

## ON CERTAIN CRIMINAL-LEGAL SPECIFIC CHARACTERISTICS OF CORRUPTION IN REPUBLIC OF SERBIA


**ABSTRACT:** Corruption is a negative social phenomenon being present in all societies and states, and which can be found in all layers and relationships within a society. Corrupt practice, as an ubiquitous negative social phenomenon, certainly has its political, sociological, criminological, legal and other aspects. Bearing in mind the fact that the widespread corrupt practice significantly erodes the foundation of society, the allowance of its both survival and deepening necessarily results in the abandonment of democracy, democratic values, legal certainty and the rule of law. Therefore, every legislator, including the legislator in Republic of Serbia, prescribes various material and procedural legal measures trying to suppress corruption in the country. This paper looks at certain criminal law specific features of the incrimination of corruption at both the international and national level, but also at certain procedural aspects of prosecuting corruption crimes. In this sense, there is involved the competence of the specialized prosecuting and judicial authorities, including special evidentiary actions that are regularly used in discovering and prosecuting corrupt criminal offenses.

**Keywords:** *corruption, giving and receiving bribes, organized crime, abuse.*

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\* A PhD candidate, The Faculty of Law for Commerce and Judiciary in Novi Sad, The University of Business Academy in Novi Sad, Serbia, e-mail: svetlanailicin0103987@gmail.com

\*\* Associate professor, The Faculty of Law for Commerce and Judiciary in Novi Sad, The University of Business Academy in Novi Sad, Serbia, e-mail: jdragojlovic@pravni-fakultet.info

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## 1. Introduction

Corruption, as a relatively old social phenomenon, could be said to mean spiritual and moral corruption, complete disregard for honor and dignity, offering or receiving money in order not to fulfill a duty, or to act contrary to conscience or the law (similarly Đurić, 2010). Basically, corruption itself is reduced to any abuse of power of a public character, for the purpose of achieving some individual, personal or private interest (Bjelajac, 2008). In this context, corruption, that is, corrupt acts, from a historical point of view, are closely related to other criminal activities, and especially to organized crime. It can be said that corruption, as a form of organized crime, is at the same time one of its most important characteristics, which directly connects the organized criminal group with the authorities (Bošković, 2000, p. 5).

Bearing in mind that corrupt practice represents one of the main obstacles in the process of democratization of society and the introduction of the rule of law, as a fundamental value, into the course of a society, it is the criminalization of corruption, i.e. the fight against it, placed high on the list of priorities of democratic states, but also of international community as a whole. Therefore, guided by a common interest and goal, the international community incriminated various emerging forms of corrupt activity, both on a universal level, under the auspices of the United Nations, and at regional levels within the Council of Europe, the Organization of American States, the African Union, etc. Moving largely within the framework set by the UN Convention against Corruption, but also by the conventions of the Council of Europe, our legislator intervened relatively intensively and extensively in criminal material and criminal procedural legislation, with the aim of suppressing corruption.

This paper points out certain criminal-legal specifics of corruption, especially the incrimination of corruption at the international and national level, as well as certain corrupt acts prescribed by the current criminal legislation, but also certain procedural aspects of prosecuting corrupt criminal acts, in terms of jurisdiction of prosecuting authorities as well as judicial authorities, but also with regard to special evidentiary actions that are regularly used in the detection and prosecution of corrupt crimes.

The aim of the paper is to provide a concise description of the criminalization of corrupt practices on the international level and at the level of domestic legislation, as well as various procedural measures and special organizational mechanisms that the domestic legislator has foreseen for the successful fight against corruption in the Republic of Serbia. The methods

that were used in the preparation of this work are the normative method, the comparative method that examines solutions at the international level, but also the historical-legal method that gives a brief overview of the regulation of the fight against corruption in the Republic of Serbia.

## **2. Criminalization of Corruption in International and Domestic Legal Frameworks**

Since corruption, corrupt practice and organized crime represent a problem that equally affects every national legislator, as well as the international community as a whole, measures to combat corruption are undertaken in parallel at the national and international level. Bearing in mind the fact that issues of corruption and organized crime have long and largely crossed state borders and are rising to the supranational and universal level, the interest and activity of the international community to intervene, set legal frameworks, in the form of various conventions, and undertakes specific measures to combat corruption and organized crime are legitimate. The cooperation of states, international organizations and other entities is not only justified, but also necessary if there is a real will and intention to fight corruption. This is simply a necessary consequence of the fact that the effects of corruption and organized crime cross national borders.<sup>1</sup>

