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ADDIS ABABA UNIVERSITY

COLLEGE OF LAW AND GOVERNANCE STUDIES, SCHOOL OF LAW

LL.M PROGRAM (CONSTITUTIONAL AND PUBLIC LAW)

Reversal of Burden of Proof In Case of the Crime of Illicit Enrichment: A Case Study

By

MARKOS DEBEBE BELAY

Research Paper submitted to the School of Law of Addis Ababa University in the postgraduate program in partial fulfilment of the Requirements of the Degree of Masters in Constitutional and Public Law (LL.M)

ADVISER: DR ABERA DEGEFA

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MARKOS DEBEBE BELAY

Approved by Examiners:

______________________________	______________________________
Adviser	Signature
______________________________	______________________________
Examiner	Signature
______________________________	______________________________
Examiner	Signature

DECLARATION

I, Markos Debebe Belay, declare that 'Reversal of Burden of Proof In Case of the Crime of Illicit Enrichment: A Case Study' is my own work, that it has not been submitted for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

Student: Markos Debebe Belay

Signature: ______________________

Date: __________________________

ACKNOWLEDGMENT

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However, none of the persons mentioned above should be responsible for any error or mistake possibly manifested in this thesis. This author takes full responsibility.

LIST OF ACRONYMS AND ABBREVIATIONS

1. ACHPR: the African Charter on Human and People's Rights
2. AU Convention: the African Union Convention on Preventing and Combating Corruption
3. AU: the African Unions
4. CCI: Council of Constitutional Inquiry
5. ECHR: the European Court of Human Right
6. ECOWAS Protocol: the Economic Community of West African States Protocol on the Fight against Corruption
7. FDRE: Federal Democratic Republic of Ethiopia
8. FEACC: Federal Ethics and Anti-Corruption Commission
9. FSC : Federal Supreme Court
10. GDP: Gross Domestic Product
11. HoF: House of Federation
12. IACAC: the Organisation of American States Inter-American Convention against Corruption
13. ICCPR: the International Covenant on Civil and Political Rights
14. IMF: the International Monetary Fund
15. PoI: Presumption of Innocence
16. TI: Transparency International
17. UDHR: the Universal Declaration of Human Rights
18. UK: the United Kingdom
19. UNCAC: the United Nations Convention against Corruption
20. UNDP: United Nations Development Programme
21. UNODC: United Nations Office on Drugs and Crime
22. UNTOC: the United Nations Convention against Transnational Organised Crimes
23. US: the United State of America
24. WB: the World Bank

KEY WORDS

Accused

Case Study

Corruption

Corruption Crimes Proclamation

Ethiopia

FDRE Constitution

Fundamental Fair trial rights

Onus of proof

Reversal of onus of proof

The Crime of Illicit Enrichment

CHAPTER ONE

INTRODUCTION

1.1 Abstract

This thesis aims at addressing questions such as what is reversal of onus of proof; is there a reversal of onus of proof in case of the crime of illicit enrichment; if any, its constitutionality. It answers the constitutionality question of the onus imposed on those who are accused of the crime of illicit enrichment under Ethiopian laws. The constitutionality test is made in view of the fundamental rights of accused persons that are guaranteed under the FDRE Constitution. To this end, this thesis embarks on by determining the existence or otherwise of reversal of onus of proof in case of the crime of illicit enrichment. Apart from theoretical explications, the discussion is backed up by examination of illustrative practical cases. Moreover, in addition to a discussion on the legal frameworks that govern the crime of illicit enrichment, the thesis examines the elements of and rationales behind criminalisation of illicit enrichment.

After discussing all the above issues, the author argues that, in Ethiopia, in case of the crime of illicit enrichment, there is a reversal of onus of proof, and it infringes the constitutionally guaranteed rights of accused persons, unambiguously, the PoI and protection against self-incrimination. However, contrary to Article 9(1) of the FDRE Constitution, the author recommends not to nullify the proclamation's provision on the crime of illicit enrichment but to amend some constitutional provisions; particularly, the provision on the PoI and the protection against self-incrimination.

1.2 Background to the Study

In criminal cases, the onus of proof lies on the prosecutor.[1] However, evidently, the nature of some crimes makes the application of this principle difficult. For instance, since corruption is

[1] Jerry E. Norton, 'Discovery in the Criminal Process', Journal of Criminal Law and Criminology, vol. 61(1970), p. 18. See also, Bertrand de Speville, 'Reversing the Onus of Proof: Is it Compatible with Respect for Human Rights Norms', 8th Anti-Corruption Conference (2010) p. 2; and, D. Hamer, 'Dynamic Reconstruction of the Presumption of Innocence', Oxford Journal of Legal Studies, vol. 31(2011), p. 417.

committed surreptitiously,[2] having the willful act of the parties involved,[3] it is problematic to gather adequate evidences that could proof criminality beyond a shadow of doubt.[4] Moreover, in case of the crime of corruption, unlike other ordinary crimes, most often than not, there is no person who is directly identified as a victim.[5] Often, the public at large is considered as a victim.[6] In addition to these problems, there is also difficulty in recovery of stashed funds, which are often the fruits of criminal acts including corruption. Put differently, since corrupt persons regularly enshroud their ill-gotten assets abroad, especially in countries where there are weak financial protection schemes,[7] it is difficult to locate the whereabouts of the ill-gotten asset and then recover it to its country of origin.

Having the above illustrative natures, the 'cancer'[8] of corruption is causing unspeakable misery around the globe. It is affecting both the private and public sectors at all levels: locally, nationally, regionally, and internationally.[9] For example, pursuant to the WB and the IMF, corruption is the greatest impediment in lifting millions of people out of poverty.[10] Notwithstanding the difference in extent, in every country, there is larceny of a huge sum of

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[2] Jeffrey R. Boles, 'Criminalizing the Problem of Unexplained Wealth: Illicit Enrichment Offenses and Human Rights Violations', Legislation and Public Policy, vol. 17(2014) p. 845. See also, M. Perdriel-Vaissiere, 'The Accumulation of Unexplained Wealth by Public Officials: Making the Offence of Illicit Enrichment Enforceable', U4 brief, No.1 (2012) p. 2, Ndiva Kofele-Kale, 'Presumed Guilty: Balancing Competing Rights and Interests in combating Economic Crimes', the International Lawyer, American Bar Association, vol. 40(2006), No. 4, pp. 914-915, D. Wilsher, 'Inexplicable Wealth and Illicit Enrichment of Public Officials: A Model Draft That Respects Human Rights in Corruption Cases', Crime L. & Soc. Change, vol. 45(2006), p. 27; and, D. Derenčinović, 'Criminalisation of Illegal Enrichment' Freedom from fear of magazine (2012) available at: *http://f3magazine.unicri.it/?p=469*, (accessed 29 March 2016), P. 1-2.

[3] Johann G. Lambsdorff, M. Taube, and M. Schramm (eds), The New Institutional Economics of Corruption, (2004), p. 145. See also, D. Wilsher, cited above at note 2, p. 26.

[4] Ndiva Kofele-Kale, cited above at note 2, p. 915. See also, Bertrand de Speville, cited above at note 1, p. 1.

[5] A. Peters, 'Corruption and Human Rights', Basel Institute on Governance Working Paper Series 20 (2015) p. 11. See also, N. Jayawickrama, J. Pope, and O. Stolpe, 'Legal Provisions to Facilitate the Gathering of Evidence in Corruption Cases: Easing the Burden of Proof', Forum on Crime and Society, vol. 2(2002), p. 23. However, dissenter such as Ninsin argues that corruption is not a victimless crime wherein merely the public are taken as the victim. For him, specifically, the workers and the peasants are the victims of corruption. On this point, see, KA. Ninsin, 'The Root of Corruption: A Dissenting View' in RS Mukanda(ed) African Public Administration, a reader (2000), p. 462.

[6] A. Peters, cited above at note 5, p. 11.

[7] Besides, there is a huge cost of repatriation and absence of effective international cooperation.

[8] The WB President James Wolfensohn used this terminology, for the first time, in 1996, see, James Wolfensohn, Speech on 'People and Development', Annual Meetings (1 October 1996) as cited in A. Peters, cited above at note 5, p. 7.

[9] Jeffrey R. Boles, cited above at note 2, p. 838.

[10] D. Chaikin and J. Sharman, Corruption and Money Laundering a Symbiotic Relationship, (2009), p. 1.

money.[11] Furthermore, the WB estimated that, annually, corruption is decreasing country's growth rate by 0.5 to 1.0 percentage points.[12] Likewise, the IMF's study exhibits that investment into countries with little corruption is significantly more than in countries with widespread corruption.[13] Additionally, an estimation made by the AU in 2004 ascertained that Africa as a continent lost an estimated amount of $148 billion annually to corruption, which is a representation of 25% of its GDP.[14] Without any doubt, this story on corruption is not different in Ethiopia's case. In Ethiopia too, there is an entrenched corruption. For example, consistent with the 2015 the TI's Corruption Perception Index report, it ranks 33 out of 100.[15]

The above facts attest how much the problem of corruption is deep rooted, at least, in Africa in general (in Ethiopia in particular), and the need to thwart it. Moreover, it is worth noting that corruption does not only kill business and slow down country's development. Besides other factors, it has a negative implication on the protection of citizens' fundamental rights. It is among the greatest obstacles in protecting fundamental constitutional rights. It has an inverse relationship with protection of human rights. Accordingly, fighting corruption, besides the significant role it can plays for country's development, will assuredly boost the protection of constitutionally guaranteed rights. Currently, there is a pressing need to fight corruption at all level. The public wants to see corrupt persons (and their criminal associates) held accountable and the forfeiture of the fruits of the crime.[16] In response to this public need and deleterious effect of corruption, almost all countries and the international community have been employing various mechanisms to combat corruption. One of such tools opted to fight corruption is

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[11] For example, General Augusto Pinochet of Chile ($27 million), Sani Abacha of Nigeria (between $2 and $5 billion), Hosni Mubarak of Egypt and his family (somewhere between $40 billion and $70 billion, Alberto Fujimori, of Peru (more than $2 billion) have stolen from the state pocket. For further discussion, see, Ndiva Kofele-Kale, Combating Economic Crimes Balancing Competing Rights, and Interests in Prosecuting the Crime of Illicit Enrichment, (2012), p. 3-5.
[12] UNDP, Constraints on the Private Sector in Developing Countries, available at *http://web.undp.org/cpsd/documents/report/english/chapter2.pdf* (accessed 25 March 2016) p. 17.
[13] See, Press Release, Tenth United Nations Crime Congress in Vienna, 10–17 April, United Nations (Apr. 6, 2000), *available at http://www.unis.unvienna.org/unis/en/pressrels/2000/cp373.html* (accessed 25 March 2016).
[14] Nelly G. Kamunde, 'Kenya law: The Crime of Illicit Enrichment under International Anti-corruption Legal Regime', Kenya Law Report Journal, available at *http://kenyalaw.org/kl/index.php?id=1891* (accessed 21 January 2016).
[15] According to this ranking, those countries that are close to zero are the most corrupt countries. See, the Transparency International, Corruption Perception Index (2015), available at *http://www.transparency.org/cpi2015* (accessed 25 March 2016).
[16] Worku Yaze Wodage, 'Burdens and Standards of Proof in Possession of Unexplained Property Prosecutions', Mizan Law Review, vol. 8(2014), p. 2.

introducing a new forms of corruption crime called illicit enrichment which is also known as 'Possession of unexplained property'[17].

Various anti-corruption instruments recognise the crime of illicit enrichment.[18] Nonetheless, except under the IACAC, the states parties to the instruments are not oblige to criminalise illicit enrichment. They are merely commended to consider criminalising it. It is the discretion of the states' parties. Accordingly, some countries have rejected the idea of criminalising illicit enrichment as an independent corruption crime under their respective domestic laws.[19] The main rationale behind the hortatory nature of the anti-corruptions instruments' provision on the crime of illicit enrichment and the rejection of criminalisation of illicit enrichment by some states is related with its constitutionality.[20] Some states have been arguing that since it reverses the onus of proof from the prosecutor onto the accused persons, criminalisation of illicit enrichment infringes the constitutionally guaranteed rights of accused persons such as the PoI, protection against self-incrimination and the right to remain silent. On the other hand, there are countries and scholars that support the criminalisation of illicit enrichment. For these proponents, the attack against criminalising illicit enrichment from constitutionality perspective is a result of a flawed understanding of the concept of reversal of onus of proof. For them,[21] there is no reversal of burden of proof unto the accused. The accused bear only evidentiary burden. The public prosecutor still bears the legal onus of proof. All told, since its introduction as anti-corruption tool, the crime of illicit enrichment has been controversial among scholars and jurisdictions of many countries save in Ethiopia.

[17] L. Muzila, M. Morales, M. Mathias, and T. Berger, On the Take: Criminalizing Illicit Enrichment to Fight Corruption (2012), p. 6. In this thesis, the author uses the term 'illicit enrichment'.
[18] For example, see, UNCAC (2003), Art. 20. See also, the AU Convention (2003), Art. 8; and, the IACAC (1996), Art. IX.
[19] For example, the USA, and Canada.
[20] The UNODC, the *Travaux Preparatoires* of the negotiations for the elaboration of the United Nations Convention against Corruption (2010) Vienna, available at *http://www.unodc.org/documents/treaties/UNCAC/Publications/Travaux/UNCAC_Travaux_Preparatoires__English.pdf* (accessed 21 March 2016), p. 39.
[21] For example, see, Ndiva Kofele-Kale, 'The Right to a Corruption-Free Society as an Individual and Collective Human Right: Elevating Official Corruption to a Crime under International Law', The International Lawyer American Bar Association, vol. 34 (2000), 149–78. See also, Worku Yaze Wodage, cited above at note 16, p. 7.

Akin to the FDRE Constitution, in many countries jurisprudence and international human rights instruments accused persons have, besides other rights, the right to be presumed innocent until proven guilty, protected from self-incrimination; and, right to remain silent.[22] The battle against corruption should not unjustifiably cost these illustrative rights of accused persons. In the absence of an express limitation to these rights under the supreme law, upsetting those rights under the guise of fighting corruption would be illegal. The battle against corruption, a disease besides other reasons undermines the protection of fundamental rights, should not be waged in a way that hurts those rights the elimination of corruption would benefit.

