Reversal of Burden of Proof in Case of the Crime of Illicit Enrichment: Appraisal of its Existence and Constitutionality in Ethiopia

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I ABSTRACT

Akin to the international and regional anti-corruption instruments, many domestic jurisdictions have an unequivocally recognised crime of illicit enrichment as an anti-corruption kit. This fast and vast recognition, however, does not absolve it from controversy. The law on the crime of illicit enrichment, rather than demanding the public prosecutor to proof the asset in question is ill-gotten, it requires the accused to satisfactorily prove (in the Ethiopian context) how she/he amassed it. Therefore, it has become debatable whether this burden is a mere evidentiary burden or the shift of a legal burden of proof and hence constitutes a reversal of the onus of proof or not.

This author contends that the burden is a legal burden of proof and is not in tandem with the FDRE Constitution. It violates the constitutional provisions on the principle of presumption of innocence and protection against self-incrimination. However, unlike the often-accustomed recommendation,[1] the author urges that the proclamation's provision on the crime of illicit enrichment should not be nullified. To the author's mind, the position of the detail law is in line with the interest of the public and apt to fight the crime of corruption. It is also the opinion of the writer that the FDRE Constitution fails to foresee the nature of such special and complicated kinds of crimes. Therefore, the detail law provision on the crime of illicit enrichment shall be validated by amending the constitutional provisions that make it an unconstitutional.

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1 Often, whenever a certain law is found to be contrary to the supreme law of the country, the recommendation is for the detail law to be null and void.

Keywords: Illicit enrichment, Reversal of burden of proof, Self-incrimination, Presumption of innocence, Corruption, Ethiopia.

1 SETTING THE CONTEXT

Currently, the ‘‘cancer’’[2] of corruption is causing an unspeakable harm around the globe. It is affecting both the private and public sectors at all levels.[3] For example, pursuant to the World Bank and the International Monetary Fund, corruption is the greatest impediment to lifting millions of people out of poverty.[4] Consonant with this, corruption is considered as the major challenge to the World Bank Group’s ‘‘twin goals of ending extreme poverty by 2030 and boosting shared prosperity for the poorest 40 percent of people in developing countries’’.[5] To illustrate the extent of the problem in figure, businesses and individuals pay an estimated $1.5 trillion in bribes each year.[6] This is about 2% of global GDP—and 10 times the value of overseas development assistance.[7] Likewise, the International Monetary Fund’s study exhibits that investment into countries with little corruption is significantly more than in countries with widespread corruption.[8] In Ethiopia, too, there is an entrenched corruption. For example, according to the 2017 Transparency International’s Corruption Perception Index Report, Ethiopia ranks 35 out of 100, zero being the most corrupt whereas 100 is the least corrupt country.[9] The perception of the transparency international is uncontestably confirmed by the Ethiopian government itself.[10]

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2 The World Bank 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 Peters A (2015) ‘‘Corruption and Human Rights’’ *Basel Institute on Governance Working Paper Series* 20 at 7.

3 Boles J (2014) ‘‘Criminalizing the Problem of Unexplained Wealth: Illicit Enrichment Offenses and Human Rights Violations’’ 17 *Legislation and Public Policy* 835- 880 at 838.

4 Chaikin D and Sharman J (2009) *Corruption and Money Laundering a Symbiotic Relationship*: Palgrave Macmillan US at 1.

5 The World Bank, Combating Corruption, available at http://www.worldbank.org/en/topic/governance/brief/anti-corruption (visited 10 August 2018).

6 The World Bank, Combating Corruption, available at http://www.worldbank.org/en/topic/governance/brief/anti-corruption (visited 10 August 2018).

7 The World Bank, Combating Corruption, available at http://www.worldbank.org/en/topic/governance/brief/anti-corruption (visited 10 August 2018).

8 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 (visited 10 August 2018).

9 See, the Transparency International, the 2017 Corruption Perception Index, available at https://www.transparency.org/news/feature/corruption_perceptions_index_2017 (visited 24 April 2018).

