

TAILOR- MADE LAW

**Has the time come for a law on
lobbying in Kosovo?**

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TAILOR-MADE LAW

Has the time come for a law on lobbying in Kosovo?

It has been repeated many times that corruption, as a form of abuse of power entrusted for personal interests, presents the greatest challenge to the new state of Kosovo in its efforts to build a democratic society and sustainable economic development.

Corruption in a society manifests itself in a **variety of forms**, from the simplest cases of misuse of official information, conflicts of interest, giving and receiving bribes, misappropriation in office to the most serious forms of nepotism and clientelism, unlawful issuance of court decisions, extortion and state capture. Corruption, as a social phenomenon, can be of **varying intensity**, depending on the damage it causes to the public interest. Petty corruption¹ mainly occurs at low levels of state administration, but becomes a major corruption if it affects governing bodies at large-scale and high decision-making levels. Major corruption further evolves into **systemic** (endemic) **corruption** by taking advantage of weaknesses in internal institutional organization and unclear procedures within the state apparatus.

The factors that contribute to the appearance of systemic corruption are the unlimited freedom of action of some powerful individuals, the creation of monopolies in certain sectors, the lack of transparency and accountability and a general culture of impunity resulting from interference with the work of the judiciary. **Sectorial corruption** affects different spheres of society, scholars talk about political corruption, judicial corruption, academic corruption, corruption in health sector, legislative corruption and so on.

Measures taken to prevent corruption have made progress in recent decades around the world and the level of regional and global cooperation in the fight against this phenomenon has increased. But even the world's strongest criminal networks have not stayed idle, but have taken advantage of legal and institutional weaknesses and loopholes to ensure the continuation of their illicit benefits. The forms of their corrupt actions have evolved and are sophisticated to the extent that they include attempts to "legalize" their criminal acts. In addition to capturing states with weak institutions and those in transition, these groups tend to extend their influence to consolidated states and developed economies. One of such forms of action are efforts to change the **legal framework**².

¹ petty corruption

² The legal framework is built through laws and administrative instructions. Laws are formal acts adopted by the Assembly and represent the set of



Administrative Instructions are bylaws provided by law and are approved by the government. The guidelines further supplement and detail the legal provisions and should be in full compliance with the law from which they derive. Unfortunately, the fact that they are drafted and approved by the executive has been used by the ruling parties to adopt guidelines contrary to the applicable laws, thus damaging the public interest.] which guarantees full control over a sector. Such legislation, which serves the specific interests of persons or narrow networks in a sector, is known as **“tailor-made law”**³.

The real intentions behind these legislative initiatives are usually hidden in the text of the legal provisions, and the legal effects only become apparent once they are implemented. Scholars in the field of anti-corruption agree that the main purpose of these laws is to control a particular sector or to continue to enjoy privileges for certain interest groups. To ensure this, tailor-made law operates on three levels::

- 1 On an individual level** - these groups aim to bring the recruitment process under full control with a view to appointing suitable persons for the implementation of their schemes and at the same time dismissing certain officials.
- 2 At institutional level** - damaging the so-called system of “checks and balances⁴” within institutions, reducing the monitoring capacities of auditor agencies and offices, reducing institutions’ budgets, and building a complex system of inter-agency accountability.
- 3 At public level,** hampering public access to official information in order to weaken the control of government work by the media and civil society.

norms through which a particular area of the public sphere is regulated. The Assembly - as the highest legislative and representative body - is the only political arena where citizens’ interests are represented, defended and confronted until a general consensus is reached in the form of a law or other legal act.

³ In English known as “tailor-made law”

⁴ From English “checks and balances



The Kosovo Democratic Institute, as part of the global anti-corruption network - Transparency International, is implementing a project involving five other Western Balkan states (Serbia, Northern Macedonia, Bosnia and Herzegovina, Montenegro, Albania) and Turkey. One of the objectives of the project is also to understand the extent to which the phenomenon of “tailor-made law” is widespread in the Balkan region and the possible links between similar cases in these countries. The institute has analyzed several legal and sub-legal acts as suspicious cases of legislation such as: draft law on financing of political entities, draft law on freedom of association, administrative instruction on homologation of vehicles and administrative instruction on medical treatment outside public health institutions.



HOW TO IDENTIFY CASES OF TAILOR-MADE LAW?

