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Illicit enrichment of public officials as a criminal offence?[▪▪]

The paper discusses whether the introduction of the new criminal offence of illicit enrichment, whereby offenders would be public officials who, while discharging their public office, acquire assets which they cannot prove have been acquired legally, is justified. Given that the UN Convention against Corruption provides for elements of this criminal offence (Article 20) and recommends that the State Parties consider the possibility of its introduction, various arguments for and against the introduction of this criminal offence have been considered. Despite international recognition of the criminalization of illicit enrichment, it has not been universally accepted as an anti-corruption measure. Instead, such criminalization continues to generate extensive debate and controversy.

Taking a standpoint concerning this issue calls not only for consideration of certain legal issues but also for criminal and political assessment of the usefulness of this criminalization in fighting corruption. This paper presents the main reasons against criminalizing illicit enrichment, as well as the problems that the legislator would face when deciding to take this step.

Key words: Corruption, Illicit enrichment, Public Officials, UN Convention against Corruption, Criminal Law

Introduction

Criminal law plays a significant role in the fight against corruption. However, the scope of criminal law and its possibilities are limited and unclear, particularly when systemic corruption is concerned. An additional problem is that it cannot be precisely determined which type of conduct should be suppressed by criminal law. There is almost complete agreement among scholars about the difficulty of defining a precise concept of corruption, since it is a complex and multidimensional phenomenon. Hence, instead of a single definition of corruption, reference is usually made to

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various concepts of corruption, according to the discipline studying it, its causes, or its types determined mostly by the areas in which it takes place.[1] While in the theory this diversity of opinions and approaches is possible and acceptable, the legislator must have a clear idea of what to suppress and which values to protect.

Furthermore, when referencing the fight against corruption (as well as against organized crime and terrorism), common standards and principles of criminal and procedural law are questioned whereby a lot is put at stake, i. e., do we give up the standards that have become a civilizational achievement, especially when the resulting measures do not contribute greatly to battling corruption.

In addition to the long-standing existing offences used to fight corruption, there have been various proposals and ideas lately to introduce a number of new criminal acts within this area. One of them is the criminal offence of illicit enrichment. The elements of criminalization of illicit enrichment are provided for in Article 20 of the UN Convention against Corruption (UNCAC),[2] as well as the obligation of the State Parties to consider the possibility of introducing this criminal offence (but not to actually introduce it). The Convention quite ambiguously determines the elements of this criminal offence. It consists of illicit enrichment itself, i. e. a significant increase in the assets of a public official for which s/he cannot give a reasonable explanation, taking into account his or her legal income. Specifically, Article 20 of the Convention underlines that State Parties should consider the possibility of introducing this criminal offence, taking into account their constitutions and the basic principles of their legal systems.[3] A disputable issue is whether there is the obligation to introduce it if such an act is not contrary to the constitution and basic principles of the legal system of a certain country, i. e. if it is concluded, after considering the mentioned possibility, that there are no hurdles of that kind, but neither is there criminal-political justification for its introduction. Out of 186 countries that are parties to the UNCAC[4], less than 50, mainly developing countries, have introduced this criminal offence.[5] When it comes to European

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1 See, inter alia: D. M. Santana Vega, The Fight against Corruption in Europe: Lights and Shadows, *Crimen* 3/2017, pp. 242–243.

2 According to the provision of Art. 20 illicit enrichment is considered as 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 when committed intentionally. United Nations Convention against Corruption, 31 Oct. 2003, 2349 U. N. T. S. 41, entered into force Dec. 14, Dec. 2005 (hereinafter UNCAC).

3 The UNCAC (Art. 20) directs signatories to consider enacting criminal illicit enrichment legislation "subject to its constitution and the fundamental principles of its legal system."