Thus, this issue is actively dealt with by the United Nations, the European Union and the Council of Europe, but also by other supranational and international organizations, which activity is reflected in the adoption of various conventions and recommendations in the field of corruption, including especially the giving and receiving of bribes by officials and other holders of any public functions, etc. In this sense, among the most important documents in this area can be mentioned: a) Convention on preventing and suppressing corruption, which was adopted at the level of the African Union, from 1999, b) Civil law Convention against

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<sup>1</sup> Thus, for example, the agreement between the governments of the countries of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of controls at common borders (known as the Schengen Agreement) was concluded on June 14, 1985 (and then the corresponding Convention on implementation of the Schengen agreement of June 19, 1990, in part three entitled: "Police and security" in articles 39-91) in chapter one, among "Short-term measures" in article 9, determined the obligation for the contracting parties to intensify and strengthen cooperation between their customs and police authorities, especially in the fight against crime, and especially against tax and customs evasion and embezzlement (Mitrović & Račić, 1996, p. 11). With this, the first in a series of steps, the position was clearly taken that the issue of organized crime, corruption and similar corrupt practices transcends national borders and is a common problem of the Union.

corruption, adopted within the framework of the Council of Europe, in Strasbourg 1999, c) Criminal Law Convention against Corruption, adopted within the framework of the Council of Europe in Strasbourg in 1999, d) Inter-American Convention against Corruption, adopted in Caracas in 1996, e) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, adopted within the framework of the Organization for European Cooperation and Development in 1997, f) UN Convention against Corruption, g) UN Convention against Transnational Organized Crime with Protocols and h) UN Declaration against Corruption and Bribery in International Business Transactions.

Therefore, starting from the mentioned documents, it is clear that the activity of the states, both on the appropriate regional and global level, was intensive and comprehensive in order to suppress organized crime and corruption as decisively as possible.

However, without disputing the importance of other acts, special importance should be given to the UN Convention against Corruption. This is because this Convention is the only legally binding universal instrument for the fight against corruption. The far-reaching and comprehensive approach of the Convention and the mandatory nature of many of its provisions make it a unique tool for finding answers to the issue of corruption as a global problem. Also, this Convention has a special impact due to the fact that 189 countries are signatories to this Convention, but also because of its provisions that obligate countries to international cooperation, exchange of experience, knowledge, data, etc. in order to fight corruption.<sup>2</sup>

For the international legal definition of corruption, the provision of the UN Convention against Transnational Crime is important, according to which, in Article 8, corruption is defined as a form of manifestation or a form

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<sup>2</sup> However, what will not be found on over 60 pages of this Convention, is a provision that contains the definition of corruption for the purposes of international law or the course of the act, but only states certain acts and actions that should be considered corruption in each jurisdiction. Such regulation can be accepted as justified due to the fact that a partially defined definition of corruption is found in the previously adopted UN Convention against Transnational Organized Crime, but also the fact that it is an act for which its universality is essential. Namely, as the intention was to achieve the widest possible consensus and the involvement of states in this Convention, it was not necessary to introduce a strict and clearly defined definition of corruption, but, with reference to the UN Convention against Transnational Organized Crime, the freedom was left to the contracting states to relatively freely define the concept of corruption, all with the aim of achieving the widest possible consensus and uniform rules. Similar rules are contained in regional documents, which is a logical consequence of the fact that the UN Convention against Transnational Organized Crime was adopted after other regional acts related to organized crime and corruption.

of criminal offense within the framework of organized transnational crime (Derenčinović, 2005, p. 187). According to this definition, corruption is a criminal offense that is committed with the intention (premeditated) in the form of undertaking the following activities: a) promising, offering or giving a civil servant, directly or indirectly, an inappropriate benefit that is intended for him personally or for another person or entity, in order for that official to act or refrain from acting in the performance of his official duties (giving a bribe) and b) seeking or accepting by a civil servant, directly or indirectly, an inappropriate benefit given to him personally or to another person or entity, in order for that official to act or refrained from acting in the performance of his official duties (accepting bribes). It also imposes an obligation on the contracting states to incriminate the instigators and accomplices in these corrupt actions (similarly to Bjelajac, 2008, p. 51).

When it comes to the above-mentioned international legal framework for the fight against corruption, it should be noted that the Republic of Serbia has ratified the most important international acts, which include: the UN Convention against Corruption, the UN Convention against Transnational Organized Crime, the Council of Europe's Criminal Law Convention on Corruption, the Civil Law Convention against corruption of the Council of Europe and the Convention of the Council of Europe on laundering, seizing and confiscating proceeds of crime (Jovašević, 2009, p. 86).

