ANTI-CORRUPTION FIGHT AND HUMAN RIGHTS: A SINGLE AGENDA REINFORCED BY SPECIALIZED CONVENTIONS

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RESUMEN

Corruption is a long-standing social scourge that is constantly evolving, acquiring new modalities that negatively impact the public and private sectors. The destructive effect of corruption disrupts the capacity of States to develop, respect, protect and fulfill human rights. Historically, anti-corruption initiatives have emerged, including at the country level with the FCPA (United States, 1977), at the regional level with the Inter-American Convention Against Corruption (IACAC-Caracas, 1996) and at the international level with the OECD Anti-Bribery Convention (1997), the United Nations Convention Against Transnational Organized Crime and its supplementary Protocols (2000) and the United Nations Convention Against Corruption (UNCAC, 2003). Finally, through this article we recognize that the success of the fight against corruption is based on the fulfillment of common objectives, which in turn have a positive impact on the modernization of public administration, thus promoting timely attention and respect for the human rights of the population, especially those persons and groups in situations of vulnerability and marginalization.

Keywords: corruption, human rights, convention, organized crime, bribery, embezzlement.

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DEVELOPMENT

The behaviors associated with corruption take various forms including bribery, extortion, influence peddling, nepotism, fraud and graft. Its negative consequences undoubtedly affect the legitimacy of human rights, thus impacting the development of society in general, of which the public and private sectors are an integral part.

The complexity and transnational nature of corruption have led international organizations not only to devote efforts to combat it, through specialized technical assistance to their member states, but also to maximize limited resources within shared agendas, i.e., the fight against corruption cannot be separated from the protection of human rights.

Generally, countries subscribe to regional and international conventions, which are then adopted as part of their domestic law. In other words, at the macro level, the legal bases or model laws are created for the development of national regulations. An unparalleled precedent in anti-corruption matters occurred in 1977, when, for example, the United States enacted its anti-corruption law, known by its acronym in English as FCPA, after extensive debates.

The FCPA establishes rules for business people to act ethically when bidding for contracts abroad, from which arises the duty to refrain from making payments to public officials, political parties or candidates. Its applicability is directed to several groups, namely: the first group is composed of issuers of securities, U.S. domestic companies and other persons who are not issuers and companies of that country[2]; in the second group are domestic companies3; and finally, a third group is composed of foreigners, meaning only those who, being within the United States, commit the prohibited act (bribery) directly or through third parties.

The FCPA law recognized in transnational bribery not only the detour of power for the undue achievement of favorable decisions for the interested parties, among them, those who hold power, but also contemplated with futuristic vision the negative impact that corruption would generate on the development of countries, the legitimacy of their governments, their authorities and their public and private actors. It constituted a significant precedent that, in strict legality, illustrated to the whole world the need for updated anti-corruption legislation to combat this social and multidimensional scourge, which is not static, but is constantly evolving and acquiring new modalities.

This awareness of the need to unite efforts to combat corruption as a regional problem became a reality on March 29, 1996, when the Inter-American Convention Against Corruption (IACAC) was adopted in Caracas, Venezuela, and entered into force on March 6, 1997. This legal instrument

of international human rights law, in the content of its preamble, highlights the importance derived from fundamental pillars, including the legitimacy of public institutions[3], the development of peoples and the preservation of democracies in the defense and consolidation of the rule of law. Thus, civil and political rights or better known as first generation human rights.

The IACC recognizes that combating corruption is an effective vaccine against distortions in the economy, vices in public management and the deterioration of social morale; in other words, societies achieve the strengthening of their institutions through the effective and continuous fight against this social scourge. This Convention considers corruption as one of the effective means used by organized crime to achieve its objectives.

In addition to being a crime according to the criminal regulations of the States, this illicit also crosses borders through its ramifications. It is difficult to circumscribe it to a single macro criminal conduct. In practice and based on Article 328-A of the Criminal Code of Panama, corruption, one of the crimes against public administration contained in Title X (Articles 345 to 350), can become a crime of organized crime when those who belong to an organized criminal group that by itself or united with others has the purpose of committing it specifically or associated with other conducts.

The exercise of public functions, according to the IACC, must be protected against corruption and to this end, States must commit to prevent, detect, punish and eradicate it. The IACC urges States to promote, through their domestic anti-corruption legislation, not only compliance with ethical standards, transparency and accountability, but also the criminalization of criminal behavior such as illicit enrichment and transnational bribery. The latter is precisely an example of the need to effectively strengthen international cooperation through best investigative practices related to the identification, tracing, freezing, seizure, confiscation and forfeiture of assets obtained or derived from the commission of acts of corruption and its modalities.

Combating corruption is not an easy task, especially when we find that acts of corruption and their effects cross borders; transnational bribery is a clear example in which States need to share their best investigative practices and their criminal policy strategies aimed at combating corruption and its associated crimes. In practice, and in light of the IACC, States are called upon to standardize their domestic legislation focused on combating corruption, so that the atypical nature of a conduct is not an opportunity that favors the impunity of its perpetrators and other responsible parties.

2 An issuer is defined as any company that has securities listed on a U.S. stock exchange. This concept also extends to companies that trade their securities through the over-the-counter market. A company does not necessarily have to be incorporated in the United States to be required to comply with the FCPA. The obligation derives from the holding of securities listings on an exchange located in that jurisdiction.
3 These include corporations, partnerships, associations, trusts or sole proprietorships organized under U.S. law.