4 See United Nations Convention against Corruption Signature and Ratification, Status as of 26 June 2018, UNITED NATIONS OFFICE ON DRUGS AND CRIME, https://www.unodc.org/unodc/en/corruption/ratification-status.html

5 According to L. Muzila et al., *Illicit enrichment*, StAR, The World Bank-UNODC, 2011, p. 9.

countries, only Macedonia[6] and Lithuania[7] have adopted it. Many of the remainder have not even taken the first steps in fulfilling the obligation referred to under Article 20 of the Convention, which is to consider the implications and consequences that the introducing the criminal offence of illicit enrichment would have. This article might thereby be a further contribution to debate about the justification of introducing this offence into national legislation.[8]

Although at first glance it seems that by prescribing this as an offence an effective mechanism to combat corruption among public officials would be gained, seldom has a criminal offence been so controversial in terms of feasibility and justifiability.[9]

1. Arguments in favour of criminalization

The following reasons support the criminalization referred to under Article 20 of the UNCAC.

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6 The Law on the Amendment to the Criminal Code of Macedonia dated 2009, Article 395-a introduced a new criminal offence of illicit acquiring and concealing assets instead of 2004 introduced criminal offence of concealing the origin of disproportionally acquired assets. It is also envisaged, as an act of commission (paragraph 2), when an official or a responsible person in a public company, public institution of any other legal entity managing the state capital while discharging his/her office or duties, either s/he or a member of his/her family, acquires assets the value of which significantly exceeds his/her legal earnings.

7 In Lithuania, the new offence was introduced in 2010. It is already noticed that "the techniques of criminalization and legal wording of the offence (Art. 189) ... do not go well with the established principles of criminalization". L. Pakštaitis, Illicit enrichment as a crime according to the criminal law of Lithuania: origins, problems of criminalization, implementation and perspectives, *Jurisprudencija*, 1 2013. p. 340.

8 In Montenegro, this issue has been considered since 2011. Among other things, the Ministry of Justice organized a round table with the participation of foreign experts in 2012. The introductory presentation was held by the author of this paper. See: Z. Stojanović "Fight against corruption: Illicit enrichment — pro et contra," Workshop on Organised Crime, Issue: Regional Cooperation and European Practices, European Commission Taiex, Danilovgrad, Montenegro, 24–25 February 2012. Although there were some opinions in favour of the introduction of this new criminal offense, the majority thought that it was not justified. Further, the National Research Center of Montenegro has undertaken a comparative study of the legislation of European countries. The study showed that of the 23 European countries covered by the research only Macedonia and Lithuania introduced new criminal offence, while the remaining 21 countries do not recognize illicit enrichment as a criminal offence, "neither there have been any deliberations with regard to the possibility or its introduction in their legal systems". See: *Comparative overview: Criminalisation of illicit enrichment of public officials in certain European countries*, Parliament of Montenegro, Parliamentary Institute, Research Centre, Podgorica, April 2016, p. 7.

9 This offence has been labelled by some scholars "perhaps the most controversial criminal offence". See J. Boles, Criminalizing the Problem of Unexplained Wealth: Illicit Enrichment Offenses and Human Rights Violations, *Journal of legislation and public policy* 2014, vol. 17. number 4, p. 838.

First of all, this form of criminalization might be useful when fighting corruption committed by representatives of the political establishment, particularly in cases of so called systemic corruption, and corruption committed by representatives of political power where the law is powerless. However, the expectation that this criminalization would make progress in positive terms is just a presumption, and it is not possible to draw any certain conclusion in this respect. The experience of the countries that have introduced this criminal offence cannot confirm such a conclusion.[10]

Further, it would significantly simplify establishing proof, i. e. a conviction would be relatively easily adjudicated, which could lead to the efficient application of the criminal law. Namely, it would not be necessary to establish that a criminal offence of corruption had been committed. It would suffice to establish a significant discrepancy between the assets a public official had at the time s/he took office and at some later stage in the course or after termination of his/her office, provided that s/he cannot prove that the assets have been acquired legally. Establishing proof is simplified by the existence of the obligation of public officials to declare their assets. In many countries, non-disclosure of assets or giving false information on assets by public officials is deemed a criminal offence.[11] However, the fact there has not been a single final decision concerning the mentioned criminal offence, despite the fact that it can be easily proven, speaks in favour of the fact that when fighting against corruption committed by political representatives or representatives of economic elite, proving related problems is not the main obstacle.