In accordance with these acts, that is, the general framework set by these conventions, the Republic of Serbia, fulfilling its international obligations, has criminalized corruption with its national legislation, that is, it has covered various forms of corrupt acts with different criminal acts.

Moving within the framework and respecting the basic principles set by the international legal regulations related to corruption and organized crime, Serbian legislator, both in respect of the framework of substantive and procedural law, provided for special rules related to criminal acts of a corrupt nature, which refer to criminal proceedings regarding the prosecution of criminal offenses with elements of corruption and organized crime.

When it comes to criminalizing corruption, it should be noted that the current Criminal Code (Criminal Code, 2005) does not mention the concept of corruption at all.<sup>3</sup> What's more, the word "corruption" can be found in only

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<sup>3</sup> It should be noted that the National Assembly of the Republic of Serbia adopted the National Strategy for the Fight against Corruption for the period from 2013 to 2018 on July 1, 2013. This document sets the basic goals and methods of fighting corruption. However, after the expiration of this document, a new one was not adopted. The strategy is available at <https://www.mpravde.gov.rs/tekst/22534/-nacionalna-strategija-za-borbu-protiv-korupcije-arhiva.php> ; visited on 6/26/2022.

one place in the entire text of the Code - in Article 46, paragraph 2, point 3, which refers to the possibility of conditional release of a person convicted in proceedings conducted in accordance with jurisdiction determined by the law governing the organization and jurisdiction of state bodies in combating organized crime, corruption and terrorism.<sup>4</sup> Unlike the current Criminal

<sup>4</sup> At this point, we should point out the nomotechnical illogicality regarding certain provisions of Article 46 of the Criminal Code, which regulates the issue of parole. Namely, paragraph 1 of this article prescribes the conditions when parole is allowed - "The court will conditionally release a convicted person who has served two-thirds of his prison sentence, if he has improved during the course of his sentence so that it can be reasonably expected that he will freedom to rule well, and especially not to commit a new criminal offense by the end of the time for which the sentence was imposed. When assessing whether the convicted person will be released on parole, his behavior while serving the sentence, performance of work duties, taking into account his ability to work, as well as other circumstances that indicate that the convicted person will not commit a new criminal offense while on parole will be taken into account. A convicted person who has been punished twice for serious disciplinary offenses during his sentence and who has been deprived of the benefits granted cannot be released on parole. However, paragraph 2 of the same article further prescribes "If the conditions from paragraph 1 of this article are met, the court may release the convicted person on parole" and lists different cases, i.e. convictions for certain criminal offenses when parole is possible, where an additional condition is prescribed somewhere and somewhere not. Thus, in the case of a person who has been sentenced to life imprisonment, it can be conditionally released if he has served twenty-seven years, while in the case of a person who has been convicted of crimes against humanity and other goods protected by international law (Art. 370 to 393a), criminal offenses against sexual freedom (Articles 178 to 185b), the criminal offense of domestic violence (Article 194, paragraphs 2 to 4), the criminal offense of unauthorized production and distribution of narcotic drugs (Article 246, paragraph 5), criminal offenses against the constitutional order and security of the Republic of Serbia (Articles 305 to 321), the criminal offense of accepting a bribe (Article 367) and the criminal offense of giving a bribe (Article 368), as well as the one convicted by special departments of the competent courts, in procedures conducted in accordance with the jurisdiction determined by the law that governs the organization and jurisdiction of state bodies in combating organized crime, corruption and terrorism, no additional condition is required, except for the general ones set forth in paragraph 1. It seems that the intention of the legislator was that in "ordinary" cases that are not part of the enumerative listing of criminal offenses in paragraph 2 of the same article, the approval of parole should be, if not automatically, then as a rule and with significantly less discretion of the court regarding the possibility of not granting parole. On the other hand, with a pure linguistic interpretation - *"If he fulfills the conditions from paragraph 1 of this article, the court can conditionally release the convicted person"* (underlined by the author) - it seems that with regard to the criminal offenses listed in paragraph 2 of this article, the fulfillment of the conditions prescribed by paragraph 1 of that article is not enough for parole, but the court seems to have a wide discretion in terms of granting parole - this follows from the usual meaning of the word "may" (similarly Stojanović, 2021, p. 231). Giving this kind of discretionary power, i.e. freedom to the courts regarding the granting of parole in the listed criminal offenses is not unacceptable, but, in our opinion, the legislator should have been clearer in prescribing this possibility, especially in regard to prescribing possible guidelines or criteria that the courts should have in mind when they use this discretionary power of theirs. It is a completely different criminal-legal question, whether parole in these cases should be possible in these crimes.

