

Critique of the Federal Act on the Freezing and Restitution of Assets of Politically Exposed Persons obtained by Unlawful Means



The Egyptian Initiative for Personal Rights

Economic and Social Justice Unit

<http://www.eipr.org/ESJ>

esj@eipr.org

Written By
Osama Diab

Edited By
Tamer Wageeh

Reviewed By
Baha aEzzelarab
Yara Sallam
Yasmine Shash



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Preamble:

On May 22, 2013, the Swiss Federal Council finished the preliminary draft of the Federal Act on the Freezing and Restitution of Assets of Politically Exposed Persons obtained by Unlawful Means. This draft federal act is designed to incorporate in to a single act all the current practices and issues relating to the freezing, confiscation and restitution of assets linked to foreign dictators which were obtained by unlawful means.

Since this act may be applicable to Egypt and other Arab spring countries, who now represent the major cases of freezing and restitution of funds addressed by the act, EIPR's Economic and Social Justice Unit along with the legal research team of EIPR thought it might be constructive to offer their own comment—in their capacity as international stakeholders—on the new act as part of the consultation procedure announced by the Federal Council in May 2013.

After 30 years in power, it is unrealistic and daunting for any authority to enclose all cases of corruption and provide evidence for them, especially when an ousted regime leaves behind dysfunctional and worn-out institutions that lack the ability and the independence that enables them to conduct an unprejudiced investigation during times of political turbulence and violence. Furthermore, because no measures of transitional justice were implemented in post-revolutionary Egypt, corruption trials taking place against ousted dictator Hosni Mubarak still rely on laws that date back to his era and are overseen by institutions and a bureaucracy of his own making.

Like most dictatorial regimes, Mubarak's rule gave a legitimate cover to its corruption and abuses and easily disposed of evidence, thanks to its dominance of the various state institutions. That means that corruption and human rights violations in Egypt were structural and state-sponsored.

It is, therefore, unmerited to the people of the requesting nation to depend on the current tumultuous institutions to repatriate the



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proceeds of corruption with all its requirements of technical expertise, a good and independent judicial system and good laws.

The Swiss Federal Court took note of the institutional failure in Egypt, which was expressed in December 2012¹ when it denied the Egyptian side the right to access Egypt's criminal files. The decision was attributed to the *institutional situation* in Egypt, which does not guarantee that authorities would maintain the confidentiality of the provided information. We should note here that Tunisia was given the right Egypt was denied since the former enjoys "a better institutional environment".²

This took place after the Office of the Attorney General of Switzerland (OAG) granted Egypt access to the files of the criminal proceedings (for money laundering offences as well as participation in a criminal organization), despite the pending mutual legal assistance (MLA) proceedings in May 2012.

The quandary of expecting evidence and final court decisions from unstable institutions

However, despite this proclaimed institutional tribulation, the Swiss authorities are awaiting evidence and final court verdicts from the very same Egyptian institutions before it could repatriate the frozen assets, which we believe are two arguments incorporating a major contradiction. A message from the Swiss Foreign Ministry said: "Returning assets frozen in Switzerland to Egypt will be possible in principle based on a *final court decision* stating the illegality of those assets and *linking the offence with the assets*. Discharging the account holder in Egyptian courts may therefore lead to a lifting of the freezing measures in Switzerland, if there is no final conviction by a Swiss court based on a parallel Swiss procedure."³

This runs counter to the case of Sani Abacha, the former Nigerian dictator, against whom article 260 of the Swiss criminal law was

¹Bundesstrafgericht.(2012). *Arrêt du 12 décembre 2012 Cour des plaintes*. Available: http://bstger.weblaw.ch/cache/pub/cache.faces?file=20121212_RR_2012_122.htm&ul=fr. Last accessed 18th Aug 2013.

² Ibid

³ValentinZellweger. Email message. Egyptian assets. 4 Feb 2013.



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applied to give him the status of the committer of an organized crime. Giving him such status facilitated the repatriation of the money as two important requirements were waived: linking the crime to the offense and waiting for a final court decision in Nigeria.⁴

The waiver of two requirements: 1) linking a specific asset to a specific crime; and 2) not having to wait for a final court judgment from the requesting state, significantly facilitated the asset recovery process and allowed Switzerland to return to Nigeria a sum of 505.5 m USD in 2005 and early 2006.⁵

The waiver of a final court conviction was also applied when the Philippines government won a ruling that the assets could be moved out of Switzerland without a final conviction of Mrs. Marcos under article 74A of the International Mutual Assistance on Criminal Matters Act (IMAC). The money was then moved to the Philippine National Bank in 1998.