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[10] Hong Kong is among few countries that introduced this criminal offence, and some of its solutions have become the model for efficient fight against corruption. Bangladesh, which has been for years among the countries with the highest level of corruption, is also one of these countries. Besides, to assess whether this inclination contributes towards fighting corruption, in some countries, it would be necessary to be well aware of a series of other factors, inter alia, whether it is really enforced.

[11] In Serbia, for instance, The Anti-Corruption Agency Act ("Official Gazette of the RS", no. 97/2008, 53/2010, 66/2011 — decision of the Constitutional Court and 12/2013 — Interpretation Act) stipulated in Article 72 the criminal offence of non-disclosure of assets or giving false information on assets. Namely, public officials who failed to declare their assets to the AC Agency or give false information about their assets, intending to conceal the information on their assets, shall have a prison sentence ranging from 6 months to five years sentence imposed. See Z. Stojanović *et al*., Priručnik za suzbijanje privrednog kriminaliteta i korupcije (Manual for combating economic crime and corruption), OEBS — Misija u Srbiji, Beograd, 2017, p. 234–235. Unlike Serbia and some other countries, in Montenegro the non-disclosure of assets or giving false information on assets by public officials constitutes an administrative offense for which a fine is prescribed (Article 103 para. 1 item 22, 23 and 24 of Law on prevention of corruption, Official Gazette of Montenegro, no. 53/2014).

2. Arguments against criminalization

The following arguments are, inter alia, against the introduction of the offence of illicit enrichment.

Criminalization would lead to a certain restriction of ownership rights. Despite the fact that there are not sufficient arguments to claim that criminalization would be unconstitutional and that it would violate ownership rights[12], there are however some doubts thereto. Hence, one could claim that the introduction of such criminalization, at least compared to the limited circle of political officials, brings uncertainty in ownership rights. It could have negative repercussions in terms of readiness to take a political or any other office, for the reason that whoever takes it would be subject to controls and checks of assets and would face the risk of being easily convicted even in cases when they did not commit any corruption-related criminal offences. Also, in terms of assets which were fully acquired in a legal way, an individual could, for whatever reason, be opposed to being subject to controls, and to having this information made publicly available. The problems would particularly arise in those countries where the tax administrations and tax systems do not function adequately. On the other hand, the counter-argument is that it concerns only public officials and not common citizens and that they are expected to be able to explain the origin of their assets.

Criminal law is *ultima ratio*, that is, it should be used only when all other resources and mechanisms available to society have been exhausted. This would mean, amongst other things, taking serious steps to apply existing offences to public officials. In the situation when not even the existing statutory offences are applied, introducing new ones can hardly be justified. Moreover, the criminalization of unlawful enrichment would also have the effect of demotivating the judiciary to apply the existing criminal offences of corruption.

The statutory description of the criminal offence would be vague and difficult to define in line with the usual standards of criminal law. Moreover, it would be atypical to such an extent that it would give grounds for the claim that the criminal law is no longer based on the act committed.

The presumption of innocence is seriously brought into question, because such an offence is based on the assumption that the assets have been acquired by committing corruption-related criminal

[12] 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. See L. Muzila et al., *op. cit*. p. 31–32

offences, and the burden of proof would be placed on the defendant who would then have to show the origin of his/her assets. A serious objection can be raised here, which is that this criminal offence would be based on the violation of the presumption of innocence.[13] Regardless of the fact that the prosecutor and the court must establish that the assets in question are not proportional to the lawfully gained income, that still does not mean that they have to prove that the assets have been acquired by committing a criminal offence. In fact, the burden of proof is placed on the defendant who has to prove that s/he legally acquired the assets. In addition, if assets have not been lawfully acquired (or if there is no evidence to prove that they have been lawfully acquired), it does not mean that they were necessarily acquired through crime.[14]Although there are known exceptions in criminal law, which in some cases places the burden of proof on the defendant instead of the prosecutor, they do not extend to requiring the defendant to prove he has not committed a criminal offence, merely some aspects of it. However, in this case, this is a central element, i. e. what is presumed and what the defendant must refute is the essence of the offence. In fact, here it starts from the presumption of guilt, which is a hard position for the defendant to recover from.

