LEGAL PROVISIONS TO FACILITATE THE GATHERING OF EVIDENCE IN CORRUPTION CASES: EASING THE BURDEN OF PROOF

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ABSTRACT

The present article explains the strategic value of facilitating the gathering and evaluation of evidence by easing the burden of proof in order to overcome the inability of the criminal justice system to respond effectively to non-conventional crime such as corruption, money-laundering and organized crime.

INTRODUCTION

Unlike most other crime, the offence of corruption has no obvious victim who could complain. Everyone involved in its commission is a beneficiary and has an interest in preserving secrecy. As it is exceptionally difficult to obtain clear evidence of the actual payment of a bribe, corrupt practices frequently remain unpunished. However, while evidence of the commission of specific corrupt acts may be lacking, circumstantial evidence is often available. This may be as stark as the model of the car that a junior officer drives to work or as the schools abroad at which the children of a senior official are being educated.

With the increase in the levels of corruption and in the complexity of methods used to transfer bribes, there is a growing need in many societies for an effective and efficient legal framework for the investigation and prosecution of corrupt acts. In particular, there is a need to render laws enforceable by greater resort to circumstantial evidence, but only to the extent consistent with international human rights norms, including the principle of the presumption of innocence. The challenge is to strike the

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right balance between, on the one hand, society's need to protect itself from corrupt practices and, on the other, the need to safeguard the accused from unfairness, unjustified intrusion into his or her privacy, or wrongful conviction (De Speville 1997). In this regard, some national legislators have chosen to focus on the results of the criminal act rather than on the illicit practice at its root. The two main strategies aim at criminalizing unexplained wealth and facilitating the confiscation of such wealth.[2]

Criminalizing the possession of unexplained wealth

There is an increasing tendency to criminalize the possession of unexplained wealth by introducing an offence that penalizes a public servant (or former public servant) who is or has been maintaining a standard of living or is in possession of pecuniary resources or property significantly disproportionate to his or her present or past official salary and who is not able to give a satisfactory explanation in this regard. Criminalizing the possession of such wealth, which is described in some jurisdictions as "illicit enrichment" or possession of "unexplained wealth", has now become an accepted measure in the fight against corruption.[3]

Confiscation of unexplained wealth

Far more widespread than measures to criminalize the possession of unexplained wealth are those designed to facilitate the confiscation of such wealth. These were, in the past, adopted in respect of drug-related offences by States seeking to implement the provisions of article 5, paragraph 7, of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (United Nations 1994):

> "7. Each Party may 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."

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[2]The steadily growing number of regional and international initiatives and instruments designed to combat not only corruption but also organized crime, drug trafficking and money-laundering include the 40 recommendations of the Financial Action Task Force on Money Laundering (1996), the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (United Nations 1998), adopted by the Organisation for Economic Cooperation and Development (OECD) on 21 November 1997; the Inter-American Convention against Corruption (E/1996/99), adopted by the Organization of American States (OAS) on 29 March 1996; and the United Nations Convention against Transnational Organized Crime (General Assembly resolution 55/25, annex I).

[3]See Hong Kong Special Administration Region of China, Prevention of Bribery Ordinance, s.10; Botswana, the Corruption and Economic Crime Act, art. 34; the OAS Inter-American Convention against Corruption, art. IX; Greece, Law on Money Laundering, No. 2331, 24 August 1995, arts. 2 and 3; Kenya, Narcotic Drugs and Psychotropic Substances Act, No. 4, 8 July 1994, arts. 36 and 40.