Considering the negative impact that corruption has on governance, economic growth and market competitiveness, the OECD Anti-Bribery Convention was signed in 1997 and entered into force on July 27, 1999. The purpose of this instrument is to establish measures to deter, prevent and penalize individuals and companies that promise, give or conceal gratuities to foreign public officials involved in international business transactions. Thus we observe that what was once the initiative of one country, i.e. the United States in 1977 with its FCPA law, over the years became a common goal, i.e. to fight corruption beyond national borders. Since 1999, this goal has inspired a group of countries, which have as a common denominator not only their democratic governments, but also their market economies.

The fight against corruption was also reinforced through the United Nations Convention against Transnational Organized Crime and its complementary Protocols, which were approved by the United Nations General Assembly through resolution 55/25 of November 15, 2000. This treaty, also known as the Palermo Convention, describes corruption as a transnational organized crime that, like other crimes in the same category, impedes the full enjoyment of human rights. Article 8 of this Convention criminalizes corruption, recognizing the need for States to adopt administrative and legislative measures that, in addition to preventing and combating corruption, also make it possible to hold legal persons legally responsible, through the imposition of effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions, on the legal persons held liable.

The United Nations Convention Against Corruption (UNCAC), adopted on October 31, 2003, has become another powerful tool in the fight against corruption for its member states, which are called upon to engage in prevention; criminalization and law enforcement; international cooperation; asset recovery; technical assistance and information exchange. The UNCAC text urges states to develop a comprehensive anti-corruption criminal policy involving the public and private sectors. The strengthening of existing institutions or the redefinition of their functions and the creation of new anti-corruption bodies have also been suggested by this instrument. The creation of the National Authority for Transparency and Access to Information in 2013 arises as a country's response to promote and support a culture based on ethical, civic and moral values, as a suitable mechanism to prevent the harmful effects of corruption, generating support from the public and private sectors. Likewise, the UNCAC recommends that States pay attention to electoral campaigns and political parties, considering that regardless of the financing mechanism they use, transparency and accountability are fundamental pillars.

Corruption and its forms cannot find in the absence of modern legislation (atypicality) a fertile

ground that allows its perpetrators and other participants to be free from the legal consequences derived from the commission of their acts. It will be up to the domestic legislation of each State to develop the legal mechanisms, tending not only to penalize the reprehensible conduct, but also to recover the resources derived from the illicit activity. In the case of Panama, Article 50 of the Criminal Code includes among the types of accessory penalties, confiscation, understood as follows, in the light of Article 75 of the same code: "Confiscation consists of the adjudication of the goods, assets, securities and instruments used or originating from the commission of the crime. Those belonging to third parties not responsible for the act are excluded". This accessory penalty has been widely used in matters of seized goods in those cases of drug-related crimes, where according to Law 34 of July 27, 2010, when the confiscation of goods has been judicially ordered and it is money or securities, Fifty percent (50%) will be destined to the National Commission for the Study and Prevention of Drug Related Crimes and fifty percent (50%) to the security agencies of the Public Force, under the responsibility of the Ministry of Public Security, to strengthen them economically[4].

Law 67 of 2008 developed the accounts jurisdiction contained in Article 281 of the National Constitution. This development represented an effort by the country to create a special jurisdiction with nationwide competence to judge the accounts of management agents and employees when they are subject to objections due to alleged irregularities.

States' efforts to implement at the domestic level the recommendations derived from the content of the specialized conventions are developed through action plans. The multidimensional nature of corruption must be taken into account when creating public policies to prevent, combat and address the problem, thus legitimizing human rights in a timely and effective manner. Thus, aware of the complexity of corruption, the OECD in its Anti-Corruption Program recognizes the existence of common objectives derived from these specialized conventions.

4 Artículo 3. El artículo 35 de la Ley 23 de 1986 queda así: Artículo 35. Cuando judicialmente se haya ordenado el comiso de bienes, instrumentos, dineros o valores que hayan sido utilizados o provengan de la comisión de algunos de los delitos mencionados en la presente Ley, el juez ordenará en la sentencia que estos sean puestos a disposición del Ministerio de Economía y Finanzas para su remate y adjudicación. El producto será distribuido de la siguiente manera: Cuando se trate de dineros o valores, cincuenta por ciento (50%) para la Comisión Nacional para el Estudio y la Prevención de los Delitos relacionados con Drogas y cincuenta por ciento (50%) para los estamentos de seguridad de la Fuerza Pública, bajo la responsabilidad del Ministerio de Seguridad Pública, para fortalecerlos económicamente. Cuando se trate de bienes muebles o inmuebles, el producto de su venta, cumpliendo con las formalidades legales para estos propósitos, será adjudicado en la forma antes descrita. Los dineros que se comisen o los que se hayan obtenido del remate de bienes comisados y que se adjudiquen a la Comisión Nacional para el Estudio y la Prevención de los Delitos relacionados con Drogas constituirán un fondo que se destinará a las campañas y a los programas de prevención, rehabilitación y represión de las actividades relacionadas con drogas, desarrollados por las instituciones gubernamentales y no gubernamentales involucradas en el tema. Este fondo se regulará conforme a los procedimientos de fiscalización y manejo establecidos por la Contraloría General de la República. La Comisión Nacional para el Estudio y la Prevención de los Delitos relacionados con Drogas presentará un informe anual y público a la Contraloría General de la República en el que detallará la manera en que se han utilizado dichos dineros.

In conclusion, it is important to mention that the fight against corruption is closely related to the legitimacy of human rights, regardless of the category or generation to which these rights belong. From the synergy of these agendas, relevant inputs emerge when designing, implementing and controlling public, legislative and other policies (including judicial ones) aimed at combating, preventing and repressing corruption based on the observance, protection and fulfillment of human rights in a democratic society that demands constant modernization processes, where the population itself is the direct beneficiary and main participant in the right to development.

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