SPECIALIZED ANTI-CORRUPTION COURT: FOREIGN EXPERIENCE IN ESTABLISHMENT AND OPERATION

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ABSTRACT

Description: The purpose of the article is to analyze the peculiarities of organization and operation of anti-corruption courts in some countries of the world (in the Philippines, Slovakia and Indonesia).

The subject of the study: The subject of the study is to examine some aspects of foreign experience in the organization and operation of anti-corruption courts.

Methodology: Research methods are chosen based on the object, subject and purpose of the study. The study used general scientific and special methods of legal science. Among them: dialectical, logical, historical methods, method of system analysis, system-structural and comparative-legal methods.

The results of the study: The results of the study showed that the practice of establishing anti-corruption courts in the world has a long history, and has already proven, or vice versa-has denied its effectiveness.

Practical implications: As a result of the research, the authors identified both the shortcomings and the benefits of organization and operation of anti-corruption courts in each of the studied countries, which allows us to adopt and implement only global best practice.

Value/originality: This is the first thorough study in Ukraine, dedicated to the research of the peculiarities of organization and operation of anti-corruption courts in selected countries of the world.

Keywords: Corruption, Anti-Corruption Court, Philippines, Slovakia, Indonesia, Foreign Experience.

INTRODUCTION

Corruption is one of the biggest problems of modern Ukrainian society. It has progressively been extended to all spheres of public life at all levels. The main reason for this situation, in our opinion, is the tolerance of the population, which perceives corruption as a characteristic of our country phenomenon, and giving a bribe–as an opportunity to achieve the desired result or to obtain certain material benefits.

At the same time, the responses to sociological questionnaires indicate that, in general, the population of Ukraine considers corruption as an evil that destroys the State, harms public

morality and is bad for the whole society. Most of the population of Ukraine (56%) interprets corruption as bribery, venality and bribery of officials, politicians. For others, corruption is abuse of power, exceeding official authority for self-enrichment. Therefore, corruption in the general and literal sense can be defined as abuse of state power for personal gain. In other words, it is a system of relationships that allows the owners of capital to buy everything–privileges, influence, laws, and decisions in their favor, patronage of the legislative, executive and judiciary authority. The most corrupt, in the opinion of the population, are: medical institutions, law enforcement and judicial authorities, higher educational establishments, ministries and other central executive authorities (Glodan, 2019).

Ukraine scored 32 points out of 100 and ranked 120 out of 180 countries in the 2018 Corruption Perceptions Index (Transparency International, 2018). It is clear that in such realities, conducting anti-corruption reforms is a top priority for our country. For the purpose of its implementation, the system of bodies of pre-trial investigation and prosecution of high-ranking officials for corruption offenses has been created in the last three years–the National Anti-Corruption Bureau of Ukraine (NABU) with relevant territorial departments and the Specialized Anti-Corruption Prosecutor's Office (SAP). The final stage of the reform is the creation of an anti-corruption court, which would try corruption cases of top officials of the State.

Therefore, on June 07, 2018, the Law of Ukraine *"On the Supreme Anticorruption Court*" was adopted, which began its activity only on September 05, 2019, so a number of questions have already been arisen concerning its work and organization. Instead, the practice of setting up anti-corruption courts in the world is not new, and has already proven, or vice versa, refuted its effectiveness. In this article, we will examine the history of organization and operation of this body in some countries of the world: the Philippines, Indonesia and Slovakia.

MATERIALS AND METHODS

Research methods are chosen based on the object, subject and purpose of the study. The study used general scientific and special methods of legal science. Thus, the analysis and synthesis method as well as the logical method were used to formulate a holistic view on corruption and its features, as well as the ways in which it may be manifested. The logical-semantic method was used to establish the meaning of the term "*corruption*". The historical method helped us to study the history of the establishment of anti-corruption courts in some countries of the world. The comparative method was used when analyzing international and national legislation of Ukraine and some other countries, as well as scientific categories, definitions and approaches. The system-structural method was applied to determine the organization of anti-corruption courts of the countries under consideration.

The studied materials are the legislation of Ukraine and some other countries, as well as the works of Ukrainian and foreign scientists, who have studied the investigated issue. Indeed, a great deal of scholarly writings deal with the problem of corruption in Ukraine, however, very little attention has been paid to the functioning of the anti-corruption court, particularly in other countries.