Despite the permissive nature of the crime at international arena and its rejection by some prominent country's legal tradition,[23] Ethiopia unequivocally criminalised illicit enrichment in 2004.[24] Based on this law, there have been prosecution of many individuals for the crime of illicit enrichment. Howbeit, in Ethiopia, hitherto, no one has questioned its constitutionality before an appropriate organ. Consequently, in this thesis, the author scrutinises the crime of illicit enrichment in Ethiopia; specifically, with a special focus on the question of reversal of onus of proof. Stated differently, the focus is on determining the existence or otherwise of reversal of onus of proof in case of the crime of illicit enrichment, and if any, determine its constitutionality in view of the constitutionally guaranteed rights of accused persons.

1.3 Statement of the Problem

Both at international level and some domestic jurisdictions, there have been contention or uncertainty concerning the compatibility of the crime of illicit enrichment, particularly its element of onus of proof, with the constitutionally guaranteed rights of accused persons such as the PoI, the right to remain silent, and protection against self-incrimination. It has been argued that, in case of the crime of illicit enrichment, the onus of proof shifts onto the accused so that violates constitutionally guaranteed rights of accused persons. Due to this, while the international anti-corruption instruments save the IACAC make the criminalisation of illicit enrichment

[22] See, the ACHPR (1981) Art. 7(2). See also, the ICCPR (1966) Art. 14(2) & (3)(g); the UDHR (1948), Art. 11, the FDRE Constitution, 1995, Year 1, Fed. Neg. Gaz., Art. 19(2) & 20 (3).
[23] For example, the USA, and, Canada.
[24] Corruption Crimes Proclamation, 2015, Proclamation, No. 881, Fed. Neg. Gaz. Art. 21.

hortatory, some domestic jurisdictions considered it unconstitutional. Nevertheless, under the Ethiopian law, unlike other jurisdiction,[25] this question of reversal of onus of proof in case of the crime of illicit enrichment has never been given enough attention under both the law and practice. This absence of consideration and challenge by and in itself does not guarantee the absence or existence of a problem. However, the close examination of the constitutional rights of accused persons such as the PoI, the right to remain silent, and protection against self-incrimination in light of the onus of proof element of the crime of illicit enrichment begs a question of constitutionality. However, in Ethiopia, unlike other jurisdictions, the practice looks like there is a tendency of accepting the problem without adequate scrutiny. Therefore, it is necessary to look into the situation before it is too late. In a nutshell, in Ethiopia, the constitutionality of the onus assumed by the accused in case of the crime of illicit enrichment has never been determined in light of the constitutionally guaranteed rights of accused persons. Indeed, the question of whether there is a reversal of onus of proof or not itself is controversial.

Hence, this thesis determines the existence or otherwise of and scrutinises the constitutionality of reversal of onus of proof in case of the crime of illicit enrichment in the Ethiopian law.

[25] For example, the South African Constitutional Court in the State *v.* Samuel Manamela, Jabulani Mdlalose and the Director-General of Justice case states that 'The question of the constitutionality of reverse onus provisions has come to this Court with more frequency than any other matter and has produced a number of judgments in which such provisions have been struck down.'

1.4 Objectives of the Study

1.4.1 General Objective

The main objective of this thesis is to examine the existence or otherwise of reversal of onus of proof in case of the crime of illicit enrichment; and if any, determines its constitutionality under Ethiopian law.

1.4.2 Specific Objectives

The following are the subsidiary objectives of the thesis. These are:

I. It aims to discuss the elements and rationale of criminalising illicit enrichment.

II. It targets to explore the onus of proof in general and in case of the crime of illicit enrichment in particular.

III. It aims to examine the existence or otherwise of reversal of onus of proof in case of the crime of illicit enrichment; if any, and securitises its constitutionality in view of the constitutionally guaranteed rights of accused persons and other related criminal law principles.

1.5 Research Questions

The following are the research questions of this thesis:

I. What are the elements of and rationales behind recognising the crime of illicit enrichment?

II. What does reversal of onus of proof denote? Is there a reversal of onus proof in case of the crime of illicit enrichment under Ethiopian law, if any, is it constitutional?

1.6 Significances of the Study

The thesis has the following main significances:

A. Since the concept of reversal of onus of proof is relatively a new concept in Ethiopia, this thesis shades a light as to how it should be understood.

B. Since this paper determines the existence or otherwise of reversal of onus of proof in case of the crime of illicit enrichment and determine its constitutionality in light of the constitutionally

rights of accused persons, it will solve possible potential problem that could be raised in the future.

C. The paper also serves as a reference material for academicians, practitioners and anybody who wants to have knowledge concerning the crime of illicit enrichment.

1.7 Literature Review

In the Ethiopian context, there are only handful scholarly writings on the subject of illicit enrichment. To be specific, besides a journal articles written by Worku Yaze Wodage entitled 'Criminalization of 'Possession of Unexplained Property' and the Fight against Public Corruption: Identifying the Elements of the Offence under the Criminal Code of Ethiopia',[26] and 'Burdens and Standards of Proof in Possession of Unexplained Property Prosecutions',[27] there is a thesis written by Mesay Tsegaye Meskele on the legal framework of illicit enrichment entitled 'The legal framework of illicit enrichment in Ethiopian anti-corruption law'.[28] Moreover, there is also one unpublished research paper entitled 'Possession of Unexplained Property as a Crime under the Criminal Code' written by Tsedey Girma.[29]

However, the author is convinced that these works do not fully address the objectives this paper aims to achieve. None of the works tried to determine the existence or otherwise of reversal of onus of proof in case of the crime of illicit enrichment and test its constitutionality in Ethiopian law. Moreover, these works were written before the promulgation of the current Corruption Crimes Proclamation. Therefore, the author believes that there should be further research.

[26] Worku Yaze Wodage, 'Criminalization of 'Possession of Unexplained Property' and the Fight against Public Corruption: Identifying the Elements of the Offence under the Criminal Code of Ethiopia', Mizan Law Review, vol. 8(2014).
[27] Worku Yaze Wodage, cited above at note 16.
[28] Mesay Tsegaye Meskele, The legal framework of illicit enrichment in Ethiopian anti-corruption law (2012**,** Faculty of Law, University of the Western Cape (South Africa) & Humboldt University (Germany).
[29] Tsedey Girma, Possession of Unexplained Property as a Crime under the Criminal Code (2007, Faculty of Law, Addis Ababa University).

1.8 Scope of the Study

Corruption can be committed both in the public and in private sectors. Additionally, there are various typologies of corruption. However, this thesis's scope is delimited on the crime of illicit enrichment; specifically, the question of reversal of onus of proof and its constitutionality under the contemporary Ethiopian legal tradition.

1.9 Limitation to the Study

I. The first major problem that the author faces is the absence of established practice of challenging the constitutionality of illicit enrichment in general and reversal of onus of proof in particular in Ethiopia. Hence, it was impossible to back up the thesis by cases that appear before the CCI and the HoF. However, the author has tried his best to crystallise the possible problem by using cases adjudicated before regular courts and the Cassation Division.

II. The second problem that the author faces is the absence of transparency in some institutions such as the FEACC. For instance, the FEACC was not willing to make some cases available and give enough information.

III. The other limitation is in relation to literatures. Although there are some works on the general notion of corruption and illicit enrichment, the writings on the issues of reversal of onus of proof in Ethiopian context are almost none.

1.10 Research Methodology

In order to achieve the objective of this thesis, the author primarily employs document analysis. This includes:

I. Analysis of the law: Meaning, interpreting and discussing laws related to the crime of corruption in general and illicit enrichment in particular; and,

II. Literature review: nevertheless academic works are limited, the author wisely used the available once for the accomplishment of the intended purpose. The author also, besides

interview, examines some illicit enrichment cases, which can demonstrate the practical aspect of the law.

1.11 Organization of the Study

This thesis has four chapters. This chapter being the first chapter sets out the context of study. The second chapter looks into a thumbnail sketch of the crime of illicit enrichment. It tries to put it in perspective. Subsequently, the third chapter, having the second chapter as a background, explicates the issue of reversal of onus of proof in case of illicit enrichment, and determine its constitutionality in Ethiopian legal tradition. Finally, the fourth chapter provides a conclusion and recommendations.

CHAPTER TWO

THE OFFENCE OF ILLICIT ENRICHMENT IN PERSPECTIVE

Corruption is a generic notion. It encompasses various conducts in it as a crime. One of such conducts is the crime of illicit enrichment that this thesis aims to examine in view of reversal of onus of proof. Accordingly, this chapter intends to put the crime of illicit enrichment in perspective and serves as a backbone for the next chapters' elucidation on reversal of onus of proof.

2.1 Criminalisation of Illicit Enrichment

2.1.1 Development

The conception of criminalising illicit enrichment was emerged in Argentina and India at the end of the 20th century.[30] In Argentina, for instance, a state congressional representative named Rodolfo Corominas Segura initiated it.[31] In 1936, albeit never became a law, he introduced a bill that enable the government to penalise those 'public officials who acquire wealth without being able to prove its legitimate source'.[32] Following to this bill, similar bills were introduced in successive legislations until 1964,[33] and after four decades in 2010, illicit enrichment had been criminalised in more than 40 jurisdictions.[34] This rapid expansion of the crime of illicit enrichment into many jurisdictions as a best anti-corruption tool is ascribed to its recognition by the major anti-corruption instruments.[35] Of these instruments, whereas the Vienna Convention[36] and the UNTOC[37] embraced the idea behind it,[38] the IACAC,[39] UNCAC[40] and the AU

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[30] L. Muzila, M. Morales, M. Mathias, and T. Berger, cited above at note 17, pp. 7-8. See also, Worku Yaze Wodage, cited above at note 26, p. 48.
[31] L. Muzila, M. Morales, M. Mathias, and T. Berger, cited above at note 17, p. 7.
[32] Ibid.
[33] Id., p. 8.
[34] Ibid.
[35] Id., p. 9.
[36] The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (hereinafter, the Vienna Convention), (19 December 1988), Art. 5(7).
[37] UNCAC, cited above at note 18, Art. 12(7).
[38] Meaning, they did not criminalise illicit enrichment *per se* but have reversal of onus notion.
[39] The IACAC, cited above at note 18.
[40] UNCAC, cited above at note 18.

Convention [41] have unambiguously criminalised illicit enrichment. Besides these three conventions, regional instruments such as the ECOWAS Protocol criminalise illicit enrichment.[42] By contradistinction with the other instruments, the criminalisation of illicit enrichment under UNCAC, albeit hortatory, arguably shows the better place given for it. UNCAC introduced the crime at global level as an advisable anti-corruption tool. Consonant with it, many states have criminalised illicit enrichment. However, the criminalisation of illicit enrichment under the major anti-corruption instruments has never been without a challenge. For example, states parties to the IACAC such as Canada and the US expressly refused its criminalisation.[43] According to these countries, the crime of illicit enrichment shifts the onus of proof onto the accused and violates the constitutionally guaranteed rights such as the PoI.[44]

2.1.2 Conceptual Underpinning and its Constituent Elements

It is not uncommon to witness, most often in developing countries, when some people amassed a huge sum of money or live a lavish lifestyle that is incompatible with their legitimate known source of income. A person who gets an average monthly salary of close to ETB 5000 may have a lifestyle of a multimillionaire businessperson. This incompatibility begs a question as to the source of the income. For many, even without having credible evidence, the presumption is an illicit source. The crime of illicit enrichment comes when there is such misalliance between the legitimate known source of income and the asset at hand.

Although various international and regional instruments as well as domestic jurisdictions have defined the crime of illicit enrichment, in this thesis, besides the Ethiopian legal tradition, the author only uses the definition accorded by the IACAC, the AU Convention, and UNCAC. Moreover, since the definition provided under the IACAC, the AU Convention, and UNCAC is

[41] The AU Convention, cited above at note 18.
[42] The ECOWAS Protocol on the Fight against Corruption (adopted 2001), Art. 6(3)(a). It has not yet enforced.
[43] Moreover, the permissive language under UNCAC shows the absence of a unanimous support for the criminalisation of illicit enrichment.
[44] D. Chaikin and J. Sharman, cited above at note 10, p. 133.

quoted under various scholarly works,[45] this author reiterates only the contemporary Ethiopian law definition.

Ethiopia, a party to UNCAC[46] and the AU Convention,[47] for the first time, criminalise illicit enrichment by the 2004 FDRE Criminal Code.[48] Before that, it was provided as evidentiary rule.[49] Presently, the Corruption Crimes Proclamation No. 881/2015 governs the crime of illicit enrichment. This proclamation under its Article 21 defines the crime of illicit enrichment as follows:

> Article 21: Possession of unexplained property
>
> 1) Any public servant or employee of a public organisation, being or had been in office, who:
>
> a) maintains a standard of living above that which is commensurate with the official income from his present or past occupation or other means; or,
>
> b) is in control of pecuniary resources or property disproportionate to the official income from his present or past occupation or other means;
>
> unless he proves satisfactorily before the court of law as to how he was able to maintain such a standard of living or how such pecuniary resources or property came under his control, shall be punishable …….. .
>
> 2) where the court, during proceeding under paragraph (b) sub-article 1 of this article is satisfied that there is reason to believe that any person, owing to his closeness to the accused or other circumstances, was holding pecuniary resource or property in

[45] Concerning IACAC, see, the IACAC, cited above at note 18. Regarding the making process of this provision, see, Carlos A. Manfroni, The Inter-American Convention against Corruption Annotated with Commentary, (2003), pp. 67-73. Concerning the AU Convention, see, the AU Convention, cited above at note 18. Concerning UNCAC, see, UNCAC, cited above at note 18.
[46] It signed UNCAC on 10 December 2003 and ratified it on 26 November 2007.
[47] It signed the AU Convention on 1 June 2004 and ratified it on 18 September 2007.
[48] The FDRE Criminal Code, 2004, Proclamation, No. 414, Fed.Neg. Gaz, Art. 419.
[49] The Anti-Corruption Special Procedure and Rules of Evidence, 2001, Proclamation, No. 236. Fed.Neg. Gaz, Art. 37.

> trust for or otherwise on behalf of the accused, such resources, or property shall, in the absence of evidence to the contrary, be presumed to have been under the control of the accused.

