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Arconn Consult Policy Paper 01

Executive Summary

The prosecution of public corruption and the recovery of the proceeds of such corruption go hand-in-hand. This is especially so where public property has been illegally acquired or public funds embezzled. However, at times there is insufficient evidence to sustain a corruption prosecution even if it is clear that the suspect has grown impressively wealthy and cannot account for that wealth from known sources of legal income.

This article argues that there should be an offence of illicit enrichment enacted into Kenyan law. Prosecutors around the world have successfully used the offence to convict corrupt public officers who may successfully hide their criminal conduct but cannot account for the dramatic rise in wealth accruing from such conduct. Such an offence would criminalise the possession of assets or liabilities that are disproportionate to a defendant public officer's known sources of lawful income if the defendant cannot give a satisfactory explanation for the disproportion.

As a criminal offence that must be proved beyond reasonable doubt, the illicit enrichment offence could supplement, or even replace the controversial civil forfeiture provision in Section 55 of the Anti-Corruption and Economic Crimes Act 2003. Illicit enrichment would complement and strengthen the wealth declaration

provisions of the Public Officer Ethics Act 2003 as well as the forfeiture provisions of the Proceeds of Crime and Anti-Money Laundering Act 2010. Criminalising illicit enrichment may, however, fall foul of rights enshrined in the Constitution. Of particular concern are the presumption of innocence, freedom from self-incrimination and the principle of legality. These concerns can, however, be addressed by careful drafting- they are not fatal to the existence of such an offence. Furthermore, the courts regularly enforce other penal provisions that similarly affect constitutional rights and are able to balance between fair trial rights and the need to effectively prosecute corrupt public officers.

Arconn Risk Policy Paper 01: Should Kenyan Law Contain the Crime of Illicit Enrichment?

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1. Introduction

On 23 March 2015, Karim Wade, a former Senegalese government minister and the son of former Senegalese President Abdoulaye Wade was convicted of illicit enrichment, sentenced to 6 years imprisonment and handed a fine of $230 million (nearly 22 Billion Kenyan Shillings).[2] In Senegal, the conviction has alternatively been hailed as a landmark anti-corruption case and condemned as politically motivated; it is currently under appeal. However, an interesting aspect of the case is that the Senegalese prosecutors did not have to prove that Mr. Wade had engaged in corrupt conduct. The criminal conviction was based on his inability to explain the source of wealth which he supposedly hid in the British Virgin Islands and Panama.[3] This is the core of the crime of illicit enrichment.

The offence enables the prosecution of public officers who cannot explain the significant rise in their wealth (sometimes defined as 'disproportionate wealth') on the presumption that the officer corruptly accrued such riches. The prosecution will usually target a particular period- the check period- during which the alleged

significant/disproportionate increase in assets occurred. A recent study gave this definition of how the offence operates:

> 'In order to attain a conviction of illicit enrichment, the prosecution must demonstrate that the official's enrichment cannot be justified from legitimate sources of income, raising the presumption that it is the proceeds of corruption. The public official may rebut this presumption by providing evidence of the legitimate origin of his wealth. Failure to rebut the presumption results in a conviction and the imposition of penalties.'[4]

Some countries, such as India include an additional presumption where the accused failed to file a complete statutory wealth declaration or filed a false declaration. In such cases, the accused is deemed to have no reasonable explanation that is based on his or her *known* sources of legitimate wealth.[5] However, as will be argued later, the complexity of having multiple presumptions operating against the accused- irrespective of whether they are evidential or persuasive presumptions may violate rights to fair trial.

Mr. Wade is not the only high-profile target of prosecutors fighting illicit enrichment around the world. In 2014, a former President of El Salvador[6] was convicted, as was a former Chief Minister of Tamil Nadu, India (although that conviction was overturned on appeal) and in early 2015 a former Police Chief in Bolivia was under investigation for this offence[7]. Even though bribery,

embezzlement or abuses of office often capture most of the headlines for corruption crime, the offence of illicit enrichment can be a useful addition to a prosecutor's toolbox.

Kenya like many low and middle income countries suffers a level of corruption that actually constitutes a threat to development and stability. Such high rates of corruption reduce growth, threaten investment, stifle productivity and cause a detrimental redistribution of wealth.[8] Kenyan law tackles corruption in a multitude of ways, including through the forfeiture of unexplained assets,[9] a process that is similar to- but not the same as- criminalising illicit enrichment. There is no specific provision under either the Penal Code or anti-corruption statutes like the Anti-Corruption and Economic Crimes Act 2003 (ACECA) that creates a criminal offence illicit enrichment. This article argues for the inclusion of such an offence in Kenyan criminal law, on the basis that convicting a defendant of illicit enrichment and imposing a sanction- whether imprisonment, a fine, forfeiture or disqualification from public office- would greatly assist the struggle against corruption. This article describes the basic elements of the offence, setting out its international background and constitutional basis. It then assesses the arguments for and against creating such an offence, before concluding with a proposal that illicit enrichment should be legislated, subject to safeguards to ensure constitutionality.

