
ILLICIT ENRICHMENT AS A CRIMINAL OFFENSE: POSSIBILITY OF IMPLEMENTATION IN THE NATIONAL CRIMINAL LEGISLATIONS

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The authors analyze the criminalization of illicit enrichment in order to examine the possibilities for the implementation of this crime in national legislations. The incrimination in question has existed for a long time as a mechanism for combating corruption and other forms of economic crime characterized by a dark figure, but it is practically unrepresented in Europe (especially EU countries) as well as in the United States. The reason why some countries are reluctant to introduce the crime of illicit enrichment into their legislation is mainly related to allegations that it violates important human rights and guarantees in the criminal process. The literature specifically mentions the risks of violation of the presumption of innocence, violation of the right to silence, violation of the privilege against self-incrimination, violation of the burden of proof principle, violation of the lege certa principle, violation of ownership rights etc. After a brief look at the historical background, we also analyzed the essential elements of incrimination. We pointed out that adequate nomotechnics can avoid the risks of violating the principles listed above, but we have singled out the issue of determining the threshold of enrichment in order to mark the criminal zone / dealing with the lege certa principle and the issue of the competent authorities capacity to continuously determine all important circumstances when it comes to the criminalization of illicit enrichment as a critical spots of the incrimination that we analyzed that should be carefully addressed.

KEYWORDS: *illicit enrichment; unexplained wealth; human rights; due process safeguards; corruption.*

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INTRODUCTION

Nations often face huge procedural challenges in successfully detecting and prosecuting their officials when the officials engage in corrupt activities (Boles, 2013: 836). Difficulties in detecting cases and initiating anti-corruption proceedings have led many governments, and consequently international organizations, to consider alternative measures that go beyond the classic provisions of criminal law and address the risks of corruption. One of the difficulties when dealing with a hidden crime like corruption is its detection. Using traditional investigative techniques can take years and a highly sophisticated team of experts with spending tremendous resources. Even after spending a considerable time on investigations it is not unusual for the prosecuting authorities to drop a case owing to lack of evidence (Carr, Lewis, 2010: 38).

Determining the existence of corrupt crimes is, as a rule, associated with problems in finding relevant and credible evidence. Therefore, on the one hand, we have a situation where it is extremely difficult to accuse for corrupt crimes and then to convict the defendant, while on the other hand it is indisputable and ubiquitous that many people, especially those who hold public office often have property and material benefits that is much higher and is significantly disproportionate to their legal and declared income.

Corruption appears to be a kind of “business offer” made to the public authorities. Therefore, corruption is able to provide a sphere of interest for both sides of corrupt relationships, making them interested to extend such relation in confidence. Because of this, it is extremely difficult to detect and even harder to get to any kind of evidence that could be used in court proceedings (Stevanović, 2019: 115).

In the case of corrupt crimes, the most visible and the most immediate consequence is the fact that officials may amass luxury cars, buy homes that look like palaces and enjoy exotic vacations. Such social, economic and political anomalies could be labeled as “illogicalities” that are clear indicators of high degree of corruption in one society.

Having in mind the paradoxical situation that individuals show off wealth with disputable origin in terms of legal acquisition, the idea arose to incriminate, ie target precisely the amount of wealth that could not possibly have come from official salary or other legal income. One of the first attempts to pass a bill on the concept of ‘illicit enrichment’ was made by a 1930s Argentinian congressman, Rodolfo Corominas Segura, after being inspired by an encounter he had with a public official who openly displayed an amount of wealth that was in a huge disproportionate to his legal and declared income (Muzila *et al*, 2012: 7). Such attempt most likely failed due to a lack of political will, but it certainly influenced the concept of *illicit enrichment* to be codified in various international documents in the decades that followed, and then implemented in numerous national legislations.

