

Seizure, Confiscation and Asset Recovery

Background paper submitted by

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The proceeds of corruption are often stashed abroad in bank accounts or converted to assets/property. This is a common modus operandi used by offenders in the Third World to hide their ill-gotten wealth. An effective deterrent against corruption is therefore, the seizure, confiscation and return of proceeds of corruption. It is also necessary for recovery of national assets and as evidentiary requirement in judicial proceedings.

The Convention

The U.N. Convention against Corruption 2003 (UNCAC) contains elaborate mechanism and procedure for seizure, confiscation and return of assets. The relevant provisions are:

Article 31 Freezing Seizure and Confiscation - The State Parties are required to formulate domestic legislation, procedure and establish mechanism to facilitate in seizure and confiscation of proceeds of crime as well as property, equipment or other instrumentalities, used in or destined for use, in offences under the Convention.

Article 55 International Cooperation for Purposes of Confiscation - The State Party that has received a request for confiscation of proceeds of crime, property, equipment or other instrumentalities is required to process such request through its executive authorities or courts to obtain an order for seizure or confiscation.

Article 46 Mutual Legal Assistance - The State Parties are required to provide mutual legal assistance to one another in investigation, prosecution or judicial proceedings including the taking of evidence, executing searches or seizures, providing information, evidentiary items and expert evaluations and identifying, freezing and recovering the proceeds of crime.

Article 48 Law Enforcement Cooperation - This State Parties are required to cooperate closely with one another to enhance the effectiveness of law enforcement action to combat the offences.

Article 49 encourages the State Parties to launch joint investigations into offences.

Articles 37 & 38 provide for cooperation among law enforcement authorities and public officials to supply information for investigative and evidentiary purposes.



Articles 53 provides for measures for direct recovery of property through civil action in the courts of another State Party.

Articles 54 and 57 provide for cooperation and mutual legal assistance to effect seizure or confiscation of proceeds of crime.

Article 52 provides for preventive measures by State Parties including financial disclosure system and sharing of information on suspicious transactions to apprehend the offenders.

Article 58 provides for the establishment of Financial Intelligence Unit to receive, analyse and disseminate information of suspicious financial transactions.

Articles 14 and 23 provide for necessary domestic legislation to deter and detect money-laundering and laundering the proceeds of crime.

Article 44 Extradition - The State Parties are required to process requests for extradition of fugitive offenders to stand prosecution. The extradition request is processed under domestic law subject to a bilateral treaty or the Convention being base for extradition.

Implementation

On ratification, a treaty/convention becomes binding. It has to be enforced through executive authorities or by the courts. The Constitution of Pakistan lays stress on adherence to and enforcement of international obligations. The Constitution reaffirms the common aspiration of the people of Pakistan that the country and its people should attain their rightful and honoured place among the World and make their full contribution towards international peace, progress and happiness of humanity¹.

International law is gradually making inroads into the state's domestic sphere. Some states regard international law at par with domestic law and enforce it as such, through their courts. In Pakistan, international treaties/conventions are not directly enforceable. They require adoption through domestic legislation². The courts however have taken a more lenient approach: they give effect to a treaty or convention, even though it may not have been adopted, provided that it is not in conflict with the Constitution or statute³. Even in conflict situation, the courts do make an effort for rapprochement through harmonious construction⁴. In a case, the High Court struck down a statutory provision, which was found to be in conflict with international human rights norms, laid down in the Universal Declaration of Human Rights 1948 and International Covenant on Civil and Political Rights 1966⁵. It may be noted that the Court did so even though Pakistan, so far, has not ratified the International Covenant on Civil and Political Rights. The Court clarified that mere non-ratification of a treaty or convention should not undermine the importance of internationally recognized rights. In yet another case, the Supreme Court based its decision on International Declaration⁶, saying it has enormous persuasive value and command respect⁷. Similarly, in a case of extradition of a citizen abroad to face trial on drug charges, the Supreme Court rejected the plea of staying the deportation order on the ground of 'freedom of movement'. The Court observed that the nation could not attain its honoured and coveted place in the comity of nations, as envisaged

¹ Preamble and Article 2A.

² A.M. Qureshi v USSR, PLD 1981 SC 377.

³ Nasrullah Khan Henjra v. Government of Pakistan (PLD 1994 SC 23).

⁴ Messrs Majid Zarab Ltd v Government of Pakistan, PLD 1993 Kar 93.

⁵ Wajid Shamsul Hassan V Federation of Pakistan, PLD 1997 Lah 617.

⁶ Declaration of the UN Conference on Human Environment at Stockholm, 1972; Rio Declaration on Human Environment, 1992.

⁷ Shehla Zia v Wapda, PLD 1994 SC 693.

by the Constitution, if it becomes a safe-heaven for outlaws and criminals⁸. These pronouncements clearly establish the increasing recognition of human rights norms and application of international law in the domestic jurisdiction.