Before explaining the constituent elements of the Ethiopian, and the international and regional instruments' definition of the crime of illicit enrichment, it is illuminating to say few words on the nature of such legal instruments' provisions. Whereas there is a bit similarity in their formation, there is one major difference.[50] Contrasting to UNCAC and the AU Convention, the IACAC uses a mandatory language with a qualification clause. Under the IACAC, criminalising illicit enrichment is not the discretion of states parties. Conversely, under UNCAC and the AU Convention, states parties are only recommend criminalising illicit enrichment. This permissive language in these conventions was opted owing to constitutionality issue. Differently stated, there was argument by some states parties that criminalising illicit enrichment via its reversal of onus of proof element could undermine basic constitutional fair trial rights conferred upon accused persons.[51] Indeed, the IACAC too was not free from such a challenge.[52] Coming back to Ethiopia, despite the permissive nature of the crime under UNCAC and the AU Convention, Ethiopia opts to criminalise illicit enrichment since 2004.

Moving to the definition bestowed by these instruments, compared to UNCAC and the IACAC, the AU Convention's definition is broader. It includes persons other than the public officials. The phrase 'any other person'[53] in the definition of the convention shows the possibility of hiding an asset under the name of other persons who are not public officials. Parallel to the AU Convention, Ethiopia foresees this possibility and the realm of illicit enrichment goes beyond public officials. Accordingly, the stand of the AU Convention and the Ethiopian law is compatible with the easily transferable nature of asset to third parties affiliated with the public officials in one way or another. Nevertheless, this does not mean that under UNCAC and the IACAC, these persons would not be responsible. For example, Article 52 of UNCAC allows

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[50] For further discussions and comparative analysis, see, Thomas R. Snidert and W. Kidane, 'Combating Corruption through International Law in Africa: A Comparative Analysis', Cornell International Law Journal, vol. 40, (2007) pp. 715-747.

[51] Mesay Tsegaye Meskele, cited above at note 28, p. 35

[52] In this regard, it is possible to remind Canada and the United States position.

[53] The AU Convention cited above at note 18, Art. 1(1).

investigation and prosecution of family members and/or other close associates of the public official under whose name the asset could be amassed. Therefore, it is possible to hold third parties responsible.

Further, all the three instruments have a qualification clause.[54] Put concisely, according to the instruments, the criminalisation` of illicit enrichment should be consistent with states parties' domestic constitution and fundamental principles. This enables them to refuse criminalisation of illicit enrichment if it is contrary to their domestic legal principles even without making an exception to the instrument.[55] Understandably, the qualification clause signposts the acknowledgment of the possible constitutional defies.[56]

Be the above natures of the provisions as they may, the offense of illicit enrichment has the following constituent elements.

2.1.2.1 Person of interest

In principle, unlike the Ethiopian law, the crime of illicit enrichment is mainly interested in public officials. And, various international and regional instruments have provided clear guidelines on who public officials are. For example, UNCAC defines public officials[57] as:

i. any person holding a legislative, executive, administrative, or 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; and,
iii. any other person defined as a public official in the domestic law of a state party.

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[54] The phrase 'subject to its constitution and the fundamental principles of its legal system' is the common preface of all the instruments provision on the crime of illicit enrichment.
[55] Carlos A. Manfroni, cited above at note 45, p. 70.
[56] D. Wilsher cited above at note 2, p. 27
[57] UNCAC, cited above at note 18, Art. 2.

In the Ethiopian context, the meaning of public servant[58] is broader and includes those who work in public organisation. Briefly, public servant refers to 'any person, who is employed, appointed or elected to work either temporarily or permanently in a public office[59] or public enterprise[60] and includes a member of the management board'.[61] Moreover, public organisations refers to 'any organ in the private sector which is whatever way administers money, property or any other resource collected from members or from the public or any money collected for the benefit of the public which includes appropriate company, but does not include religious organisations, political party, international organisation and *edir* or other similar traditional or religious associations'.[62]Accordingly, unlike the international and regional anti-corruption instruments, the crime of illicit enrichment under the Ethiopian law can be applicable on the private-to-private corruption but in limited scope. [63]

2.1.2.2 Period of check

The period of check is about the time span during which the person could be hold responsible.[64] Pursuant to the IACAC, in order for the person to be charged for the crime of illicit enrichment, she/he is not required to start her/his official duty. They could be charged since the date they have been selected, appointed, or elected.[65] Moreover, if there were discovery of an apparent subsequent enrichment that did happen during the performance of an official duty, they would be liable even after they have left their position. This shows that although the period of check overlaps with the officials' term of office, there is a chance that they could be charged while they did not actually start their official function or have already left their office. However, the question at this point remain how to determine the period of check.

Albeit there is no universally agreed means, there are three common approaches that are used to determine the period of check; these are the coincidence with the performance of functions, a

[58] The Ethiopian law opts to use the phrase 'public servant'.
[59] Corruption Crimes Proclamation, cited above at note 24, Art. 2(1).
[60] Id., Art. 2(3).
[61] Id., Art. 2(2).
[62] Id., Art. 2(4).
[63] Id., Art. 21(1).
[64] L. Muzila, M. Morales, M. Mathias, and T. Berger, cited above at note 17, p. 16.
[65] Carlos A. Manfroni, cited above at note 45, p. 71.

limited term after leaving their functions, and an open-ended period.[66] Irrespective of the approach used, the period of check overlaps with some part of the public official's term in office.[67] However, to avoid prosecution, in countries wherein the first two approaches are used, the corrupt public officials may defer receiving the undue benefit until they leave office or the specified period determined by the law expired.

In the Ethiopian case, there is an ambiguity concerning the period of check. The law requires that the person should be currently in office or was a public official and the asset is disproportional to his/her present or past occupation or other means.[68] The law does not clearly provide the time until when the official could be charged after she/he has lefts office. In this regard, Worku argues,[69] which is also affirmed by Mr. Billen Girmay, Chief Legal Advisor at FEACC and participated in the drafting process of the incumbent anti-corruption crimes law[70], Ethiopia adopted the third approach, which is leaving the time open-ended. Therefore, the only limitation is the general period of limitation provided under the FDRE Criminal Code. Accordingly, the period of check is determined based on Articles 216ff of the Code. Since the proclamation itself allows the application of the Criminal Code's provisions from Article 1 to 237,[71] and the FDRE Constitution also explicitly lists crimes that may not be commuted by amnesty or pardon of the legislature or any other state organ,[72] under the Ethiopian legal tradition, arguing for the total absence of a period of limitation in case of prosecuting illicit enrichment is unconvincing. Moreover, akin to the IACAC, although the proclamation is silent, the person to be charged for the crime of illicit enrichment should not be waited until he/she actually started his/her job. Rather, the person must be charged since he/she has been selected, appointed, or elected.

[66] L. Muzila, M. Morales, M. Mathias, and T. Berger, cited above at note 17, p. 16.
[67] Ibid.
[68] Corruption Crimes Proclamation, cited above at note 24, Art. 21.
[69] Worku Yaze Wodage, cited above at note 26, pp. 77-78.
[70] Corruption Crimes Proclamation, cited above at note 24.
[71] Id., Art. 34.
[72] The FDRE Constitution, cited above at note 22, Art. 28.

2.1.2.3 Significant/disproportionate increase in Assets

The significant/disproportionate increase in asset of the person in question is third main element of the crime of illicit enrichment. Asset, in this context, should be interpreted broadly, among others, to include the lifestyle of the accused person. Regarding the magnitude of the disparity in asset, although international and regional anti-corruption instruments use the phrase 'significant increase', the Ethiopian law opts phrases 'above that which is commensurate with the official income from his present or past occupation or other means' and 'disproportionate to the official income from his present or past occupation or other means'. Coming back to the conventions, acontraire reading of 'significant increase in assets' implies that insignificant increase in asset though illicitly obtained cannot be a ground for illicit enrichment prosecution. In this regard, Manfroni opines that the disparity in asset should be 'gross'.[73] For him, calling for a complete accuracy would be an onerous load on the person of interests. It would collude against the peace of mind they require to perform their official and other functions effectively.[74] Moreover, demanding such stringent standards would easily be manipulated. It could be used as a political weapon to attack political opponents.[75] The ruling regime can investigate and prosecute political opponents and others it wants to attack for any trivial disparity in asset and harass them. Therefore, for Manfroni, the approach adopted by countries such as Ethiopia is not advisable. However, although it may be absolve from the above problems, the stand taken by the international and regional anti-corruption instruments has its own positive and negative implications. On the positive side, it could proscribe prosecution for trivial asset discrepancies. In doing so, it serves as a controlling mechanism against the investigation and prosecution offices. It bars them from harassing public officials and other persons under the pretext of the crime of illicit enrichment. On the negative aspect, it may send a signal that certain level of corrupt practice is tolerable.[76] It may suggest that insignificant amount (petty corruptions) are acceptable or out of the realm of corruption. Be the implications as they may, the question now remains, what does 'significant increase' imply and which assets should be taken into account.

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[73] Carlos A. Manfroni, cited above at note 45, p. 72. See also, N. Jayawickrama, J. Pope, and O. Stolpe, cited above at note 5, p. 29.
[74] Carlos A. Manfroni, cited above at note 45, p. 72.
[75] Ibid.
[76] L. Muzila, M. Morales, M. Mathias, and T. Berger, cited above at note 17, p. 18.

Concerning the question of 'significant increase', the prevailing trends show that it denotes a relative term. Most countries leave the determination of whether there is a significant increase in asset or not for the prosecutors and courts on case-by-case approach.[77] However, it is yet admitted that 'significant increase in assets' as an *actus reus* of the offense of illicit enrichment is not palpable enough.[78] Accordingly, some countries expressly provided a minimum threshold in percentage. For instance, in India, the divergence in asset should be 10%.[79] Nothing less than 10% can be a ground for illicit enrichment prosecution. In Ethiopia, there is no such express minimum percentage threshold. The wording of the law tells that any disproportionality in asset could be a ground of illicit enrichment prosecution. According to Mr. Billen Girmay, the intention was to leave the disproportionality in asset to be determined on case-by-case approach. However, the practice seems to differ from what was intended by the law makers. According to the prosecutors of the FEACC,[80] the amount of the disparity is immaterial. Any disparity in asset can be a ground for prosecution. All said, increase in asset should include reductions in liabilities.[81] Unjustified payment of a large debt is tantamount to acquiring an illicit asset. There should be an all-rounded monitoring of the accused's asset.[82]

2.1.2.4 Mental element

In formulating the offense of illicit enrichment, as often as not, there is a tendency of omitting the required *mens rea.*[83] However, UNCAC explicitly requires intention.[84] According to its *Travaux Preparatoires*, this *mens rea* was opted to make the nature of the offence of illicit enrichment consonant with other core crimes in its Chapter III.[85] It was also considered as a means to avoid an arbitrary/unreasonable use of the crime for ill purposes.[86] On this requirement of UNCAC, Wilsher questions as to how a person who commit the crime 'intentionally' is again

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[77] Id., p. 17.
[78] Id., p. 20.
[79] Id., pp. 18-19.
[80] Interview with three prosecutors of the commission who do not want to be identified.
[81] Carlos A. Manfroni, cited above at note 45, p. 72.
[82] Ibid.
[83] For example, see, the AU Convention, cited above at note 18. See also, the IACAC, cited above at note 18.
[84] UNCAC, cited above at note 18, Arts. 20.
[85] See, the UNODC, cited above at note 20, pp. 195-196.
[86] Ibid.

bear the onus to offer a reasonable explanation to show the legitimacy of the asset.[87] For him, it is a ramification.

As stated above, save UNCAC, the other instruments including the Ethiopian law provides no express *mens rea* requirement. This absence provokes two lines of argument. First, it means that the law does not require another state of minds such as negligence. Since intention is an overarching element in the definition of crimes, it is not always mandatory to spell out it in every case.[88] It is an unwritten *mens rea* of all crimes. Hence, if there is omission concerning mental element of a crime, the required *mens rea* is intention. Second, the omission of *mens rea* in crime has its own purpose. It is a way of transforming the crime, in the case at hand illicit enrichment, into a strict liability offense so that allows prosecution of public officials even when they are genuinely ignorant of the an unexplained income and increase in a net worth.[89] Hence, the absence eases the mental element requirement and makes the public official responsible for whatever state of mind if there is a significant/disproportionate increase of asset. Under the Ethiopian law, albeit there is an omission, the FDRE Criminal Code provision on mental element can be applicable.[90] Accordingly, since there is no an express statement as to liability based on negligence, the required *mens rea* is intention.[91]

2.1.2.5 Absence of justification

In any jurisdiction, accruing asset is not a crime *per se*. However, in illicit enrichment's context, some groups of persons should have justification for the asset they have accumulated in excess of their legitimate source of income. If there is no legitimate justification, there will be a responsibility for the crime of illicit enrichment. For this reason, this element of the crime of illicit enrichment has been controversial. It has been considered as an element that places/shifts the onus of proof onto the accused or; at least, relieves the prosecutor from proving the unlawfulness of the accumulated asset. In a related fashion, it makes the accused's onus very

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[87] D. Wilsher, cited above at note 2, p. 28
[88] L. Muzila, M. Morales, M. Mathias, and T. Berger, cited above at note 17, p. 21.
[89] Ibid.
[90] Corruption Crimes Proclamation, cited above at note 24, Art. 34.
[91] Id., Art. 21. See also, the FDRE Criminal Code, cited above at note 48, Arts. 57 cum 58 cum 59(2).

onerous, because, his/her failure to provide a justification leads to a presumption of corruption. Accordingly, there has been argument that the offense of illicit enrichment has the effect of reversing the onus of proof. Since this issue is the crux of the thesis, there is a detailed explication under the next chapter. Moving to the standard of justification required from the accused, while the international and regional anti-corruption instruments use the expression 'reasonable explanation', the Ethiopian law uses 'satisfactory explanation'. Accordingly, these expressions seem to connote that the accused's onus is less than beyond a shadow of doubt.

2.2 The Debate on Criminalising Illicit Enrichment

Compared to other forms of corruption crimes such as bribery, illicit enrichment is a new and most debateable form. There have been contentions in favour and against it. The major controversy revolves around the question of reversal of onus of proof and its constitutionality in view of the constitutionally guaranteed rights of accused persons. Thus, to crystallise this controversy and draw the holistic implication of the offense, the ensuing section converses these arguments.