2. International Law on Illicit Enrichment

Illicit enrichment is not a new offence, having existed for over 40 years in India and Argentina. Currently, about 40 countries have such a criminal provision.[10] Both the United Nations Convention Against Corruption (UNCAC) and the African Union Convention on Preventing and Combating Corruption 2003 (AUCPCC) urge member states to take measures to penalise illicit enrichment. Kenya has ratified both treaties and they are now part of the law of Kenya under Article 2(6) of the Constitution.[11] However, neither is a self-executing treaty because both require state parties to pass subsequent domestic laws or other incorporation measures to render the treaties enforceable in domestic courts. This is part of the reason why it is important to debate the enactment of a domestic offence of illicit enrichment. Prosecutors cannot simply rely on either the UNCAC or the AUCPCC to bring charges

The UNCAC requires state parties to *consider* creating an illicit enrichment offence in the following terms:

> 'Subject to its constitution and the fundamental principles of its legal system, … adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, illicit enrichment, that is, a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income.'[12]

Addressing each component in turn, such an offence: (i) needs to meet the requirements of the Constitution and fundamental principles of the legal system; (ii) must be limited to a public official; (iii) requires a fault element of intent on the part of the defendant; (iv) requires a physical element of a significant increase in the assets of the public official; (v) requires a second physical element that he or she cannot reasonably explain the increase in assets in relation to his or her lawful income. Failure to provide an explanation creates a presumption that the source of the unexplained assets is illicit.

Importantly, the UNCAC does not require the offence to be drafted in the exact terms given in the convention. This is clear from the words 'subject to its constitution and fundamental principles' and the allowance for state parties to adopt the measures that they deem necessary. This is important because, this article will argue that 'significant increase in assets' is too narrow an offence and the question should instead turn on the *disproportion* between the public officer's known sources of income and his or her known assets and liabilities. However, if a member state did decide to create such an offence yet significantly deviated from the UNCAC definition, it might create problems for cross-border enforcement of anti-corruption laws. In particular, where extradition or mutual assistance agreements between states require dual criminality, divergent definitions of the same offence may create a loophole for defendants to exploit to evade law enforcement.

The AUCPCC lists the offence of illicit enrichment before stating that state parties undertake to make it a penal offence under their domestic laws.[13] Like the UNCAC above, the AUCPCC defines the offence as:

> '…the significant increase in the assets of a public official or any other person which he or she cannot reasonably explain in relation to his or her income.'[14]

The AUCPCC definition does not, however, explicitly state what the fault element of the offence should be. The fault element- whether intent, knowledge or recklessness- is important because if, for example, a cynical third party deposits a large sum of money in a public officer's bank account, the officer may not be aware of the deposit or the reason for it. As a result, if charged with illicit enrichment the public officer would be unable to reasonably explain how the money came into his or her possession. In these circumstances the accused might be unjustly convicted. Thus by demanding that the prosecutor prove that the accused *deliberately* (or at least knowingly) had a significant increase in his or her assets, the risk of unfair culpability is reduced.

Despite these technical differences in defining the offence, the common feature of illicit enrichment is its focus on the person suspected to be in possession of proceeds of corruption. This is irrespective of whether the 'illicitly rich' accused actually participated in corrupt conduct him or herself. The prosecutor does not

need to prove the criminal source of the riches, only the criminal possession of unexplained wealth that is disproportionate or has seen a significant increase during the period of under investigation. At the core of illicit enrichment is assumption of impropriety based on the unexplained disproportion or increase in wealth not, as Boles argues, the mere fact unexplained wealth.[15]

Furthermore, the offence tends to reverse the onus of proof such that the accused is put in the position of explaining to the satisfaction of a court that his or her assets were not illicitly gained. The offence is designed to prevent beneficiaries of corruption from evading prosecution merely because they have successfully obscured or concealed the trail between the corrupt conduct and the illicit assets (for example by depositing those assets in a 'secrecy jurisdiction' such as the British Virgin Islands). In this way, it even complements anti-money laundering (AML) efforts; while AML focuses on catching those who seeking to conceal proceeds of crime, illicit enrichment can apply even to someone who successfully 'cleaned' those criminal proceeds. Even if an accused successfully launders his or her wealth, he or she can still be held liable if he or she cannot explain the disproportion or dramatic increase in his or her assets relative to his or her known sources of lawful income. Yet some of the features that make such an offence attractive to a prosecutor including the reverse onus of proof are also a cause for concern from a human rights and criminal law perspective.

3. The Constitutional Basis for An Offence of Illicit Enrichment

Although many provisions of the Constitution, including Chapter 6 on Leadership and Integrity address corruption concerns, arguably the primary underpinning of an offence of illicit enrichment lies in the national values and principles. These bind all State organs, State officers, public officers and all persons when any of them enacts, applies or interprets any law.[16] Among these values and principles are those of good governance, rule of law, transparency, integrity and accountability.[17] These are interlinked and support each other.

Having an offence of illicit enrichment meets both the requirements of rule of law and integrity with respect to public officers and state officers. Both types of officers are subject to the highest standards of probity and thus their integrity is expected to be privately and publicly above reproach. Furthermore, as employees, appointees or agents of the state, and because their powers are delegated from the Kenyan people, they also have statutory, contractual and fiduciary duties to account for their use of public office and public funds.[18] If those charged with upholding the constitution, enacting, interpreting or implementing laws, and running state organs amass wealth which they cannot explain, then the rule of law and public confidence in public office are both gravely weakened.

Having an offence of illicit enrichment also advances the principle of transparency. Public officers are required to file regular wealth declarations.[19] These ensure that the sources of income, assets and liabilities of such officers are open to lawful scrutiny. Yet this obligation of financial transparency cannot be

effectively advanced if the officers in question were unaccountable for any disproportion between their known wealth and their known sources of income. This accountability can partly be achieved from the risk sanctions such as an illicit enrichment prosecution if the public officer in question is unable to explain that wealth.

