

CRIMINALISATION OF ILLICIT ENRICHMENT AND THE RIGHT TO PRESUMPTION OF INNOCENCE IN NIGERIA: FINDING A BALANCING GROUND FROM A COMPARATIVE LENS

Abstract

Corruption is an insidious plague that is consistently ravaging the core fabric of the society thereby creating a wide range of corrosive effects on the society. Various laws have been enacted and several policies have been formulated to curb corrupt practices in its entirety. Legislative response to curb organised crimes evidenced by unexplained wealth has given rise to the criminalisation of illicit enrichment. Among corruption crimes, illicit enrichment is the most difficult to trace because it symbolises the accumulated crops of other corrupt practices. The aim of this paper is to provide a justification for placing the onus of proof on the accused in a charge of illicit enrichment. The paper examines the provisions making up the offence of illicit enrichment in Nigeria, England and Hong Kong while interrogating the constitutionality of the onus placed on the accused in that regard. The paper comparatively examines the validity of these provisions in the light of the presumption of innocence which is guaranteed to the accused under various statutes including the constitutions and international conventions. The paper concludes that the proof required in establishing the innocence of the accused on a charge of illicit enrichment is a partial reversal of the burden of proof which is justified by the limitations contained in the statutes creating the right to the presumption of innocence.

Keywords: illicit enrichment, unexplained wealth order, presumption of innocence, UNCAC.

1. Introduction

Recent high-profile cases have focused attention on the transfer of assets abroad by heads of state and other senior officials from developing countries in amounts that far exceed their legitimate sources of income. Corruption, as a type of white collar crime, has been evolving into a sophisticated enterprise, making direct evidence hard to find by any legal apparatus.¹ In many cases, especially in cash economies and where small amounts of bribes are paid over time, it is difficult or impossible to prove individual of corruption. This means many corrupt officials are never prosecuted and get to keep the assets that they have acquired through their corruption. Criminalisation of illicit enrichment, which is very commonly referred to as “disproportionate wealth” or “inexplicable wealth” or “unexplained wealth” enables states to, inter alia, prosecute public officials and confiscate the wealth they have acquired by the means of corruption. Illicit enrichment is defined by Article 20 of the United Nations Convention against Corruption (UNCAC) as “a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income”. A successful legal action for illicit enrichment opens the door to asset recovery i.e. returning the illegally acquired assets to the state.

Some critics argue that illicit enrichment amounts to finger-pointing, unfairly reversing the burden of proof and removing the presumption of “innocent unless proven guilty”.² To this end, the Constitutional

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¹Laras 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 U.S.”, (2015) 13 (1) *Indonesian Journal of International Law*, 63-126.

² Andrew Dornbierer, *Illicit enrichment: Quick Guide Series*, Basel Institute of Governance, 1-4.

Court of Ukraine has reportedly declared unconstitutional Article 368-2 of the Criminal Code, which provides for liability for illegal enrichment.³ The ratio of the court was that the provisions of the article failed to comply with the principles of the rule of law and presumption of innocence. In particular, the article on illegal enrichment obliges the suspect to prove legitimacy of his revenues' origin, whereas the law places the burden of proving wrongdoing solely on the side of prosecution.

In Nigeria, the criminalisation of illicit enrichment is a way of fulfilling the obligation of the State under the UNCAC. Illicit enrichment is an offence under various criminal law statutes in Nigeria. Notably amongst these statutes are the Corrupt Practices and Other Related Offences Act⁴ (hereinafter 'ICPC Act'). The ICPC Act provides that Where the chairman of the commission has reasonable grounds to believe that any public officer who has been served with the written notice owns, possesses, controls or holds any interest in any property which is excessive, having regard to his present or past emoluments and all other relevant circumstances, the Chairman may by written direction require him to furnish a statement on oath or affirmation explaining how he was able to own, possess, control or hold such excess and if he fails to explain satisfactorily such excess, he shall be presumed to have used his office to corruptly enrich or gratify himself and charged accordingly.⁵ Similarly, the Criminal Law of Lagos State⁶ provides that any public official who enriches himself so as to have a significant increase in his assets that he cannot reasonably explain the increase, in relation to his lawful income commits a felony and is liable on conviction to imprisonment for 7 years.⁷

In Hong Kong, the main statute enacted to tackle corruption is the Prevention of Bribery Ordinance⁸ (POBO). The POBO provides in one of its sections that any person who, being or having been the Chief Executive or a prescribed officer maintains a standard of living above that which is commensurate with his present or past official emoluments; or is in control of pecuniary resources or property disproportionate to his present or past official emoluments, shall, unless he gives a satisfactory explanation to the court as to how he was able to maintain such a standard of living or how such pecuniary resources or property came under his control, be guilty of an offence.⁹

In the United Kingdom, the Proceeds of Crime Act¹⁰ (POCA) contains provisions relating to illicit enrichment. The POCA allows the High Court to make an 'unexplained wealth order' if it is satisfied that

³ Constitutional Court in Ukraine reportedly rules "illegal enrichment" Article in Criminal Code unconstitutional – media, available at <https://www.unian.info/politics/10461237-constitutional-court-in-ukraine-reportedly-rules-illegal-enrichment-article-in-criminal-code-unconstitutional-media.html>, accessed November 2, 2020.