2.2.1. Arguments against Criminalising Illicit Enrichment

I. The first challenge against criminalising illicit enrichment comes from the perspective of onus of proof. Unlike most offences, in the case of illicit enrichment prosecution, the onus of the public prosecutor is eased only to the extent of showing the existence of a significant increase in asset or disproportionality in asset between the known legitimate source of income and the accumulated asset.[92] The prosecutor is not required to prove the illegitimacy of the asset but the existence of discrepancy. Unless the accused prove the legitimacy of the amassed asset, they would be convicted for a corruption crime of illicit enrichment. For many, this is called 'a reversal of onus of proof', and violates the rights of accused persons such as the PoI, the right to remain silent, and the protection against self-incrimination. For example, for Snidert and Kidane,

[92] In other words, it means that it is enough if the public prosecutor proves the first four elements of the crime of illicit enrichment.

criminalising illicit enrichment is 'a remedy that is worse than the ailment'.[93] Compared to the role it plays in thwarting corruption, its adverse effect on constitutional rights such as the PoI of accused persons outweighs. Therefore, they advise countries not to implement illicit enrichment provision of international and regional anti-corruption instruments at domestic level. For them, illicit enrichment is 'fundamentally flawed as a matter of recognised principles of criminal justice.'[94]

II. The question of indispensability is the other challenge that is invoked against criminalising illicit enrichment. There is question on the need for another crime on corruption. For some, illicit enrichment is considered as an uncalled for crime. Introducing a new corruption crime is contrary to the central issue of criminal law, which is optimising the existing legal framework rather than introducing a new crime. The focus should be in enhancing the existing legal framework. Regarding this point, Derencinovic writes 'instead of introducing a new criminal offence into an anti-corruption legislation, due attention must be paid on how to improve the system of confiscations of illegal proceeds acquired by corruption criminal offences. So, the accent should not be on introducing new crime but on improving the already existing system set up to demotivate potential perpetrators from engaging in different forms of illegal exchange.'[95] Generally, illicit enrichment is unnecessary in terms of its benefit and the central idea of criminal law.

III. The third challenge to the offense of illicit enrichment is its delicate nature. It is susceptible for manipulation for illegitimate ends. The ruling regime may use it to attack persons whom it considered a challenge to its power. It is easy to accuse public servants and keep them busy with defending themselves or defame their reputation. Especially, in countries that do not require a significant increase in asset, alike Ethiopia, the problem is worrisome. It could be a means to paralyse prominent political opponents; at least until election periods are expired. This fear is

[93] Thomas R. Snidert & W. Kidane, cited above at note 50, p. 729.
[94] Ibid.
[95] D. Derencinovic, cited above at note 2. However, this criticism of Derencinovic is highly criticised by writers such as Ndiva Kofele-Kale as wrong-headed approach. For him, the criticism does not take into account the failure of the current assets confiscation regime. For the counter criticism, see, Ndiva Kofele-Kale, cited above at note 11, p 7.

real, especially in countries where the judiciary is symbolic.[96] In these countries, criminalising illicit enrichment has a more devastating effect than its benefit.

IV. Criminalising illicit enrichment is challenged from its utilitarian value perspective.[97] In principle, as a public sector corruption, it does not concern private-to-private corruption.[98] Moreover, it is applicable when there is 'a significant increase in asset'. Put differently, it works only in case of grand corruption. Petty corruption is not within its ambit.[99] Hence, it adds marginally almost nothing more to the global war against the 'cancer' of corruption.

V. Criminalising illicit enrichment may negatively affect the effectiveness of the investigation and prosecution office. Having the possibility of transferring the onus onto the accused in mind, investigators, and prosecutors may not be diligent enough, as they ought to be to uncover the truth and get the true criminals convicted. These organs, rather than exerting all their effort to find the truth, they might instead be tempted to rely on the anticipated justification of the accused.[100] Hence, illicit enrichment may adversely drag the efficacy of the investigators and prosecutors.

2.2.2 Arguments in Favour of Criminalising Illicit Enrichment

Despite the above arguments against criminalising illicit enrichment, various international and regional anti-corruption instruments as well as domestic jurisdictions have recognised it. This positive move towards criminalising illicit enrichment triggers a question as to the rationales behind it. Accordingly, the rationales are stated as follows.

I. Criminalising illicit enrichment is highly applauded in solving the difficulty of gathering evidence. The problem of gathering evidences that guarantee criminality comes from the stealth

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[96] Ndiva Kofele-Kale, cited above at note 11, p 8.
[97] Ibid.
[98] As explained previously, the same argument may not work under the Ethiopian law.
[99] Since the Ethiopian law requires disproportionality, it is hardly possible to say that petty corruption is out of the scope of illicit enrichment.
[100] Worku Yaze Wodage, cited above at note 26, p. 68.

nature of the crime of corruption.[101] Besides the difficulty to identify the immediate victims,[102] it is committed based on consent.[103] It is often committed in underground. Since all parties involved have an incentive to maintain secrecy, it is burdensome to gather enough evidences that secure criminal conviction. This problem along with its pervasiveness, has led states to adopt legislations that criminalise an 'inexplicable wealth'.[104] Criminalisation of illicit enrichment responds to the legal needs to circumvent the hurdles of meeting the onus of proof in corruption crimes, and the problem of gathering evidence.[105] It absolves the prosecutor from adducing evidence that show a commission of a direct corruption crimes such as bribery or any other form of corruption. Criminalising illicit enrichment also plays a paramount role in the judicial economy and administrative convenience.[106] Moreover, illicit enrichment increases conviction in corruption crimes prosecution and end impunity. Altogether, criminalising illicit enrichment is a way of arresting corruption in a way that is practical, policy responsive and effectively enforceable. For the proponents of illicit enrichment, the attack against illicit enrichment from constitutionality perspective is the result of a flawed understanding of the concept of reversal of onus of proof. For them,[107] there is no reversal of burden of proof unto the accused. The accused bear only an evidentiary burden. Imposing evidentiary burden is not a violation of the constitutional rights of accused persons and is accustomed under various domestic jurisdictions and supranational courts. Hence, there is no problem in criminalising illicit enrichment. The public prosecutor still bears the onus of prove.

II. Criminalising illicit enrichment is also justified by the practice of limiting fundamental rights and freedoms. Fundamental rights and freedoms are often limited, among other grounds, for the sake of public interest. In the scenario at hand, since corruption kills everything, the public have

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[101] Jeffrey R. Boles, cited above at note 2, p. 845. See also, M. Perdriel-Vaissiere, cited above at note 2, Ndiva Kofele-Kale, cited above at note 2, pp. 914-915; and, D. Wilsher, cited above at note 2, p. 27.

[102] M. Perdriel-Vaissiere, 'Overcoming the Paper Trail Issue - The Potential Value of Profit-Oriented Approaches and their Compatibility with ECHR' Council of Europe, (2011), available at: *www.coe.org.rs*, (accessed 21 March 2016).

[103] D. Derenčinović, cited above at note 2.

[104] D. Wilsher, cited above at note 2, p. 27.

[105] Ndiva Kofele-Kale, cited above at note 11, p. 8.

[106] Byron M. Sheldrick, 'Shifting Burdens and Required Inferences: the Constitutionality of Reverse Onus Clauses', Toronto Faculty of Law Review, vol. 44, no. 2, (1986) p. 204.

[107] For example, see, Ndiva Kofele-Kale, cited above at note 21, 149–78. See also, Worku Yaze Wodage, cited above at note 16, p. 7.

the right to fight it and live a corruption free life.[108] Owing to this, the fundamental constitutional rights of accused persons can be limited. Moreover, shifting some aspect of the onus of proof is not a new introduction. [109] For example, in case of illegal possession of firearms, the accused is required to show a permit to be acquitted from criminal charge.[110]

III. The public have an inherent interest of controlling its officials. The public want to know or can require their officials to explain how they amass their asset. Consonant with this, when assuming office, the public officials, *at least tacitly and arguably*, contractually agree to be liable for the crime of illicit enrichment.[111] Further, for reasons of administrative transparency, public trust, and criminal policy, the state has a right to demand government officials to own only a property that they can legally justify.[112] Hence, criminalising illicit enrichment is essentially rooted in the contractual and fiduciary responsibilities that public officials assumed while taking up office.

IV. Criminalising illicit enrichment is a means of strengthening transparency in government activity and secure accountability of public officials. If there is no transparency, the community can punish its administrators.[113] Concerning the public's interest in fighting corruption and making their officials accountable, Ndiva Kofele-Kale asks, 'in the interest of promoting the greater good for the greater number of people, which is what the global war against official corruption seeks to achieve, why not simply allow the accused public official to disclose the source of his suspicious wealth?'[114] For him, disclosing the source of the asset in question is the lesser evil.

V. Criminalising illicit enrichment is also justified by the presence of opaque laws in many "safe haven" states.[115] There are countries that serve as a hiding place for the proceeds of crimes and make its recovery very cumbersome. For example, in Seychelles, if the corrupt persons invest

[108] Ndiva Kofele-Kale, cited above at note 21, 149–78.
[109] Carlos A. Manfroni, cited above at note 45, p. 71.
[110] Ibid.
[111] L. Muzila, M. Morales, M. Mathias, and T. Berger, cited above at note 17, P. 7
[112] Carlos A. Manfroni, cited above at note 45, p. 70.
[113] Id., p. 71.
[114] Ndiva Kofele-Kale, cited above at note 2, P. 936.
[115] Ndiva Kofele-Kale, cited above at note 11, p. 7.

more than $10 million, it gives them immunity from prosecution and deportation.[116] Moreover, asset recovery is more complicated owing to the lack of transparency in the banking laws and system of these countries. In this situation, unless a special mechanism is devised to secure the proceeds of the crime before it lefts the country of the corrupt public officials, it would be like '*game of hide-and-seek'.* Hence, criminalising illicit enrichment allows governments to confiscate the proceeds of the crime of corruption before it is too late.[117]

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[116] R. Palan, R. Murphy and C. Chavagneux, Tax Havens: How Globalisation Really Works, (2009), p. 73
[117] Jeffrey R. Boles, cited above at note 2, pp. 846-847.

CHAPTER THREE

REVERSAL OF ONUS OF PROOF CONCERNING THE CRIME OF ILLICIT ENRICHMENT: APPRAISAL OF IT'S CONSTITUTIONALITY IN ETHIOPIA

The previous chapter has placed the offence of illicit enrichment in perspective. It has explained illicit enrichment from various vantage points. Therefore, this chapter only focuses on the most controversial issue[118] of the crime of illicit enrichment, which is reversal of onus of proof. Precisely, it converses the existence or otherwise of reversal of burden of proof, and if any, determines its constitutionality under Ethiopian law.

3.1 The Dilemma on Reversal of Onus of Proof in case of the Crime of Illicit Enrichment

3.1.1 Deciphering Reversal of Onus of Proof

Albeit onus of proof exists in both civil and criminal trials, since the main concern in this thesis is the crime of illicit enrichment, the discussion is limited to criminal trials. However, in both cases, onus of proof refers to 'the obligation of a party to persuade the existence or non-existence of a disputed matter of fact to the satisfaction of judges with the necessary amount and quality of evidence and/or other probative devices.'[119] It also dictates which party bears the onus to prove a certain fact during the course of a trial.[120] It is the legal obligation of a party in dispute to provide sufficient justifications up to a specified standard of proof in order to satisfy the courts that certain facts are true.[121] The standard of proof required differs based on the nature of the case. In a criminal case, unlike civil litigations wherein it is preponderance of evidence,[122] it is beyond a reasonable doubt.[123] In criminal cases, this onus is bear by the prosecutor.[124] Therefore, the

[118] At least, unlike the Ethiopian law, it has been very controversial in many other jurisdictions.
[119] Worku Yaze Wodage, 'Burdens of Proof, Presumptions and Standards of Proof in Criminal Cases', Mizan Law Review, vol. 8(2014), p. 259. See also, Simeneh Kiros Assefa, 'The Principle Of The Presumption Of Innocence And Its Challenges In The Ethiopian Criminal Process', Mizan Law Review, vol. 6 no. 2,(2012) p. 284.
[120] J. Gupta, 'Interpretation of Reverse Onus Clauses' National University of Juridical Sciences Law Review, vol. 5, Rew.5 (2012), p. 49.
[121] I. Dennis, The Law of Evidence, (3rd ed, 2007), p. 438.
[122] RA. Sedler, Ethiopian Civil Procedure, (1968), p. 195.
[123] Jeffrey R. Boles, cited above at note 2, p. 858. For detail discussion of what beyond reasonable doubt mean, see, Charles Robinson Mandlenkosi Dlamini, Proof Beyond A Reasonable Doubt, (1998, Faculty of Law, University of Zululand), pp. 67-115.
[124] In Ethiopian case, see, Criminal Procedure Code of Ethiopian, 1961, proclamation, No. 161, Arts. 136(1), 141 & 142.

prosecutor is under duty to prove every element of the alleged crime beyond a shadow of doubt.[125] However, recently there has been deviation from this typical rule of criminal law. In the prosecution of some crimes such as illicit enrichment, there is a trend to ease the prosecutor's or increase the accused's onus of proof. In other words, unlike the ordinary principle of criminal law, the prosecution office, which has the gargantuan hand of the state, has no duty to prove all the substantive elements of the crime. This trend of easing the prosecutor's onus is being termed a reversal of burden of proof. In criminal trials context, reversing the onus of proof means, instead of the prosecution proving the guilt of the accused beyond reasonable doubt, the accused would have to prove his/her innocence.[126]

Therefore, there is an argument that the justification requirement imposed on the accused in case of the crime of illicit enrichment proceeding shifts the onus of proof from the prosecutor onto the accused, before the former proof criminality beyond a shadow of doubt. However, there are also some who argue that it is not reversal of proof but an evidentiary burden.[127] To put vividly, in strict sense, reversal of onus of proof came into picture when the accused person bears a legal burden of proof. Accordingly, to determine whether there is a reversal of onus of proof in case of illicit enrichment or not, it is necessary to elucidate both evidentiary and legal burden of proof separately.

3.1.1.1 Evidentiary versus Legal Burden of Proof

The allocation of burden of proof is complicated by factors such as affirmative defences and presumptions that are considered exceptions thereby shifting the burden of proof to the defendant.[128] In criminal cases, the shifting or easing of burden of proof is made by using three

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[125] A Ashworth, 'Four Threats to the Presumption of Innocence', The International Journal of Evidence & Proof, vol. 10 (2006) pp. 250-251. See also, J. Gupta, cited above at note 120, p. 50, Simeneh Kiros Assefa, cited above at note 119, p. 289. For detail discussion, see, Charles Robinson Mandlenkosi Dlamini, cited above at note 123, pp**.** 228-281.

[126] R. Singh, 'Reverse onus Clauses: A Comparative Law Perspective', Student Advocate, vol. 12 (2001) p. 149.