The idea of sanctioning illicit enrichment is not inherent only to the criminal law. On the contrary, it has developed in civil law in order to regulate the situation when in a quasi-contractual relationship one party without a legal basis increases its property at the expense of the other(s). Furthermore, a similar concept is related to public, more precisely tax law, where in many legislations there is a possibility to determine the origin of property and within that process the possibility to tax the part of the property for which the legal origin is not proven, with special tax rates which are far more intrusive than the regular tax rates. However, having in mind that criminal law implies the most powerful form of legal (formal) social control known to modern civilization (Clark, Marshall 1967, 23), and that it most directly attacks the goods and interests of persons who violate criminal norms, it is indisputable that precisely in the domain of criminal law, illicit enrichment as a crime causes the most controversy in the professional and general public. This is mostly because the formulation of incrimination of illicit enrichment, as proposed in the *United Nations Convention Against Corruption* (UNCAC),¹ according to some scholars, but also the views of some constitutional courts, is contrary to proclaimed constitutional guarantees and “due process” principles. For the reason of divergent attitudes towards this legal concept, the main focus of our article will be put on considering the relationship between incrimination in question with a set of guaranteed human rights and especially with guarantees in criminal proceedings, which are considered as an indispensable civilizational heritage of the rule of law.

1. HISTORICAL BACKGROUND AND DEVELOPMENT OF THE IDEA

We mentioned the unsuccessful but certainly significant attempt of the Argentine congressman to target and criminalize unexplained wealth. Thereafter, In the early 1950s, Hong Kong introduced a regulation that outlined disciplinary offences for public officials that could not explain how they managed to own assets or maintain a standard of living that was disproportionate to their official salaries (Dornbierer, 2021: 22).

In the coming decades, many other countries such as: Egypt, Sénégal, India, Cuba, Turkey, Niger etc. have introduced a laws to prevent possession of unexplained property (Dornbierer, 2021: 22).

International recognition at the regional level, for the concept of illicit enrichment was made when the *Inter-American Convention Against Corruption*²

¹ United Nations Convention Against Corruption, Article 20.

² The IACAC adopts an aggressive approach in treating illicit enrichment as a mandatory offense.

(IACAC)³ became the first convention to include illicit enrichment under Article 9, describing the concept as a “significant increase in the assets of a government official that he cannot reasonably explain in relation to his lawful earnings during the performance of his functions...” It was 1996 and seven years later, in 2003, the *African Union Convention on Preventing and Combating Corruption* (AUCPCC)⁴ became the second convention to include a provision on illicit enrichment, describing the concept in the same manner.

Finally, in the year 2003, the UNCAC also included a provision on illicit enrichment in Article 20 stating that: “Subject to its constitution and the fundamental principles of its legal system, each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, illicit enrichment, that is, a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income.” With this, the international recognition of a concept got a universal dimension. However, due to the existence of numerous controversies that are reflected in conflicting views when it comes to the violation of important criminal law principles, the crime of illicit enrichment is provided as an option, ie. states are only obliged to consider the possibility of introducing it into their legal systems if this is not contrary to its constitution and the fundamental principles of its legal system. Today, illicit enrichment provisions can be found in most regions of the world, with the notable exceptions of North America and most of Western Europe (Muzila *et al*, 2012: 9).

At the heart of the whole idea of legally sanctioning illicit enrichment is the fact that any increase in property must have its legal basis. When it comes to the criminal aspect of the fight against unexplained capital, two main goals prevail.⁵ The first one is to recover property acquired through crime, and the second one is to punish the perpetrators by fulfilling the preventive role of criminal law. Following the nature of the incrimination itself, it seems that illegal enrichment fully corresponds to the challenges posed by the fight against corruption, ie. represents a simplified form of preventive mechanism. From the aspect of criminology, it was pointed out in the XVIII century that it is more important that the punishment is fast and certain, than to be severe, because only in that way the necessary efficiency could be achieved (Ignjatović, 1997: 9).

The introduction of illicit enrichment in criminal law legislation could possibly cast a shadow over many so-called corruption offenses (Taking / Offering Bribes, Trading in Influence and Abuse of Office...) for the reason that punishment would be possible if it is proven that in a certain period a certain person knowingly owns property that significantly does not correspond to his legal income. This

³ Inter-American Convention Against Corruption, Article 9.

⁴ African Union Convention on Preventing and Combating Corruption, Article 1.

