ALBANIAN HELSINKI COMMITTEE

# STUDY REPORT ON CRIMINAL OFFENCES OF CORRUPTION AND OTHER FORMS OF ABUSE OF OFFICE

**Tirana, 2014**

This report is prepared in the framework of the project "To contribute for strengthening law enforcement on punity of corruption cases", implemented by the Albanian Helsinki Committee (AHC) and funded by the Open Society Foundation for Albania (Soros Foundation)

*Open Society Foundation for AlbaniaSoros FoundationThe concept of open society is based on the recognition that people act on imperfect knowledge and nobody is in possession of the ultimate truth.*



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## 1. Introduction

A democratic state is based on the principle of check and balance between the executive, legislative and judiciary. The judiciary should be independent in order to ensure that the executive and legislative operate within constitutional limits. The fact thatjudiciary deals with corruptive cases, shows the need for a more powerful and independent judiciary. The political influence and pressure that may be potentially exercised against the judiciary, especially in cases when the judges and prosecutors follow up corruption cases of senior officials, poses a major threat. One of the most prevalent forms of pressure is exactly their appointment, especially of the judges of High Court and Constitutional Court.

These wrongful influences may guide the principles of democracy such as rule of law, division of powers and respectof human rights in relation to corruption.

Taking into account the amendments to Criminal Code for adding criminal offences and with the view of contributing to a higher rate of punity of corruption offices, the Albanian Helsinki Committee launched a study of judicial decisions regarding the criminal offences of corruption and other forms of abuse of office.

The Committee of Helsinki expresses its full readiness to cooperate and contribute to the fight against corruption and its prevention in the justice system, specifically in the judiciary.

AHC aimed to investigate not only the way how corruption cases and forms of abuse of office were adjudged but also the penal policy followed under these provisions and the examination of objectiveness of hearings by judges and bringing of the charge of prosecutor's office.

The main methodology followed in this report is the analysis of about 370 final decisions of the judicial circuit of Tirana, including the High Court decisions for the period 2007 – 2011. The methodology followed for the selection of decisions was initially applied to opt for those court decisions in relation to the provisions of Criminal Code, specificallyarticles 135, 164/a, 164/b, 244, 245, 245/1, 248, 258, 259, 260, 319, 319/a.

Due to the level of difficulty of the study of these decisions, a questionnaire and an outline of main issues monitored were prepared. The decisions were analyzed due to the professional commitment of experts, Mrs.Enida Shameti, Mrs. Eva Dyrmishi and Mr. Hipokrat Biba, and Mr. Florian Xhihani, while the latter prepared the summary of experts'reports, to whom we extend our most cordial thanks. The experts were advised all the time by the Executive Director, Mrs. Vjollca Meçaj and personnel of AHC program "Legal and Institutional Reform, access of citizens to justice and free and fair elections", Mr. Niazi Jaho, Mrs. Etilda Saliu and Mrs. Erida Skendaj.

The experts were informed beforehand and were trained not only about the main legal issues regarding this matter but also about the methodology for analyzing the decisions. The experts were engaged not only for the collection and standardization of statistics for corruptionoffences and other forms but also for the study and comparison of qualitative indicators of the judicial decisions for the same or similar cases.

One of the key components taken into account during the implementation of this study was the analysis of penal policy followed during that period for these criminal offences, which based on the reasoning, are of a moderate risk level.

All statistical data and findings from the study of decisions and criminal legislation were introduced to the main stakeholders in a round table, where the respective inputs were provided, as well as conclusions and recommendations in this study report.

The study of legislation and of its developments for the corruption offences and other forms of abuse of office, as provided for in the second chapter, was prepared by Prof. Dr. Ismet Eleziand we take this opportunity to express him our gratitude.

The final report on findings and conclusions of the study of judicial decisions was prepared by Ma.Att.Etilda Saliu Gjonaj, Program Manager of AHC.

We avail ourselves of this opportunity to thank the Foundation for Open Society-Albania-SOROS for the support provided.

## 2. Study of legislation and its developments for corruption offences and other forms of abuse of office

The Helsinki Committee's initiative for the study report on criminal judgments of the District Court of Tirana, Appeal Court and High Court in the field of corruption deserves to be praised.

Qualitative analyses of the groups of experts under the auspices of AHC' staff serve as a basis to draw some valuable generalizations, conclusions and recommendations for the justice system.

Criminalization and punishment of corruption are of special importance, if we take into account that this trend has become a matter of concern and practical needs require concentrated efforts directed against it.

Furthermore, this obligation derives from the international organizations which have stressed out that corruption in Albania has spread and combat against it is attached high priority as a prerequisite for integration in the European Union.

It would be worth mentioning the last report of the European Commission and European Parliament, shifting the main focus on combat against corruption, specifically in the judicial system.

Therefore, the study report is produced at the right time and in proper manner, without claiming that it is flawless and comprehensive. Similar studies require the operation of criminal law, criminal procedure, criminology, penal policy, penology, in order to reach key conclusions and recommendations but they are subject to special institutes of criminology in Albania.[1]

Clearly, the new national strategy being prepared for the fight and prevention of corruption will lay a firm foundation for the cooperation and interaction between the state bodies, civil society and the public.

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[1] *Elezi, I. Elezi, E. History of criminal law, Tiranë, 2010*
*Hysi, V. Criminology, Tiranë, 2010*
*Gjonaj, L. Criminology, Tiranë, 2013*

## 2.1 Definition of corruption and its historical background

Corruption as a historical and social phenomenon dates back to ancient ages, 15-20 centuries BC such as in Egypt, Mesopotamia, Babylonia, Assyria etc. It is currently manifested on national level, including Albania.

The term corruption derives from Latin language – the verb "corrumpire", which means break, demolish, damage, destruct the morality, consciousness of a person in relation to another person, who performs a public duty or public office.

Indeed, the concept of corruption has suffered transformations in centuries.

The great Roman philosopher and orator, Cicerone, highlighted the increased prevalence of corruption and attributed its nature to the human being and self-consciousness and to the presence of human vices, namely he links it with a psychological explanation.[2]

In the Roman law we encounter for the first time a law specially drafted for corruption and use of the term of corruption.

In the Middle Ages Niccolo Machiavelli defined corruption as a state evil underlying the abuse of public duty facilities for private interests. This definition presently constitutes the core of most definitions provided by the scientists or international organizations.

Accordingly, the Training Institute of Public Administration (TIPA) states that: "Corruption is the abuse of delegated power for private purposes".

Other authors consider corruption as the form of agreement of someone in public office or public duty to derive financial benefits or other benefits of private interest and of the one who receives such an advantage.

According to the Criminal Law Convention of the Council of Europe "On Corruption" as the main legal act ratified by the Albanian state,

[2] *Aliu, E. Roman criminal law in judicial speeches of Cicerone, Juridical Tribune , No.55/ 2005, pp.121-126*

the term "corruption" has the meaning of promising, offering or giving by any person, directly or indirectly, of any undue advantage to any of its public officials, for himself or herself or for anyone else, for him or her to act or refrain from acting in the exercise of his or her functions". This definition is also reflected in the Albanian Criminal Code.

At present, a number of foreign authors extensively deal with the definition and forms of corruption up to "total sales and purchase of state officials" as stated by the US researcher B. Reisman.

Notwithstanding the diversity of opinions and definitions, there are common crucial components- giving and receiving financial benefit (bribe).

Following the creation and operation of local self-government organizations, corruption in Albania started to be punished administratively and then criminally. Hence, Shkodra Statutes (in the beginning of XIV century) envisaged as a criminal offence the receipt of money from the judge for a trial and penalty by fine and permanent dismissal of the judge.[3] (chapter IX)

The Code of Lekë Dukagjini expressly provided "Any elders conducting a biased trial or against the Code, subject to bribery of the adversary party, shall be disgraced and not taken as an elder" (paragraph 1016).[4]

From the creation of Albanian independent state to date, corruption is criminally punishable and furthermore it is morally punishable as incompliant with law and moral of the Albanian society in the rule of law.

### 2.2 Corruption from legal-penal perspective

The crime of corruption seriously prejudices the economic interests of people, their moral and consciousness, justice authorities and people's trust in this system, proper functioning of the rule of law, democracy, financial system up to the national security (article 217).

In 2013, according to Transparency International, Albania was

[3] *Elezi, I. Shkodra Statutes, December 2003*

[4] *Gjeçovi, Sh. Code of Lekë Dukagjini, Shkodër 1933*

classified as the most corrupt country in Europe, ranked as the 116th compared to the 113th position of the last year.[5]

Additionally, the progress report of the European Commission for 2013 underscored the strengthening of fight against corruption as the main duty of the Albanian state.

Therefore, resolute fight against this adverse practice becomes of primary importance, as well as the adoption of comprehensive measures for its prevention.

A powerful effective tool to fight corruption is also the penal legislation of the Republic of Albania, which, in accordance with the international Conventions and Recommendations, provides for the criminalization of corruption offences and their punishment under criminal sanctions, based on the principles of lawfulness and guilt, criminal liability, protection of human rights and fundamental freedoms for combating criminality.

This legislation on criminalization and punishment of corruption has evolved during the period of transition, being complemented and by continuously imposing harsher sentences.

The Criminal Code of the Republic of Albania was introduced in 1995, following the political pluralism of Albania. The Code provided for only two components of corruption crime: a. asking for bribe (article 259) and b. bribe taking (article 260).

Bribery was not provided as crime, arguing that the bribe giver could not report himself/herself. The limitation of criminalization only to two offences of corruption was not an effective combating instrument. As long as in this crime there is a direct or indirect agreement between the bribe giver and taker, both of them should be sentenced.

These gaps were filled with the legal reform of 2004 by Law No. 9275 dated 16.09.2004, based on the Criminal Convention on Corruption of the Council of Europe (Strasbourg 1999), ratified by Albania by virtue of Law No. 8778 dated 26.04.2001.

