**Asset recovery in the fight against corruption in Vietnam: problems and perspective**

Abstract The paper analyses legal provisions and results of asset recovery in Vietnam in the recent years. By using official Government figures and comparing them with requirements under United Nations Convention against Corruption (UNCAC), this paper demonstrates the shortcomings of the legal processes and procedures for recovery of stolen assets in Vietnam. The problems faced by Vietnam in this area mainly resulted from the fact that although the country has numerous substantive and procedural laws on anticorruption, an appropriate strategy for anticorruption has been wrongly identified by Vietnamese law makers and practitioners. Accordingly, not much thought has been given to asset recovery, which has been globally recognized as the most effective way to deter corruption. Besides, law enforcement in Vietnam is also another big concern. Therefore, there is no significant progress in asset recovery in Vietnam in the shortterm, though the country is revising the law against corruption in a comprehensive manner.

Keywords Asset recovery Confiscation Corruption Vietnam

# Introduction

Corruption in Vietnam is considered as a major threat to the survival of the regime. Although since the creation of its first anticorruption law in 2005 that was later modified in 2010 and 2012 and in its current draft as strong moves of Vietnamese legislators to reflect international anticorruption standards into the national legal system. However, annual anticorruption enforcement has neither met the governments expectations nor impressed international observers. The way government has cautiously adjusted its goal in the fight against corruption from the lofty objectives (*to deter and step by step get rid of corruption*)[1](#_bookmark0) to a less ambitious one which is to just *try to restrain corruption from getting more and more complicated and serious*[2](#_bookmark1) has embarrassed Vietnamese lawmakers and practitioners. Finding the right anticorruption strategy, given the limited resources and capacity within the country, has been a challenge. Finding the appropriate anticorruption strategy has been work has been an issue. The traditional anticorruption approaches have been inadequate to prevent corruption. A few highprofile corruption cases related to a number of politically exposed persons (PEPs) unearthed in recent years shed light on the huge losses to the state budget. As a result, asset recovery, which is recognized as a strong deterrent for corruption (as it attacks right at the motive for committing the crimes), has become the key issue. Unfortunately, the current shape of Vietnamese anticorruption laws shows the absence of any theoretical framework and pragmatic approach in tackling the malaise. This paper seeks to examine theoretical issues and international standards for asset recovery to identify the gaps in the Vietnamese law. It is argued that there would be no significant progress in anticorruption work in general and asset recovery if the current anticorruption draft does not consider asset recovery as a priority issue which strongly demands breakthrough regulations.

# Asset recovery: an overview of theoretical issues and international standards

Under the United Nations Convention Against Corruption (UNCAC), the term *proceeds of corruption* is interpreted through the definition of *proceeds of crime*. As prescribed in Article 2 (d, e) under UNCAC, in broad terms, *property* refers to assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to or interest in such assets; *proceeds of crime* means any property derived from or obtained, directly or indirectly, through the commission of an offence. As prescribed in Article 31 (1a, b), *proceeds of crime* derives from offences established in accordance with UNCAC or property, the value of which corresponds to that of such proceeds; property, equipment or other instrumentalities used in or destined for use in offences established in accordance with this Convention. Besides UNCAC, United Nations Office on Drugs and Crimes (UNODC) has provided further clarification about *proceeds of crime* as follows:[3](#_bookmark2)

Property, equipment of the instrumentalities of crime, which have been used in or destined for use in offences established in the Convention. The alleged purpose for confiscating instrumentalities of crime is to prevent the objects from being further misused.

Proceeds have been transformed or converted, as a whole or partially, into other property. UNCAC encourages states to give primacy to the irrevocability of the taint irrespective of the iterations of transfer, receipt and conversion.

Proceeds of crime have been intermingled with property from legitimate sources. In such a case, without prejudice to any powers relating to freezing or seizure, such property shall be liable to confiscation up to the assessed value of the intermingled proceeds.

