Discussion Paper 5

The Fight against Corruption and the Concept of Unexplained Wealth

by

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Introduction

Corruption is a major challenge to the development and wellbeing of many countries including Zambia. The UNDP Report, *Tackling Corruption, Transforming Lives* (2008) observes that corruption undermines democratic institutions, retards economic development and contributes to government instability. It attacks the foundation of democratic institutions by distorting electoral processes, perverting the rule of law and creating bureaucratic quagmires whose only reason for existence is the soliciting of bribes. Corruption stunts economic development because outside direct investment is discouraged and small businesses within the country often find it impossible to overcome the "startup costs" required by corruption. In procurement and construction, the ordinary people end up getting inferior quality goods as corruption advantages bribe givers at the expense of quality and the efficient delivery of goods and services. Tragically, as late Former UN Secretary General, Kofi Anan, observed; "corruption hurts the poor disproportionately by diverting resources intended for development, undermining a government's ability to provide basic services, feeding inequality and injustice, and discouraging foreign investment."

Laws adopted by several countries, including Zambia, to fight the scourge of corruption, include the introduction of special rules of evidence, the effect of which is to ease the burden of proof resting on the prosecution and in so doing increase the odds of securing convictions. These rules are termed "*unexplained wealth*" provisions and they require public servants to explain sudden unexplained wealth. Those facing corruption charges claim that these laws are unconstitutional and are an abuse of police powers. In this article, we wish to explore the role of "*unexplained wealth"* provisions in the fight against corruption, and their consistence with the constitutional rights against self-incrimination and the presumption of innocence. We argue that "*unexplained wealth*" laws are constitutional and are a critical tool in the fight against corruption. We further argue that these provisions are mandated by international conventions, and are consistent with, and do not violate, the right to self-crimination and the presumption of innocence. They are a legally appropriate technique in dealing with corruption in all its increasing complexity.

International Conventions and Unexplained Wealth Provisions

Article 20 of the United Nations Convention against Corruption provides that:" subject to its constitutional and the fundamental principles of its legal system, each state party shall consider adopting such legislative measures as may be necessary to establish as 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." In similar vein, the African Union Convention on Preventing and Combating Corruption, in article 8 provides that: "(1) subject to the provisions of their domestic laws, state parties undertake to adopt necessary measures to establish under their laws an offence of "illicit enrichment." The Inter-American Convection Against Corruption, in article 9 states that: "subject to its constitution and the fundamental principles of its legal system, each state party that has not yet done so shall take the necessary measures to establish under its laws as an offence a significant increase in the assets of a government official that he cannot reasonably explain in relation to his lawful earnings during the performance of his function"

The power to prosecute "*illicit enrichment"* without having to prove specific acts of corruption constitutes a core weapon in the United Nation Convention on the Prevention of Corruption. Article 20 of the United Nations Convection against Corruption, also acts as a detection mechanism since it requires the accused to account for his or her incommensurate standard of living and to explain the disproportion between the amount of pecuniary resources and other assets in his or her control at the charge date and his or her total official emoluments up to the same date. To date at least 98 jurisdictions have some form of *illicit enrichment laws*. (*Basel Institute of Governance*).

The common characteristics of all illicit enrichment laws is that they do not require prosecutors to secure conviction for the underlying criminal conduct that allegedly produced the illicit wealth. Rather, illicit enrichment laws only require that the prosecutors show that the person enjoyed an amount of wealth that *cannot be explained* by reference to their lawful income.

In the unexplained wealth/illicit enrichment approach, by placing the onus of proof on the individual whose wealth is in dispute the concept raises a presumption that the wealth was obtained by corrupt means. In other words, in jurisdictions with unexplained wealth laws, it is not necessary to demonstrate beyond reasonable doubt that the wealth was gotten by criminal activity, but instead, the state places the onus on an individual to prove that their wealth was acquired by legal means. A legal device aims at overcoming the difficulties of meeting the burden of proof in corruption related cases. It must however, be emphasized that even though the accused partly bears the burden of proof on this one issue, the standard of proof that applies in the case of the accused is merely an evidential burden of adducing sufficient evidence to rebut the legal presumption created by such a provision.

Those who object to the illicit enrichment provisions do so on the grounds that they are inconsistent with the constitution and violate the presumption of innocence, relax the burden of proof on the prosecution to establish a case beyond reasonable doubt and violate the right of an accused person to remain silent. In the paragraphs below, we would like to demonstrate that the presumption of innocence and the right to silence are not absolute rights. On the contrary, inroads into these rights have been permitted in numerus jurisdictions subject to specific limitations. In the last two decades, there has been a revolution in criminal law and in law enforcement theory. Since the 18th century and until a few decades ago, law has been governed by a relatively steady paradigm centered at determining under what conditions the state would be able to deprive a human being of his fundamental right to freedom. In the era of what others have termed "acquisitive crimes" (crimes that generate profits) however, there has been a shift from traditional theory towards a new "profit oriented paradigm of criminal law." This approach is concerned with the confiscation of ill-gotten gains. It disputes the view that the approach undermines fundamental rights. It observes that in corruption cases fundamental rights provisions on due process and fair hearing are often used by persons accused of corruption to divert attention from the real targets of these provisions-unexplained wealth. In claiming that their refusal to explain the sources of their wealth was justified by the constitutional right to remain silent and not incriminate themselves, they seek to impose an almost impossible task for the prosecution to discharge its burden of proving its case beyond reasonable doubt.