This law ensured the terminology consistency with the one of

[5] Gazeta shqip 3 December 2013

Convention, replacing the term " bribe taking" with "passive corruption" and "bribe giving" with "active corruption" under the impact of legal terminology globalism because Albanian people are familiar with the terms of "bribe" or "under-the-counter".

Most importantly, the Law of 2004 criminalized new offences of active and passive corruption in the private sector (article 164); active and passive corruption of public officials (articles 244 and 259); corruption of senior state officials or local elected representatives (articles 245 and 260); active and passive corruption of judges, prosecutors and other senior justice officials.

Based on the Additional Protocol of the Criminal Convention and recommendations of the group of states against corruption (GRECO),[6] in 2012 some other additions and amendments were made to the Criminal Code by Law No. 23 dated 1.3.2012 for the criminalization and punishment of criminal offences of active and passive corruption of judges of international courts, juries, domestic and foreign arbiters (articles 319/a to 319/e).

The Criminal Code currently includes 21 articles sanctioning and punishing the criminal offences of corruption whereas the European Convention includes 13 articles (11 of which are their subversions).

As above, it follows that Albania has properly approximated the criminal legislation to the Criminal Convention of the Council of Europe and GRECO recommendations for combating active and passive corruption.

These measures constitute encouraging achievements in the legal reform. However, we are far from the European standards in the lawmaking process. The German researcher Heinz Zipf reiterates: "No hasty, non-consulted and short-term interventions shall be tolerated in the field of criminal matters. Penal policy requires mid-term and long-term perspectives".[7]

The Albanian Code has made over 250 recurrent additions and amendments, including articles on corruption.[8] Most of them have

[6] *Akte juridike Ndërkombëtare (International Legal Acts), Tiranë 2006*
[7] *Zipf, H. Politica criminale, Giuffre editore, Milano 1989, p.320*
[8] *Criminal Code of the Republic of Albania, Tiranë 1995, as amended.*

been mechanically adopted, without being analyzed and consulted. Many articles on corruption could have been summed up. The Italian and Kosovo Criminal Code have only 5 and 2 articles respectively. Legal technique has not been taken into due account for their formulation.

The Code has not included the aggravating circumstances of corruption- committed by a structured criminal gang, by means of coercion or in large quantities. Hopefully, the new Criminal Code to be prepared will provide such supplements.

### 2.3 Active corruption (judges, prosecutors and other senior justice officials)

Study reports about decisions of Tirana District Court, Appeal Court and the High Court analyze the activity of the above in adjudicating corruption related offenses but it is not about the corruption of judges, prosecutors and other officials of justice.

Therefore, it is worth underlining this aspect, which is also important in fight against corruption because it is specific and of major concern for our society, and for the international opinion concerning corruption in justice.

In a court survey conducted by the Center for Transparency and Freedom of Information in cooperation with the British Embassy, which included 68% of first instance judges across the country (14 of 29), with the participation of 58% or 117 judges out of 305, there were given these answers: 25% of judges stated that the judiciary in Albania is corrupt, about 58% believed it was only perception, while 18% deemed the justice system is not subject to corruption.[9]

To protect the authority of judicial power, judges and prosecutors and other officials of justice and the moral and interests of citizens, after legal reforms of 2004-2013 the Criminal Code provides criminalization of active and passive corruption (Article 319 below), with the following content:

[9] *"Gazeta Shqiptare" of 24 October 2012, no. 14*

Direct or indirect promising, proposition or giving any irregular profit, for oneself or a third party, to a judge, prosecutor or any other employee of the judicial bodies in order to act or not act, regarding their duty or function, shall be punishable by a term of one to four years of imprisonment. (Article 319)

By virtue of this provision, not only the correct and honest activity of judges, prosecutors or other officials of justice, but also the rights and interests of citizens are placed under special legal protection, in order to not to give money (bribe) or other profits to resolve their legal cases.

According to article 319 of the Criminal Code, from the objective perspective, offence of active corruption is conducted when the briber gives money or irregular profit directly but also indirectly, for example, gives money or material profits to the judge's or the prosecutor's driver, so that the latter gives them to the judge or to the prosecutor for accomplishment or non-accomplishment of an action, which is related to his duty or function (e.g. to cease the case, or to change the legal qualification of the criminal offence in favor of the defendant).

For active corruption of a judge or prosecutor or other officials of justice, the responsible is the person subject of the offense that promises, proposes or gives any irregular profit. In this sense, the briber shall become subject to criminalization and penalization (person - general subject of active corruption).

According to the study report about Tirana court decisions, it turns out that there is not sentenced any person who committed bribery (active corruption) because he was not detected by the police or was not taken as defendant. Such a practice is wrong and harmful - illegal because it favors the spread of active corruption and without restricting and fighting it.

### 2.4 Passive corruption (bribery) of judges, prosecutors and other senior justice officials

By law no. 9275 of 16.09.2004 article 319/ç is added to the Criminal Code with the following content:

Request or possession, directly or indirectly, of whatever irregular benefit or such benefit, for oneself or for other persons, or acceptance

of an offer or promise derived from irregular profits, by the judge, prosecutor or other officials of justice, for accomplishment or non-accomplishment of an action, which is related to his duty or function, shall be punishable by a term of three up to ten years of imprisonment and a fine from eight hundred thousand to four million ALL. (Article 319/ç)

Morality, conscience and provision of correct and fair activity of judges, prosecutors and other justice officials and the legitimate economic rights and interests of citizens protected specifically by the criminal law, from criminal acts or omissions, are subject to passive corruption of a judge, prosecutor or other officials of justice.

From the objective perspective, passive corruption of the above categories of persons shares common elements with active corruption both in form and content. The main difference of figures of these two offenses (Article 319 and 319 / a) is the subject of the offense, as in the case of passive corruption it is a special subject (judge, prosecutor or other justice officials).

"Judge" means a judge of first instance, the Appeal Court, High Court and "Prosecutor" is a prosecutor of judicial districts.

With regard to other justice officials, as they are not defined in the glossary, they mean the persons who have duty assignments at these bodies (Secretary General, Chancellor, Department Directors and court clerks) (for example in Puka).

### 2.5 Some major penal legal concerns emerged from the study report

A key problem that arises in the study reports about Tirana District Court decisions is the **failure to analyze all elements of the figure of the criminal act of corruption** in close connection with the matter, subject to judgment.

Analysis of the constituent elements of the criminal act is necessary to conclude whether or not the defendant has or not the responsibility and for a proper legal qualification of the offense and the imposition of punishment.

Essential elements of corruption offenses are common but every crime figure has its own specifics.

Object (items) given and taken in the framework of active and passive corruption can be various, with economic value, such as cash, check, securities, other valuable items, transportation tickets, various services, such as transport of goods, provision of rent-free housing apartments or donation. Literature sources explore whether the subject of corruption includes diplomas, employment record books etc. Considering that private universities provide diploma not only to Albanians but also to foreigners, I am of the opinion that there is no room for discussion. They ought to be accepted as subject to corruption.

Among the elements of the criminal act of corruption, it is important to clarify the objective aspect - how corruption is committed, active actions or omissions, whether the material profit is given or received before or after doing the favor in the interest of the briber. It is important to clarify if the consequences are serious or not, as well as the causal link. The study report shows that decision no. 679, of 30.04.2012 on corruption in the private sector does not clarify the casual relationship and the defendant is convicted.

Equally important is also the explanation and clarification of the subject of the offense of passive corruption because they are separate entities. In addition, there has to be analyzed whether there were complicities and who the mediator was.

If someone takes money from another person to give to the judge or prosecutor and appropriates them, he will be responsible for fraud, and the briber responsible for full attempt of active corruption.

With regard to the other element, the objective aspect, the decision must specify that these offenses are committed with direct intention and with the purpose to have material profit[10].

[10] *Elezi, I. Criminal Law (special part) 2009*

Presentation of elements of the criminal offence without organically connecting it with the fact that constitutes an offense shall be deemed formal and of no practical value. Only by closely connecting it with the subject of judgment, it has the required effectiveness and it is proven that the defendant has committed or not the offense of corruption and his criminal liability is properly grounded.

**On the basis of this analysis of the constituent elements of the criminal act it is done fair and correct qualification of the offense which serves to especially distinguish, when there is competition or similar offenses, such as** corruption by abuse of office.

Report - studies of Tirana court decisions give a lot of examples on the application and interpretation of different articles of the Criminal Code, relating to corruption, especially to distinguish corruption from abuse of office and consequently they have caused changes in the legal qualification of the criminal offense with regard to punishment of the defendant

This issue has no formal - legal character. Instead, it has principle character for the rule of law, rendering of justice, protection of human rights and freedoms, especially of defendants.

Distinction of crime of corruption from abuse of office is made clear in the doctrine of criminal law (special part) for each lawyer. These crime figures are separate but when abuse of office and corruption are joined, then we have their concurrence.

By criminal offense of abuse of office, the person who exercises public functions when he or other persons were given irregular tangible or intangible material profits, acts in violation of the law. Meanwhile by offense of passive corruption the person requires or receives profits to accomplish or not accomplish an action related to the duty but does not act contrary to his duty.

**Another key issue related to corruption is failure to properly enforce the criminal law and specifically corruption** crime impunity,

especially against senior justice officials, and the state in general.

Relevant causes and factors are different, with subjective and objective character.

**Non-observance of law and offence impunity are** associated with subjective factors, starting with professional incompetence of a judge or prosecutor, to ignorance of law or wrongful interpretation of the relevant provision, due to the collision of different provisions and contradictions between them.

Additions and amendments to the Criminal Code are numerous and frequent, so it is necessary to know and understand them. This can be achieved by reading domestic and foreign legal literature, commentaries, through training courses organized in collaboration with law faculties. European standards cannot be achieved only with the background of legal culture of the Faculty or the School of Magistrates. It is necessary to have high-level professionalism, continuous qualification and study, European and genuine legal culture.