Thus the national values and principles provide the basis for a law against illicit enrichment by demanding laws that uphold transparency, integrity, respect for the rule of law and accountability from public officers with respect to their assets and liabilities and appropriate sanctions to hold them accountable if they cannot explain the acquisition of such assets and liabilities. Such qualities in public officers are, in turn, among the hallmarks of good governance.

4. Benefits of an Offence of Illicit Enrichment

There are several reasons why an offence of illicit enrichment makes sense for Kenya. First, it eases the burden on prosecutors to prove corruption where secrecy, obstruction and the absence of a concrete complainant complicates criminal proceedings. Second, illicit enrichment complements the requirement that public officers in this country make regular declarations of their assets and liabilities. Third, it also complements the procedure in the ACECA for the forfeiture of unexplained assets by ensuring that property is not just seized, but the public officer in question is subject to the full range of criminal sanctions- including

imprisonment, disqualification from office and the stigma of public shaming as a criminally corrupt person. Fourth, a criminal conviction beyond reasonable doubt constitutes the highest judicial standard of proof in Kenyan courts. Criminal trials, due to their gravity, also have the highest level of safeguards for defendants under Article 50 of the constitution. A conviction for illicit enrichment after such a 'safe' trial is therefore the soundest basis for a finding that property has been unlawfully acquired in order to duly seize such property without violating the due process provisions of Article 40 of the Constitution. Fifth, once illicit enrichment is proven, it would form a predicate crime under the Proceeds of Crime and Anti-Money Laundering Act 2010 (POCAMLA) for purposes of pursuing those who may have laundered the proceeds of the illicit enrichment crime. Each of these reasons will be discussed in turn.

Many corruption offences have a peculiar attribute: sometimes there is no specific complainant or victim. For example, in bribery,[20] a potential complainant is the principal whose agent receives a benefit as an inducement or reward for acting or not acting, showing favour or disfavour in relation to the principal's affairs or business. Yet the actions of the agent may not necessarily cause direct harm to the principal and the principal may never learn of those corrupt acts. As the UK Law Commission put it:

> 'Corruption is a difficult crime to prove: it tends by its very nature to be carried out in secret, and its "victims" may never be aware of it.'[21]

For example, X, a procurement officer at a Cabinet Office, has determined through an impartial process that Company Y is the best supplier for vehicles. Yet once Company Y wins the tender, it rewards X with a free car that X cannot possibly afford based on his or her known wealth or known sources of income. The Cabinet Office has not been harmed. Regardless of whether X benefits unlawfully or not, his or her Principal will still get the cars tendered for. As such, the corrupt transaction will likely remain a secret between X and Company Y. It is difficult, without a whistleblower or sloppiness from the parties to the bribe, for an investigator to crack that veil of secrecy. An offence of illicit enrichment addresses this problem because once the investigator discovers the gift of the expensive car and shows that it could not have been acquired from X's known sources of income, the burden is then on X to give a reasonable explanation that the car was lawfully acquired. Failing to do so leaves X open to criminal sanction.

The second argument for illicit enrichment provisions is that they complement declarations filed by public officers under the Public Officers Ethics Act 2003 (POEA) and the registry of interests for state officers under the Leadership and Integrity Act 2012 (LIA). Under Section 32 of the POEA, public officers must submit wealth declarations upon commencement of employment and thereafter annually until termination of employment in the public service (at which point they submit a final declaration). A failure to submit a wealth declaration incurs a criminal penalty of one year imprisonment or a one million shilling fine.[22] The same tariff applies to a defendant convicted of filing a false declaration.[23]

These provisions are consistent with Kenya's obligations under both the UNCAC and AUCPCC. The AU Convention, for example, requires state parties to undertake to ensure that public officials:

> '…declare their assets at the time of assumption of office during and after their term of office in the public service.'[24]

The UNCAC also demands that states endeavour to establish:

> '…measures and systems requiring public officials to make declarations to appropriate authorities regarding, inter alia, their outside activities, employment, investments, assets and substantial gifts or benefits from which a conflict of interest may result with respect to their functions as public officials.'[25]

However, the wealth declaration offences under the POEA are effectively regulatory offences penalizing a failure to perform an administrative task. They resemble a failure to file a tax return or filing a false tax return. Though they advance the principles of transparency and integrity, they do not adequately capture wrongfulness of a public officer inexplicably amassing a large amount of wealth while in office. For example if X, a police officer, regularly filed truthful declarations pursuant to the POEA, then he or she has fulfilled his or her legal

obligation under Section 32. Under this statute, it would not matter that he or she had an annual net income of less than two hundred thousand shillings during 5 years employment, yet in the same period he or she had accrued a net worth of four billion shillings. Furthermore, unlike the UNCAC,[26] neither the POEA nor the schedule thereunder require public officers to give details of outside activities and outside employment in their declarations. Therefore, in the above example, X does not even have to inform the Police Service Commission- who retain custody of the officer's wealth declaration- about any types of activities outside his or her police duties that may have contributed to the accrual of billions in net worth. In contrast to the standard declaration under the POEA, the register of state officers' interests in the LIA is markedly more comprehensive. It includes a requirement that potential state officers declare plans and expectations of future employment, sponsorships, overseas travel by the state officer or close family, pending litigation as well as other non-financial interests.[27]

