المجلة الأردنية في القانون والعلوم السياسية

اسم المقال: مفهوم جريمة الكسب غير المشروع: الخطوط المتوازية بين التجريم والملاحقة تنتهي دون التقاء دراسة في قانون الكسب غير المشروع الأردني
اسم الكاتب: د. مهند أحمد أبو مراد
رابط ثابت: https://political-encyclopedia.org/index.php/library/9464
تاريخ الاسترداد: 2026/11/01 15:14 +03

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The Concept of Illicit Gains: The Parallel Lines Between Criminalization and Prosecution End Without Intersection A Study in Jordanian Law on Illicit Gains

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Received : 13/03/2024
Revised : 28/09/2024
Accepted : 29/09/2024
Published : 30/06/2025

DOI: 10.35682/jjlps.v17i2.962

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Abstract

Corruption is developing rapidly and significantly in terms of its methods, tools, and strategies for committing corruption crimes, benefiting from the difficulties of proof and the complexity of prosecution procedures. On the contrary, combating corruption is still a traditional and slow process. However, illicit gains are the final container in which the proceeds of corruption accumulate in a way that creates extreme wealth that legitimate sources of income do not justify. On the other hand, corruption crime is often secretive in that evidence is difficult and -sometimes- untraceable, which facilitates evading corruptors from prosecution. Thus, the proceeds of corruption easily fly and dissolve in the safe havens and deprivation. Hence, the international community established and developed an unconventional prosecution technique for proving illicit enrichment based on transferring the burden of proof from the public prosecutor to the accused to prove the legitimacy of the increase in wealth. However, illicit enrichment has been criminalized in Jordan since 2006; prosecutions regarding it are almost very rare. According to this study, the reason is due to the misconception of illicit gains and its elements and methods of proof within the provisions of the Illicit Enrichment Law and its amendments No. (21) of 2014, where this study describes the parallel lines between criminalization and prosecution without meeting. To this end, the study concludes by presenting recommendations to ensure the proper application of prosecuting and proving illicit enrichment.

Keywords: Corruption, Illicit Gains, Burden of proof, Prosecution, UNCAC.

مفهوم جريمة الكسب غير المشروع: الخطوط المتوازية بين التجريم والملاحقة تنتهي دون التقاء دراسة في قانون الكسب غير المشروع الأردني

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تاريخ الاستلام: 2024/03/13
تاريخ المراجعة: 2024/09/28
تاريخ موافقة النشر: 2024/09/29
تاريخ النشر: 2025/06/30

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الملخّص

الفساد ظاهرة تتطور بشكل ملحوظ ومتسارع من حيث أساليبها ووسائلها واستراتيجياتها في ارتكاب جرائم الفساد وتستغل أيضاً صعوبات الإثبات وتعقيدات الملاحقة الجزائية. بينما بقيت مكافحة الفساد تقليدية تتطور بشكل بطيء جداً. ويعتبر الكسب غير المشروع المستوعب النهائي الذي تتراكم فيه متحصلات الفساد بشكل يحدث ثراءً فاحشاً لا يمكن تبريره بما ينسجم مع مصادر الدخل المشروعة. ومن جانب آخر، تعتبر جريمة الفساد جريمة ذكية وتتمتع بالسرية التي لا يمكن اقتفاء أثر الأدلة بسهولة، مما يسهم بإفلات الكثير من الفاسدين من الملاحقة الجزائية، وبالتالي هروب واختفاء متحصلات الفساد في الملاذات الآمنة. ومن هنا، استحدث المجتمع الدولي تقنية في الملاحقة القضائية غير تقليدية في إثبات جرائم الكسب غير المشروع تقوم على نقل عبء الإثبات من المدعي العام إلى المتهم لإثبات مشروعية الزيادة على الثروة. إلا أنه وعلى الرغم من تجريم الكسب غير المشروع في الأردن منذ عام 2006 إلا أن الملاحقات الجزائية بشأنها تكاد تكون نادرة جداً. ويعود السبب حسب هذه الدراسة الى وجود ثغرات تشريعية تكمن في مفهوم الكسب غير المشروع وأركانه وسبل الإثبات وفقاً لأحكام قانون الكسب غير المشروع وتعديلاته رقم (21) لسنة 2014 التي عبرت عنها الدراسة بالخط المتوازي بين التجريم والملاحقة دون التقاء بينهما. وقد خلصت الدراسة الى تقديم جملة من التوصيات لضمان التطبيق السليم لملاحقة الكسب غير المشروع وإثباتها.

