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CRIMINALIZATION OF ILLICIT ENRICHMENT

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Abstract

Illicit enrichment is a particularly dangerous criminal phenomenon that not only undermines the proper functioning of the public sphere but also inevitably contributes to corruption. In the context in which the Republic of Moldova decided to criminalize the crime under analysis, through this study we propose clear and structured objectives such as: the history and definition of the crime, its evolution, the provisions of the crime of illicit enrichment in other states, as well as, summarising, we will also indicate the conclusions on the reflections with recommendations.

Keywords: corruption, public sphere, other states, illicit enrichment, evolution.

Introduction

The history of the criminalization of illicit enrichment begins much earlier – in 1936 in Argentina. Argentine Senator Rodolfo Corominas Segura, travelling by train from Mendoza to Buenos Aires, had noticed a public official who was showing off, in front of some friends, the wealth he had accumulated since taking office. In the senator's view, the wealth could not have come from a legitimate source, which prompted him to introduce a bill in the Argentine National Congress to sanction public officials who acquire wealth without being able to demonstrate that it came from a legitimate source.

The bill, as well as others submitted later, were not adopted until 1964, when, finally, the Argentine Criminal Code was completed with a new component of the crime - illicit enrichment. Thus, dating back to 1964, Argentina became the first state to criminalize illicit enrichment.

Materials and methods

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The history of criminalizing illicit enrichment begins much earlier – in 1936 in Argentina. Argentine Senator Rodolfo Corominas Segura, travelling by train from Mendoza to Buenos Aires, had noticed a public official who was showing off, in front of some friends, the wealth he had accumulated since taking office. In the senator’s view, the wealth could not have come from a legitimate source, which prompted him to introduce a bill in the Argentine National Congress to sanction public officials who acquire wealth without being able to demonstrate that it came from a legitimate source. The bill, as well as others submitted later, was not adopted until 1964, when, finally, the Argentine Penal Code was completed with a

new component of the crime: illicit enrichment. Thus, dating from 1964, Argentina became the first state to criminalize illicit enrichment [1].

In the same year, it was also criminalized in India. Since 1964, over the course of 20 years, similar provisions have been introduced in Brunei, Colombia, Ecuador, Egypt, the Dominican Republic, Pakistan and Senegal. By 1990, illicit enrichment was criminalized in at least 10 countries, by 2000 - in more than 20 countries, and by 2010 - in more than 40 states. In Europe, illicit enrichment is criminalized in three states: Lithuania, Moldova and Ukraine. It is worth noting that European states, as well as states around the world, have criminalized the act differently, gaining different experiences in its implementation.

Methods

Ab initio, one manifestation of corruption is illicit enrichment. Public opinion is dominated by the view that officials everywhere live beyond their means and that, to combat the illegal possession of property arising from their functions, it was considered necessary to implement the strictest measures, within the limits of fundamental rights. Criminal prosecution for corruption crimes, especially those involving the possession of illicit assets, has a specific meaning. In our opinion, the definition of illicit enrichment will help clarify the definition of this crime in our own country and in other states in the European space.

If we review the crimes attributed to the phenomenon of corruption, within the limits of the incriminations provided for in the Convention, we will find in art. 20, "Illicit enrichment" [2], constituting right as a destructive phenomenon for the democratic values of contemporary society, which causes damage to democratic states and the rule of law as well as undermines the economic development of the Republic of Moldova and other states in the European space. We consider that, first of all, it is necessary to come up with a brief description regarding the composition of the crime of illicit enrichment in the Republic of Moldova; therefore, as mentioned in art.330^2 of the Criminal Code [3] of the Republic of Moldova under the name of "illicit enrichment", two types of crimes are brought together.

The first type specified in paragraph (1) of art. 330^2 of the Criminal Code consists of the possession by a person with a responsible position or by a public person, personally or through third parties, of goods if their value substantially exceeds the means acquired and it was found, based on the evidence, that they could not have been obtained licitly [4].

Subsequently, the second type of crime provided for by art.330^2 paragraph (2) of the Criminal Code is expressed in the possession by a person with a public position, personally or through third parties, of goods if their value substantially exceeds the means acquired and it was established on the basis of evidence that they could not have been obtained lawfully. In the first and second paragraphs, the specified penalties differ: the first is a serious crime, and the second is considered a particularly serious crime (according to the classification of crimes by the degree of harm).

