

The accumulation of unexplained wealth by public officials: Making the offence of illicit enrichment enforceable



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Recent high-profile cases have focused attention on the transfer of assets abroad by heads of state and other senior officials from developing countries in amounts that far exceed their legitimate sources of income. Article 20 of the United Nations Convention against Corruption, criminalizing illicit enrichment, was drafted to address this issue. However, very few of the states parties to the UNCAC have introduced this offence in their legal systems, largely because of due process concerns. The challenge is to find ways to implement Article 20 that balance the rights of the accused with the right of society to recover illicitly acquired national wealth.



According to the latest estimates by Global Financial Integrity, developing countries lost between US\$723 billion and US\$844 billion per year on average through illicit flows in the decade ending in 2009. Approximately half of these huge sums were capital transfers likely to be linked to corruption, including illegal enrichment by public officials (GFI 2011).

The repatriation of even a small fraction of illicit assets could provide much-needed funds for development. A joint report by the World Bank and the United Nations Office on Drugs and Crime (UNODC) estimated that every US\$100 million returned to a developing country could fund up to 10 million insecticide-treated bed nets, 50 to 100 million ACT treatments for malaria, first-line HIV/AIDS treatment for 600,000 people for one year, 250,000 household water connections, or 240 kilometres of two-lane paved roads (World Bank and UNODC 2007).

Yet that report also estimates that no more than US\$5 billion has been recovered, and even less has been returned to the affected countries. There are many reasons for this. Asset recovery processes are complex, requiring substantial resources and expertise as well as effective cooperation between the jurisdictions involved.

Difficulties of establishing a paper trail

One of the greatest challenges lies in establishing a paper trail that links the assets abroad to a specific predicate offence, most often committed in the country where the assets originate.

Confiscation, and subsequent return of assets to the country of origin, usually takes place as part of sentencing following conviction at trial.¹ Such a conviction cannot be based simply on the fact that a politically exposed person owns assets in various parts of the world, since such assets are not necessarily illegal. Prosecuting authorities must prove that the assets were acquired through criminal conduct, meeting the standards of proof required by criminal courts. The burden of proof is twofold.

First, it is necessary to prove that the defendant committed an offence and to obtain a conviction for that offence. This task of establishing the predicate offence—the criminal activity that generated the assets—presents specific difficulties because of the clandestine nature of corruption crimes. In many cases the witnesses are also participants in the corruption system, and there is usually no individual victim to present a complaint. Moreover, in cases such as those concerning the assets of the deposed leaders of Tunisia and Egypt, the supporting documentary evidence may have disappeared (or may never have existed), potential witnesses may have died, and statutes of limitation may reduce the possible avenues for prosecution.

Second, prosecuting authorities must also prove that the assets in question were in fact derived from the offence for which the conviction was obtained. In general, the only assets subject to criminal confiscation are those that represent the proceeds of the criminal offence for which the offender was convicted.² If the accused can show that the assets were not derived from this criminal act, no confiscation can be ordered. If, for example, one is dealing with assets belonging to a deposed ruler who remained in power for decades, there is a good chance that some of the illicit assets may have been acquired through criminal activities for which the official can no longer be prosecuted because the relevant limitation period has expired. Establishing a paper trail is made even more difficult by the fact that offenders usually resort to opaque financial schemes in order to disguise the illegal sources of money.

Given the difficulty of proving the predicate offence, several jurisdictions (mostly developing countries) have made it a criminal offence for a public official to possess unexplained wealth (Muzila et al. 2011). Examples include the Hong Kong Special Administrative Region of China as well as Argentina, Botswana, Ecuador, El Salvador, India, Paraguay, Peru, Venezuela, and Zambia.

The offence of illicit enrichment: Potential benefits and challenges

The offence of illicit enrichment (also called possession of unexplained wealth) penalizes public officials for possessing wealth disproportionate to their known lawful

sources of income if they cannot provide a satisfactory explanation for this.³ Prosecuting authorities thus have to establish the public official's legitimate sources of income, the extent of assets under his or her control, and the discrepancy between the two. Once such a prima facie case of illicit enrichment is made, the defendant can reverse the presumption by making a reasonable case that the excessive wealth originates from legitimate sources.