Regular failure to enforce the law and impunity of the offense are the result of political pressure, especially when it comes to senior officials accused of corruption, a phenomenon which is often encountered in practice.

Impunity may be a result of external interference of relatives, acquaintances, friends that mediate the judge or prosecutor to cease the case or give innocence in Albanian society, and for a small country with multilateral connections, this phenomenon seriously affects the rendering of justice from the court, especially against the defendants for corruption, hence the impunity.

In rendering justice by the court, as Dr. Sadushi Sokol notes, a former experienced member of the Constitutional Court, "Qualities of judges, like professionalism, sustainability of morality, character with

uncorrupted virtues, particularly with regard to the truth and fairness, make them invincible to any attack and to contribute to the quality of decision making and independence of the court."[11]

Naturally, emphasizing several factors directly related to the judiciary in combating corruption, we must have in mind that the decisive factor is the political, serious, effective will of the governmental decision-makers.

This factor is coupled with and sets in motion other factors that were highlighted above, as well as organizational educational factors, training of judges, prosecutors etc.

### 2.6 Criminalization of corruption offenses

Penal policy against corruption as state policy performance, is accomplished not only through the criminalization of its offenses but also by penalizing them through the application of criminal sanctions, based on individualization of punishment, rehabilitation and socialization of persons convicted. [12]

Criminal sanctions provided for in the Criminal Code for types and forms of corruption are, without exception, subject to imprisonment totaling up to twelve years for some crime figures (fine was foreseen, but it is derogated as principal punishment).

Thus, active corruption in the private sector is punishable by a term of three months to two years of imprisonment, whereas passive corruption from six months to three years. Active corruption by persons exercising public functions is punishable by six months to

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[11] *Sadushi, S.Importance that represents the process of selecting judges of the High Court and the Constitutional Court, as a guide for jurisprudence and constitutional justice. Is the legal framework presented comprehensive in this regard? Challenges and realities. Albanian Union of Judges: Press Conference and conclusions, May 4, 2012*

[12] *Latifi, V. Elezi, I. Hysi, V. Crime combating policy, Prishtina 2012*

three years of imprisonment, while passive corruption is punishable by two to eight years. Active corruption by senior state or local elected officials is punishable by one to five years of imprisonment, whereas passive corruption is punishable by four to twelve years. Active corruption by judges, prosecutors and other justice officials is punishable by one to four years of imprisonment, whereas passive corruption is punishable by three to ten years.

Criminal sanctions in the Criminal Code of the Republic of Albania on corruption, compared to some criminal codes of foreign countries (Italy to Kosovo), are more or less similar, with the exception of passive bribery of senior public officials, judges, prosecutors, for which our Criminal Code provides harsher sentences.

In contrast to the sanctions provided for in the Criminal Code on corruption offenses, the court practice of Tirana District Court attached priority to average punishments. In principle, taking into account the great danger of corruption and the extent of its spread, such a policy of average punishment may not have the right effectiveness, especially for passive corruption of senior public officials, judges and prosecutors.

This, of course, cannot be interpreted as in any case the court must apply a maximum sentence of imprisonment. Legal criteria for imposing the punishment are defined in domestic law and the judge's internal belief is formed during the court process from evaluation of evidence and the defendant's personality, by making the individualization of punishment.

Alternative sentences can be appropriate and acceptable for active corruption. A more effective penal policy of imprisonment shall be applied for passive corruption.

Tirana District Court decisions during 2011 - 2012 show that there is no unified approach to social risk assessment of corruption crime. In several decisions the danger is high, in others there is no high risk involved. The punishment is determined on the basis of this evaluation. In every corruption case, especially passive corruption poses great

risk and it serves to impose punishment.

In general, in imposing punishment the Court takes into account mitigating and aggravating circumstances provided by law. Remarks are made to these decisions for which the punishment is rendered, without taking into account the huge damage to the state.

Accordingly, decision no. 711 of 19.05.2008 on the criminal case for commission of acts of corruption for public fund procurement on investment regarding the construction of some public roads, for which there were taken as defendants some senior officials of the Ministry of Transport and General Road Directorate, causing major financial damage, the decision does not analyze the punishment values derived from acts of corruption (150 thousand Euro for each of them).

**Alternative sentences:** According to the study report on the practice of Tirana Court, it is applied the alternative punishment (Article 59) - suspension of execution of the sentence (imprisonment- placement under probation), obligation to appear before the prosecutor, not to perform any public offices, not to exercise management functions and suspension of performance as a lawyer.

In our opinion, it would be appropriate that for the crime of passive corruption, besides imprisonment, as a rule there should be given more often the punishment of canceling the right to practice the profession or duty in judicial system. This penal policy is more or less pursued by Tirana Court and this may continue to be followed in the future without excluding other alternative sentences.

Even after amendments to the Criminal Code in 2008, the court continued to apply Article 59 of the Criminal Code - the suspension of the execution of imprisonment and put on probation. The data of the Ministry of Justice in the last conference (October 2013) have shown that the Probation Service has produced positive results.

We may draw the general conclusion that the implementation of

alternative sentences and specially suspension of the execution of decisions and placement under probation are appropriate sanctions with educational effects, socializing and rehabilitating for the defendant accused of corruption and relieve financial burden of the state to keep these defendants in jail. The trend of expanding alternative conviction instead of prison deserves more support and is in harmony with the philosophy of liberal - democratic theory and contemporary theory of Mark Ansel (France) and recommendations of the Council of Europe. **However, passive corruption of senior public officials, judges and prosecutors shall be punishable by effective imprisonment term because it is a felony and causes incalculable harm to the justice authority, moral and conscience of judges and prosecutors themselves.**

**Complementary punishments.** Report study on the decisions for corruption offenses also deals with complementary punishments (Article 30 of the Criminal Code) applied by Tirana Court - prohibition to exercise public functions for a certain period of time.

Following the analysis of decisions, it is concluded that there is no unified approach of the court to enforce complementary punishment of prohibition to exercise public functions due to the state position and function of senior officials (directors, heads of units) while they are given to low-rank employees - accountants, tax inspectors etc.)

The courts do not give sound explanations of the necessity of complementary punishments but they are based only on the citation of the respective legal provisions. These criteria deserve to be considered by the courts because the additional sentences have a great impact if implemented against the category of senior officials as they have performed important public functions and the damage caused by them is more serious.

This report has mentioned that there have been no exceptions of sentences in cases when the defendants have collaborated with the justice according to article 245/2 of the Criminal Code.

This practice should be improved because this article is thought to be implemented according to the legal criteria envisaged in the

Criminal Code, representing high interest for the criminal prosecution bodies, especially for the detection of corruption cases and other accomplices in corruption activities.

### 2.7 Filing claims against judgments to the Appeal Court

The study report pays attention to the filing of claims against judgments to the Appeal Court, which on its side, has upheld several of them, while some others are changed or quashed, and one of them is ceased.

For the decisions upheld, it is followed the same course of argument even for the evaluation of the elements of criminal offence the defendants are accused of.

In our opinion, two important issues come out from this situation:

1. The changes and cancellations of criminal judgments by the Appeal Court are relatively large in number. The analysis of the causes of changes and cancellations is not comprehensive and clear with regard to the doubts of corruption cases of the Judicial District Court of Tirana, or they have occurred because of professional incompetence of the legal interpretation, or improper evaluation of evidence, which might have led to an ill-grounded decision.
2. The other issue has to do with the legal interpretation of the penal case. In my opinion, the Appeal Criminal Section, in two decisions – the decision dated 16.03.2012 and the decision 916 dated 07.06.2011, of Tirana Judicial District Court has made a right assessment of the distinction between the elements of the penal case of passive corruption provided for in article 259 of the Criminal Code from the crime related to abuse of office (article 248) based on the specific section of the criminal law doctrine.

A right decision is also made in the legal interpretation of article 164/b made by the decision no. 833 dated 14.06.2010 regarding passive corruption in the private sector, emphasizing it is not necessarily

required that, from an objective view, the defendant shall reject, take or offer money, when it is foreseen in cases of "asking for, taking directly or indirectly any kind of irregular benefits".

In this case, the decision of Tirana Judicial District Court, in that we are not confronted with a situation of passive corruption in the private sector, is to be criticized. The study report righteously raises the question: what is the interest of the defendant with regard to the forgery of loan documents and cooperation with a person who has benefitted money from the loans taken by a large number of borrowers? The question of corruption remains applicable in this case.

### 2.8 Recourses to the High Court

According to the study report, recourses are made for a number of decisions which are analyzed by the High Court. The decisions for most of them are not accepted, one is upheld and another one is ceased.

The fact that most of the appealed decisions are not accepted by the counseling chamber, shows that filed claims are ill-grounded and they engage the High Court in ineffective work. This also demonstrates the inappropriate level of professional education and training of the complainants, or abuse of lawyers filing the recourses. These are the competent authorities making appropriate assessment of the recourses to be made, by convincing the complainants in cases when they have no legal grounds for appealing the decisions.

### 2.9 Opinions and assessments on corruption in justice system

There is room for debate and discussions based on evidence regarding the opinions and assessments already made and being made by various international organizations and the perception of public opinion in Albania regarding the corruption in justice system.

In order to rightly judge on the corruption in justice system as a whole and the judiciary in particular, it is necessary to make a separate assessment of the situation at the prosecutor's office, courts and other

justice authorities. This difference shall be made because of the specifics of public functions and authorities of each of the bodies, as well as other specific subjects.

Another reason is the backlog of these bodies, the nature and methods of their control, which have their own specifics.

The investigation activity of the prosecutors' office is subject to control by the courts during the due legal processes, along with the internal audit while the decisions of courts are subject to control by higher instance courts, the Ministry of Justice and the High Council of Justice.

The same level of importance has to be given to the factor of the integrity of prosecutors, judges and other justice authorities, as well as to their professional level of skills of the bodies they represent, and their personal values and qualities at these institutions.

