ANTI-CORRUPTION HELPDESK

PROVIDING ON-DEMAND RESEARCH TO HELP FIGHT CORRUPTION

ILLICIT ENRICHMENT REGULATIONS

QUERY

Could you provide examples of regulations criminalising illicit enrichment in fulfilment of Article 20 of the United Nations Convention against Corruption (UNCAC)? Has the criminalisation of illicit enrichment improved the efficacy of judicial bodies in investigating and prosecuting corruption?

CONTENT

1. Benefits and challenges associated with the offence of illicit enrichment
2. International legal precedents
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CAVEAT

Given the current debate occurring in Portugal the response will focus more extensively on the legal measures that permit a “reversal” of burden.

SUMMARY

Regional and international agreements such as the Inter-American Convention against Corruption (1996) and the UNCAC (2005) encourage state parties to criminalise illicit enrichment as part of efforts to combat corruption, money laundering and organised criminal networks.

Yet, due process concerns and the protection of the rights of the defendant have created challenges in related legislation. The offence of illicit enrichment has been criticised as falling into conflict with human rights law standards for a fair trial. At the same time, international cooperation and mutual legal assistance can make legal enforcement challenging.

As noted in the case of Portugal, there is a concern that adopting legislation on illicit enrichment would violate one’s constitutional rights of presumed innocence until proven guilty. To generate proof, many countries, including Portugal, have established systems that mandate heads of state, ministers and legislators to file income and asset declarations. These systems, which often exist in countries without an illicit enrichment law, aim to flag unjustified, extreme changes in one’s wealth, using them as evidence to file corruption charges.

However, the effectiveness of such norms remains in question. As seen in practice, asset declaration systems rely on government enforcement to ensure compliance by public officials, adequate resources to review the declarations in a timely manner, and institutions (courts and police) to prosecute infractions.

1 BENEFITS AND CHALLENGES ASSOCIATED WITH THE OFFENCE OF ILLICIT ENRICHEMENT

Benefits of criminalising illicit enrichment

To address the evidentiary difficulty of proving ill-gotten wealth through bribery and other means, some countries have adopted legal provisions criminalising illicit enrichment. Illicit enrichment is defined in the UNCAC 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". Such provisions are typically coupled with laws requiring the disclosure of income, assets and liabilities by public officials as well as provisions shifting the burden of proof for unexplained wealth onto the defendant. Some countries allow the confiscation of inexplicable wealth if the public official or individual in question cannot satisfactorily explain its lawful origin.

Practice has shown that without such legislation in place, it may be challenging to establish that a crime has occurred and proceed with confiscation due to the burden of proof on the prosecution for showing that corruption offences such as bribery or embezzlement have occurred. The acts are often hidden as well as the money trail connected with them. Secondly, even if conviction results, then it must be proven that assets identified were gained through that specific offence.

Illicit enrichment laws remove these barriers. In the case of public officials, prosecutors must only show that the person has assets that exceed those possible based on the person's legitimate sources of income, and are no longer required to establish guilt for a criminal offence.

Studies have confirmed the benefits of such legislation in the fight against corruption.[1] The Organisation for Security and Cooperation in Europe (OSCE), United Nations Office on Drugs and Crime (UNODC) and the World Bank have pointed to illicit enrichment legislation as being an effective tool in the fight against corruption.[2]

Challenges associated with the offence of illicit enrichment

Illicit enrichment and human right standards

However, the offence of illicit enrichment has also been criticised as conflicting with human rights legal standards for a fair trial and presumption of innocence. The presumption of innocence entails that (i) the defendant is presumed innocent until proven guilty; (ii) the prosecution needs to prove the guilt of the accused; and (iii) the defendant has the right to keep silent/not to testify against him or herself.[3]

Some authors have argued that the offence of illicit enrichment infringes on the rights of the accused since no criminal act needs to be proven. His or her offence is that there has been a sudden increase in unexplained personal income or wealth.[4] In addition, the offence of illicit enrichment also shifts the burden of proof from the prosecution to the defendant. In trying to determine if the income and assets have been illegally obtained, the defendant may risk self-incrimination for other criminal acts that are not in question (such as tax evasion), or could suffer conviction if he or she opts to keep silent.

