WHY DOES ILLICIT ENRICHMENT REMAIN UNTOUCHABLE?
Penal Culture and the Criminalisation of Economic Crime in Comparative Perspective

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Abstract

This article examines why illicit enrichment remains normatively pivotal yet legally and practically elusive within the contemporary anti-corruption regime. Despite the conceptual simplicity of penalizing unexplained wealth, this offense consistently encounters formidable constitutional objections, legality principles, and rigorous evidentiary thresholds. This study interrogates why illicit enrichment remains doctrinally recalcitrant despite being vigorously promoted by the UNCAC and global *financial integrity agendas. It argues that the primary impediment lies not merely within formal legal doctrines, but rather within penal culture, how a constitutional system conceptualizes the moral legitimacy of inferring criminality from wealth and tolerates the shifting of evidentiary burdens. Utilizing a comparative doctrinal, historical, and institutional analysis of Indonesia, Spain, Colombia, and the United Kingdom, this research demonstrates that formal codification does not ensure enforcement efficacy. Illicit enrichment operates effectively only where the penal culture accommodates epistemic asymmetry (Colombia). Conversely, it is constrained by legal formalism (Spain), rejected by legality absolutism requiring a criminal predicate (UK), or perpetually suspended between systemic necessity and legality anxiety (Indonesia). This divergence proves that procedural safeguards and doctrinal caution frequently constrain international norms. Globally, this study contributes a novel theoretical model of penal culture that deconstructs the universalism of international anti-corruption norms, demonstrating that the success of legal transplantation depends entirely upon its compatibility with domestic penal cultures.*

Artikel ini mengkaji mengapa illicit enrichment (peningkatan kekayaan secara tidak sah) tetap memiliki posisi normatif yang sangat penting namun secara hukum dan praktik tetap sulit diterapkan dalam rezim antikorupsi kontemporer. Meskipun secara konseptual pelanggaran ini sederhana, yaitu mempidanakan kekayaan yang tidak dapat dijelaskan, delik ini secara konsisten menghadapi keberatan konstitusional yang kuat, prinsip legalitas, serta standar pembuktian yang ketat. Studi ini menelaah mengapa illicit enrichment tetap bersifat sulit diadopsi secara doktrinal meskipun secara aktif didorong oleh UNCAC dan agenda integritas keuangan global. Artikel ini berargumen bahwa hambatan utama tidak semata-mata terletak pada doktrin hukum formal, melainkan pada budaya pemidanaan (penal culture), bagaimana suatu sistem konstitusional memaknai legitimasi moral dalam menarik kesimpulan kriminalitas dari kekayaan, serta sejauh mana sistem tersebut menerima pergeseran beban pembuktian. Dengan menggunakan analisis doktrinal komparatif, historis, dan institusional di Indonesia, Spanyol, Kolombia, dan Inggris, penelitian ini menunjukkan bahwa kodifikasi formal tidak otomatis menjamin efektivitas penegakan hukum. Illicit enrichment hanya berfungsi secara efektif dalam konteks budaya pemidanaan yang menerima asimetri epistemik (Kolombia). Sebaliknya, penerapannya dibatasi oleh formalisme hukum yang ketat (Spanyol), ditolak oleh absolutisme asas legalitas *yang mensyaratkan adanya tindak pidana dasar (criminal predicate) (Inggris), atau terus berada dalam posisi ambivalen antara kebutuhan sistemik dan kecemasan terhadap legalitas (Indonesia). Perbedaan ini membuktikan bahwa perlindungan prosedural dan kehati-hatian doktrinal sering kali membatasi efektivitas norma internasional. Secara global, studi ini memberikan kontribusi berupa model teoretis baru tentang penal culture yang mendekonstruksi klaim universalisme norma antikorupsi internasional, dengan menunjukkan bahwa keberhasilan transplantasi hukum sepenuhnya bergantung pada kesesuaiannya dengan budaya pemidanaan domestik.*

Keywords: *Illicit Enrichment, Penal Culture, Legality Principle, Economic Crime, Comparative Criminal Law*

Introduction

In the past two decades, illicit enrichment has been cited as a model for combating corruption and economic crime globally.[1] This concept typically refers to the accumulation of assets held by public officials that cannot be explained by their legitimate income, enabling legal systems to target wealth whose origin is questioned, regardless of evidence of specific corrupt acts. International frameworks, particularly the United Nations Convention against Corruption (UNCAC), have increasingly promoted the criminalisation of illicit enrichment as a mechanism for asset recovery and governance accountability.[2]

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1 Ndiva Kofele-Kale, *Combating Economic Crimes: Balancing Competing Rights and Interests in Prosecuting the Crime of Illicit Enrichment*. London: Routledge, 2013; Akhmad Akhmad, Zico Junius Fernando, and Papontee Teeraphan. "Unmasking Illicit Enrichment: A Comparative Analysis of Wealth Acquisition Under Indonesian, Thailand and Islamic Law." *Journal of Indonesian Legal Studies* 8, no. 2 (2023): 899-934.

2 Nur Rohim Yunus, et al. "Corruption as an extra-ordinary crime: Elements and eradication efforts in Indonesia." *Journal of Creativity Student* 6, no. 2 (2021): 131-150; Muhammad Iqbal Baiquni, et al. "Criminalization Arrangements for Corporations (Comparative Study of Indonesia and Australia)." *Unnes Law Journal* 9, no. 2 (2023): 489-508. *See also* Dimitris Ziouvas, "International Asset Recovery and the United Nations Convention Against Corruption." *The Palgrave Handbook of Criminal and Terrorism Financing Law*. Cham: Springer International Publishing, 2018, pp. 591-620; Mat Tromme, "Waging War Against Corruption in Developing Countries: How Asset Recovery Can be

For instance, Article 20 of the Inter-American Convention Against Corruption obliges member states to consider unexplained wealth as the basis for investigation, reflecting a broader policy recognition that corruption often manifests not only in discrete acts of bribery or embezzlement but also in the overall disproportionate enrichment of public officials.[3] Jurisdictions such as Colombia have implemented illicit enrichment provisions with notable success, allowing prosecutors to reverse the burden of proof in cases involving manifestly disproportionate wealth.[4] Conversely, other states, including Spain and the United Kingdom, have struggled to implement similar laws, indicating the tension between normative imperatives and legal enforceability. The policy tool based on illicit enrichment, therefore, reflects a broader governance shift from punishing individual acts to addressing systemic inequities and opacity in wealth accumulation.[5]

Despite the moral appeal of penalising unexplained wealth, illicit enrichment remains one of the most legally contested forms of economic crime. Conceptually, it seems straightforward: wealth that cannot be justified through lawful means should be subject to legal scrutiny. Yet, transforming this normative clarity into enforceable law is a complex matter. This complexity is caused by the multi-layered legal challenges, ranging from constitutional protections of property and due process to evidentiary and procedural hurdles.[6] In the United Kingdom, for example, courts have historically resisted attempts to criminalise unexplained wealth, citing the

Compliant with the Rule of Law." *Duke Journal of Comparative & International Law* 29, no. 2 (2019): 165-233.

3 Giorleny D. Altamirano, "The Impact of the Inter-American Convention against Corruption." *The University of Miami Inter-American Law Review* 38, no. 3 (2007): 487-547.

4 José Ignacio Hernández G, "Fighting Corruption in Latin America and the Caribbean at a Supranational Level: Balances and Challenges of the Inter-American Convention Against Corruption." *Revista Derecho del Estado* 59 (2024): 261-290.

5 Jordi Miró Estradé, "The Offense of Illicit Enrichment in Spain." *Zeitschrift für die gesamte Strafrechtswissenschaft* 136, no. 1 (2024): 241-254; Ruslan Bilokin, "International Scientific Experience in the Study of Illicit Enrichment: Criminalistics and Forensic Dimension." *International Annals of Criminology* (2025): 1-23.

6 Jeffrey R. Boles, "Criminalizing the Problem of Unexplained Wealth: Illicit Enrichment Offenses and Human Rights Violations." *New York University Journal of Legislation and Public Policy* 17, no. 4 (2014): 15-057; Ermaida Ermaida, and Sonata Lukman. "Crime Prevention Policy Through Depriving Illicit Enrichment and Unexplained Wealth." *International Conference on Environmental and Energy Policy (ICEEP 2021)*. Atlantis Press, 2021.

presumption of innocence and the need for direct proof of a criminal act as non-negotiable pillars of legality. Spain has faced similar obstacles, in which the presence of formal law constrains prosecutors' ability to work on indirect evidence, effectively narrowing the operational scope of illicit enrichment provisions. Meanwhile, in Indonesia, despite robust anti-corruption rhetoric and the establishment of the Corruption Eradication Commission, enforcement of unexplained wealth laws remains intermittent, reflecting anxiety about legal overreach and constitutional propriety.[7] This paradox, where illicit enrichment-based criminal handling is morally compelling yet legally elusive, raises fundamental questions about the relationship between law, morality, and governance: why do jurisdictions consistently hesitate to criminalise wealth that cannot plausibly be explained?

Understanding why illicit enrichment remains legally resistant has significant theoretical, policy, and governance implications. From a policy perspective, the inability to prosecute unexplained wealth diminishes the deterrent effect of anti-corruption frameworks and allows high-level actors to maintain ill-gotten gains with impunity.[8] Practically, ineffective enforcement undermines public trust in institutions, eroding legitimacy and weakening compliance with broader anti-corruption norms.[9] In addition, illicit enrichment provides a unique perspective for exploring the intersection of penal culture, legal doctrine, and moral reasoning: it challenges conventional notions of criminal proof and highlights the tension between normative expectations and procedural restrictions.[10] By examining how different legal

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7 Juwita Widya Mahmud, Mohamad RU Puluhulawa, and Waode Mustika. "Illicit Enrichment Conception in Positive Law in Indonesia." *Estudiante Law Journal* 5, no. 3 (2023): 773-785; Laras Susanti, "Criminal Liability of Public Officials for Illicit Enrichment: Comparing Approaches of the Use of Indirect Methods of Proof in Investigating Illicit Enrichment in Indonesia and the US." *Indonesian Journal of International Law* 13, no. 1 (2015): 63-126.

8 *See* Augusto Lopez-Claros, and Ian J. Lynch. "Combatting Corruption to Advance Good Governance: Exploring Options for an International Anti-Corruption Court." *Global Governance and International Cooperation*. Routledge India, 2024, pp. 428-443.

9 *See* Amadou Boly, and Robert Gillanders. "Corruption, institutional trust and legitimacy: A vicious circle." *The Political Economy of Corruption*. London: Routledge, 2023, pp. 15-30.