⁴ Cap C31, Laws of the Federation of Nigeria 2004.

⁵ Corrupt Practices and Other Related Offences Act, s. 44 (2).

⁶ The Criminal Law of Lagos State 2015, s.82.

⁷ Ibid, s.82 (a-c).

⁸ The Prevention of Bribery Ordinance (Cap. 201) (POBO), enacted in 1971, is the primary anti-bribery legislation in Hong Kong and is enforced by the Independent Commission against Corruption (ICAC). It contains provisions prohibiting bribery in both the public and private sectors.

⁹ The Prevention of Bribery Ordinance, s.10.

¹⁰ The Proceeds of Crime Act (POCA) came into force on the 24th March 2003 and relates to the recovery and confiscation of proceeds made from criminal activities and money laundering. Before the Proceeds of Crime Act 2002 came into force, the law on confiscation was governed by the Drug Trafficking Act 1994 and the Criminal Justice Act 1988. These Acts still apply to confiscation proceedings where POCA offences are committed before the 24th March 2003. The Proceeds of Crime Act only applies to POCA offences committed on, or after, the 24th March 2003. The law on confiscation orders is governed by Part 2 of the Proceeds of Crime Act 2002; see also What is the Proceeds of Crime Act? Available at <https://www.stpaulschambers.com/the-proceeds-of-crime-act-explained/#:~:text=Proceeds%20of%20crime%20defines%20the,the%20Proceeds%20of%20Crime%20Act>, accessed November 3, 2020.

there are reasonable grounds for suspecting that the known sources of the respondent's lawfully obtained income would have been insufficient for the purposes of enabling the respondent to obtain the property which the order is made in respect of.¹¹

This paper examines the nature of the offence of illicit enrichment in Nigeria, England and Hong Kong. In addition to this, the paper analyses the various laws making up the presumption of innocence which is a fundamental right of every person charged with a criminal offence.

2. A Comparative Analysis of the Right to Presumption of Innocence

The principle that each person should be presumed innocent until guilt is proven is a cardinal principle of criminal proceedings and one of the most recognizable rights of the accused in the civilized world.¹² A fundamental element of the right to a fair trial is that every person should be presumed innocent unless and until proved guilty following a fair trial. This is why the responsibility falls on the state to prove guilt and to discharge the presumption of innocence. Due to the presumption of innocence, a person cannot be compelled to confess guilt or give evidence against him/herself. It is for the state to produce evidence of guilt, not for the defendant to prove innocence. In general, therefore, a suspect's silence should not be used as evidence of guilt.¹³ Among all human rights which are guaranteed to the accused person standing trial in court, the right to be presumed innocent until the contrary is proved is arguably the most important. The right is so important that no human rights document can be drafted without including the right. At international law, the right to be presumed innocent until proven guilty is entrenched in Article 11 of the Universal Declaration of Human Rights¹⁴ (UDHR). The UDHR states that everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.¹⁵ Similarly, the United Nations International Covenant on Civil and Political Rights¹⁶ (ICCPR) provides

¹¹ The Proceeds of Crime Act 2002, s.362B.

¹² John RWD Jones, 'Protection of Victims and Witnesses' in Antonio Cassese, Paola Gaeta and John RWD Jones (eds) *The Rome Statute of the International Criminal Court. A Commentary*, vol. II (OUP 2002).

¹³ The Presumption of Innocence, available at <https://www.fairtrials.org/presumption-innocence>, accessed November 5, 2020.

¹⁴ The Universal Declaration of Human Rights remains as relevant today as it was on the day in 1948 that it was proclaimed and adopted by the United Nations General Assembly. The extraordinary vision and resolve of the drafters produced a document that, for the first time, articulated the rights and freedoms to which every human being is equally and inalienably entitled. The Universal Declaration of Human Rights, which was adopted by the UN General Assembly on 10 December 1948, was the result of the experience of the Second World War. With the end of that war, and the creation of the United Nations, the international community vowed never again to allow atrocities like those of that conflict happen again. World leaders decided to complement the UN Charter with a road map to guarantee the rights of every individual everywhere. The document they considered, and which would later become the Universal Declaration of Human Rights, was taken up at the first session of the General Assembly in 1946. The first draft of the Declaration was proposed in September 1948 with over 50 Member States participating in the final drafting. By its resolution 217 A (III) of 10 December 1948, the General Assembly, meeting in Paris, adopted the Universal Declaration of Human Rights with eight nations abstaining from the vote but none dissenting. The entire text of the UDHR was composed in less than two years. At a time when the world was divided into Eastern and Western blocks, finding a common ground on what should make the essence of the document proved to be a colossal task.

¹⁵ The UDHR, Art. 11 (1).