The domestic response has included an easing of the burden of proof,[4] a reversion of the burden of proof[5] and even an irrebuttable presumption of the illegal origin of the assets in question.[6] In many legal systems, confiscation is not regarded as a penalty but as a "compensating measure" aimed at depriving the offender of what he or she has acquired illegally and therefore has no right to possess. Its purpose is to replace the offender in the same situation (economically) as that in which he or she was before the offence was committed.[7] For example, in 1994 in Hong Kong,[8] the Court of Appeal held that the presumption of innocence did not apply to confiscation proceedings under the Drug Trafficking (Recovery of Proceeds) Ordinance 1989, since those proceedings did not involve the determination of a criminal charge.[9]

The effectiveness of such measures varies significantly, depending on how strong a link is required between the unexplained wealth and the criminal act from which such wealth originated. Some countries allow the confiscation without requiring a prior conviction, the only criteria being the absolute disproportion between the assets and the known sources of income, and the unwillingness or inability of the "owner" to provide a satisfactory explanation for their acquisition. In other words, a rebuttable presumption is applied that the assets are derived from criminal activities.[10] Other countries require a conviction, thus creating a link between the criminal act and the assets to be confiscated. An obvious disadvantage of this approach is that it is sufficient for the accused person to show that the property or pecuniary resources in his or her possession were not derived from the offence of which he or she has been convicted. The confiscation provision thus becomes a "toothless tiger", especially in the case of an offender whose illicit wealth has been accrued systematically over a long period of time and who, though found guilty of a criminal act, is able to demonstrate that his or her wealth was not derived from

[4]See Italy, Law No. 356, art. 12; Germany, Strafgesetzbuch (Criminal Code), art. 78d; and Singapore, Confiscation of Benefits Act, s. 4.

[5]See Greece, Law on Money Laundering, No. 2331, 24 August 1995, arts. 2 and 3; Norway, General Civil Penal Code, art. 34a; Kenya, Narcotic Drugs and Psychotropic Substances Act, No. 4, 8 July 1994, arts. 36 and 40; Japan, Anti-Drug Special Law, art. 8.

[6]In El Salvador, article 46 of Law No. 78 of 5 March 1991 establishes a presumption in law that the "monies or proceeds are derived from transactions connected with drug-related offences if, within a maximum period of three years computed retroactively, their negotiation has been proposed or requested by or on behalf of a person prosecuted for any of the offences under this Law".

[7]The situation might be different in the case of confiscation of the *instrumenta sceleris* or *producta sceleris*, where a penalty-like effect might prevail.

[8]On 1 July 1997, the territory of Hong Kong became the Hong Kong Special Administrative Region of China.

[9]*R. v. Ko Chi-Yuen*, Court of Appeal of Hong Kong (1994), 4 HKPLR 152.

[10]In Italy, article 2 of Law No. 575 of 31 May 1965 provides for the seizure of property owned directly or indirectly by any person suspected of participating in Mafia-type associations when its value appears to be out of all proportion to his or her income or economic activities or when it can be reasonably argued, based on the available evidence, that said property constitutes the proceeds of unlawful activities. The seized property becomes subject to confiscation if its lawful origin cannot be proved (see also United States of America, Anti-Drug Abuse Act 31 USC, s. 5316; and Ireland, Proceeds of Crime Act 1996 and Criminal Assets Bureau Act 1996).

that one criminal act or was acquired through other criminal acts for which he or she cannot be prosecuted because of the operation of a statute of limitations.

Another approach, one that is perhaps more innovative and has been adopted in certain legal systems that accord constitutional protection to both the presumption of innocence and the right to property, is the so-called property penalty.[11] As its name suggests, it is a provision that enables not the confiscation of property of illegal or apparently illegal origin but the imposition of a penalty. Problems have, however, been encountered in its application. For example, in Germany, the legislature failed to prescribe a clear system by which the application of the property penalty would be compensated by a reduced prison term; it was left to the judiciary to develop such a system on a case-by-case basis.[12] Moreover, it was argued that wealthy offenders may more likely receive a reduction of their penalty, while those whose resources are exhausted would be denied the opportunity to "buy themselves out" of prison (see, for example, Eser (1993)).[13] A fourth approach is that of administrative sanctions, such as the loss of office, the loss of licences and procurement contracts, and exclusion from certain professions.[14] None of these sanctions requires proof of illicit origin of the assets "beyond reasonable doubt", but regards a "high degree of probability" resulting from the inability of the owner to prove the contrary as sufficient to meet the evidentiary requirement.