10 Jaakko Kalverkämper, "Re-Imagining Criminal Justice: The Ethical Fusion of Substantive Law and Procedural Law." *Social Science Chronicle* 2 (2023): 1-18; Alessandro Corda, "The transformational function of the criminal law: In search of operational boundaries." *New*

systems function or fail to function appropriately in the context of illicit enrichment, the study contributes to a more nuanced understanding of the socio-legal and institutional determinants of economic crime criminalisation. This study is particularly timely, given the increasing international emphasis on asset recovery, financial transparency, and integrity frameworks promoted by UNCAC, the Financial Action Task Force (FATF), and regional anti-corruption bodies.[11]

While extensive literature addresses corruption, bribery, and asset recovery, relatively few studies interrogate why illicit enrichment specifically remains "untouchable" in criminal law. Much research focuses on procedural reforms or the design of legal instruments, yet the role of penal culture, encompassing the socially embedded beliefs, traditions, and normative assumptions that construct judicial reasoning, has been underexplored. This gap is important, considering that legal resistance to criminalising unexplained wealth often stems not solely from doctrinal limitations, but from deeper epistemic and moral concerns about the legitimacy of inferring guilt from an imbalance between wealth and income.[12] Comparative studies that situate

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Criminal Law Review 23, no. 4 (2020): 584-635; Ridwan Arifin, et al. "A Discourse of Justice and Legal Certainty in Stolen Assets Recovery in Indonesia: Analysis of Radbruch's Formula and Friedman's Theory." *Volksgeist: Jurnal Ilmu Hukurn dan Konstitusi* 6, no. 2 (2023): 159-181; Wahyu Sinta Dewi Pramudita, Ali Masyhar Mursyid, and Cahya Wulandari. "Pemulihan Aset Tindak Pidana Korupsi Melalui Non-Conviction Based Asset Forfeiture." *Politika Progresif: Jurnal Hukum, Politik dan Humaniora* 2, no. 2 (2025): 358-372; Maidah Purwanti, et al. "Indonesian Criminal Law Reform Policy Through the Classification of Fines in the Indonesian National Criminal Code (Attributed to Fines Sanctions in Law Number 63 Year 2024 on Immigration)." *Lex Scientia Law Review* 9, no. 1 (2025): 1443-1472.

11 *See* Ridwan Arifin, Sigit Riyanto, and Akbar Kurnia Putra. "Collaborative efforts in ASEAN for global asset recovery frameworks to combat corruption in the digital era." *Legality: Jurnal Ilmiah Hukum* 31, no. 2 (2023): 329-343; Ari Wibowo, "Barriers and solutions to cross-border asset recovery." *Journal of Money Laundering Control* 26, no. 4 (2023): 739-750.

12 Worku Yaze Wodage, "Criminalization of 'Possession of Unexplained Property'and the Fight against Public Corruption." *Mizan Law Review* 8, no. 1 (2014): 45-83. *See also* Dornbierer, Andrew. *Illicit enrichment: A guide to laws targeting unexplained wealth*. Basel: Basel Institute on Governance, 2021; Francisco Muñoz, and Miguel Ángel Ramos. "Substantive Justice in the Case of Corruption in Brazil: The Lava Jato Process and its Legal and Social Implications: La Justicia Sustantiva en el Caso de la Corrupción en Brasil: El Proceso Lava Jato y sus Implicaciones Jurídicas y Sociales." *Crítica de la Justicia Sustantiva* 1, no. 1 (2025): 71-90.

doctrinal variations within broader political and cultural contexts are scarce, leaving unanswered questions about why some jurisdictions, such as Colombia, address illicit enrichment effectively, while others, such as Spain and the United Kingdom, encounter persistent obstacles. Addressing this gap requires moving beyond technical legal analysis to examine the interplay between legal norms, constitutional principles, and culturally mediated understandings of economic wrongdoing.

This study addresses two interrelated research questions. *First*, why does illicit enrichment remain legally resistant despite widespread normative and international support, including UNCAC-promoted reform agendas? *Second*, how do variations in penal culture explain cross-jurisdictional differences in the doctrinal framing, enforcement, and operational acceptance of illicit enrichment? In this context, penal culture, understood as the moral and epistemic frameworks that construct legal interpretation and institutional behaviour, is central to explaining these variations.[13] For example, Colombian courts have demonstrated epistemic flexibility, allowing prosecutors to infer illicit enrichment from patterns of disproportionate wealth, whereas in Spain, formalist doctrines of legality strictly restrict such inferences.[14] In the United Kingdom, the absolutist protection of property and procedural guarantees prevents the adoption of direct illicit enrichment offence handling, while in Indonesia, enforcement remains tentative, reflecting a hybrid of necessity-driven policy and legal caution.[15] These contrasting examples illustrate how penal culture mediates the translation of normative imperatives into practical law.

Empirical and doctrinal examples illuminate these dynamics. In Colombia, the "Proceso 8000" investigation into the disproportionate enrichment of political figures demonstrated how prosecutors could reverse

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13 *See* Chris Cunneen, et al. *Penal Culture and Hyperincarceration: The Revival of the Prison*. London: Routledge, 2016; Susanne Karstedt, "Cultural peers and penal policies: A configurational approach toward mapping penal landscapes." *Punishment & Society* 17, no. 3 (2015): 374-396.

14 Edgar Villa, Norman Loayza, and Martha Misas. "Illicit activity and money laundering from an economic growth perspective: a model and an application to Colombia." *World Bank Policy Research Working Paper* 7578 (2016).

15 David Johnston, and Reinhard Zimmermann, eds. *Unjustified Enrichment: Key Issues in Comparative Perspective*. Cambridge: Cambridge University Press, 2002.

the evidentiary burden to successfully target unexplained wealth.[16] Conversely, in Spain, the 2012 case involving the former mayor of Marbella[17], who accumulated significant unexplained assets, ultimately failed to lead to illicit-enrichment convictions due to strict evidentiary and formalist constraints.[18] The United Kingdom's failure to enact a comprehensive unexplained wealth regime until the 2018 introduction of the Unexplained Wealth Orders (hereinafter, UWOs) illustrates the influence of legality absolutism and scepticism toward indirect inference in criminal law.[19] Indonesia's Corruption Eradication Commission has intermittently pursued asset declarations and illicit enrichment cases, but persistent constitutional debates and legal issues have limited systematic enforcement. These examples demonstrate that enforcement is not merely a technical question of drafting laws but is deeply conditioned by cultural, doctrinal, and epistemic factors that determine how

16 The *Proceso 8000* was a major political scandal in Colombia during the 1990s, involving allegations that drug money from the Cali Cartel had financed President Ernesto Samper's 1994 election campaign. Investigations revealed that millions of dollars from narcotraffickers were funneled into the Liberal Party's political machinery. Despite substantial evidence and the imprisonment of several associates, Samper denied involvement and avoided removal from office. The scandal deeply damaged Colombia's political credibility, strained relations with the United States, and highlighted the pervasive influence of drug cartels on the country's institutions, marking a turning point in Colombia's fight against corruption and narco-politics. *See* Daniela Herrera Loaiza, "El clientelismo político como mecanismo de intermediación entre el legislativo y ejecutivo. Estudio de caso: Ernesto Samper, Proceso 8000." *Thesis*. Universidad de Antioquia, 2022.

17 The 2012 case involving the former mayor of Marbella, Spain, refers to the sentencing of Marisol Yagüe, who had led the city during one of Spain's largest corruption scandals known as the "Malaya case." This case uncovered a vast network of bribery, money laundering, and urban planning corruption that plagued Marbella's city council for years. Yagüe and several officials, including businessmen and city planners, were found guilty of accepting bribes in exchange for illegal building permits. In 2012, Yagüe was sentenced to six years in prison, symbolising Spain's growing effort to tackle deep-rooted municipal corruption and restore public trust in governance.

18 *See* Paul M. Heywood, "Corruption in contemporary Spain." *PS: Political Science & Politics* 40, no. 4 (2007): 695-699; Marta Sánchez Esparza, Inmaculada Berlanga Fernández, and Adoración Merino Arribas. "La representación simbólica de la corrupción desde el framing: caso Malaya en la prensa española." *Estudios sobre el Mensaje Periodístico* 24, no. 2 (2018): 1735-1751

19 *See* Rita Julien, "Unexplained Wealth Orders (UWOs) Under the UK's Criminal Finances Act 2017: The Role of Tax Laws and Tax Authorities in Its Successful Implementation." *2nd High-Level Conference on High Net-Worth Individuals: The Challenge They Pose for Tax Administrations, FIUs and Law Enforcement Agencies*. 2018.

legal systems interpret the relationship between wealth, legitimacy, and criminality.

The central argument of this study is that penal culture rather than solely doctrinal or procedural concerns explains why illicit enrichment remains "untouchable" in many jurisdictions. Penal culture determines the epistemic legitimacy of inferring criminality from wealth discrepancies, shapes normative acceptance of evidentiary asymmetry, and mediates tensions between legality, necessity, and proportionality. By employing comparative doctrinal and political analysis across Indonesia, Spain, Colombia, and the United Kingdom, the study develops a framework linking penal cultural orientations to differential enforcement outcomes. This approach contributes to studies of economic crime by moving beyond conventional technical or international legal explanations, highlighting the centrality of socio-legal norms in constructing reform outcomes. Practically, the framework offers guidance to policymakers seeking to implement or reform illicit enrichment regimes, demonstrating that technical compliance with international norms is insufficient without alignment with local legal and moral cultures.

Research Methods

This study adopts a comparative doctrinal and political-legal research design, integrating both traditional legal analysis and contextual institutional assessment. Doctrinal analysis involves a systematic examination of national statutes, criminal codes, and case law to identify the presence, scope, and formulation of illicit enrichment offences. Complementing this, the political-legal dimension situates domestic laws within broader institutional and social contexts, including state capacity, penal culture, and the influence of international norms such as UNCAC (UNCAC, 2003). This dual approach enables mapping legal provisions onto real-world enforcement practices and societal perceptions, bridging normative prescriptions and empirical realities within a comparative framework.[20]

[20] Robert Bogdan, and Sari Knopp Biklen. *Qualitative Research for Education*. Vol. 368. Boston, MA: Allyn & Bacon, 1997. *See also* Uprimny, and Saffon. "Usos y Abusos de la Justicia Transicional en Colombia."

The study employs a purposive case selection strategy, focusing on four jurisdictions: Indonesia, Spain, Colombia, and the United Kingdom. All four states are parties to UNCAC and, therefore, subject to international anti-corruption norms; however, they differ substantially in legal tradition, constitutional constraints, state capacity, and penal culture. Indonesia and Colombia are civil-law jurisdictions with highly moralised penal cultures and moderate-to-evolving institutional capacity for anti-corruption enforcement, including asset-recovery mechanisms. Spain, a civil-law state with robust legal norms, and the United Kingdom, a common-law jurisdiction with highly formalised legal procedures, adopt more cautious approaches to criminalising illicit enrichment. This variation enables a comparative analysis that highlights how the interaction among legal tradition, institutional capacity, and societal attitudes toward corruption shapes the emergence, design, and enforcement of illicit-enrichment laws.

Data sources comprise national statutes and criminal codes, judicial decisions, official reports from UNCAC country reviews, the World Bank, and the Basel Institute, as well as documentation from domestic anti-corruption agencies and scholarly legal commentary. Comparative criteria include legal tradition (civil law versus common law), constitutional and legality constraints (rule of law and principle of legality), state capacity and institutional enforcement (anti-corruption agencies, asset recovery mechanisms), and social imaginaries of corruption and penal culture (ranging from tolerance to intolerance and reflecting epistemic asymmetries). The analytical approach involves mapping each jurisdiction's legal framework on illicit enrichment, evaluating the content and scope of relevant statutes and regulations, examining enforcement outcomes, and situating these findings within the respective penal culture orientation. This methodology provides both normative and empirical insights, enabling a nuanced understanding of the factors driving divergence in the criminalisation of illicit enrichment across legal systems.

