

Anti-corruption policy according to the Algerian constitution, reality and prospects

سياسة مكافحة الفساد وفق الدستور الجزائري؛ واقع وأفاق



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Abstract: *Towards constitutionalizing the policy of anti-corruption, discussing a problematic problem, drawing in the fifth axis of the preliminary project to amend the 1996 constitution: Transparency, Prevention and Control of Corruption, in a question about the necessity of constitutionalizing of the anti-corruption's policy, as a popular requirement.*

Despite the existence of legal mechanisms, corruption has become a general phenomenon. The Committee explained that this is due to the problem of the ethics of public life.

Among the proposals were: the constitutionality of the supreme authority for transparency and the prevention of corruption into a constitutional body.

The committee neglected the consistency of the legal texts in order with the main text. The concept of corruption was neither in line with the provisions of international agreements, nor with the

criminal text the committee neglected the field of ethics for private business. This should be reviewed by the parliament in the future.

Keywords: *corruption, constitutionalizing, ethics, transparency, prevention.*

ملخص:

نحو إضفاء الطابع الدستوري على سياسة مكافحة الفساد، ومناقشة إشكالية مرسومة في المحور الخامس من المشروع الأولي لتعديل دستور عام 1996: الشفافية والوقاية والسيطرة على الفساد، في سؤال حول ضرورة دسترة سياسة الوقاية من الفساد ومكافحته، كمطلب شعبي.

على الرغم من وجود آليات قانونية، تمثلت في المصادقة على الاتفاقيات الدولية لمكافحة الفساد و وجود قانون خاص ذي طابع جنائي للوقاية منه وقمعه، أصبح السلوك ظاهرة مستفحلة. وأوضحت اللجنة أن هذا يرجع إلى مشكلة أخلاق الحياة العامة في القطاع العمومي في افتقاد الشفافية والحكام الرشدة.

وكان من بين المقترحات: ترقية السلطة العليا للشفافية ومنع الفساد إلى هيئة دستورية. أهملت اللجنة اتساق النصوص القانونية مع النص الأساسي. لم يكن مفهوم الفساد متماشيا مع أحكام الاتفاقيات الدولية، ولا مع النص الإجرامي. أهملت اللجنة مجال أخلاقيات مجال القطاع الخاص، لذلك يجب تدارك ذلك مستقبلا من قبل البرلمان.

كلمات مفتاحية: الفساد، الدسترة، الاخلاق، الشفافية، الوقاية.

Introduction

Just after several weeks of having come to office, the newly elected president, on December 12th, 2019, launched his schedule for a constitutional review. An ad-hoc committee of experts in public law and human rights, has been appointed since January 8th , 2020, to elaborate an introductory draft amendments to the constitution of 1996.¹

According to the undertaking letter of assignment, the future amendments are looked to be steps on road to respond, naturally, to the popular movement's aspirations (EL-HIRAK), raised on february 22nd, 2019. The public request aims to a settling of a new republic.

The adhoc committee ² has estimated it to be necessary issue that may help to get rid of such crucial behaviour . A behaviour , which has been running the public affairs for almost a couple of decades . It has thought that "**Ethics of public life**"; through carefully suggested regukations should bring about a very salvation to the situation.

As a policy , within the whole vision of making a new republic, has to be incorporated into the fundamental law's preamble . Clearly, a statement, by the way will be necessary to be constitutionalized . promoting of practical ethics will thanks to some regulations be sustainable for a good governancy .

The most relevant regulations are: constitutionalizing the consultative authority of transparency, preventing and combating corruption. engagement of the public authorities in respecting the

good governancy _ punishment of exploiting influence .³

The schedule, wich is the road map, introduces seven great axes, to deal with and to debate on, largely, by social actors. Certainly, transparency, prevention and anti-corruption combating, are mainly the choice of the fifth suggested axis.

The fifth axis would be the object of our paper's research. However, the committee has seen it to be an issue of public life and it is a dilemma of social ethics .