الكلمات المفتاحية: الفساد، الكسب غير المشروع، عبء الإثبات، الملاحقة الجزائية، اتفاقية الأمم المتحدة لمكافحة الفساد.

1.0.Introduction

Allah Almighty says in The Holy Qur'an -
"ظَهَرَ الْفَسَادُ فِي الْبَرِّ وَالْبَحْرِ بِمَا كَسَبَتْ أَيْدِي النَّاسِ لِيُذِيقَهُمْ بَعْضَ الَّذِي عَمِلُوا لَعَلَّهُمْ يَرْجِعُونَ"(سورة الروم-الآية- 41)
"Corruption has appeared throughout the land and sea by [reason of] what the hands of people have earned so He [i.e., Allah] may let them taste part of [the consequences] what they have done that perhaps they will return [to righteousness]" (Surat Ar-Rum, Verse: 41)
(Saheeh, 2010).

According to Robert Klitgaad: "In many countries, corruption is not harmful at all. It is the grease for the wheels of the economy and the glue of the political system". (Robert Klitgaard, 2000)(Robert Klitgaard et al., 2000).

Due to the difficulty of proof through traditional and general provisions, this article intends to demonstrate the need for effective prosecution of corruption, in addition to the secretive nature of corruption with sufficient awareness, deep legal knowledge and experience of corruptors to save themselves from the criminal prosecution (Bank, A. D, 2003).

To this end, illicit enrichment as a corruption crime is a good example to explain this need because of its extraordinary concept, as it shifts the burden of proof from the prosecutor more often to the suspicious person (a public official) to explain the legitimate source of the significant increase in his wealth (Derencinovic, 2010) (Muzila et al., 2012).

It is not as simple, though, to write or speak about the penalties of illicit enrichment. Owing to several obstacles that could conflict with the legal process outlined in Jordan's Illicit Enrichment Law No. (21 of 2014).

Furthermore, there are general problems in different world jurisdictions, i.e., the presumption of innocence as a human rights issue, which is an example of these challenges (Kofele-Kale, 2006). Therefore, this article tries to explain illicit enrichment as a corruption crime within Jordanian-related legislation.

1.1.Significance of the Study

This study intends to highlight some of the gaps that frustrate the prosecution of illicit enrichment. Since 2006, when illicit enrichment was first established by the Financial Disclosure Law no. (54) Of 2006, up to the present under the current Illicit Enrichment Law no. (21) Of 2014, no one has been prosecuted for illicit enrichment crime in Jordan, except in one or two cases without conviction.

Furthermore, there has not been much research on this topic related to the Jordan Case. As a result, this study provides a wealth of scientific references to make reading more related publications easier. This study attempts to add more investigation into the cause of these deficits for that purpose. Nonetheless, to make the hidden components of the aforementioned crime more transparent and intelligible for future procedures and legislative remedies, this study clarifies the notion of illicit enrichment crime throughout its legal components. In light of this, this study suggests potential solutions to make this crime enforceable, enabling it to play a vital role in the battle against corruption.

1.2. Objectives of the Study

The study objectives include bridging the Jordanian Illicit Enrichment Law gaps to comply with international standards, namely the United Nations Convention against Corruption (UNCAC). Therefore, this study aims to demonstrate the international view of illicit enrichment from different aspects that are absent in Jordanian practice. Finally, the study objective is to contribute to future legal reform in the anticorruption legal framework.

1.3.Statement of the Problem

There is an apparent nexus between the lack of prosecution of illicit enrichment crime and the misconception of this crime. Accordingly, adopting criminalization requires an adequate legal framework with the right independent power of prosecution to bring life and reality to the criminalization legal provisions, not just lifeless legal text. Consequently, this altered conception is substantial in supporting the demonstration of the study's problem in achieving its objectives.