[127] For example, see, Ndiva Kofele-Kale, cited above at note 2, pp. 909-944. See also, Margaret K. Lewis, 'Presuming Innocence, or Corruption, in China', Columbia Journal of Transnational Law. vol. 50(2012), p. 312; and, Worku Yaze Wodage, cited above at note 16, p. 12.

[128] Simeneh Kiros Assefa, cited above at note 119, p. 274.

principal ways. These are: presumptions, exceptions, and defences.[129] Focusing on the crime of illicit enrichment, it is made via presumption.[130] Presumption may impose either legal or evidentiary burdens. In illicit enrichment prosecution, the prosecutor discharged from its onus towards his/her case by adducing evidences that are less persuasive than might otherwise be required under the reasonable-doubt standard.[131] If the accused has no an otherwise explanation to its legitimacy, the asset in question is presumed as a fruit of corruption. As pointed out above, there is controversy as to this burden imposed on the accused: whether it is an evidentiary or legal burden.

Evidentiary burden also known as the 'burden of adduction/production of evidence', 'provisional or tactical burden', or the 'burden of going forward with evidence',[132] is about 'the obligation of a party to a dispute to lead evidence to show his/her case.'[133] In this case, the party is not under duty to prove anything.[134] It is simply required to raise a reasonable doubt as to the issue in question.[135] Once the party discharged the evidentiary burden successfully, the burden of proving or disproving the issue then shifts to the other party.[136] The parties should show that they have evidence that can keep their case alive. Concisely, whereas the prosecutor is required to indicate evidences that are sufficient to prevent the court from dismissing its charge on the ground that there is no case to answer, the accused is required to show that there is reasonable evidence that could challenge the charge brought by the prosecutor. Hence, evidentiary burden is all about pointing towards certain evidence(s) that make(s) the issue in a case alive, and that further deliberation on the issue is required before coming to the decision. It is not about proving or disproving something and convincing the court.[137] It is an aspect of the sensible proposition that there must be some degree of evidence on asserted issues before they can be a matter for the

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[129] D. Wilsher, cited above at note 2, p. 30.
[130] For further discussion of presumptions (in the context of illicit enrichment), see, Worku Yaze Wodage, cited above at note 119, pp. 262-265.
[131] John C. Jeffries, and Paul B. Stephan III, 'Defenses, Presumptions, and Burden of Proof in the Criminal Law', the Yale Law Journal, vol. 88(1979), p. 1327.
[132] Worku Yaze Wodage, cited above at note 119, p. 255.
[133] Id., p. 255.
[134] Id., p. 256.
[135] D. Hamer, cited above at note 1, p. 418.
[136] Ndiva Kofele-Kale, cited above at note 2, p. 928.
[137] D. Hamer, 'The Presumption of Innocence and Reverse Burdens: A Balancing Act', Cambridge Law Journal, vol. 66(2007), p. 143.

trial.[138] If the party fails to discharge its evidential burden, the issue would not be raised at a court of law.

Moving to legal burden of proof, it is mainly explained in light of the elements of the crime. In criminal cases, the public prosecutor is under duty to prove every element of the crime beyond a shadow of doubt.[139] This onus bears by the prosecutor is called legal burden of proof.[140] This burden cannot legally be shifts to the accused. The accused is said to have assumed the legal burden of proof and the onus of proof reversed if they are required to prove one or more element of the crime.[141] If the accused fails to provide rebutting evidences to the prosecution claim, they would be convicted for the alleged crime.[142] When legal burden placed on the accused, he/she must prove an ultimate fact necessary to the determination of guilt or innocence.[143] In short, unlike evidential burden, legal burden of proof is about proving or disproving the case. It is not about pointing towards evidences. While the legal burden of proof remains on a single party for the duration of the trial, by contrast the evidentiary burden shifts between parties over the course of the proceedings.[144]

Be the notions as they may, the crucial question is what kind of onus is imposed on the accused by the crime of illicit enrichment. Is it a legal or an evidential burden? On this issue, there is no unanimity. For example, academicians such Ndiva Kofele-Kale,[145] Margaret K. Lewis,[146] and Worku Yaze Wodage[147] believe that what the accused bears is an evidentiary burden. However, others such as Dan Wilsher believe that the defendant has the legal burden of disproving the presumption.[148] In a similar vein but only from Ethiopian law context, as explained under the

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[138] Burden and standard of proof; presumptions, (8th ed, 2014), available at *http://oxfordindex.oup.com/view/10.1093/he/9780199661954.003.0002*, (accessed 29 March 2016).
[139] Charles Robinson Mandlenkosi Dlamini, cited above at note 123**,** p. 228. See also, Simeneh Kiros Assefa, cited above at note 119, p. 289, A Ashworth, cited above at note 125, pp. 250-251; and, J. Gupta, cited above at note 120, p. 50.
[140] Ibid.
[141] D. Hamer, cited above at note 137, p. 418.
[142] L. Muzila, M. Morales, M. Mathias, and T. Berger, cited above at note 17, p. 25.
[143] Ndiva Kofele-Kale, cited above at note 2, p. 927.
[144] Bertrand de Speville, cited above at note 1, p. 1.
[145] Ndiva Kofele-Kale, cited above at note 2, pp. 909-944.
[146] Margaret K. Lewis, cited above at note 127, p. 312.
[147] Worku Yaze Wodage, cited above at note 16, p. 12.
[148] D. Wilsher, cited above at note 2, p. 30.

subsequent sections, this author argues that the accused has a legal burden of proof and hence there is reversal of onus of proof in case of the crime of illicit enrichment.

3.1.2 Reversal of Onus of Proof in Case of the Crime of Illicit Enrichment

3.1.2.1 Reversal of Onus of Proof in Case of the Crime of Illicit Enrichment: International and Regional Instruments

Albeit debatable, various international and regional instruments have recognised the notion of shifting onus of proof onto the accused. Of these instruments, although not in illicit enrichment sense, the Vienna and the Palermo Conventions are the front-runners. These conventions allow state parties to reverse the onus of proof for the sake of confiscating and seizing the proceeds of the crimes that are within their scope.[149] However, this reversal is advised to be in harmony with the principles of their domestic law and the nature of the judicial and other proceedings.[150] Moreover, although this reversal can play a significant role in fighting the perpetrators of organised crimes by going after their money, there was no unanimous acceptance of this provision of the conventions. For example, Colombia, while signing the Vienna Convention, expressly declared that it does not consider itself bound to the provision of the reversal of onus of proof because it is incompatible with the fundamental rights of the accused.[151]

In illicit enrichment context, the first convention that encompasses the notion of reversal of burden is the IACAC.[152] Afterwards, the AU Convention[153] and UNCAC[154] accepted it almost in similar formulation with the IACAC. Alike the Vienna and the Palermo Conventions, the inclusion of the reversal of onus of proof notion under the IACAC, the AU Convention, and UNCAC has no unanimous support. For instance, Canada and the US in the case of the IACAC, and Switzerland in case of UNCAC strongly opposed the inclusion of the crime of illicit enrichment in general and its justification element in particular in the respective conventions.

[149] The Vienna Convention, cited above at note 36, Art. 5(7). See also, the UNTOC (2000), Art. 12(7). While the Vienna Convention is limited to trafficking in drugs, the Palermo Convention embraces other organised/transnational organised crimes.
[150] The Vienna Convention, cited above at note 36, Art. 5(7). See also, the UNTOC, cited above at note 149, Art. 12(7).
[151] Ndiva Kofele-Kale, cited above at note 11, p. 36.
[152] The IACAC, cited above at note 18.
[153] The AU Convention, cited above at note 18.
[154] UNCAC, cited above at note 18, Arts. 20 & Art. 31(8).

These countries argue that the inclusion of illicit enrichment as one form of corruption crime in general and reversal of onus of proof notion provision in particular would contradict constitutional norms such as the PoI.[155] Further, similar to the Vienna and Palermo Conventions, these major anti-corruption instruments require the reversal of burden notion to be consonant with the principles of states parties' respective domestic law and the nature of their judicial and other proceedings. This qualification preface in the conventions is the result of the absence of unanimity during their deliberation stage. Since the deliberation stage, some countries argue that it is contrary to the constitutionally guaranteed fair trial rights of accused persons such the PoI.[156]

Therefore, the question in this thesis is, does the Ethiopian law as it is today allow the application of such kind of approach: shifting the onus of proof onto the accused; for that matter, easing the prosecutor's burden with the aim of fighting some crimes like corruption before it proves the guilty of the accused beyond a shadow of doubt? Therefore, the subsequent sections discuss this issue. Accordingly, discussion is made to determine the existence or otherwise of reversal of burden of proof in case of the crime of illicit enrichment and then its constitutionality.

3.1.2.2 Reversal of Onus of Proof in Case of the Crime of Illicit Enrichment: Ethiopian Context

Ethiopia is a state party to the major anti-corruption instruments, UNCAC and the AU Convention,[157] arguably, those encompasses the notion of reversal of onus of proof. Moreover, while ratifying these instruments, it did not oppose the application of this provision under its domestic legal system. Although it recognised the notion as evidentiary rule in 2001,[158] Ethiopia criminalises illicit enrichment for the first time in 2004. In 2015, with the aim of making its anti-corruption law consonant with continental and international instruments,[159] Ethiopia enacted a

[155] The UNODC, cited above at note 20, p. 195.
[156] Id., pp. 195-196.
[157] See, note 48 and 49.
[158] The Anti-Corruption Special Procedure and Rules of Evidence, cited above at note 49, Art. 37.
[159] Corruption Crimes Proclamation, cited above at note 24, preamble, paragraph, 1 & 2.

new Proclamation on corruption crimes. This proclamation criminalises illicit enrichment under its Article 21.[160]

Although there is no codified evidence law in Ethiopia,[161] akin to other jurisdictions, in Ethiopia, criminal law principle dictates that the public prosecutor has the duty to prove all elements of a crime beyond a reasonable doubt.[162] For example, if we put the last element of the crime of illicit enrichment in the ordinary criminal law principle context, it would have been the duty of the prosecutor to show the illegitimacy of the asset. The prosecutor would have been required to show the direct link of the asset and any form of corruption crime. However, currently, owing to the justification element imposed on the accused, the prosecutor is only required to show the first four elements of the crime.[163] After that, the court will have order the accused to provide justifications that prove the legitimacy of the asset. In other words, the asset presumed as a fruit of corruption and the accused will be required to rebut this presumption by adducing the required evidences. According to some scholars such as Worku Yaze Wodage, this onus imposed on the accused is hardly a legal but evidentiary burden.[164]

For this author, based on the subsequent reasons and the illustrative cases discussed in this thesis, there is a reversal of onus of proof in case of the crime of illicit enrichment under Ethiopian law. First, the question of illegality is an essential element of the offence of illicit enrichment. However, the burden concerning it (legality of the asset) is bear by the accused. The onus of the prosecutor is limited to the extent of adducing circumstantial evidence(s) that could show the possible commission of a corrupt practice. Stated differently, it is almost equal to the so-called evidentiary burden. However, the burden imposed on the accused is not about pointing evidence(s) but defending the case. Moreover, the accused assumed the burden of disproving the element of the crime that in the normal criminal law principle would have been assumed by the prosecutor. Second, the phraseology used during the introduction of the notion of reversal of

[160] Corruption Crimes Proclamation, cited above at note 24.
[161] This absence of a codified evidence law in Ethiopia causes a problem; specifically, difficulty to easily and fully understand burden of proof standards such as beyond a reasonable doubt.
[162] For detail discussion, see, Charles Robinson Mandlenkosi Dlamini, cited above at note 123, p. 228. See also, Simeneh Kiros Assefa, cited above at note 119, p. 289, A Ashworth, cited above at note 125, pp. 250-251; and, J. Gupta, cited above at note 120, p. 50.
[163] Person of interest, checking period, significant increase or disproportionate of asset, and mens *rea* elements.
[164] Worku Yaze Wodage, cited above at note 16, p. 7.

onus of proof by proclamation no. 236 in 2001 under Article 37 as evidentiary burden, and the anticipation made by the criminal justice administration policy that was adopted by the council of ministers in 2011 can be an indication for the existence of reversal of onus of proof. While the proclamation's Article 37 caption explicitly use the phrase 'Shifting of Burden of Proof', the criminal justice administration policy anticipates the shifting of burden of proof onto the defendant in some serious crimes.[165] Given the fact that corruption is one among the crimes mentioned as serious in the policy, the cumulative reading of the above facts strengthen the argument of the existence of reversal of onus of proof in case of the crime of illicit enrichment. Third, effect wise there is no difference between the evidentiary and legal burden of proof. In both cases, failure on the part of the accused will lead to conviction. Therefore, the difference made between evidentiary and legal burden of proof is merely theoretical. Hence, for this author, invoking evidentiary burden to justify the undue burden imposed on the accused is unacceptable. The placement of any kind of onus on the defendant, be the terminology a legal or evidentiary burden, is unacceptable under the existing Ethiopian law. For example, in Ethiopia, the exploration of its substantive and adjective law[166] as well as the practice of courts indicates that there is no even practice of the so-called evidentiary burden. If the prosecutor proves the existence of disproportionality in asset, the court orders the accused to defend his/her case.

To conclude, as affirmed by the next section discussion of illustrative cases, based on the existing Ethiopian law, there is a reversal of onus of proof in case of the crime of illicit enrichment.

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[165] For further discussion on the policy, see, Simeneh Kiros Assefa, cited above at note 119, p. 282-284.

[166] An assessment of the Criminal Procedure Code and other laws of the country by this author also show that there is no procedure called reversing of evidentiary burden.

3.1.3 Probing Illustrative Illicit Enrichment Cases before Ethiopian Courts

Albeit the offense of illicit enrichment is a new introduction under the Ethiopian law, there have been numerous cases before the Federal and Federating Units' Courts. In this regard, Worku Yaze Wodage, for example, in his work entitled 'Criminalization of 'Possession of Unexplained Property' and the Fight against Public Corruption: Identifying the Elements of the Offence under the Criminal Code of Ethiopia'[167] has listed and assessed some cases. His assessment clearly shows that, under the Ethiopian law, the crime of illicit enrichment is not a crime that remains on paper. Accordingly, this author finds it necessary to list the cases he mentioned hereunder by a footnote.[168] Accordingly, in this section, the author discusses illustrative cases that can show the existence of reversal of onus of proof in case of the crime of illicit enrichment.