Code, the Criminal Code that was valid in the period from 2001 to 2006 knew the concept of corruption. Admittedly, even in this Code, there was no general definition of corruption, but as a concept it was found within the chapter “Criminal acts against corruption” and the name of certain criminal acts (Petrović, 2015, p. 30). However, the current Criminal Code does not recognize the term corruption even to that extent.

Analyzing the different chapters of the Criminal Code, one can see the difference between those criminal acts that in their being contain elements of corruption (corruption crimes) and criminal acts that can be committed in connection with corruption.<sup>5</sup> According to the current regulation of the Criminal Code, criminal offenses with elements of corruption primarily mean criminal offenses from chapter thirty-three of the Criminal Code, which is entitled “Criminal offenses against official duty”, but also certain other criminal offenses from other chapters of the Criminal Code, such as chapter twenty others - “Criminal acts against the commerce” (Dragojlović & Milošević, 2018, p. 385.). Corruption crimes primarily include:

- Receiving a bribe from Article 367 of the CC,
- Giving a bribe from Article 368 of the CC,
- Abuse of official position from Article 359 of the CC,
- Trade in influence from Article 366 of the CC,
- Violation of the law on part of a judge, public prosecutor and his deputy from the article 360 CC,
- Accepting bribes in the performance of commerce activities from Article 230 of the CC,
- Giving a bribe in the performance of commerce activity from Article 231 of the Criminal Code,
- Abuse of the position of a responsible person from Article 227 of the CC,<sup>6</sup>
- Giving and receiving bribes in connection with voting from Article 156 of the CC.

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<sup>5</sup> The criminal acts that can be committed in connection with corruption, which are listed in Chapter XXXIII of the CC, include: unscrupulous work in the service from Article 361 of the CC, illegal collection and payment from Article 362 of the CC, misuse of budget funds from Article 362a of the CC, fraud in the service from Article 363 of the CC, embezzlement from Article 364 of the CC, service from Article 365 of the CC and disclosure of official secrets from Article 369 of the CC (Human Rights Committee, 2013, p. 14)

<sup>6</sup> For a detailed review of the issue of abuse of the position of the responsible person, see: Dragojlović, J., & Grujić, G. (2018). Krivično delo zloupotrebe položaja odgovornog lica [The criminal act of abuse of the position of the responsible person]. *Pravo – teorija i praksa*, 35 (4-6), pp. 30–44.

Our legislator, therefore, started from international regulations, that is, from the respective conventions of the United Nations and the Council of Europe, which our country ratified. Thus, positive criminal legislation divides corrupt acts, basically, against the object of protection, that is, the good that is protected. So, as can be seen, the domestic legislator followed the principles contained in international conventions related to issues in the domain of corruption, and that is why, in principle, he separated official criminal acts and those that are not. Making a division against the protective object, it is obvious that official criminal acts are those acts directed against the official duty. These are, in terms of receiving and giving bribes, criminal offenses from Articles 367 and 368 of the Criminal Code, while the other three criminal offenses do not constitute official criminal offenses in their basic form, i.e. their protective object is not an official duty, but some other good (such as freedom elections, i.e. voting rights, etc.). In any case, our legislator chose not to incriminate corruption as such, giving a general definition of it, but decided to include a wider range of corrupt behavior with a larger number of criminal acts, from different chapters of the CC.

Presenting detailed views on each of the mentioned corrupt criminal acts greatly exceeds the scope of this paper, however, it should be pointed out that, in terms of the criminalization of corrupt acts of receiving and giving, our legislator followed international legal frameworks, and separately criminalized corrupt acts committed by officials and, more broadly, holders of public authority, and, on the other hand, corrupt acts of receiving and giving bribes committed by private legal subjects, i.e. private persons who do not exercise public authority (Stojanović, 2021, pp. 1097–1121).

### **3. Some Specific Organizational and Procedural - Legal Issues in Prosecuting Corruptive Criminals**

Since, in terms of material criminal legislation, he introduced a corrupt element into the nature of certain criminal acts, our legislator also prescribed certain special rules that refer to the prosecution of these criminal acts, all with the aim of detecting and prosecuting these acts as effectively as possible, that is, suppressing corruption as a whole as effectively as possible.

