the State to defend human rights and the third examines the Court of Auditors' role as a main guarantor as regards the individual's demand that corruption be fought.

I.

The Council of Europe, an institution which defends the fundamental principles of democracy, the rule of law and human rights on our age-old continent, maintains that corruption undermines the very values that the Council has been called upon to uphold. By undermining social justice, fair competition and good governance in general, corruption, as the Council of Europe proclaims, constitutes an obstacle to economic development and upsets the stability of democratic institutions and the ethical foundations of society.

Corruption has an impact at three levels of the social fabric. It renders a fundamental human right, that of equality, inapplicable, distorts the democratic procedure by perverting proper decision-making as it affects the exercise of human rights and, lastly, renders the rule of law ineffective, thus undermining the citizen's security and faith in the supremacy of the law over arbitrariness.

The principle of equality is not applied

Corruption in the area of public service primarily attacks the principle of equality. As regards people holding the purse strings, public works, supplies and services seem to comprise the domain in which corruption is by far most pre-eminent. The honest participants in tendering competitions are pushed aside by those who aim to increase their marks by bribing those responsible. Tailored invitations to tender, over-laxity or undue strictness in examining supporting documents, leniency in evaluating technical specifications, all of these constitute means of circumventing the legislation that aims to secure equal treatment for all candidates, while ensuring that the public interest is optimally served. There is a similar problem with the selection of staff for posts in public administration. It also applies to the grant of official authorisations to operate industrial enterprises, to the growth in the number of public-sector posts, the operation of coastal shipping lines and, in the area of health, obtaining better medical care from doctors and nurses. Corruption removes equality and gives the impression that people are more capable, qualified or competent than they actually are.

Debasement of the democratic procedure

Where corruption is involved, the decisions taken regarding key human rights are not as they should be. The principle of proportionality between the selection of the right objective and the appropriate means of attaining it suffers. Environmental protection constitutes the first victim, for example, in cases where there is laxity in complying with restrictions and permits are granted for activities that are damaging to the environment which do not comply with legal requirements. Development aid is not granted on the basis of objective criteria, which means that development efforts are undermined or defeated. Contracts for works, supplies and services are awarded, but urgent needs corresponding to specific social rights, such as health, education and employment, are not met. Democracy proves unable to choose the optimum solution.

The rule of law is ineffective

Corruption distorts legal reality and renders difficult that which would otherwise be so very simple. Where a person in authority has been bribed and furthers a case as a result, even though this in itself perhaps has no impact on observance of the principle of equality, it nevertheless strikes every time at the human right that is affected by the procedure in question. When a person has to pay a bribe in order to obtain the required construction permit, because its issue would otherwise be excessively delayed, this constitutes a blow against the right of ownership and prevents the exercise of that right. When someone has to pay a bribe in order to have surgery carried out by a doctor employed at a public hospital who is the right person for the job, this constitutes an attack on the right to health. Corruption thus strikes at the operation of the rule of law and creates a situation of generalised arbitrariness which corrupts the conscience, so that the moral standards required to abide by the law, which itself constitutes a guarantee of freedom, are dangerously eroded.

II.

The fight against corruption thus becomes necessary to defend fundamental rights. The international community has already been sensitised in this regard. The individual is coming to the front in the fight. The fight itself is now developing into a positive obligation on the part of the State that is an integral part of every human right that is attacked by corruption.

Positive obligations on the part of the State with regard to defending human rights

According to the classic concept of individual rights, the latter involve only obligations of abstinence on the part of the State. Inspired by the principle of effectiveness, the European Declaration of Human Rights also imposes positive obligations on States in support of the rights and freedoms safeguarded in the Treaty. Thus, respect of a human being's right to life not only obliges States to abstain from acts that take human life, but also to enact the requisite legislation prohibiting the taking of life in general, to maintain an effective force for the protection of human life and, in the case of homicide, to carry out proper investigations to find the guilty persons and punish them. With regard to the prohibition of torture and inhuman or degrading treatment or punishment, the Court of Human Rights requires the Contracting States to conduct an in-depth investigation to find and then convict the guilty persons. This comprises a positive obligation. The right to judicial protection presupposes the organisation of a judicial system and the safeguarding of a persons' private life presupposes legislation on criminal offences or provision for compensation, as well as the setting-up of public services. It is the requirements for positive action that give substance to human rights.

The fight against corruption as a manifestation of positive obligations deriving from many fundamental rights

If the logic of the positive obligation is transferred to the area of problems regarding corruption, the following may be established: the principle of equality, the defence of social rights, such as employment, health and education, respect for ownership and the safeguarding of freedoms whose exercise is subject to the grant of an authorisation (economic freedoms) require measures to be taken by the public authorities to fight the corruption phenomenon. Corruption attacks fundamental freedoms. And when the State is faced with such a phenomenon and does not act or does not fight it with positive measures, then it itself attacks human rights. The State's failure to act to fight a phenomenon that threatens equality is tantamount to the State itself encouraging infringement of the principle of equality. The same also applies to every one of those rights already mentioned.