The right to defence (the right to remain silent, the right against self-incrimination) is seriously limited by shifting the burden of proof to the defendant. If the defendant chooses to defend himself/herself by remaining silent, a conviction would be inevitable where there is discrepancy between his/her assets and legal income. Moreover, in some situations, an efficient defence would imply self-incrimination on some other charges (e. g. tax evasion). Apart from self-incrimination in the true sense, the defendant, to avoid a conviction, in some cases may be forced to present facts that would undoubtedly harm his/her reputation. There are ways to obtain property benefits that are more or less socially unacceptable (e. g. gambling, begging, prostitution), although they do not constitute criminal activity, and especially a criminal offence with an element of corruption. The questionable income may originate from work and jobs that are not considered worthy of a public official or that may have bad consequences for his reputation but do not have elements of corrupt behaviour.

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[13] The opinion that illicit enrichment statute offends the presumption of innocence is prevalent among scholars. See J. Boles*, op. cit*., p. p. 866–869

[14] The situation is similar with the Law on Seizure and Confiscation of the Proceeds from Crime enacted in Serbia in 2008. and 2013. which does not require proving that the property has been acquired by committing the crime although the name of that law refers to it. There is a similar approach in the Montenegrin Law of 2015, but the problem is considerably mitigated by the two conditions: it is necessary to establish reasonable doubt that a property has been acquired by committing the crime and it is sufficient for the defendant to make it probable that he has acquired the property legally.

This criminalization resembles the examining the origin of assets that existed in the socialist era which was more a political than a legal mechanism. It did not prove to be effective and was misused for political purposes.

Although at first glance it looks like a paradox, it is disputable whether the imposition of this criminal offence would be in accordance with international law. Even though the provision of Article 20 of the Convention recommends the introduction of this criminal offence, the question arises as to whether this provision itself is in accordance with existing international law. There are opinions that it is contrary to the norms of *ius cogens*, and that it is inconsistent with various international documents such as the International Covenant on Civil and Political Rights of 1966.[15] These opinions are based on serious arguments, especially when it comes to violation of the presumption of innocence.[16] For the signatories of both these international treaties, priority would be given to the respect of Article 14 ICCPR rather than Article 20 UNCAC.

The objection may be raised that the defendant is being punished for a condition, that is, the consequences or results rather than for the action itself, which is unacceptable in criminal law. In other words, there is a refutable presumption that the defendant gained assets by committing a crime (corruption) unless s/he proves otherwise. In fact, it is the problem of gathering evidence, which is often unsolvable for some corruption charges, that has led to such an idea. A criminal offence defined in this way would be easier to prove in court, but it would not be in accordance with the usual standards applied in criminal law. Even the authors of the Convention were aware of this and consequently required the states to consider the option of introducing this criminal offence rather than saying that they must introduce it. Because of the problems with gathering evidence, an attempt is being made to base the charges only on the consequences, that is, on the result of corruption. One could argue here that an individual is being punished because they own assets whose legal origin cannot be established. But is this a justified reason? In criminal law, illegal possession of some objects could be a criminal offence. However, there is a significant difference between possession of a weapon, hazardous poisons or some kind of objects that can only be used for committing criminal offences, and the possession of money or other assets whose origin or purpose cannot be explained. It is one thing when an individual is punished for possessing something that a citizen normally would not possess and it is a totally different thing when an individual is punished

[15] See Th. Kliegel, *Der Straftatbestand der unerlaubten Bereicherung*, Nomos, Baden-Baden, 2013. pp. 391–406

[16] *Ibid*., p. 398–400.

for possessing something that any citizen, in principle, owns or has the right to own.[17]

Due to the serious difficulties that the legislator would encounter when defining the act of commission and other constitutive elements of this criminal offence, other problems would also arise. For example, how to determine the time and place of perpetration of this criminal offence, which is necessary in solving important criminal and procedural issues? Regardless of whether the illicit enrichment is understood as an act or consequence (and both solutions can be objected to), it would be necessary to determine when and where it came about, which involves determining how the illegal revenue was obtained, which defeats the purpose of introducing this offence.