Back in 2002, our legislator adopted the Law on the Organization and Competence of State Bodies in Suppression of Organized Crime, Corruption and Other Particularly Serious Crimes. Bearing in mind the previously mentioned international regulations, it can be seen that our legislator started taking special measures relatively early in the fight against, that is,



incriminating, detecting and prosecuting corruption. This Law, which has been amended and supplemented many times, established rules for the fight against organized crime and corruption, which were mostly maintained or slightly corrected by the new law. Thus, in 2016, our legislator passed a new special law - the Law on the Organization and Competence of State Bodies in the Suppression of Organized Crime, Terrorism and Corruption. The purpose of Organization and Competence of State Bodies in the Suppression of Organized Crime, Terrorism and Corruption is to regulate the organizational structure and cooperation of state authorities with the aim of more effective detection, prosecution and trial for criminal acts of organized crime, terrorism and corruption. The Law is of an organizational nature, with certain procedural provisions (Krstić, 2017, p. 69). Organization and Competence of State Bodies in the Suppression of Organized Crime, Terrorism and Corruption systematizes state bodies, in principle, into two categories, depending on the criminal acts for which they will be responsible for detection, prosecution and trial; and it does so by dividing them into: state authorities for the suppression of organized crime and terrorism and state authorities for the suppression of corruption.

For criminal acts of corruption, with the exception of those for which state bodies are in charge of combating organized crime and corruption, this Law designates special departments of higher public prosecutor's offices for combating corruption, the Ministry of internal affairs - the organizational unit responsible for combating corruption and special departments of higher courts for the suppression of corruption. The organization of public prosecutor's offices and higher courts for conducting criminal proceedings for corrupt crimes and their territorial centralization in four cities on the territory of the Republic of Serbia - Belgrade, Novi Sad, Kraljevo and Niš are very specific. Namely, powers to act in corruption cases in the area of local jurisdiction, *exempli causa*, for the Appellate Public Prosecutor's Office in Belgrade has the Higher Public Prosecutor's Office in Belgrade, i.e. the Special Department of the High Court in Belgrade for the area of the Court of Appeal in Belgrade, and this type of legislation is not typical in terms of existence harmonization with the general Law on Court Organization and the regulation of public prosecution by type in the Law on Public Prosecution and the Law on Seats and Areas of Courts and Public Prosecutions. By the nature of things, higher public prosecutor office it includes multiple lower basic public prosecutor's offices, and so far it is by no means in terms of scope and type work could also include other higher public prosecutions from the area of a certain appellate public prosecution, whereby, by analogy, the same applies in regards to the

courts, because appellate courts are, by rank, higher courts than high courts (Krstić, 2017, p. 70). The same happens with Novi Sad, Kraljevo/Kragujevac and Niš.<sup>7</sup> As far as the organization of the courts is concerned, the first-instance court for the trial of criminal offenses of organized crime and corruption is the Special Department of the Higher Court in Belgrade for Organized Crime, which is headed by the president of that department. All judges in the Special Department are appointed or assigned by the president of the High Court in Belgrade, with the fact that the president of the department must have at least ten years of professional experience in the field of criminal law, and the other judges must have at least eight years, and preference is given to those who possess the necessary professional knowledge and experience in areas of the fight against organized crime and corruption. Apart from these basic qualifications related to professional experience, no other criteria are provided for the appointment of judges. Exceptionally, it is possible for judges to be sent by the High Council of the Judiciary from other courts in the Republic of Serbia to work in the Special Department with written consent. The mandate of judges is limited to six years, with the fact that due to the principle of permanence of the judicial function, the complexity of the case and the large volume of work, limiting the duration of the exercise of the judicial function is superfluous. The Special Department of the Appellate Court in Belgrade is responsible for deciding in the second instance in cases of organized crime, terrorism and corruption. The term of office of the president and judges of that