Therefore, the generic legal object of this crime, and of the crimes provided for in chapter XV of the special part of the Criminal Code, is social relations regarding the proper conduct of activity in the public sphere. However, in the Criminal Code of Lithuania, art. 189 “Illicit enrichment” is included in chapter XXVIII “Offences against patrimonial property, rights or interests”. In Lithuanian criminal doctrine, this conception is criticized:

"It can be doubted that patrimonial property, interests or rights would represent the social value that is always harmed in the case of this offence... Conceptually, the offence of illicit enrichment is closer to the offence of money laundering... This is because it harms public security, as well as the financial interests of the state." [5]. Indeed, in the crime of money laundering, the object of the crime is the social relations that regulate the circulation of funds and securities in the sphere of economic activity. [6], which denotes an obvious similarity.

Next, we draw attention to the special legal object of the offense provided for in art.330^2 paragraph (1) of the Criminal Code of the Republic of Moldova, which forms social relations regarding the proper performance of service activity in the public sphere, which requires compliance by a person with a responsible position or by a public person not to possess illegally obtained goods whose value substantially exceeds the means acquired. Regarding this subject, the text of the law "substantially exceeds the means" has been a subject of the Constitutional Court's attention more than once, thus in 2019, the Constitutional Court was notified by way of an exception of unconstitutionality. In this regard, by Notification no. 158g of 05.09.2019 it was criticized that the text "their value substantially exceeds the means acquired" does not meet the requirements of the quality of the law, imposed by art. 23 of the Constitution [7] .

The Constitutional Court observed that, on June 17, 2016, the Parliament adopted Law No. 133 on the declaration of assets and personal interests, and found that in Art. 2 of the Law on the declaration of assets and personal interests the notion of "substantial difference" is defined. Thus, "substantial difference" represents a difference exceeding 20 average monthly salaries in the economy between the acquired assets and the income obtained by the subject of the declaration together with family members, the common-law partner/concubine during the exercise of mandates or public functions or public dignity in the same period. [8] In this context, the Constitutional Court pointed out that the above-mentioned legal text "their value substantially exceeds the means acquired" is clear and that its meaning can be understood by any citizen, in such a way that they can adapt their conduct to the letter of the law. However, we support the opinion that criminal liability for illicit enrichment is tempered by several impediments. A first impediment lies in the estimation of the "substantial difference" with the income acquired licitly. However, the circle of subjects of the offense under art. 330^2 of the Criminal Code of the Republic of Moldova is much wider than the circle of subjects of asset declaration provided for in art. 3 of Law no. 133 of June 17, 2016 on the declaration of assets and personal interests and, consequently, the notion of "substantial difference" in art. 2 of the same law does not completely eclipse the issue of estimating the "substantial difference" with legally acquired income [9].

For comparison, *exempli gratia* in the legislation of European states this substantial difference is well determined within fixed margins, for example in Lithuania, any citizen who owns goods worth over 250 minimum subsistence levels (approximately 65 thousand litas or 24 thousand dollars), knowing that they cannot be acquired with legitimate income, is punished with a fine, arrest or imprisonment of up to 4 years. [10], fact that facilitates the legal classification of the crime and the activity of law enforcement agencies.

The material or immaterial object of this crime is the goods. According to the UN Convention in art. 2 letter d) goods are understood to mean any type of property, corporeal or incorporeal, movable or immovable, tangible or intangible, as well as legal acts or documents attesting the ownership of these goods or the rights relating to them. It is

imperative to mention that not every good represents the material or immaterial object of the crime analyzed, in order to be in the presence of the crime component these goods will meet the two conditions: 1) their value substantially exceeds the means acquired; 2) based on the evidence, it was found that they could not have been obtained licitly.

Regarding the first condition, it is necessary that their value substantially exceeds the means acquired by the subject of the declaration, that is, given the fact that, as we have previously explained, there is no fixed margin in the legislation of the Republic of Moldova regarding this, the legislator referring to a blanket norm, a special one that, in his opinion, has a clear and predictable character. We appeal to the opinion of scholars in criminal law from the Republic of Moldova, in which a possible solution to the problem in question is suggested to us by a legislative initiative that was registered in the Russian Federation: in the draft art.290[1] „*Illicit enrichment*" of the Criminal Code of the Russian Federation, note 4 is formulated as follows: "The value of the assets held substantially exceeds the value of the means acquired, if it is in the amount of at least 5 million rubles". To adjust the amount in question to the social realities of the Republic of Moldova, one could, for example, take into account the provision in letter a) of art. 226[3] of the Tax Code of the Republic of Moldova: „*Subjects of estimation by indirect methods are resident individuals, citizens of the Republic of Moldova, who, during a fiscal year, starting with January 1, 2012, obtain properties (real estate, securities, means of transport, financial means) that cumulatively exceed the amount of one million lei*„ [11] .