Having such an offence established by law can ease the work of the prosecution, since it avoids the requirement to establish guilt for a criminal offence giving rise to the assets. The Organization for Security and Co-operation in Europe considers the existence of such an offence to be one of the best practices for combating corruption (OSCE 2004). In Hong Kong, where the offence has existed for nearly 40 years, the Court of Appeal found that it has "proved its effectiveness in the fight against corruption" (Attorney General v. Hui Kin-hong, 1995). 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 offence of illicit enrichment (Muzila et al. 2011). The UNODC (2006) has also cited the offence as a useful deterrent to corruption among public officials.

Given the potential effectiveness of criminalizing illicit enrichment, the United Nations Convention against Corruption (UNCAC), which identifies the return of stolen assets as a fundamental principle in Article 51, specifically encourages states parties to take this action. Article 20 of the Convention defines the offence 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" and specifies that the crime is constituted "when committed intentionally."⁴ However, states parties to the UNCAC are required only to consider adopting the offence; they are not obliged to do so. This reflects the concerns expressed by some states that such an offence may conflict with the fundamental rights of the accused, as recognized by national and international law.

Since the offence establishes a presumption of liability upon proof of excessive wealth, it may infringe on the right of persons charged with a criminal offence to be presumed innocent until proved guilty. According to the European Court of Human Rights, resort to presumptions is compatible with the presumption of innocence as long as (a) the primary responsibility for proving matters of criminal substance against the accused rests with the prosecution (i.e., there is no reversal of the burden of proof onto the defendant), and (b) the presumptions are rebuttable (Salabiaku v. France, European Court of Human Rights, 1988). Similarly, the Hong Kong Court of Appeal ruled that the offence did not trigger any reversal of the burden of proof since the burden of proving the "ingredients" for the establishment of the crime remained upon the prosecution and the defendant can reverse the presumption.⁵

The legislative guide to the UNCAC further states that the offence of illicit enrichment should not be seen as contrary to the presumption of innocence as long as those two requirements are met (UNODC 2006).

While some commentators agree with this standing

(Jayawickrama, Pope, and Stolpe 2002; De Speville 1997), others argue that the offence of illicit enrichment does infringe on the rights of the accused, since no criminal act needs to be proven for the crime to be presumed. Indeed, the so-called ingredients—being a public official with excessive wealth—do not in themselves constitute criminal activity (Wilsher 2006).

In fact, the main issue results from the fact that there is no explicit connection between excessive wealth and criminal activities (corruption, embezzlement, theft, etc.). This may prevent public agents from having clear guidelines that enable them to avoid engaging in prohibited conduct, thus infringing the “principle of legality.” This principle requires that offences 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).

Another issue is that in providing an explanation for the source of assets, the defendant may risk self-incrimination. For example, a defendant may provide evidence that his excessive wealth originates from lawful sources of income, such as an inheritance. While this might be a defence against illicit enrichment, it might at the same time expose the defendant to criminal, administrative, or fiscal sanctions for other prohibited conduct, such as failure to declare income to tax authorities.

No supranational court, such as the European Court of Human Rights, has ruled on such cases. But there have been challenges to convictions for the offence in several countries on constitutional and human rights grounds. In some cases these challenges have been successful (Muzila et al. 2011).

Practical implications

These considerations are of practical importance, since the recovery process for illicit financial flows requires judicial cooperation between countries. Although UNCAC Article 51 calls on states parties to “afford one another the widest measure of cooperation and assistance” in the area of asset recovery, states may still decline to render assistance if they consider that due process standards have not been properly followed.

Requests for mutual legal assistance may also be declined because of the absence of dual criminality. The dual criminality requirement means that it must be demonstrated that the offence underlying the request for assistance is criminalized in both the requested and requesting jurisdictions. Interpretation of this requirement varies. Some jurisdictions require an exact match between the names and elements of the offence in both jurisdictions, while others apply a conduct-based approach, requiring equivalence between the criminal conducts prohibited by the two offences. The latter approach is recommended by UNCAC Article 43(2).

Given that developed countries are the main destinations for cash flowing out of developing countries (Kar, Cartwright-Smith, and Hollingshead 2010), and that very few of the former have criminalized the offence of illicit enrichment (Muzila et al. 2011), the dual criminality

requirement is likely to pose a major obstacle in transnational asset recovery cases.

Notwithstanding these challenges, establishing an offence of illicit enrichment is an attempt to achieve a legitimate public policy aim. It is worth continuing to try to find ways to implement UNCAC Article 20 that can both respect individual rights and achieve the public policy objective.