Illicit enrichment and the burden of proof: balancing prosecution and due process

[1] Maud Pedriel-Vaissiere, *The accumulation of unexplained wealth by public officials: Making the offence of illicit enrichment enforceable,* U4 Brief, January 2012:1, http://www.u4.no/publications/the-accumulation-of-unexplained-wealth-by-public-officials-making-the-offence-of-illicit-enrichment-enforceable/downloadasset/2638.

[2] Lindy Muzila, Michelle Morales, Marianne Mathias, and Tammar Berger, *Illicit Enrichment: Stolen Asset Recovery (StAR) Initiative Study*, (Washington, DC: World Bank, 2011); OSCE, *Best Practices in Fighting Corruption*, (Vienna: OSCE, 2004), http://www.osce.org/eea/13738?download=true; UNODC, *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, (Vienna: UNODC, 2006), http://www.unodc.org/documents/treaties/UNCAC/Publications/LegislativeGuide/06-53440_Ebook.pdf.

[3] See Nelly Gachery Kamunde, *The crime of illicit enrichment under international anti-corruption legal regime*, http://www.kenyalaw.org/klr/index.php?id=426.

[4] Maud Pedriel-Vaissiere, *The accumulation of unexplained wealth by public officials: Making the offence of illicit enrichment enforceable*, U4 Brief, January 2012:1, http://www.u4.no/publications/the-accumulation-of-unexplained-wealth-by-public-officials-making-the-offence-of-illicit-enrichment-enforceable/downloadasset/2638; also see Dan Whilse, *Inexplicable wealth and illicit enrichment of public officials: a model draft that respects human rights in corruption cases*, 2006.

As a result, 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. The criminalisation of illicit enrichment rests on the premise that the burden of proof can be temporarily "reversed" based on the assumption that there is sufficient cause to seek out evidence. In legal terms, this is often referred to as a "predicate offence". A predicate offence is any offence as a result of which proceeds have been generated that may become the subject of a criminal charge or offence. In countries where there are no laws against illicit enrichment, the challenge is to prove first that there were criminal activities that generated an increase in one's wealth through illicit enrichment.

According to the European Court of Human Rights, illicit enrichment legislation that uses a predicate offence is consistent with the presumption of one's innocence as long as: (i) the prosecution is responsible for proving that criminal activities led to the change in one's income and/or assets; and (ii) the presumed activities can be rebutted and contested.[5] Similarly, the legislative guide to the UNCAC also states that illicit enrichment is not contrary to the presumption of innocence as long as those two requirements are met.

For a "predicate offence" charge to move forward, the evidence usually takes the form of sizeable increases in one's personal wealth (based on tax and/or asset declarations) or visible increase in assets (such as the purchase of an expensive car or house). Often called "lifestyle tests", these assessments have been used to launch inquiries into misconduct and corruption in France and Greece. In France, allegations of illicit enrichment have been used to levy money laundering charges against Equatorial Guinea's minister of agriculture, who also happens to be the president's son.[6] In Greece, the purchase of a pricey home has led to the arrest of a former defence minister on corruption charges.[7]

As the ability to reverse the burden of proof can be challenging and depends on the legal system in place, some legal experts have argued it is better to use a charge of illicit enrichment as a "last resort"[8] and to go after individuals on charges stemming from corruption and other criminal activities.

Moreover, the tenuous balance of having to protect one's right to innocence while preserving the public good (sometimes termed "proportionality") has also led some legal experts to suggest that illicit enrichment laws should be limited to public officials.[9] The argument is that public officials have to maintain a code of conduct and ethics that places them above normal citizens. Illicit enrichment by public officials also may be the most visible evidence of corruption and the only legal recourse available to address it.

Other potential challenges for prosecuting illicit enrichment

In spite of their potential for prosecuting corruption cases, illicit enrichment laws also come with their own barriers to facilitating prosecution. In addition to the abovementioned human rights concerns, the "principle of legality"[10] requires that offences be clearly defined under the law so that the individual can know from the relevant provision what acts and omissions make him or her liable. It has been argued that the offence of illicit enrichment may not provide sufficiently clear guidelines on which conduct is prohibited, and some authors emphasise the need for offences associated with illicit enrichment to be clearly defined under the law to ensure that public

[5] Ibid. Also see: Salabiaku v. France, European Court of Human Rights, 1988.