During the legislative process, these cases are identified through continuous monitoring of the process of drafting and reviewing draft laws at both the governmental and parliamentary levels. Similar experiences from other countries refer to the phenomenon of some individuals (whether MPs or government officials) becoming ardent advocates of legislation and loyal to any change.

The Draft Law on Financing Political Parties was intended to supplement and amend the current law⁵ which regulates the manner, conditions of financing, administration, supervision, transparency and reporting of assets and income of political entities in the Republic of Kosovo. Following the Venice Commission’s positive review of the text of the draft law, the draft law passed its first reading and entered the stage of main review by the Parliamentary Committee on Budget and Finance. The work of the working group set up by this Commission was characterized by lack of transparency and inclusiveness, preventing civil society representatives from attending its meetings. There were even cases of expulsion of MPs themselves.

Finally, the text of the draft law with the amendments of the Commission became public and with it the real intentions of the sponsors of this draft law. The detailed analysis of the text revealed many irregularities, which could be categorized into **five main points**. First, it restricted the independence of the Political Entity Registration Office, as part of the Cen-

tral Election Commission (CEC) by removing the mandate to oversee the finances of political parties. The transfer of these functions to a political body such as the CEC (composed of representatives of political parties) contradicted the recommendations of the Venice Commission to strengthen the role of the Office. Secondly, it did not address the priorities of the European Reform Agenda (ERA) to ensure transparency, accountability, implementation and effective sanctioning of political party finances. The third point was the violation of the principle of constitutionality of the law, due to the conflicting provisions regulating the relations between the political entity and the parliamentary group on the issue of the allocation of the Democratization Fund (funds allocated to political entities on the basis of the number of seats in the political parties in the Assembly).

Furthermore, the proposed changes to the law affected the transparency of political entities as they enabled entities not to disclose the names of the owners of companies contributing to political entities. In addition, the allowable contribution ceiling for political entities was proposed to be ten folded (from 50 to 500 Euros), while the contributions during campaigning to double. And lastly, the reduction of accountability of political entities to the public was evidenced in the provisions that allowed the extension of deadlines for the publication of campaign financial reports and mitigation of fines of up to 75 percent for violations of law by political parties.

⁵ Law no. 03/L-174 on the Financing of Political Parties





After analyzing the changes proposed by the Assembly Budget and Finance Committee, a group of civil society organizations gathered around a coalition to prevent the draft law from being adopted. The campaign consisted of meetings with all political party leaders, diplomatic missions accredited in Prishtina and organizing protests. All of these activities also received media attention, thereby creating an atmosphere of public pressure on decision makers to act. In the end, the campaign proved successful and on 21 June 2019 the Government decided to withdraw the draft-law.

Even the Law on Freedom of Association⁶, which regulates the establishment, registration, internal governance, operation, termination and de-registration of non-governmental organizations in Kosovo, was the focus of the 2017 legislative change initiative. Even in this case, the network of civil society organizations launched a campaign against the Freedom of Association Draft-law, insisting that the changes introduced to the Parliamentary Committee lobbied by representatives of micro-finance institutions violate the nonprofit principle of civil society engagement. These changes enabled micro-finance institutions (then registered and operating with the status of non-governmental organizations) to transfer the profits accrued through micro-credit to other organizations. This campaign also forced the President of the Republic not to promulgate the law, which had passed the second reading in the Assembly.

⁶ 04 / L-57 on Freedom of Association in Non-Governmental Organizations

⁷ <https://gzk.rks-gov.net/ActDetail.aspx?ActID=14671#>



Identification of cases of legislation commissioned **after its adoption and entry into force** is done through monitoring its implementation and measuring the effects it has on society. It usually starts with identifying **direct beneficiaries** that may be companies (or groups of companies) with political affiliations, organized crime groups in the service of current power holders, etc. Furthermore, **victims of such legislation** are identified (excluded from competition in the sector, injured customers, neglected suppliers, party candidates, dismissed officials, etc.)

The largest beneficiaries of these schemes are the oligarchs. Corruption in the legislative process by these powerful individuals is one of the first symptoms of the **captured state**, which provides monopoly and impunity to powerful persons helping them to devour wealth and power by choosing no means. The term “state capture” was first used by the World Bank to describe the situation created in Russia and other states exiting the Soviet Union, more specifically the practices installed where small corrupt groups used their influence over elected and government officials to strengthen their economic positions.