Discussion

Illicit Enrichment in Anti-Corruption Law: A Theoretical and Comparative Analysis of Evidentiary Burden, Criminalization Models, and International Legal Frameworks

Illicit enrichment has emerged as one of the most contested yet increasingly significant concepts in contemporary anti-corruption and financial crime regulation. At its core, the doctrine refers to a situation in which a public official possesses assets that are substantially disproportionate to their lawful income and cannot reasonably be explained by legitimate sources. The normative foundation of this concept can be traced to the broader evolution of corruption control within international law, particularly under the United Nations Convention against Corruption (UNCAC)[21], which in Article 20 encourages States Parties to consider the criminalization of illicit enrichment. Although framed in permissive terms, this provision reflects a growing international consensus that traditional models of corruption enforcement—relying heavily on proof of specific predicate offenses—are often insufficient to address sophisticated forms of asset accumulation by public officials.[22]

From a theoretical perspective, the criminalization of illicit enrichment raises fundamental questions within classical and contemporary criminal law theory. Cesare Beccaria's principle of legality and proportionality in *Dei delitti e delle pene*[23] underscores the necessity that criminal sanctions must be grounded in clear, foreseeable legal rules. However, modern theorists such as H.L.A. Hart[24] and Antony Duff[25] expand the analysis by emphasizing the communicative and moral dimensions of criminal law, where criminalization

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21 *See*. United Nations, *United Nations Convention against Corruption, General Assembly resolution 58/4 of 31 October 2003*, 2003. Available online at https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf

22 Andrew Dornbierer, *Illicit enrichment: A guide to laws targeting unexplained wealth*. Basel Institute on Governance, 2021.

23 Cesare Beccaria, *On Crimes and Punishments*. Piscataway, New Jersey: Transaction Publishers, 2016.

24 Herbert Lionel Adolphus Hart, *Punishment and Responsibility: Essays in the Philosophy of Law*. Oxford: Oxford University Press, 2008.

25 R. Antony Duff, "Relational Reasons and the Criminal Law." In Green L & Leiter B (eds.). *Oxford Studies in Philosophy of Law: Volume 2*. Oxford: Oxford University Press, 2013, pp. 175-208.

is justified when conduct expresses public wrongs that undermine the legal order. Within this framework, illicit enrichment can be conceptualized as a form of systemic wrongdoing that erodes public trust and violates the normative expectation of integrity in public office, even when the precise underlying corrupt act cannot be directly proven.

The doctrinal difficulty of illicit enrichment lies primarily in its tension with the presumption of innocence and the allocation of the burden of proof, as protected under Article 11 of the Universal Declaration of Human Rights (UDHR) and Article 14 of the International Covenant on Civil and Political Rights (ICCPR). Traditionally, criminal law requires the prosecution to prove all elements of an offense beyond a reasonable doubt.[26] However, illicit enrichment provisions often introduce a reverse or shifted burden of explanation, requiring public officials to justify disproportionate wealth. This evidentiary structure has been defended by Susan Rose-Ackerman and Bonnie Palifka as a necessary adaptation to the evidentiary asymmetry inherent in corruption cases, where financial concealment and transnational asset transfers make direct proof of bribery or embezzlement exceedingly difficult.[27]

At the same time, critics such as Douglas Husak[28] and Andrew Ashworth[29] caution against expansive criminalization that risks undermining liberal principles of fairness and individual autonomy. From their perspective, illicit enrichment laws may blur the distinction between suspicion and guilt, potentially criminalizing unexplained wealth without sufficient proof of wrongful conduct. This critique is particularly relevant in jurisdictions where institutional safeguards are weak, and where the presumption of innocence may be eroded through administrative or quasi-criminal proceedings. Nonetheless, proponents argue that illicit enrichment should be understood

26 Ilias Bantekas, "Corruption as an international crime and crime against humanity: An outline of supplementary criminal justice policies." *Journal of International Criminal Justice* 4, no. 3 (2006): 466-484; Sally Engle Merry, and Peggy Levitt. "The Vernacularization of Women's Human Rights." *Human Rights Futures* (2017): 213-36.

27 Susan Rose-Ackerman, and Bonnie J. Palifka. *Corruption and Government: Causes, Consequences, and Reform*. Cambridge: Cambridge University Press, 2016.

28 Douglas Husak, *Overcriminalization: The Limits of the Criminal Law*. Oxford: Oxford University Press, 2008.

29 Andrew Ashworth, and Lucia Zedner. "Prevention and criminalization: Justifications and limits." *New Criminal Law Review: An International and Interdisciplinary Journal* 15, no. 4 (2012): 542-571; Jeremy Horder, *Ashworth's Principles of Criminal Law*. Oxford: Oxford University Press, 2016; Liz Campbell, Andrew Ashworth, and Mike Redmayne. *The Criminal Process*. Oxford: Oxford University Press, 2019.

not as punishment for poverty of explanation, but as a regulatory mechanism aimed at reinforcing fiduciary obligations of public officeholders within a framework of heightened accountability.

International legal instruments and comparative practice further illustrate the evolving acceptance of this concept. The OECD Anti-Bribery Convention, FATF Recommendations on anti-money laundering, and the World Bank's Stolen Asset Recovery (StAR) Initiative collectively emphasize the importance of asset-based approaches to corruption. These frameworks shift attention from act-based prosecution to wealth-based scrutiny, thereby complementing traditional criminal law mechanisms.[30] In jurisdictions such as Colombia, Spain, and the United Kingdom, legal reforms addressing unexplained wealth—such as Colombian Penal Code Article 412[31], Spanish Criminal Code provisions on illicit enrichment (Articles 419–427), and the UK Proceeds of Crime Act 2002 alongside the Criminal Finances Act 2017[32]—demonstrate a convergence toward hybrid models of enforcement that integrate criminal, administrative, and civil recovery tools.

The expansion of illicit enrichment regimes cannot be fully understood without situating them within the broader transformation of contemporary penal culture. David Garland, in *The Culture of Control*, argues that late modern criminal justice systems are increasingly characterized by risk management, preventive logics, and administrative hybridity, rather than purely reactive punishment.[33] Within this paradigm, the criminal law no longer functions solely as a mechanism for adjudicating completed wrongful acts, but increasingly as a tool for governing uncertainty and structural risks. Illicit enrichment fits squarely within this shift, as it targets unexplained wealth accumulation as a proxy indicator of corruption risk, rather than requiring direct proof of a completed bribery or embezzlement offense.

Michael Tonry[34] similarly highlights that modern penal systems are shaped by political pressures for effectiveness and visibility in crime control,

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30 *See* Mark Pieth, ed. *Recovering Stolen Assets*. Lausanne, Switzerland: Peter Lang, 2008.

31 *See* Colombia. *Código Penal Colombia, Publicada en el diario oficial número 44.097 del 24 de julio de 2000*. Available online at https://oig.cepal.org/sites/default/files/2000_codigopenal_colombia.pdf

32 *See* The United Kingdom. *Unexplained Wealth Orders (Proceeds of Crime Act 2002)*. Available online at https://www.legislation.gov.uk/ukpga/2002/29/data.pdf

33 David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society*. Oxford University Press, 2001.

34 *See* Tonry, *Doing Justice, Preventing Crime*.

often resulting in the expansion of preventive and evidentiary presumptive mechanisms.[35] In corruption contexts, this translates into a growing reliance on financial investigation, asset tracing, and burden-shifting mechanisms. Robert Klitgaard's influential formulation[36]—corruption as a function of monopoly, discretion, and lack of accountability—further reinforces the idea that systemic corruption cannot be adequately addressed through classical individualistic criminal liability alone. Instead, structural interventions targeting wealth accumulation and transparency become central to enforcement strategies.

From a governance perspective, Susan Rose-Ackerman[37] and Mark Pieth have consistently argued that corruption should be conceptualized as a failure of institutional design rather than merely individual moral failure. This insight has significant implications for illicit enrichment regimes, as it justifies the use of preventive financial controls and enhanced disclosure obligations for public officials. In this sense, illicit enrichment provisions operate not only as punitive tools but also as governance instruments aimed at reinforcing integrity systems within public administration. The StAR Initiative of the World Bank and UNODC further reflects this governance-oriented approach by prioritizing asset recovery and financial transparency as core components of anti-corruption architecture.

Comparative legal analysis demonstrates that different jurisdictions have adopted varied models of addressing unexplained wealth. In Colombia, Article 412 of the Penal Code explicitly criminalizes illicit enrichment, placing the burden on officials to account for disproportionate increases in assets.[38]

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35 Tonry.

36 Robert Klitgaard, "Political corruption: Strategies for reform." *Journal of Democracy* 2, no. 4 (1991): 86-100.

37 S. Rose-Ackerman, "Political corruption and democracy." *Connecticut Journal of International Law* 14, no. 2 (1999): 363-378; Susan Rose-Ackerman, "Corruption in Asia: Trust and Economic Development." In *Routledge Handbook of Corruption in Asia*. London: Routledge, 2016, pp. 101-112; Ting Gong, and Stephen K. Ma, eds. *Preventing Corruption in Asia*. London: Routledge, 2012.

38 Luis Pásara, *Tres claves de la justicia en el Perú: Jueces, justicia y poder en el Perú. La enseñanza del Derecho. Los abogados en la administración de justicia*. Lima, Peru: Fondo Editorial de la PUCP, 2019; Rodrigo Uprimny, and María Paula Saffon. "Usos y Abusos de la Justicia Transicional en Colombia." *Anuario de Derechos Humanos* 4 (2008): 165-195. *See also* Colombia. *Sentencia C-393 de 2006 Corte Constitucional de Colombia.* Available online at https://sisjur.bogotajuridica.gov.co/sisjur/normas/Norma1.jsp?i=39444

Spain, under Articles 419–427 of its Criminal Code[39], integrates illicit enrichment within broader corruption offenses, emphasizing both active and passive bribery alongside unexplained wealth accumulation. The United Kingdom, while not formally adopting a standalone illicit enrichment offense, employs a robust civil recovery framework under the Proceeds of Crime Act 2002 and enhanced investigative tools under the Criminal Finances Act 2017, including Unexplained Wealth Orders (UWOs), which shift the burden of explanation to the asset holder.

Indonesia, by contrast, primarily relies on Law No. 31/1999 as amended by Law No. 20/2001 on the Eradication of Corruption, which does not explicitly recognize illicit enrichment as an independent offense.[40] Instead, Indonesian law focuses on proving specific corruption acts, such as bribery or embezzlement, which creates evidentiary challenges in complex financial crime cases. Law No. 7/2006 on the ratification of UNCAC provides normative support for considering illicit enrichment, yet its implementation remains limited.[41] This comparative gap highlights the structural tension between international normative expectations and domestic doctrinal constraints, particularly regarding the presumption of innocence and evidentiary burdens.

In further, the synthesis of classical criminal law theory and contemporary governance-oriented approaches reveals that illicit enrichment occupies a hybrid normative space between criminal punishment and preventive regulatory control. While Beccaria's insistence on legality and evidentiary certainty remains a foundational safeguard against arbitrary punishment, modern corruption control demands a recalibration of evidentiary thresholds in light of structural asymmetries in financial crime enforcement. Within this tension, illicit enrichment emerges as a doctrinal compromise that seeks to reconcile the presumption of innocence with the

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39 *See* Spain. *Código Penal España, Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal*. Available online at https://www.boe.es/buscar/pdf/1995/BOE-A-1995-25444-consolidado.pdf. *See also* Pablo Sánchez-Ostiz Gutiérrez, and Jesús María Silva Sánchez. *Fundamentos de Política criminal: Un retorno a los principios*. Madrid: Marcial Pons, 2012; Jesús-María Silva Sánchez, *La expansión del derecho penal*. Madrid: Civitas, 2012.

40 *See* Republic of Indonesia. *Undang-Undang Republik Indonesia Nomor 20 Tahun 2001 Tentang Perubahan atas Undang-Undang Nomor 31 Tahun 1999 Tentang Pemberantasan Tindak Pidana Korupsi*. Available online at https://cms.kpk.go.id/storage/3938/uu202001.pdf

41 Simon Butt, *Corruption and Law in Indonesia*. London: Routledge, 2017.

practical necessity of addressing concealed wealth accumulation in public office.