<sup>7</sup> It must be emphasized here that, when it comes to prosecutions of special jurisdiction, formally and legally, it was not necessary to prescribe complicated rules about public prosecutor office of special jurisdiction that would be in the rank of a certain other public prosecutor's office (the rank of a higher public prosecutor). This is because the constitutional prohibition from Article 143 of the Constitution exists only in relation to the establishment of special (extraordinary) courts, but does not say anything about the prosecutor office. Therefore, constitutionally and legally, it would be acceptable to establish a special prosecutor's office that would not be part of the regular prosecutor office's system, and would not be in the same rank as the higher public prosecutor's office and would not be responsible to the directly higher - appellate - public prosecutor's office. Bearing in mind the complexity and specificity of the issues that represent the competence of specialized prosecutor's offices, it would be completely justified, even necessary, to remove any unnecessary potential pressure or supervision. On the other hand, the organization of the court in the form of a Special Department of a Higher Court is necessary in order, on the one hand, to enable specialization in trials for individual, in this case corrupt, criminal acts, and on the other hand to comply with the constitutional ban on the establishment of extraordinary courts. It seems, however, that this compromise solution is not the best, bearing in mind the frequent disagreements of special departments and appellate courts on various issues, especially regarding measures to ensure the presence of the accused. This moreover bearing in mind that the legislator could have established, for example, the Criminal court for Corruption, as court of special jurisdiction, such are commerce courts or probate courts.

Special Department is identical in terms of duration to that of the judges of the first instance court, with the fact that the special conditions for assignment, i.e. referral, are stricter, as at least twelve or ten years of professional experience in the field of criminal law is required, with preference given to candidates who have professional knowledge and experience in the matter of organized crime. The Special Division of the High Court in Belgrade and the Special Division of the Court of Appeals in Belgrade, within the framework of their jurisdiction, have exclusivity in dealing with criminal offenses of organized crime. Therefore, no other court of lower, same or higher instance has the competence to decide or try defendants for criminal acts of organized crime and terrorism, while the new Organization and Competence of State Bodies in the Suppression of Organized Crime, Terrorism and Corruption also established Special Departments of Higher Courts for the suppression of corruption in Belgrade, Novi Sad, Kraljevo and Niš, which are the courts of the first instance, while the corresponding chambers of appeal courts rule in the second instance (Krstić, 2017, pp. 73–74).

On the other hand, the Code of Criminal Procedure (2011) also contains some special rules related to the prosecution of crimes of corruption and organized crime. First of all, within the transitional and final provisions of the Code of Criminal Procedure, Article 608, it is foreseen that the provisions of the new Code of Criminal Procedure will start to be applied starting on January 15, 2012, when it comes to proceedings for criminal offenses for which by a special law it was determined that the public prosecution of special jurisdiction acts, while the Code of Criminal Procedure for other, "ordinary" criminal offenses, began to be applied only on October 1, 2013. This emphasis already, in itself, indicates the special importance that the legislator gave to the suppression of corruption and organized crime, especially bearing in mind the provisions on special evidentiary actions.

The Code of Criminal Procedure also contains specific rules that refer to procedures related to corrupt criminal acts, the prosecution of which is the responsibility of the prosecutor's office of special jurisdiction, starting with the provisions on the composition of judicial panels<sup>8</sup> and the resolution

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<sup>8</sup> Thus, Article 21, paragraph 1, point 3 of the Code of Criminal Procedure stipulates that in the first-instance proceedings for criminal offenses for which a special law is determined to be handled by the Public Prosecutor's Office of Special Jurisdiction, a panel of three professional judges shall judge, i.e. without a jury-judges, while paragraphs 2 and 3 of the same article stipulates that in the second and third degree in the proceedings for which, by a special law is determined to be handled by the public prosecutor's office of special jurisdiction, a panel of five professional judges will judge.

of conflicts of jurisdiction.<sup>9</sup> Although, in addition to these special rules, some others of lesser importance are prescribed in terms of the presence of evidentiary actions (Code of Criminal Procedure, 2011, article 300), the completion of the investigation (Code of Criminal Procedure, 2011, article 310, paragraph 2), and the rules on the preparation of a court decision in these proceedings (Code of Criminal Procedure, 2011, article 427), the most important are, beyond any doubt, the rules that refer to special evidentiary actions in criminal proceedings. Namely, Article 162 of the Code of Criminal Procedure, according to the principle of enumeration, lists criminal offenses for which special evidentiary actions can be ordered. Thus, Article 162, paragraph 1, point 1 prescribes a blanket legal norm according to which special evidentiary actions can be determined for criminal offenses "for which a special law determines that the public prosecutor's office of special jurisdiction shall act." Although prescribing the possibility of determining special evidentiary actions in crimes for which prosecution is the responsibility of the special prosecutor's office is completely justified and necessary, such blanket norming could still be questioned from the aspect of the general legal principle of legality in criminal law, which, in itself, is *lex stricta*. This is because the legislator can, by changing the special regulation - the Law on the Organization and Competence of State Bodies in the Suppression of Organized Crime, Terrorism and Corruption - completely freely determine, expand and narrow the number and nature of criminal offenses to which this provision can apply. It would be more acceptable, in our opinion, if the circle of criminal acts to which special evidentiary actions can refer is determined by the procedural regulation that provides for these evidentiary actions - which is the Code of Criminal Procedure.