In Kosovo, we have the recent case of **Administrative Instruction on vehicle homologation**, which derives from Law 05 / L-132 on Vehicles⁷ and sets out the procedures,





organization and conditions for the placing on the market of road vehicles as a whole, their systems and spare parts. The instruction also specifies the technical conditions for the homologation of the type of vehicle, the types and contents of the homologation forms and certificates as well as the consent to the registration form, their validity, refusal to issue, etc.

There is currently a campaign in Kosovo involving non-governmental organizations as well as former opposition parties. The only request of this campaign is to bring to an end the monopoly of the “Euro-Lab Company” during the homologation process and allow free and fair competition for other companies to provide the same services. The campaign has also drawn the attention of EU representatives in Kosovo. The Head of the EU Office in Kosovo, Nataliya Apostolova, addressed the Parliamentary Committee on Economy on 19 June this year to raise concerns about monopoly on vehicle homologation and the imposition of non-tariff barriers on new vehicles, which are causing unnecessary expenses to the people of Kosovo.⁸

“The EU is concerned that the Government Administrative Instruction 02/2018 on vehicle homologation will lead to the extension of the monopoly, as the current regulation implies the automatic extension of the economic operator who has had exclusive agreement since 2008. This practice runs in contradiction with the spirit of the Stabilization and Association Agreement (SAA) and creates trade barriers. Competition between homologation service providers will lower the price and enable better services for the people of Kosovo,” Ambassador Apostolova said to the members of the Committee. She also expressed concern about mandatory homologation and verification of conformity certificates of new vehicles originating in the EU. “This is against the rules for competition within the EU. According to EU legislation, new vehicles with valid EU homologation must be admitted for sale and registration without any additional checking or costs”. The Kosovo government has pledged to implement EU-related reforms,

in line with European standards, and such a practice of vehicle homologation is detrimental to consumers and is contrary to the spirit of the SAA.

Another similar case is the **Administrative Instruction on medical treatment outside public health institutions**. Instruction 10/2013, adopted in May 2012, enabled the Ministry of Health to establish a National Program for treatment outside public health care institutions. The program enabled patients to receive subsidized treatment outside of public health institutions for services that the public health system could not provide. The Administrative Instruction was initially considered vital to the health of Kosovo citizens who were forced to seek medical treatment at private health facilities in the country and abroad by paying unbearable bills for their financial capabilities. The first challenges to this legislation became apparent several months after its implementation, when complaints about the work of the then Minister of Health and other ministry officials amounted to charges against 59 persons and 4 legal entities. The former Minister of Health and the Secretary General of the Ministry of Health led the group accused by the prosecution of abuse of office, bribery, irresponsible medical treatment, unlawful use of medical and pharmaceutical activities, allowing payments for the treatment of patients outside public health institutions for the period 2011-2015 and causing total damage to the country’s budget of about 4.5 million Euros. Following the situation created, in 2017 the Ministry of Health drafted the new administrative instruction⁹ which seems to have prevented potential large-scale irregularities.

All serious studies in the field of anti-corruption agree on one thing: a very thin thread separates the legitimate activities of lobbyists during the legislative process and the pressure that certain interest groups exert on decision makers to pass legislation that serves their interests. This inevitably raises the question of whether the conditions for a legal framework regulating the field of lobbying have been created in Kosovo.

⁸ https://eeas.europa.eu/delegations/kosovo/64369/node/64369_sq

⁹ <https://msh.rks-gov.net/wp-content/uploads/2017/01/Udhezim-Administrativ-3-2017.pdf>





DOES KOSOVO NEED A LAW ON LOBBYING?



LOBBYING MEANS THE TOTALITY OF THE ACTIONS OF A GROUP OF INTEREST IN ORDER TO INFLUENCE THE ACTIONS, POLICIES OR DECISIONS OF OFFICIALS (LEGISLATORS, GOVERNMENT REPRESENTATIVES, AND BOARD MEMBERS IN REGULATORY AGENCIES). LOBBYING ACTIVITIES INCLUDE PRESENTING GROUP REPRESENTATIVES TO PARLIAMENTARY COMMITTEES, SENDING LETTERS, ORGANIZING CAMPAIGNS, BUT THERE IS ALSO A LACK OF RESEARCH ON LEGISLATIVE INITIATIVES OFFERED TO PARLIAMENTARY COMMITTEES.