A further reading on the preliminarily given work of the previous committee on that axis, will help us to examine its perspective and its suggested means . Of course, the paper research will raise a key question : will the constitutionality of an anti-corruption policy be necessary, to the legal system of preventing and combatting the fenomenan? Consequently, other secondary questions about this dilemma could be raises : what is the background of such a dilemma ? Has the existing legislation failed to fullfil the public request ? what are the adhoc committees suggestions for the anticorruption policy ?

In dealing with our paper research, we will follow the coming steps, in the light of the analytical approach, in order to get at some ends.

1.The background of dilemma:

The assignment letter has exposed the reasons behind the distinct mission .

It has clarified it. The comitee is comitted to give suggestions when studying the letter's axes . Mainly , the fifth axis on transparency, preventing and combatting corruption has been the most relevant one among others to be discussed and enriched .⁴

Concerned about the seriousness of crisis posed by corruption to the stability and security of society, indermining values of demacracy, ethical code, justice and hurting sustainable development , the Algerian government has already adhered to the international law on preventing and combating such a phenomenon on april 19th, 2004, with reservation .And early, it has also signed the african and arab conventions anti-corruption . The mission has come at a distinct moment, in the country's history .

It aims at taking care of the popular requests. The guarantee of transparency in dealing with public affairs , the good governancy by institutional means are the most relevant legitimate requests.

The deviations that the public affairs have lived for about a couple of decades, followed by judiciary proceedings, have sounded to be shamefull.

The U.N.CAC is the first international anti-corruption act . It is really global within its contain.in its eight chapters and seventy one articles . The act calls for comittement of the State parties . They should implement a wide and a detailed range of anti-corruption measures .⁵

They also should condition their laws , institutions and practices to the new mood of post modernisme .Those measures aim at preventing , detecting and sanctioning such behaviour . In pararell , the international coooperation among State parties should be enforced, on combatting that evil .⁶

However , protecting the national economy has been mentioned by the 1996's constitution ,in its 9th article , 7th alenea . The very purpose of choosing institutions by the citizens is protecting the national economy against any forms of embezzlement, misappropriation, illicite traffic, power abuse, bribery and grabbing.⁷

Also the 23rd article has strongly prohibited the illicite enrichment by public officials and elected representatives of the citizens . It states : “ No public functions , mondates can be source of enrichment , neither means for serving private benefits .” . The same article has stressed on the public officials and elected representatives of people commitment to put down their declaritions about their own assets , at the beginning and as well at the end of their functions or mandates.⁸

In responding to the international law against corruption , the national legislators has succeeded in drafting a distinct law on the matter , on february 20th ,2006.

The text no: 06-01, already mentioned , has known several modifications. It has focused on its purpose . However, its 1st article declares that the law aims at :

- Strengthening measures aming at preventing, combatting

corruption.

-Promoting integrity, responsibility and transparency in managing both public and private sectors .⁹

The adhoc committee has believed in its limited job . The assignment letter has offered it a bit of freedom to give suggestions on the 7th axes, including the preamble to enrich the constitutional text.

Legaly speaking , the anticorruption policy exposes meaningful problems : 1-The problematic of a concept /2- The ethics of both public and private affairs /3- Promoting a body or an admistratif authority to be a suprem institutional of control. /

The previous problems will generate the following points which are in need of discussion throughout the job of the adhoc committee.

2. A problematic of a concept :

On top of the research, the word corruption has suffered from disagreement on a formal definition. The context dependency of an act appears to be the most interesting problem, toward unification of a meaning. In practise, both words : bribery and corruption, are generally used interchangeably, often in familiar language .

the word « Corruption » is defined as misuse of power by someone to whom it has been entrusted , for his own private gain. The most common form of corruption is bribery.It is giving or recieving money, a gift or other advantages, as an inducement to do something that is dishonest, illegal ,or a breach of trust in the

course of doing buissness culture shapes the difference a “bribe” and a gift but culturly induced diffrences seemed small .¹⁰

the world bank , for instance , defines corruption as “ The abuse of public office for private gains¹¹ .