3. The constitutive elements of the Criminal offence

The decision to introduce the criminal offence of illicit enrichment faces serious issues and questions. These are, primarily, the following.

What should be prescribed as 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. None of these options would be free of objections. Just failure to declare the acquired assets does not contain sufficient amount of social harm to be declared as a criminal offense. Possession as such could be in some cases considered as an act of crime.[18] It is about the possession of objects that are normally prohibited (weapons, narcotic drugs, child pornography). But possession of assets is socially adequate and desirable. Only if assets significantly exceed lawfully gained income possession would become a criminal act. This means that any possession of property and other assets may be subject to assessment of whether it meets this requirement, and not because of its own nature as it is in the mentioned cases. Some advantage rests with action under 3) unlawful acquiring of assets, but that would greatly reduce the basic advantage of this criminal offence which is — simple and easy determination of its important elements.

The object of the act may be defined as — assets that are not proportional to lawfully earned income, that is, those assets that significantly exceed it. By itself, the object is not problematic to the extent that the act of the criminal offense is. Uncertainty and violation of

[17] Nevertheless, as a counterargument one could ask the question: Is it normal and acceptable that a public official owns assets for which he/she cannot prove that he/she acquired them in a lawful manner?

[18] See: C. Roxin, Besitzdelikte. In: *Stanje kriminaliteta u Srbiji i pravna sredstva reagovanja*, II deo, Beograd, 2008, p. 9.

principle of *lex certa* could be somewhat avoided by specifying case law (i. e. meaning of term "significantly").

When it comes to specifying the circle of offenders, there are serious dilemmas. The circle of offenders might include 1) all public officials (this would be in line with the Convention which, generally, provides a wide interpretation of the term: "public official");[19] 2) public officials who are required to declare their assets; 3) all civil servants 4) officers and responsible officers (some responsible officers); 5) all citizens. The easiest thing would be to tie this to that circle of public officials who are required by the law to declare their assets (although this is narrower than intended by the Convention). However, that circle is too narrow, not so much because of the Convention, as because of the opportunity for some officials to more frequently exercise corruption than others. So, for instance, what to do with clerks in public administration authorities working behind the counter, customs officers, policemen and so on? Finally, it might also be asked whether it would be justified to set this offence as general, i. e. that every citizen can commit it. This is not only unreasonable but also not required by the Convention. It cannot be a universal offence that would be directed at combating all forms of corruption, but only, if it is possible at all, the corruption of holders of public offices.

It would be necessary to prescribe special grounds for the exclusion of unlawfulness, and therefore of criminal offence, if the perpetrator makes it probable that he has acquired the property legally.

There should be a stand taken on the need to foresee a form of the offence committed by the person to whom the assets were transferred (this is where the matter of relationship with the existing criminal offence of concealment of property acquired by criminal offence occurs).

Further, should the mandatory confiscation of assets exceeding the lawfully gained income be explicitly stipulated? Is the special provision necessary, or could the assets be confiscated based on the general provisions regulating confiscation of the proceeds of crime?

Finally, the matter of the concurrence of offences should be addressed by expressly prescribing that if it is proved that illicit enrichment is a result of other criminal offences committed, then only those other criminal offences would exist, not illicit enrichment as a criminal offence. Without such a provision, the application of

[19] For the purposes of the Convention "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 (Article 2. of UNCAC).

general rules on the concurrence of offences in the case of this atypical criminal offence, would not always give acceptable and indisputable solutions.

Conclusion

There are no easy answers to the question of whether it is reasonable to criminalize illicit enrichment. The answer to that question greatly depends on criminal-political assessment and evaluation. There are certain reasons that justify it, but the legislator would come across several problems and controversial issues in regards to the elements of this criminal offence. It is my opinion that the arguments contra prevail and that such a criminal offence would not be in accordance with the usual standards of criminal law. It would be hardly realistic that it could be effectively applied (regardless of the fact that it would be easier to prove it) and it would be unrealistic to expect that it would provide any serious contribution to the fight against corruption. Nevertheless, despite the serious doubts in terms of justification for introducing this criminal offence, it should not be lightly dismissed as an option; instead, the reasons pro and contra should be examined more thoroughly.