⁵ Argentina and India became the first countries to criminalize illicit enrichment (Muzila *et al*, 2012: 8).

does not mean that the mentioned corruption crimes, which UNCAC prescribes as mandatory, lose the purpose of their existence, on the contrary, they would be applied on the basis of the *principle of specialty* when prosecuting authorities can prove the fulfillment of all elements, ie. when it is possible to provide the necessary evidence. There should be a more severe threatened punishment for those criminal acts. Moreover, the offence of illicit enrichment should be seen as a tool of last resort. When enforcement authorities can pursue cases by prosecuting regular corruption offences, the illicit enrichment offence, with its implied limitations of defendants' rights, should not be considered a proportionate response. On the other side, illicit enrichment as an incrimination, seeks to cover all those situations in which an official with a salary of \$ 1,000 per month, has a car that costs \$ 150,000 and is unable to explain where he got the funds to buy it.

In above mentioned simplification of the proceeding lies the potential danger of abuse and violation of not only important principles of criminal procedure, but also of human rights in criminal procedure. This danger can be eliminated only with a careful criminal-political strategy and careful nomotechnics.

However, when it comes to the criminal-political justification for the implementation of this crime, it should be emphasized that the Organization for Security and Co-operation in Europe considers the existence of such an offense to be one of the best practices for combating corruption. For instance, In Hong Kong, where the offense has existed for nearly 40 years, the Court of Appeal found that it has "implemented its effectiveness in the fight against corruption". Finally, a recent study by the World Bank / UNODC's StAR Initiative notes that some jurisdictions were able to recover large sums of money thanks to the offense of illicit enrichment (Perdriel-Vaissiere, 2012: 3).

2. DEFINING ILLICIT ENRICHMENT

Despite the fact that illicit enrichment has now become a widely adopted legal concept, there is still a significant amount of uncertainty amongst practitioners over what the concept actually refers to (Dornbierer, 2021: 25).

Based on the definitions found in the UNCAC, AUCPCC, and IACAC it could be said that five core elements comprise the offense: (1) *a public official who* (2) *during the relevant time period* (3) *experiences a significant increase in assets* (4) *knowingly* and (5) *without justification* (Muzila *et al*, 2012: 13).

2.1. Potential perpetrators

Given the importance of their duties, as well as access to the public budget and the ability to dispose of it, most international and national definitions of illicit enrichment see public officials as potential perpetrators and *persons of interest*. There are two issues that arise in this context as controversial. The first relates to the scope of the term public official, while the second concerns to the related persons. We suggest a broad view of “public official” that includes anyone who provides a public service or performs a public function.⁶

Much bigger problems than defining the term public official occur when an official *de facto* controls a certain property that is formally transferred to another person, as a rule to a family member. That is the reason why a number of countries also scrutinize the financial dealings of the family members and close associates of the public official (Boles, 2013: 853).

This problem can also be solved by adopting the model that Lithuania⁷ has decided on, as the only EU member state that has criminalized illicit enrichment. According to this model, the target person is not a public official exclusively, but any person (it also applies to legal entities) who realizes the remaining elements that make up illicit enrichment.

2.2. The relevant time period

The “period of interest” refers to the period during which a person can be held liable for having illicitly enriched himself. Knowing that in the most legislations where there is an incrimination of illicit enrichment, it targets public officials, the logical consequence is that the period in which a crime can be committed coincides with the period of performing public duty.

Since it is not an unusual situation to maintain the socio-political influence even after the period of office, officials can commit this crime for several years (depending on the legislator’s choice) after leaving office. We can label this as

⁶ According to UNCAC: ‘Public official’ shall mean: (i) any person holding a legislative, executive, administrative or judicial office of a State Party, whether appointed or elected, whether permanent or temporary, whether paid or unpaid, irrespective of that person’s seniority; (ii) any other person who performs a public function, including for a public agency or public enterprise, or provides a public service, as defined in the domestic law of the State Party and as applied in the pertinent area of law of that State Party; (iii) any other person defined as a ‘public official’ in the domestic law of a State Party.” See Article 2(a).