RESULTS AND DISCUSSION

Currently, 20 countries have specialized courts dealing with top corruption cases: Afghanistan, Bangladesh, Botswana, Bulgaria, Burundi, Cameroon, Croatia, Indonesia, Kenya, Malaysia, Nepal, Pakistan, Palestine, Philippines, Philippines, Slovakia, Uganda, Mexico, Tanzania and Thailand.

There are four models of anticorruption courts nowadays:

1. The model of individual specialized judges, which provides, instead of creating separate specialized courts, the specialization of judges appointed by anti-corruption judges in courts of general jurisdiction. This model has been applied in Bangladesh and Kenya.
2. The model of court of the first instance, on which a specialized anticorruption court has exclusive jurisdiction over corruption cases with the possibility of appealing against its decisions to the Supreme Court. This model, in which the anti-corruption court is in fact a court of first instance with a defined list of court cases, was introduced in Slovakia, Croatia and Pakistan.
3. The Hybrid Courts Model, which provides that an anticorruption court may act as a court of the first instance for certain corruption cases, and also as a court of appeal for other cases pending in the courts of general jurisdiction. This model was applied in the Philippines.
4. The model of parallel courts, on which the system of anti-corruption courts includes both courts of first instance and courts of appeal. This model has become widespread in Bulgaria, Indonesia and Malaysia (Slusar, 2017).

Philippine Sandiganbayan is the oldest anti-corruption court in the world, the creation of which was envisaged in the Constitution of 1973. According to Section 5, Article 13 of the Basic Law of Philippines

> *"The Parliament of the Philippines (Batasang Pambansa) shall create a special court, to be known as Sandiganbayan, which shall have jurisdiction over criminal and civil cases involving graft and corrupt practices and such other offenses committed by public officers and employees, including those in government-owned or controlled corporations, in relation to their office as may be determined by law" (Constitution of the Republic of the Philippines, 1973).*

The court began its activity in 1979. In the Philippines, ordinary criminal cases are heard by courts of the first instance–regional municipalities. The decisions of such courts can be appealed in the Court of Appeal and then in the Supreme Court of the country (the highest judicial body of the Philippines, which is vested with both general and constitutional jurisdiction). Under the judicial hierarchy, Sandiganbayan is on par with the Court of Appeal, but it operates primarily as a court of the first instance. The defendants in anti-corruption cases can be both public and private persons, provided that two conditions are met:

1. The rank of a civil servant is sufficiently high (determined mainly by establishing the salary of a civil servant, although the category of the official is additionally taken into account);
2. The amount of money, which is likely to be the object of the crime, is large enough.

If these conditions are not met, the case is heard by a regional court, and Sandiganbayan acts as a court of appeal in this case. In practice, however, the anti-corruption court is first and foremost a court of the first instance; it operates extremely rare as the Court of Appeal. The decisions of Sandiganbayan can be appealed to the Supreme Court. The special office, which is

called the Ombudsman's Office, has an exclusive power to refer cases to Sandiganbayan (Stephenson, 2016).

According to Article 4 of the Law of the Philippines no. 8249 Sandiganbayan jurisdiction (The LawPhil Project, 1997) extends to cases involving:

1. Violation of the provisions of Law RA 3019 (the Anti-graft and Corrupt Practices Act);
2. Violation of the law of RA 1379 (Confiscation of Illegally Acquired Material Benefits);
3. Offences committed by public officials listed in Chapter II, Section 2, Title VII, Book II of the Revised Penal Code ("*Offenses committed by public servants"*), namely:
    1. Direct bribery provided for in Art. 210 of the Revised Penal Code;
    2. Indirect bribery provided for in Art. 211 of the Revised Penal Code;
    3. Qualified bribery provided for in Art. 211-A of the Revised Penal Code;
    4. Corruption among public officials listed in Art. 212 of the Revised Penal Code.

The cases in Sandiganbayan are handled by separate chambers of three judges each. According to the recent amendments to anti-corruption legislation, the number of chambers has been increased from five to seven, and the total number of judges from 15 to 21 judges. Three judges always sit together; if one of the chamber's judges cannot attend the hearing (for example, due to the illness or due to the conflict of interest), the presiding judge appoints a judge from another unit to hear the case (Stephenson, 2016).