¹⁶ The ICCPR attempts to ensure the protection of civil and political rights. It was adopted by the United Nations' General Assembly on December 19, 1966, and it came into force on March 23, 1976. The ICCPR recognizes the inherent dignity of each individual and undertakes to promote conditions within states to allow the enjoyment of civil and political rights. Countries that have ratified the Covenant are obligated "to protect and preserve basic human rights... [and] "compelled to take administrative, judicial, and legislative measures in order to protect the rights enshrined in the treaty and to provide an effective remedy." There are currently 74 signatories and 168

in one of its articles that everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.¹⁷

Regionally, the African Charter on Human and Peoples' Rights¹⁸(African Charter) guarantees the right to the presumption of innocence when it states that every individual shall have the right to have his cause heard and this includes the right to be presumed innocent until proved guilty by a competent court or tribunal.¹⁹ In the same vein the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms²⁰ (European Convention) provides in Article 6 that everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. In the case of *R v DPP, ex parte Kebilene*,²¹ P sought judicial review because he was charged with an offence whose content contravened the presumption of innocence contained in art. 6(1) of the European Convention and he had a legitimate expectation that he would not be charged with an offence that infringed his ECHR rights. The House of Lords held that he could have no legitimate expectation here since the wording of the charge was clear and unambiguously denied the presumption of innocence.

The innocence presumption principle entails that the accused person has a right to remain silent and not offer a word in rebuttal of the allegation against him as the burden of proof is on the prosecution and it is for the prosecution to prove his guilt. The right to the presumption of innocence is entrenched under the Nigerian Constitution.²² The Nigerian Constitution states that every person who is charged with a criminal offence shall be presumed to be innocent until he is proved guilty; provided that nothing in this section shall invalidate any law by reason only that the law imposes upon any such person the burden of proving particular facts.²³ The proviso to this section constitutes a limitation to the right and

parties to the ICCPR. The unifying themes and values of the ICCPR are found in Articles 2 and 3 and are based on the notion of non-discrimination.

¹⁷ ICCPR, ART. 14 (2).

¹⁸ African member states of the organisation for African unity (OAU, now the African union), adopted the African charter on human and people's rights (African charter), in 1981.the African charter sets out not only rights, but also duties of African people as its affects the rights of other persons and their respective countries. The African charter established the Africa Commission on human and people's rights an institution mandated to promote and protect human rights on the continent. It recognises and gives equal importance to the observance of civic and political rights as well as economic, social and cultural rights. The African charter on human and people's rights established the African Commission on human and people's rights. Its mandate is to promote and protect human rights in Africa and to interpret the African charter. The African commission is located in Banjul, the Gambia. The African court on human and Peoples Rights(the court) was established by the protocol to the African charter on the establishment of an African court is a continental court established by African countries to ensure protection of human and people's rights in africa.it complements and reinforces the function of the African commission on human and people's rights. The court is located in Arusha, Tanzania.

¹⁹The African Charter, Art. 7 (1) (b).

²⁰The European Convention on Human Rights is an international convention to protect human rights and political freedoms in Europe. Drafted in 1950 by the then newly formed Council of Europe, the convention entered into force on 3 September 1953. All Council of Europe member states are party to the Convention and new members are expected to ratify the convention at the earliest opportunity. The Convention established the European Court of Human Rights (ECHR). Any person who feels his or her rights have been violated under the Convention by a state party can take a case to the Court. Judgments finding violations are binding on the States concerned and they are obliged to execute them. The Committee of Ministers of the Council of Europe monitors the execution of judgments, particularly to ensure payment of the amounts awarded by the Court to the applicants in compensation for the damage they have sustained. The compensations imposed under ECHR can be large; in 2014 Russia was ordered to pay in excess of \$2 billion in damages to former shareholders of Yukos. The Convention has several protocols, which amend the convention framework

²¹ [2000] 2 AC 326.

²² The Constitution of the Federal Republic of Nigeria 1999 (As Altered), s.36 (5).

²³ See *Emmanuel Ibeziako v Commissioner of Police* (FSC 329/62) [1963] 8 (28 JANUARY 1963).

this will be further discussed in another part of this paper. In the case of *Mumuni & Ors. v The State*,²⁴ the Nigerian Supreme Court held that it is not under our laws for the accused to prove his innocence. Further, the Nigerian Evidence Act 2011²⁵ (the Evidence Act) prescribes that the standard of proof in criminal cases is proof beyond reasonable doubt and the same section establish that the burden of proving that any person has been guilty of a crime is on the person who asserts it i.e. the prosecution. Recently the Nigerian Supreme Court in the case of *COP v Amuta*²⁶ per Clara Bata Ogunbiyi, J.S.Copined that “the constitutional provision on the presumption of innocence of an accused person is sacrosanct and settled. The burden is always on the prosecution to prove the guilt of the accused and not his business to prove his innocence. He can decide to keep mute from beginning of the trial right through to the end; it is for the prosecution to make out a prima facie case against the accused through credible evidence which must be laid bare before the Court. It is the proof of hard facts that would lead to the conviction of the accused; without any case made out against the accused, he cannot be called upon to enter his defence because in doing otherwise would undermine the constitutional presumption of innocence.”

In England, the presumption of innocence is described as the “golden thread of criminal law” as contained in the Human Rights Act.