I. The FEACC v. Yared Getaneh T/Haymanot

The FEACC prosecutor brought two charges against the accused, Yared Getaneh T/Haymanot. Whereas the first charge is based on Article 419(1)(a)(b) of the FDRE Criminal Code, the second charge is based on Article 684(1) of the same code.[169] In his amended charge, the prosecutor claimed that the accused has amassed a disproportionate amount of asset during the years 06/25/2001(Sene 18, 1993 E.C) to 06/16/2010(Sene 9, 2002 E.C). During these years, the accused has worked in different government offices as a public servant and amassed asset worthy of ETB 1,399,377.35. This asset is registered both under his and under his wife's name. To show the disproportionality in asset, the prosecutor, besides indicating the known source of the accused's income, stated that the accused has no other sources of income. Additionally, the

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[167] Worku Yaze Wodage, cited above at note 26.

[168] According to his assessment there are various cases that reach to the Cassation Division of the Federal Supreme Court such as 'Hankara Harqa v. SNNP EACC (Cassation File No. 58514, decided on Tir 9, 2003 E.C), Adem Abdu et al v. FEACC (Cassation File No. 57938, decided on Hamle 14, 2003 E.C), Tarekegn Teklu et al v. SNNP EACC (Cassation File No. 67411, decided on Tahsas 30, 2004 E.C), Tesfaye Tumiro v. FEACC (Cassation File No. 73514, decided on Hidar 6, 2005 E.C)' and there are also many more decided and pending cases before the federal and some of the regional states courts. To mention some: the FEACC v. Adem Abdu et al case, the FEACC v. Abdulkerim Adem et al case, the FEACC v. Seyfe Desta et al (on 6th count against 2nd defendant, Ahmed Seid Ebrahim) case, and the FEACC v. Elethabet W/Gebriel et al case (particularly the 4th count against 5th defendant, Mulugeta Yayeh) and the FEACC v. Birhanu Hika Roba case.' etc. For his detail discussion, see, Worku Yaze Wodage, cited above at note 26.

[169] Since the focus of this thesis is the crime of illicit enrichment, the question of reversal of onus of proof, the discussion is limited to the first charge.

prosecutor counted witnesses and listed various documents. The prosecutor's charge is detailed and clear enough. However, it does say nothing about the mental element of the accused.

After verifying the accused and reading out of the charge to the accused, the Court asked him whether he has an objection against the prosecutor's charge, and committed the crime or not. The accused responded that he has no objection to the charge but pleaded not guilty arguing that the assets are acquired lawfully. Following, based on the prosecutor's request, the Court immediately ordered the prosecutor to adduce its evidence only on the second charge and notified the accused that he will produce his defence subsequently. This means, for the mere fact that the asset is disproportional and its ownership is admitted by the accused, the Court finds a case against the accused on the first charge. In this case, the prosecutor was not required to show that the assets owned by the accused are fruits of a criminal conduct. Once the accused has finished adducing evidence, what follows was conviction and punishment. Then after, following appeal, the FSC confirms the decision of the Federal High Court. The case also appeared before the FSC Cassation Division. However, the Cassation Division decided that there is no basic error of law.

This case typically demonstrates how illicit enrichment cases have been and are being adjudicated before all level of Courts in Ethiopia, both at Federal and Federating Units level. Concerning the procedures followed in Court and the interpretation of the law on the crime of illicit enrichment, readers are remind that this case represent almost all illicit enrichment cases. Hence, the conclusion reached based on this case can safely be transposed to other crime of illicit enrichment cases.

- A crime is an act that is prohibited and made punishable by law.[170] Except in the case of juridical persons, a crime is only completed when all its legal, material, and moral ingredients are present.[171] If either of the ingredient elements is not exist, there is no crime. Accordingly,

[170] The FDRE Criminal Code, cited above at note 48, Art. 23(1).
[171] The FDRE Criminal Code, cited above at note 48, Art. 23(2) cum 23(3) cum 34.

although there is no consensus on the *mens rea* element,[172] the prosecutor should state these three elements of a crime when preparing its charge and the Court should also make sure the fulfilment of them in rendering its decision.[173] In case of the Ethiopian law on the crime of illicit enrichment, unlike UNCAC, the required *mens rea* is not expressly stated.[174] However, according to the cumulative reading of the Corruption Crimes Proclamation and the FDRE Criminal Code,[175] the accused should be in intentional state of mind to be hold responsible. As Abebe Asamere compellingly argues since the palpable mention of the *mens rea* in the prosecutor's charge helps the accused to challenge the evidences adduced by the prosecutor and the law by which he is charged, and also helps the Court to evaluate whether the prosecutor proves up to the required *mens rea* standard, the prosecutor should clearly indicate the *mens rea* in his charge.[176] However, in the case at hand and in many other cases[177] nothing is said concerning the *mens rea* of the accused. And, none of the parties including the Court opposed the omission of the *mens rea* element of the crime in the prosecutor's charge. At least arguably, this makes the burden of the prosecutor too easy. Stated differently, it imposes more onus of proof on the accused than the prosecutor does. However, for this author, this by and in itself cannot assure the existence of a reversal of onus of proof. It is a mere flaw being committed by the prosecutors and would have been easily corrected if the accused would have raised it.

- In criminal cases, the prosecutor has a legal duty to proof the commission of a criminal conduct to the required standard, beyond a reasonable doubt.[178] The prosecutor must prove the fulfilment of all the ingredient elements of the crime before the burden shifts to the accused.[179] The evidences used by the prosecutor to prove the commission of the crime should not also be

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[172] See, አበበ አሳመረ እንዳለ፡ <u>የሙስና ወንጀል እና የክርክር ሥነ ሥርዓት፥ ከመደበኛው ወንጀል የክርክር ሥነ ሥርዓት ጋር በንጽጽር የቀረበ</u>፣ (2006) ገጽ 8.
[173] See, the FSC Cassation Decision, file no. 38161 as cited in አበበ አሳመረ እንዳለ፣ cited above at note 172፣ ገጽ 3.
[174] Corruption Crimes Proclamation, cited above at note 24, Art. 21.
[175] Corruption Crimes Proclamation, cited above at note 24, Art. 34 cum the FDRE Criminal Code, cited above at note 48, Arts. 57 & 58.
[176] Owing to the presence of Article 111(2) of the Criminal Procedure Code of Ethiopia, this stand could be controversial. The provision, while mentioning the contents that should be included in a criminal charge, only mentions the material and legal elements. However, the author believes that the silence concerning the mental element does not mean it should not be included. After all, the list made by the provision is illustrative.
[177] Interview with three prosecutors of the FEACC who do not want to be identified.
[178] Charles Robinson Mandlenkosi Dlamini, cited above at note 123, p. 228. See also, Simeneh Kiros Assefa, cited above at note 119, p. 289, A Ashworth, cited above at note 125, pp. 250-251; and, J. Gupta, cited above at note 120, p. 50.
[179] Ibid.

acquired by incriminating the accused person.[180] Furthermore, it should not also violate the accused rights to be presumed innocent until proven guilty and the right to remain silent. In other words, the burden of proof imposed on the prosecutor is the reflection of the constitutionally guaranteed rights of accused persons. However, in case of the crime of illicit enrichment, as witnessed in this case, the prosecutor did not prove the commission of a criminal conduct by the accused. What he showed was the existence of a mere disproportionality in asset. It was up to the accused to show the lawfulness of the asset in question. In this case, the moment the accused admits the ownership if the asset, the Court ordered him to defend the prosecutor's charge. Although it is not palpable enough, this signifies that the onus bears by the accused is not merely evidentiary as some argues. Rather, there is a shift of the onus of proof from the prosecutor to the accused. The accused was required to defend the case against him despite the fact that the prosecutor did not prove the illegitimacy of the asset in question beyond a reasonable doubt. If the accused fails to do so, he will automatically be convicted. Absolving the prosecutor from proving the commission of a criminal conduct and limiting his duty to the extent of showing a mere disparity in asset is a clear instance of shifting the onus of proof, and this is what has happened in the case at hand.

II. The Southern Regional State's Anti-Corruption Commission v. Mr. Workneh Kenbatu (two person*s*)

This case started at Hawassa High Court. The Regional State's Anti-Corruption Commission Prosecutor charged Mr. *Workneh Kenbatu* and Mrs. *Amelework Dale* for the crime of illicit enrichment. According to the prosecutor's charge, the accused have accumulated asset worth ETB 2, 081, 468.90 cents in violation of Article 32(1) (b) cum 33 cum 419(1) of the FDRE Criminal Code. In their sequence, the prosecutor and the accused have adduced various evidences. Afterwards, the Court acquitted the accused based on Article 149(2) of the Ethiopian Criminal Procedure Code. Following that, the prosecutor has lodged an appeal to the Regional State's Supreme Court that affirmed the decision of the lower Court. The prosecutor then lodged petition to the Regional State's Cassation Division arguing that the lower Courts have committed

[180] See, for example, the FDRE Constitution, cited above at note 22, Arts. 19(5) & 20(3). See also, the ICCPR, cited above at note 22, Art 14(3)(g).

a basic error of law while acquitted the accused from the crime of illicit enrichment charge brought against them. The Division has accepted the petition and reversed the decision of the lower Courts. To do so, the Regional State's Cassation Division argued that the evidences adduced by the defendants were not credible and capable enough to refute the prosecutor's charge. Consequently, the accused petitioned to the FSC Cassation Division. The petitioners argued that the Regional State's Supreme Court Cassation Division has no power to evaluate the credibility and probative value of the evidences. Its power is limited to determining the existence or otherwise of a basic error of law. The FSC Cassation Division accepted the petition but confirmed the decision of the Regional State's Cassation Division decision. To resolve the case, besides others, the FSC Cassation Division found it necessary to determine the level of onus of proof required from the accused. It asked what level of onus of proof is required from the accused in illicit enrichment proceeding. Is it to prove the accurate legitimate source of the asset in question or simply causing a doubt? To give response for this issue, the Cassation Division opted to analyse the onus of proof imposed by Article 419 of the Criminal Code, the then law on the crime of illicit enrichment. For the Cassation Division, once the prosecution shows the existence of disproportionality in asset, the burden of proof shifts onto the accused. The prosecutor is free from proving the illegitimacy of the asset. Moreover, pursuant to the Cassation Division, the accused can only defend the case by showing the accurate legitimate source of the asset. Unlike the ordinary cases of criminal prosecution, causing a doubt on the prosecutor's charge or evidence(s) is not enough but proving the legitimacy of the asset accurately.[181] This interpretation of Article 419 of the FDRE Criminal Code by the Cassation Division clearly shows that the burden imposed on the accused is not the so-called evidentiary but a legal burden of proof. Put differently, as contemplated under the previous case, the Cassation Division affirms that there is a reversal of onus of proof in case of illicit enrichment prosecution.[182]

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[181] ….. "ከዚህም የምንረዳው ዓቃቤ ህግ በግልፅ ከሚታወቀው ህጋዊ ገቢ በላይ ነው በማለት በክሱ የገለፀውን እና በማስረጃ ያረጋገጠውን ሀብት **ትክክለኛ ምንጭ የማስረዳት ግዴታ (burden of proof) በተከሳሾች ላይ የሚወድቅ መሆኑን ነው፡፡** የተከሳሾች የማስረዳት ግዴታም ዓቃቤ ህግ በክሱ ከገለፀው እና በማስረጃ ካረጋገጠው ውጭ ተከሳሾች ሌላ ገቢ የሚያገኙበት ስራ ወይም የገቢ ምንጭ ያላቸው መሆኑን ብቻ ለፍ/ቤቱ በማሳየት የሚወሰን ሳይሆን፤ በዓቃቤ ህግ ክስ እና ማስረጃ ከተረጋገጠው ገቢ ውጭ በእጅ እንደተገኘ የተረጋገጠው ገንዘብ እና ሀብት **ትክክለኛ ምንጭ ምን እንደሆነ የማስረዳት ግዴታ እና ሀላፊነት ያለበት መሆኑን ከወንጀል ህግ አንቀፅ 419(1) ሶስተኛው ፓራግራፍ ድንጋጌ አቀራረፅ እና ይዘት ለመረዳት ይቻላል፡፡**" *emphasis added.*

[182] In order to understand the implication of this interpretation, it is necessary to remind the legal effect of the FSC Cassation Division interpretations. It is binding on federal as well as regional Courts at all levels, see, the Federal Courts Proclamation No, 1996, Proc. No. 25 Fed.Neg.Gaz, as re-amended, Federal Courts Proclamation, 2005,

The above illustrative cases of the crime of illicit enrichment clearly show the existence of a reversal of onus of proof in case of the crime of illicit enrichment under Ethiopian legal tradition. The cases show, unlike the so-called evidentiary burden, that the duty of the accused is not merely to raise a reasonable doubt but prove the legitimacy of the asset in question accurately. Undoubtedly, this shifting of the onus of proof onto the accused, as discussed under the next section, has a negative implication on their constitutionally guaranteed rights such as the PoI and the protection against self-incrimination. However, alike to all cases that have been decided and being adjudicated before the Regional and Federal Courts, no party to the proceeding including the Court[183] pondered its constitutionality. Hence, the cases, besides signifying the existence of reversal of onus of proof, tell the continuous silence concerning the constitutionality issue of reversal of onus of proof in case of the crime of illicit enrichment in Ethiopian law. Consequently, under the next section, the author breaks the silence and tries to determine the constitutionality of the reversal of onus of proof element that exists in the crime of illicit enrichment. This test of constitutionality is made in light of selected constitutionally guaranteed rights of accused persons.

Proclamation, No. 454, Art. 10(4). This shows that the case is not a mere court practice but a law that has a binding legal effect throughout the country.

[183] When there is possible constitutionality issue, the court can submit the issue to the CCI. See, Council of Constitutional Inquiry, 2013, Proclamation, No. 798, Fed. Neg. Gaz. Art. 4(1).