The idea of reversing the burden of proof was first internationalized in the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. Article 5 of the Convention required states to confiscate proceeds of drug trafficking as well as to internationally cooperate to that end. Article 7 provided that: " state parties 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 action is consistent with principles of its domestic law and within the nature of judicial proceedings and other proceedings." The underlying theory is quite straightforward: increasing the effectiveness of legal instruments to detect, seize and confiscate ill-gotten gains will reduce the motivation for engaging in these criminal activities. Several countries of different legal traditions have adopted and implemented this approach in their anti-corruption legislation. France has introduced in its penal code several offences allowing the reversal of the burden of proof as a central element of the crime. Article 36 of the Dutch Criminal Code allows a partial reversal of the burden of proof with regard to the illicit origin of the proceeds of several crimes. On a constitutional challenge based on the right to innocence, the Dutch Supreme Court held that the provision is compatible with the presumption of innocence of Article 6 (2) of the European Convention on Human Rights. The most important factor considered by the Dutch Supreme Court in reaching this conclusion was the fact that "once a presumption of criminal origin of proceeds has been established by the prosecution, the defense can always reverse the presumption". A mere denial will not be sufficient, however. Once the criminal origin of the proceeds has been made probable, the burden to rebut, not simply deny this presumption, lies with the defense.

Several Australian states have enacted "unexplained wealth laws". Western Australia was the first Australian jurisdiction to introduce unexplained wealth laws with the Criminal Property Confiscation Act, 2000. The Australian legislation requires courts to make an order seizing property if satisfied that a person's total wealth is greater than the lawfully acquired wealth. The Australian legislation is broad and covers more than just public officials. The European Court of Human Rights has made an important ruling on the compatibility of these laws with the right to silence and the burden of proof. The court observed that generally the

prosecution must prove the accused person's guilt beyond reasonable doubt. The court went on to say that such abstract formulation is more or less far from being absolute. In *Salabiaku v. France,* the European Court of Human Rights stated: "in principle the contracting states may under certain conditions, penalize a simple or objective fact as such, irrespective of whether it results from criminal intent or from negligence. These are not cases of reversal of the burden of proof, but rather cases where the prosecution is not obliged to prove the subjective part showing the will and knowledge elements of the crime". In the United Kingdom, the House of Lords has stated that: "in a constitutional democracy limited iron roads into a presumption of innocence maybe justified. The approach to be adopted as stated by the European Court of Human Rights in *Silabiaku v. France i*s the proportionality test". The South African Supreme Court in *S. V. Coetzee* observed that such a presumption should be open to challenge and held that the presumption of innocence must be balanced with the advantage for the prosecution. The United States has reversed burden of proof for criminal asset forfeiture-confiscation of property that is alleged to be criminal proceeds or an instrumentality of criminality. The burden shifts to the defendant once the government shows that the defendant acquired the property around the time of the crime, and no other likely source exists.

Argentinian courts in approving the constitutionality of such laws, have taken a different approach on the question of whether these laws violate the right to remain silent and shift the burden of proof. They have taken the view that the burden of proof is never actually reversed in proceedings under illicit enrichment statutes, because the illicit enrichment offense is itself a crime of commission. The prosecution retains the sole responsibility for proving the guilt of the accused by proving beyond reasonable doubt an appreciable enrichment in the accused's income that is not justified by his or her legitimate income. In the view of the Argentinian courts, consequently the presumption of innocence is never actually impaired.

Another argument often advanced against the illicit enrichment provisions is that they are a violation of the right to silence. In most constitutions, an accused person is guaranteed a right not to incriminate himself or herself when charged with a crime. The privilege against self-

incrimination is composed of the right to silence or the right to remain silent and the right not to be compelled to produce exculpatory evidence. The right protects the accused against improper compulsion by the authorities, reducing the risk of a miscarriage of justice. In principle, the prosecution must prove its case without resort to evidence obtained through coercion or oppression. Any compulsion to produce incriminating evidence becomes an infringement of the right to silence. The European Human Rights Court has taken the view that the right is not absolute. In one of its most important decisions on the matter, *Murray v. UK, the* court observed that: "on the one hand it is self-evident that it is incompatible with the immunities under consideration to base a conviction solely or mainly on the accused's silence or on a refusal to answer questions or to give evidence himself. On the other hand, it seems equally obvious that these immunities cannot and should not prevent the fact that the accused's silence in situations which clearly call for an explanation from him be taken into account in assessing the persuasiveness of evidence adduced by the prosecution. Whenever the line between these two extremes is to be drawn, it follows from this understanding of the right to silence that the question whether the right is absolute must be answered in the negative".

Conclusion

In sum, directly holding officials criminally liable for unexplained increases in their wealth has considerable support in the jurisprudence of several countries and is supported by International conventions and international human rights tribunals. As Professor Rod Broadhurst observed in testimony before the Australian Senate, "Tainted or unexplained wealth may be the only means to reliably identify criminal entrepreneurs whose involvement in the crime is usually indirect in terms of actual commission. The unexplained wealth laws deter those who contemplate criminal activity by reducing the possibility of gaining or keeping a profit from criminal activity and to remedy the unjust enrichment of criminals who profit at society's expense. As Shakespeare puts it so cleverly, "Costly thy habit as thy purse can buy."