This is totally applicable to Egypt as it is difficult to convict most of the former regime figures for corruption, because of the lack of institutional accountability. It is important to bear in mind here that this is neither the money of the Egyptian institutions nor the current leadership, so the lack of political will and functionality should be beside the point. Lack of political will to restitute the money could well be because Mubarak's criminal network still controls a large part of Egypt's bureaucratic body. The focus instead should be on the people of Egypt, by associating the money with them and investing the repatriated funds for the good of the Egyptian people.

Moreover, the fact that there is questionable governance and institutions in Egypt should lead us to make the AR process more

⁴Monfrini, A & Klein, Y.. (2010). *L'État requérant lésé par l'organisation criminelle : L'exemple des cas Abacha et Duvalier*. Available: http://www.mcswisslaw.com/pages_e/2010%20Monfrini%20%20Klein%20Organisation.pdf. Last accessed 18th Aug 2013.

⁵World Bank. (2007). *Stolen Asset Recovery (StAR) Initiative: Challenges, Opportunities, and Action Plan*. Available: <http://siteresources.worldbank.org/NEWS/Resources/Star-rep-full.pdf>. Last accessed 5th Feb 2013.



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inclusive to avoid transfer of illicitly-gained money from one corrupt party to another that is not—at the very best—fully accountable. This can be overcome by the inclusion of non-governmental institutions in the process and by thinking about creative ways to use the recuperated money, such as development projects, reparations for the victims of the Mubarak regime and the revolution, rather than simply placing the money in the treasury with no mechanism to monitor its expenditure.

Cooperation with the Egyptian government should still take place but the scope of cooperation should be widened to include different entities such as law firms, anti-corruption NGOs, and all forms of other representations of Egyptian people to provide more impartial information, evidence and consultancy.

For this reason, we at EIPR received the news of the completion of the draft *federal act on the freezing and restitution of potentates' assets* with great relief. We hope that the act will be approved, passed in a timely manner, and applied to the case of Egypt.

Despite our relief with the new draft act that entrenches the principle of the reverse burden of proof in cases of partial or full institutional failure in a post-dictatorship setting, we still have few remarks we believe will make the act stronger and more supportive to the peoples of countries in transition who have long suffered from corruption, and made great sacrifices to rid their country of it. Our article-specific remarks and commentaries are presented as follows:

Art. 3

Sperrung im Hinblick auf eine Rechtshilfезusammenarbeit

1 Der

Bundesrat kann zur Unterstützung einer künftigen Rechtshilfезusammenarbeit mit dem Herkunftsstaat die Sperrung von Vermögenswerten, einschliesslich Vermögenswerte juristischer Personen, in der

Schweiz anordnen, sofern die folgenden Voraussetzungen erfüllt sind:

a. Ein Machtverlust der

Regierung oder einzelner Regierungsmitglieder im Herkunftsstaat eingetreten oder steht unmittelbar bevor.

b. Der Korruptionsgrad im Herkunftsstaat ist notorisch hoch.

c. Die Vermögenswerte unterliegen der Verfügungsmacht von politisch exponierten Personen oder ihnen nahestehender Personen, die sich mutmasslich schuldig gemacht haben, dies durch Korruption,