Specific features of the fight against corruption as an expression of specific positive obligations

However, when it comes to every individual right, the fight against corruption cannot be treated in the same way as classic human rights. The person whose life is threatened and who asks for police protection knows that he or she is threatened. The woman who has been raped and demands that the rapist be found so that he can be prosecuted and punished knows what was done to her. In the case of corruption, matters are very different. Corruption is discreet. The persons who are actively and passively involved do not want to be exposed. Standard legality does not appear to have been corrupted. No matter how many suspicions a person eliminated from a tendering competition may have, he or she is often unable to prove anything. The innermost certainty of corruption goes hand in hand with its unprovability. Some international conventions on the fight against corruption grant specific rights to the victims of corruption. The European Law Convention stipulates that the victims must have a right to seek compensation from private individuals and the State. The same Convention provides for the right to cancel an agreement concluded after an act of corruption has been committed. However, in order for corruption to be suppressed, global action is required on the part of the public authorities. It calls for a policy of suppression implemented by means of specific programmes that is aimed not at individual phenomena, but at corruption as a whole and which strikes at its roots. And this global policy, serving so many fundamental rights, should incorporate the foundations of a new positive obligation on the part of the State and, correspondingly, a new human right. It is in this sense that the fight against corruption constitutes a new human right.

III.

The new human right, the fight against corruption, precisely because of its singular nature, does not have the same institutional guarantors as classic fundamental rights. The role of the Supreme Audit Institutions, or SAIs, in protecting this new human right is crucial. Not only because the passive vehicle of corruption is answerable to the public, but also because corruption which deflects the proper course of public expenditure results in bad financial management.

The Audit Institution's interest in corruption

The interest is threefold: firstly because when an administrative decision to make public funds available is taken following corruption on the part of the official responsible, the decision is illegal. It is a decision taken in the context of abuse of power, as it is termed in administrative law. Therefore, a classic case of illegality exists. And the Court of Auditors' main job is to detect these illegalities. Secondly, the Court of Auditors is interested in sound financial management, namely, whether the correct means are employed to achieve the political objective that has been set. Means that are selected as a result of corruption of the persons responsible constitute grounds for presumption of the fact that a bad choice has been made and thus constitute proof of poor financial management. Lastly, if we allow ourselves to take a tolerant view of the situation, the official who has been bribed is de facto answerable to the public, by virtue of his or her acceptance of a bribe. The money that the official receives, i.e. the well-known "small envelope", is public money, because it is given so that a public service can be carried out, irrespective of the intentions of the beneficent payer of the bribe and his or her undue offering.

**(As corruption theorists explain in brief but fully comprehensive form,
C(orrption) (equals) = M(onopoly situation) (plus) + D(iscretionary power)
(minus) - CTRL (control).**

In other words, the phenomenon of corruption appears where the following are observed: firstly, provision of services of a monopolistic nature in the broad sense, which also includes institutions such as the National Health System, which has a monopoly in, in principle free, healthcare, secondly, a power characterised by legal scope that enables a person managing a service to legally differentiate between what he or she allows or decides, e.g. as in the case of a driving examiner when deciding whether or not to grant driving licences and, thirdly, lack of adequate control whereby the exercise of discretion in accordance with the above is not subject to objective control criteria.

In the area of public service, where the situation described above is observed and significant interests of the users of public services are at stake, the existence of the phenomenon of corruption must be expected. There are many ways in which this corruption can be suppressed. One method is what we would term classic ex post, where the State awaits complaints lodged by victims and acts in the customary manner. Another way is by organising a special prosecution department with specialist police officers whose mission will be to expose those guilty of corruption by examining, for example, anonymous complaints and the financial position of the public bodies or by setting well-devised traps, and so on. Corruption phenomena

are suppressed using these methods and an effective warning is given to anyone hoping to make money from corruption. However, the phenomenon is not checked at its root, hence it may only be struck a drastic blow when the reasons for it are ascertained and eradicated. In other words, monopoly situations plus the use of discretionary power that is not subject to checking.

The SAIs' responsibility to audit sound financial management

The SAIs that audit sound financial management are in a position to pinpoint the systematic reasons for corruption. There is no need to track down specific guilty persons; it is sufficient to detect situations that give rise to the phenomenon. That is quite enough. Tax legislation that is based on a tax being imposed at the discretion of the Director of Taxes needs only to be replaced by documented findings concerning the quantity and value of the taxed item, if suspicions of corruption are to be removed. The SAI detects such situations and, in its annual report, puts forward solutions to the Parliament, which, in its capacity as the legislative body, also accepts that it must answer to public opinion. Of course, the exercise of its responsibilities presupposes that the SAI redefines its own priorities and the areas on which it will focus when carrying out its audit work. The fight against corruption as a phenomenon that is systematic in nature must also be incorporated into the audit objectives. Specific and, in particular, scientifically elaborated control criteria must also be determined.

Hence, corruption is not a matter of criminal law alone. It is not a matter that concerns the prosecuting authorities, police and the Public Prosecutor's Office alone. And it is not associated exclusively with the mentality of suppression and penalisation, which are frequently identified with oppressive and illiberal policies. The fight against corruption is a matter of human rights. Corruption is a cancer affecting human rights. It is the contemporary form of arbitrariness in an age where the undisguised arbitrariness of despotic procedures belongs to the past. By virtue of the corruption of those serving the public interest and of the moral standards of State officials, the democratic State is transformed from a means of defending human and citizens' rights into a means of furthering opaque interests.