The presumption of innocence

Everyone charged with a criminal offence has the right to be presumed innocent until proved guilty according to the law. This right is recognized not only under international and regional human rights instruments,[15] but also under most national constitutions. The presumption of innocence contains three fundamental components: the onus of proof lies with the prosecution; the standard of proof is beyond reasonable doubt; and the method of proof must accord with fairness.[16] Its objective is to minimize

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[11]See Germany, Strafgesetzbuch (Criminal Code), art. 43a; see also United Kingdom, Drug Trafficking Offences Act of 1986 and Drug Trafficking Act of 1994.

[12]For that reason the article was found to violate the principle of legality and declared unconstitutional by the German constitutional court.

[13]However, these reservations were not shared by the German High Court, since the provision "is not containing any presumption in law regarding the origin of the property of the accused" (Bundesgerichtshof, Fifth Senate, *Neue StrafrechtsZeitschrift* 1995, 333; confirmed by the Third Senate, *Neue StrafrechtsZeitschrift*, 1996, p. 78.

[14]For example, Italy, Law No. 575/1965.

[15]*R. v. Oakes*, Supreme Court of Canada (1987), LRC (Const) pp. 477 and 489.

[16]Universal Declaration of Human Rights (General Assembly resolution 217 A (III)), art. 11, para. 1; International Covenant on Civil and Political Rights (Assembly resolution 2200 A (XXI), annex), art. 14, para. 2; Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms (United Nations, *Treaty Series*, vol. 213, No. 2889), art. 6, para. 2; American Convention on Human Rights (United Nations, *Treaty Series*, vol. 1144, No. 17955), art. 8, para. 2; and African Charter of Human and Peoples' Rights, art. 7, para. 1.

the risk that innocent persons may be convicted and imprisoned. The Committee on Human Rights has emphasized that no guilt can be presumed until the charge has been proved beyond reasonable doubt. Indeed, none of the international or regional human rights instruments permit any limitations to be placed by law on the presumption of innocence.

However, with the emergence or escalation of organized crime, drug trafficking, terrorism and corruption, in many legal systems the operation of other statutory presumptions of law or fact have been considered necessary for the effective administration of criminal justice. The pre-eminent position accorded to the presumption of innocence means that these presumptions of law or fact require to be confined within reasonable and appropriate limits.[17] In no circumstances should an accused be required to do more than raise a reasonable doubt as to his or her guilt. Accordingly, a presumption that relieved the prosecution of part of its burden of proving all the elements of a criminal charge, so that a conviction could result despite the existence of a reasonable doubt as to the guilt of an accused person, would be inconsistent with the presumption of innocence.[18]

There does not appear to be a common formula that could be applied to determine whether a statutory presumption of law or fact conflicts with the presumption of innocence. The degree of flexibility that is normally assumed to be implicit in a provision of general application is perhaps also permitted in respect of the presumption of innocence. One example of this is the case of an offence involving the performance of some act without a licence. Common sense dictates that the prosecution should not be required to shoulder the virtually impossible task of establishing that a defendant does not have a licence when it is a matter of comparative simplicity for the defendant to establish that he or she has one (*Halsbury's Laws of Hong Kong* 2001, p. 470).

The Judicial Committee of the Privy Council of the United Kingdom, sitting in Hong Kong's court of final appeal, observed that this "implicit flexibility" allows a balance to be drawn between the interests of the person charged and the State in "situations where it is clearly sensible and reasonable that deviations should be allowed from the strict application of the principle that the prosecution must prove the defendant's guilt beyond reasonable doubt". Whether an exception is justifiable will in the end depend upon whether it remains primarily the responsibility of the prosecution to prove the guilt of an accused to the required standard and whether the exception is reasonably imposed, notwithstanding the importance of maintaining the principle enshrined in the presumption of innocence. The less significant the departure from the normal principles, the simpler it will be to justify the exception. If the prosecution retains responsibility for proving the essential ingredients of the offence, it is less likely that an exception will be regarded as unacceptable. In deciding what are the essential ingredients, the language of the relevant statutory provision will be important. However,

[17]*Salabiaku v. France*, European Court of Human Rights (1988), 13 EHRR 379.