[6] For more information on case, see: "France approves arrest warrant for son of E. Guinea president", 11 April 2012, Reuters, http://af.reuters.com/article/commoditiesNews/idAFL6E8FB1VO20120411.

[7] See: "Former Greek Defense Minsiter Arrested for Corruption", 11 April 2012, *Deutsche Welle*, http://www.dw.de/dw/article/0,,15875204,00.html.

[8] Maud Pedriel-Vaissiere, *The accumulation of unexplained wealth by public officials: Making the offence of illicit enrichment enforceable*, U4 Brief, January 2012:1, http://www.u4.no/publications/the-accumulation-of-unexplained-wealth-by-public-officials-making-the-offence-of-illicit-enrichment-enforceable/downloadasset/2638.

[9] Ibid.

[10] Ibid.

officials cannot claim they were unaware of the prohibited conducts.

Moreover, cases can quickly become complicated to prosecute without the mutual legal assistance of other countries (as stated in Article 51 of the UNCAC). As the assets in question may be held abroad, the assistance of other countries is essential. Yet for this to be provided, the act being prosecuted must be criminalised in both jurisdictions, as all mutual legal assistance treaties allow refusal of cooperation on dual criminality grounds. This means that countries which have not criminalised illicit enrichment can refuse cooperation. This also means that due to the constitutional challenges of the reversal of burden of proof, the support needed to effectively pursue the case may not be possible.

While they do not supplant legal provisions that allow for the prosecution of illicit enrichment, it is important to note that for public officials there are other laws and measures, including civil-based law, which can be used to address the problem. For example, all UNCAC signatories have adopted legislation to prosecute embezzlement by public officials, and others have passed laws on the trading of influence and the abuse of office by public officials.[11] All of these laws provide for a legal recourse to process corruption on the part of public servants.

Another effective mechanism in the fight against illicit enrichment has been the use of income and asset disclosure (IAD) systems. These systems rely on the filing of regular and timely asset declarations by public officials. The systems aim to detect and prevent corrupt activities and/or conflicts of interest. As part of detecting corruption, the establishment of an IAD system can be used for targeting illicit enrichment even if national laws do not exist that criminalise the offense, and may be well placed in countries where impunity and corruption levels are perceived to be high.[12] Past research suggests that the usefulness of an IAD system will depend on the strength of the regulatory framework (for sanctions) and the resources (human, technical and financial) that are made available to monitor compliance and analyse the filing of declarations.[13] For example, while Portugal currently mandates that elected officials file declarations, it has been argued that there is no strong mechanism in place to review and follow up on them.

The UN Stolen Asset Recovery (StAR) initiative has compiled case studies and analysis of "good practices" on how to maximise the effectiveness of a disclosure requirement in different contexts. These draw on the extensive data that StAR and the World Bank have collected about IAD systems, which point to some of the following characteristics:

- clearly-defined goals of the purpose of the system
- determination of whether the system is designed to prevent and detect illicit enrichment and/or conflicts of interest
- recognition of the context and capacity of the complementary mechanisms (such as the judicial system and oversight bodies)
- establishing the right degree of publicly-available information while protecting privacy concerns
- balancing the need for coverage of public officials with the capacity of the system to assess and monitor the disclosures
- setting out clear areas for disclosure and frequency for filing
- establishing proportionate and enforceable sanctions for non-compliance
- linking disclosure requirements to a code of conduct or ethics for public officials
- enforcing sanctions to establish credibility[14]

Still, IAD systems may not promote the prosecution of crimes. Based on a study completed by the Organisation for Economic Co-operation and Development (OECD), only two countries out of 14 have recognised that filed declarations can be used as evidence in a criminal case or filing one. The

[11] UNCAC, *Implementation of chapter III of the United Nations Convention against Corruption*. Report prepared for the fourth CoSP, Marrakech, Morocco, 24-28 October 2011, http://www.unodc.org/documents/treaties/UNCAC/COSP/session4/V1185288e.pdf.

[12] World Bank, *Public Office, Private Interest*, (Washington, DC: World Bank, 2012).