Income or other benefits derived from such proceeds of crime, from property into which such proceeds of crime have been transformed or converted or from property with which such proceeds of crime have been intermingled.

Blacks Law Dictionary defines *confiscation* as the seizure of property for the public treasury by actual or supposed authority. Meanwhile, *recovery* means to get back or regain in full or in equivalence; the regaining or restoration of something lost or taken away.[4](#_bookmark3)

UNCAC goes beyond previous instruments of this kind by stating explicitly asset recovery as a fundamental principle of the Convention (Article 51). UNCAC calls the whole process of tracing, freezing, confiscating and returning the stolen assets to legal owners as asset recovery. On this basis, the Council of Europe and the European Union then broadened this term to the meaning of recovery of assets of all types of crimes. According to the World Bank[5](#_bookmark4), the management of returned assets in a transparent, efficient and effective manner should be considered the final step in the asset recovery process in order to ensure that the returned funds are used for the benefit of the people.

Justifications for confiscation first derives from an eternal moral principle of common law courts and expressed in a Latin term as *Commodum ex injuria sua non habere debet,* which means *the wrong doer should not derive any benefit from his own wrong*.[6](#_bookmark5) Under the proactive crime prevention approach in criminal justice, confiscation of proceeds of crime aims to deprive all income or other benefits derived from proceeds of crime. In the early 1970s, the neoclassical criminology appeared and gave rise to the birth of the socalled *Crime Opportunity Theory*[7](#_bookmark6) that assumes the offenders to make rational choices and thus choose targets that offer a high reward with minimal effort and risks. Among the three pillars of Crime Opportunity Theory, *Rational Choice Theory*[8](#_bookmark7) has proved helpful in forming key theoretical foundations for crime prevention policies in general and asset recovery in particular. Trying to see the world from the offenders perspective, the Rational Choice Theory adopts a utilitarian belief that, all humans base their decisions on rational calculations, act with rationality when choosing, and aim to increase either pleasure or profit. Offenders commit crime based on an assessment of benefits and risks. As such, a committed crime is the expression of the offenders will when he/ she believes that the benefits derived from the crime is more than the cost and he/she accepts the potential risks. Bringing this theory into play for asset recovery policies, as can be noticed, if offenders chose to commit crimes based on a number of factors, then those factors must be altered to discourage them from choosing to commit crime. More specifically, effective asset recovery laws should be put to the efforts to: (i) increase the perceived risk of crime; (ii) reduce the anticipated rewards of crime and (iii) remove any expected benefits of crime, which is the proceeds of crime.

Over the last decade, while traditional responses to crime such as the penalties of imprisonment and fines have not been efficient, asset recovery was acquiring great importance, to the extent of being considered a more effective way to prevent corruption. The primary justifications for asset recovery are as follows[9](#_bookmark8):

First, asset recovery is the best remedy to mitigate the damages caused by corruption, especially material damage. Recoverable assets shall serve as important resources for development and contribute to restore justice and equality for the society[10](#_bookmark9). According to the World Bank (2010), corruption robs developing countries of $20 to $40 billion annually[11](#_bookmark10). Even a small fraction of recovered assets (1%) could fund first linetreatment for over 600,000 people with HIV/AIDS; or provide vaccination for 4 million children; or provide clean water for the poor for a full year. Furthermore, what asset recovery brings out, most obviously, are the results of great efforts to make radical reforms in terms of institutions, legal framework, law enforcement capacity to improve the transparency and accountability of the government.

Second, corruption by its nature is a profitdriven crime and the final goal of offenders is to appropriate properties for private interests. Eliminating the greed is impossible because when facing a great bargain, what scares the offenders the most may be not an imprisonment term or even death penalty but the confiscation of all proceeds of crime. As such, the most powerful tool is to directly attack the criminal psychology in order to prevent and eliminate right from the beginning. It is quite obvious that, a strict asset recovery strategy shall eliminate the motive for corruption of the offenders as it would be harder to commit a crime and even when the crime is finished, it would be difficult to launder the dirty money.