The procedure for appointing Sandiganbayan judges is the same as the procedure for appointing judges of the Supreme Court and is enshrined in the Constitution. According to Section 9, Article 8 of the Philippine Constitution of 1987, The Members of the Supreme Court and judges of the lower courts shall be appointed by the President from a list of at least three nominees prepared by the Judicial and Bar Council for every vacancy. Such appointments need no confirmation (The Constitution of the Republic of the Philippines, 1987).

A Judicial and Bar Council is hereby created under the supervision of the Supreme Court composed of the Chief Justice as ex officio Chairman, the Secretary of Justice, and a representative of the Congress as ex officio Members, a representative of the Integrated Bar, a professor of law, a retired Member of the Supreme Court, and a representative of the private sector (Section 8, Article 8 of the 1973 Philippines Constitution).

At present, the Philippine judiciary is ineffective because it takes years (or even decades) to resolve a case (especially complicated ones) (Pangalangan, 2010). This issue does not refers directly to corruption cases, however, delaying the consideration of these cases undermines the authority of the judiciary as a whole, and with it–the confidence of the population, which already doubts that those responsible will be ever brought to justice.

In order to implement the United Nations Convention against Corruption, which the Slovak Republic signed on December 09, 2003, and to combat corruption at all levels of State and local government, Slovakia has set up a unified system of investigative, prosecutorial and judicial bodies specializing in the fight against corruption and other serious economic crimes.

Thus, in 2003, a Special Court was established, which began its activity in 2005 (Criminal Code of the Slovak Republic, 2005; Excerpt Law, 2005). The jurisdiction of this court included cases of corruption and organized crime. In the same period, the Office of the Special Prosecutor (OSP) was established with the exclusive right to refer cases to the Special Court. In 2009 the Special Criminal Court (Špecializovaný trestný súd–hereinafter–SCC) in Pezinok became the successor to the Special Court.

In the Slovak judicial system, ordinary criminal cases are heard by district courts operating in 54 judicial districts of Slovakia. Appeals lodged against the decisions of these courts are heard in eight regional courts, which decisions may, therefore, be appealed to the Supreme Court. SCC judges have the status of judges of a regional court, although the SCC is the court of the first instance, the appeals against decisions of which are filed directly with the Supreme Court.

The SCC is currently consisted of13 judges, including the president. Less serious cases are heard by one judge; a panel of three judges, headed by the presiding judge, is created to consider more serious ones. The decision is taken by a simple majority of votes (Stephenson, 2016).

The procedure for appointing or dismissing judges of the Specialized Criminal Court is the usual procedure applied to judges of ordinary courts. Candidates for the post of judge take the examination and submit their nominations for consideration to a committee appointed by the Judicial Council (a body consisting of 9 judges and 9 members elected by other branches of government). The Committee selects a nominee that can be approved or rejected by the Council of Judges (Stephenson, 2016).

According to Section 14 of the Criminal Procedural Code of Slovak Republic Special Criminal Court has jurisdiction to hear cases involving the following offences:

1. First degree murder;
2. Duress and undue influence in relation to public procurement and public auctions under section 266 (3) of the criminal code (deceitful practices in public procurement and public auction);
3. Forgery and counterfeiting of currency and securities under section 270 (4) of the criminal code (forgery, fraudulent alteration and illicit manufacturing of money and securities);
4. Misfeasance in public office under section 326 (3) and (4) of the criminal code (abuse of power by a public official) in conjunction with offences under subparagraphs (b), (c), (e), (f), (g), (h), (k) or (l);
5. Receiving a bribe under sections 328 to 331 of the criminal code. These articles provide for liability for passive bribery, whether directly or through an intermediary;
6. Bribery under sections 332 to 335 of the criminal code.

Sections 332 and 333 of the Criminal Code criminalize active bribery both in the public and private sector. In practice, however, section 333 is used for prosecutions in relation to bribery in the public sector, while section 332 is used in relation to bribery in the private sector. This is due to the additional requirement under section 333 that the act of bribery take place in relation to the "*procurement of a thing of general interest*", meaning that the act of bribery was in some way contrary to the public interest. This requirement is more likely to be satisfied in the context of the bribery of public officials than private individuals.

Active bribery of foreign public officials and officials of international organizations is criminalized under articles 334 and 335 the Criminal Code, with articles 330 and 331 criminalizing passive bribery by such officials. However, to date, no prosecutions have been brought under these provisions (United Nations Office on Drugs and Crime, 2015).