Following the logical thread, the second condition is similar to the crime of money laundering, in other words, money laundering is considered a subsequent condition, that is, for its criminalization, it is necessary to commit another crime that generates illegal income and for which there is a court decision in force.

In another sense, in the absence of a conviction for the main crime, it is mandatory to prove that the assets constitute proceeds of criminal activity [12].

Similar to the crime analyzed by us, we find *a sine qua non condition*, the existence of the material object would be possible, the absence of which automatically leads to the absence of the crime component.

Due to its individualizing features, the crime specified in paragraph (1) of art. of the Criminal Code of the Republic of Moldova has no victim [13].

The objective side of the crime in question consists of the prejudicial act expressed in the action of possessing the goods if their value substantially exceeds the acquired means and it was found, based on the evidence, that they could not have been obtained licitly.

The subjective side of the crime specified in paragraph (1) art. of the Criminal Code of the Republic of Moldova is characterized by guilt expressed in intent. As for the type of intent, the crime under examination can only be committed with direct intent. This is because the crime provided for in paragraph (1) art. of the Criminal Code of the Republic of Moldova is a formal crime [14].

The subject of the offense provided for in paragraph (1) of art. of the Criminal Code of the Republic of Moldova is the responsible natural person who at the time of committing the act has reached the age of 16.

The legal person cannot be the subject of the analyzed offense. For comparison, for example, paragraph (3) of art. 189[1] „Illicit enrichment" of the Criminal Code of Lithuania

provides that the legal person can be the subject of the corresponding offense, and not only, in this regard it is relevant that both Belgium provides for criminal liability for the discrepancy between the value of the property and the declared income and Lithuania, not only officials, but also any citizen can be prosecuted for illicit enrichment. The article works not only to combat corruption, but also to counteract the legalization of any proceeds from crimes. In the fall of 2021, the court sentenced a student to a fine for not explaining the origin of the money for the apartment.

She was also ordered to return to the treasury the cost of the property - about 100 thousand euros. According to investigators, her father, who is connected to drug trafficking, helped the girl buy an apartment [15] .

The opposite situation is observed in the Republic of France. In accordance with art. 321^{6} of the French Republic, the crime is part of section 2 entitled On crimes assimilated or related to concealment as amended on 01.02.2020 The act by which a person, who has regular relations with one or more persons who either commit crimes or misdemeanors punishable by at least 5 years of imprisonment, bringing them a direct or indirect profit, or are victims of one of these crimes, cannot justify the resources corresponding to his way of life or the origin of a property held is punishable by 3 years of imprisonment and a fine of 75,000 euros [16] .

At the same time, a more severe penalty is provided for the act by which a person facilitates the justification of fictitious resources for persons who commit crimes or misdemeanors punishable by at least 5 years of imprisonment, bringing them a direct or indirect profit. A relevant practical case from the ECHR in the case of Salabiaku v. France (1988) is relevant. Therefore, „*a legislative interference in the case of the presumption of innocence requires a justification and must not exceed what is necessary. The principle of proportionality must be respected*"[…] 653. Any legal system can decide on presumptions of fact or law; obviously, the Convention does not oppose them, in principle, any obstacle, but, in criminal matters, it obliges the Contracting States not to exceed reasonable limits taking into account the gravity of the stakes and preserving the rights of the defence [17].

The Court stressed the position that violations of the presumption of innocence may be subject to a proportionality test. That is, this statement took into account that violations of the presumption of innocence could be justified. According to Transparency International in France, the implementation of this provision is limited in practice by deficiencies in the declaration regime. Since 2011, civil servants have been required to submit asset declarations at the beginning and end of their mandate to a commission responsible for monitoring them. However, the declarations are not made public and the powers of control are limited. The prosecutor can only receive a declaration that he submits if something seems wrong; he also does not have the power to conduct any investigation or rule on the issuance of a sanction [18] .

According to the Swiss model, if it is established that a person supports or is part of a criminal organization, the court is obliged to order the confiscation of all assets owned by that individual. The Swiss Criminal Code, Article 59 para. (3), creates a presumption that an offender who is associated with a criminal organization controls the assets of all its members. The burden is on the individual to rebut the presumption by demonstrating the legal origin of the assets. The Swiss Supreme Court has maintained the position that this respects the presumption of innocence because the accused can rebut it by demonstrating that he is not under the control of the organization or that the assets have a legal origin [19].