It is well known that the structures and authorities of the prosecutor's office and the courts, and other justice authorities are established by law.

These specifics are also reflected in the public opinion and perception about the corruption of prosecutors and judges. The judges are more ill-spoken because they are the authorities who take final decisions on the cases, subject to trial.

The historic right is that during the period of political pluralism in Albania, the courts and prosecutor's offices have been central subject to attacks. Firstly, these attacks are made by politicians, media and under its direct influence, by dissatisfied convicts or by those who have lost in other civil cases, etc.

All these factors have produced their strong impact with their negative public image versus the justice system. The same factors associated with the internal political factor have especially given to international bodies a strong negative image of corrupted justice system.

However, how correct is the public and international perception about the total corruption of the entire judicial system? In my opinion, this perception is not correct and fair, because facts show the opposite. The number of cases adjudged and persons sentenced by the judicial system during 2011 – 2012 are as follows:[13]

| Year | Investigations completed | Brought for trial | Sentenced |
|---|---|---|---|
| 2011 | 11330 | 9256 | 9,071 |
| 2012 | 11654 | 9354 | 6,446 |

The above data show more than anything else if the prosecutors' offices and courts have been functional and have punished the offenders and fought criminality. In case all of them were corrupted, as pretended, all the defendants would be free and out of prisons.

Prosecutors and judges are discharging a very important public function in the fight against criminality in general and corruption in particular. They are not and shall not be activists of political parties but they shall be determined fighters, brave, honest and impartial while rendering justice. That is the right way to efficiently fight corruption in the justice system.

Judicial power is not and shall not be treated as an instrument of political parties but as the third independent power and sanctioned by the Constitution, and as such it shall be respected.

This is a key conclusion stemming from undisputable facts that noone can generalize and give the absolute opinion that all prosecutors and judges are corrupt and that judiciary is the most corrupt as a whole, etc.

This general conclusion does not deny or underestimate the fact that there are cases of corrupt prosecutors and judges, such as in health and education services and public administration in general, despite the fact of how many cases they are.

The decisions of Tirana courts, subject to this study, report cases giving rise to serious doubts of corruption, especially related to the

[13] *Report of Attorney General, 2012*

changes of legal interpretations of the penal cases, evaluation of evidence, and partiality of the interpretation of decisions etc. It belongs to the higher level bodies to exercise their controls on these decisions and take appropriate measures.

In my opinion, the spread of negative opinion within the country and especially abroad, originates from the High Court decisions in the Gërdec case, giving innocence to the senior officials accused of corruption, decisions of the General Prosecutors' Office to cease corruption cases, as well as the decisions of Tirana Court and the Appeal Court on the case of persons murdered during the protests of 21 January 2011.

These negative examples are sufficient to create a wrongful and unfavorable image which needs to be corrected by the judges themselves together with the state, with legal, organizational and structural reforms by use of all available means but not by overthrowing the system as it is being spoken because the legal reforms are built based on the model and recommendations of the Council of Europe. This would be carried out without underestimating the fight against corruption wherever it is observed, at the prosecutors' offices or courts, among individuals or groups of individuals.

This study report is instrumental in this regard and deserves to be treated as such.

### 2.10 Preventive measures against corruption

The Albanian society is interested to take preventive measures against corruption rather than its occurrence and punishment of persons.

The people's philosophy "prevention is better than cure" is a guiding principle for preventive measures against corruption cases.

Recommendations of the Council of Europe have attached primary importance to the prevention of corruption through comprehensive social, economic, education and cultural reforms of the justice system and other sectors of the society. These reforms underlie the general prevention concept.

In the framework of the National Strategy for Development and Integration, the overall implementation of the new anti-corruption strategy in place, has the main focus to strengthen moral integrity of the judiciary, prosecutor's office etc, as well as judges, prosecutors and other senior justice officials, which includes special and individual prevention.

Measures to prevent corruption in the justice system are taken primarily by the state itself and its bodies, starting with the state police for the detection and prevention by the prosecutors' office, which through investigations identifies causes and grounds favoring the conditions of corruption crime, as well as by the courts and other higher level bodies of justice system. The advancement of legal, organization and structural reforms associated with dissemination of legal education are very important measures for the prevention of corruption in the justice system.

Modalities, means and methods used to prevent corruption are various and complex. According to the new Strategy under development, the main task is the cooperation and coordination of these bodies with other state bodies for the measures against corruption, and the cooperation and coordination with NGO-s, civil society and the public.

Another key recommendation of the Council of Europe is the consolidation of educational work with the public and especially with the youth to boost their awareness for reporting any corruption cases in the justice system. The establishment of modern technology at the Ministry of Justice creates easier access to the citizens to report any judges or prosecutors asking for or taking bribes.

A crucial assistance to prevent corruption at courts and prosecutors' offices or other higher level justice authority can be provided by media, TV, press etc.

The role of lawyers is also decisive for the prevention of corruption practices at the justice system.

The Ministry of Justice and the High Council of Justice have all the required potential to follow up and organize the legal education of the public through legal awareness practices (via publications, seminars, conferences etc), in cooperation with the public and private Law Faculties.

These bodies are also capable, through use of administrative control, to prevent corruption and take disciplinary measures or propose criminal proceedings against the judges accused of corruption. The same measures may be adopted by the General Prosecutors' Office at the prosecution system.

Another positive action for the prevention of corruption would be the publication of judicial rulings related to the punishment of public authorities for corruption activities.

The prevention of corruption in justice system would provide a growing authority of these bodies, trust of the public opinion in the justice system, consolidation of the rule of law, and development of the democracy. The prevention of corruption is the key word in this battle.

## 3. SOME FINDINGS OF THE STUDY OF TIRANA DISTRICT COURT DECISIONS IN RELATION TO THE DECISIONS ON CRIMINAL OFFENCES OF ABUSE OF OFFICE AND CORRUPTION

Various reports of international organizations highlight that corruption in Albania is at high levels, especially in the field of judiciary, customs, taxes, police, health, education etc.

Increase of transparency and confidence of the public in justice authorities is a key component of the rule of law. Due to the specifics of corruption criminal offences and adverse consequences they bring in particular to the interests of citizens and smooth operation of the state institutions, the justice authorities should attach special priority to the strict implementation of criminal legislation, with the view of effective investigation and trial of those criminal offences.

The last progress report of the European Commission showed that Albania has marked a moderate progress regarding the policies for combating corruption. The implementation of Anti-Corruption Strategy and special measures has continued but at a slow pace. Further, good progress is reported for the fight against corruption in the judiciary as a result of the approval of constitutional amendments restricting the immunity of judges. The European Commission observes moderate progress in the strengthening of legal framework for the fight against corruption. Based on recommendations of the Group of States against Corruption (GRECO), some amendments were made to the Criminal Code in March 2012, including a stricter penal policy for the corruption offences.

Having that kind of sensitivity, the Albanian Helsinki Committee[14] conducted a study of judicial decisions of Tirana District Court regarding the criminal offences of corruption and abuse of office.[15]The

[14] *This study was conducted in the framework of the project "To contribute to the strengthening of law enforcement for the punishment of corruption cases and other forms of abuse of office", implemented by the Albanian Helsinki Committee and funded by Soros Foundation.*

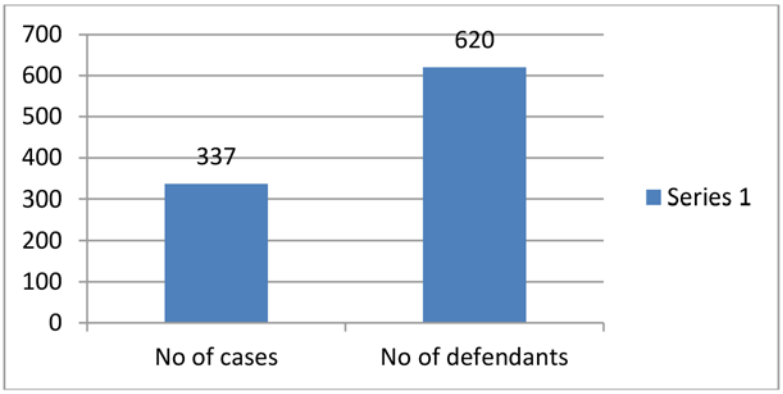
[15] *Further, the present study covered only court decisions and information introduced in this round table is the one perceived by the decisions, without involving the study of judicial files.*

study of criminal judicial decisions in the field of corruption aimed to analyze the level of punishment of this category of offences from the perspective of the practices followed by the court and prosecutor's office. The examples of investigated decisions covering the period 2007-2012 include highly sensitive cases for the public opinion, which are broadly analyzed by print and audio-visual media due to involvement or doubts about the involvement of senior state officials, whose punishment in Albania is at low levels.

This study will introduce some of the main findings highlighted during the study of decisions.

### 3.1 Some quantitative data on the study of judicial decisions

In the framework of AHC study, a total of 337 criminal decisions of Tirana District Court were analyzed in relation to the criminal offences in the field of corruption and abuse of office, with a total number of 620 defendants subject to trial. Further, in the context of these cases, some decisions of the Appeal Courtand High Court were investigated.



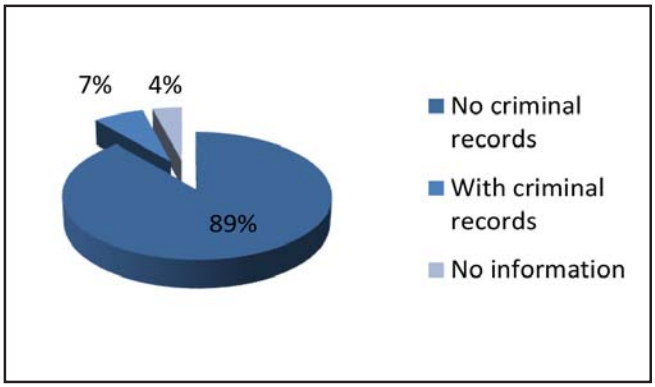

*Graph 1 –Quantitative data on the analyzed decisions*

Data taken into account in the present study are those linked with components of the study of Tirana District Court decisions. In some cases we have referred to data by decision numbers and in some other

cases by the number of defendants.