[13] Marie Chêne, *Foreign exchange controls and assets declarations for politicians and public officials*, U4 Expert Answer, , 28 June 2011.

[14] Ruxandra Burdescu, Gary J. Reid, Stuart Gilman and Stephanie Trapnell, *Stolen Asset Recovery: Income and asset declarations: Tools and trade-offs,* (Washington, DC: World Bank and UNODC, November 2009); also see: *Public Office, Private Interests, Accountability through Income and Asset Disclosure* at: http://www1.worldbank.org/finance/star_site/.

exceptions include Latvia and Romania. In Latvia, criminal proceedings have been taken up against 12 officials. In Romania, 99 cases have been sent to the public prosecutor since 2008.[15]

2 GLOBAL LEGAL PRECEDENTS

Relevant international frameworks

There are three global conventions that address illicit enrichment: the 1988 UN Convention against Illicit Traffic of Narcotic Drugs and Psychotropic Substances (Article 5), the 2005 UN Convention against Corruption (Chapter 3, Articles 20 and 28) and the 2003 UN Convention against Transnational Organized Crime (Article 12.7).

The first convention recommends that all state parties to the convention "consider ensuring that the onus of proof be reversed regarding the lawful origin of alleged proceeds or other property liable to confiscation, to the extent that such action is consistent with the principles of its domestic law and with the nature of the judicial and other proceedings".

The second convention, known as the UNCAC, states a non-mandatory requirement that "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" (Article 20). It also adds that all state parties shall "consider the possibility of requiring that an offender demonstrate the lawful origin of such alleged proceeds of crime or other property liable to confiscation" (Article 31.8). It was made a non-mandatory provision as many Western European countries objected, arguing that such offence would be unconstitutional in their legal systems, especially with regard to the inclusion of the concept of reversal of the burden of proof, and suggested making it less binding and moving it to the chapter on preventive measures.

The third convention, sometimes called the Palermo Convention, requires that all state parties look at the "widest range of predicate offences" and consider "requiring 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" (Article 12).[16]

Other legal references

Apart from these conventions, there are other legal references that have been used to extend the understanding and remit of states to prosecute illicit enrichment.

At the regional level, the Inter-American Convention against Corruption was among the first conventions to include a specific provision to target illicit enrichment (Article IX) in 1996. It calls on signatories to establish as an offence "a significant increase in the assets of a government official that he cannot reasonably explain".[17] According to some scholars, the convention was inspired in this regard by Latin American criminal law, where the offence of illicit enrichment is established legally in more than ten nations.[18]

In 2003, the African Union Convention on Preventing and Combating Corruption made the offence of illicit enrichment – referred to as a significant increase in the assets of a public official or any other person which he or she cannot reasonably explain in relation to his or her income – a mandatory provision of the convention.

The same year, the Financial Action Task Force took on the issue of illicit enrichment through money laundering and advised members to include "the

[15] OECD, 2011, *Asset Declarations for Public Officials: a tool to prevent corruption,* http://www.oecd.org/dataoecd/40/6/47489446.pdf.

[16] See: http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf.

[17] See: http://www.oas.org/juridico/english/treaties/b-58.html.

[18] See Nelly Gachery Kamunde*: The crime of illicit enrichment under international anti-corruption legal regime*

widest range of predicate offences" (Recommendation 1).[19]

In 2005, the Council of Europe came out with a framework decision that places the responsibility on individuals convicted of organised-crime-related offences to establish that their assets were not illegally acquired. The decision recommends confiscation "where it is established that the value of the property is disproportionate to the lawful income of the convicted person and a national court based on specific facts is fully convinced that the property in question has been derived from the criminal activity of the convicted person" (Article 3.2.c).[20]

3 EXAMPLES OF NATIONAL LEGAL FRAMEWORKS

Countries having unexplained wealth offences include Hong Kong, Botswana, India, Zambia and many Latin American countries such as Argentina, Chile,[21] Colombia,[22] Costa Rica[23] and Panama.[24] It is interesting to note that there has been a renewed focus on this type of legislation. Brazil, for example, will vote on a proposed law that would criminalise the illicit enrichment of public officials and allow for the confiscation of the assets in question.[25]

Based on civil law, most of these countries have used indirect methods of proof.[26] This requires arguing that the money in question does not correlate with income that has been legally earned (such as through inheritance, a loan, gift, award, etc.). While the assessment requires deducing which evidence is relevant, it typically looks at unsubstantiated and non-typical increases in one's assets that are incongruent with the legally-reported income that the person in question has accounted for. Once this fact is successfully established, the burden then shifts to the accused to provide evidence to the contrary.