In Hong Kong, the Bill of Rights Ordinance²⁷ (the Ordinance) was enacted to provide for the incorporation into the law of Hong Kong of provisions of the International Covenant on Civil and Political Rights as applied to Hong Kong and for ancillary and connected matters. Article 11 of the Ordinance provides that everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law. Similarly the Constitution of Hong Kong guarantees in one of its articles that anyone who is lawfully arrested shall have the right to a fair trial by the judicial organs without delay and shall be presumed innocent until convicted by the judicial organs.²⁸At the trial, the burden of proof is generally on the prosecution, which has to convince the court that the accused person is guilty of the offence beyond reasonable doubt. That means the prosecution must present sufficient evidence to the court so that the court can be sure that all the ingredients of the offence charged against the accused have been proven. If there is any reasonable doubt that a particular ingredient of the offence may not have been proven, then the accused person should be acquitted of the offence. The accused person is not required to prove that he or she is not guilty, and can decide whether to give evidence at the trial or not. Any law enacted which contravenes the provisions of the Ordinance which is the basic law of the land shall be of no effect.²⁹Criminal trials in Hong Kong are conducted in open court where the public and the press can attend. They are either heard by a Magistrate or a District Court Judge alone without a jury, or by a High Court Judge sitting together with a jury.³⁰

²⁴ (1975) 1 ALL N.L.R 294.

²⁵ The Evidence Act 2011, s. 135.

²⁶ (2017) LPELR-41386 (SC).

²⁷ The Ordinance was enacted on 6 June 1991 and came into operation on 8 June 1991.

²⁸ Constitution of Hong Kong (Special Administrative Region), Art. 87 (2).

²⁹ This has been held in the cases of *Ng KaLing v HKSAR* (1999)2HKCFAR4; *Av Commissioner of ICAC* (2012)15 HKCFAR 360at 381.

³⁰ Community Legal Information Centre, Court Procedure-criminal cases, available at https://www.clic.org.hk/en/topics/policeAndCrime/court_procedure/#:~:text=In%20Hong%20Kong%20%2C%20any%20person,Basic%20Law%20of%20Hong%20Kong, accessed November 5, 2020.

3. Criminalisation of Illicit Enrichment in Nigeria, England and Hong Kong

The crime of illicit enrichment has today become largely recognized as an effective mechanism for curbing corruption. This offence was first established by various international and regional anti-corruption instruments such as the United Nations Convention against Corruption, African Union Convention on Prevention and Combating Corruption and the Inter-American Convention Against Corruption. The illicit enrichment offence takes unexplained wealth of a public official as visible proceeds of corruption. Essentially, illicit enrichment penalises persons for accumulating wealth that is deemed disproportional to their sources of income if they cannot satisfactorily account for its origin. The burden lies with the accused to prove the legitimate sources of his/her assets. Failure to do so leads to the assets being considered ill-gotten, followed by conviction and forfeiture of the assets. These anti-corruption conventions oblige state parties to criminalize illicit enrichment in performance of their international obligations in the fight against corruption. States could either enact a national legislation criminalizing illicit enrichment or provide special mechanisms for the implementation of the conventions. Accordingly, the United Kingdom, Nigerian and Hong Kong, amongst many others, have in compliance with this obligation enacted laws aimed at criminalizing the act of illicit enrichment in their various jurisdictions. Each of these legislations would be reviewed hereunder.

Under Nigerian law, the EFCC has special powers to investigate the assets of any person where the person's lifestyle is not justified by the known sources of income³¹ and possession of unexplained property can be used as corroborative evidence in a court of law.³² The EFCC Act provides that the commission may cause investigations to be conducted into the properties of any person if it appears to the commission that the person's lifestyle and extent of the properties are not justified by his source of income. This is a statutory provision of illicit enrichment although it is to be used as corroborative evidence under the EFCC Act.

Similarly, the Independent Corrupt Practices and Other Related Offences Act (ICPC Act)³³ provides that where the chairman of the commission has reasonable grounds to believe that any public officer who has been served with the written notice owns, possesses, controls or holds any interest in any property which is excessive, having regard this present or past emoluments and all other relevant circumstances, the Chairman may by written direction require him to furnish a statement on oath or affirmation explaining how he was able to own, possess, control or hold such excess and if he fails to explain satisfactorily such excess, he shall be presumed to have used his office to corruptly enrich or gratify himself and charged accordingly. This without mincing words amounts to presumption of guilt. The Money Laundering (Prohibition) Act provides that if an accused person is in possession of pecuniary resources or property which is disproportionate to his known source of income, or he obtained an accretion to his pecuniary resources or property, the burden of giving a satisfactory account of how he made the money or obtained the accretion shifts to him.³⁴ By this provision, the prosecution is relieved of the burden of having to prove that the money so found in his account or in his possession is proceeds from illicit traffic in narcotic drugs or psychotropic substances or of any illegal act.

In Hong Kong, the Legislative House promulgated the Prevention of Bribery Ordinance³⁵, establishing the offence of illicit enrichment. With the enactment of POBO, Hong Kong became one of the first

³¹ EFCC Act, s. 7(1) (b).

³² *Ibid*, s. 19.

³³ Independent Corrupt Practices and Other Related Offences Act 2000 (ICPC Act), s. 44(2).

³⁴ The Money Laundering (Prohibition) Act 2010, s. 19 (3).