These defects in the POEA scheme undermine the interlinked principles of integrity and transparency. Because the source and lawfulness of public officers' wealth are not adequately revealed, it is difficult to hold them accountable if they engage in corruption. An offence of illicit enrichment would be more effective as it puts the burden on the public officer to explain the disproportion or significant increase between his or her known income during his or her employment and his or her known wealth rather than simply filling out a statement of his or her income, assets and liabilities. Furthermore, the proposed offence might contain a provision

whereby filing a false or misleading wealth declaration creates a rebuttable presumption that the public officer cannot reasonably explain his or her wealth from his or her known sources of income. As an Indian Judge put it, '…a receipt from a windfall or gains from graft, crime or immoral secretions by a person *prima facie* are not known sources of income'.[28] then that officer has added incentive to be truthful and thorough in making his or her wealth declarations under the POEA.

Enacting an offence of illicit enrichment also complements the ACECA's asset forfeiture provisions. Under Section 55(2) of the ACECA, if the Ethics and Anti-Corruption Commission investigates a person and is satisfied that the person has unexplained assets, it may institute an inquiry in the High Court through a summons issued to the person with the unexplained assets. The Commission must prove on a balance of probabilities that the person has unexplained assets.[29] If this is successfully done, then the respondent must satisfy the court that the assets were acquired by means other than as a result of corrupt conduct.[30] 'Corrupt conduct' means, *inter alia,* conduct that constitutes corruption or an economic crime under Section 2 of the ACECA.[31] If at the end of the inquiry the Court is not satisfied that the assets were acquired by means other than corrupt conduct, it will order the person to pay to the Government an amount equal to the value of the unexplained assets that the Court is not satisfied were acquired otherwise than as the result of corrupt conduct.[32]

While Section 55 of the ACECA is a vital tool in depriving corrupt persons of ill-gotten wealth, it is still only a civil proceeding. Thus despite the loss of his or her

unexplained assets, a corrupt person still evades the stigma of a conviction for corruption as well as the risk of imprisonment. This makes it doubtful that Section 55 is adequately dissuasive to public officers who display a lack of integrity. Furthermore, as the above summary of its operation shows, there is some confusion as to the burden of proof that a person must meet in order to refute the evidence of the Commission that, on a balance of probabilities, that person has unexplained assets. Arguably, if the Commission has already satisfied the court on a balance of probabilities, then it is implied that the respondent must adduce evidence that is achieves a standard that is higher than on a balance of probabilities in order to satisfy the court. Thus there is a constitutional problem in that it is unfair to impose on a respondent a higher burden of proof than that imposed upon the claimant (the EACC). The injustice is even more pronounced when one considers that a finding that a person has unexplained assets can be used as corroboration in later criminal proceedings where that person is charged with corruption or an economic crime.[33]

These problems led to a controversial High Court decision in *KACC v Amuti*[34] that invalidated Section 55. In that case, the defendant was a financial controller with the National Water Conservation and Pipeline Corporation. Proceedings were brought by the Kenya Anti-Corruption Commission (the predecessor to the EACC) seeking preservation and forfeiture of the defendant's unexplained assets. The judge found against the KACC, holding that Section 55(5) and (6) violated constitutional rights to due process before the seizure of property (Article 40) and the right to fair

trial (Article 50) by failing to specify the appropriate standard of proof that the defendant is required meet to satisfy the court that the assets in question were acquired otherwise than by corrupt conduct. At the same time, the court felt that the Section created a legal (rather than evidential) presumption that the defendant's property was acquired by corrupt conduct, and yet put an unacceptably high burden of proof on the defendant to displace this presumption. Therefore, those provisions found to be unconstitutional where null and void and it followed that the proceedings against the defendant were also rendered a nullity.

The *Amuti* case can, however, be criticised on the basis that the judge erroneously conflated the criteria for achieving a fair *criminal* trial with the criteria for achieving a fair *civil* trial despite noting that Section 55 proceedings were civil in nature. This lead the Judge to cite criminal cases and human rights lawsuits that were based on criminal proceedings[35] in order to hold the shifting of the burden of proof in a civil proceeding was unconstitutional. For example, the judge cited the English Case of Attorney General's Reference No. 1 of 2004[36] for the proposition that the European Convention on Human Rights required reversal of the burden of proof had to be proportionate and reasonably justifiable. However, that case was a reference from 4 criminal cases where defendants were charged with offences that reversed the onus of proof;[37] the European Court of Human Rights has in several cases held that when it comes to civil cases, states have 'a greater latitude concerning civil rights and obligations than they have when dealing with criminal cases'[38]. In criminal proceedings the burden of proof beyond reasonable doubt of

each element of an offence is almost always on the Prosecutor. The requirements are less onerous in civil proceedings[39] and the burden of proof can shift between claimant and defendant depending on who needs to prove a fact in order to succeed. The party that ultimately succeeds will be the one that convinces the civil court of its case on a balance of probabilities.

Furthermore, the judge displayed inconsistency when she criticized Section 55: in one paragraph the judge held that Section 55(6) failed to set out any standard of proof when the burden of proof was on the defendant; while in a subsequent paragraph the judge stated that

> '…it is apparent that The Act has stipulated *"higher Standard of proof"* [for the defendant] than the one stipulated for the commission and I do find so.' [emphasis in the original]

Thus it is not clear on what basis the judge was invalidating the offending provision- was it because of an absence of a standard of proof or an unduly high standard of proof?

