

MAKALAH



CORRUPTION AND HUMAN RIGHTS

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Corruption and Human Rights

An introduction to a human rights perspective on corruption

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Corruption and its consequences

"Corruption threatens the rule of law, democracy and human rights, undermines good governance, fairness and social justice, distorts competition, hinders economic development and endangers the stability of democratic institutions and the moral foundations of society".

Preamble to the Council of Europe Criminal Law Convention on Corruption

Three questions

1. Can corruption be a human rights violation.
2. Why should we focus on corruption as a human rights violation? Are there any benefits from focusing on corruption leading to violations of human rights? Do we need a supplement to the criminal approach towards corruption?
3. How can we fight corruption with a human rights approach?

Definitions

- Corruption
 - TI: *"...the misuse of entrusted power for private gain"*
 - Petty (administrative or bureaucratic) vs. Grand (political) Corruption
 - Legal definition based on UNCAC. Which crimes constitutes corruption

Definitions

- Human Rights

"Basic rights and freedoms entitled by all persons under the state's jurisdiction, enjoyed towards the state in accordance with international agreements and state practice" .

Crimes constituting corruption according to UNCAC

- *Art. 15. Bribery of national public officials*
- *Art. 16. Bribery of foreign public officials and officials of public international organizations*
- *Art. 17. Embezzlement, misappropriation or other diversion of property by a public official*
- *Art. 18. Trading in influence*
- *Art. 19. Abuse of functions*
- *Art. 20. Illicit enrichment*
- *Art. 21. Bribery in the private sector*
- *Article 22. Embezzlement of property in the private sector*
- *Article 23. Laundering of proceeds of crime*

First question: Is corruption a human rights violation?

Former UN secretary general **Kofi Annan** stated:

“corruption hurts the poor disproportionately by diverting funds intended for development, undermining a government’s ability to provide basic services, feeding inequality and injustice, and discouraging foreign investments and aid”.

Three models for how corruption might violate human rights.

1. Direct violation

- Corruption may be linked directly to a human rights violation when a corrupt act is deliberately used as a means to violate a right.
- Corruption may also directly violate a human right when a state (or someone acting in an official capacity) acts or fails to act in a way that prevents individuals from having access to a right.

2. Indirect violation

- In other situations, corruption will be an essential factor contributing to a chain of events that eventually leads to a violation of a right. In this case the right is violated by an act that derives from a corrupt act and the act of corruption is a necessary condition for the violation.

Delineation of HR responsibility for corrupt practices

3. Remote violations

- Those corrupt practises that in the end might lead to a human right breach, but where the distance between the two phenomena is to great to legally be declared a causal link
- The legal climate or culture is not prepared to make this connection
- Other sciences might state a causal link

Second question:

Can focus on corruption's relation to human rights give added value to the fight against corrupt activities?

Two perspectives

- To apply a human rights perspective on corruption is fairly new compared to the traditional where corruption and its symptoms are being combated by criminal law and punishment.
- Many academic scholars in several countries are today suggesting an additional effort in the combat against corruption.

The traditional perspective: criminal law approach


- Victimless crime?
- Victims are hard to identify.
- The reasons why the corruptors so easily resort to such practices. They don't feel they harm anyone directly.
- Also why the public perceives corruption as not that serious?
- It goes without saying that a criminal perspective is important in order to fight corruption. Deterrence.
- Corruption is a crime where entrusted people misuse their trust.

Why a new perspective?

- Most countries if not all have defined corruption as a criminal offence in their legislation, and most countries fight corruption by using law enforcement agencies to fight the practice.
- Despite this, there are relatively few reported convictions for corruption offences worldwide.
- The situation therefore calls into question the use of criminal law as the main pillar for combating corruption.

Thinking new

An approach to support the victims of corruption

- Changes the focus from the perpetrator(s) to the victim(s).
- While the criminal perspective is an issue between the state and the perpetrators regarding a crime, the human rights approach regards the issue between the victim and the state responsible for human rights violation.
- The victim may be entitled to a form of restoration because of the harm suffered  The right to a remedy.
- By focusing on the serious consequences of corruption; that it might lead to violations of human rights; people's perception of corruption as a "victim less crime" might change.
- This again might lead to incentives for the "ruling class" to change their practice in accepting corruption, and strengthening the combat against corruption.

How can a human rights approach towards corruption strengthen the anti-corruption efforts? Two models.

1. Enforcing constitutional rights

- The constitution (and laws?) guarantees most of the civil and political rights, as well as the economical and cultural and social rights.
- Should a violation of any person's human rights occur, the person should be granted the right to enforce his given constitutional right.
- The courts must uphold the rights enshrined in the constitution, and hence give a verdict on restitution or compensation, depending on which right is violated.

2. Utilising National Human Rights Institutions

- The National Human Rights Institution's mandate shall be to "provide for the promotion and protection of constitutional rights".
- The NHRI should be equipped with the power to investigate all instances of alleged or suspected human rights violations.
- Should it be proven that any of these stems from corruption this should be prosecuted, whether it be done by the NHRI it selves, or by the prosecutor after receiving the case from the NHRI.

Third question:

How can we fight corruption with a human rights approach?

1. Identify the corrupt practice

- Establish what corrupt act is involved (bribery, embezzlement, etc.);
- Identify perpetrator(s);
 - A state actor (e.g. a government official) or someone acting in partnership with a government official (e.g. if a private party commits the violation, but government officials are significantly involved in ordering, furthering or allowing the violation; or if government officials commit the violation, private parties are significantly involved in furthering it);
 - A private party through the failure of the state to prevent it.

2. Identify the state's human rights obligations

- Study the scope and content of the human right in question;
- Establish what were the acts or omissions of the state required by the right in question

3. Remote violation

- Sometimes corruption will play a more remote role. Many other factors might contribute and, to that extent, the corruption has a merely influenced on the human rights violation.
- It is too remote to be responsible for the violation.

3. Identify the victim(s)

- Identify who is the rights holder of the human right in question;
- Identify the harm;
- Establish whether the harm suffered by the victim reflects the failure of the State to respect, protect or fulfil the human right in question.

4. Evaluate the causal link between the corrupt practice and the harm

- Establish how the connection is between the corrupt act and harm suffered by the victim on the one hand, and the content of the human right and the obligation required from the State on the other hand;
 - Direct: the corrupt act itself goes against the content of the human right;
 - Indirect: the corrupt act is an essential factor in the chain of events that led to the infringement of the human right(s);
 - Remote: the corrupt act itself does not violate human rights.

5. Evaluate the responsibility of the State for the damage caused

- Determine if the State has undertaken an effective investigation and prosecuted those found responsible;
- Determine which forms of reparation would be adequate for the given case (e.g. restitution, compensation, satisfaction, etc.).

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