Below are some examples of how such laws have been pursued and where this has been done.[27] As these examples note, many of the laws have been designed to target criminal networks and their conspirators rather than focusing on public officials. A key part of enforcing the legislation includes the use of asset declarations on the part of public officials.[28]

Argentina

The country's criminal code allows for the prosecution of illicit enrichment by public officials (as well as any individual) through an amendment passed in 1999.[29] This amendment targets public officials and assigns specific sanctions, including prison terms (two to six years), fines (between 50 per cent and 100 per cent of the value in question) and disqualification from public office (for life).[30] Also, a constitutional reform (1994) led to the inclusion of specific text disqualifying anyone from public office who commits illicit enrichment. Case law has since argued that the measures punish the lack of

[19] See: http://www.fatf-gafi.org/document/55/0,3746,en_32250379_32236920_43660471_1_1_1_1,00.html.

[20] Council of Europe, Council Framework Decision 2005/212/HA, 24 February 2005, paragraph 10. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:068:0049:0051:en:PDF.

[21] Código Penal de Chile, Titulo V, Libro Segundo, artículo 241 bis.

[22] Código Penal Colombiano, TÍTULO XV Delitos contra La administración publica, capitulo 6°: Del enriquecimento ilícito, Articulo 412.

[23] Ley Contra la corrupción y el enriquecimiento ilícito en la función pública, N° 8422, Costa Rica, 2004.

[24] Código Penal de Panamá, Libro II: de los delitos, Titulo X: Delitos contra la administración pública, Capitulo II: Corrupción de servidores públicos, articulo 335 a.

[25] A senatorial commission has just completed work to recommend the criminalization of illicit enrichment in Brazil. In May, the Senate is to vote on the measure, which would reform the country's penal code. See: http://www1.folha.uol.com.br/poder/1080160-comissao-de-juristas-aprova-criminalizacao-do-enriquecimento-ilicito.shtml.

[26] Guillermo Jorge, *The Romanian Legal Framework on Illicit Enrichment* (Washington, DC: ABA, CEELI, July 2007), http://apps.americanbar.org/rol/publications/romania-illegal_enrichment_framework-2007-eng.pdf.

[27] For more examples, see: Jorge (2007). Also see the good database of laws provided at www.assetrecovery.org/kc.

[28] Only Chile and Colombia require that this information is made public and is published online.

[29] Law on Public Ethics (number 25.188).

[30] See: Jorge (2007), Appendix A, section F.2.

justification of the origin of one's enrichment and does not reverse the burden of proof.[31]

Australia

While the country has no specific laws that criminalise illicit enrichment, it does have legislation for offences listed in its Proceeds of Crime Act (2002) that permits the burden of proof to be placed on the defendant to demonstrate that the assets in question have not been illicitly gained.[32] Moreover, the burden of proof is lower for civil forfeiture than conviction-based recovery (which must be beyond reasonable doubt).[33]

Canada

The country treats illicit enrichment as one piece of circumstantial evidence which can be introduced at trial when and if the prosecutor has charged a person with one of the existing corruption offences. The existence of illicit enrichment may help the prosecutor prove the corruption offence beyond a reasonable doubt.[34] However, illicit enrichment is not considered an offence in itself according to Canadian law.

France

The country has introduced criminal code provisions that allow for the reversal of the burden of proof.[35] The offence of illicit enrichment does not exist per se but another closely related offence has been introduced, called "non-justification of resources". According to Article 321-6 of the penal code, if a person cannot justify his or her resources or the origin of something that he or she owns, the law presumes that he or she is aware of the unlawful origin of the funds. As a result, the public prosecutor does not have to prove the financial link between the resources of the person and the offence. The proof of a link between the person and another person who committed an offence and the lack of justification of the resources would be enough to constitute the offence. This provision covers any citizen and not just public officials.