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	<p>Veruntreuung oder andere Verbrechen erlangt zu haben, oder diese Personensind an den Vermögenswerten wirtschaftlich berechtigt.</p> <p>d. Die Wahrung der Schweizer Interessenerfordert die Sperrung.</p> <p>2 Vor der Anordnung einer Sperrung klärt der Bundesrat die Haltung der wichtigsten Partnerländer bezüglich Sperrungsmassnahmen ab. In der Regel stimmtersich in zeitlicher und inhaltlicher Hinsicht mit den wichtigsten Partnerländern ab.</p>
Comment	<p>This article “allows” the federal council to freeze the assets of the Politically Exposed Persons, but it does not “necessitate” the freezing of the assets in case the listed requirements were met. We recommend that there is a stronger obligation on the Federal Council especially that the requirements are quite strict. Additionally, the first three requirements are sufficient, and if they are met, this would represent a clear case and need for assets to be frozen. Alternatively, the article could explicitly state that the freezing could take place if “any” of the requirements are fulfilled, including, but not only conditioned by, the protection of Swiss interests.</p>
Art. 5	<p>1 Wenn die Sperrung nach Artikel 3 in Form einer Verordnung (Sperrungsverordnung) angeordnet wird, so kann das Eidgenössische Departement für auswärtige Angelegenheiten (EDA) die im Anhang dieser Verordnung aufgeführte Liste der von der Sperrung betroffenen Personen anpassen. Es kann nach Konsultation der anderen betroffenen Departementepolitisch exponierte Personen oder ihnen nahestehende Personen, einschliesslich juristische Personen, streichen oder hinzufügen, wenn die internationale Koordination mit den wichtigsten Partnerländern oder die Wahrung der Schweizer Interessenerfordern.</p> <p>2 Das EDA streicht die Personen, gegenüber denen sich die Sperrung als unbegründeterweist, unverzüglich von der Liste.</p>
Comment	<p>EIPR expresses its concern about the ability of the Swiss Federal Department of Foreign Affairs to remove persons from freezing lists. Some NGOs and lawyers have already expressed concerns about modifying the Tunisian list twice and removing 19 Politically Exposed Persons from the list which they maintain was without any plausible explanation.</p>
Art. 10	<p>1 Der Bundesrat kann das EDA beauftragen, während der Sperrung eine gütliche Einigung zu suchen, die die vollständige oder teilweise Rückerstattung der gesperrten Vermögenswerte ermöglicht. Für diese Rückerstattung gelten die Artikel 18 und 19 sinngemäss.</p> <p>2 Die gütliche Einigung bedarf der Genehmigung durch den Bundesrat.</p> <p>3 Genehmigt der Bundesrat die gütliche Einigung, so hebt er die Sperrung auf.</p>
Comment	<p>EIPR expresses its concern about the possibility of an amicable settlement that allows a Politically Exposed Person to be reinstated and to avoid any legal responsibility in exchange for a mere full or partial repayment of the funds in question. It is EIPR’s position that such policy might also enable financial intermediaries to escape potential charges for money laundering.</p>
Art. 15	<p>1 Es gilt die Vermutung, dass Vermögenswerte unrechtmässiger worden wurden, wenn:</p> <p>a. das Vermögen der Person, deren Verfügungsmacht die Vermögenswerte unterliegen, im Zusammenhang mit der Ausübung des öffentlichen Amtes durch die politisch exponierte Person</p>



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	<p>ausserordentlich stark gestiegenist; und b. der Korruptionsgrad des Herkunftsstaatsoder der betreffendenpolitischexponierten Person währendderenAmtszeitnotorischhoch war. 2 Die Vermutungwirdumgestossen, wennmitüberwiegenderWahrscheinlichkeitnachgewiesenwerdenkann, dass die Vermögenswerterechtmässigerworbenwurden.</p>
Comment	<p>This is the ground-breaking quintessential article of the act that allows for the reverse burden of proof, which we believe is the foundation for a more effective process of Asset Recovery belonging to corrupt political regimes, because they quite typically cause the destruction of institutions during their rule, a thing that negatively affects carrying out a proper judicial process and hinders any serious process of evidence collection. The independent work of institutions is also often stalled in post-dictatorship settings by attempts of the old regime to reproduce itself, which we could see many evidence of now in Egypt.</p>
Art. 18	<p>Verfahren 1 Die Vermögenswertewerdenüber die Finanzierung von Programmen von öffentlichemInteresserückerstattet. 2ZurRegelung der Rückerstattungkann der BundesratAbkommenabschliessen. 3 SolcheAbkommenkönneninsbesondereregeln: a. die Art der Programme von öffentlichemInteresse, die mit den rückerstattetenVermögenswerten unterstütztwerdensollen; b. die Verwendung der rückerstattetenVermögenswerte; c. die an der Rückerstattungbeteiligten Partner; d. die Kontrolle und Überwachung der Verwendung der rückerstattetenVermögenswerte.</p>
Comment	<p>This is a vitally important article, and represents a familiar problem in asset recovery. Most governments in a post-dictatorship setting, either need cash to settle and pay for odious debts inherited from the former corrupt leadership, or are weak in their fight against corruption, which put the restituted money at risk of being wasted and lost again in the same corruption channels without the people benefiting from it. The Berne Declaration, a Swiss NGO, said that in the Sani Abacha case in Nigeria, the money had just gone astray again in private pockets as soon as it was repatriated. Therefore it is crucial for all parties involved to make restitution as transparent as possible, and to involve carefully-selected civil society in the country of origin in the process. We should all learn how corruption in Nigeria barred funds from being transformed into development projects benefiting those who are in most need of it.⁶</p> <p>Other than the delayed or abandoned projects, even completed projects manifested “poor workmanship, outputs requiring major refurbishment shortly after the completion of construction”, as described in a report published by the Basel Institute about the management of</p>

⁶Jimu, I. (2009). *Managing Proceeds of Asset Recovery: The Case of Nigeria, Peru, the Philippines and Kazakhstan*. Available: http://www.baselgovernance.org/fileadmin/docs/publications/working_papers/Managing_Proceeds_of_AR_Final.pdf. Last accessed 22nd Aug 2013.