1.4.Research Methodology

Due to the nature of the study (legal research) as an issue of the Illicit Enrichment Law and the objectives and problem statement of the study, doctrinal research methodology seems to be dependable and ideal for this study's purposes. Additionally, legal doctrinal analysis is reliable in identifying the merits and demerits of the core subject, unpacking the issues highlighted in this study to link between the problem statement, objectives, and conclusions. To this end, the study applies the context analysis method based on conceptual and rational analysis to ensure reliability and credibility.

However, the advantages of prosecution illicit enrichment as a new technique that moves the burden of proof from the prosecutor to the defendant are unimaginable without acceptable and logical rational causation, which the adopted methodology of this study can carry out (Yaqin, 2007).

1.5.Limitations of the Study

There is a lack of cases of illicit enrichment crime in Jordan, i.e., only two cases have been prosecuted since the criminalization of this crime in 2006. Consequently, the absence of sufficient judiciary explanation for illicit enrichment will appear later in this study. In addition, very few Jordanian academic references are considered a limit to this study, which focuses on the case of Jordan. That is why this study's challenge is how to employ the data from different jurisdictions to reach the study's objectives.

2.0.Literature Review

2.1.Literature Review on the Concept and Cost of Corruption

The momentum of studies pays unparalleled attention to establishing the concept of corruption and rooting it in several fields according to the core subject of the study of interest. In contrast, it seems hard to find the agreed-upon definition of corruption (Bardhan, 1997). However, there is an accord on the correlation between corruption and misusing the power of public office for private interest against the law. Rose-Ackerman defines corruption economically: "Whenever an agent is given discretionary authority, corruption provides a way for the objectives of the higher authority to be undermined" (Rose-Ackerman, 1981).

Similarly, the consensus on the same meaning with different wording, corruption was defined as a process based on mutual political and economic interests (Robert Klitgaard et al., 2000) (MacDonald & Majeed, 2011). For example, Robert Klitgaard defined corruption in the following formula: Monopoly + Discretion - Accountability = Corruption.

Pranab Bardhan expresses this notion clearly in the following definition:
"In a majority of cases such corruption ordinarily refers to the use of public office for private gains, where an official (the agent) entrusted with carrying out a task by the public (the principal) engages in some sort of malfeasance for private enrichment which is difficult to monitor for the principal." (Bardhan, 1997).

Hence, the United Nations Development Program (UNDP) adopts a broad definition of corruption: "misuse of entrusted power for private gain" (UNDP, 2008), which is similar to the definitions adopted by the World Bank (WB) and Transparency International (TI).

According to the World Bank, the estimated stolen assets are between USD 1 trillion and 1.6 trillion every year; most of these assets are generated by corruption crimes and tax evasion, with bribe gains of USD 20 billion to USD 40 billion.(UNODC & Bank, 2007). Remarkably, after (11) years, that estimated cost tripled into USD (3.6) trillion, according to the United Nations Secretary-General António Guterres on the International Anti-Corruption Day, December 9, 2018.
According to the Global Financing Integrity (GFI), developing countries lost between USD 723 billion and USD 844 billion per year through illicit financial flows in the decade ending in 2009 (Freitas, 2011). Approximately 50 % of this number is related to corruption, including illicit enrichment by public officials (Vaissiere, 2012). Surprisingly, in 2014, GFI found that the developing countries lost USD 6.6 trillion from 2003 to 2012 (Spanjers, 2014).

However, the terrible impact of corruption affects all walks of life, whether through the grand corruption inherent among politicians, decision-makers, and high-level officials or through petty corruption (UNOCD, 2004) or bureaucratic corruption amongst public officials with little payoff.