[18]In El Salvador, article 46 of Law No. 78 of 5 March 1991 may contain such a provision.

what will be decisive is the substance and reality of the language creating the offence rather than its form. If the exception requires certain matters to be presumed until the contrary is shown, then it will be difficult to justify the presumption unless it can be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.[19]

Rebutting a presumption of fact

In most cases, there are three potential ways in which the presumed fact may be rebutted. First, the accused may be required merely to raise a reasonable doubt. Second, the accused may have an evidentiary burden to adduce sufficient evidence to bring into question the truth of the presumed fact. By so doing, he or she raises an issue before it has to be determined as one of the facts in the case. Third, the accused may have a legal or persuasive burden to prove on a balance of probabilities the non-existence of the presumed fact. A persuasive burden reverses the burden of proof by removing it from the prosecution and transferring it to the accused and is therefore, as far as criminal conviction is concerned, in breach of the presumption of innocence. If the accused has a legal burden of disproving on a balance of probabilities an essential element of an offence, as the third option mentioned above would require him or her to do, a conviction could occur despite the existence of a reasonable doubt. That would result if the accused adduced sufficient evidence to raise a reasonable doubt as to his or her guilt but did not convince the court on a balance of probabilities that the presumed fact was untrue.[20]

Application of a "reverse onus" provision

The question of whether a so-called "reverse onus" provision is consistent with the presumption of innocence was examined in Hong Kong, where the Hong Kong Bill of Rights Ordinance 1991 had entrenched the International Covenant on Civil and Political Rights in the constitution of that territory. Section 10 of the Prevention of Bribery Ordinance of Hong Kong, which preceded the Bill of Rights, provides that "any person who, being or having been a public servant, *(a)* maintains a standard of living above that which is commensurate with his present or past official emoluments; or *(b)* is in control of pecuniary resources or property disproportionate to his present or past official emoluments, shall, unless he gives a satisfactory explanation to the court as to how he was able to maintain such a standard of living or how such pecuniary resources or property came under his control, be guilty of an offence." The validity of section 10 was challenged on the grounds of inconsistency with the constitutionally guaranteed presumption of innocence.

[19]*Attorney General v. Lee Kwong-kut* (1993), 1 HKPLR 72.

[20]*Lingens and Leitgens v. Austria*, European Court (1981), 4 EHRR 373.

The Court of Appeal of Hong Kong held that section 10, paragraph 1, places the burden of proving the absence of corruption on the defendant. But before he or she is called upon to do so, the prosecution has to prove beyond reasonable doubt the public servant status of the accused, his or her standard of living during the charge period and his or her total official emoluments during that period; in addition, the prosecution has to prove that his or her standard of living could not reasonably, in all the circumstances, have been afforded out of his or her total official emoluments during that period. Once those matters have been proved by the prosecution, the defendant has to give a satisfactory explanation as to how he or she was able to maintain an incommensurate standard of living or how disproportionate pecuniary resources or property came under his or her control. Ordinarily, the primary facts on which the defendant's explanation would be based, such as the existence of any capital or income independent of his or her official emoluments, would be peculiarly within the defendant's own knowledge. If the defendant "proves" on a "mere balance of probabilities" the factual matters on which his or her explanation is based, the court has to decide whether or not such matters might reasonably account for the incommensurate standard of living or disproportionate pecuniary resources or property.[21]

The court stressed that the explanation requirement was not triggered by trifling incommensurateness or disproportion. Unless something is more than trifling, the court cannot safely hold that it even exists. What really triggers the explanation requirement is incommensurateness or disproportion that is unreasonable in the circumstances. Even where that threshold is reached, it is still the case that the slighter such incommensurateness or disproportion is, the less is required by way of an explanation for the same. The court observed that where corruption is concerned, there is a need, within reason, of course, for special powers of investigation and an explanation requirement. Specific corrupt acts are inherently difficult to detect, let alone prove in the normal way. The true victim, society as a whole, is generally unaware of the specific occasions on which it is victimized; and, unlike in dangerous drug cases, there is no obviously unlawful commodity such as the drugs themselves that the offender can be in possession of. Accordingly, section 10, paragraph 1, was consistent with the constitutional guarantee of the presumption of innocence. It was dictated by necessity and went no further than necessary.[22]

Conclusion

The expression "reverse onus" is perhaps both unfortunate and inaccurate. Its continuing use invariably leads to controversy. To "ease" the burden of proof ought not to be regarded as "shifting" the burden to the accused

[21]It should be noted that the terms "prove" and "mere balance of probabilities" are used in the judgement not with reference to the explanation as such, but to the primary facts or factual matters on which the explanation is based.