3.2 Exploration of Constitutional Concerns

Besides ending impunity, the battle against the 'cancer' of corruption complements human rights protection. An effective anti-corruption measures and protection of human rights are mutually reinforcing.[184] However, there is uncertainty concerning the compatibility of the crime of illicit enrichment, specifically owing to its reversal of onus of proof element, as a tool to fight corruption on the one hand, and the constitutionally guaranteed rights of accused persons on the other hand. In other jurisdictions, there have been arguments that connote the unconstitutionality of the crime of illicit enrichment;[185] unambiguously, it has been argued that it shifts the onus of proofs onto the accused and infringes the rights of accused persons.[186] However, in Ethiopia, despite the apparent application of the crime on practice and as discussed under the previous section the existence of a reversal of onus of proof, hitherto, unlike other jurisdictions, the constitutionality issue has not been raised before the appropriate organs. Moreover, according to Billen Girmay, even during the drafting of the contemporary Corruption Crime Proclamation, the crime of illicit enrichment in general was simply presumed constitutional.[187] Indeed, despite the fact that Ethiopians are accustomed to litigation for long time, they have not been active in challenging potentially unconstitutional laws, decisions and other measures.[188] Although further research is necessary, the following possible justifications can be contemplated on the rationale behind the continuous silence concerning this continuous silence. First, as Worku rightly

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[184] The United Nations Human Rights Office of the High Commissioner, The Human Rights Case against Corruption, available at *http://www.ohchr.org/Documents/Issues/Development/GoodGovernance/Corruption/HRCaseAgainstCorruption.pdf*, p. 5, (accessed 28 March 2016).

[185] For example, the South African and Italian Constitutional Courts on several occasions found reverse onus provisions to be unconstitutional. See, for example, the State v Coetzee and Others (South African Constitutional Court, 1997) and the State *v* Manamela and Another (Director-General of Justice Intervening)(South African Constitutional Court, 2000). Likewise, in 1994, the Italian Constitutional Court held that the illicit enrichment provision in that country was unconstitutional on the basis that it violated the presumption of innocence. See, L. Muzila, M. Morales, M. Mathias, and T. Berger, cited above at note 17, p. 47.

[186] For example, during the drafting stage of UNCAC, there was an argument that the criminalisation of illicit enrichment would be in violation of the constitutional rights of accused persons. Specifically, some delegations expressed their concern stating that it would face constitutional challenges, as it would include a reversal of the burden of proof. As a result, the provision on illicit enrichment suggested to be hortatory and moved to the chapter that deal with prevention. For further discussion, see, the UNODC, cited above at note 20, p. 196.

[187] He explained that since the crime was already recognised under the FDRE Criminal Code, there was no intention to look into and check the constitutionality questions that could be posed against criminalising illicit enrichment.

[188] Tadesse Melaku, 'Constitutional Adjudication in Ethiopia: Exploring the Institutional System and its Limitation' Ethiopian Bar Review, vol. 4 No. 2(2012), p. 112. See also, Getahun Kassa, 'Mechanisms of Constitutional Control: A Preliminary Observation of the Ethiopian System', Afrika Focus, vol. 20, No. 1-2 (2007) 86.

confirmed,[189] since the crime of illicit enrichment is a new introduction into the Ethiopian law and there is absence of continuous training, there is a huge lack of awareness concerning its holistic natures and implications among the practitioners including the public prosecutors and judges.[190] Hence, this lack of awareness could contribute for the reason behind the continuous silence. Second, this could be the result of lack of trust on the current constitutional interpretation scheme or fear to be associated with corruption. In general, in the presence of these postulations as to why challenging constitutionality is not accustomed (often exercised) in Ethiopia and without scrutinising the reversal onus of proof element of illicit enrichment in light of the constitutionally guaranteed rights of the accused, it is hardly possible to conclude that the existing silence favours its constitutionality. Consequently, the next section determines the constitutionality or otherwise of reversal of onus of proof in case of the crime of illicit enrichment in lights of the nature of the various rights of accused persons that are guaranteed under the FDRE Constitution.

3.2.1 The Principle of Presumption of Innocence

Various key international and regional human rights instruments,[191] as well as domestic jurisdictions have recognised the PoI as a bedrock principle.[192] Moreover, in almost all domestic jurisdictions, it has the status of a higher constitutional norm.[193] The principle gives every person the right to be presumed innocent until proven guilty; in doing so, protecting innocent defendants is its main aim.[194] It protects accused persons from being oppressed by the immense power and resources of the government.[195] Accordingly, the principle requires judges and all other public officials to refrain from prejudging any case.[196] It implies that before an accused can be convicted, the judge must be satisfied beyond a reasonable doubt as to the existence of all the

[189] Worku Yaze Wodage, cited above at note 26, p. 71.
[190] Worku Yaze Wodage, cited above at note 16, p. 39.
[191] For example, see, ACHPR, cited above at note 22, Art. 7(2). See also, the ICCPR, cited above at note 22, Art. 14(2); and, the UDHR cited above at note 22, Art. 11.
[192] See, for example, the UK, Canada, the US, Indian and Ethiopian law.
[193] D. Wilsher, cited above at note 2, p. 29.
[194] A. Ashworth, cited above at note 125, 253.
[195] J. Gupta, cited above at note 120, p. 49.
[196] S. Baradaran, 'Restoring the Presumption of Innocence', Ohio State Law Journal, vol. 72(2011), p. 724. See also, Ndiva Kofele-Kale, cited above at note 2, p. 917.

essential elements of the offense.[197] It connotes, among others, the onus of proof that lies on the prosecution.[198] The principle requires the presumption that suspects of crime or defendants in criminal trials did not commit the offence until proven guilty.[199] The prosecutor should prove every element of the criminal charge beyond a shadow of evidence.

Unlike the international instruments,[200] many countries allow an express limitation to the principle of PoI.[201] Likewise, in countries where there is no express limitation, the principles of rationality and proportionality test have been used as a means to restrict the principle.[202] These tests are developed following the decision of the ECHR in *Salabiaku v. France.*[203] In line with the Court's argument, although countries have no an express exception in their legislation, limiting the PoI have been found still to be constitutional. The infringement of the right of accused persons to be presumed innocent is justified based on the public's interest in convicting corrupt public officials and the severity and pervasiveness of public-sector corruption.[204] Similarly, under the international instruments, albeit they seem absolute, in practice, courts have held that this right can be qualified.[205] Generally, the practice in other jurisdictions, both supranational organs and domestic jurisdictions suggest that the PoI is not an absolute right of accused persons. The difference seems on the justifiability and proportionality of the public interest to fight corruption as a limitation to the right.[206] The question remains whether it is possible to adopt similar interpretation in Ethiopia.

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[197] R. Singh, cited above at note 126, p. 155.
[198] Nelly G. Kamunde, cited above at note 14, p. 4.
[199] M. Naughton, 'How the Presumption of Innocence Renders the Innocent Vulnerable to Wrongful Convictions', Irish Journal of Legal Studies, vol. 2 (2011), 41.
[200] For example, there is no qualification to Article 6 ECHR. See also, N. Jayawickrama, J. Pope, and O. Stolpe, cited above at note 5, p. 27.
[201] D. Wilsher, cited above at note 2, p. 29.
[202] L. Muzila, M. Morales, M. Mathias, and T. Berger, cited above at note 17, p. 49.
[203] The court stated that 'Presumptions of fact or of law operate in every legal system. Clearly, the Convention does not prohibit such presumptions in principle. It does, however, require the Contracting States to remain within certain limits in this respect as regards criminal law. It requires States to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence'. See also, Attorney General v Hui Kin Hong and the Privy Council in Attorney General v Lee Kwong-Kut, (Hong Kong Court of Appeals, 1995).
[204] Ibid.
[205] Salabiaku v France (EHRR, 1988).The court states "Presumptions of fact and law operate in every legal system. Clearly, the Convention does not prohibit such presumptions in principle. It does, however, require the contracting states to remain within certain limits in this respect as regards criminal law.
[206] In this regard, it is necessary to remember the stand taken by the US and Canada. It seems that for them it is not justifiable and proportional.

Focusing on the Ethiopian law, the FDRE Constitution provides that 'During proceedings accused persons have the right to be presumed innocent until proved guilty according to law and not to be compelled to testify against themselves.'[207] While the English version of this provision has the phrase 'according to law' as to how guilty should be proven, the same requirement is missed in the Amharic version that has a final legal authority.[208] However, in this specific provision, the English version is more persuasive and untarnished.[209] Be the translation or poordraftmanship flaw as it may, the question remains whether the PoI under the FDRE Constitution is an absolute or qualified protection. In other words, whether it tolerates any form of shifting of burden of proof onto the accused or easing the duty of the prosecutor or not?

The FDRE Constitutional provision on the presumption of innocent has no an express limitation clause. Moreover, in Ethiopia, there is lack of jurisprudence on how this constitutional provision should be interpreted. Accordingly, unlike those countries that provide an express limitation to the principle, constitutionality is an issue under the Ethiopian legal tradition. Looking how limitations to fundamental rights are made under the FDRE Constitution, it is safe to say that the PoI has no limitation.[210] Hence, for the author, unlike those common law countries, in the absence of an express limitation, applying the rationality and proportionality tests to justify the limitation of the accused's rights in Ethiopia is implausible. Under the FDRE Constitution, the fulcrum behind the rationality and proportionality test is already inculcated under the expressly provided limitation clauses of the other provisions. Hence, applying them (the rationality and proportionality tests) for the PoI would be contrary to the intention of the constitutional engineers. Therefore, in Ethiopia, the right to be presumed innocent until proven guilty is an absolute right and any restriction to it is not tolerable. At this juncture, it is important to remind what Jeffrey R. Boles argues regarding those who argue in favour of criminalising illicit enrichment. He argues the justifications made to validate the acceptance of illicit enrichment in general are 'concentrated too narrowly on the pervasiveness of public-sector corruption and give short shrift to the principles embodied in the presumption of innocence.'[211] Rather than

[207] The FDRE Constitution, cited above at note 22, Art. 20(3).
[208] Id., Art. 106.
[209] The omission of the phrase in the Amharic version creates an ambiguity on how guilty should be proved
[210] This stand is also confirmed by other writers such as Simeneh Kiros Assefa. See, Simeneh Kiros Assefa cited above at note 119, p. 274.
[211] Jeffrey R. Boles, cited above at note 2, p. 867.

independently evaluating the nature of the illicit enrichment offense and the essence of the protection accorded for accused persons, the rationality and proportionality test principles are used as a mechanism to vindicate the accused's human rights violation.[212] Hence, his argument certainly works in Ethiopian case too. The crime of illicit enrichment clearly, through its burden-shifting element, intrudes the PoI right of accused persons.[213] Furthermore, the international and regional anti-corruption instruments clearly appreciated how much criminalising illicit enrichment would be contrary to the domestic constitutional norms of states parties. The qualification preface in all instruments' illicit enrichment provision tells the need to look at the domestic constitutional principles.

To conclude, undoubtedly, criminalising illicit enrichment has a paramount importance in the battle against the 'cancer' of corruption. Its importance is very significant especially in least developing countries such as Ethiopia. It eases the fight against the blight of corruption by solving the problem in relation to gathering evidences. However, the author submits that this fight against corruption should be carried out in a consistent way with the fountainhead of laws, the FDRE Constitution. In Ethiopia, at least theoretically, the PoI is an absolute right. The FDRE Constitution as it is today allows no limitation for whatsoever reason. Moreover, unlike some countries such as South Africa,[214] there is no general limitation clause in Ethiopia. Therefore, under the current Ethiopian law, not only shifting but also easing the onus of the public prosecutor is not tolerable. It is contrary to the accused right to be presumed innocent until proven guilty.

[212] Ibid.
[213] Ibid.
[214] Adem Kassie Abebe, 'Human Rights under the Ethiopian Constitution: A Descriptive Overview', Mizan Law Review, vol. 5 (2011), p. 58. See also, Adem Kassie Abebe, 'Limiting Limitations of Human Rights under the FDRE and Regional Constitutions', Ethiopian Constitutional Law Series, vol. Iv, (2011), p. 63, 69-73, 74.

3.2.2 The Protection against Self-Incrimination

Akin to the PoI, the protection against self-incrimination is recognised under various human rights instruments[215] and domestic jurisdictions.[216] As a fundamental due process right, it is developed in opposition to the unfair methods of compulsory interrogation and prosecution. It protects anyone who is suspected or accused of a crime from giving a testimony that incriminates them.[217] This protection is justified by the inherently cruel and immoral nature of making anyone an instrument of his/her own conviction.[218]

The offense of illicit enrichment requires accused persons to adduce evidence that could exonerate them from conviction. It requires the accused to *say* something to *explain* about their disproportionate amount of asset or lavish living standards. In such case, the accused may be exposed to adducing self-incriminating evidence.[219] For instance, the asset could have been acquired via illicit activities such as drug trafficking, human trafficking or other illegal conducts. Hence, telling the true source of the asset as a justification to show how the asset in question is acquired would incriminate her/him. At the same time, the accused is under duty to speak out or adduce evidences to show the legality of the asset. If not, she or he would be held responsible for a corruption crime of illicit enrichment. Hence, their protection from self-incrimination is unduly narrowed. Moreover, unlike the PoI, thus far, although there is no a supranational organ that has ruled on the relation of the protection against self-incrimination and illicit enrichment, there have been challenges to convictions for illicit enrichment in several domestic jurisdictions. For example, in Zambia, illicit enrichment was held to be unconstitutional since it infringed the accused persons' protection against self-incrimination.[220]

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[215] For example, see, the ICCPR, cited above at note 22, Art 14(3)(g).
[216] For example, See, the FDRE Constitution, cited above at note 22, Arts. 19(5) & 20(3).
[217] Ibid.
[218] David W. Louisell, 'Criminal Discovery and Self-Incrimination: Roger Traynor Confronts the Dilemma', California. Law Review, vol. 89(1965), p. 95.
[219] Worku Yaze Wodage, cited above at note 26, p. 67.
[220] R. Stapenhurst, N. Johnston, and R. Pelizzo (eds), The Role of Parliament in Curbing Corruption, (2006), p. 230. See also, Joshua Kabwe, Criminalising Possession of Unexplained Wealth by Public Officials: Legal Perspectives from Zambia (2014, Faculty of Law, University of the Western Cape (South Africa) & Humboldt University (Germany), pp. 40-41.

Under Ethiopian law, the protection against self-incrimination is envisaged as the right of both arrested[221] and accused[222] persons. The close reading of the constitutional provisions signifies that the protection is not from all kinds of evidences that may come from the suspected or accused person. Requiring the accused persons to adduce non-testimonial evidences is not contrary to the constitutional right of the protection against self-incrimination. Hence, the protection is not applicable to artificial persons and non-testimonial evidences could be acquired from natural persons. The protection is applicable only in case of oral/testimonial evidences. Akin to the PoI, under the Ethiopian law, the protection of against self-incrimination is an absolute right. Accordingly, any attempt to get the confession of the accused without her/his full and informed consent is unconstitutional.