Finally, the judge failed to concretely identify what she meant by 'due process' under Article 40 of the Constitution and thus what it was about the burden of proof in Section 55(5) and (6) that violated this due process and rendered it impossible for there to be finding that the property had been illegally acquired. The judge essentially hung her hat on two ideas: (i) that any time a civil defendant is called upon to prove something to a higher standard than the claimant, this violates

'due process'; and (ii) that due process requires that the *claimant* satisfies a legal burden of proof for a finding of unlawful acquisition. Yet the civil law is replete with examples where the court may make conclusive findings based on the failure of the defence to prove an aspect of its case. It is unclear why, even in light of Article 40 of the Constitution, civil property seizure should be that much different. What matters is that (i) the property seizure is based on evidence acquired by a legal process, (ii) the defendant had sufficient opportunity to challenge that evidence and adduce his or her own evidence before an independent and impartial tribunal of appropriate jurisdiction, (iii) the decision of the tribunal was not arbitrary, unlawful or unreasonable and finally, (iv) that the defendant could appeal or seek review of the decision of the tribunal. These, are the indicia of 'due process' in a civil proceeding. All this indicia are arguably present in Section 55 of the ACECA.

Despite the problems with the *Amuti* case, it remains valid jurisprudence and thus casts doubt on the legality of any forfeiture proceedings under Section 55 of the ACECA. Fortunately, prosecutors and the Asset Recovery Agency can still pursue civil and criminal forfeiture under the POCAMLA.[40]

Nonetheless, if an offence of illicit enrichment is created, it would need to address the concerns of the judge in the *Amuti* case since, if anything, criminal proceedings require more not less fair trial protections. One way of dealing with the problem is by ensuring that any presumption based on inability to give reasonable explanation for the significant increase/disproportion was an evidential presumption and not a persuasive presumption. Thus the defendant would displace

the evidential presumption by adducing sufficient evidence to show 'a reasonable possibility' that the wealth in question was lawfully acquired.[41] Another way of stating this is that the defendant would need to adduce sufficient evidence to satisfy the court that the presence of a reasonable explanation is an issue. Upon displacing the presumption, the burden of proof would be on the prosecutor to then prove beyond reasonable doubt that the defendant lacks a reasonable explanation for his or her disproportionate assets or liabilities. The prosecutor's legal burden is not a requirement to negate every possible explanation however ludicrous. Rather, the prosecutor needs only prove beyond *reasonable* doubt that there is no *reasonable* explanation.

To deal with the judge's criticism of lack of due process in Section 55, a proposed illicit enrichment offence would need to be carefully crafted and strictly interpreted so that it is clear that the prosecutor must meet the criminal law threshold of proof beyond reasonable doubt on all the other elements of the crime before calling the defendant to offer an explanation. Only by holding the prosecutor to strict criminal standard would there be a clear finding that meets the highest fair trial standards in Article 50. This will, in turn, ensure that any seizure or forfeiture of property can withstand a challenge based on Article 40 of the constitution.

Another reason to legislate an offence of illicit enrichment is that it addresses the need for a sanction which adequately encapsulates the corrupt official's wrongdoing. In other words, it satisfies the criminal law principles of fair labeling and proportionality. Forfeiture provisions may ensure defendants do not enjoy illicit

wealth, but only a criminal provision (and sanction) can most clearly indicate society's disdain for purveyors and beneficiaries of corrupt conduct. Furthermore, if the risk of prosecution is sufficiently real and the penalties are sufficiently high, then illicit enrichment may be more dissuasive than any civil process since a criminal conviction can lead to additional sanctions such as being barred from public office for a period of time.

A final reason for enacting an offence of illicit enrichment is that it complements the anti-money laundering regime under the POCAMLA. Investigators of illicit enrichment can use Suspicious Transaction Reports filed by reporting bodies under Section 44(2) of the POCAMLA to acquire evidence about income, assets and transactions involving suspects.[42] Such reports are filed by financial and designated non-financial institutions that include banks, real estate agents, casinos, providers of company services and dealers in precious metals and gems.[43] The investigators may also use Customer Due Diligence forms filed such institutions to ascertain the ownership and sources of assets (including bank accounts) held by suspects. The POCAMLA is also helpful because in the event that prosecutors secure a conviction, they (or the Asset Recovery Agency) can then use the criminal forfeiture scheme under Part VII of that Act to seize the illicitly gained assets.

5. Costs of an Offence of Illicit Enrichment

There are strong counter arguments against having such an offence in Kenyan law. Many of the reasons centre on evidential issues.[44] Other reasons are based on the potential vagueness of the definition of the offence which would violate the principle of legality: that before an accused can be tried for an act or omission, such conduct must already be a criminal offence in Kenya or under international law.[45] First, by placing the burden on the defendant to explain his or her wealth or face conviction, an illicit enrichment offence may violate the presumption of innocence[46] and rule against self-incrimination.[47] Second, the absence of any prohibited conduct element to the offence of illicit enrichment may mean that it infringes the principle of legality in Article 50(2)(n) of the constitution. Third, unless the definition of what constitutes 'disproportionate' wealth or assets is sufficiently certain this would also infringe the principle of legality and the right to adequate information about the charge in order to answer it;[48] because of this the accused cannot adequately defend him or herself. Finally, there are already laws that penalise public officers who are coy about their wealth. Each of these reasons will be considered in turn.