Third, depriving illegal assets out of the hands of criminals shall prevent them from funding further criminal activities. Practice shows that, proceeds of corruption are rarely used for legal businesses or investment but rather used for personal expenditure or committing further crimes to make more money.

Although asset recovery has proved to be an efficient tool in preventing corruption, numerous challenges remain in practice. A study within The Stolen Asset Recovery Initiative (StAR) a partnership between the World Bank Group and the UNODC that supports international efforts to end safe havens for corrupt funds, has identified 29 obstacles to asset recovery under three distinct headings of general barriers and institutional issues, legal barriers and operational barriers, specifically as follows[12](#_bookmark11):

the general and institutional barriers include issues related to political will and legal framework on asset recovery at national level. Obviously, lack of political will and political interferences shall stand in the way of adopting asset recovery as a policy priority. As a result, needed tools, resources and expertise to this end are unavailable.

the legal barriers refer to the inadequacies of the national legal system in meeting mutual legal assistances requirements, such as excessive banking secrecy; lack of nonconviction based confiscation procedures; requirement for dual criminality and reciprocity; lack of informal cooperation channels; overly burdensome procedural, evidentiary laws and burden of proof; statutes of limitations etc.

the operational barriers include impediments involving processes and communication issues, such as identifying focal points to make MLA requests; challenges in maintaining contacts and coordinating asset recovery actions; delays in processing and responding MLA requests, costs for litigation etc. Besides this, other barriers include difficulties in identifying owners of bank accounts and beneficial owners; failure to manage and preserve assets that have been restrained during prelitigation process; indepth expertise of investigators, investigative magistrates, prosecutors and judges in asset recovery.

# Asset recovery in Vietnam: a summary of the developments

Confiscation of the proceeds of crimes was introduced in the Vietnamese criminal regulations at the time of its independence in 1945. During the Vietnam War (19451975), neither corruption nor confiscation of the proceeds of corruption was regulated in the national laws. However, confiscation of the proceeds of crime in general was stipulated in a number of legal documents as an additional penalty[13](#_bookmark12).

After reunification in 1975 and prior to the *Doi Moi* (*literally renovation*) in 1986, Vietnam adopted a centrally planned economy at its inception. Under the command economy, due to the scarcity of staples and consumer goods, impoverished living conditions and industrial stagnation, corruption was limited in scope and extent.[14](#_bookmark13) Popular economic crimes in this period involved the commercial sector, mainly in the field of goods distribution and associated with the use of food stamps and consumer goods.[15](#_bookmark14) In 1976, confiscation was officially introduced in Decree No. 03/SL dated 15th March 1976 on economic crimes and penalties, for instance, *crime against public property* (Article 4), *and crime of infringing on the property of citizens* (Article 8). Especially, the Prevention of Bribery Ordinance dated 20th May 1981 introduced the confiscation of part or whole of property and fines as additional penalties. Nevertheless, corruption did exist but not yet serious in comparison with the region and the world[16](#_bookmark15) as it was mainly fragmented, spontaneous and unpopular.[17](#_bookmark16) As such, anticorruption and confiscation provisions did not mention the content, scope, conditions and time limits applicable to each type of penalty.

Since 1986, Vietnam launched the cause of the *Doi moi* along the direction of the marketoriented economy, corruption became more popular as economic and social relations had been broadened and became more complex. Facing this challenge, confiscation had been given more attention. The Criminal Code 1985 (Article 32) defined:

Confiscation of property means to confiscate the sentenced persons property for remittance into the States fund. The property confiscation shall apply only to persons sentenced for serious crimes prescribed in this Code. The State shall confiscate all or part of property. When all of their property is confiscated, the sentenced persons and their families shall still be left with conditions to live.

The courts were obliged to choose either confiscation or fines for crimes relating to positions.[18](#_bookmark17) As it can be noticed, confiscation provisions in this period remain vague and unspecific.