According to Transparency International France, the implementation of this provision is limited in practice by shortcomings in the overall French asset declaration regime. Since 2011, public officials have to file asset declarations at the beginning and end of their mandate and submit them to a commission tasked with monitoring them. However, asset declarations are not made public and the powers of the commission are limited. It can only receive the declaration and forward it to the public prosecutor if something seems wrong; it does not have the power to conduct any investigation or to pronounce any sanction.

Germany

The country's criminal code allows for a forfeiture of assets when it is believed that they have been obtained illegally, but the burden of proof is not reversible. Any case must be built around substantial evidence.[36]

Ireland

The Proceeds of Crime Act (1996) was introduced to reign in organised crime.[37] It established the Criminal Assets Bureau (CAB), which is a specialised unit within the Irish police (Garda) that can secure a High Court order to freeze and seize the proceeds of

[31] See: Case "Vallone, José A.", National Criminal Court, Chamber 1, 11 June 1998.

[32] See: http://www.comlaw.gov.au/Series/C2004A01022.

[33] *Confiscation of the proceeds of crime: federal overview*, Transnational Crime Brief No. 1 (Canberra, Australia: Australian Institute of Criminology, January 2008), http://www.aic.gov.au/publications/current%20series/tcb/1-20/tcb001.aspx.

[34] Transparency International, *Asset Declaration for Politicians*, Germany, December 2011; also see Gerry Ferguson, 'Canada's Efforts at Combating Corruption' paper presented at the International Symposium on UNCAC: Implementation and Improving Criminal Justice in China, Guiyang, China, June 2006, http://www.icclr.law.ubc.ca/china_ccprcp/files/Presentations%20and%20Publications/20%20Canadas%20Efforts%20at%20Combating%20Corruption_English_English.pdf.

[35] See the Criminal Code, Articles 225-6 (paragraph 3), 225-12-5 (paragraph 4), 321 (paragraph 6) and 450-2-1.

[36] See: Criminal Code, section 73d, http://www.gesetze-im-internet.de/englisch_stgb/index.html.

[37] For more information, see: http://www.irishstatutebook.ie/1996/en/act/pub/0030/index.html.

crime. Confiscation can occur without a criminal conviction, although the burden of proof rests with the CAB to prove that the assets in question were acquired unlawfully. In 2005, public officials were brought under the same legislation. Interestingly, the CAB needs a conviction on corruption before pursuing action on related illicit enrichment charges against public officials. However, the burden of proof can be reversed through a predicate offence if well-argued by the prosecution. Moreover, the Ethics in Public Office Act (1995) requires specific grades of public officials to declare their assets annually. The failure to do so can open up the way for further action.[38]

Italy

The current law is limited to cases involving drug trafficking and organised crime. In these instances, the defendant must prove that his/her assets have been legally gained if the prosecution is able to demonstrate that they do not correspond with the person's income or other resources. Interestingly, if the person is convicted, any confiscation would be of the person's entire assets and not just those generated by the offence in question.[39]

Mexico

The country has some of the strictest sentences for illicit enrichment in a region where many countries have sanctions for this offence. The Mexican penal code allows for the prosecution of an individual who cannot certify a legitimate increase in his/her assets. The penalties for illicit enrichment are: (i) state confiscation of the assets in question; (ii) imprisonment for between two and 14 years if the amount of illicit enrichment exceeds five thousand times the minimum wage (for Mexico City); (iii) penalties of three hundred to five hundred times the minimum wage; and (iv) removal and disqualification from public offices for two to 14 years.[40]

Netherlands

The country modified its criminal code (Article 36e) through the "Pluk-ze" ("Squeeze 'em") act in 1993 to allow the partial reversal of the burden of proof in cases associated with illicit proceeds that are the product of committing a specific set of crimes (such as drug trafficking). As with Italy, the inclusion of all of a person's assets is possible if the prosecution can demonstrate successfully that there is a high probability of these being proceeds gained from similar offences.[41] The Dutch Supreme Court also has upheld that the provision does not violate the European Convention on Human Rights, which declares the presumption of innocence (Article 6(2)).[42] Finally, a new law was introduced by the Ministry of Security and Justice to make confiscation mandatory in money-driven cases.[43]

Spain

The Spanish Supreme Court has noted that several, non-contradictory indications are admissible as sufficient proof beyond a reasonable doubt that the assets in question have an illicit origin.[44] Nevertheless, the Spanish penal code does not consider illicit enrichment to be a separate criminal offence that is subject to prosecution. Rather, it addresses other crimes that may lead to illicit enrichment, such as bribery, embezzlement etc.