Such an offence would violate some of the fundamental principles of the rule of law and standards of criminal law. Contemporary criminal legislation increasingly makes exceptions more frequent in this direction. Maybe the question might arise if this is already done in other cases, why not in this? However, the problem of contemporary criminal legislation is that in some areas more and more frequently it makes exception to some of the basic principles, so that the question is whether in the near future the criminal law that we have known so far will survive. Precisely in the area of corruption, organized crime and terrorism, contemporary criminal law has already made so many exceptions that one can speak of the erosion of the principle of the rule of law and of violating those principles that have become generally accepted over the last two centuries.[20] Although it is often stressed that the fragmentation and subsidiarity of criminal law as the *ultima ratio* in relation to other branches of law should be emphasized precisely in the area of anti-corruption,[21] legislator in most countries prefers to give priority to the criminal law.

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[20] This, however, does not bring any results in terms of a more effective suppression of these forms of crime so that it cannot be said that something was gained for such a highly paid price. For more on criminal law expansionism, see: Z. Stojanović, Krivičnopravni ekspanzionizam i zakonodavstvo Srbije (Criminal Law Exspansionism and Legislation of Serbia), In: *Stanje kriminaliteta u Srbiji i pravna sredstva reagovanja* IV deo (priredio Đ. Ignjatović), Beograd, 2010, pp. 32–48.

[21] See, e. g., J. Queralt, Randbetrachtung über die Korruption in Spanien. In: *Festschrift für Imme Roxin*, C. F. Müller, 2012, p. 819.

However, this is not to be agreed. The task of the theory of criminal law is not to approve of such a position by the legislator.

Nor is the symbolic role of criminal law of decisive importance here. Incriminations which are not applied create the impression among citizens that there is no sincere readiness to suppress some behaviour. Moreover, it can cause citizens to feel deceived and to the utmost, contrary to the expectation, that legislators and politicians do not care about the fight against corruption,[22] especially when its actors are public officials.

Finally, does this mean that modern states have to tolerate cases of apparent illegal enrichment of politicians and other public officials only to preserve some of the principles of criminal law? Of course not. There are other ways and mechanisms to counter the unscrupulous and criminal behaviour of certain public officials. The ineffectiveness of the criminal justice system to combat corruption cannot be the reason for introducing new criminal offences that violate some of the fundamental constitutional and criminal law principles.

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Nezakonito bogaćenje kao krivično djelo javnih funkcionera?

U radu se razmatra pitanje opravdanosti uvođenja novog krivičnog djela nezakonitog bogaćenja čiji bi izvršioci bili javni funkcioneri koji za vrijeme vršenja javne funkcije steknu imovinu za koju ne mogu da dokažu da je stečena na zakonit način. S obzirom na to da Konvencija UN-a protiv korupcije daje elemente ovog krivičnog djela (član 20) i preporučuje državama potpisnicama da razmotre mogućnost njegovog uvođenja, u radu se razmatraju neki razlozi za i protiv uvođenja ovog krivičnog djela. Zauzimanje stava u vezi sa ovim pitanjem zahtijeva ne samo razmatranje određenih pravnih pitanja, već i kriminalno-političku procjenu o korisnosti ove inkriminacije u suzbijanju korupcije. Autor samtra da, ipak, ne postoje dovoljno ubjedljivi razlozi koji idu u prilog uvođenju ove inkriminacije. Analiza argumenata za i protiv uvođenja novog krivičnog djela pokazala je da argumenti protiv preovlađuju, te da oni imaju veću težinu ne samo po broju, već i po svom značaju.

Ključne riječi: Korupcija, nezakonito bogaćenje, javni funkcioneri, Konvencija UN-a protiv korupcije, krivično pravo