³⁵ Prevention of Bribery Ordinance 1971 (CAP 201) S. 10 (herein after referred to as POBO)

countries to criminalize illicit enrichment by virtue of the provisions of section 10 of the ordinary under the title “the crime of possession of inexplicable”. The section states that any person who, being or having been a prescribed officer, maintains a standard of living above that which is commensurate with his present or past official emoluments; or is in control of pecuniary resources or property disproportionate to his present or past official emoluments, shall, unless he gives a satisfactory explanation to the court as to how he was able to maintain such a standard of living or how such pecuniary resources or property came under his control, be guilty of an offence. Where a court is satisfied in proceedings for an offence under subsection (1) (b) that, having regard to the closeness of his relationship to the accused and to other circumstances, there is reason to believe that any person was holding pecuniary resources or property in trust for or otherwise on behalf of the accused or acquired such resources or property as a gift from the accused, such resources or property shall, in the absence of evidence to the contrary, be presumed to have been in the control of the accused.

As inferred from this provision, a public officer is considered to have committed the crime of possession of inexplicable wealth if found in possession or control of resources or properties disproportionate to his present or past official emolument or where he maintains the standard of living above that commensurate with his present or past official and in respect of which he cannot give a satisfactory explanation. Apparently, these provisions, without an iota of doubt, impose on the defendant the obligation to prove that the said wealth was not obtained by illegal means. It is worthy of note that illicit enrichment as implemented in Hong Kong is not only legislated upon but has also been judicially stamped and recognised.

In the United Kingdom, the offence of illicit enrichment is also well-entrenched in the Proceeds of Crime Act 2002. Interestingly, on the 30th of September 2017, UK enacted the Unexplained Wealth Order, as a new investigative tool in its anti-corruption struggle. This order came to bear by virtue of the provisions of sections 1 and 2 of the Criminal Finances Act 2017, enacted by the UK Parliament to amend the provisions of the proceeds of crime Act 2002³⁶. This order is an investigative court order issued by the British High Court compelling the recipients to reveal the source of his income. It requires a person who is reasonably suspected of involving or being connected to a person involved in serious crimes, to explain the nature and extent of their interest in particular and to properly explain how the property was obtained where there are reasonable grounds to suspect that the respondent known lawfully obtained income would not be sufficient to allow him obtain such property. It is an investigative power in addition to other available powers contained in POCA, to investigate and recover proceeds of crime.

Clearly, each of these legislations is fashioned in line the international conventions on illicit enrichment, making the lack of reasonable explanation the main element of the offence.

3.1. Persons of Interest in the Illicit Enrichment Laws

The United Nations Convention is the organic law from which other countries’ anti-corruption laws are modeled after. Illicit enrichment specifically targets public officials. All the aforementioned international laws and all of the national enrichment laws examined in this paper identifies public officials as the persons of interest—the individuals who may be prosecuted for the crime. Article 2 of UNCAC defines “public official” as (i) any person holding a legislative, executive, administrative, or

³⁶ Home Office “Circular 003/2018: Criminal Finances Act: unexplained wealth orders” GOV.UK. Her Majesty’s Government. (1 February 2018), accessed on the 25th of February 2021.

judicial office of a state party, whether appointed or elected, whether permanent or temporary, whether paid or unpaid, irrespective of that person's seniority; (ii) any other person who performs a public function, including for a public agency or public enterprise, or provides a public service, as defined in the domestic law of the state party and as applied in the pertinent area of law of that state party; (iii) any other person defined as a public official in the domestic law of a state party. The Nigerian laws considered in this paper i.e. ICPC Act, EFCC Act, Money Laundering Prohibition Act, all provides that when a public official is in possession of wealth which is incommensurate with his lawful source of income, he shall be presumed to be in possession of illicit incomes. This invariably means that the provisions of the laws only apply to public officials in Nigeria. Similarly, in Hong Kong, the illicit wealth provisions only apply to public officials just as it is in Nigeria. However, the law is slightly different in the United Kingdom as the illicit wealth provision made use of the phrase "any person" which is suggestive that the provision may apply to a private person. Section 1 of the Criminal Finances Act which amends section 362A of the Proceeds of Crime Act 2002 provides that the High Court may, on an application made by an enforcement authority, make an unexplained wealth order in respect of any property if the court is satisfied that each of the requirements for the making of the order is fulfilled. Further an application for an order must specify *the person* (emphasis mine for clarification) whom the enforcement authority thinks holds the property ("the respondent") (and the person specified may include a person outside the United Kingdom). This is clear from the provision that a private person may be charged with the offence of illicit enrichment in the United Kingdom.

Another innovation witnessed by the passing of the UK Criminal Finances Act is that a person who is not resident within the United Kingdom may be charged and prosecuted under this Act. This is a provision which is lacking under the laws of the other jurisdictions.

4. Criticism for and Against the Criminalisation of Illicit Enrichment

The validity of establishing an illicit enrichment offence is a highly controversial topic globally. While some legal scholars posit that it must be declared null and void on the grounds that it appears inconsistent with the constitutionally guaranteed right to presumption of innocence, other scholars opine otherwise given the existence of such provisions in criminal law and considering the fact that the right to presumption of innocence is in itself not absolute. The main factor for this controversy is the provision of reverse onus embedded in the offence of illicit enrichment. For clarity of purpose, a reverse onus clause is a statutory provision contained in criminal law shifting the burden of proof upon the defendant to disprove certain elements of an information. This onus has become the main force by which the enactment of illicit enrichment is used to combat against corruption globally.