Establishing clear rules for lobbying is an important step in strengthening transparency and the legal framework for combating corruption, so establishing a legal framework is an important part of modern democratic society. Law-regulated lobbying enhances transparency in the public sector and regulates relationships between different groups of interest, lobbyists, public office holders and politicians, which contributes to the better functioning of the state administration.

Laws regulating lobbying should clearly define who can act as a lobbyist and how they can influence official

policies. In many cases, lobbyists are an influential and important factor in the policy-making process. By representing various groups of interest, lobbyists help the government in identifying the most important needs of society. By increasing transparency in the public sector, the state protects itself from the negative consequences that lobbying can have.

The experiences of countries in the Balkans show that proper implementation of these laws requires some time to be put into practice. In Macedonia, the activities of non-governmental organizations and citizen groups have played an important role in the adoption and subsequent amendment of the law on lobbying, while in Slovenia and Montenegro this law has proved to be an important part of the legal framework for combating corruption in the public decision-making process..





RECOMMENDATIONS

Lobbying is a legitimate activity and an important part of the democratic process. In a democratic society there is always the public interest in ensuring a transparent and full integrity lobbying process. The Democratic Institute of Kosovo considers that the conditions for this scope have been clearly defined in Kosovo by the Kosovo Democratic Institute and proposes the following recommendations that should be taken into account by law-making initiatives:

- 1 The legal framework for lobbying **should clearly define** lobbying, what can be considered a legitimate goal of a lobbying activity and who can be a lobbyist. As an activity that involves direct or indirect communication between lobbyists and public officials in order to influence public decision-making, this legislation should clearly define the concepts of public¹⁰, lobbying official¹¹ and public decision-making¹².
- 2 Transparency in communication between lobbyists and public officials should be guaranteed by law in order to contribute to stakeholder participation and increase public confidence. Responsibility for transparency is shared between lobbyists and public officials but it is the public officials who will be held accountable for decisions made on behalf of citizens.
- 3 **Registration of lobbyists** should be mandatory. The law should require the creation of a Compulsory Lobbying Register, in which individual lobbyists as well as all lobbying organizations are registered in order to conduct their lobbying activities. Registered entities must report on their activities on a periodic basis, along with other information: the identity of the lobbyist, the issue of lobbying activities and required results, the final beneficiary of lobbying activities, the target institution and public official, the type and number of lobbying activities, supporting documentation shared with public officials, lobbying costs (including voluntary or "in-kind"), funding sources, etc.
- 4 The law should also clearly state restrictions after termination of employment ("cooling off period"¹³), the period of 2 years before the former public official can lobby the institution to which he was previously engaged. Restrictions must also exist prior to employment when prospective public officials must undergo a process of conflict of interest verification.

10 A public official can be any individual with decision-making powers who is elected, appointed or employed in the executive or legislative branches of government at central or local level.

11 A lobbyist may be any natural or legal person engaged in lobbying activity, whether for private or public purposes, with or without compensation.

12 Vendimmarrja publike përfshin procesin e draftimit dhe ndryshimit të legjislacionit ose ndonjë masë tjetër rregullatore: zhvillimin, modifikimin dhe zbatimin e politikave, strategjive dhe programeve dhe dhënien e kontratave ose granteve qeveritare, vendimeve administrative ose vendimeve të tjera të shpenzimeve publike.

13 Literally from English "cooling period"





- 5** The law should also provide for **adequate oversight** through an independent body charged with administering the Lobbying Register; reviewing potential conflicts of interest; investigating complaints, violations and irregularities, providing guidance and training to lobbyists and public officials, and organizing campaigns to raise public awareness.
- 6** The law should provide for **effective and proportionate sanctions** for lobbyists and public officials when violating lobbying rules. These sanctions should have scales which include the temporary de-registration of lobbyists and disciplinary proceedings for public officials but also the threat of criminal sanctions. Institutional responsibility is also attached to personal responsibility if the consent of the leaders of the organization in committing the crime is revealed.
- 7** The legal framework for lobbying should take into account **the local context** and harmonize it with the **broader legal framework and policies** in place. The legal infrastructure to be consulted is one that sanctions the trading in influence and other forms of corruption (e.g. giving and receiving bribes), financing and sponsorship of political entities and candidates, public procurement; media law; labor law; the law on protection of whistle-blowers; legislative process (including expedited review); law on freedom of association, petitions, etc.