The Algerian constitution has used the word in its Arabic version : رشوة ie; bribery , but in the french version , the word is corruption .legally , the word bribery is a form of corruption .The fundamental legislator has used the informal word رشوة instead of using فساد ie : corruption

The old penal code has never used the term of corruption . In its former text 126 , chapter four section two entitled “Bribery and power abuse” the legislator used the conventional form of corruption which is bribery . we think that the classical penal code didn’t know the word corruption , until the international law came in 2003 on preventing and combating corruption .¹²

The doctrine has considered bribery as corruption in its restrict meaning. The notion may have a large meaning, depending on different areas. The new text, has been ispiried of U.N convention .This last one has already held the term.

The legislator has defined corruption by the second article of the previous text. He has said : « it is meant by" corruption " , all offences set up by the chapter 4th of the law »¹³. Formly , this position looks to make an end to a famous debate on corruption's concept. Apparently, he has kept in doing his job. He has reflected a formal outlook toward the phenomenon. As a maker of ethics he has agreed that the reaction should be upon many fields:

social, legal , moral and institutional.

Yet ,there are several forms of corruption . The Algerian constitution of 1996 . in its 9th article sets out a principle of a protective policy of the national economy from any forms of malversation or public fund stealing, bribery and the abuse of authority.¹⁴

Obviously, the fundamental law is expressly clear on what it is traditionally known to be a form of corruption : it is bribery. It is relevant to note that the new text came before the last constitutionally ammandemnts on march 6th, 2016

But , those ammandements did not take the U.N convention into account.This omission might have a negative reflection, at least, upon the lawful side, in its legitimacy .

The inevitable hierarchy of the texts had to be appeared into the new law of corruption.Someone must , therefore , be mindful of the fact that the reference to "Nullum crimen , nulla poeana sine lege" is a foundation to constitutional postulate: the formal legality.Unfortunately , one can think that the previous golden rule has been violated.

We think , there should be a future debate about the natural place of the preceding text in the legal order.

However , the new born law has been well-grounded in international norms and ethics.The survey of contemporary domestic legislation and practices reveal that status endeavoured to provide arms for self –deffense ,under the doctrine of the U.N convention.Corruption threatens social peace, values anel justice.

It distorts economic growth.

Our point of view is worth clarifying, there is no definition of the concept in that convention. The Algerian legislator has dared to draw up his definition, likewise, his French homologue .¹⁵

It is evident that the new text holds a clear expression that corruption is "all offences inserted in the forth chapter of this law"

It sounds for two aims : Prevention and repression. Notably, the legislator has used the word " Fight", instead of "Repression". One can note that this position is not odd .The Algerian legislator has kept his habit wich could be known in several penal texts. His choice is not creative, but a traditional way in his own criminal literature. The legislator has been clearly influenced by his French homologue , when making law . The word " Fight" has its connotation in criminal policy, but not in penal law . "Repression" is really the propre word in a propre place . It means sentence in its various meanings . The word " Fight" is naturally related to war .literally , it is far from legal sense.

One drawback of the former definition is the inherent ambiguity, because all illegal acts are not necessarily corrupt and all corrupt are not necessarily illegal.

But with regard to the principle of a formal legality , the legislator has provided a definition of a concept. A conceptual definition maybe preferable in penal law, in particular , when it is stricto-sensu. Corruption is an offence , it has really a penal nature.

So far, it is necessary to choose between conceptual definition

and drawing up a list of offences. The general theory of penalisation imposes a list of some offences, since the stricto-sensu rule is a guarantee of individual freedom.

Several criteria could be used to define what is meant by corruption .The legislator referred to offences which he considered, affect the very foundations of public services, trade and investments in both sectors: public and private. Such approach can be contested, in the sense that the criminalisation could never cover the whole context of such phenomenon.

Unfortunately , Introductory draft to amend the constitution has kept the formulation of the 9th article , particularly in its French version “corruption”. Perhaps the work has been done in an exceptional circumstances of pandemic “Covid-19” . So it has been an urgent job . we think that the article should be reviewed in its meaning and formulation , following this way : “ people choose for himself institutions , their purpose is:

- Protecting the national economy against any forms of corruption: embezzlement , bribery , misappropriation ...etc .

The harmony of the text in its legal system must be the first careness of the law makers . we wish , therefore , the parliament be aware of that vacuum .

3. Ethics and corruption :

Ethics can simply be referred to as a set of principals relating to morals , particularly as they apply to human conduct . Ethics is about what is morally correct , honorable and acceptable to the larger majority of the people and organization , society or group.