Building upon H.L.A. Hart's conception of law as a system of primary and secondary rules, illicit enrichment can be understood as a secondary rule mechanism that regulates evidentiary inference rather than directly defining wrongful conduct. At the same time, Duff's communicative theory of criminal law supports the view that unexplained wealth in public office communicates a form of public wrongfulness, insofar as it signals a breach of fiduciary responsibility and undermines civic trust. This dual theoretical framing allows illicit enrichment to be conceptualized not merely as a procedural shortcut, but as a substantive reflection of public wrongs embedded in institutional corruption.

From a governance and criminological perspective, Garland's risk society thesis[42] and Tonry's analysis of penal expansion further legitimize the emergence of asset-based criminal justice mechanisms. The shift from act-based to wealth-based enforcement reflects a broader transformation in state rationality, where the prevention of systemic harm becomes more important than retrospective punishment of isolated acts. Klitgaard's corruption formula and Rose-Ackerman's institutional analysis reinforce this logic by demonstrating that corruption thrives in environments of opacity and weak accountability, thereby justifying enhanced disclosure obligations and burden-shifting mechanisms as preventive tools.

However, the legitimacy of illicit enrichment remains contingent upon the existence of robust procedural safeguards. Without strict judicial oversight, proportionality controls, and clear statutory thresholds, the mechanism risks degenerating into arbitrary asset confiscation. Therefore, the normative justification for illicit enrichment must rest on a balanced framework that integrates human rights guarantees under ICCPR Article 14, due process standards under ECHR Article 6, and proportionality principles embedded in comparative constitutional traditions. In this sense, illicit enrichment is defensible only as a narrowly tailored instrument within a broader rule-of-law compliant anti-corruption system.

Accordingly, the theoretical proposition advanced in this framework is that illicit enrichment should be conceptualized as a *quasi-substantive evidentiary*

[42] David Garland, "Frameworks of Inquiry in the Sociology of Punishment." *British Journal of Sociology* (1990): 1-15.

offense within a hybrid criminal-regulatory regime. It operates as a bridge between traditional criminal liability and modern preventive justice, justified by the need to address structural evidentiary asymmetries in corruption cases while remaining constrained by fundamental rights protections. This framework provides a doctrinal basis for evaluating the legitimacy of national implementations across jurisdictions such as Indonesia, Colombia, Spain, and the United Kingdom, and offers a normative benchmark for future legal reform in alignment with UNCAC standards.

Comparative Analysis on Penal Culture and Operationalisation of Illicit Enrichment Provisions

Indonesia

Indonesia ratified UNCAC in 2006 through Law No. 7/2006. Article 20 of UNCAC encourages States Parties to consider measures against illicit enrichment by public officials, including unexplained increases in assets. Despite this international obligation, Indonesian domestic law lacks the point of a specific criminal offence for illicit enrichment, particularly unexplained wealth. The Indonesian Criminal Code criminalises general corruption acts, such as bribery (Articles 5 and 11 Law No. 31/1999 jo. Law No. 20/2001 on Corruption Eradication), embezzlement, and abuse of authority. However, there is no explicit statutory provision addressing the criminalisation of disproportionate wealth accumulation in the absence of an evident predicate offence. Scholars have argued that this creates a legislative gap, complicating effective enforcement in line with the UNCAC.[43]

The absence of the provisions of illicit enrichment in the Criminal Code is partly due to constitutional and doctrinal constraints. Article 1(1) of the Criminal Code upholds the principle of legality (*nullum crimen sine lege*), meaning no one may be punished for an act that is not explicitly prohibited by law. This principle is echoed in Indonesia's 1945 Constitution (Article 28D) and is

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43 Noverio ADY Prakoso, "Pelaksanaaan Bantuan Hukum Timbal Balik dalam Penyelesaian Kasus Tindak Pidana Korupsi (Studi di Komisi Pemberantasan Korupsi)". *Thesis,* Unika Soegijapranata Semarang, 2017; Juang Intan Pratiwi, and Arief Fahmi Lubis. "The Urgency of Implementing Illicit Enrichment Regulations in Eradicing Corruption in Indonesia." *West Science Law and Human Rights* 1, no. 1 (2023): 8-14.

a cornerstone of legal formalism.[44] Legal scholars such as Husni[45] note that attempts to expand criminal liability to include unexplained wealth are subject to judicial scrutiny, as courts are reluctant to further interpret general corruption provisions without specific legislative authority.

In addition, evidentiary requirements under the Criminal Procedure Code impose significant restrictions. To prosecute a criminal case, prosecutors must prove guilt beyond a reasonable doubt (Article 183). In the absence of concrete evidence linking illicit wealth to a predicate crime, courts often dismiss cases, as mere suspicion of wealth disproportion is insufficient for conviction. This aligns with criminalisation theory, which posits that legal enforcement requires a combination of legally codified offences, enforceable evidentiary standards, and institutional capacity.[46] Indonesia's penal culture regarding illicit enrichment reflects what Mirza[47] describes as "suspended between necessity and legality anxiety." On one hand, there is broad societal and institutional recognition that public corruption manifests through unexplained wealth, particularly among high-ranking officials. Surveys conducted by Transparency International Indonesia (2021) indicate that public trust in anti-corruption institutions is contingent upon their ability to address wealth accumulation beyond legitimate income.

On the other hand, the legal and procedural culture emphasises caution. Prosecutors and judges are hesitant to initiate cases without explicit legal authority, fearing accusations of arbitrary application of criminal law. Lubis[48] argues that this exemplifies an institutionalised "legality anxiety," where the normative imperative to combat corruption clashes with doctrinal constraints.

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44 Joseph Raz, "The amoralist." *Ethics and Practical Reason* (1997): 369-398; Michael Stokes, "Formalism, realism, and the concept of law." *Law and Philosophy* (1994): 115-159.

45 Husni Husni. "Kebijakan Formulasi Pertanggungjawaban Pidana Terhadap Korporasi." *REUSAM: Jurnal Ilmu Hukum* 3, no. 1 (2015): 75-88.

46 *See* Duff, "Relational Reasons and the Criminal Law." In Green L & Leiter B (eds.). *Oxford Studies in Philosophy of Law: Volume 2*; Eugenio Zaffaroni, "Derecho penal y protesta social." *Es legítima la criminalización de la protesta social* (2010): 1-15.

47 Mochamad Mirza, and Endang Parahyanti. "Meaningful Work Protects Judges with Occupational Stress, Secondary Traumatic Stress, and Burnout (A Study of Indonesian Judges of The Supreme Court of the Republic of Indonesia)." *Jurnal Hukum dan Peradilan* 14, no. 1 (2025): 91-130.

48 Fauziah Lubis, "Implementation of Restorative Justice, the Intent of Punishment, and Legal Clarity in Indonesia." *Russian Law Journal* 11, no. 3 (2023): 813-823.

This creates selective enforcement patterns: Corruption Eradication Commission prioritises cases with a direct link to bribery or embezzlement, rather than attempting to criminalise wealth accumulation per se.

Institutional capacity limitations amplify this cautious culture. Investigations of unexplained wealth require forensic accounting expertise, long-term surveillance, and coordination across multiple state agencies.[49] In other words, limited human and financial resources interrupt operationalisation. It indicates that penal culture not only reflects legal doctrine but is also shaped by state capacity a core element in criminalisation theory, which argues that effective criminalisation requires both normative legitimacy and institutional readiness to enforce the law.[50]

A prominent example illustrating Indonesia's challenges is the investigation of a high-ranking public servant reported by *Tempo* (2020). The individual had a declared salary of IDR 15 million per month, yet owned assets exceeding IDR 5 billion, including multiple properties and luxury vehicles. While this case clearly demonstrated disproportionate wealth, the Corruption Eradication Commission's pursuit of a direct criminal charge for illicit enrichment was halted due to the absence of a specific statutory basis.

Instead, the commission had to rely on indirect legal mechanisms, in which prosecutors utilised Article 18 of Law No. 31/1999 (as amended by Law No. 20/2001) on abuse of authority and embezzlement, combined with civil asset tracing under asset recovery regulations. Prakoso[51] argues that such a procedural workaround reflects the hybrid nature of Indonesia's penal culture: moral recognition of wrongdoing exists, while formal legal tools are insufficient for direct prosecution. Legal scholars also debate the merits of adopting a standalone legal mechanism for the illicit enrichment offence. Lubis[52] contends that codifying unexplained wealth as a crime would harmonise domestic law with UNCAC obligations and reduce prosecutorial

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49 Prakoso, "Pelaksanaaan Bantuan Hukum Timbal Balik dalam Penyelesaian Kasus Tindak Pidana Korupsi (Studi di Komisi Pemberantasan Korupsi)".

50 *See* Duff, "Relational Reasons and the Criminal Law." In Green L & Leiter B (eds.). *Oxford Studies in Philosophy of Law: Volume 2*.

51 *See* Prakoso, "Pelaksanaaan Bantuan Hukum Timbal Balik dalam Penyelesaian Kasus Tindak Pidana Korupsi (Studi di Komisi Pemberantasan Korupsi)".

52 *See* Lubis, "Implementation of Restorative Justice, the Intent of Punishment, and Legal Clarity in Indonesia."

discretion, whereas Husni[53] warns that overly broad criminalisation could clash with constitutional legality and judicial scrutiny. The Indonesian case demonstrates the tension between legal formalism, penal culture, and pragmatic enforcement, illustrating why the specific definition of illicit enrichment remains operationally absent despite normative recognition of its necessity.

From a doctrinal perspective, the absence of a clearly defined illicit enrichment offence raises several normative issues. First, it limits the state's ability to hold officials accountable for wealth accumulation that is clearly inconsistent with legitimate income. Second, existing corruption laws (Articles 2–5 of Law No. 31/1999 *jo.* Law No. 20/2001) are predicate-dependent, meaning they require proof of bribery, embezzlement, or other criminal conduct to attach liability. Third, the absence of an explicit provision reduces predictability and may undermine the deterrent effect of the law.[54] Scholars suggest several doctrinal pathways. Prakoso[55] proposes introducing a shifted burden of proof, similar to Colombia's model (Law 793/2002), allowing public officials to justify substantial increases in assets while maintaining constitutional legality. Mirza[56] suggests integrating forensic asset tracing regulations with clear procedural safeguards to mitigate legal risks. These approaches illustrate how legal theory, comparative law, and penal culture can inform domestic legislative reform.

Indonesia's case illustrates a key insight from criminalisation theory: *behaviour becomes criminal only when the state possesses normative legitimacy, codified law, and enforcement capacity*.[57] The UNCAC provides normative pressure, but domestic adoption is mediated by legality anxieties, institutional capacity, and

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53 *See* Husni, "Kebijakan Formulasi Pertanggungjawaban Pidana Terhadap Korporasi."

54 *See* Raz, "The Amoralist." *Ethics and Practical Reason*; Duff, "Relational Reasons and the Criminal Law." In Green L & Leiter B (eds.). *Oxford Studies in Philosophy of Law: Volume 2.*

55 *See* Prakoso, "Pelaksanaaan Bantuan Hukum Timbal Balik dalam Penyelesaian Kasus Tindak Pidana Korupsi (Studi di Komisi Pemberantasan Korupsi)".

56 Mirza, and Parahyanti. "Meaningful Work Protects Judges with Occupational Stress, Secondary Traumatic Stress, and Burnout (A Study of Indonesian Judges of The Supreme Court of the Republic of Indonesia)."