2.2. Literature Review on the Concept of Illicit Enrichment

Illicit enrichment has many synonyms in the field of corruption crimes. For instance, "illegal enrichment", "ill-gotten wealth", "unexplained wealth", and "inexplicable wealth" are different in the legal traditions (Derencinovic, 2010) (Muzila et al., 2012). Besides, "illicit enrichment" is used interchangeably with corruption as one of its aspects(Sheikh, 2003). However, the expression "illicit enrichment" is derivative of the word "possession", for example, "possession of Unexplained Wealth" (Vaissiere, 2012). That is why this study dedicates this section to illustrate the concept of illicit enrichment.

However, IACAC 1996 was the first international convention to establish a precise definition of illicit enrichment. Therefore, the majority of other conventions, including UNCAC, quoted the same definition from IACAC. Accordingly, the scope of this study is limited to the UNCAC definition found in Article 20. Besides, Jordan is a state party to UNCAC.

However, Article (20) of UNCAC provides: "Subject to its constitution and the fundamental principles of its legal system, 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".(UNODC, 2004)

Some scholars adopt the same definition of illicit enrichment as stated by the UNCAC and other international conventions as follows: "the 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" (Kofele-Kale, 2006). Similarly, IACAC prescribes illicit enrichment in Article 9 (OAS, 1996).

Equally, the AUCPCC adopts illicit enrichment under Article 8 but defines it within Article 1 thereof (African Union, 2003). Additionally, the ECOWAS Protocol under article 6/3/A (ECOWAS, 2001). In addition, the ACAC under Article 4 (League of Arab States, 2010).

3.0.The International Action Against Corruption Legal

The world reacted to corruption so late, especially in the aftermath of WW2 and the colonization era in many countries worldwide. However, the regional reaction against corruption was based on alliances and the exchange of common interests between the countries. Two European conventions were found to tackle corruption: the Criminal Law Convention on Corruption 1999 (Council of Europe, 1999) and the European Civil Law Convention on Corruption 1997 (Council of Europe, 1999).

Meanwhile, the Organization for Economic Cooperation and Development (OECD) launched the Convention on Combating Corruption of Public Officials in International Business Transactions in 1997. The Asia-Pacific region, Asian Development Bank ADB and OECD launched the initiative to combat corruption in 1999. However, the first international action against corruption took place in 1996 by the Inter-American Convention Against Corruption (IACAC) (Inter-American Convention Against Corruption, 1996). Therefore,

IACA inspired the rest of the world to the importance of international cooperation in fighting corruption (Fagan, 2013). Consequently, the United Nations Convention against Corruption (UNCAC) which was adopted in 2003 (UNODC, 2004) (UN General Assembly, 1997). Jordan had signed and ratified according to the UNCAC Ratification Law no. (28) of 2004.

The African Union Convention on Preventing and Combating Corruption (AUCPCC) was established in the African region in 2003 (African Union, 2003). In addition, the South African Development Community (SADC) Protocol against Corruption was created in 2001(SADC, 2001). The Economic Community Organization of West African States (ECOWAS) Protocol on the Fight against Corruption was adopted in 2001(ECOWAS, 2001). The Arab League launched the Arab Convention Against Corruption in 2010 (ACAC) (League of Arab States, 2010). Jordan had also ratified ACAC according to ACAC Ratification Law no. (21) of 2012.

4.0.Illicit Enrichment in Jordan Legislation

According to the distinguished historian Arnold Toynbee:
"It is a rule, and this rule is inherent in the very nature of the declines and falls of civilisations – the demand for codification reaches its climax in the penultimate age before social catastrophe, long after the peak of achievement in jurisprudence has passed, and when the legislators of the day are irretrievably on the run in a losing battle with the ungovernable forces of destruction." (Rosenne, 1998).

The Jordan Illicit Enrichment Law (IE) No.21 of 2014 criminalises illicit enrichment under Article (4) (The Illicit Enrichment Law, 2014), which stipulates long and composite definition as follows: "It shall be considered an Illicit Enrichment; any movable or immovable property attained by any person, subject to this law, for his benefit or the benefit of any other person due to exploitation of his position, office or the status he holds or by capacity any of them; and it is also: any increase occurs on the movable or immovable properties owned by him-or- his/her spouse or minor children according to in the financial disclosure submitted by him under this law or the Financial Disclosure Law no. 45 of 2006, during his tenure of position, office, status or by the capacity any of them, if this increase does not commensurate with their financial resources, and he fail to prove a legitimate source for that increase".