In case of the offense of illicit enrichment, the accused are required to prove the legitimacy of the asset in question. Failure to do will lead to criminal sanction. This consequence, be convicted for the offense of illicit enrichment, shows how the accused could be indirectly forced to speak out something that may make her/him criminally responsible. The pressure imposed by the nature of the crime of illicit enrichment via its justification requirement is not consonant with the protection accorded to accused and arrested persons. It forces them to speak something that could incriminate them back. Therefore, the reversal of onus of proof element in case of the crime of illicit enrichment is not tolerable under the existing Ethiopian law.

3.2.3 The Right to Remain Silent

Although the right to remain silent is another manifestation of the PoI and the protection against self-incrimination, for the sake of clarity, here, it is decided to be discussed independently. Similar to the FDRE Constitution,[223] various human right instruments[224] have recognised the right to remain silent. This right entitled arrested persons the right not to say a word in response

[221] The FDRE Constitution, cited above at note 22, Art. 19(5). It provides 'Persons arrested shall not be compelled to make confessions or admissions which could be used in evidence against them. Any evidence obtained under coercion shall not be admissible.'
[222] The FDRE Constitution, cited above at note 22, Art. 20(3). It states 'During proceedings accused persons have the right……………. not to be compelled to testify against themselves.'
[223] The FDRE Constitution, cited above at note 22, Art. 19(2).
[224] See, the ICCPR, cited above at note 22, Art. 14(3)(g).

of any question that may be posed to them by the investigators and/or prosecutors. In various domestic jurisprudences, most often, the right to remain silent does not considered as an absolute right. Indeed, this is also affirmed by the ECHR.[225] According to the ECHR, albeit it is hardly possible to convict the accused solely based on the accused's silence or on a refusal to answer questions, the accused's decision to remain silent throughout criminal proceedings does not necessarily mean it has no any implications. It could be possible to make an inference from the accused's silence. This inference can be made upon the fulfilment of two conditions: if the prosecution has made out a *prima facie case*, and/or only common sense inferences are permissible.[226] However, since reversal of onus of proof came into picture during a prosecution, one question that needs an answer is whether the right to remain silent is guaranteed to accused person or not. Since this right is a manifestation of the protection against self-incrimination and the PoI, this author believes that accused persons can also enjoy it.

Moving to the compatibility or otherwise of reversal of onus of proof in the case of the crime of illicit enrichment and the right to remain silent, akin to the PoI and the protection against self-incrimination, in Ethiopia, the right to remain silent seems formulated in an absolute form but only for arrested persons. But, the same strict protection cannot be guaranteed for accused persons. Indeed, the FDRE Constitution does not expressly guarantee the right to remain silent for accused persons. Moreover, not accepting the inference argument made by the ECHR would be absurd. Allowing accused persons to remain silent for the whole proceeding would not be the intention of the makers of the constitution. There should be a time when the accused should say or adduce the necessary evidence to acquit them from the criminal charge. Therefore, there is no violation of the right to remain silent.

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[225] See, Murray (John) v UK (EHRR, 1996).

[226] For further discussion, see, G. Jorge, 'The Romanian Legal Framework on Illicit Enrichment, CEELI promoting the rule of law', (2007), available at *https://apps.americanbar.org/rol/publications/romania-illegal_enrichment_framework-2007-eng.pdf*, (accessed 14 March 2016).

3.2.4 The Principle of Legality

Akin to the above fundamental rights, the principle of legality has recognition both at the international[227] and domestic level. This principle is about the time of entry into force of the criminal law of a state. Apart from other, it demands the crime to be clearly defined in advance so that the public can know what acts and/or omissions make them criminally responsible.[228] If there is no such clear law, there is no crime and hence punishment.[229] Among other things, the principle of legality requires a clear conduct as *actus reus* of the crime.

The principle of legality is recognised under the Ethiopian law.[230] In Ethiopia, it is not an absolute principle in the sense that a law promulgated subsequent to the commission of the criminal conduct may be applied if it is advantageous to the accused or convicted person.[231] In illicit enrichment context, there is question as to the nexus between the asset amassed by the accused and criminal activities whatsoever form. All what is presented as *actus reus* of the crime is the existence of a significant/disproportionate increase in asset. Moreover, being a public servant with excessive wealth" *per se* is and should not be criminal activity. Nevertheless, in case of illicit enrichment, it is all about deduction than a direct link. The crime of illicit enrichment does not clearly define a prohibited conduct that constitutes the basis of the offence.[232] It is not clear as to what does significant increase/disproportionate in asset constitute. It seems a crime based on unsettled ground. This absence of a clear criminal conduct leads to the argument that the law is penalising a mere possession of unexplained asset and the suspicion of misconduct. For example, Wilsher argues that illicit enrichment law is a draconian measure that does not constitute 'a corruption crime as such but rather penalizes a public official for excess wealth *per se*'.[233] This poses a challenge as to the existence of clear guidelines that enable public officials to avoid conducts they should not engage in. However, in principle, this does not mean

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[227] For example, see, the UDHR cited above at note 22, Art. 11(2).
[228] P Graven, An Introduction to Ethiopian Penal Law (Arts.1-84 Penal Code) (1965) pp.9-10.
[229] The FDRE Constitution, cited above at note 22, Art. 22(1). See also, the FDRE Criminal Code, cited above at note 49, Art. 5(3).
[230] The FDRE Criminal Code, cited above at note 48, Art. 5. See also, the FDRE Constitution, cited above at note 22, Art. 22.
[231] The FDRE Constitution, cited above at note 22, Art. 22(2).
[232] L. Muzila, M. Morales, M. Mathias, and T. Berger, cited above at note 17, p. 65
[233] D. Wilsher, cited above at note 2, p. 31.

that there is a restriction in state's power to determine what constitute a criminal conduct. As the ECHR addressed it in the *Salabiaku Case*, States may criminalise any conduct, regardless of whether the conduct occurs without accompanying criminal intent if the act is not carried out in the normal exercise of one of the recognised human rights.[234]

However, contrary to the above argument propagated by academicians such as Wilsher, this author submits that the criminal conduct in the crime of illicit enrichment relates to the failure to justify the significant increase or disproportionate in asset. The accused has a statutory duty to explain the origin of his or her asset, and the failure to do so when required is an offense. Hence, there is no violation of the principle of legality. Moreover, as explained by practical cases, the law has no retroactive application. Therefore, the problem with the law on the crime of illicit enrichment is not the principle of legality but other constitutional rights like those discussed above.

3.2.5 Equality before the Law

Various human rights instruments[235] and domestic jurisdictions such as the FDRE Constitution[236] an unambiguously provides the equality of all persons before the law. This protection accords all persons an equal treatment before the law. There should be no discrimination among citizens irrespective of their particulars such as official position. Accordingly, public officials should not be negatively treated based on their official status. However, some argue that the crime of illicit enrichment negatively discriminates public officials and violates their right of equality, and is unconstitutional. However, in this regard, it is stated that 'If the state stipulates a penalty for those officials whose property does no correspond to their lawful earnings, it violates no constitutional principle. This legislative policy is not a threat against equality, because such a constitutional guarantee only imposes consistent treatment in similar situations.'[237] Illicit enrichment would be against the constitutional protection, if there were a distinction among those public officials who are in similar status. Similar line of argument is also tenable under the

[234] Bertrand de Speville, cited above at note 1, p. 3.
[235] The UDHR, cited above at note 22, Art. 7; and, the ICCPR, cited above at note 22, Art, 2.
[236] The FDRE Constitution, cited above at note 22, Art. 25.
[237] Carlos A. Manfroni, cited above at note 45, 70

Ethiopian law. The mere existence of a criminal offence that direct a certain portion of the public does not warrant to argue for a violation of the right to equality before the law. Arguing, as there is a violation of the right to equality before the law is the result of a flawed understanding of the protection.

CHAPTER FOUR

CONCLUSION AND RECOMMENDATION

4.1 General Conclusion

Corruption is a global blight. Albeit the extent may differ, it indiscriminately affects both the developed and developing countries. Accordingly, currently, there is a global anti-corruption discourse. This discourse employs various mechanisms to combat corruption. Of these mechanisms, the introduction of the crime of illicit enrichment as a new form of corruption crime is one of them. Since its introduction, it has been controversial but also been recognised by various international and regional anti-corruption instruments as well as domestic jurisdictions. The controversy on the crime of illicit enrichment comes from the fact that it requires the accused to provide an explanation how they amassed the asset in question. Too put in a nutshell, mainly from constitutionality perspective, this element of the crime triggered two lines of arguments. First, for the proponents of the criminalisation of illicit enrichment, since it plays a prominent role in thwarting widespread corruption by solving the thorny evidentiary issues that prosecutors face, this element of the crime is admissible. Moreover, they do not accept the existence of a reversal of onus of proof. For them, the accused bears merely evidentiary burden. Second, for opponents of the criminalisation of illicit enrichment, there is a shift of onus of proof to the accused and violates their fundamental rights. To sum up, there is no unanimity concerning the existence or otherwise of reversal of onus of proof in case of the crime of illicit enrichment, and, its constitutional status.

Owing to the above controversies, except in case of the IACAC to which Ethiopia is not a state party, criminalising illicit enrichment under UNCAC and the AU Convention, to both Ethiopia is a state party, is not obligatory. Moreover, arguing that it is unconstitutional, some countries such as the US and Canada have rejected the idea of criminalising illicit enrichment as an independent corruption crime under their respective domestic laws. However, despite various challenges as to the constitutionality of illicit enrichment under various domestic jurisdictions and its hortatory status under international and regional anti-corruption instruments, Ethiopia criminalised illicit enrichment in 2004. Indeed, it was first introduced in 2001 as evidentiary rule. Further, since 2015, in Ethiopia, besides the public sector, illicit enrichment covers some section of the private

sector. In addition, based on this law, there have been prosecution of many individuals. Moreover, unlike other jurisdictions, hitherto, in Ethiopia, there has been no constitutional challenge that appear before appropriate organ against the crime of illicit enrichment based on its requirement of a justification as to the legality of the asset in question; stated differently, reversal of onus of proof. Albeit this absence of challenge by and in itself does not guarantee the absence or existence of a problem, the close examination of the constitutional rights of accused persons such as the PoI, the right to remain silent, and protection against self-incrimination begs a question of constitutionality.

Akin to many human rights instruments, the FDRE Constitution guaranteed various rights such as the PoI, the protection against self-incrimination and the right to remain silent for accused persons. Depending on the legal system, these rights of the accused persons could be restricted or not. Put differently, any interference in the enjoyment of these rights should depend on the existence or otherwise of a limitation clauses. Unless it is allowed by the fountainheads of laws, it is hardly possible to limit these rights. In Ethiopia, this thesis concluded that the FDRE Constitution does not tolerate any kind of inroads on the PoI, and the protection against self-incrimination rights of accused persons. However, in contravene to these rights, it is submitted that, under the Ethiopian law, there is a reversal of onus of proof in case of illicit enrichment. The author finds that, reversal of onus of proof, for that matter, placement of any kind of onus onto the accused, before the prosecutor proof all elements of the crime beyond a reasonable doubt is not tolerable under the FDRE Constitution.

4.2 Recommendation

In Ethiopia, the constitution is the supreme law of the land.[238] Accordingly, any law, customary practice or a decision of an organ of state or a public official that contravenes it has no effect.[239] It is submitted that in case of the crime of illicit enrichment, there is a reversal of onus of proof. Furthermore, it is not compatible with the constitutionally guaranteed rights, specifically, the PoI and the protection against self-incrimination. Hence, based on this interpretation, the law on the crime of illicit enrichment is unconstitutional and should be nullified. However, although there are also some other weaknesses in relation to it such as its possibility of manipulation, and problem of formulation, it is the best means of fighting the 'cancer' of corruption especially in developing countries such as Ethiopia. Therefore, this author believes that criminalising illicit enrichment is necessary and needs to be validated than be nullified. Accordingly, the author urges the following recommendations:

I. Constitutional Amendment

If the author followed Article 9(1) of the FDRE Constitution strictly, he would have urged the current provision on the crime of illicit enrichment to be annulled. However, since corruption wreaks unspeakable havoc in Ethiopia, he argues the need of validating the crime as one anti-corruption tool. In order to validate it, the constitutional provisions on the PoI, and the protection against self-incrimination should be readjusted and allow limitation. This revision of the constitutional provisions would provide a better protection for the interest of the society.

II. Strengthening use of the asset registration and declaration systems and tax evasion laws

Amending the constitutional provisions and validating the crime of illicit enrichment in general is not enough in and by itself to curtail the 'cancer' of corruption. It should be supported by other means such as a strong asset registration and declaration mechanisms. A consistent use of asset registration and declaration mechanism helps to effectively prevent corruption, and increase

[238] The FDRE Constitution, cited above at note 22, Art. 9(1).
[239] Ibid.

accountability and integrity that in turn ensure good governance. Ethiopia promulgated an asset registration and declaration law in 2010. However, there is no consistent and full utilization of this law.[240] Hence, the author urges for the full and consistent use of this asset registration and declaration law. In the meantime, rather than applying the more delicate and complicated law on the crime of illicit enrichment, it is advisable to use tax evasion laws.

III. The existing formulation of the crime of illicit enrichment lacks some clarity. For example, there is confusion concerning the period of check and what constitute 'disproportional' in asset as well as its required *mens rea*. Hence, the law on the crime of illicit enrichment should be revisited. This revision would allow for an easier interpretation and understanding of the constituent elements of the crime.

IV. Awareness creation

In Ethiopia, corruption is an entrenched problem. Moreover, although it needs a separate study, there is lack of awareness concerning the holistic natures and dire consequences of corruption. Especially, since the crime of illicit enrichment is a newly introduced form of crime not only under Ethiopian law but also under international level, there is a problem of awareness. Hence, the concerned organs should work hard to create awareness among the different stakeholders.

V. Finally, it should be noted that having a beautiful law in and by itself is not adequate response to curtail the problem of corruption. Fighting corruption requires beyond having a beautifully drafted laws and institutions. It needs a responsive and determined system to the need of the people. The officials must be accountable. They should be loyal to the law and resolute to fight corruption than making mere pious speeches and conferences.

[240] Bekuretsion Alemayehu, A Study of the Role of Assets Disclosure and Registration Law Proclamation No 668/2010 in Reducing Corruption: The Case of FEACC,(2015, unpublished, Department of Public Administration and Development Management, Addis Ababa University), pp. 114-115.

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