⁷ Lithuania is not an isolated case. While most states have enacted illicit enrichment legislation directed toward public officials, some have extended it to the private sector.

a second approach that is more intrusive than the first, but better responsive to reality. However, there are also legislations that have opted for an open-ended period approach which, in our opinion, violates the principle of obsolescence of prosecution in criminal law. The period of interest should be distinguished from the period forming the basis of an investigation or indictment (Muzila *et al*, 2012: 17).

2.3. Significant increase in assets

It is indisputable that the reaction of the criminal law mechanism in the given context deserves only significant increase in assets. In the practice of countries that have criminalized illicit enrichment, the notion of significant is generally not defined in detail. Nevertheless, after a comparative insight, it can be concluded that most countries link a significant increase in assets to the legal and reported income. However, most legislators do not define what is considered “disproportionate”, thus leaving this to be determined by prosecutors and the courts, that due to insufficient specificity, directly violates the principle *lege certa*.

An appropriate approach would be to set a threshold expressed as a percentage of legal income. We point out that the threshold needs to be set at the level that justifies the punitive reaction. This, of course, does not mean that unjustified increases in property below that threshold should be ignored by the competent authorities, but that it does not deserve a response from the criminal mechanism. Such illegal increases in assets could be treated by special tax rates or by disciplinary measures.

Although in the practice of some countries (Hong Kong, Malawi, Nepal, Lesotho...) a lifestyle that is not in accordance with legal income is criminalized, we argue that it should not be an element of the crime. Rather, the “lifestyle” triggers an investigation because this is the only visible manifestation of illicit enrichment (Muzila *et al*, 2012: 17).

Another important issue that arises here is the notion of property. The meaning of “assets” and similar terms in illicit enrichment statutes dictates what types of evidence prosecutors may introduce to prove illicit enrichment (Boles, 2013: 835). There is a consensus that assets should include liquid assets, real property, income-generating instruments, and the like. Many jurisdictions only legislate for a limited definition of illicit enrichment, and only take into account situations in which someone has acquired traditional tangible and/or intangible assets that cannot be justified in reference to their lawful income (Dornbierer, 2021: 25). In addition, it should include all legal forms of property acquisition in accordance with national laws regulating the acquisition of property. As it is the case in Argentina,

the relevant provision defines an enrichment in terms of net worth, taking into account debts or other obligations that have been canceled (Muzila *et al*, 2012: 19), what we consider to be an adequate solution.

At the widest end of the spectrum, many jurisdictions define illicit enrichment to include the unjustifiable enjoyment of anything of pecuniary value (Dornbierer, 2021: 26) what certainly is not in line with basic criminal law principles such as the principle of *lege certa*.

2.4. Intent

The UNCAC explicitly requires a demonstration of intent in the offense of illicit enrichment by incorporating the element “when committed intentionally.” We argue that it is not unduly to emphasize the intention as a subjective element of the crime, but this is not necessary at all, since it is difficult to imagine that someone increases his property with no intention. This is also the reason why IACAC and AUCPCC expressly do not identify intent as an element of the crime. Furthermore, intent is usually considered an overarching element in the definition of criminal offenses within a criminal code and, as such, does not need to be spelled out in each and every case (Muzila *et al*, 2012: 21).

2.5. Unjustifiability

The final element requires that the enrichment lacks any legitimate explanation or justification. When it comes to the legitimate explanation, as we have already stated, the legal basis for acquiring property should only be taken into account. This is generally not disputable, but the problem is the burden of proof. Illicit enrichment prosecutions can potentially be challenged constitutionally on the basis that the reversal of the burden of proof violates the defendant’s right to a due process (Fagan, 2012: 3). We will address this issue in more detail in the next chapter where we analyze the criminalization of illicit enrichment in the context of human rights and due process safeguards.

3. ILLICIT ENRICHMENT OFFENSE AND HUMAN RIGHTS VIOLATIONS – HOW TO AVOID PROBLEMS

As the Human Rights Council observed the promotion and protection of human rights is essential to the fulfillment of all aspects of an anti-corruption strategy.⁸ There are a large number of theorists and practitioners who argue that criminalizing of illicit enrichment raises serious questions of civil liberties protection and criminal proceedings safeguards.⁹ Taking into account the previous statements from the available literature, but also a certain views of the courts,¹⁰ the following problems related to the criminalization of illicit enrichment stand out:

- violation of the presumption of innocence;
- violation of the right to silence;
- violation of the privilege against self-incrimination;
- violation of the burden of proof principle;
- violation of the *lege certa* principle and
- violation of the ownership rights.