The first concern is the claim that illicit enrichment violates the constitutional presumption of innocence. By putting the burden on a public officer to explain his or her wealth, it is argued that illicit enrichment provisions reverse the presumption such that the officer is presumed guilty unless he or she proves themselves innocent.

However, it has long been held that placing the burden of explanation on the accused is not the same as a presumption of guilt. This is recognised in Kenyan rules of evidence.[49] As the High Court put it recently:

> 'In Kenya, a statutory provision which shifts the legal burden of proof in criminal cases is unconstitutional except in so far as it creates only [sic] evidential burden, relates to acceptable exceptions such as the defence of insanity, or other rebuttable presumptions of law.'[50]

The prosecutor bears the ultimate burden and must still prove beyond reasonable doubt all the other elements of illicit enrichment- including the accused's intent (under the UNCAC definition) or the disproportion between assets and legal sources of income- before the accused is required to provide an explanation. Nor does creating a legal or evidential presumption in itself violate the presumption of innocence. What matters is that the presumption is reasonable and proportionate as between the state's interest in prosecuting the officer for disproportionate, unexplained wealth and the defendant's right to a presumption of innocence.[51] A recent study argues that applying this test to illicit enrichment means asking whether the state's interest in 'convicting corrupt officials outweighs the infringement on the rights of the accused'.[52] In applying this proportionality test to Kenya one may argue that public corruption is pervasive, the justice system is rife with delay and inefficiency, the investigative resources of the prosecutor are often outweighed by those of the defence, and there are weak witness protection

frameworks.[53] These make it difficult to procure testimonial and documentary evidence against those accused of corruption.

Furthermore, the accused's interests can be secured by ensuring stricter adherence to all the other aspects of the right to fair trial under Article 50; such as ensuring prompt information about charges, adequate facilities and time to prepare a defence and ensuring the fullest possible access to prosecutorial evidence. Arguably, if these steps are taken then any proportionality test would allow the shifting of the burden to the accused on the issue of explaining the legitimate sources of his or her wealth. The reasonability part of the test can be met by ensuring that the prosecutor must adduce sufficient evidence to *prima facie* show that there is no reasonable explanation. Only if such evidence exists then the accused may be required at the second stage to tender a reasonable explanation; furthermore the accused's explanation, if the legal burden were applied, need only satisfy the court on the standard of a balance of probabilities. If an evidential burden is applied, then the accused need only adduce evidence sufficient the raise reasonable possibility that the wealth was lawfully acquired.

The same applies if there is a presumption based on a failure to provide a wealth declaration or filing a false declaration. The accused would only have to meet an evidential burden to displace the presumption; thus he or she is not compelled to 'prove' his or her innocence but rather, as in the above presumption, to adduce sufficient evidence raise the reasonable possibility that the wealth is lawfully acquired. Once the presumption is displaced in this way, the matter then

reverts to the prosecutor to satisfy the court beyond reasonable doubt that there is an absence of a reasonable explanation.

However, it is clear from the above discussion that addressing concerns about the presumption of innocence involves a complex shifting of the evidential and persuasive burdens both for the physical element of lack of reasonable explanation and the presumption based on failure to properly declare wealth. This may be another reason for avoiding criminalising illicit enrichment; such manipulation of rules of proof can create a high danger of miscarriage of justice and leave too much for the court's discretion in determining when the *prima facie* standard has been satisfied, when the evidential or persuasive burden displacing the presumption is met and finally, whether the prosecutor has proved his or her entire case beyond reasonable doubt. This is a strong argument against having an offence that muddies the waters as to how much evidence is required to convict an accused. It is also notable that in countries that prosecute illicit enrichment, the cases may require highly complex assessments of wealth and income often carried out by accountants and valuers. The shifting evidential or legal burden only adds to the complexity of the trial.

A further constitutional concern linked to the presumption of innocence is the potential for self-incrimination. An accused may well have an explanation for the disproportion in his or her assets, but the explanation may put the accused at risk of different criminal charges. For example, he or she may own an unlicensed business (such as an unlicensed bar) and to avoid being charged for running a liquor

retailer without a license, the accused avoided making a declaration of his or her ownership of the business. He or she may be in the midst of divorce proceedings and have concealed ownership of certain assets in order to avoid them being adjudged to be matrimonial property (and thus potentially losing ownership to the spouse). While running a bar without a liquor license or obstructing justice (through concealing evidence from a court) may be crimes, neither is the corrupt conduct at which the illicit enrichment offence is aimed. While the aspiration is for public officers to act lawfully in both public and private dealings at all times, the rule against self-incrimination applies to all accused, not just to private individuals. It is arguably unjust that in order for public officers to reasonably explain their income and assets and thereby mount a defence against a charge of illicit enrichment, they must explicitly incriminate themselves for other crimes.

It should, however, be noted that the so-called privilege against self-incrimination is not absolute. It is most commonly permitted with respect to driving offences- where one is required to have a tachometer installed in the vehicle or to submit to a breathalyser test.[54] Both can be used in evidence against an accused despite being self-incriminating. Furthermore, the National Police Service Act permits police officers to take fingerprints and non-intimate DNA samples (such as a mouth swab or eye-brow follicle) without being accused of violating the right against self-incrimination.[55] Finally, in theft and handling of stolen goods offences, being found in possession of goods recently reported as stolen can create a presumption that the accused either stole or committed the offence of handling

stolen goods. The test for recent possession was recently re-stated in the case of *Patrick Njiru Njue v Republic*[56]*:*

> '...first that the property was found with the suspect, secondly that; that property is positively the property of the complainant; thirdly the property was stolen from the complainant, and lastly; that the property was recently stolen from the complainant.'