Following the elaboration of quantitative data, it results that 574 defendants have not been previously sentenced by the court while 46 had previous criminal records and there is no information on the judicial records of 28 defendants.

This is reported as a limitation of judicial decisions, where there is a lack of data on judicial records and other key components for the decision-making by the end of this process.




*Graph No. 2. Judicial records status of adjudicated persons by judicial decisions*

The defendants, subject to trial under the decisions of the present study, are accused of the following criminal offences, where some defendants are accused of having committed an offence in complicity. Regarding the classification of criminal offences, there were cases when the defendants are tried not only for offences of corruption but also for other related offences such as counterfeiting of documents, seals, passports, failure to report crime, fraud etc.

For some provisions, including article 244/a and basically the new legal provisions under the legal package of amendments of April 2012, it is noted a lack of decisions rendered by the court, probably because of the study period.

| No. | ARTICLES (CRIMINAL OFFENCES) | Numberof defendants |
|---|---|---|
| 1 | ARTICLE 135 “Theft by abuse of office” | 139 |
| 2 | ARTICLE 164 “Abuse of powers” | 3 |
| 3 | ARTICLE 164/a “Active corruption in the private sector” | 1 |
| 4 | ARTICLE 164/b “Passive corruption in the private sector” | 9 |
| 5 | ARTICLE 244 “Active corruption of persons exercising public functions” | 58 |
| 6 | ARTICLE 245 “Active corruption of senior state officials or of local elected representatives“ | 3 |
| 7 | ARTICLE 245/1 “Unlawful influence against persons exercising public functions” | 40 |
| 8 | ARTICLE 248 “Abuse of office” | 158 |
| 9 | ARTICLE 257/a “Refusal for declaration of … property” | 19 |
| 10 | ARTICLE 258 “Infringement of Equality of Participation in Tenders” | 37 |
| 11 | ARTICLE 259 “Passive corruption of persons exercising public functions” | 75 |
| 12 | ARTICLE 260 “Passive corruption of senior state officials or of local elected representatives” | 3 |
| 13 | ARTICLE 319 “Active corruption of judges, prosecutors& senior officials” | 5 |
| 14 | ARTICLE 319/a “Active corruption of judges or officials of international courts” | 1 |

*Table No. 1: Number of the defendants in relation to the criminal offences*

### 3.2 Personal security measures against defendants under the decision studies

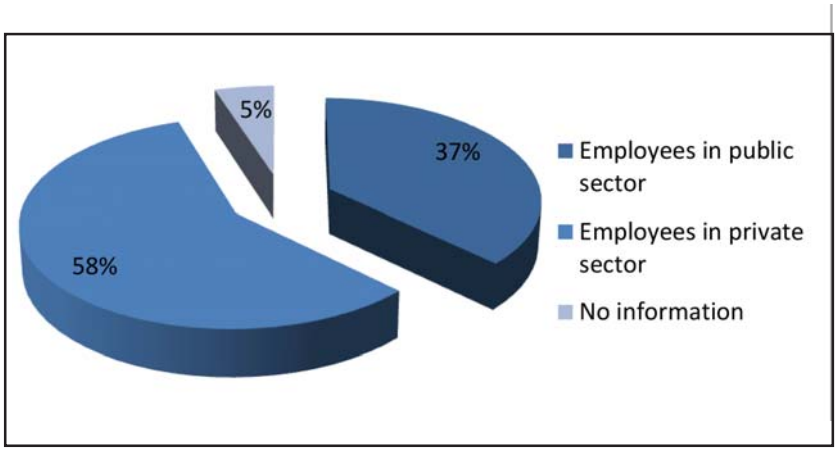
Data reported from these decisions show that most of the defendants for those offences are adjudicated without personal security measures. The study has demonstrated that when some of those defendants were imposed the measure of arrest in prison, under the decision that measure was changed to obligation for appearance or house arrest. This has also occurred due to the change of measures by the Appeal Courts. Considering that some of them are officials at public institutions, we are of the opinion that property guarantees

and electronic monitoring have to be more often applied. A matter of concern is the lack of information in the deliberated studies for the personal security measures of the defendants. The examination of decisions has shown that in some cases the personal security measures of arrest in prison were replaced by those of house arrest.

| Security measures | Number of defendants |
|---|---|
| Arrest in prison | 89 |
| House arrest | 37 |
| Obligation for appearance | 32 |
| Property guarantee | 6 |
| At large (without personal security measure) | 304 |
| In absentia | 29 |
| There is no information | 52 |
| With some measures during trial (amended) | 18 |

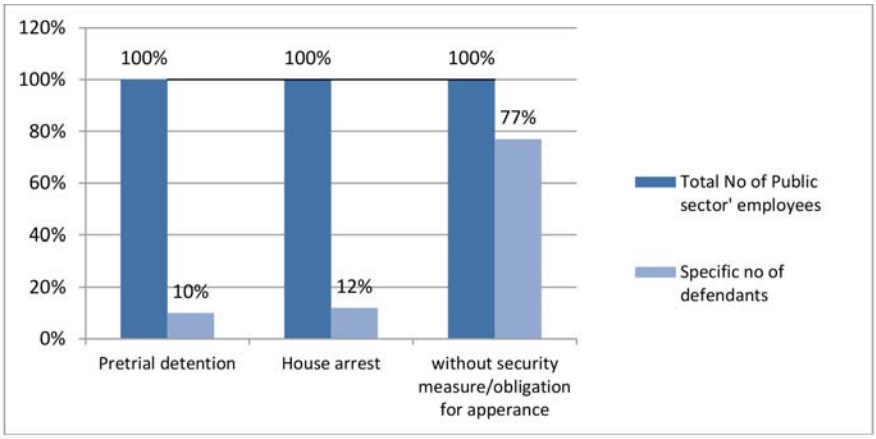
*Table No. 2 – Types of personal security measures imposed for the number of defendants*

It is noted that out of a total of 620 defendants, 232 adjudicated persons are employees in the public sector. There is no information on 31 persons while the others are employees in the private sector.




*Graph No. 3. Status of defendants*

While most of the persons holding public functions are adjudicated at large, i.e., without a security measure, 25 are under arrest in prison and 28 under house arrest.




*Graph No. 4 Security measures as per job position*

The criminal processis mainly set in motion after the charges of both public and private entities. The state institutions that are mostly encountered in the judicial decisions, which have initiated the process are: Directorate General of Meteorological Service, Minister of Justice, Ministry of Defense, Ministry of Agriculture and Food, Council of Ministers, Road Transport Regional Directorate, Energy Distribution Directorate, Civil Registry Office, Immovable Property Registration Office, Regional Directorate of Social Securities. Directorate of Electricity Inspection Police of Tirana, Regional Directorate of Social Security of Tirana, Ministry of Defense, Directorate General of Metrology and the one of Tirana.

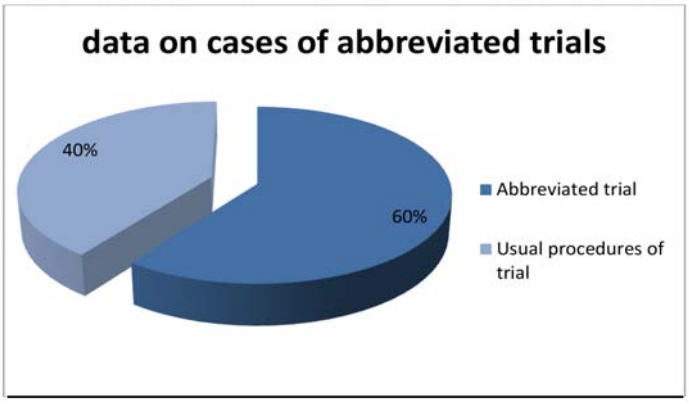
Additionally, there were many cases initiated by individuals or private entities, affected or not by the criminal offence. Furthermore, media was the one to set in motion media outlets. In one of the cases under study, the process was set in motion by the representative of a private entity (legal entity), following the denouncements to the investigative media program Fiks Fare.

| Entity that has set in motion the criminal process | Number of criminal cases |
|---|---|
| Prosecutor's Office | 84 |
| Internal Control Service (ICS) | 5 |
| State Information Service (SIS) | 1 |
| Police and its specific structures | 12 |
| Public Institutions | 26 |
| High Institutefor Property Declaration and Audit | 18 |
| High State Audit | 8 |
| Individual (aggrieved parties/denouncers or concerned parties (natural persons or legal entities) | 95 |
| Not applicable (there is no information) | 41 |

*Table No. 2 Entities that have set in motion the criminal process*

### 3.3 Data on cases subject to abbreviated trial

The study has shown that abbreviated trial is applied for 60% of the adjudicated defendants. Reportedly, in 99% of the cases the Court has accepted the application of individual for abbreviated trial arguing that it shortens the procedures, increases the speed and effectiveness of trial and besides the advantage of 1/3 sentence remission, mitigates the judicial economy.




*Graph No. 5 Abbreviated or ordinary trial*

There have been many reported cases which due to the admissibility of abbreviated trial, have led to the separation of case for the defendants, arguing that it does not affect evidence in this case. As it has followed, the court has not consented to case separation.

However, notwithstanding that, the reflection and reasoning in the published court decision remains a matter of concern. Accordingly, a decision subject to study[16]reported that only in the section of reasoning of the decision, the court has reflected the application of abbreviated trial, wherefrom it follows that 1/3 of the sentence of defendants was reduced, while the reasoning section provides no information and arguments regarding the request of defense, opinion of the prosecutor and grounds that have made the court take an interlocutory ruling.