In 2021, the Jordan IE law adopted an additional definition of illicit enrichment, where paragraph (B) of Article (4) stipulates the same concept of UNCAC as follows: ((It shall be considered an illicit enrichment: any significant increase or abnormal growth that occurs in the wealth, assets or properties of any public official who is not covered by the provisions of this law cannot reasonably explain it in comparison to his income resulting from legitimate sources)) (The Illicit Enrichment Law, 2014).

However, criminalising illicit enrichment in Jordanian IE law is not easy. Accordingly, the Verification Committee in the Court of Cassation should verify a pre-complaint before prosecution. Additionally, the pre-complaint should address the financial declaration itself in accordance with Article 10 thereof (Nasrallah, 2013). Besides, the issues of proofing the elements in different ways affect the final judgment.

Consequently, the disclosures remain closed and sealed due to the extreme confidentiality enshrined by articles 6, 8, 12, and 16 of the Jordan IE law, and that's why "no data transfer is performed" (Daniel W. et al., 2012).

5.0.Types of Illicit Enrichment

Illicit enrichment offences can be committed through criminal acts, primarily but not exclusively, such as corruption offences (Abu-AL-Khair, 1968). For instance, abuse of office, embezzlement, bribery, accepting or soliciting gratification, favouritism, cronyism, nepotism, et cetera, in order to make a personal gain or interest. That is why illicit enrichment is considered the final container of criminal proceeds arising from these crimes (Muzila et al., 2012) (Abdul Jaleel, 2004).

Basically, an unethical act is any behaviour that comes out of what is deemed morally correct or does not conform with the standards, for example, mismanagement, violate the code of conduct, abuse of influence and conflict of interest (OECD, 2010). However, misconduct may reach serious levels that constitute an exploitation of office or position, thereby enabling the official to obtain illicit profits or interests (Abu-AL-Khair, 1968). Nevertheless, misbehaviour should also be associated with the office or position and the personal interest derived by such conduct. Equally important, delegation of powers and discretionary authority are major keys contributing to the committing of illicit enrichment, as opined by some scholars and practitioners (Robert Klitgaard et al., 2000).

6.0.Rationalization of Criminalizing Illicit Enrichment

Illicit enrichment is comprehensively criminalized under the aforementioned conventions, UNCAC, IACAC, AUCPCC, and ACAC, in addition to domestic laws, due to the need for efficient legal instruments to tackle the rigid provisions which hold back any attempt of prosecution (Muzila et al., 2011). Generally, many jurisdictions tend to criminalize illicit enrichment because of the difficulty of proving corruption crimes with the secretive nature of corruption. The only evidence is excessive wealth, insufficient to prosecute somebody just for possessing extra money(Derencinovic, 2010). Besides, clear provisions should be provided to ease the complexity of prosecution procedures in corruption crimes (Chanda, 2004). It also provides provisions for the restitution of stolen assets by confiscation, forfeiture or seizure of the asset (Muzila et al., 2011).

Hence, the criminalization of illicit enrichment overcomes barriers associated with the prosecution; for example, it moves the burden of proof from the prosecutor to the defendant to illustrate the lawfulness of the wealth(Derencinovic, 2010). Typically, most legislations that criminalize illicit enrichment are coupled with asset declaration provisions, where the public official should disclose his/her wealth periodically as applicable (Daniel W. et al., 2012). To this end, such legislation normally allows confiscation of the defendant's freezing property (OECD, 2011).

The bottom line is that criminalizing illicit enrichment can facilitate the investigation and the gathering of information and evidence (Vaissiere, 2012). It can also assist the prosecution process in recovering the stolen asset. Moreover, it improves integrity and accountability and raises awareness of the abuse of public office (Chanda, 2004).

7.0.Elements of Illicit Enrichment

Article 20 of UNCAC clearly identified the elements of illicit enrichment as follows: (1) the public official, (2) the timeframe of illicit enrichment, (3) the increase of wealth, (4) intent, and (5) the failure of proof.