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asset recovery proceeds. Civil society groups there were able to report on the lack of political will and the different ghost projects that never existed in reality. According to the Basel Institute report, one contractor abandoned the work after a local official refused to accept a bribe in exchange for signing off on the project's completion. Despite the civil society's efforts to monitor the projects and report on its inadequacy, a careful and close scrutiny of projects was not possible given that a comprehensive list of the projects funded by the repatriated funds was not made available by the government.⁷

It is therefore of vital importance to add a paragraph ensuring that the restitution agreements are publicly available as a transparency measure, and another paragraph encouraging the inclusion of independent and respected civil society groups in the country of origin to participate in deciding how to best spend the funds for the benefit of the people of the injured nation, and to subsequently monitor its spending once it is repatriated.

Conclusion:

Egypt is seeing one of the most unstable periods in its modern history, and there are many signs that the Mubarak regime is working hard to reproduce itself under new banners and faces. The judicial and executive branches are being affected by one political storm after the other and are being subjected to such political considerations. Therefore, investigation should be carried out independently from politics with the help of the Swiss authorities and Egyptian non-governmental organizations, which is a condition already allowed by the *Federal Act on the Restitution of Assets illicitly obtained by Politically Exposed Persons* in the case where the country of origin is unable to satisfy the requirements of mutual legal assistance proceedings owing to the total or substantial collapse, or the unavailability, of its national judicial system (failure of state structures).⁸

⁷ Ibid

⁸ The Act states that it "governs the freezing, forfeiture and restitution of assets of politically exposed persons or their close associates in cases where a request for mutual legal assistance in criminal matters cannot produce an outcome owing to the failure of state structures in the requesting state in which the politically exposed person exercises or exercised office (the country of origin)."



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It is essential to understand and define the nature of Mubarak's political and white collar crimes and how they link to the human rights abuses carried out during his era, which we, at EIPR, believe should lead to defining all its assets abroad as proceeds of crime until proven otherwise without having to link the asset with the offence, and without a final court decision. We believe that securing a financial gain by criminal means is a defining characteristic of the Mubarak regime which benefited financially from a political power gained by immense and violent human rights abuses, as has been consistently suggested by many international and local indicators of corruption and human rights abuses.⁹ We believe that given the length of his rule, and the scale of corruption in his era, and the number of human rights abuses committed during his rule, it will be impossible to make a distinction—regardless of how in-depth the trail investigation goes—between wealth gained from outright corruption and wealth gained licitly.

The institutional situation in Egypt which was deemed unstable by the Swiss Federal Court is an obstacle to provide final court verdicts and sufficient evidence to link individual assets to specific crimes jeopardizing the rights of the Egyptian people twice; firstly because the inefficiency of their government and secondly because of the loss of money that results from this inefficiency, which was

"The Federal Council may order the freezing of assets in Switzerland with a view to the instigation of forfeiture proceedings under this Act, provided the following conditions are fulfilled: The country of origin is unable to satisfy the requirements of mutual legal assistance proceedings owing to the total or substantial collapse, or the unavailability, of its national judicial system (failure of state structures)."

⁹ Criminal organization: 1. Any person who participates in an organisation, the structure and personal composition of which is kept secret and which pursues the objective of committing crimes of violence or securing a financial gain by criminal means, any person who supports such an organisation in its criminal activities, is liable to a custodial sentence not exceeding five years or to a monetary penalty. 2. The court has the discretion to mitigate the penalty imposed (Art. 48a)² if the offender makes an effort to foil the criminal activities of the organisation. 3. The foregoing penalties also apply to any person who commits the offence outside Switzerland provided the organisation carries out or intends to carry out its criminal activities wholly or partly in Switzerland. Article 3 paragraph 2 applies.



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already the objective of the Federal Act on the Restitution of Assets illicitly obtained by Politically Exposed Persons to help in cases “where a request for mutual legal assistance in criminal matters cannot produce an outcome owing to the failure of state structures in the requesting state.”¹⁰ Therefore, we see no reason why this legal principle should not be applied to the case of Egypt, replacing the current Mutual Legal Assistance process that is constantly stalled Egypt’s enduring political turmoil and institutional tribulation.

¹⁰Federal Act on the Restitution of Assets illicitly obtained by Politically Exposed Persons.