A positive fact is that the court generally argues that guilt confession is not a prerequisite to proceed with abbreviated trial and the sentence is reduced due to the agreement and not because of the guiltconfessionor not as the decisionregarding the guilt is an attribute of the court. However, there have been some sporadic cases which are at variance with the unifying decision of the High Court No. 2 dated 29.1.2003 and Criminal Procedural Code[17], in which the Court argues that the defendant adopts a position of denial to the offence notwithstanding the application for abbreviated trial[18].

Almost in most of the criminal cases heard, subject to the present study where abbreviated trial is applied, it has followed that case duration has been under the average rate planned for specific categories of criminal offences, thus significantly facilitating and shortening judicial procedures. Notwithstanding that, there have been cases thathave lasted beyond the average time due to the absence of litigants in the hearing.

Nonetheless, according to the case law of the High Court Criminal Section, the abbreviated trial procedure cannot be applied when the court cannot draw conclusions about the guilt or innocence of the

[16]*Tirana District Court Decision, dated 29.02.2012*

[17] *Criminal Procedure Code*

[18]*Tirana District Court Decision, dated 02.12.2010*

person adjudicated on the basis of the trial file, and in cases when the adjudged waives thereof, otherwise the justice and lawful interests of the defendants will be affected. It has followed that not in all cases of admissibility of abbreviated trial; the District Court has provided arguments of such admission in the decision.

The investigated decisions showthat some decisions are final, some decisions have been subject to recourse to the High Court but no decision was taken in this regard as they were under a process of deliberation.

### 3.4 Length of trial

The study has demonstrated that the minimum duration for the trial of cases varies from 30 to 50 days, while the maximum duration goes up to 1599 days. It is worth highlighting that it is hard to categorize as per calendar year the duration of case with the average rate specified under the provision. This occurs as different provisions have different average periods specified for different years. Furthermore, some of the deliberated decisions involve more than one defendant, who are adjudged for different criminal offences but there are also cases when the same defendant is tried for more than one criminal offence.

| Length of trial | Number of defendants |
|---|---|
| 1 - 90 days | 125 |
| 91 - 180 days | 160 |
| 181 days- 1 year | 164 |
| 1 - 2 years | 141 |
| 2 - 3 years | 13 |
| 3 - 5 years | 17 |
| **Total** | **620** |

*Table No. 3 – Length of trial per number of defendants*

Also, there have been cases when for the same offence in the same calendar year, the trial average period has been different. Regardless

of the formula for calculating the trial average period from the court, some cases were observed when there is obvious incompatibility for the calculation of average trial length of criminal cases in the field of corruption for the same offences. In view of the above, it is hard to draw a conclusion on duration of cases related to different provisions and calendar years.

However, notwithstanding that, following our analysis of the duration of judicial processes with calendar days and the number of hearings, we have reached the following conclusions:

Specifically, a case under article 135 involving 5 defendants has lasted 1599 days, namely almost 4 years and a half and another case with two defendants lasted 4 years.

However, sporadic cases were observed, where although under abbreviated trial, the court has exceeded the trial average period contemplated for the criminal case (for instance the Court Decision No.1263, dated 02.10.2008, trial duration has lasted 301 days, almost 240 days beyond the scheduled average period).

### 3.5 Causes of trial delays

This study also includes the analysis of causes of trial delays as an infringement of the right to a due legal process. Following a deliberation of studies, it has resulted that many cases exceed the average time limits of trial set out by Tirana District Court. The main causes why some of these trials exceed the average time limit are specified by Tirana District Court as follows: 1. ***Absence of the prosecutor in judicial hearings and without furnishing reasons about the absence,***for instance in a criminal case by virtue of the decision of 27.05.2008, judicial hearings are postponed 14 times only due to the absence of prosecutor, where the prosecutor has claimed the postponement of hearing only once. 2. ***Non-appearance of witnesses is another cause*** for the excess delay of judicial hearings. It is noted a procedural passivity of the court to prevent this practice. Of all judicial hearings investigated, which have been postponed due to the non-appearance of witnesses, only in one case the court has ordered the

forceful summoning of the witness and this proves the passive position of judges during the hearings. In many cases witnesseshave not appeared before the court and often they do not cite the reasons for their absence; 3. ***Non-appearance of the defense counsels***is also one of the causes for the postponement of judicial hearings and another cause is also the non-appearance of defense counsels of the defendants. Although the defense counsels find procedural grounds for the postponement of judicial hearings, their postponement causes a delay of the process. 4. Another ground is also***the non-composition of the panel of judges, which has frequently occurred***due to personal grounds of the judges, training seminars and participation in other trials with a three-judge jury.

**Further, taking of evidence from a third party is one of the causes**for the postponement of judicial hearings, which is not often encountered and is one of the causes obliging the court to postpone the hearing, with the view of implementing rules of a due legal process. *In this case, the court is procedurally incapable to oblige the third parties, beyond trial, to submit in trial the evidence requested by litigants within a reasonable time limit.*

### 3.6 Data on penal policy pursued for the persons adjudicated under the deliberated decisions

The decisions of Tirana district court have differed as regards the penal policy pursued for the defendants adjudicated during the period of study.

| Tirana District Court Decision | Number of defendants |
|---|---|
| Guilty | 428 |
| Not guilty | 149 |
| Case dismissal | 17 |
| Remand of acts to the prosecutor's office, article 377 of the Criminal Procedure Code | 26 |
| **Total** | **620** |

*Table No. 4 – Reasoning of the court decision on defendants*

Further, of 428 persons found guilty by Tirana District Court, 44 were subject to punishment by fine, 138 were sentenced by imprisonment and 246 were fined and imprisoned. Accordingly, as observed, most of the decisions of Tirana district court have rendered both fine and imprisonment sentence. According to the Constitutional Court decision of July 2012, both sentences could not apply.

| Types of sentences | Number of defendants |
|---|---|
| Fine | 44 |
| Imprisonment | 138 |
| Fine and imprisonment | 246 |
| **Total** | **428** |

*Table No. 5 – Types of sentences rendered by the court*

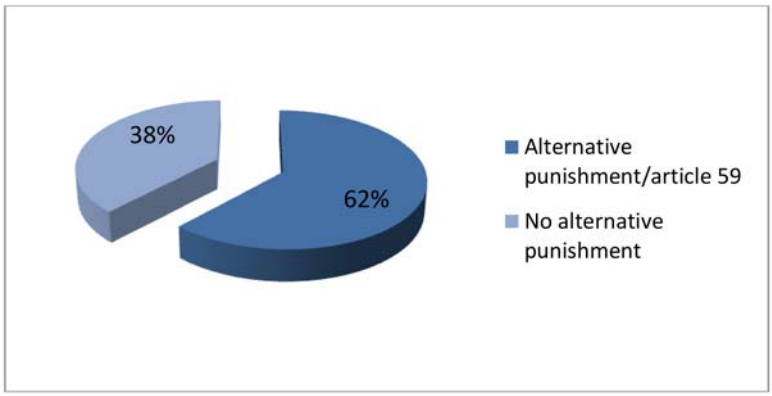
Reportedly, in most of the cases Tirana district court has imposed the minimum and average sentence term in comparison to the term of sentence of each criminal offence under the Criminal Code. Meanwhile, the maximum sentences are very rarely applied.

Of 232 adjudicated persons who are public officials, only 144 are found guilty by Tirana district court while 73 are found not guiltyand for the rest of them either acts are remanded to the prosecutor's office, or the case is dismissed. Accordingly, 62% of the adjudicated defendants are found guilty.

### 3.7 Application of alternative sentences

The criminal decisions, subject to the study, have reported that only one type of alternative sentence is applied, specifically the one provided by article 59 of the Criminal Code "Suspension of the Enforcement of Imprisonment Sentence and Placement under Probation". Of 484 persons sentenced by fine and imprisonment, 147 defendants were applied alternative sentences. The sentence for all

these convicts was suspended by 18 months of probation to a maximum term of 3 years of imprisonment and in rare cases it has been 5 years of imprisonment.

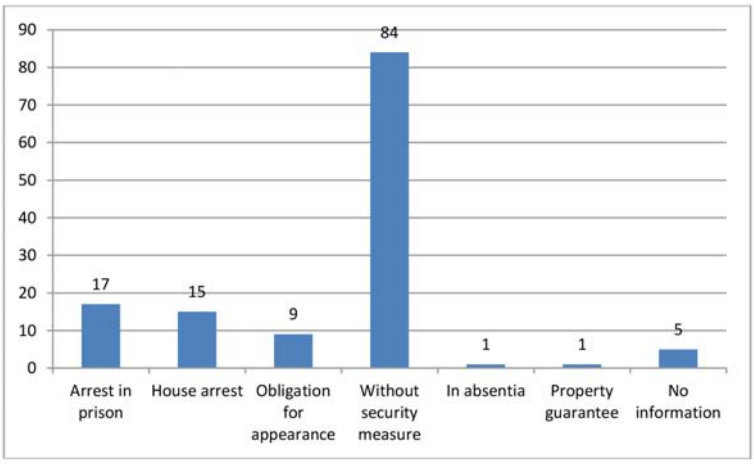



*Graph No. 6 Types of alternative sentences*

Besides the obligation to not commit another criminal offence, according to article 60 of the Criminal Code "Obligations of the convict under probation", the courthas mostly ordered the sentenced person should meet the following obligations during the probation period:

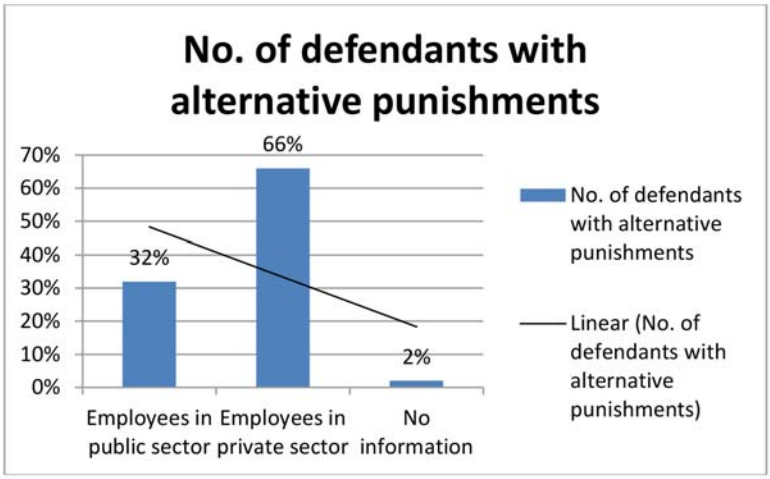
1. Not exercise any professional activities in the field of medicine;
2. No be under the company of mainly sentenced persons;
3. Repair of civil damage (in few cases while almost all provisions involve damage from action or omissions)
4. Not exercise public functions (this is alsoat a low rate)
5. Not be under the company of sentenced persons.