1. Indirect corruption under Section 336 of the Criminal Code;
2. This article provides for liability for any person who, either directly or through an intermediary, receives, requests or accepts the promise of a bribe for using or having used his influence on the execution of duties by persons referred to in Sections 328, 329, 330 and 331;
3. Electoral bribery under section 336a of the Criminal Code.

This article enshrines the liability 1) for the person, who either directly or through an intermediary, gives, offers or promises a bribe to the person who has the right to vote or 2) for the person with the right to vote, who directly or through an intermediary, for himself or another person receives, requests or accepts the promise for a bribe to elect or vote a certain way, not to elect or to vote a certain way, not to elect or not to vote at all or not to participate in elections, referendum or plebiscite on the recall of the President of the Slovak Republic:

1. Creating, organising or promoting a criminal or terrorist group;
2. Particularly serious offences committed by criminal or terrorist groups;
3. Offences against property under title four of the special part of the criminal code or economic offences under title five of the special part of the criminal code, where the offence resulted in damage or a gain of at least 25 000 times the amount of minor damage under the criminal code or where the extent of the offence committed amounts to at least 25 000 times the amount of minor damage under the criminal code;
4. Damage to the financial interests of the european communities;
5. Offences related to those listed above where the conditions for joined proceedings are met.

At the beginning of the activity, the indicators of the anti-corruption court were quite high. The first years of the court's work were marked by the accumulation of specialized knowledge, breaking of some local criminal ties, and the successful completion of several corruption cases.

However, the number of cases being investigated by the Office of the Special Prosecutor has now decreased. The Special Prosecutor is sharply criticized by the Attorney General for not being actively involved in the prosecution of corruption, as well as by the media, which claim that the Special Prosecutor himself did not initiate any criminal proceedings in 61 cases that he had personally managed over the last ten years. In turn, the Special Prosecutor accuses police in poor performance and failure to provide a sufficient amount of evidence at the stage of pre-trial investigation (Zhilinchyk, 2017). Over the 9 years of the Specialized Criminal Court of Slovakia, the perception of corruption has dropped by only two points, from 56 points to 54 (Transparency International, 2018).

In the Indonesian judicial system ordinary cases are heard by the general courts; in the first instance by the district courts, with the right of appeal to the high courts of the provinces, and from there to the Supreme Court. The Court for Corruption Crimes (Pengadilan Tindak Pidana Korupsi, better known as Pengadilan Tipikor, or the Tipikor court), was established in 2002 as part of the general court system and started operating in 2004.

By 2010, the Tipikor court of the first instance was in the District Court of Central Jakarta, appeal against decisions of which were submitted to the Tipikor Special Judicial Commissions in the Jakarta High Court and finally to the Supreme Court. There was a panel of five judges at each of these levels: two professional judges and three ad hoc judges. Special judges were (and still are) elected by the Supreme Court using multi-tiered procedure for a five-year term from among lawyers, scholars and other professionals with legal or other relevant experience (Schütte, 2016).

The same 2002 Act also provided for the creation of a Corruption Eradication Commission (Komisi Pemberantasan Korupsi–KPK). The KPK was entrusted with the following tasks:

1. Coordinating with authorized institutions to eradicate corruption;
2. Supervizing authorized institutions in their activities of eradicating corruption;
3. Conducting investigations, indictments, and prosecutions against criminal acts of corruption;
4. Preventing criminal acts of corruption; and
5. Monitoring the governing of the state (Cases, 2002).

Tipikor courts only considered cases referred to them by the KRK during the start-up phase; the case files materials, collected by the prosecution bodies were considered by the courts of general jurisdiction. The fate of the offender depended on whether his (her) case would be heard by the Tipikor court on the charge of the KRK or by the court of general jurisdiction on the indictment of the Prosecutor General's Office. Differences in the conduct of judicial investigations and a significant difference in the number of convictions led to a situation of legal dualism. Therefore, in 2006 the Constitutional Court of the country declared such a system of dealing with corruption cases unconstitutional.

In this situation, the public has clearly lined up on the side of the anti-corruption court, as almost 100% of the offenders whose cases were heard by the Tipikor courts were criminally prosecuted. The convicts included officials and former parliamentarians, former ministers, officials of the Bank of Indonesia, senior local government officials, and law enforcement officials. It was a remarkable achievement in a country with a notoriously high level of corruption (Butt, 2012).