To rebut the presumption, the accused must give a credible innocent explanation for his or her possession of the goods. This doctrine is based on Section 111(1) of the Evidence Act because the facts that could provide an innocent explanation are especially within the knowledge of the accused. This provision has usually been upheld in Kenyan courts.

One could argue that there is little difference between accepting that once the prosecutor has proven recent possession of stolen goods, the accused must give a credible explanation, and requiring that once the prosecutor proves disproportionate wealth, the accused must give a reasonable explanation. To distinguish these two situations would be inconsistent even if such a distinction superficially appears to uphold a defendant's fair trial rights.

Another form of potential unconstitutionality arises from the lack of a clear conduct element for the crime of illicit enrichment. General criminal law principles discourage holding a defendant liable where it is not proved that the defendant

engaged in any unlawful conduct. For example, the Penal Code defines an offence as '...an act, attempt or omission punishable by law'[57]

Because the illicit enrichment merely requires proof of the possession of disproportionate assets (or liabilities) and the absence of a reasonable explanation, the accused is at risk of being convicted simply for being found with items; he or she is a criminal for possessing assets and not being able to give a lawful explanation for that possession. There is no prohibited act, attempt or omission in the strict sense of those terms. This may infringe the *nullem crimen sine lege* provision in Article 50(2)(n) of the constitution (also known as the principle of legality) because no crime- as understood under the definition of an 'offence'- is disclosed.

However, criminal law does in fact penalise the accused for being in a particular state (such as idle or disorderly) or being in possession of prohibited things. For example, possession of narcotics,[58] implements for burglary,[59] stolen goods,[60] implements for forgery[61] and proceeds of crime[62] are all offences in Kenyan law. Thus although principle favours requiring some act, attempt or omission from the accused, it would be impossible to adequately prohibit certain wrongful behaviour if the prosecutor always had to show conduct on the part of the accused, especially if the aim of parliament is to prevent more serious crimes by discouraging the possession of certain preparatory implements or the concealment of criminal items. What is important in terms of fairness is that the accused is in *voluntary* possession of prohibited items: in the case of illicit enrichment, the 'disproportionate assets'. This can be reflected by the fault element of 'intent' attached to the physical

element of ownership/control as recommended by the UNCAC. Other states, such as Argentina, have dealt with this problem by interpreting the illicit enrichment offence to mean that it is the conduct of *enriching* oneself in a significant and unjustified manner during public office that is prohibited.[63]

The principle of legality might also be violated if the term 'disproportionate' is not fully defined. . Indian jurisprudence, for example, regards more than ten percent deviation from known sources of income as 'disproportionate'.[64] But as the Karim Wade and Jayalalitha cases seem to demonstrate, in practice, prosecutors will focus efforts on increases in wealth or disproportion between wealth and income well above ten percent in order to avoid doubt about this element of the offence. In the *Jayalalitha* case, the disproportion between the accused's known total income and net assets during her term as Chief Minister was nearly 536 million rupees or over five hundred percent.[65] Similarly the millions of dollars in assets that Karim Wade allegedly hid away were clearly more than ten percent above what a person earning the salary of a Senegalese Cabinet Minister could have accrued. Not every 'significant increase' or disproportion may be as magnificent as in these two cases, but it shows that the threshold of disproportion need not be problematic if the prosecutor picks his or her target carefully.

Courts might also resolve any uncertainty in the definition of 'significant increase' or 'disproportionate' assets through development of jurisprudence. But that may violate the doctrine of *in dubio pro reo* and possibly the principle of non-retrospectivity. The best way to address this is by giving statutory guidance as to

what is a 'significant increase' or 'disproportionate'. Indeed, bearing in mind the temptation to turn high profile corruption proceedings into political contests, having a clear legal test will protect prosecutors from accusations of 'political targeting' when launching illicit enrichment proceedings.

A further reason that an offence of illicit enrichment is an unnecessary is that the POEA, the ACECA and the POCAMLA arguably adequately provide for the situation where a public officer unlawfully enriches him or herself. The POEA criminalises the failure to file a wealth declaration as well as the filing of a false declaration. The ACECA allows the EACC to bring forfeiture proceedings against a person who is called upon to explain the source of their assets and cannot do so to the satisfaction of a court. Finally, the POCAMLA penalises persons who conceal, possess or otherwise deal with the proceeds of crime; this Act also permits forfeiture of the criminal assets upon conviction. Why, therefore is an offence of illicit enrichment necessary?

The ACECA, Section 55 is almost a criminal provision in everything but name. This includes the heightened burden of proof discussed earlier as well as the fact that proceedings for unexplained assets can be used as corroborative evidence in subsequent criminal proceedings for corruption or economic crime if the accused is alleged to have received a criminal benefit.[66] Another similarity with criminal proceedings is that no limitation period applies to forfeiture under ACECA Section 55.[67] It is not just the ACECA that covers situations akin to illicit enrichment. The POEA penalises failing to file a declaration or clarification under Section 32.

Section 32 also penalises filing a false declaration. The penalty for these POEA offences is a maximum fine of one million shillings or one year imprisonment.