As we mentioned before, in order to avoid listed potential violation of the core principles of the proclaimed human rights and due process safeguards it is necessary to have adequate nomotechnics. With careful selection of legal solutions, the listed risks could be avoided while ensuring efficient implementation.

In fact, an optimal starting point is to prescribe properly the act of committing the crime. It is possible to take into account the following acts: 1) failure to declare the acquired assets 2) possession or owning assets that significantly exceed lawfully gained income 3) the act of acquiring the assets itself (Stojanović,

⁸ Human Rights Council Res. 7/11, Rep. of the Human Rights Council, 7th Sess., Mar. 3–Apr. 1, 2008 U.N. Doc. A/HRC/7/78, at 31 (July 14, 2008).

⁹ For instance, J. Boles has labelled this offence as “perhaps the most controversial criminal offence” (Boles, 2013: 838).

¹⁰ “In 2010, in Romania, the body in charge of fighting corruption (ANI) was able to directly request from the court the confiscation of assets in cases where it was deemed that there was a significant disproportion (exceeding the amount of EUR 10,000) between the acquired assets and legal wage of a public official. However, in April 2010, the Constitutional Court of Romania found that such legal solution was unconstitutional in terms of several elements. It concluded, among other things, that that way the constitutional presumption that the assets have been legally acquired unless proven otherwise was violated.” (Stojanović, 2019: 27). In 1994, Italy’s Constitutional Court overturned the illicit enrichment provisions of Law no. 356 of 1992 on grounds that a presumption based on the status of the accused violated the presumption of innocence.⁴⁷ In 2004 in the Arab Republic of Egypt, the Cassation Court addressed the question of whether the illicit wealth offense is compatible with legal principles and held that the second paragraph of Article 2 of the Illicit Enrichment Law, which defines as an offense whenever such increase is not consistent with the public official’s resources and the public official fails to prove the legitimate source for it, violated the constitution regarding the genesis and presumption of innocence (Muzila *et al*, 2012: 29).

2019: 30). The third solution should be categorically written off. The first and the second, although seemingly similar, are in fact different solutions, since the failure to declare the acquired assets for the persons to whom the law imposes an obligation to do so (public officials) criminalizes this omission. This is due to the fact that these persons have to show an increased degree of transparency in performing duties and income, since they control and dispose of public funds.

When it comes to the possession or owning assets that significantly exceed the lawfully earned income the situation is completely opposite. At the same time, the parallel existence of the first and the second solution do not exclude each other.

The *ratio* of the second solution is to criminalize social illogicality that indicates illegal actions in the sphere of acquiring property. This should not have any negative implications for the acquisition of property and in general for doing business. Simply, if, as an official who earns \$ 1,000 a month, you own a yacht worth \$ 300,000, and you cannot justify it with any legal way to acquire property, then, in our opinion, it is justified to direct the criminal law mechanism to such an official.

All in all, if we start from the fact that the act of committing the crime is possession or owning assets that significantly exceed the lawfully earned income, there can be no violations that we listed above. The burden of proof is on the prosecution, which must prove that the property owned significantly exceeded the lawfully earned income. However, we argue that the solution proposed in Article 20 of the UNCAC, which includes in the element of the act of committing the crime the requirement that the defendant "... cannot reasonably explain in relation to his or her lawful income" a significant increase in his assets is wrong.¹¹ If the legislator accepts the solution from the mentioned Article of the UNCAC, then we can really end up at the shifting of the burden of responsibility field. As we have seen, this is certainly not necessary to ensure the *ratio* of illicit enrichment within the limits set by the basic principles of criminal procedure.