Significantly, it is important to note that the whole debate surrounding the offence of illicit enrichment arises in the bid to ensure that states, whose duty it is to respect and protect human rights, conform to international human rights obligations in combating corruption. Accordingly, it is observed that an effective anti-corruption measure and the protection of human rights are mutually reinforcing and that the promotion and protection of Human Rights is essential to the fulfillment of all aspects of an anti-corruption strategy. On the basis of this argument, various international conventions specify that the absence of a reasonable justification for enrichment is an integral element of the crime of illicit enrichment, defining it as a 'significant increase in the assets of a public official that he or she cannot reasonably explain'. Thus, in order to obtain a conviction on illicit enrichment, the prosecution is to demonstrate that the accused is in ownership or control of some assets, or maintains a standard of living significantly higher in value than the official's lawfully earned income. Once this is established in line with the specific provisions, a rebuttable presumption of illicit enrichment arises, and which the court

would hold to be true save where the accused provides reasonable explanations on how he obtained the assets.

This appears to shift the burden of proof on the defendant and has led to the criticism that the concept of illicit enrichment infringes on the fundamental principles of presumption of innocence, an integral part of the criminal justice system. According to some critic, the effects of illicit enrichment is so flawed that it is a remedy much worse than the ailment and the criminalization of illicit enrichment should be discouraged particularly for fear of its abuse leading to the relegation of the concept of rule of law. It is in view of this that many state parties to the conventions have decided not to criminalize illicit enrichment in their jurisdictions.³⁷ On the contrary, the proponents of the offence of illicit enrichment contend that it is valid and constitutional in spite of the reverse onus principle. The scholars argue that the concept of illicit enrichment is not an infringement on the rights to presumption of innocence. Specifically, the principle of presumption of innocence does not exclude legislatures from creating criminal offences containing a presumption by law as long as the principles of rationality and proportionality are duly respected. In the case of *Salabiaku v France*,³⁸ Salabiaku, a Zairan national was convicted for violating the French custom law by receiving a package containing 10 kg of cannabis. The court established a test known as the Salabiaku test in identifying the approach to the permissibility of burden shifting provisions. The test is based on the recognition that the presumption of fact or of Law operates in every legal system but this presumptions must be restricted to a reasonable limit having regards to the right of the defence and the interest of a state. By establishing this test, the court was able to strike a balance between the interests of the state in prosecuting a crime and the rights of the accused by keeping these presumptions within limits.

Thus in applying this test to the concept of illicit enrichment, it becomes material to determine whether public interest outweighs and justifies the degree of deviation from the normal principle that the prosecution must establish the guilt of an accused beyond reasonable doubt. This is answered in the affirmative given the difficulty associated with proving corrupt practices. As such, it is argued that the criminalization of the offence of illicit enrichment is mainly to strengthen the state's ability in combating corruption as the most visible manifestation of corruption is the actual enrichment of the corrupt official. It is therefore in the interest of the public that the public official be compelled to give reasonable explanations on the acquisition of the specified wealth or assets. However, this is not to say that the burden of prove is entirely on the accused to establish his innocence but merely that he is to assert certain evidential facts. Thus the law places on the accused an evidential burden of proof while the prosecution still bears the entire legal burden of proof.

In the case of *Dauda v Federal Republic of Nigeria*,³⁹ the Nigerian Supreme Court had the opportunity to decide on the constitutionality of the Money Laundering (Prohibition) Act which places the burden of proving his innocence on the accused. In the case, the Economic and Financial Crimes Commission (EFCC) preferred a 208 counts charge against the accused/appellant before the Federal High Court, Lokoja. The appellant was however convicted on 75 counts. The appellant appealed against this decision to the Court of Appeal, Abuja which was dismissed and further appealed to the Supreme Court. The appellant in the case appealed among other grounds on the basis that the trial judge contended that

³⁷ Lindy Muzila, Michelle Morales, Marianne & Tammar Berger 'On the Take: Criminalising the Offence of Illicit Enrichment to Fight against Corruption' document.wordbank.org. @ page 28. Assessed on the 25th of February 2021.

³⁸ *Salabiaku v France* (1988), Application no. 10519/83, Section 28.

³⁹(2018) 10 NWLR (Pt.1626) 169.

the onus is on the appellant's to establish the lawfulness or legality of each lodgment made into the accounts. The appellant submitted that the trial judge by postulating such position reversed the time-honored rule that "the burden of proof in criminal matters lies on the prosecution." The appellant contended that the trial court and the Court of Appeal court failed to ascertain whether the ingredients of the offence of money laundering was established beyond reasonable doubt by the prosecution but decided to shift the onus of proof to the appellant. The appellant argued that by shifting the burden of proof to the appellant, his presumption of innocence, which is a right constitutionally guaranteed was breached by the trial Court and the Court of Appeal whilst arguing that the Nigeria Criminal jurisprudence puts the burden on the prosecution to prove that the appellant has committed a crime or illegal act.

