*Criminalization of illegal enrichment**

By Davor Derenčinović

According to the public opinion's group of definitions, some behaviour or act should be considered as corruption as the public opinion considers it as corruptive. Corruption also can be defined as a process in which at least two persons, through an illegal exchange conducted with purpose of getting certain personal benefits, do something contrary to public interest and, by breaching moral and legal norms, threaten the fundamentals of democratic society and the rule of law. In any case, corruption is the generic term set for criminal offences such as bribe giving, bribe accepting, trading in influence and so on.

The undisputed fact about corruption is that it can be found everywhere. There is no field of social life immune to this global phenomenon. Using the criminological terminology, the risk zone of corruption is very broad; in other words, it is much more likely to become a victim of corruption than of any other crime.

Public polls recently carried out in Croatia, clearly indicate that citizens perceive corruption as a widespread phenomenon. While the perception of corruption suggests that the extent of it has become alarming, statistical figures offer opposite conclusions. Namely, that corruption criminal offences are not among those prevailing in criminal statistics. For instance, in the period between 2005 and 2007, the total number of reported corruption criminal offences in Croatia was slightly above 500. In the same period, 211 persons were indicted and 191 convicted. The vast majority of them were convicted for the most typical so-called hard-core corruption offences: 96% of these were in fact constituted by bribe giving and bribe accepting.

How to explain the misbalance between official statistics and public perception on corruption? Corruption offences, particularly bribery giving and bribery accepting, are, by the definition, "secret" offences. The dark number of these offences, i.e. the number of offences committed but not recorded in official statistics for various reasons, is considerable given the fact that neither of two sides has an genuine interest in disclosing an illegal exchange.

One of the measures intended to overcome difficulties pertaining to the "secret" nature of corruption criminal offences is the criminalization of illegal enrichment. Unlike hard-core bribery offences (in which the substance of a crime is an illicit *quid pro quo* exchange), illegal enrichment means the accumulation of wealth in the hands of public officials who cannot reasonably explain or justify the background or origin of these funds. When illegal enrichment is involved, the burden of proof is not on the prosecutors but on the defendants who must prove that they didn't make their wealth by abusing their official duties or taking part in any bribery offence or in some other illicit conduct. Criminal offences of illegal enrichment make it easier for the prosecution because there is no need for them to prove neither the so-called *quid pro quo* test nor the corruptive intent.

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The concept of illegal enrichment made its way, *albeit* as an optional provision, in article 20 of the United Nations Convention against Corruption (UNCAC): "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".

This is not an obligatory provision, so the state party may decide whether to make of illegal enrichment a separate criminal offence or not. The majority of European states, as well as the United States of America, are still reluctant to criminalize illegal enrichment as a separate criminal offence.

Apart from other considerations, the main reason for that is the following: does this criminal offence violate some principles of criminal law, first of all, the presumption of innocence and privilege against self-incrimination? The shifting of the burden of proof from the prosecutor onto the defendant has been known in some very important international conventions, domestic law and the European Court of Human Rights jurisprudence.

For instance, according to the article 12 of the United Nations Convention against Transnational Organised Crime (UNTOC, also known as the Palermo Convention) "States Parties may consider the possibility of requiring that an offender demonstrate the lawful origin of alleged proceeds of crime or other property liable to confiscation, to the extent that such a requirement is consistent with the principles of their domestic law and with the nature of the judicial and other proceedings".

Similar provision can be found in the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

The European Court of Human Rights has ruled that the burden of proof does not always rely on the prosecution. There are three cases when the burden of proof is not on the prosecution: *a*) in the so-called strict liability offences, *b*) in confiscation of pecuniary gain acquired by a criminal offence and *c*) in criminal offences in which the burden of proof has been shifted to the defendant.

There are also a few examples of shifting the burden of proof in domestic criminal law. Probably the best example of departure from the principle *actore non probante reus absolvitur* is the reversal of the burden of proof in defamation cases. The burden of proof in these cases is on defendant because the principle *quisquis presumitur bonus* presumes that the defamation statement is not true.

There must be a temporal link between the moment of the acquiring the property and the time when the criminal offence was committed. Lastly, the value of the property must be disproportionate to the lawful income of the convicted person. When it comes to the domestic law, Swiss legislation provides a rebuttable presumption that a criminal organisation (of which the defendant is a member) has an authority over the entire properties of its members.

This is not against the presumption of innocence and the defendant can always prove that his property is not under the control of the criminal organisation to which he belongs and that his wealth has a legitimate source. According to article 225-6 of the French *Code Penal*, the liability for the criminal offence of procuring would not fall

only on the person who is helping, assisting or protecting the prostitution of others, but also on a person who is "unable to account for an income compatible with his lifestyle while living with a person habitually engaged in prostitution or while entertaining a habitual relationships with one or more persons engaging in prostitution".

In general, illegal enrichment is not *per se* contrary to the presumption of innocence. However, introducing this new criminal offence into a legislation triggers the question of an added value. Namely, the central issue concerning criminal law prevention and suppression of corruption is how to optimize the existing legal framework rather than substituting it with the new one. In other words, instead of introducing a new criminal offence into an anti-corruption legislation, due attention must be paid on how to improve the system of confiscations of illegal proceeds acquired by corruption criminal offences. So the accent should not be on new criminalization but on improving the already existing system set up to demotivate potential perpetrators from engaging in different forms of illegal exchange. Apart from this argument, introducing illegal enrichment into a legislation could be manipulated in various ways for the purpose of undermining political opposition. Other negative consequences could be an increase in the number of false accusations and similar crime reports not supported by any tangible piece of evidence. Furthermore, as a magic bullet for prosecutors, this new criminal offence will presumably take an absolute precedence over all the other corruption criminal offences as well as other offences in which perpetrators go for the acquisition of pecuniary gain.

Instead of engaging in often very difficult searches for evidence with usually unpredictable outcomes, it would be much easier for the prosecution to rely on an illegal enrichment statute and to shift the burden of proof to the defendant. In addition, a criminal offence of illegal enrichment is contrary to *nullum crimen sine lege certa* as one of the legality principle's requirements. Although it is very similar to money laundering, there is a significant difference between these two criminal offences. In money laundering there must be a predicate offence, i.e. the act generating money is always illegal per se. So the substance of money laundering as a separate criminal offence is a transaction made for the purpose of concealing illegally obtained money. Since there is no predicate offence requirement in illegal enrichment, it may seem that the *actus reus* of this crime would be rather a way of life (which is obviously disproportionate to the perpetrator's legitimate income) than some particular criminal behaviour.

A last, but not least, criminal offense of illegal enrichment is directed only at the suppression of corruption in the public sector. A key element that must be proven by the prosecutor is that the perpetrator was in a position to abuse the authority for getting some private gain. Without abuse of authority there would be no illegal enrichment as a criminal offence. It means that this criminal offence does not address various forms of corruption in the private sector and, as such, has a very limited potential as a normative anticorruption tool.