Domestic Legislation

The UNCAC may be categorised as a framework convention, requiring necessary domestic legislation for enforcement. It necessitates an effective administrative framework for implementation. The Convention contains elaborate provisions, both substantive and procedural. Domestic legislation however is inadequate to enforce its obligations. The National Accountability Ordinance 1999 contains a provision for international cooperation and mutual legal assistance⁹. It empowers the Federal Government to request a foreign state for legal assistance in respect of matters such as collection of evidence/documents, executing search warrants or lawful instruments, freezing or confiscating assets or proceeds of crime and the transfer of custody of a person who volunteers to assist Pakistan in judicial proceedings. The Ordinance further stipulates that any material or document received from abroad shall be admissible as evidence in legal proceedings. It authorises the National Accountability Bureau to employ a person or organization within or outside Pakistan for detecting or identifying unlawful assets, hoarded abroad. The Bureau have created an Overseas Operation Wing for the purpose of tracing the proceeds of crime and pursuing investigation or prosecution of offenders abroad and their extradition to Pakistan. Two foreign investigating firms have also been hired for the purpose. The Bureau have further set-up a Working Group on money-laundering to formulate draft legislation for establishing an effective anti-money-laundering regime in the country.

The Code of Criminal Procedure 1898 also contains few provisions on international cooperation in pursuing criminal investigations and prosecutions. It has provisions for (a) sending of summons for service or execution of warrants outside Pakistan and (b) service of summons and execution of warrants in Pakistan, received from abroad.¹⁰ The courts have the necessary powers to do so. The Code further contains provisions for appointment of commissions to examine witness residing abroad in certain specified countries, viz the United Kingdom, Commonwealth States and any other country having reciprocal arrangement in this behalf with the Government of Pakistan¹¹. Thus, a commission may be issued to a court or a judge having authority in this behalf in that country as may be specified by the Central Government by notification in the Official Gazette. The Supreme Court in a judgment clarified though that such commission can be issued to a court or a judge in a foreign country and not to a person in Pakistan to visit a foreign country for the purpose¹².

Perusal of the domestic law clearly reveals the gaps and shortcomings in our criminal justice system, which cannot cope with the requirements of international cooperation and mutual legal assistance, prescribed in the Convention. The Convention contains very detailed and categorical provisions for extending cooperation and assistance in criminal proceedings, in the extradition of offenders and identification, confiscation and return of assets and proceeds of crime. It necessitates enabling provisions in the criminal law of Pakistan. Obviously, the National Accountability Ordinance does not contain adequate provisions to ensure compliance with the Convention. In this regard, the Control of Narcotic Substances Act 1997 may be refused to, which prescribes a detailed procedure for making a request to a foreign state or entertaining a foreign

⁸ Nasrullah Khan Henjra, *op. cit.*

⁹ Section 21.

¹⁰ Section 93 (A), 93 (B) & 93 (C).

¹¹ Section 508A & 503.

¹² *Mohtarma Benazir Bhutto v The State*, PLD 1999 SC 937.

request for international cooperation and mutual legal assistance. The Act contains enabling provisions for collection of evidence/documents, execution of warrants and freezing, confiscation and return of assets and extradition of offenders¹³. This Act is our compliance with the UN Convention against Illicit Trafficking in Narcotic drugs and Psychotropic Substances 1988. The Convention has been in force since 1990 and ratified by Pakistan. Indeed, the Control of Narcotic Substances Act can serve as model for drafting suitable provisions for securing compliance with the requirements of international cooperation and mutual legal assistance under the UNCAC.

As regards cooperation in respect of extradition, necessary legislation exists. It is the Extradition Act 1972, which prescribes the process, procedure and designates authority for the grant of extradition request of a foreign state. The Act is generally in accord with the principles of international law. It lays down the grounds of extradition and the fulfilment of the requisite conditions namely compliance with the principle of 'double criminality', principle of 'speciality', exemption of offenders involved in offences of political, military or religious character or trivial nature and the production of prima facie evidence to show the involvement of the offender in the criminal act. Under the Act, extradition is permissible to and from a state with which Pakistan has signed an extradition treaty. There are 29 countries with which extradition treaties have been made¹⁴. However the Act authorizes the Federal Government to extradite a person to foreign state, if it is so expedient, even though no such extradition treaty exists with it. The request for extradition is decided by the court, after examining the evidence received and hearing the evidence and defence of the fugitive offender. The court gives a finding and may discharge a fugitive, if no prima facie case is made out against him. In case, the court concludes that the evidence is sufficient to warrant the extradition of the offender, it gives such finding to the Government. The Government makes the final decision to allow or decline request for extradition.

The Extradition Act however is deficient in as much as it does not cover all the offences, listed in the National Accountability Ordinance. The offences covered are bribery, stealing, embezzlement, fraudulent conversion, fraudulent false accounting, obtaining property or credit by false pretences, receiving stolen property, offence against the law relating to forgery, offence in respect of property involving fraud, blackmail or extortion by means of threats or abuse of authority and offence against bankruptcy law or company law. The list of offences in the Ordinance goes beyond that. Naturally this will have to be catered through amendments in the Act.

There are two ways to meet the requirements of the UNCAC: one, to make suitable amendments for international cooperation and mutual legal assistance in the National Accountability Ordinance; and two, to add a new chapter for the purpose in the Code of Criminal Procedure. The later will facilitate international cooperation and mutual legal assistance in respect of all general offences, listed in the Pakistan Penal Code 1860 and can also be extended to offences in special laws, such as the National Accountability Ordinance.

¹³ Sections 38, 40, 56-66.

¹⁴ They are Argentina, Belgium, France, Greece, Switzerland, USA, San Marino, Monaco, Netherlands, Denmark, Austria, Yugoslavia, Iraq, Equador, Portugal, Luxemburg, Columbia, Cuba, Italy, Iran Turkey, Saudi Arabia, Maldives, Egypt, Australia, Uzbekistan, Algeria, China, United Arab Emirates.