It is typically observed that alternative sentences are mostly rendered for those defendants who have been at large and less frequently in cases when they were under arrest in prison or house arrest. Specifically, the following graphical presentation introduces the situation.



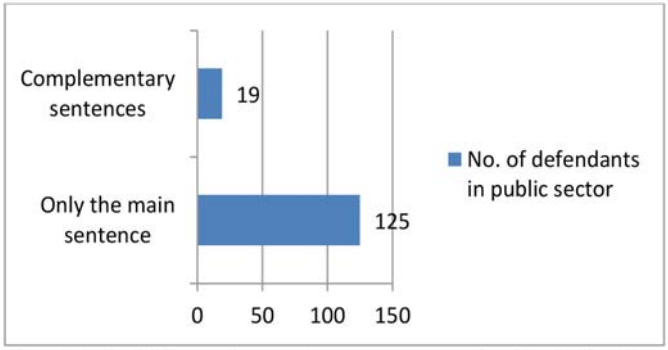

*Graph No. 7 Alternative sentences applied in relation to the personal security measure against the defendant*

The study has shown that 32% of the total number of alternative sentences was rendered for persons who work at state institutions while 66% for persons working for private companies. For further information, see the following graphical presentation:




*Graph No. 8 – Application of alternative sentences as per job function of the defendant*

Of the total number of 428 sentenced defendants, besides the main sentence, complementary sentences were rendered for only 53defendants, while for the defendants who have exercised public functions the number of complementary sentences has been very low.




*Graph No. 9 Complementary sentences for the defendants with public functions*

As regards the application of complementary sentences provided by article 30 of the Criminal Code, the examined decisions show that for some of the defendants, apart from the main sentence, it was ruled the revocation of their right to exercise public functions for a specific term; revocation of the right to exercise management duties at legal entities; suspension of the exercise of lawyer's functions; confiscation of the means for commission of offence and crime proceeds.

### 3.8 Complaints and recourses

The examined decisions show that for 348 defendants the decisions were appealed to the Appeal Court, namely, a little more than half of the defendants adjudicated by Tirana District Courts. As regards the decisions, subject to the High Court recourse, they total for 185 defendants out of 620.

As regards the Appeal Court decisions, it follows that for 192 defendants, it has upheld the decisions of Tirana district court(54%);

for 7 defendants the Appeal Court has ruled to reject the complaint; for 108 defendants it has quashed the decision of Tirana district court of which in 30 cases it has dismissed the case due to the failure to prove the guilt.

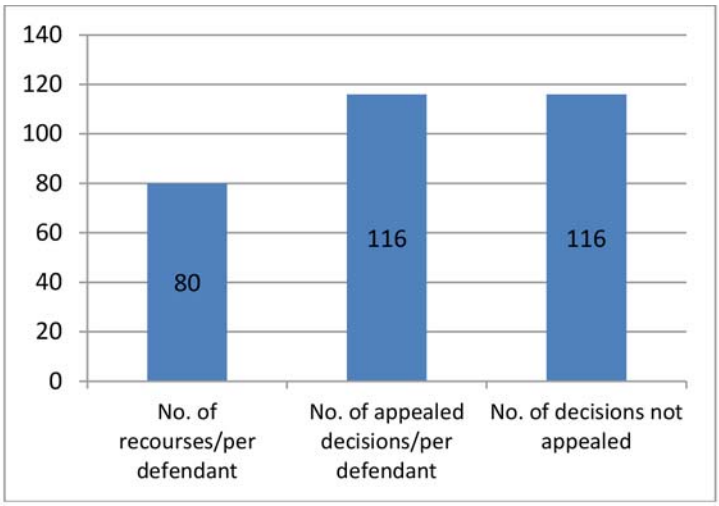
It has followed that in some cases the appeal court has decided to quash the decision in order to cease/dismiss it, reduce the sentence term, increase the sentence term, apply alternative sentences or simply a more lenient sentence term. In rare cases the decision is quashed as procedural violations are reported or infringement of the due legal process. This has occurred in cases of remand and was basically caused due to the failure of regular service as provided by law. For 16 defendants, it has decided to remand the case for retrial to Tirana District Court with another jury and for the rest of decisions there is no information.

Further, decision data show that in most of the cases, complaints to the Appeal Court are filed by the defendant or defendants. Specifically, they are listed as below:

| **Complainant** | **Number of complaints** |
|---|---|
| **Prosecutor's Office** | 62 |
| **Defendant (for each defendant)** | 144 |
| **Prosecutor&defendant** | 45 |

*Table No. 6– Subjects that have filed complaints*

Following the examination of complaints and recourses filed by public officials, it has resulted that 116 defendants have filed complaints to the Appeal Court and 80 defendants being public officials, have filed recourses to the High Court. Most of the recourses filed to the High Court during the period of study, have been subject to trial.




*Graph Nr. 10 –Complaint of the decision by defendants, officials in the public sector*

### 3.9 Argumentation and reasoning of court decisions and clarity of decision writing

Decisions that have been examined have demonstrated that judges at Tirana District Court use ***different techniques in writing decisions***, and the latter not only unified, but rather make the reader confused about the information and analysis that must be incorporated in a decision, and in particular with regard to providing argument on the evidence administered in this process.

The highest percentage of decisions examined has shown that ***the main evidence administered*** in the trial, some of which are formed at the stage of investigation in the prosecution, are: *transcripts from environmental wiretaps and intercepts of telephone conversations, witness testimonies, readings allowed on the statements made in the prosecutor's office by the denouncer, the person under investigation, the person who shows the circumstances of the investigation, the exhibits seized, various acts of expertise, etc.*

A number of practices have been ascertained regarding the way how the Court evaluates the evidence of decisions examined, while under Article 152 of the Criminal Procedure Code, the Court has the purpose to establish accuracy/veracity of decisions and evidential value. In some cases, incorrect assessment of the evidence available at trial or insufficiency due to limited investigation of the prosecution has resulted in dismissal of criminal cases or finding defendants charged with the commission of criminal offenses in the field of corruption not guilty.

While examining a decision[19], Tirana District Court found that the results of interception of incoming and outgoing telephone communication of defendants of this trial, validated, allowed or extended by the District Court and the Appeal Court, should be considered unusable, in reference to Article 226, of the CPC, as procedural provisions have not been followed regarding the secret interception of phone communications. Tirana District Court has permitted interception, hence deeming it as sufficient evidence for the confirmation of charges under Article 222/1 of the CPC.

Most of the decisions examined have shown that ***legal argument spresented by the parties*** have not been analyzed. In these decisions the court has only the final requests of the parties in the introductory partof the decision, where the prosecution claims to find the defendant guilty for offen ses in the field of corruption or other offenses that were committedto support corruption, while in most cases the lawyer requires to find the defendant not guilty and in some cases requires dismissal of the criminal caseorfinding the defendant guilty by apply ingamore lenient punishment. Failure to present in the judgment the legal arguments of parties, their most important rebuttals dealing with various aspects of criminal lawand criminal procedural law, make the court decision flawedin light of this study.

***Element analysis in defining an offense*** in the trial of corruption

[19]*Decision of Tirana District Court dated 23. 02. 2012*

cases is made insome decisions through a detailed and full analys is of all elements of the offense for which the defendantis charged, by analyzing in particular theconcretization ofthese elementsintothe actions or o missions by the defendant.

In several other decisions,we have noted that a formal and much more doctrinal analysis of the elements of offensefor whichthe defendant is charged have been made, without further elaborating concretization of these elementsinto the specific case that is subject to judgment. However, it has been observed that some decisions have not taken into account the analysis of elements of the offense and are based only on the provision of the Criminal Code that sanctions this offense.

Most of the decisions examined have shown that the ***implementation of analternative punishment*** is requested by the defendant or his/her defense counsel. However, other cases have been observed wheretheprosecution has required the application of such a punishment, there by mitigating the defendant's criminalpolicy.[20]

In a few sporadic cases, the court has applied alternative to imprisonment mainly by assessing the applicability of provisions of this punishment. Specifically, by virtue of decision no. 965, dated 19.06.2012, the prosecution asked for the suspension of execution of imprisonment but the court has rendered the same punishment requested by the prosecution and did not apply alternative punishment. In another case, the Court established an internal belief that both defendants had changed their position to the charge, claiming innocence and avoiding criminal liability, not feeling remorsefor the crime committed. Rejection of alternative punishment for these defendants has made the Appeal Court change the decision and impose the suspension of execution of imprisonment for both defendants. While article 59 of the Criminal Code provides, *inter alia*, as a criteria for which alternative punishment of suspension of the

[20] *Decision No. 965, dated 19.06.2012*

execution of imprisonment and placement of the sentenced person under probation "*due to the low risk profile of the person, his/her age, health and mental condition, lifestyle, and or work, the circumstances under which the criminal act was committed as well as the conduct of the person after the committal of criminal act.*

Regarding ***the exemption from punishment of the defendants***, it turns out that the court has ruled in a few cases exclusion and this occurred when these people had filed charges and contributed to the criminal prosecution of these offenses, detection of the activity of other defendants and finding the truth. Meanwhile, there have been cases when the Court despite having been in the conditions to accept exemption from punishment of certain persons, has not done it on the grounds that the persons have not filed any reports, do not meet the criteria, etc. Incases where people have filed charges, although had been involved in bribery they were exempted from punishment because they have reported it to the prosecutor's office or police.