In addition, from a nomotechnical point of view, the provisions of the Code of Criminal Procedure on special evidentiary actions are not the best prescribed. Namely, point 1 of the mentioned article stipulates that special evidentiary proceedings are always allowed for those crimes for which a special law determines that the public prosecutor's office of special jurisdiction should act, while point 2 enumerates criminal offenses from the Criminal Code for which, in addition to those from point 1, may determine special evidentiary actions. Thus, point 2 of the same paragraph lists, among

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<sup>9</sup> Unlike the general rule that a conflict of jurisdiction between public prosecutors is resolved by the joint immediately superior public prosecutor, a conflict of jurisdiction between public prosecutors of special jurisdiction or a public prosecutor of special jurisdiction and another public prosecutor is resolved by the Republic Public Prosecutor (Article 47 of the Code of Criminal Procedure).

others, the criminal acts of abuse of office (Article 359 of the Criminal Code), influence peddling (Article 366 of the Criminal Code), accepting bribes (Article 367 of the Criminal Code), giving bribes (Article 368 of the Criminal Code). However, as Article 2, paragraph 1, item 3 of the the Law on the Organization and Competence of State Bodies in the Suppression of Organized Crime, Terrorism and Corruption already stipulates that this law refers to "criminal acts against official duty (Articles 359 and Articles 361 to 368 of the Criminal Code) and criminal offenses giving and receiving bribes in connection with voting (Article 156 of the Criminal Code)" it was not necessary to additionally burden the text of the Code of Criminal Procedure by re-listing these acts in Article 162, paragraph 1, point 2 of the Code of Criminal Procedure. This failure of the legislator is not without potential practical consequences. Namely, Article 162, paragraph 2 stipulates that the special evidentiary action of the *Undercover Investigator* can be determined only for criminal offenses from point 1 of paragraph 1 of that article, that is, only for those offenses for which the action of the public prosecutor's office of special jurisdiction is foreseen. As the criminal acts of abuse of official position from Article 359, as well as the giving and receiving of bribes from Articles 367 and 368, are covered by the enumeration in Article 162, paragraph 1, point 2 of the the Code of Criminal Procedure, but they are also, at the same time, according to the provisions of Article 2 of the Law on the Organization and Competence of State Bodies in the Suppression of Organized Crime, Terrorism and Corruption, and for which the public prosecution of special jurisdiction acts, they are at the same time part of the provisions of point 1 but also point 2. Therefore, bearing in mind the fact that criminal law is *lex stricta*,<sup>10</sup> and in case of ambiguity it should be interpreted in favor of the accused, it can be justified to ask the question whether in that case a special evidentiary action of an undercover investigator could be determined. Despite the clumsy legislator, it should not be considered that the application of this special evidentiary action is excluded in these criminal acts, because it would go against the spirit and *ratio legis* of the provisions of the Code of Criminal Procedure and the Law on the Organization and Competence of State Bodies in the Suppression of Organized Crime, Terrorism and Corruption.<sup>11</sup>

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<sup>10</sup> The assumption is that the legislator, when it comes to criminal law, was perfect, and he prescribed everything he wanted, just the way he wanted (similarly Stojanović, 2017, p. 20).

<sup>11</sup> Regardless of that, if the acting public prosecutor would base his request for a special evidentiary action of an undercover investigator for criminal offenses from Articles 359 and 361-368 of the CC on Article 162, paragraph 1, point 2 of the Code of Criminal Procedure, such a request would have to be rejected by the acting court as impermissible.

From the above, it can be concluded that, due to the seriousness and specificity of corrupt criminal acts, our legislator prescribed special organizational and criminal procedure rules when it comes to prosecuting corrupt criminal acts. Such a prescription by our legislator is completely understandable and justified, and is in accordance with the global trend and in accordance with international legal regulations.

However, it is surprising that our legislator failed to treat the criminal offense from Article 360 of the Criminal Code - Violation of the law by a judge, public prosecutor and his deputy - as a criminal offense of corruption or organized crime, in the sense of the Law on the Organization and Competence of State Bodies in the Suppression of Organized Crime, Terrorism and Corruption, i.e. not placing it under the jurisdiction of public prosecutor of special jurisdiction, nor does it enable the use of special evidentiary actions in relation to that criminal act. Bearing in mind the generally accepted fact that corruption is also present in the judiciary itself, and at the global level, which causes special damage to a democratic society and the rule of law, it seems that this failure of the legislator was reckless and difficult to accept.