7.1.The Public Official

The major element of illicit enrichment, as pointed out by all conventions and domestic laws stipulate illicit enrichment is "public official" (Muzila et al., 2011). Accordingly, the capacity of the public official, "any officer of a public body," where the abuse of position may occur from two sides; firstly, when the public official uses his/her position to obtain illicit benefits through corruption acts such as bribes, trade in influence, investment of power. Secondly, public official uses their position or office to conceal or transfer such illicit property (Abu-AL-Khair, 1968).

Due to the contractual relationship between the state and public officials, assuming that he/she accepts the position's responsibility (Muzila et al., 2012). In addition, shifting the burden of proof from the prosecution to the public official will reveal the crime, the amount of stolen money and how (Peter Kyle, Professor Ndiva Kofele-Kale, Dr. Shiao-Ming Shen, 2006).

The concept of "public official" may refer not only to the governmental employees but also to the three branches of the state: judicial, legislative, and executive authorities. Therefore, the Jordan IE law enumerates the subjected persons in accordance with article 3 thereof, wherein it includes the three branches of the state (The Illicit Enrichment Law, 2014) (Nasrallah, 2013). Accordingly, article 3 of the law provides public officials categories, such as parliamentarians, judges, prime ministers, and ministers (The Illicit Enrichment Law, 2014).

Additionally, Article 4 paragraph (B) of the Jordan IE law expands the scope of "public officials" in the occasion of criminalizing illicit enrichment offences, where it includes (Any public official) who is not covered by the provision of said law.

However, some countries have maximized the concept of public officials, such as any person who provides a public service shall be considered a public official, as in the case of India (Muzila et al., 2012). Similarly, the Malaysian Anti-Corruption Commission Act (MACC) 2009 law maximizes the scope of illicit enrichment, which may exceed the public official to include relatives, associations or any person referred to the public official in accordance with section 36 subsection 1 paragraph (b) thereof, and penalizes under the subsection (3) of the said section (Malaysian Anti-Corruption Commission Act, 2009).

7.2.Timeframe (*Exploitation of Public Office*)

Illicit enrichment is committed by the public official during the performance of his duties within the public office (AL-Sayed, 2005). This element is clearly recognized and mentioned in IACAC article 9, which stipulates "during the performance of his functions." Meanwhile, other conventions do not mention the timeframe, even though it is implied, as in Article 20 of UNCAC, Article 1 of AUPCC, and Article 6 of ECOWAS.

On the other hand, Article (4) (A) of the Jordan IE law stresses this element with the extra condition through Article 4, which provides "…due to exploitation of position, office or the status he holds or by capacity any of them...". Accordingly, "exploitation" contradicts the notion of illicit enrichment, which may disrupt procedures or oppose Article 20 of UNCAC.(Burdescu et al., 2010). In this way, paragraph (A) from Article (4) contradicts paragraph (B) from the same Article, where the exploitation of public office is not a mandatory element to be proved if the defendant is (Any public official) who is not covered by the provision of this law (Jordan IE Law) (The Illicit Enrichment Law, 2014).

Consequently, the criminalization of the public officials covered by Article (3) of the Jordan IE law is different from the other part of (Any public official) not covered by the said law. Thus, Article (4) (b) of the Jordan IE law places an additional burden of proof on the public prosecution, which is the element of (exploitation) along with the increase of wealth. Consequently, this extra burden prevents or frustrates the prosecution and/or convection due to the lack of evidence on the exploitation acts (The Illicit Enrichment Law, 2014). As a result, this concept is also considered an exception to the general principles of the prosecutor's role in bearing the burden of proof (Muzila et al., 2012).