[38] http://www.irishstatutebook.ie/1995/en/act/pub/0022/index.html.

[39] See: Law 356, 7 August 1992; also see: Giuliano Turone, "Legal Frameworks and Investigative Tools for Combating Organized Transnational Crime in the Italian Experience", Resource Material Series No. 73 (Tokyo, Japan: UNAFEI, December 2007), http://www.unafei.or.jp/english/pdf/RS_No73/No73_10VE_Turone.pdf.

[40] Código Penal Federal de México, Artículo 224, Libro Segundo.

[41] Tijs Kooijmans, "The Burden of Proof in Confiscation Cases: A Comparison between the Netherlands and the United Kingdom in Light of the European Convention of Human Rights", European Journal of Crime: Criminal Law and Criminal Justice 18 (2010), 225-236, http://arno.uvt.nl/show.cgi?fid=106381.

[42] See: "Netherlands: Measures to Facilitate Seizure of Criminal Proceeds", US Library of Congress online, 23 June 2009. http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205401377_text.

[43] This law took effect on 1 July 2011. See: http://www.debrauw.com/News/LegalAlerts/Pages/RCENewsletter-July2011.aspx.

[44] Ibid. Also see: SST de 2-10-2004, by Justice Granados Perez, SST 1-3-2005, by Justice Berdugo, SST de 14-9-2005, by Justice Monterde, .STS de 19-1-2005 , by Justice Giménez García.

These crimes can be flagged through the asset and interest declarations submitted by Spanish public officials. In Spain, members of the government have to disclose interests and activities to the Spanish Conflict of Interest Office (CIO). The CIO is responsible for managing these declarations and making them public. If there is any evidence of criminal offence, the CIO has to refer to the State Prosecutor's Office.[45]

United Kingdom

Relevant legislation is tied to the Criminal Justice Act and the Proceeds of Crime Act (2002) and focuses on drug trafficking and other profitable crimes. The prosecution must establish whether the defendant has had a criminal lifestyle or whether the illicit benefits have been the result of a single offence.[46] In addition, existing legislation requires preventative and detective measures to signal possible cases of illicit enrichment by public officials. For example, members of UK Parliament must register business interests, gifts and hospitality provided to them (above a threshold value). Still the burden of proof rests with the prosecution to prove, beyond reasonable doubt, that offence.[47]

United States

The legal system in the United States does not permit the reversal of burden of proof for cases of illicit enrichment. There is a presumption of innocence for the accused required under the US Constitution. However, there has been an adoption of other statutes to target public officials who have profited from illicit gains. For example, the Ethics in Government Act[48] requires employees of the executive, legislative and judicial branches to file financial disclosure reports which can then be used as evidence to pursue cases and confiscate these proceeds.[49] As with Australia, the country has a difference in thresholds for criminal and civil proceedings. Criminal confiscation can only occur once there has been a conviction. In civil cases, once the prosecution demonstrates that there is probable cause to bring a case, then the defence must show that the property or assets in question were legally acquired.

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[45] Pinto Leon, Ignacio, "El enriquecimiento ilícito" – Tesis, México, 200, p. 74.

[46] See: http://www.legislation.gov.uk/uksi/2008/1978/contents/made.

[47] See: *BOND, Report on the UK's Compliance with the UN Convention Against Corruption* (London, UK: BOND, 2011). http://www.uncaccoalition.org/en/learn-more/resources/finish/4-2011-cosp-materials/198-uk-civil-society-uncac-report.html

[48] See: http://www.oge.gov/FOIA-and-Privacy-Act/The-Ethics-in-Government-Act/The-Ethics-in-Government-Act/.

[49] See Nancy Boswell and Shruti Shah, *UN Convention against Corruption: Civil Society Review: USA 2011* (Washington, DC: TI USA and UNCAC Coalition, 2011), http://www.uncaccoalition.org/en/uncac-review/cso-review-reports.html.