The national government , in a democratic state, is expected to be responsive to the needs of its people. The realization of such an expectations is often dependent on public servants commitment to maintaining acceptable standards of service dilevery .

Morality and ethics have historically contributed gradually to the corruption -control startigies of accounting . This control have usually been accredited in successive layers of regulations and controls. Thus a major cost of corruption is the inefficiency imposed on society by the vast and ever growing confusion of rules, regulations, controls and norms established to contain and control corruption, but never quiet succeeding .¹⁶

According to an experience of past years , the public affairs have been particularly vulnerable to corruption and unethical practices .Resources that could be otherwise ued to buy usebals or recruit much needed governmental professionals are wasted as a result of corruption . Indeed the applications of the above defficiency are abvious .

A lack of direction for integrity in the overall public administration dilevery .

In exposing causes beyond its mission , the adhoc committee has observed that the absence of clearly stated and enforced polices to promote ethical values allows the whole public and local administrative systems to be vulnerabal to bet practices and corruption.

In doing so, the committee has believed that a notion of “Ethics of public life “should be promoted to be integrated within a

fundamental text. Such a constitutionality of a principal for a code of conducts would be enforcing the standards of performance which can lead officials and elected representatives of people to be good servants.

Again , the committee has estimated that once the ethics of public life would be institutionlised the more it would be working on as a granatee for protecting public funds and so making efficient means for preventing and combating corruption.

The ethics of public life are imposed , mainly, for promoting some conventional rules to a constitutional level . The most relevant ones are :

- The non cumulus between the public function and private activity.
- Creating public functions and the public command must only correspond to public interest.
- Prohibiting any public official to be in a state of interests conflict.

The committee has proposed that the law making should ,from now on, be rational . Since establishing legally strict conditions to get at interest, will open a way for corruption .Notably , the previous proposition aims at granting much more transparency in mananging public affairs, as soon as it is founded on good governancy, as being on the international level.

The committee in the 5th axis entitled “ Transparency , preventing and combatting corruption “, has proposed the following modifications:

1. Constitutionality of the supreme authority for transparency , preventing and combating corruption.
2. Prohibiting the cumulus between the public functions and private activities or liberal professions
3. Prohibiting the creation of the public post or introducing any public command doesn't aim at achieving public interest.
4. Each public agent must avoid interests conflict , when exercising his /her functions.
5. Declaration of the own funds either at the beginning of the function , or mandate or at its end .
6. obliging the public authorities to respect the good governancy and imposes it as well in managing the public affairs.
7. Law must punish the power abuse.

Those propositions would be embodied in the article 23rd , after its reviewing , when keeping in the old rule of prohibiting the use of any function or mandate in the State's establishments as a source for wealth or means for serving private benefits.

However , the 24th article has been proposed to be reviewed completely. It would state the obligation of respecting the good governancy in managing the public affairs , enforcing the transparency and flexibility in making law and regulations, in order to avoid corruption¹⁷.

The former text has been proposed to be included in the 25th article which is about punishing the power abuse .The 26th article would include the contain of the 25th one in a new formulation ; it would stressed on the administrations role . that is the gold rule :

the administration is to serve the citizen and the law guarantees its impartiality.

4. The commission's neglect of the private sector's corruption :

The adhoc committee has pointed out that the integration of the State's duty for a policy of anti-corruption in constitution should come into force .However, the Algerian constitution should contain the international commitment in order to strengthen its legal regime on matter, as the State has adhered to the international conventions of preventing and combating corruption, whatever they are : U.N.CAC, African and Arab¹⁸, conventions.

To do so, the committee has integrated a remarkable alenea in the constitutional preamble . It dedicates the Algerian commitment to embody the previous conventions in its legal regime against corruption .

The committee has believed that such a constitutionality of commitment should strengthen its legal and regularity systems.

We can note that the U.N convention against corruption constitutes of substantial provision for preventing , detecting and punishing corruption in both public and private sectors . The convention dedicates an article entitled : "Private sector", in its 12th article .