On the contrary, other domestic laws focus on the public official to prevent him/her from abusing office, capacity, or position to obtain personal interest during the tenure at the office (Sheikh, 2003), for example, the Indian Act on Prevention of corruption for the year 1988 expresses on the timing of commission in section 13 stipulates:
"(e) If he or any person …at any time during the period of his office" (The Indian Prevention of Corruption Act, 1988)

Another example is the Malaysian MACC Act 2009, which provides that the public office's enrichment of public officials must be committed, indicating the period of commission of the crime/crimes. Likewise, the Jordan IE law and other Arabic laws, such as those of Egypt and Lebanon, provide the same conditions. In other words, the timeframe for increasing the wealth or commission of illicit enrichment should be during the public official tenure of the position (Peter Kyle, Professor Ndiva Kofele-Kale, Dr. Shiao-Ming Shen, 2006).

7.3. The Increase of Wealth

The abovementioned international conventions have emphasized this element as a key element of illicit enrichment. Therefore, the international standards share the same measure of comparison method and similar phrasing. For example, Article 20 of UNCAC expresses wealth 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” (UNODC, 2004). Also, Article 9 of IACAC defines this term as “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 functions”.(Inter-American Convention Against Corruption, 1996)

Other scholars argue that “Excessive Wealth” means possessing a high level of living and acquiring lavish property and bank accounts incompatible with the normal origin of his/her

salary or lawful remuneration (Muzila et al., 2012). Therefore, increasing wealth is the fundamental element and the only tangible evidence of illicit enrichment (AL-Sayed, 2005).

However, Article (4) (A) of the Jordan IE law considers the increase of the wealth "suspected part" that is not commensurate with the public official's legal income because of exploitation and/or abusing the public office, position, and capacity. Hence, this misconception of illicit enrichment provided by the Jordan IE law needs amendment to comply with the abovementioned international standards and to be consistent with paragraph (B) Article (4) of the Jordan IE law.

The bottom line is that financial disclosure per se is used as a measuring method to determine whether there is an increase in wealth and which part is suspected or not appropriate with legal income (Burdescu et al., 2010).

7.4.Intention of Illicit Enrichment

Intention or (mens rea) is a considerable element in the criminalization of illicit enrichment, and it goes with saying that this crime must be "intentionally committed" (UNODC, 2004). Therefore, an illicit enrichment offence is considered an intentional crime by its nature (Muzila et al., 2012). The Jordan Penal Code No.16 of 1960 defines "intent" in article 63, which stipulates that "Intent is the will to commit the crime as defined by law" (Jordan Penal Code, 1960). In this manner, the perpetrator of illicit enrichment has the awareness and knowledge of what he has acquired, which is supported by the increase in wealth as tangible evidence (Derencinovic, 2010).

7.5.Failure of Proof

Article (20) of UNCAC criminalizes public officials if they fail to explain the relationship of increasing wealth to legitimate sources. As well, Article 4 (B) of the Jordan IE law agrees with Article (20) of UNCAC regardless of the element of exploitation, as provided by paragraph (A) Article (4) of the same law. Accordingly, illicit enrichment shifts the burden of proof to the public official (defendant) to prove the legal origin of wealth (Chanda, 2004). Thus, excessive wealth that is not convincible according to public official's legal income is deemed an illicit enrichment as such (Muzila et al., 2012). Besides, the public official is obliged to justify and clarify the legitimate reason for such an increase (Chanda, 2004). For example, Malaysian law (Malaysian Anti-Corruption Commission Act, 2009) builds the conviction of illicit enrichment upon the failure of proof. Correspondingly, the public prosecutor is not required to prove the illegitimacy of wealth or the exploitation of public offices (Muzila et al., 2012).

On the contrary, paragraph (A) Article (4) of the Jordan IE law establishes a further requirement where the public prosecution should prove the causation between this increase of wealth and the exploitation of office or position (Muzila et al., 2012). As a result, from the establishment of this crime in 2006 until 2024, only two cases of illicit enrichment were prosecuted: first one where the final judgment of conviction of illicit enrichment was issued by (the Court of Cassation, criminal case no. (4924/2022). The second one is not the final judgment issued by the Court of First Instance (minor felony) No. 654 for 2023, where the accused person was found guilty and convicted of illicit enrichment.