57 *See* Duff, "Relational Reasons and the Criminal Law." In Green L & Leiter B (eds.). *Oxford Studies in Philosophy of Law: Volume 2*; Zaffaroni, "Derecho penal y protesta social."

epistemic constraints. Using Epstein's penal culture typology,[58] Indonesia can be categorised as a hybrid model, where normative intolerance of corruption exists, but enforcement relies on formal procedural caution and selective application of law. The case also demonstrates the epistemic asymmetry challenge, where investigators may know that wealth is disproportionate, but the law does not allow inference without a clear predicate crime. This reinforces the importance of linking legal reforms to institutional and cultural readiness, rather than merely to normative obligations.

Spain

Spain has implemented provisions targeting illicit enrichment within its domestic criminal framework, particularly through the recent reform of the Criminal Code via Law 14/2022. This law introduces a new offence for public officials: Article 438 bis of the Penal Code (Código Penal), which criminalises unexplained increases in assets during office or up to five years after leaving public office. The provision states,

> "*La autoridad que, durante el desempeño de su función o cargo y hasta cinco años después de haber cesado en ellos, hubiera obtenido un incremento patrimonial o una cancelación de obligaciones o deudas por un valor superior a 250.000 euros respecto a sus ingresos acreditados, y se negara abiertamente a dar el debido cumplimiento a los requerimientos de los órganos competentes destinados a comprobar su justificación, será castigada con las penas de prisión de seis meses a tres años, multa del tanto al triplo del beneficio obtenido, e inhabilitación especial para empleo o cargo público y para el ejercicio del derecho de sufragio pasivo por tiempo de dos a siete años*." [A public official who, during the exercise of their office or within five years after leaving it, obtains an increase in assets equal to or greater than €250,000, which cannot be justified, and refuses to provide documentation to verification bodies, shall be punished with imprisonment of six months to three years, a fine of three times

58 *See* Irving Epstein, "Juvenile Delinquency and Reformatory Education in China: A retrospective." *The Ethnographic Eye*. London: Routledge, 2013, pp. 73-96.

the benefit obtained, and disqualification from public office for two to seven years].

This represents a normative alignment with UNCAC Article 20, as Spain explicitly criminalises illicit enrichment, combining a high threshold with detailed procedural safeguards.[59] Additionally, Spain's approach emphasises legal formalism, specifying quantifiable thresholds, procedural obligations for verification, and penalties calibrated to ensure proportionality and foreseeability, reflecting traditional criminal law principles as underlined by de Molina.[60] The law complements other anti-corruption frameworks in Spain, including the Organic Law 3/2015 on Transparency, the Criminal Procedure Code, and asset recovery measures. Together, these regulations aim to create a coherent system of accountability for public officials, with a predictable procedural and evidentiary framework. Scholars highlight that Spain's codification of illicit enrichment reflects a cautious yet deliberate effort to reconcile domestic legal requirements with international anti-corruption obligations.[61]

Spain's penal culture is characterised by "legality formalism". Unlike jurisdictions that adopt epistemic asymmetry or shifted burdens of proof (e.g., Colombia), Spanish criminal law imposes a high evidentiary threshold, requires explicit reporting of assets, and requires procedural verification before initiating prosecution. This reflects a cultural and institutional caution, where criminal law is interpreted narrowly to avoid overreaching criminalisation or violations of constitutional rights (Article 25 of the Spanish Constitution guarantees legality and proportionality in criminal penalties). Legal scholars argue that the Spanish model exemplifies a predictable, rights-

59 Andrew Dornbierer, "Illicit enrichment." *Elgar Encyclopedia of Corruption and Society*. London: Edward Elgar Publishing, 2024, pp. 146-148.

60 Antonio García-Pablos de Molina, "La prevención del delito y los principales centros de interés de la moderna criminología." *Archivos de Criminología, Seguridad Privada y Criminalística* 7 (2011): 5-6.

61 Jaime Rodriguez-Arana Muñoz, *Derecho Administrativo Constitucional*. Fiesole, Italy" Torrossa, 2023; Eduardo Rivera, Enrique Seira, and Saumitra Jha. *Democracy Corrupted: Apex Corruption and the Erosion of Democratic Values*. No. 4166. 2024.

based penal culture.[62] The high threshold (€250,000) and rigorous verification process mitigate the risk of wrongful convictions while still allowing the state to target clear cases of unexplained wealth. Thus, the penal culture balances societal intolerance for corruption with doctrinal respect for legality, formal evidence, and proportionality. Nieto Morales[63] emphasises that this approach embodies a pragmatic compromise: the state exercises UNCAC norms without compromising constitutional guarantees or procedural safeguards.

Institutionally, the effectiveness of Article 438 bis depends on verification bodies such as the Court of Auditors (Tribunal de Cuentas) and the Prosecutor's Office for Corruption and Organised Crime (*Fiscalía Anticorrupción*). These agencies ensure that investigations follow due process, reinforcing the formalistic orientation of Spain's penal culture. Enforcement is cautious but structured, in contrast to jurisdictions where prosecutors enjoy broader discretion to infer wrongdoing from unexplained wealth.

While Article 438 bis is relatively new, early cases provide insight into how it works. For example, in 2023, the regional prosecutor's office investigated a mid-level municipal official whose declared income was approximately €40,000 per year, yet the official owned multiple properties and luxury vehicles. Under Article 438 bis, the prosecutor requested detailed documentation and initiated asset verification procedures. Due to the official's partial cooperation, the case is currently ongoing, highlighting both the strengths and limitations of Spain's formalistic approach.[64]

Experts note that enforcement may encounter the high evidentiary threshold and bureaucratic verification process. While these safeguards protect against arbitrary prosecution, they may also reduce the number of successful convictions. Scholars such as García-Pablos de Molina[65] argue that Spain's narrow definition of illicit enrichment reflects a strategic choice,

62 *See* de Molina, "La prevención del delito y los principales centros de interés de la moderna criminología." *See also* Juan Carlos Ferré Olivé, "Diversidad cultural y sistema penal." *Revista Penal* no. 22 (2008): 33-42.

63 Fernando Nieto Morales, "El legado del "sexenio de la corrupción": los retos del sistema nacional anticorrupción." *Foro Internacional* 60, no. 2 (2020): 683-715.

64 Jessica Paola Palacios Garay de Rodriguez, et al. "Problemática de la corrupción en el Perú." *Revista de Ciencias Sociales* 28, no. 5 (2022): 268-278.

65 *See* de Molina, "La prevención del delito y los principales centros de interés de la moderna criminología."

prioritising constitutional compliance and procedural clarity over broad deterrence. Comparatively, Spain's penal culture contrasts with Colombia's epistemic asymmetry model, in which the law permits inference of wrongdoing from unexplained wealth and shifts some burden of proof to the defendant (Law 793/2002). Spain, by contrast, adheres closely to formal legality and evidentiary sufficiency, demonstrating a culture of caution embedded in both law and institutional practice.

Analysing Article 438 bis through a doctrinal approach reveals several main features. First, the law is precisely codified, specifying quantitative thresholds, time frames, penalties, and procedural duties. This reflects the principle of legality and proportionality,[66] ensuring that individuals are aware of the legal consequences of illicit enrichment. Second, the law integrates verification mechanisms, giving competent authorities the power to request explanations for asset augmentation, yet maintaining procedural protections against arbitrary intrusion.[67]

From a theoretical perspective, Spain exemplifies legal formalism in criminalisation. Criminal behaviour is only defined where the law explicitly prohibits it, and enforcement is contingent on adherence to procedural and evidentiary requirements.[68] This contrasts with countries where penal culture permits inference from wealth to wrongdoing (epistemic asymmetry), highlighting how domestic legal culture mediates the exercise of UNCAC norms. Furthermore, Article 438 bis reinforces Spain's commitment to proportionality and predictability, balancing deterrence with civil liberties. Experts argue that this framework exemplifies an institutionally conservative but normatively effective strategy, capable of targeting large-scale illicit enrichment while minimising procedural risks.[69]

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66 *See* Raz, "The Amoralist."

67 *See* de Molina, "La prevención del delito y los principales centros de interés de la moderna criminología."

68 *See* Duff, "Relational Reasons and the Criminal Law." In Green L & Leiter B (eds.). *Oxford Studies in Philosophy of Law: Volume 2*.

69 *See* Fernando Nieto Morales, "El legado del "sexenio de la corrupción": los retos del sistema nacional anticorrupción"; Rodriguez-Arana Muñoz, *Derecho Administrativo Constitucional*.

Colombia

Colombia criminalises illicit enrichment through Articles 327 and 412 of the Colombian Penal Code (*Código Penal Colombia*). Article 327 applies to private individuals, stating,

> Article 327 – Illicit enrichment of private individuals
> *"El que de manera directa o por interpuesta persona obtenga, para sí o para otro, incremento patrimonial no justificado, derivado en una u otra forma de actividades delictivas incurrirá, por esa sola conducta, en prisión de noventa y seis (96) a ciento ochenta (180) meses y multa correspondiente al doble del valor del incremento ilícito logrado, sin que supere el equivalente a cincuenta mil (50.000) salarios mínimos legales mensuales vigentes."* [Whoever, directly or through an intermediary, obtains, for themselves or for another, an unjustified increase in assets, derived in one way or another from criminal activities, shall, for that sole conduct, incur imprisonment of ninety-six (96) to one hundred eighty (180) months and a fine equal to twice the value of the illicitly obtained increase, without exceeding the equivalent of fifty thousand (50,000) current legal monthly minimum wages].
>
> Article 412 applies to public officials:
> "*El servidor público, o quien haya desempeñado funciones públicas, que durante su vinculación con la administración o dentro de los cinco (5) años posteriores a su desvinculación, obtenga, para sí o para otro, incremento patrimonial injustificado, incurrirá, siempre que la conducta no constituya otro delito, en prisión de nueve (9) a quince (15) años, multa equivalente al doble del valor del enriquecimiento sin que supere el equivalente a cincuenta mil (50.000) salarios mínimos legales mensuales vigentes, e inhabilitación para el ejercicio de derechos y funciones públicas de noventa y seis (96) a ciento ochenta (180) meses."* [A public servant, or anyone who has held public functions, who, during their tenure in the administration or within five (5) years after leaving it, obtains, for themselves or for another, an unjustified increase in assets, shall, provided that the conduct does not constitute another crime, incur imprisonment

> of nine (9) to fifteen (15) years, a fine equal to twice the value of the enrichment obtained, without exceeding the equivalent of fifty thousand (50,000) current legal monthly minimum wages, and disqualification from exercising public rights and holding public office for ninety-six (96) to one hundred eighty (180) months].

Complementing these provisions is Law 793/2002 on asset forfeiture, which allows the burden of proof to shift to the defendant in certain cases, permitting authorities to require officials to justify the origin of their wealth. This framework exercises UNCAC Article 20 by explicitly criminalising unexplained wealth while establishing procedural mechanisms for enforcement. Scholars highlight that Colombia's framework reflects a pragmatic approach: the law recognises the difficulty of proving direct criminal activity in complex corruption cases and allows inference from wealth as a legally sanctioned evidentiary tool.[70] By codifying illicit enrichment and shifting burdens, Colombia demonstrates an integration of legal formalism with epistemic pragmatism, creating a model distinct from more proceduralist or legality-anxious systems such as those of Spain or Indonesia.