In resolving the issues raised by the appellant, the Supreme Court in its judgment established the nature of the burden of proof in cases of illicit enrichment, drawing a distinction between the evidential and legal burden of proof. Explaining the evidential burden of proof, the Court stated the legal position as follows: "Incidence of evidential burden of proof is the burden of adducing evidence to prove or disprove a particular fact. When a party wishes the Court to believe any fact, then the burden of proof as to that fact rests on that party. The party bearing the legal burden of proof must first make out a prima facie case in his favour. This means that he has to adduce enough evidence which, if believed, may reasonably justify a finding that the facts he seeks to prove exist. But whether this burden has been discharged cannot be known until at the end of the trial and the Court actually gives a verdict in his favour. If the Court disbelieves his evidence then the burden is not discharged. The court held for the that stated that "Proving Money Laundering cases is a herculean task because it requires a prior establishment of the predicate offence before the money laundering aspect can be established. To obviate this problem a remedy was introduced by statutorily inferring money laundering from not only the conduct of the defendant but his lifestyle which is similar to the Proceeds of Crime Act 2002 of the UK.

In Hong Kong, a similar position was held in the case of *Attorney-General Hong Kong v. Hui Kin-Hong*⁴⁰. In this case, the court held that before the prosecution can rely on the presumption that pecuniary resources or property were in the accuser's control, it has of course to prove beyond reasonable doubt the facts which give rise to it. The presumption must receive a restrictive construction, so that those facts must make it more likely than not that the pecuniary resources or property were held on behalf of the accused or were acquired as a gift from him."

The same position applies in the UK. In 2018, the first UWO to be issued in UK was issued against Zamora Hijiyeva. She was alleged to have engaged in several multi-million pound purchasing, one of which was a 16.3 million pounds purchase at London's departmental store Harrods, an expenditure which the British authorities found to be out of keeping with her husband official salary. She appealed to the court of appeal where Lord Justice Burnett dismissing the appeal refused her the right to appeal to the Supreme Court. According to the judge the relevant requirements for making a UNO is that the court must be satisfied that there are reasonable grounds for suspecting that the known sources of the lawfully obtained income would have not been sufficient to enable him or her obtain the property. She was thus ordered by the court to provide the NCAA with a full account of the source of her wealth⁴¹. These judicial authorities tilt in favour of the argument that the offence of illicit enrichment is not

⁴⁰ *Attorney General v Hui Kin Hong*, Court of Appeal no. 52 of 1995.

⁴¹ *Hajiyeva v National Crime Agency* [2020] EWCA Civ 108

contrary to the right to the presumption of innocence, but a reasonable deviation from the normal principle that the prosecution must prove the accused guilty beyond reasonable doubt.

However, making out such a case he has discharged the evidential burden cast on him because he has tendered the evidence basically necessary for the establishment of this case. It then becomes necessary for his opponent to call contrary evidence to challenge the case set up by the party. By the necessity to adduce this contrary evidence, the evidential burden of proof is shifted unto the opponent. Of course he is not bound to supply any evidence at all. But by so doing, he runs a great risk of the Court finding against in denial of allegations of the allegations of the other party. The position is very well clarified by Denning J (as he then was) in *Dunn v Dunn*⁴² which was a petition for divorce on ground of desertion. "The legal burden" in the case, he states- "was on the petitioner to prove that his wife deserted him without cause. In order to discharge that burden the petitioner relied on that fact that he asked her to join him and she refused. That is a fact from which the Court might have inferred that she had deserted him without cause, but it is not bound to do so, once he proves the fact of refusal she might seek to rebut the inference of desertion by proving that she had just cause for her refusal and, indeed, it is usually wise for her to do so. But there is no legal burden on her to that effect. Even if she did not affirmatively prove just because the Court had still at the end of the case, to ask itself, has the legal burden been discharged? In most cases, the party on whom the legal burden lies also bears the evidential burden at the outset of the trial for he has first to introduce evidence to establish a prima facie case: On the issue of incidence of evidential burden of proof, somewhat different considerations apply to the two types of proceedings, civil and criminal.

Hence the legal burden of proof is on the prosecution to demonstrate beyond reasonable doubt that the defendant public officer is enrichment or ownership of assets significantly higher in value than his lawful income period and once this is successfully established, the court presumes that the officer is in illicit enrichment and the evidential burden of proof shifts to him to rebut the truthfulness of the presumed facts established by the prosecution by providing reasonable explanation of the significant increase in his assets. Hence, the legal burden of proof is on the prosecution to demonstrate beyond reasonable doubt that the defendant public officer is in ownership of assets significantly higher in value than his lawful income period and once this is successfully established, the court presumes that the officer is in illicit enrichment and the evidential burden of proof shifts to him to rebut the truthfulness of the presumed facts established by the prosecution by providing reasonable explanation of the significant increase in his assets.

Even though the Nigerian Constitution⁴³ provides that every person charged with a criminal offence shall be presumed to be innocent until he is proven guilty, the proviso allows for shifting the burden of proof on the defendant. The Section provides thus:-"36(5) every person who is charged with a criminal offence shall be presumed innocent until he is proved guilty provided that nothing in this Section shall invalidate any law by reason only that the law imposes upon any person the burden of proving particular facts". The proviso serves as a 'reverse onus' provision.

⁴² 217 S.W.2d 124 (Tex. Civ. App. 1949).

⁴³ Constitution of the Federal Republic of Nigeria 1999, s. 36 (5).