Since 2005, Vietnam faced rampant and serious corruption. Statistics shown by the People Supremes Procuracy, from 2010 to 2014, crimes relating to position, including corruption had increased by 50.88%.[19](#_bookmark18) The transformation into the marketoriented economy, international integration and the global financial crisis has facilitated corruption to increase in terms of forms, extent and typologies[20](#_bookmark19). Corruption has become systemic and popular which has caused numerous challenges for authorities to detect and handle. Since 2005, there have been many highprofile cases which have resulted in the loss of trillions of dong. The current corruption status in Vietnam is extremely acute, which can obviously be seen and touched everywhere[21](#_bookmark20).

In that context, Resolution No.4/TW dated 21 August 2006 of the Partys Central Committee (Session X) on strengthening the party leadership on anticorruption and antiwaste emphasized that: to attach special importance to asset recovery. Pay attention to penalties, fines and confiscation to increase the opportunities for asset recovery. To concretize the Party Centrals policies, the Criminal Code 1999 (amended and supplemented in 2009 and currently in 2015) provided a more complete definition of confiscation in Article 40:

Confiscation of property means to confiscate part or whole of the sentenced persons property for remittance into the States fund. The property confiscation shall apply only to persons sentenced for serious crimes, very serious crimes or particularly serious crimes prescribed by this Code. When all their property is confiscated, the sentenced persons and their families shall still be left with conditions to live.

The AntiCorruption Law 2005 (amended and supplemented in 2007, 2012) also confirmed:

Corruptionrelated properties must be recovered, confiscated; persons committing corrupt acts and causing damage must pay compensations, indemnities according to the provisions of law (Article 4 on Principles for handling of corruption); Corruptionrelated properties must be returned to their lawful owners or managers or confiscated for the state funds; The confiscation of corruptionrelated properties, the recovery of corruptionrelated properties shall be carried out by decisions of competent state agencies according to the provision of law (Article 70 on principles for handling of corruptionrelated properties).

The recovery of corruptionrelated properties involving foreign elements is also prescribed: on the basis of treaties to which the Socialist Republic of Vietnam is a party and under the basic principles of Vietnamese laws, the Vietnamese government shall cooperate with foreign governments in recovering Vietnamese or foreign corruptionrelated properties and returning such properties to their lawful owners.

Apart from the Criminal Code and AntiCorruption Law, in a scattered way, asset recovery is mentioned in a number of legal documents such as the Civil Code in 2005 (amended and supplemented in 2015) (Articles 255, 257, 258 and 260), Law

on Inspection in 2012 (Article 46, 48, 53, 55), Law on Credit Institutions in 2010

(Article 11, 93), Law on AntiMoney Laundering in 2012 (Article 8, 16, 21, 22, 24,

33, 34), Law on State Audit in 2015 (Article 3, 18).

Nevertheless, changes in legal documents on confiscation are mainly due to the form of expression. Basically, Vietnamese laws still do not have breakthrough regulations on asset recovery. Among the seven crimes of corruption in the current Criminal Code[22](#_bookmark21), confiscation as an additional penalty is only applicable to *embezzling property* and *receiving bribes*. Confiscation is only the supplementary penalty when the principal penalty is not applied (Article 28, Penal Code). Until now, the Criminal Procedure Code has not provided specific regulation on the procedure, process and authority of relevant agencies in detecting, handling and recovering corruption related assets. Only a few provisions to be applied in an indirect manner are available, such as the provision on confiscation and forfeiture into the State fund when the exhibits are at the same time corruptionrelated properties (Article 76 on Handling of Exhibits) and a number of measures for confiscation in Article 140, 141, 142, 143, 144, 145 and 146. Similarly, Law on Mutual Legal Assistance 2007 has not provided specific regulations on the recovery of corruption assets gained through proceeds of corruption is largely reflected in certain documents, such as the Decision of the Prime Minister on approving the Action plan for the implementation of the UNCAC; the Coordination Mechanism for the Implementation of the UNCAC and a number of mutual legal assistance treaties between Vietnam and other states.