#### **4. Concluding Considerations**

Corruption, that is, the overall corrupt practice, as one of the manifestations of organized crime, represents a very undesirable and dangerous social phenomenon, with a high degree of social danger, which is very difficult to detect and prove.

As a rule, this form of criminal activity is difficult to detect and recognize, which makes it difficult to take effective measures to prevent and suppress corrupt practices in a timely manner. We can conclude that for society, the entire legal order and the effectiveness of the rule of law, a particular danger is represented by the corrupt acts of representatives of the state government, officials and responsible persons in various positions and in various institutions.

It seems that the complete eradication of corruption as a negative social phenomenon is almost impossible, but the aspiration of both the national authorities and the international community must be to reduce corruption to the lowest possible level, that is, to suppress it as much as possible. In this sense, in order to reduce corruption in our country to the smallest possible extent, it is necessary that each individual first respects ethical principles, i.e. constant education and training is needed, as well as the application of ethics by each individual, but also the constant concern of the state, monetary and

legislative authorities with the aim of preventing, detecting and suppressing this negative social phenomenon.

Certainly, it can be concluded that, when it comes to the normative framework, i.e. measures at the level of legislative activity, our country, by adopting broad incriminations of corrupt criminal acts, by establishing specialized prosecutor's offices and special departments of courts for the prosecution of corruption, and prescribing the wide possibility of special evidentiary actions in the procedure of proving corrupt criminal acts, establishes a strong normative anti-corruption system. However, regardless of special criminal (both material and procedural) and organizational rules in the fight against corruption, it seems that the existing normative framework is not sufficient. First of all, the state should invest greater efforts in the practical implementation of the prescribed normative framework, and adopt a new strategy for the fight against corruption, which it will vigorously and consistently implement. *De lege ferenda*, the legislator must also bring the judiciary under the anti-corruption regime, i.e. must also prescribe the crime from Article 360 of the Criminal Code as a corrupt criminal offense, and place it under the jurisdiction of special authorities for the prosecution of these criminal offenses in the sense of the Law on the Organization and Competence of State Bodies in the Suppression of Organized Crime, Terrorism and Corruption, and it must also enable special evidentiary actions to be undertaken in relation to these criminal acts. Only in this way can the domestic authorities restore trust in the judiciary, eliminate corrupt elements in the ranks of the judiciary and prosecutor's office, which is the only way to ensure further successful suppression of corruption in Serbia.

**Iličin Svetlana**

Pravni fakultet za privredu i pravosuđe u Novom Sadu, Univerzitet Privredna akademija u Novom Sadu, Srbija

**Dragojlović Joko**

Pravni fakultet za privredu i pravosuđe u Novom Sadu, Univerzitet Privredna akademija u Novom Sadu, Srbija

## O POJEDINIM KRIVIČNO-PRAVNIM SPECIFIČNOSTIMA KORUPCIJE U REPUBLICI SRBIJI

**REZIME:** Korupcija je negativna društvena pojava koja je prisutna u svim društvima i državama, a koja se može naći u svim slojevima i odnosima unutar jednog društva. Koruptivna praksa, kao sveprisutna negativna društvena pojava, svakako, ima svoje politikološke, sociološke, kriminološke, pravne i druge aspekte. Imajući u vidu činjenicu da raširena koruptivna praksa u znatnoj meri nagriza osnovu društva, to dozvoljavanje njenog opstanka i produbljivanja nužno rezultuje napuštanje demokratije, demokratskih vrednosti, pravne sigurnosti i vladavine prava. Zato, svaki zakonodavac, uključujući i zakonodavca u Republici Srbiji, propisuje različite materijalna i procesno pravne mere kojim se nastoji suzbiti korupcija u zemlji. Ovaj rad se osvrće na pojedine krivičnopravne specifičnosti inkriminisanja korupcije na međunarodnom i nacionalnom nivou, ali i na pojedine procesne aspekte gonjenja za koruptivna krivična dela, i to u pogledu nadležnosti specijalizovanih organa gonjenja i pravosudnih organa, ali i u pogledu posebnih dokaznih radnji koje se u otkrivanju i gonjenju koruptivnih krivičnih dela redovno koriste.

**Ključne reči:** korupcija, davanje i primanje mita, organizovani kriminal, zloupotreba.

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