5. Legal Justifications for the Criminalisation of Illicit Enrichment: The Reverse Onus Principle

As a general rule, the burden of proof lies on the prosecution in a criminal case. In the case of *Woolmington v DPP*,⁴⁴ Viscount Sankey LC opined thus:

‘throughout the web of the English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner’s guilt subject to ...the defence of insanity and subject also to any statutory exception’

The Nigerian Evidence Act provides that burden of proof placed upon a defendant charged with a criminal offence shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether on cross-examination or otherwise, that such circumstances in fact exist.⁴⁵ This provision unquestionably places the burden of proving the commission and existence of a crime on the prosecution.

A Reverse onus clause can be defined as ‘one that shifts the burden of proof upon the accused after the Prosecution proves the existence of a foundational fact that leads to the shift in burden. It has also been defined as the situation in which the legal burden of proof is (exceptionally) placed on the defendant in a criminal case. It is a statutory provision requiring that the accused be responsible for providing evidence on some relevant point, either to raise a doubt about whether the point is true or to show on balance of probabilities that it is not true.’⁴⁶ There are various policy motivations that have been advanced to justify reverse burdens. The argument of public interest combined with the magnitude of the evil sought to be suppressed is the most common policy rationale advanced.⁴⁷ A reverse onus clause is a provision within a statute that shifts the burden of proof onto the individual specified to disprove an element of the information. Typically, this particular provision concerns a shift in burden onto a defendant in either a criminal offence or tort claim. The concept of reverse onus is a shift in burden of proof with the presupposition that the applicant (usually prosecution) will be granted their application by the courts.

Traditionally, the prosecution bears the legal burden of proving the defining elements of an offence, as well as the absence of any defence. However, the accused will generally bear an evidential burden of proof in relation to defence. The prosecutor has to adduce evidence in support of the facts in issue, which pertain to the ingredients of the offence beyond reasonable doubt. More appropriately, this is referred to as the ‘placing of an evidential burden on an opponent’ or, as ‘a shift of the evidential burden of proof from the prosecutor to the accused. The evidential burden of proof would continue to shift in a criminal proceeding on the party who would fail if no evidence at all, or no more evidence, as the case may be, were given on either side.’⁴⁸ The legal burden to prove beyond reasonable doubt continues to rest on the prosecution in the Nigerian criminal justice jurisprudence as an accused person is not required to open the case and to lead evidence to show or to prove his innocence. Once the court is

⁴⁴ [1935] AC 462.

⁴⁵ Evidence Act 2011, s. 139 (2).

⁴⁶ Irwin Law, Definition of Reverse Onus, available at <https://irwinlaw.com/cold/reverse-onus/>, accessed February 27, 2021.

⁴⁷ Juhi Gupta, Interpretation of Reverse Onus Clauses, (2012) (5) (1) *NUJS Law Review*, pp 50-64.

⁴⁸ Lexology, Burden of proof in the prosecution of unexplained wealth in Nigeria - examining the similarity between *Daudu v FRN* and *Aamira Hajieva’s* case, available at <https://www.lexology.com/library/detail.aspx?g=329b5c8c-627f-4dfc-a44e-66d4d0e594e6#:~:text=Generally%2C%20the%20prosecution%20bears%20the,the%20absence%20of%20any%20defence.&text=More%20appropriately%2C%20this%20is%20referred,the%20prosecutor%20to%20the%20accused>, accessed March 1, 2021.

satisfied that the legal burden placed on the accused has been discharged satisfactorily, the evidential burden shifts to the accused to prove the existence of any exception or exemption or qualification which exists in the law creating that offence for which he was charged. For the purpose of clarity, the provision of the Nigerian Evidence Act is reproduced hereunder:

“Where a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification, the operation of the law creating the offence with which he is charged is upon such person”.⁴⁹

Further, the Nigerian Constitution provides that every person who is charged with a criminal offence shall be presumed to be innocent until he is proved guilty: Provided that nothing in the section shall invalidate any law by reason only that the law imposes upon any such person the burden of proving particular facts.⁵⁰ This is the most definite ground for the criminalisation of the offence of illicit enrichment.

6. Conclusion and Recommendation

This paper had earlier argued that among corruption crimes, illicit enrichment is the most difficult to trace as it symbolises the accumulation crops of other corruption crimes that has been committed during the terms of service with utmost secrecy. The criminalisation of the possession of unexplained wealth has gained approval amidst criticisms in the global war against corruption. The criminalisation of illicit enrichment allows states to prosecute corrupt officials and confiscate the proceeds of corruption on the basis that the unexplained wealth is evidence of corrupt conducts. The prosecution does not have to prove the source of the illegally acquired wealth, but the accused has the evidential burden to show that he acquired the wealth legally. This paper has posited that the offence of illicit enrichment is one of the offences that shift the presumption of innocence because once a person is charged with the offence of illicit enrichment; there is a rebuttable presumption that illicit enrichment is proved against him unless he disproves it on the civil standard of balance of probability. This paper thereby concludes that the criminalisation of illicit enrichment in the jurisdictions of examination i.e. Nigeria, Hong Kong and the United Kingdom is not only legal but it also constitutional. The paper however recommends that just as it is done in the United Kingdom, the other jurisdictions should also extend the scope of illicit enrichment to private individuals and not just public officials as there have been establishment of many corrupt practices levied on workers in the private sectors.

⁴⁹ The Nigerian Evidence Act 2011, s. 139 (1).

⁵⁰ CFRN, s. 36 (5).