Federal state - Germany, in the Criminal Code of the Federal Republic of Germany [20], Section 73d, allows for a shift in the burden of proof to the accused if the prosecution establishes a significant increase in the assets of a public official that have not been accounted for. The legislation requires the forfeiture of his assets "where there is reason to believe that the objects were used or obtained through illegal acts." The Federal Supreme Court held that this does not reduce the burden of proof, but absolves the prosecution of establishing the „*specific details*" of the crime.

Among other things, in the course of the numerous discussions, representatives of other delegations explained that illicit enrichment cannot be the basis for criminal liability, since it is not an act, but its result. It was also noted that imposing on an official the burden of proof in criminal proceedings to prove the legal origin of assets is not in accordance with the requirement of the constitutions of a number of States and is contrary to the presumption of innocence [21].

Portugal is of the same opinion, which in 2010 adopted a package of anti-corruption laws, which, in particular, significantly expanded the circle of persons who must annually report their income and introduced the concept of passive corruption, but nothing was said about illicit enrichment. Portuguese experts did not see the need to create a new component due to the fact that national legislation already provides for criminal liability for the commission of acts that are within its scope the basis of illicit enrichment, such as: corruption, interference in transactions, abuse of law, dishonesty, embezzlement and theft. In their opinion, illicit enrichment cannot lead to the triggering of criminal liability, since it is not an act, but the result (emphasis added) of it.

Romanian legislation has taken shape with an alternative regulation to the provision of the act of illicit enrichment as a crime, consisting of the obligation to submit income and interest declarations and the provision of the confiscation of unjustified assets. Pursuant to Law no. 161/2003 on some measures to ensure transparency in the exercise of public dignities, public functions and in the business environment, the prevention and sanctioning of corruption, with subsequent amendments and completions, civil servants submit these declarations which represent personal documents and can be rectified only under the conditions provided for by law [22].

If the assets whose provenance is unjustified result in the commission of a crime, the court sends the file to the competent prosecutor's office to analyze whether it is appropriate to initiate criminal proceedings. If it is found that the provenance of the assets is justified, the court decides to close the file. This is guided by the following methodology - if it is found that the acquisition of specific assets or a share in an asset is not justified, the court of appeal will decide either to confiscate the assets or the unjustified share, or to pay a sum of money equal to the value of the asset, established by the court on the basis of an expert opinion. On the other hand, if the Romanian legislator intends to nevertheless criminalize illicit enrichment, following the model of the legislator in the Republic of Moldova, a careful examination of the constitutional standards would be required, in order to avoid possible criticisms of unconstitutionality [23].

Results and discussion

We conclude the following ideas after analyzing the subjects subjected to analysis:

1) in this way, we get the idea, it is not appropriate to criminalize illicit enrichment since other instruments can be applied as alternatives for tracking illicitly acquired assets. However, in order to use legal-criminal intervention means, this mechanism must be established as an ultima ratio. In case of non-compliance with this principle, we can speak

of abusive behavior of the state that uses criminal law in a disproportionate manner, and constituting a critical issue, which is the subject of ongoing debate, refers to the compatibility of illicit enrichment with human rights principles and concerns related to the perception of the reversal of the burden of proof. We support the thesis that, within the framework of the reform of the justice sector, the legislator has immoderately criminalized illicit enrichment (art. of the Criminal Code of the Republic of Moldova), without a formulation well adaptable to other legal means of tracking/confiscating illegally acquired assets, which makes the application of this norm inoperable without controversy;

2) The Constitution does not represent an impediment to the correct application of article of the Criminal Code, an article that establishes criminal liability for illicit enrichment. On the contrary, the Constitution establishes guarantees and rights inherent in a fair criminal trial. The authorities (and, in particular, the courts) have the task of ensuring in each particular case that the rights guaranteed by the Constitution are practical and effective, not theoretical or illusory;

3) Based on the analysis, it should be noted that liability for illicit enrichment, although it is a powerful tool for combating corruption, is not provided for everywhere in the legislation of foreign countries, although there are some European states that, although they are parties to the Convention against Corruption, do not criminalize the act of illicit enrichment as a crime;

4) One of the main features of criminal liability in foreign countries lies in the fact that the subject of the crime in some countries, for example, the Kingdom of Denmark, the Republic of Moldova, Ukraine, is only state employees holding public office, while in other states, in particular, the French Republic, the Republic of Lithuania - any person can be, regardless of their relationship with the public service

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