It has been noticed that courts do not have a unified attitude to ***determine*** the ***sentence type and term,*** in respect of evaluation of the criteria stipulated in law. In particular, this is noted in considerations that courts give to social risk posed by the same offenses in the area of corruption and abuse of office, where in some cases the risk of these offenses is estimated as high and in others there is no high risk involved.

Lack of a unified practice is observed in the same court decision, where the court considers with relatively high risk the offense of "illegal exercise of influence", which is punishable by 6 months to 4 years, and a fine from 500,000 to 2 million ALL, while the offense of abuse of office is classified as not posing high social risk, which is punishable by 7 years to imprisonment, and a fine from 300,000 to 1 million ALL.

Sanction sandallowances offineandim prison mentresulting from the set wo offenses do not have significant changes and in this regard, different attitude of the courton assessing the risk resulting from such

offences is not fair. Non-unified standards are observed even in the analysis of the value of benefits from the offense committed.

There is not in place a unified practice of the court to determine the extent of the punishment on the basis of the amount of damage that the defendant owes. In particular, this issue is related to corrupt practices in the procurement of public funds for investment with the subject matter the construction of several roads. With regard to this issue, senior officials of the Ministry of Transport and the General Road Directorate were taken as defendants. All these procurements had as subject matter the construction at relatively large financial value. In determining the punishment, this decision has not analyzed the large value derived from corrupt practices from the defendants and the damage caused to the state and citizens. The Court has stated it had taken for one of the defendants an amount of 150,000 Euro and has rendered a medium punishment, referring to the minimum and maximum sentence term. Meanwhile, a young man who had exchanged money to a Turkish citizen at a wrong exchange rate, with beneficial value amounting to 1,600 ALL, is punished to one month of imprisonment.

Examination of the facts of different criminal cases in the field of corruption, which are reflected in the reasoning of the court's decision, has shown that the number of persons criminally prosecuted and brought to the court by the prosecution is decreased. The reasons are different and deal with a lack of thorough and comprehensive investigation by the prosecution and in some cases due to flaws observed in formulating legislative acts in the field of corruption offenses, as provided for in the Criminal Code.

Additionally, it is observed that although we have decisions punishing corruption cases, especially when they are made public and are still sensitive to the public, it is forgotten that the final decision is rendered by the Appeal Court or the High Courtinevent of an action. High Court decision shave been pending for many years to be examined and when their turn comes for examination, these issues will have been forgotten by the public and media.

# 4 FINDINGS AND RECOMMENDATIONS

## 4.1 Findings

1. Reports of international organizations, analysis of state bodies, Albanian public opinion and report study of criminal decisions of the courts in Tirana reach an indisputable conclusion, that corruption, as a negative international phenomenon is a distressing issue for Albania as a whole and for the system of justice in particular.

2. Combating corruptionin the justice system comprehensively aims to fight it strongly as asocial wound, because it seriously hurts the morale, conscience, human and vital interests, the law, authority of the justice system, establishment and operation of rule of law, rendering of justice, human rights and fundamental freedoms up to national security.

3. A priority is the establishment of a fair and clear concept that fighting corruptionin the justice system is not simply to acquire the status of the EU candidate country without underestimating the importance of its policy, but to save judicial authority and strengthen the confidence of people in it, fighting crime and corruption related to organized crime, money laundering etc. This requires the Government to launch reforms.

4. Combating corruptionin the justice system is not realized with political campaigns and rhetoric, butas noted in the Progress Report of the European Commission, with strong political will, without interruption, collectively and with thoroughly preventive, educational, organizational and structural measures, as well asthrough the application of criminal punishment, and bringing before justice in particular senior public and justice officials.

5. In anti – corruption policy, impunity of crime, dismissal of the case or innocence, especially for senior public officials and judges, prosecutors and other judicial officials is unacceptable and punishable.

6. Court decisions examined for the period2007-2012 for 12 offenses of abuse of office and corruption have shown that there have been rendered 337 judicial decisions and 620defendants in total. Most of them have not been convicted before.

7. Persons charged with offenses related to corruption and abuse of office, are jointly charged with other offenses such ascounterfeiting documents, stamps, passports, etc.

8. Regardless of the Criminal Code amendments for the addition of further offenses of corruption and abuse of office in May 2012, during the examination there were not observed decisions for new offenses because of the short period available for investigation and then for trial.

9. Most of the forms of offenses in the field of corruption and abuse of office are provided for in Article 135 "Theft through abuse of office" andArticle 248"Abuse of office", as provided forin the Criminal Code.

10. More than half of the defendants by the Court were not imposed a personal security measure. Very few of them were rendered the measure of "arrest in prison".

11. Almost fewer than half of the defendants by the Court are persons working in the public sector and most of them have been tried at large.

12. Abbreviated trial was conducted for more than 60% regardless the fact that judicial practice in these cases has followed what is defined in the unifying decision of the High Court.

**13.** Proceedings for offenses in the field of corruption and other forms of abuse of office have lasted in most cases from 3 months to 1 year. However, in some cases it takes up to 3 years in trial.

**14.** Compared with the total number of defendants, 62% of them were found guilty and for most of them is given a fine or an alternative punishment. The alternative punishment most applied by the courtis Article 59 of the Criminal Code.

**15.** The case for about half of the defendants is appealed to the Appeal Court which in more than 54% of appeals has upheld the decision of Tirana District Court.

**16.** Practice followed by judges in similar cases is different and creates different precedents in judicial jurisprudence. The court does not have a unified practice to determine the extent of punishment on the basis and amount of damage that the defendan towes.

### 4.2 Recomendations

1. We would recommend revising the Criminal Code and Criminal Procedure Code regarding the stipulation of these provisions,in order to increase the effectiveness of this phenomenon of impunity. Amendments should be made to Article 245/1 and 248 of the Criminal Code, providing for criminal liability of third parties who have knowingly benefited from the exercise of unlawful influence or abuse of office by a public official.

2. Pursuant to tasks for combating and preventing corruption there arearange of other concrete measures to be taken, namely to improve the mechanisms and tools for investigating cases of corruption, mainly techniques of criminal investigations in the field of corruption and in particular techniques dealing with finding and obtaining evidence.

3. Government leaders should show effective,serious and political

will to fight and prevent corruption with legal, structural, organizational reforms in the justice system and in particular the strict observance of constitutional principles of the independence of judiciary. Staying away from the pressures of political interference in the court and prosecutor's office to protect corrupt officials.

4. Strength, courage, conscience, honesty, transparency, accountability, character, will, dignity by every judge and prosecutor for the rule of law against corruption. High professionalism of all judges and prosecutors to fulfill their task will improve the delivery of justice and fighting corruption.

5. Adoption ofmeasures topreparehighly qualified lawyers educated in the country and maximum engagemen to flawyers who are educated abroad.

6. Adoption of effective multilateral measures,legislative reforms, strengthening control and broad educationof the public to report corruption and corrupted persons in court, prosecutor or other judicial officials.

7. Criminal justice authorities (police, prosecution, court) should pay particular attention to the stricten forcement of criminal legislation, to effectively investigate and prosecute these crimes.The number of criminal cases mainly investigated by the prosecution should be increased.

8. The prosecution should not become a ground for delaying and prolonging the unjustified court hearings incriminal cases of corruption.

9. Formulation ofchargesfiledby the prosecution for offenses in the field of corruption, by thoroughly analyzing the offense elements of objective and subjectives ide and in accordance with the evidence resulting from the investigation, in order not to

have cease of the criminal cases on the grounds that fact does not constitute a criminal offense or that evidence does not prove the charge filed.

10. All those who have filed charges or have collaborated with criminal prosecution authorities for one of the offenses set for thin article 245/2 of the Criminal Code must be brought before justice by the prosecution and exempted from serving the punishment.

11. Police authorities should provider apid and effective assistance in mandatory finding and escorting witnesses summoned for criminal cases of corruption.

12. Bar Associations must give punishments in cases of delays of court hearings due to unjustified post ponements of hearings.

13. The School of Magistrates should payparticular attention to write decisions in the field of corruption, in particular:

    **1.** to give legal arguments and convincing arguments for accepting or rejecting them;
    **2.** to determine the entire evidence that has been crucial inestablishing the internal belief of the judge;
    **3.** to determine the vera city and probative for ceof the evidence and thorough analysis of the facts giving contradictory evidence;
    **4.** to analyze elements of objective and subjectives ide of the offense for which the defendantis accused, always doing the concretization of these elements into his/her acts and omissions;
    **5.** to analyze the criteria and circumstances that are considered indetermining the kind and extentof main, complementary and alternative punishment, always doing individualization of punishment in relation to the characteristics presented by the defendant;

**14.** One of the recommendations in this context would be to impose more personal security measures as property security and electronic monitoring.

**15.** While rendering a punishment, harmful consequences that corruption offenses and criminal action complicity affect the state budget and citizens' interests should not be neglected.

**16.** In any case where a defendantis found guilty for committing offenses of corruption in the public sector apply additional penalty for prohibition of the exercise of public functions.

**17.** Unification of the judicial practice indoctrinal terms as regards the establishment of criteria to determine the level of risk of criminal acts in the area of corruption, so that courtswill not use double standards in this regard;

**18.** Therefore, we would address for the School of Magistrates to continue training together within International organizations of the Joint Investigation Units for this group of offenses, as well as ongoing training for judges for the unification of decision writing and reasoning.