The counterargument is that a criminal offence is necessary because Section 55 has now been fatally undermined by the *Amuti* case. Unless a superior court overrules that High Court judgment, the forfeiture for unexplained assets is no longer available to the EACC under that provision of the ACECA. In addition, even if the forfeiture provisions remained available post-*Amuti*, they would still not have the complete menu of adverse consequences that a criminal conviction can entail. For example, a public officer charged with corruption or an economic crime can be suspended from office pending trial as well as dismissed after conviction (on the expiry of the window for filing any appeal). Upon conviction, he or she is also disqualified from holding public office for ten years.[68] The threat of criminal conviction is also a better bargaining chip for prosecutors seeking to 'encourage' corrupt officials to enter into plea agreements to turn into state's witnesses and testify in return for reduced sentences. The threat of forfeiture does not carry the same gravitas.

With respect to the POEA, Section 32 is weakened by the fact that the penalties are paltry when compared with the potential gain that a public officer may make from illicit enrichment. While one million shillings may be an adequate deterrent to failing to file a declaration or filing a false declaration, if the public officer in question has illicitly enriched themselves by millions of shillings, even paying the maximum allowable fine may be a small price to pay to keep the rest of

the ill-gotten gains. Having an illicit enrichment offence that specifically requires calculation of the proportion of the officer's assets that are in excess of the known lawful sources is preferable. Provided the offence's penalty clause includes forfeiture provisions, this disproportion can be seized by the state *in addition* to any other imprisonment or fine that the convicted officer would pay. Alternatively, upon conviction for illicit enrichment, the disproportion could be assessed as 'proceeds of crime' under the POCAMLA[69] and subjected to criminal forfeiture proceedings under Part VII of that Act. Either method would be a more effective and dissuasive sanction than the capped fine under the POEA.

6. Conclusion

There are clear reasons why an anti-corruption prosecutor would want an offence like illicit enrichment that does not require proof of specific corrupt conduct. However, the trade-off should be stricter enforcement of all other fair trial rights under Article 50 of the Constitution. As argued above, this ensures safer convictions and gives a stronger basis for dismissing Article 40 challenges based on absence of due process. It also provides a good basis for forfeiture of assets either as a penalty for conviction or as proceeds of crime after POCAMLA proceedings.

Historically, Kenya has had challenges in ensuring the full implementation of the bill of rights. This may discourage parliament from the creation of criminal offences like illicit enrichment that appear to weaken the presumption of innocence,

principle of legality and freedom from self-incrimination. But many of the identified problems can be addressed in the drafting of the offence. It is also important to note that in India, roughly fifty to sixty percent of illicit enrichment prosecutions grow out of prosecution for other, more standard, corruption crimes.[70] Perhaps inculcating this approach among Kenyan prosecutors may lower the danger of wholly innocent persons being accidentally convicted since there is already a clear link between a public officer alleged to possess illicit riches and persons already investigated for offences such as bribery, embezzlement, conflict of interest, abuse of office or bid-rigging. There may not be a satisfactory way to address all challenges posed by such an offence. And one must never forget that fighting corruption through the criminal law depends on the ability and willpower of the government to investigate and prosecute.[71] But it is hoped that this article has demonstrated that appearances are deceiving and the criminalisation of illicit enrichment, at the very least, deserves serious thought.

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[9] ACECA, Section 55
[10] Muzila, Morales, Mathias and Berger (2012), *supra.,* p.8
[11] Kenya ratified the UNCAC on 9 December 2003 and the AUCPCC on 3 February 2007
[12] UNCAC, Article 20
[13] AUCPCC, Article 4(1)(g) and Article 5

[14] AUCPCC, Article 1
[15] Boles, 'The Problem of Unexplained Wealth', *supra.,* p.848
[16] Constitution of Kenya, 2010, Article 10(1)(b)
[17] Constitution of Kenya, 2010, Article 10(2)(c)
[18] Muzila, Morales, Mathias and Berger (2012), *supra.,* p.7
[19] Public Officers Ethics Act, Section 26(1)
[20] ACECA, Section 38 as read with Section 39
[21] The Law Commission, *Legislating the Criminal Code: Corruption* (1998), para.4.1
[22] POEA, Section 32
[23] POEA, Section 32
[24] AUCPCC, Article 7
[25] UNCAC, Article 8(5)
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[29] ACECA, Section 55(5)
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[32] ACECA, Section 55(6)
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[36] (2004) WLR 2111
[37] Ibid., para.1
[38] *Dombo Beheer B.V. v The Netherlands* (1993) 14448/88, para.32; *Levages Prestations Services v France* (1996) 21920/93, para.46
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[40] See POCAMLA, Part VII and Part VIII
[41] Boles, 'The Problem of Unexplained Wealth', *supra.,* p.858-861
[42] Muzila, Morales, Mathias and Berger (2012), *supra.,* Part 4
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[50] Per Justice Gikonyo in *Peter Wafula Juma and 2 Others v Republic* [2014] eKLR, para.11
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[53] Office of the Director of Public Prosecutions, *Annual Anti-Corruption Report* (2014), Section 2.1
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[64] *Krishnanand Agnahatri v. State of Madya Pradesh* (1977), 1 SCC 816; *Saran v. State of Madya Pradesh,* CRA 1060/2004 (2006)
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[68] The ACECA, Sections 62-64
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[70] Muzila, Morales, Mathias and Berger (2012), *supra.,* p.45
[71] Boles, 'The Problem of Unexplained Wealth', *supra.,* p.839