In its previous article , the international convention has, clearly stated that : "Each State party shall take measures, in accordance with the fundamental principals of its domestic law, to prevent corruption involving the private sector, enhance accounting and auditing standards in the private sector".¹⁹

Again , the international act focuses on promoting transparency among private entities , including codes of conduct for the correct , honourable and proper performance of the activities of business and all relevant professions and the prevention of conflicts of interest .

It aims at promoting the use of good commercial practices among businessman and in the contractual relations with the local State.

Although corruption is seen as a public sector problem , there can be corruption in the private sector too . It is an important social and ethical problem in both public and private affairs . The Algerian legislator , himself, has included a chapter for preventing and combatting bribery as a form of corruption in the private sector , in the penal law . In its 13th article , the text no:06 -01 on ferbruary 20th, 2006 of preventing and combatting corruption , entitled : Private sector, the legislator has spoken about measures would be taken, aiming at prohibiting corruption in the private sector.

Particularly, there must be strengthening of transparency among the private entities and promoting thhe integrity in the world of private affairs.

The Algerian legislator has widened the criminalisation to the private sector. The modern political economy doesnt distinguish between private and public sectors .Both of them shape the basis of the sustainable national development. So, the State should intervene to protect both economies when it is necessary, by

regulatory law .

Private to private corruption acts are acts that do not involve government officials. Although, neither the OECD²⁰, convention nor the FCPA²¹, address the issue of private corruption “bribery.”

Such acts are strictly prohibited under the mutual code of business conduct and this anti -corruption procedure. Private corruption also constitutes an unethical act .It is now an offence in many countries which have ratified the criminal law convention on corruption of the council of europe .

The Algerian legislator has already criminalized the private corruption, the recent penal text, previously mentioned, has consecrated several articles punishing corruptional acts such as: bribery, embezzlement of private assets, the laundring, concealment ...etc

One can ask why the adhoc committee has neglected constitutionality of the State commitment to combat corruption in private sector, as well it has thought to be so for the public sector? We think that there is no excuse for such omission .Some think that there has been a particular moment of accepting such assignment . The letters assignment has come at an unliked moment of exceptional circumstances in which people has lived , so the job has been done hastily . But, the adhoc committee has , somehow and somewhat , dealt with the fifth axis on ethics and it has been offered a chance to do so.

We propose that the fundamental law maker should be ware of this vacuum , when debating the final draft , since Algeria has

adhered to the international law against corruption . The fundamental law should reflect such a Sate's commitment to enrich its rules, taking into counts the ethics in private sector.

Conclusion:

The further reading on the introductory draft amendments to the constitution of 1996 on anti-corruption policy has revealed the necessity for a constitutionality of such policy . the adhoc committee apparently has succeeded in offering precious suggestions that have come to answer the public momvment's requests . the assignment letter though ,its limited cadre of dealing with the introductory drafting themes , has virtually left a bit of chance o that committee to think and propose.

The 5th axis has been , to some extent , an object of propositions , since it has concerned a national topic of combating corruption , a phenomenon which has hurt widly the national economy in both sectors . Though the Algerian government adhered early to the international conventions against corruption , the law has seemed to fail in preventing and combating the behaviour.

The committee has believed that promoting the anti-corruption policy to be integrated in the constitution , will be strengthening the ethics of public life. Transparency , integrity and good governance should be norms of the given fundamental law . There should bec a supreme constitutionlised authority of control instead of a body for consultation in the field.

The adhoc committee unfortunately , has neglected apparently , the real situation of the private affairs in the world of values and

ethics , though the international conventions has focused on the role of the private sector in corruption.

The previous committee has declared when exposing causes for such a job , that it will work on improving the fundamental law formulation and meaning .The industry of a fundamental law must be, however, harmonious in its dispositions, to fit in form and substance.

Further more , it has ignored such imperfections in notions . The hierarchy of texts imposes a harmony . It seems that the notion of corruption in the given fundamental text does not work on harmony with the international law.

As a result, we offer some propositions and we hope that the fundamental law maker will take it into consideration.

There should be integration of protecting private affairs from corruption, as a part of national economy , in the fundamental law

The law maker will review such notion of corruption when debating the introductory draft of constitutional ammendments .

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