Violation of the presumption of innocence, the right to silence, the privilege against self-incrimination and the burden of proof principle can be avoided with the above proposed norming. It remains to consider the compatibility of criminalizing illicit enrichment with the principle of *lege certa*. The scope of persons who can be potential perpetrators of a crime can be questioned here. However, the problem could be easily solved by prescribing what falls under the notion of public official, civil servant, etc. When it comes to the violation of principle of *lege certa*, the main task is to set the threshold¹² to determine a significant increase in the assets in accordance with the requirements of precision and sufficient clarity. It is therefore

¹¹ It is possible to prescribe that the perpetrator will not be punished for the basic criminal offense if he reasonably explains his earnings on the legal basis.

¹² India, for instance, has set a threshold of 10 percent known sources of income through its jurisprudence (Muzila *et al*, 2012: 18).

necessary that the norm is in accordance with the “principle of legality” which requires that offenses be clearly defined under the law, so that “the individual can know from the wording of the relevant provision what acts and omissions will make him liable” (Kokkinakis v. Greece, European Court of Human Rights, 1993) (Perdriel-Vaissiere, 2012: 3). There is no universally acceptable solution and this issue cannot be solved without a multidisciplinary approach and cooperation first with economists and financial experts.

In addition, a significant increase in assets cannot be observed only in relation to legal revenues, but also in expenditures. Namely, the competent authorities would have to determine the expenses of the defendants so that they could measure the average possible savings from which the defendant, for example, bought an expensive car. This further raises the question of the capacity of the competent authorities to monitor and determine all the circumstances of the incrimination, what appears to be a much bigger problem than the problem of violating the presumption of innocence for instance. However, specifying a threshold for illicit enrichment in statutes may prevent prosecutions where the amounts concerned are trivial - *de minimis non curat praetor* (Muzila *et al*, 2012: 18). In order to focus time and resources on investigating major cases, petty cases involving very small amounts should be the subject of misdemeanor or disciplinary proceedings, while criminal law needs to keep *ultima ratio* nature.

After our brief analysis, we can single out the following problems that seem to be the biggest challenges for the implementation of the crime of illicit enrichment:

- the issue of determining the threshold of enrichment in order to mark the criminal zone/ dealing with the *lege certa* principle and
- the issue of the competent authorities capacity to continuously determine all important circumstances.

CONCLUSION

Criminal response to such severe social deviations as systemic corruption is, requires a certain proactivity of the competent authorities. Traditional anti-corruption mechanisms, while indispensable, have proved insufficient. In the fight against especially corrupt crime, it is necessary to find instruments again and again that will have a preventive effect on potential perpetrators.

It seems to us that potential perpetrators of particularly corrupt crimes have realized that applying a number of principles in traditional criminal proceedings,

such as those relating to legality and gathering evidence, can often help them to stay unpunished. Of course, this does not mean that these principles should be abandoned, on the contrary, they need to be further developed, but respecting them, legislators and competent authorities should focus their energy and resources on implementing instruments that would respond more effectively to the spread of corruption.

When it comes to the illicit enrichment as a criminal offence, we concluded that it can be an important part of the criminal law mechanism in the fight against corruption. The implementation of this crime in national legislation has been compromised by the statements that it violates important principles of criminal procedure and guaranteed human rights. The analysis in this paper has shown that the criminalization of illicit enrichment does not necessarily violate the criminal process safeguards. However, we pointed out much more significant practical problems that should be overcome in order for illicit enrichment as a criminal offense to achieve its full purpose. Those are the issue of determining the threshold of enrichment in order to mark the criminal zone/ dealing with the *lege certa* principle and the issue of the competent authorities' capacity to continuously determine all important circumstances. Zakonodavac u okviru kriminalne politike u svakom slučaju has to put in balance competing rights and interests in prosecuting the crime of illicit enrichment

Finally, if we start from the fact that criminalizing illegal enrichment is a universal cure for corruption, then expectations will certainly not be met. If, on the other hand, we assumed that this incrimination is a corrective that serves to ensure that unexplained wealth does not stay unpunished (indisputable consequence of corruption) when there is no evidence for conviction for another corrupt crime.