[22]*Attorney General v. Hui Kin-Hong*, Court of Appeal of Hong Kong, 3 April 1995.

person. The focus should be on what the Judicial Committee of the Privy Council has described as the doctrine of "implicit flexibility". To "ease" the burden of proof should be viewed as drawing the right balance between the rights of the accused person and the interests of the community in situations where, without eroding the rights, common sense dictates that an explanation be sought from an official in possession of disproportionate wealth.

Efforts to ease the burden of proof in corruption cases have been criticized for a lack of rationality or proportionality or both (Hodgson 1984, p. 82; Perron 1993, p. 918; Wesslau 1991). It has been argued that the interest of society in combating corruption should not outweigh an individual's fundamental rights. However, the rationale for the offence of "illicit enrichment" and authority for the confiscation of "unexplained wealth" is, on the one hand, deterrence and, on the other, the positive effect that punishing offenders would have on restoring confidence in the rule of law. The theory of deterrence, which is founded upon the assumption that man is a *homo economicus* whose decisions are the outcome of a careful weighing of advantages and disadvantages, has been rejected so often that it can almost be discarded. Research reveals that the probability of apprehension, prosecution and conviction is seldom considered by an offender. Corruption and extortion, its twin, differ from many other offences in that they are motivated less by revenge, hate or even the inability to eke out a living through lawful means than by excessive greed. Confiscation, if designed as an effective measure, is likely to have an impact at the initial stage of demanding and accepting a bribe.[23] Moreover, empirical evidence suggests that society regards prompt and effective punishment as one (and possibly the most important) element of a credible anti-corruption strategy (Inspectorate of the Government of Uganda (n.d.), p. 18).

Despite having emerged as a controversial issue at the early stages of the negotiation of a draft convention against corruption,[24] easing the evidential burden of proof in respect of corruption offences appears to be both necessary and desirable in order to deter potential offenders as well as to facilitate the investigation and successful prosecution of such

[23]According to Michael Levi (2000), corrupt officials follow a "Business plan", which involves all pros and cons regarding the planned crime.

[24]See, for example, the proposals and contributions submitted by the Governments of Sri Lanka (A/AC.261/IPM/7) and Switzerland (A/AC.261/IPM/2) to the Informal Preparatory Meeting of the Ad Hoc Committee for the Negotiation of a Convention against Corruption, held in Buenos Aires from 4 to 7 December 2001; see also the following comments submitted by the Government of Indonesia to the Informal Preparatory Meeting (A/AC.261/IPM/16, para. 25): "The future instrument could also devise new means of overcoming the secrecy of corruption by increasing the significance of circumstantial evidence indicating some source of illicit income of a public official. Criminal and/or administrative sanctioning of the possession of unexplained wealth is only one option that could be taken into consideration. Another possibility consists of developing measures to deprive the public official of his or her inexplicable wealth if he or she maintains a standard of living or is in control or possession of financial resources or property disproportionate to his or her present or past known sources of income and fails to give a satisfactory explanation in that regard. Finally, it may also very well prove necessary to rethink the concept of 'penalty' as such and to start to rely more heavily on 'property penalties' for certain types of crime rather than on imprisonment, or a combination of both."

offences. It is likely to alter the equation of "risk versus reward" that lies at the heart of many calculations when it comes to deciding whether or not to engage in corruption. If successful detection and prosecution are rendered more likely, and a loss of the rewards more probable, then it follows that individuals will be less tempted to engage in misconduct. The challenge, therefore, is not simply to reverse the burden of proof, but to identify the situations where, in the face of strong circumstantial evidence, a person ought to be called upon to explain that which only he or she knows, namely, how he or she came to be in possession of wealth grossly disproportionate to his or her known legitimate income.

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