Instead, convictions were instituted only in half of the cases referred to the jurisdiction of the general courts. Besides, the penalty imposed by the latter was usually less severe than that imposed by anti-corruption courts.

This situation was explained by two factors: firstly, the quality of the work of the KPK was quite high; secondly, the fixed majority of ad hoc judges within the panel meant that the decisions of professional judges, whose integrity could be questioned, would be overruled when taking the final decision.

Therefore, in 2009, a new law was enacted to extend the jurisdiction of Tipikor, empowering it to hear cases involving all crimes related to corruption (as well as cases involving money laundering and the underlying predicate o ensues), whether investigated and prosecuted by the KPK or by the public prosecution service. It also envisaged the establishment of 34 anti-corruption courts in all provincial capitals within two years, with their further establishment in all districts and municipalities (Schütte, 2016).

One of the main problems that the authorities were facing with the expansion of the network of anti-corruption courts at the regional level was the lack of human resources. The primary intention was to ensure the maximum integrity of the judges who would be part of such courts, but the lack of highly qualified and dedicated staff prevented this aim. One solution to retain integrity and competence could be to assign ad hoc judges on a case-by-case basis rather than giving judges fixed-time contracts (Thomson Reuters Foundation News, 2016).

However, this was not the only problem. Unfortunately, since the reform of the anti-corruption court, its performance indicators have significantly worsened. This is due to the fact that the new Law abolished the key principles that had driven success of the first Tipikor court operating in Jakarta.

In particular, the requirement for a majority of ad hoc judges within the panel was abolished. Thus, according to Article 26 (3) of the 2009 Law, the presiding judge is empowered

to determine the ratio of special and ad hoc judges in each case. Despite the Supreme Court's instruction that the number of ad hoc judges in the panel should exceed the number of professional judges, it is quite problematic to fulfill it due to the persistent lack of ad hoc judges. For example, when in 2013 the Anticorruption Court decided to introduce several dozen of new positions, only one in forty candidates met the requirements set by the Law (Lindsey & Butt, 2018). As a result, presiding judges have to appoint only two ad hoc judges to hear the majority of cases, and therefore professional judges have the final decision. In other words, Indonesia is now going back to those days when the KPK and Tipikor were founded and the decisions were made by the judges whose integrity was questioned (Butt, 2012).

Besides, referral of cases to Tipikor has ceased to be the exclusive competence of the KPK; according to the 2009 Law, ordinary prosecutors are also vested with such power. Consequently, this could not but affect the effectiveness of the work of anti-corruption courts, since a quality pre-trial investigation is the key to speedy and effective resolution of the case. The KPC has selected highly qualified specialists for this purpose, which have been appropriately trained and better equipped with adequate resources to build a strong evidence base.

However, the percentage of acquittals made by Tipikor regional courts is still small. According to figures cited by the Chief Justice of the Supreme Court, 142 cases had been lodged with the Surabaya Tipikor court since its establishment. Convictions were handed down in 60 of these cases and acquittals in 12. In Bandung, 93 cases had been registered, of which 46 were convictions and four were acquittals. According to Hukumonline, Indonesia's leading legal news service, the Samarinda Tipikor court has acquitted 14 defendants, while Tempo magazine reports that the Tipikor court in East Kalimantan acquitted 44 local parliamentarians indicted for corruption. The conviction rate is much higher than in normal courts–where, according to Indonesian Corruption Watch estimates, around 50 per cent of corruption cases have ended in acquittals–but nowhere near the conviction rate in Jakarta (Butt, 2012).

CONCLUSION

Creation of an anti-corruption court is the practice of many countries where regular courts have proven their inability to administer justice to high-level officials and to impose relevant punishment to them. It is also an opportunity to demonstrate to the world community that the State can and wants to eradicate this negative phenomenon, and therefore is making the necessary changes and innovations.

The confidence of Ukrainians in the judiciary is extremely low. According to recent research, only 3–4% of Ukrainians trust the courts, which is the lowest rate in Europe. In recent years, Ukrainian courts have been recognized as one of the most corrupt public institutions, as evidenced by the Transparency International survey.

In view of this, the establishment of the specialized court in Ukraine that dispenses justice to protect individuals, society and the state from corruption and related crimes is more than justified. And since this body is just getting started, studying foreign experience with a view to implementing the most significant gains of other countries and avoiding their mistakes is timely and relevant.

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