REFERENCES

1. Boles, J. (2014) "Criminalizing the Problem of Unexplained Wealth: Illicit Enrichment Offenses and Human Rights Violations", *Journal of legislation and public policy* Vol. 17, pp. 835-880.
2. Carr, I., Lewis, D. (2010) "Combating Corruption through Employment Law and Whistleblower Protection", *Industrial Law Journal*, 39 (1), pp. 1-30.
3. Clark, W., Marshall, W. (1967) *A Treatise on the Law on Crimes*. 7 ed. Callaghan: Mundelein III.
4. Dornbierer, A. (2021) *Illicit Enrichment: A Guide to Laws Targeting Unexplained Wealth*. Basel: Basel Institute on Governance.
5. Fagan, C. (2013) *Anti-Corruption Helpdesk: Providing on Demand Research to Help Fight Corruption – Illicit Enrichment Regulations*. Transparency International.

6. Ignjatović, Đ. (1997) *Kriminološko nasleđe*, Beograd: Policijska akademija.
7. Muzila, L., Morales, M., Mathias, M., Berger, T. (2012) *On the Take: Criminalizing Illicit Enrichment to Fight Corruption*. Washington: The World Bank.
8. Perdriel-Vaissiere, M. (2012) *The Accumulation of Unexplained Wealth by Public Officials: Making the Offence of Illicit Enrichment Enforceable*. Bergen: U4.
9. Stevanović, A. (2019) "Lobbying and Corruption: comparative legal analysis of two notions", *Journal of Eastern-European Criminal Law*, No. 1, pp. 110-120.
10. Stojanović, Z. (2019) "Illicit enrichment of public officials as a criminal offence?" in: *Studia Iuridica Montenegrina*, No. 1, pp. 23-35.

Legal sources

1. African Union. African Union Convention on Preventing and Combating Corruption, 11 July 2003.
2. Organization of American States. Inter-American Convention against Corruption, 29 March 1996.
3. United Nations. United Nations Convention against Corruption, G.A. Res. 58/4, U.N.

NEZAKONITO BOGAĆENJE KAO KRIVIČNO DELO: MOGUĆNOST IMPLEMENTIRANJA U NACIONALNA ZAKONODAVSTVA

Autori u radu analiziraju mogućnost inkriminisanja nezakonitog bogaćenja u okviru nacionalnih zakonodavstava. Iako je odnosno krivično delo već dugo prisutno u „katalogu” krivičnih dela pojedinih zemalja, ali i u više međunarodnih dokumenata, ono ipak nije u široj primeni u zemljama EU kao i u SAD. Razlog tome su glasni stavovi o tome da se krivično delo nezakonitog bogaćenja suprotstavlja važnim principima krivičnog postupka (presumpcija nevinosti, pravo na odbranu ćutanjem, pravila o teretu dokazivanja itd.) čiji je cilj da okrivljenom obezbede fer suđenje kao i da krši brojna zajemčena ljudska prava. Nakon kraćeg istorijskog osvrta na razvoj ideje o samoj inkriminaciji i njenom postepenom razvoju ka konvencijskom krivičnom delu, razmotrili smo elemente bića krivičnog dela, a pošli smo od formulacije koja je data u članu 20. UNCAC-a. Ukazali smo da se pravilnom nomotehnikom mogu izbeći rizici koji se u literature najčešće pominju i koji se odnose na povrede osnovnih krivičnopravnih principa. Sa druge strane, izneli smo tezu da su osnovna pitanja koja bi trebalo da budu rešena ona koja se odnose na obezbeđivanje principa lege certa prilikom formulisanja ove inkriminacije kao i na kapacitete nadležnih organa da

kontinuirano utvrđuju sve relevantne okolnosti od značaja za ovo krivično delo. U svakom slučaju, ohrabрили smo tendenciju uvođenja nezakonitog bogaćenja u sistem krivičnih dela nacionalnih zakonodavstava i to ne kao supstitut tradicionalnim koruptivnim krivičnim delima, već kao samostalno krivično delo sa sopstvenim racionom, čija je svrha da vidljive koruptivne posledice ne ostanu nekažnjene.

KLJUČNE REČI: nezakonito bogaćenje; nelegalan capital; ljudska prava; procesne garancije; korupcija.