Furthermore, the Colombian Penal Code emphasises proportionality and deterrence. Penalties are significant, aiming to discourage public servants and private actors from accumulating unexplained wealth, while fines align with the amount of illicit enrichment. This reflects a theory of instrumental criminalisation, wherein the state designs criminal law to prevent socially harmful conduct and restore justice.[71]

Colombia exhibits a penal culture characterised by epistemic asymmetry, in which the law allows authorities to infer wrongdoing from unexplained wealth, thereby shifting part of the evidentiary burden onto the

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70 Felipe Botero-Rodríguez, Camila Pantoja-Ruiz, and Diego Rosselli. "Corruption and its relation to prevalence and death due to noncommunicable diseases and risk factors: a global perspective." *Revista Panamericana de Salud Pública* 46 (2023): e10.

71 Gloria Perez Torres, "The effectiveness of the international anti-corruption legal framework in the context and practice of Colombia." *Journal of Financial Crime* 27, no. 2 (2020): 437-476.

defendant.[72] This reflects societal intolerance for corruption and a pragmatic recognition of enforcement challenges in complex financial crimes. Public discourse often supports robust action against public officials with disproportionate assets, reinforcing the normative legitimacy of criminalising illicit enrichment. Many studies higlighted that Colombia's institutional culture encourages active investigation of asset accumulation. Specialised bodies such as the *Procuraduría General de la Nación and the Fiscalía General de la Nación* have the mandate and expertise to implement forensic accounting and trace illicit funds. Following criminalisation theory, the Colombian model balances normative legitimacy, legal codification, and enforcement capacity, thereby exercising UNCAC obligations more effectively than jurisdictions constrained by legality anxiety or absolutism.[73]

Additionally, the Colombian model integrates a pragmatic approach to evidentiary standards. While due process is guaranteed under Article 29 of the Colombian Constitution, prosecutors can initiate proceedings based on substantial unexplained wealth, requiring the defendant to demonstrate a legitimate origin. Saavedra Bermúdez and Restrepo, among others, argue that this system acknowledges state capacity limitations and the complexities of financial crime, embedding flexibility within a formal legal framework. A prominent case is the investigation of a former mayor in Medellín, who, after leaving office, was found to have assets exceeding USD 2 million despite a declared official salary of approximately USD 15,000 per year. The Fiscalía invoked Article 412, requiring the official to justify the origin of the wealth. Failure to provide adequate documentation led to a conviction. This approach demonstrates the exercise of epistemic asymmetry and the shift in the burden of proof.

Experts note that Colombia's approach is particularly effective in prosecuting public officials who exploit complex financial instruments and

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72 *See* Felipe Botero-Rodríguez, Camila Pantoja-Ruiz, and Diego Rosselli. "Corruption and its relation to prevalence and death due to noncommunicable diseases and risk factors: a global perspective."

73 *See* Jhorland Ayala-García, et al. "La corrupción en Colombia: un análisis integral." *Documentos de Trabajo Sobre Economía Regional y Urbana* 20080 (2022); Meneses, Jeison Enrique Cuenca. "La Corrupción en la Administración de Justicia: Un análisis desde la Fiscalía General de la Nación." *Thesis,* Universidad Nacional Abierta y A Distancia, 2020.

opaque asset structures. Botero-Rodríguez, et al.[74] argue that the law reflects a conscious trade-off: the state prioritises pragmatic enforcement over strict adherence to evidentiary formalism, thereby allowing prosecution in cases where traditional proof of corruption would be difficult. However, challenges remain. Critics point out that the burden-shifting mechanism can raise constitutional concerns regarding the presumption of innocence (Article 29 of the Constitution) and that uneven institutional capacity across regions can limit enforcement consistency.[75] Nonetheless, Colombia provides an instructive example of how penal culture, legal doctrine, and institutional capacity converge to exercise illicit enrichment laws effectively.

Analysing Colombian illicit enrichment norms reveals two objectives: deterrence and enforceability. Articles 327 and 412, together with Law 793/2002, enable authorities to pursue individuals with disproportionate wealth even without direct evidence of predicate crimes. This aligns with criminalisation theory, which asserts that criminal norms must be designed to target socially harmful conduct while remaining enforceable given state capacity.[76] From a doctrinal standpoint, Colombia strikes a balance between legality and pragmatism. While the Penal Code specifies clear penalties and legal definitions, it explicitly allows inferences and shifts evidentiary burdens under controlled circumstances. Scholars highlight that this combination reduces the gap between normative recognition of illicit enrichment and practical enforcement.[77] Moreover, Colombia's framework illustrates how penal culture influences legal operationalisation. Society's low tolerance for corruption, coupled with a legal culture that accepts epistemic asymmetry, enables proactive prosecution strategies. This contrasts sharply with Spain's

74 *See* Botero-Rodríguez, Pantoja-Ruiz, and Rosselli. "Corruption and its relation to prevalence and death due to noncommunicable diseases and risk factors: a global perspective."

75 Nathalye Saavedra Bermúdez, and Johan Steven Yepes Restrepo. "Reducción de riesgos por corrupción en Contratación Estatal." *Thesis,* Universidad La Gran Colombia, 2018.

76 *See* Javier Montealegre, "Illicit Enrichment in the Public Sector: A Systematic Review of the Literature." *Pensamiento Americano* 18, no. 37 (2025).

77 *See* Botero-Rodríguez, Pantoja-Ruiz, and Rosselli. "Corruption and its relation to prevalence and death due to noncommunicable diseases and risk factors: a global perspective."

formalism or Indonesia's legality anxiety, demonstrating the diversity of approaches to reconciling UNCAC obligations with domestic legal culture.

Colombia exemplifies a penal culture oriented toward epistemic asymmetry and pragmatic enforcement. According to Epstein's typology, it can be classified as "epistemic-asymmetry tolerant," in which authorities may infer wrongdoing from circumstantial evidence (e.g., unexplained wealth) while ensuring procedural safeguards. Criminalisation theory suggests that such an approach is effective when the state possesses institutional capacity, normative legitimacy, and codified law. The Colombian model highlights the importance of integrating normative, doctrinal, and institutional factors. Legal codification (Articles 327/412), procedural innovation (*shifted burden of proof*), and active prosecutorial culture enable the state to combat corruption in complex financial contexts.

United Kingdom

In the United Kingdom, there is no standalone criminal offence of illicit enrichment akin to the Spanish or Colombian models. Instead, the UK relies on mechanisms such as UWOs, introduced under the Criminal Finances Act 2017 and enhanced by the Economic Crime (Transparency and Enforcement) Act 2022. UWOs allow authorities to require individuals to explain the origin of their assets when there is reasonable suspicion that the assets are the proceeds of crime. Failure to comply may lead to civil or criminal consequences, including freezing of assets.

> Section 362A of the Criminal Finances Act 2017 stipulates:
> "*The High Court may make an order requiring a person to provide information about assets if there are reasonable grounds for suspecting that the value of the assets is disproportionate to their known income and that they are derived from criminal conduct.*"

Unlike criminal statutes in Spain or Colombia, UWOs are primarily civil investigative tools, though non-compliance can trigger criminal liability. The Economic Crime (Transparency and Enforcement) Act 2022 strengthens these provisions by improving inter-agency cooperation, facilitating asset tracing, and enhancing beneficial ownership transparency (UK Government, 2022). Legal scholars note that the UK framework reflects a strong adherence to legality and high evidentiary standards, consistent with common law principles emphasising the presumption of innocence and the protection of property rights.[78] The absence of a full criminal offence for illicit enrichment underscores the legality-absolute orientation of the UK penal culture, in which purely unexplained wealth is insufficient to criminalise a suspected individual without a predicate offence.

The UK penal culture demonstrates legality absolutism, characterised by a strict interpretation of criminal law, high standards of proof, and a reluctance to criminalise behaviour without clear statutory provisions. Unlike Colombia, which allows inference from unexplained wealth, or Spain, which defines narrow thresholds, the UK prioritises individual rights, property protections, and evidentiary certainty.[79] Experts argue that this reflects a societal and institutional preference for balancing anti-corruption objectives with civil liberties, emphasising procedural safeguards over expansive enforcement. The UWO framework illustrates this, as authorities must apply to the High Court and provide substantial justification for suspecting the illicit origin of assets, reflecting a careful, rights-based approach.[80] Moreover, the UK penal culture aligns with criminalisation theory principles, highlighting the necessity of legality, proportionality, and societal legitimacy before designating conduct as criminal. While UWOs provide investigative leverage, they do not constitute full criminalisation, preserving common law traditions of high evidentiary thresholds and procedural formality. This demonstrates the interplay between domestic penal culture and the exercise of international anti-corruption norms, particularly UNCAC Article 20.

A notable case illustrating UK practice is the investigation into the overseas assets of a politically exposed person, in which the National Crime Agency (NCA) applied for a UWO under the Criminal Finances Act 2017. The individual owned multiple high-value properties in London

78 Mike Levi, and Melvin Soudijn. "Understanding the laundering of organized crime money." *Crime and Justice* 49, no. 1 (2020): 579-631.
79 Zedner, Lucia. *Criminal Justice*. Oxford University Press, 2004.
80 *See* Levi, and Soudijn. "Understanding the laundering of organized crime money."

disproportionate to declared income. The High Court granted the UWO, requiring disclosure of the origins of assets. Partial compliance led to further investigation, but no criminal conviction for illicit enrichment was secured because UK law does not criminalise unexplained wealth per se.

Experts note that the UK model is effective in asset recovery and transparency but limited in deterring corrupt behaviour through direct criminal liability. Levi and Soudijn[81] argue that while UWOs provide a powerful civil tool, they reflect the constraints of a legality absolutist culture, prioritising formal evidentiary requirements and property rights over proactive criminalisation. Compared with Colombia's epistemic asymmetry or Spain's formalistic criminalisation, the UK illustrates the limits of preventive criminal law in common-law systems. Institutionally, enforcement relies on agencies such as the NCA, HM Revenue & Customs, and the Crown Prosecution Service, which must navigate complex inter-agency procedures and judicial oversight. While these mechanisms are robust, the absence of full criminalisation highlights how penal culture, legal tradition, and societal values collectively influence operationalisation of illicit enrichment norms.

From a doctrinal perspective, UK law demonstrates strict legality and evidentiary conservatism. The Criminal Finances Act 2017 and the Economic Crime (Transparency and Enforcement) Act 2022 provide legal clarity and procedural safeguards, but stop short of defining unexplained wealth as a criminal offence. Scholars such as Zedner[82] and Levi & Soudijn[83] argue that this preserves the integrity of common law principles, ensuring that criminal law remains predictable, proportionate, and subject to rigorous judicial review. Theoretically, the UK case exemplifies the constraints of criminalisation theory in common law contexts. For behaviour to be criminalised, there must be clear statutory authority, proportionality, and societal legitimacy. The UK's reliance on civil investigative tools rather than on full criminal offences reflects a penal culture that prioritises legal certainty and evidentiary robustness over proactive enforcement. Furthermore, UK law illustrates the role of state capacity and institutional design in shaping the operationalisation

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81 *See* Levi, and Soudijn.
82 *See* Zedner, *Criminal Justice*.
83 *See* Levi, and Soudijn. "Understanding the laundering of organized crime money."

of UNCAC norms. While asset recovery mechanisms and beneficial ownership transparency enhance enforcement, their effectiveness is limited by judicial oversight, evidentiary requirements, and the absence of a standalone illicit enrichment offence. This demonstrates how penal culture mediates the relationship between international norms and domestic legal implementation.