8.0. The problematic of Burden of Proof

The burden of proof, or onus probandi in Latin, means the requirement to prove the facts of disputes related to issues raised in a cause and based on two different views, firstly, the "burden of persuasion" (Henry Campbell Black, 1991), which means unaccepted the replacement from one to the other. Secondly, there is the "burden of going forward with evidence", which accepts to be shifted according to the trial stage (Jr, 1961). More importantly, the burden of proof in criminal proceedings concentrates on the elements of the crime, which must be proved by the public prosecutor beyond a reasonable doubt (Kaplow, 2011) (Walton, 1988).

Aleed argues that the prosecutor is provided and empowered with legal authorities and equipped with law enforcement to enable him/her to carry out this obligation effectively, whereas the defendant does not have such power to perform this role (Aleed, 2014). Likewise, making a balance between the associated substantial interest and the defendant's interest in the criminal action is a core idea and based on "worthy of protection" with emphasis on the principle of "He who asserts must prove." (Walton, 1988). Hence, the burden of proof is the core principle in judicial systems worldwide (Kaplow, 2011), where the prosecution shall carry out the obligation in criminal cases.

Conversely, the prosecutor has this burden under the Jordanian criminal system since it is his responsibility to begin the prosecution in accordance with Article 2 of the Criminal Procedures Law No.9 of 196 (Namor, 2013). Therefore, the public prosecutor is responsible for investigating crimes, collecting information and evidence, and referring the accused person to the competent courts.

The general prosecution with such authority should demonstrate the case before the court (Namor, 2013) (Aleed, 2014). Exceptionally, the notion of illicit enrichment shifts the burden of proof from the prosecution to the defendant to justify the excessive wealth. This new tool of prosecution enshrined by the UNCAC clearly:
"Subject to its constitution and the fundamental principles of its legal system, 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."

European Court of Human Rights highlighted an important exception to the general rules of burden of proof, which are:
(a) In the so-called strict liability offences,
(b) In confiscation of pecuniary gain acquired by a criminal offence, and,
(c) In criminal offences, the burden of proof has been shifted to the defendant."
(Derencinovic, 2010).

Theoretically, the Jordanian IE law shifts the burden of proof in paragraph (B) Article (4) as follows: ((It shall be considered an illicit enrichment: any significant increase, or

abnormal growth, that occurs the wealth, assets, or properties of any public employee who is not included by the provisions of this law cannot reasonably explain it in comparison to his income derived from legitimate sources)).

Practically, Article (4) paragraph (A) Jordanian IE law distributes the burden of proof between the prosecutor and the defendant. Accordingly, the burden of proof remains on the public prosecution to prove the element of "exploitation" and its causation with increased wealth. Correspondingly, the defendant should prove the legitimate sources of the increase that are commensurate with the lawful sources (Abdul Jaleel, 2004). That is why the criminalization of this crime is difficult to enforce under the current Jordanian IE law due to the inconsistent provisions. Accordingly, the gap between the concept and criminalization of illicit enrichment is getting wider and contradicted as two parallel lines end without intersecting.

9.0.Conclusion

Jordan took a step in the amendments of the IE law in 2021 by adding paragraph (B) to Article (4) of the IE Law to explain its advantage. However, it seems an insufficient action to make this crime prosecutable. Therefore, this study recommends the following remedies to enhance the prosecution of corruption in Jordan:

1. Amending Paragraph (A) of Article (4) to comply with international standards and consistent with Paragraph (B) from the same Article for criminalizing and prosecuting illicit enrichment crimes.

2. Amending Article (10) to replace the Verification Committee in the Court of Cassation with the Public Prosecution Office to void the overlapping and contradicting of authorities as long the Court of Cassation considered the supervision and higher authority on the Prosecution process and the judicial body.

3. Relocating the financial disclosure management jurisdiction from the Ministry of Justice to the Jordanian Integrity and Anti-Corruption Commission. In addition to the following reasons: (1) To comply with the requirements of the model adopted in the case of Jordan, (2) law enforcement authority is also needed with the capacity of Judicial Police, (3) independence of the Financial Disclosure process, whereas the current Financial Disclosure Department is affiliated with the Minister of Justice.

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