Collective right to a corruption-free society versus individual rights of the accused

In the case of conflicts between fundamental rights, both national constitutional courts and supranational jurisdictions have applied a proportionality test to balance the interests at stake. Such a test, which essentially consists of a cost-benefit assessment, is considered to be met as long as the limitations of the accused’s rights implied by the measure are strictly necessary to achieve the contemplated goal. To what extent may the offence of illicit enrichment be considered a proportionate response to the practical difficulties faced by the prosecution in pursuing corruption?

First of all, given that the offence may lead to the detection of illegal conduct that has nothing to do with corruption,⁶ illicit enrichment laws should apply exclusively to public officials. One cannot expect the average citizen to display the same degree of integrity as those holding public functions, who are required to behave in an exemplary manner by virtue of their position. Therefore, while one may justify sanctioning a public official for conduct that is beyond the scope of illicit enrichment, breach of the privilege against self-incrimination would not be justified in the case of ordinary citizens. One may also note the additional difficulties in prosecution of public officials for corruption, as they may use their position to intimidate witnesses or destroy evidence. The enrichment of a public official may be the most visible manifestation of corruption and the only practical basis on which to address it.

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. In addition, resort to the offence of illicit enrichment should not preclude the prosecution from also presenting whatever evidence is available that the illicit enrichment was likely the result of conduct also punishable under criminal law.

Such safeguards are important to prevent the illicit enrichment offence from being used in an oppressive manner, such as for the purpose of obtaining incriminating information from the defendant. In addition, following such guidelines may generate evidence that is sufficient to meet the conduct-based test in other jurisdictions that do not recognize the offence of illegal enrichment.

In conclusion, if clear safeguards are in place, it should be possible to criminalize illicit enrichment while still



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protecting the rights of the accused. This could facilitate international cooperation in such prosecutions and hopefully prevent successful challenges to convictions for this offence.

The way forward

By easing the prosecution's burden of proof and facilitating the confiscation of unexplained wealth, the offence of illicit enrichment as envisioned by UNCAC could alter the considerations of "risk versus reward" in many corruption cases (Jayawickrama, Pope, and Stolpe 2002). Indeed, if prosecution becomes more likely and confiscation of assets more frequent, public officials might be less tempted to engage in corruption.

However, it is also essential to ensure fair administration of

justice. This is true for practical as well as legal reasons: the more a defendant's rights are respected, the less likely it is that the final decision will be challenged, and the more likely it is that a confiscation order will be enforced by foreign jurisdictions.

With sufficient safeguards, as noted above, it should be possible to use the offence of illicit enrichment to strengthen anti-corruption efforts and recover stolen funds without infringing individual rights. For this to happen, however, it is essential to continue to develop other anti-corruption efforts so that prosecution for illicit enrichment is only used, and seen to be used, as a last resort. To the extent that good practice examples can be found, in either developed or developing countries, these cases should be publicized to encourage wider adoption of the use of the offence as one option in combating corruption.

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Notes

1. A rising number of jurisdictions also permit civil forfeiture of tainted assets. Under a civil forfeiture scheme, the action is brought against the property itself, which may be confiscated even in the absence of a criminal conviction. This type of confiscation is beyond the scope of this brief, which focuses only on criminal confiscation.
2. Some jurisdictions have established presumptions that assets belonging to a person convicted of an organized crime-related offence or a person associated with a criminal organization are of unlawful origin, allowing for their confiscation unless the defendant can prove the contrary. This brief does not deal with these presumptions.
3. While most of the states that have enacted illicit enrichment legislation have directed it toward public officials, some have extended the scope of the offence to private individuals. Examples include Colombia and Pakistan.
4. The offence of illicit enrichment, in comparable terms, is also included in the Inter-American Convention against Corruption and the African Union Convention on Preventing and Combating Corruption.
5. *Attorney General v. Hui Kin-hong*, Hong Kong Court of Appeal, 1995.
6. If the defendant fails to prove that the assets derive from legitimate sources, they can be confiscated even though they may be the proceeds of crimes not related to corruption (such as drug trafficking). Likewise, if the defendant refuses to provide a satisfactory explanation, the assets can be confiscated even if they are not necessarily the proceeds of criminal activity. By providing a satisfactory explanation, however, the defendant may be exposed to sanctions for other illegal conduct.