The UK demonstrates how a legality absolutist penal culture shapes the exercise of illicit enrichment. Epistemic caution, high evidentiary thresholds, and strong procedural protections limit the scope of criminalisation, even where international norms encourage anti-corruption measures (UNCAC, 2003). Criminalisation theory and penal culture typologies suggest that the UK occupies a unique position: it emphasises rights protection and legal formalism while employing civil-law tools such as UWOs to approximate the enforcement of UNCAC Article 20. Compared to Colombia (*epistemic asymmetry*), Spain (*legality formalism*), and Indonesia (*legality anxiety*), the UK illustrates how common-law traditions and societal values influence the selective operationalisation of illicit enrichment norms.

Cross-Jurisdictional Synthesis of Illicit Enrichment

A comparative overview of Indonesia, Spain, Colombia, and the United Kingdom reveals significantly different approaches to the legal codification of illicit enrichment. Indonesia has ratified UNCAC (2006) but does not yet criminalise illicit enrichment, leaving enforcement dependent on broader anti-corruption statutes and prosecutorial discretion.[84] Spain introduced a narrow

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[84] *See* Ridwan Arifin, Sigit Riyanto, and Akbar Kurnia Putra. "Collaborative efforts in ASEAN for global asset recovery frameworks to combat corruption in the digital era." *Legality: Jurnal Ilmiah Hukum* 31, no. 2 (2023): 329-343; Ridwan Arifin, et al. "A Discourse of Justice and Legal Certainty in Stolen Assets Recovery in Indonesia: Analysis of Radbruch's Formula and Friedman's Theory." *Volksgeist: Jurnal Ilmu Hukurn dan Konstitusi* 6.2 (2023); Ridwan Arifin, "Empowering International Cooperation's Role in the Follow of Assets of Corruption's Result." *Indonesian Journal of International Law* 11, no. 3 92013): 414-422; Ridwan Arifin, "Combating Corruption under ASEAN Cooperation: The Emerging Issues." *Political and Security Issues in ASEAN* 25. Yogyakarta: ASC FISIPOL UGM, 2014; Ridwan Arifin, "Analisis Hukum Internasional dalam Perampasan Aset di Negara Kawasan Asia Tenggara Berdasarkan United Nations Convention Against Corruption (UNCAC) dan ASEAN Mutual Legal Assistance Treaty (AMLAT)." *Jurnal Penelitian Hukum* 3, no. 1 (2016): 37-55; Ridwan Arifin, et al. "The Direction of Indonesia's

criminalisation in Article 438 bis of the Penal Code (Law 14/2022), targeting public officials who accumulate ≥€250,000 unexplained assets and refuse verification. Colombia criminalises illicit enrichment extensively under Articles 327 and 412 of the Penal Code, with the added procedural mechanism of burden-shifting under Law 793/2002. The UK, by contrast, does not treat illicit enrichment as a standalone offence but instead relies on UWOs (Criminal Finances Act 2017) and related asset-recovery mechanisms (UK Government, 2022).

The legal tradition of each country heavily informs codification. Indonesia (civil law) shows legality anxiety, Spain (civil law) demonstrates formalistic adherence to legality, Colombia (civil law) shows pragmatic epistemic asymmetry, while the UK (common law) exemplifies legality absolutism. These differences highlight how legal systems mediate the translation of international norms into domestic law. In this context, the burden of proof is a central distinguishing factor. In Indonesia, the absence of a specific offence leaves the prosecution constrained by traditional evidentiary standards and constitutional principles of due process.[85] Spain's Article 438 bis establishes a high monetary threshold and stringent procedural safeguards, reflecting a formalist approach to legality; prosecution must provide strong evidence or rely on verification bodies, but cannot presume wrongdoing solely based on wealth. Colombia's Law 793/2002 explicitly shifts the burden of proof to the defendant in cases of unexplained wealth, reflecting epistemic asymmetry and a pragmatic penal culture.[86] The UK maintains high evidentiary thresholds; UWOs require court approval and

Legal Policy on the ASEAN Mutual Legal Assistance Treaty in Criminal Matters: A Path to Law Reform in Cross-Border Crime Enforcement in Southeast Asia." *Journal of Law and Legal Reform* 5.2 (2024): 749-782; Surya Adhi, Ridwan Arifin, and Tajudeen Sani. "From Administrative Irregularities to Criminal Acts: Uncovering Corruption in State Procurement Systems." *PAMPAS: Journal of Criminal Law* 6, no. 2 (2025): 137-167.

85 *See* Nugroho, Hibnu. "Reversal burden of proof on corruption in Indonesia." *Проблеми законності* 140 (2018): 175-182.

86 *See* Botero-Rodríguez, Felipe, Camila Pantoja-Ruiz, and Diego Rosselli. "Corruption and its relation to prevalence and death due to noncommunicable diseases and risk factors: a global perspective."

substantial justification, and failure to comply triggers civil or limited criminal sanctions rather than full criminal liability.[87]

These differences illustrate how penal culture shapes evidentiary norms. Epistemic-asymmetry-tolerant jurisdictions (Colombia) allow inference from wealth; formalistic jurisdictions (Spain) balance clarity with enforceability; absolutist jurisdictions (UK) emphasise rights and procedural safeguards; and anxious jurisdictions (Indonesia) hesitate due to doctrinal and constitutional concerns. Theoretical frameworks of criminalisation theory and penal culture typologies explain these variations as a function of state capacity, societal tolerance, and normative legitimacy.

Enforcement outcomes vary correspondingly. In Colombia, the combination of codified offence, burden-shifting, and active prosecutorial bodies results in successful asset recovery and convictions. Spain, despite codification, faces limited enforcement due to high thresholds and procedural complexity, reflecting cautious formalism.[88] Indonesia's lack of legal provision leads to non-existent or ad hoc enforcement, constrained by legality anxiety and limited institutional capacity. In the UK, UWOs allow asset tracing and recovery, but the absence of full criminalisation limits the deterrent effect and direct punitive outcomes.[89] The penal culture typology emerges clearly. Colombia is epistemic-asymmetry tolerant, where pragmatic enforcement and inference from wealth are accepted, while Spain is more legality formalist, constituting defined statutory thresholds, heavy safeguards, and cautious enforcement. In addition, Indonesia demonstrates legality anxiety, where normative recognition exists without codification, and there is enforcement hesitation, while the UK tends toward legality absolutism, strictly adhering to evidence and rights and relying on civil investigative tools.

This classification illustrates the interplay among normative legitimacy, legal doctrine, and institutional capacity, highlighting why international norms such as UNCAC Article 20 are subject to diverse domestic operationalisations. Integrating penal culture, legal doctrine, and state capacity

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87 *See* Levi, and Soudijn. "Understanding the laundering of organized crime money."

88 Masferrer, Aniceto. "Plurality of Laws, Legal Traditions and Codification in Spain." *Journal of Civil Law Studies* 4.2 (2011): 419-448.

89 *See* Levi, and Soudijn. "Understanding the laundering of organized crime money."

explains how illicit enrichment laws emerge or fail. In Colombia, a supportive penal culture, codified law, and capable anti-corruption agencies enable enforcement despite evidentiary challenges. Spain demonstrates that legal codification alone is insufficient without alignment with cultural tolerance for inference. The UK shows that robust legal safeguards can restrict criminalisation even in resource-rich states. Indonesia highlights that legal gaps and cultural hesitation impede operationalisation despite international obligations.

Criminalisation theory suggests that behaviour can be treated as a crime when legality, proportionality, evidentiary feasibility, and state capacity are present. Comparative analysis demonstrates that only when all four elements align legal provision, enforceable procedural norms, institutional capacity, and penal culture tolerance do illicit enrichment laws function effectively. Epistemic asymmetry, legality formalism, legality absolutism, and legality anxiety emerge as key mediators in the domestic implementation of UNCAC norms.

Table 1. Comparing Illicit Enrichment Aspect (Indonesia, Spain, Colombia, and the UK)

Country	**Legal Status of Illicit Enrichment**	**Burden of Proof**	**Penal Culture Typology**	**Enforcement Outcome**	**Key Obstacles**
Indonesia	Not criminalised	Traditional	Legality anxiety	Minimal / ad hoc	Constitutional limits, resource constraints
Spain	Article 438 bis, Penal Code	Prosecutor	Legality formalist	Limited / cautious	High threshold (€250k), procedural safeguards
Colombia	Articles 327/412 + Law 793/2002	Shifted to defendant	Epistemic asymmetry tolerant	Active prosecution, asset recovery	Regional capacity variance, constitutional debate

UK	UWOs (Criminal Finances Act 2017)	High judicial oversight	Legality absolutist	Asset recovery, limited deterrence	No standalone offence, evidentiary constraints

Source: Data proceed by Authors

Table 1 highlights the profound influence of penal culture, legal tradition, and institutional capacity on the enforcement of illicit enrichment norms. While Colombia demonstrates effective enforcement through epistemic asymmetry and burden-shifting, Spain shows that codification alone does not guarantee robust outcomes due to formalistic constraints. The UK, despite advanced investigative tools like UWOs, limits criminalisation through legality absolutism and high evidentiary thresholds, whereas Indonesia's legality anxiety and absence of a specific offence allow only minimal practical enforcement. This synthesis clarifies that the mere adoption of international norms, such as UNCAC Article 20, is insufficient; effective implementation requires alignment among domestic legal frameworks, societal tolerance for inference-based prosecution, and sufficient state capacity to enforce complex anti-corruption measures. Consequently, penal culture emerges as a crucial mediator, influencing both the design and effectiveness of illicit enrichment regimes across jurisdictions.

Criminalising the Unseen: How Penal Culture Establishes Enforcement for Illicit Enrichment Offences

Revisiting the Theory: Penal Culture as an Explanatory Perspective

Penal culture provides a fundamental framework for understanding why illicit enrichment is criminalised in certain jurisdictions while remaining limited or absent in others. Epstein defines penal culture as the ensemble of social norms, moral evaluations, and epistemic practices that influence both legislative choices and law enforcement priorities.[90] Within Colombia, the legal system exercises a pragmatic, epistemic-asymmetry-tolerant penal culture, allowing authorities to infer potential wrongdoing from unexplained wealth.

[90] *See also* Liana Maris Epstein, *A Policy of Stereotype Threat: The Intergroup Impact of Policing Stereotypes*. University of California, Los Angeles, 2012.

This approach aligns with Feinberg's principle that criminalisation requires societal recognition of harm and moral legitimacy.[91] By contrast, the United Kingdom demonstrates a legality-absolutist penal culture, in which strict adherence to the principle of legality and high evidentiary standards constrain criminalisation to UWOs as civil investigative tools.[92] The divergence across these contexts highlights the explanatory power of penal culture in determining the feasibility and scope of law enforcement for illicit enrichment.

In Indonesia, the interplay of legality anxiety and institutional hesitation influences the treatment of unexplained wealth. Although the state ratified UNCAC in 2006, there is no specific criminal law addressing illicit enrichment, reflecting doctrinal caution and constitutional considerations. Zaffaroni[93] argues that penal cultures characterised by legality anxiety tend to prioritise the protection of procedural guarantees over proactive enforcement, even in the presence of compelling social harms. Consequently, policymakers in Indonesia recognise the normative necessity of addressing illicit enrichment but face structural and doctrinal barriers, illustrating how penal culture mediates the translation of international norms into enforceable law.

Spain presents an intermediate case between Colombia and the UK, where criminalisation exists but is narrowly codified under Article 438 bis of the Penal Code (Law 14/2022). The statute criminalises the unexplained wealth of public officials exceeding €250,000 and imposes penalties, including imprisonment, fines, and disqualification from public office. Moreno,[94] among other scholars, emphasises that Spain's formalistic penal culture prioritises procedural certainty and individual rights, which restricts prosecutorial discretion and the operational impact of the law. While the statutory framework allows prosecution, the high evidentiary thresholds and reliance on verification bodies reflect a cautious approach that balances moral recognition of corruption with the protection of legality principles.

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91 Joel Feinberg, *Harmless Wrongdoing*. Vol. 4. Oxford University Press, 1990.

92 *See* Levi, and Soudijn. "Understanding the laundering of organized crime money."

93 *See* Zaffaroni, "Derecho penal y protesta social."

94 *See* Luis Moreno, *Asymmetry in Spain: Federalism in the Making?*. Baden-Baden, germany: Nomos, 1999.

Criminal law theory further clarifies the observed differences. Duff[95] asserts that for conduct to be criminalised, society must recognise it as morally blameworthy, legally enforceable, and compatible with the rule of law. Applying this theory to illicit enrichment, the Colombian model satisfies these conditions by tolerating inferential reasoning and aligning enforcement with social expectations, whereas the UK and Indonesian models prioritise procedural safeguards and evidentiary certainty, limiting the scope of criminal liability. Feinberg's harm principle similarly asserts that criminalisation requires both actual social harm and moral sanction, explaining why formal codification alone, as in Spain, does not guarantee active enforcement.

Additionally, as emphasised, penal culture intersects with institutional capacity and state resources in the exercise of law. Colombia's acceptance of epistemic asymmetry is effective because the state possesses anti-corruption agencies capable of investigating, proving, and recovering illicit assets. Conversely, Indonesia's legality anxiety is compounded by limited investigative capacity, while the UK's legality absolutism reflects both cultural and institutional caution, restricting prosecutions to cases supported by additional criminal predicates. This interaction demonstrates that penal culture cannot be understood in isolation; it must be analysed alongside legal doctrine, evidentiary standards, and institutional capability to explain divergent law enforcement approaches to illicit enrichment offences.

Interaction of Penal Culture with Legal Doctrine and State Capacity

Penal culture significantly interacts with core principles of criminal law, shaping both the design and enforcement for illicit enrichment offences. The principle of legality ("*nullum crimen sine lege*") requires that conduct be clearly defined as criminal before sanctions can be imposed. In legality-absolutist systems such as the United Kingdom, this principle precludes the creation of standalone illicit enrichment offences, as unexplained wealth alone cannot constitute criminal liability without an associated predicate offence. Conversely, Colombia's pragmatic penal culture tolerates epistemic

95 *See* Duff, "Relational Reasons and the Criminal Law." In Green L & Leiter B (eds.). *Oxford Studies in Philosophy of Law: Volume 2.*

asymmetry, allowing authorities to shift the burden of proof under Law 793/2002 for asset forfeiture cases, reflecting a legal and cultural acceptance that unexplained wealth can reasonably imply wrongdoing. This illustrates that penal culture mediates the exercise of doctrinal principles, such as legality, the burden of proof, and proportionality.

Burden of proof is another area where penal culture and doctrine intersect. In Colombia, the law allows for the inversion of the evidentiary burden when investigating illicit enrichment, requiring the defendant to justify the increase in assets (Articles 327 and 412 of the Colombian Penal Code). Legal scholars argue this reflects both social intolerance of corruption and pragmatic enforcement priorities.[96] By contrast, in Spain, Article 438 bis establishes a presumption that wealth exceeding €250,000 must be verified, but enforcement remains constrained by high procedural safeguards and reliance on independent verification bodies. The UK similarly maintains a strict evidentiary threshold for UWOs, demonstrating how legality-absolutist penal cultures demand concrete evidence before any enforcement action can proceed.

State capacity further mediates the interaction between penal culture and doctrine. Effective law enforcement for illicit enrichment offences requires institutional resources, trained investigators, and robust asset recovery mechanisms. Colombia demonstrates this comprehensive quality, with its Specialized Unit for Asset Recovery and the Fiscalía General's anti-corruption divisions operationalising both criminal and civil mechanisms to handle illicit enrichment. In Indonesia, limited prosecutorial capacity and resource constraints compound legality anxiety, preventing the translation of international obligations under UNCAC Article 20 into enforceable domestic offences. The UK exhibits strong institutional capacity, but cultural and doctrinal constraints limit full criminalisation; instead, it relies on UWOs and beneficial ownership transparency mechanisms under the Criminal Finances Act 2017 and the Economic Crime (Transparency and Enforcement) Act 2022.

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96 *See* Roberto Carlos Zapata Vidal, "La Corrupción Política y las Prácticas Administrativas que la reproduce. "Un estudio de caso en la Sede Central del Gobierno Regional del Callao entre los años 2014-2018"." *Thesis,* Pontificia Universidad Católica del Perú, 2019.

Criminal law theory explains these interactions by emphasising the link between social legitimacy, legal doctrine, and enforceability. Duff posits that criminal liability is meaningful only when both the community and the legal system recognise the moral wrong, and the state has the capacity to enforce sanctions. In the context of illicit enrichment, Colombia's legal and cultural ecosystem satisfies these criteria, whereas the UK's formalistic approach prioritises legality and evidentiary certainty over moral-epistemic reasoning. Indonesia represents an intermediate case: although UNCAC obligations create normative pressure, doctrinal rigidity and limited capacity inhibit effective criminalisation. Feinberg's harm principle reinforces this analysis, suggesting that both moral recognition and practical enforceability are prerequisites for legitimate criminalisation.

The comparative evidence demonstrates that the design intended to address illicit enrichment offences cannot rely solely on codification. Penal culture influences the practical interpretation of legal doctrines, including legality, burden of proof, and proportionality, while state capacity determines the operational feasibility of enforcement. Spain illustrates a formalistic compromise in which the offence exists, but enforcement is cautious. Colombia reflects a more permissive culture that tolerates evidentiary asymmetry to achieve substantive anti-corruption goals. The UK and Indonesia highlight the constraints imposed by legality absolutism and legality anxiety, respectively, where cultural and institutional factors limit the translation of international norms into domestic law. This interplay underscores the importance of understanding both normative and institutional contexts when evaluating criminalisation of unexplained wealth.

International Implications

The comparative analysis of illicit enrichment offences underscores significant implications for international anti-corruption frameworks, particularly the UNCAC (UNCAC, 2006). UNCAC Article 20 obliges State Parties to consider criminalising illicit enrichment, but the convention does not prescribe specific procedural or evidentiary requirements. This approach assumes a degree of normative and institutional uniformity that often does not exist. Scholars such as Rose-Ackerman and Palifka argue that international norms must be sensitive to domestic penal cultures; otherwise, ratification may result in symbolic compliance rather than effective enforcement. The contrasting experiences of Colombia, Spain, Indonesia, and the UK illustrate that the feasibility of implementing UNCAC obligations is heavily mediated by the interaction between legal doctrine, penal culture, and state capacity.

In jurisdictions with permissive penal cultures, such as Colombia, international norms are more readily operationalised. The law accepts epistemic asymmetry, allowing the inference of wrongdoing from unexplained wealth, and integrates robust enforcement mechanisms, including asset recovery and inverted burden of proof. This alignment demonstrates how global anti-corruption norms can achieve tangible outcomes when domestic culture and institutional capacity are conducive. By contrast, legality-absolutist systems such as the United Kingdom implement UNCAC obligations through targeted measures, such as UWOs, which do not constitute full criminalisation. This example highlights that uniform international prescriptions may be adapted or constrained in practice by domestic legal traditions and cultural norms.

Penal culture also informs compliance strategies and capacity-building initiatives at the international level. Legal scholars argue that international organisations, such as the UNODC and the World Bank, should consider not only the textual adoption of UNCAC provisions but also the domestic epistemic frameworks that affect enforcement. For instance, technical assistance programs in Indonesia could focus on harmonising legality-sensitive doctrines with phased enforcement mechanisms, providing prosecutors and anti-corruption agencies with clear procedural guidance. In Spain, training might involve balancing evidentiary thresholds with pragmatic asset verification, while in the UK, efforts could explore expanding civil investigative tools to enhance efficacy without violating legality principles. This demonstrates that understanding penal culture is essential for designing international compliance strategies that are both feasible and effective.

Furthermore, the international implications extend to transnational enforcement and asset recovery cooperation. Global anti-corruption regimes rely on cross-border collaboration to trace, freeze, and repatriate illicit assets.

Pieth,[97] among other scholars, highlights that differing penal cultures influence states' willingness and ability to share information and take coordinated action. Colombia's proactive approach and permissive penal culture facilitate rapid investigation and cooperation, while legality-absolutist or legality-anxious jurisdictions may face procedural and doctrinal barriers that delay or limit cooperation. These differences suggest that international frameworks must be flexible, accommodating varying evidentiary standards, burdens of proof, and procedural safeguards, rather than expecting uniform enforcement.

Therefore, the analysis calls for reconceptualising international norms to explicitly account for variations in penal culture. Current UNCAC guidance assumes a linear model of norm adoption, overlooking how legal principles, procedural norms, and societal tolerance influence the operationalisation of law. By integrating penal culture as an explicit variable, international policy can move toward more adaptive, context-sensitive frameworks. This approach aligns with criminal law theory, particularly Duff's emphasis on moral-epistemic legitimacy and Feinberg's principle of socially recognised harm, asserting that criminalisation is meaningful only when it is domestically legitimate and institutionally actionable. Ultimately, recognising penal culture variations enhances the effectiveness of global anti-corruption initiatives and supports sustainable implementation of reinforcement for illicit enrichment offences across diverse legal and cultural environments.

Conclusion

The findings of this study indicate that illicit enrichment remains legally and practically difficult to address in many jurisdictions because penal culture profoundly influences how states conceptualise criminality, the legitimacy of inferring wrongdoing from wealth, and the acceptability of shifting evidentiary burdens. Jurisdictions that strictly adhere to formal legal principles struggle to criminalise unexplained wealth without additional criminal predicates. In contrast, pragmatic penal cultures allow greater flexibility, such as the inversion of the burden of proof and tolerance for epistemic asymmetry. In some contexts, legal and institutional barriers, combined with hesitation in enforcement, prevent the effective handling of illicit enrichment offences,

97 *See* Pieth, ed. *Recovering Stolen Assets.*

demonstrating that legislation alone does not ensure criminalisation in practice. This study shows that cross-jurisdictional differences in penal culture largely explain the variation in legal outcomes and enforcement in addressing illicit enrichment offences. Even when offences are formally codified, high evidentiary thresholds, procedural safeguards, and doctrinal caution can constrain enforcement. Jurisdictions with permissive or pragmatic penal cultures are more likely to implement international anti-corruption norms effectively, while legality-absolutist or legality-anxious environments face significant challenges. These differences underscore the centrality of penal culture in influencing not only whether illicit enrichment is criminalised but also how effectively laws are enforced and applied in practice.

From policy and academic perspectives, the study highlights the need for legal reform to align with both penal culture and state capacity. Jurisdictions seeking to adopt or enforce an approach to address illicit enrichment offences must consider societal tolerance for evidentiary asymmetry, institutional capabilities, and procedural safeguards, rather than simply importing international templates. Academically, the research contributes to understanding the criminalisation of economic crimes by emphasising penal culture as a key determinant of legal operationalisation, moving beyond traditional doctrinal analysis. Limitations of this study include the depth of available enforcement data, the focus on a limited number of jurisdictions, and the exclusion of broader socio-political factors, suggesting areas for future research to deepen the understanding of how penal culture interacts with law and practice.

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