10 For example, Abiy Ahmed Ali (PhD), the Prime Minister of the Federal Democratic Republic of Ethiopia, during his speech while he was sworn in as a prime minister of Ethiopia unequivocally admitted the presence of deep-rooted corruption in Ethiopia. See, Opride, Full English Transcript of Ethiopian Prime Minister Abiy Ahmed’s Inaugural Address, available at https://www.opride.com/2018/04/03/english-partial-transcript-of-ethiopian-prime-minister-abiy-ahmeds-inaugural-address/ (visited 24 April 2018).

This ingrained problem of corruption at all levels ignites the need to fight it. However, some of its unique natures such as the fact that it is committed surreptitiously[11] and have the wilful act of all the parties during its commission[12] as well as the absence of a single person that can be directly identified as a victim[13] pose a challenge against the effectiveness of the anti-corruption discourse. In other words, in case of the investigation and prosecution of the crime of corruption, there is a problem in gathering adequate evidence to prove criminality beyond a reasonable doubt. In response to this, the international community including Ethiopia have been employing various mechanisms to thwart corruption. Generally, there are four pillars to fight corruption: Prevention; Criminalisation; Transnational Anti-Corruption Cooperation; and, Asset Recovery.

Regarding criminalisation, there is an introduction of a new form of crime − illicit enrichment − also known as 'Possession of unexplained property'[14] Compared to other forms of corruption crimes, the crime of illicit enrichment is not only very young but also it is highly controversial. Unambiguously, the controversy is related with the type of burden imposed on the accused to be acquitted. It is not clear whether it is a mere evidentiary burden of proof or a legal burden of proof. Likewise, it is equally dubious whether this burden is consonant with the constitutionally recognised human rights of accused persons.

Despite the above controversial nature of the crime, Ethiopia has unequivocally criminalised illicit enrichment. Accordingly, many individuals have been prosecuted suspecting of committing this crime. This article, therefore, aims to determine the type of burden imposed on the accused; stated differently, whether it is a legal or evidentiary burden of proof; and then, its constitutionality in view of the FDRE Constitution.

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11 Perdriel-Vaissiere M (2012) ''The Accumulation of Unexplained Wealth by Public Officials: Making the Offence of Illicit Enrichment Enforceable'' *U4 brief* 1 at 2. See also, Kofele-Kale N (2006) ''Presumed Guilty: Balancing Competing Rights and Interests in combating Economic Crimes'' 40 *the International Lawyer (ABA) 4 SMU Dedman School of Law Legal Studies Research Paper No. 233* 909-944 at 914-915; Wilsher D (2006) ''Inexplicable Wealth and Illicit Enrichment of Public Officials: A Model Draft That Respects Human Rights in Corruption Cases'' 45 *Criminal Law & Social Change* 27–53 at 27; and, Derenčinović D (2012) ''Criminalisation of Illegal Enrichment'' *Freedom from Fear Magazine* available at: http://f3magazine.unicri.it/?p=469 at 1-2 (visited 10 July 2018).

12 Taube M, Johann G, and Schramm M (eds) (2004) *The New Institutional Economics of Corruption*: Routledge at 145. See also, Wilsher (2006) at 26.

13 Peters A (2015) at 11. See also, Jayawickrama N, Pope J, and Stolpe O (2002) ''Legal Provisions to Facilitate the Gathering of Evidence in Corruption Cases: Easing the Burden of Proof'', 2 *Forum on Crime and Society* 23-31 at 23. However, dissenter such as Ninsin argues that corruption is not a victimless crime wherein merely the public are the victim. For him, specifically, the workers and the peasants are the victims of corruption. On this point, see, Ninsin K (2000) ''The Root of Corruption: A Dissenting View'' in Mukanda R (ed.) *African Public Administration, a reader Mount Pleasant* at 462.

14 Muzila L, Morales M, Mathias M, and Berger T (2012) *On the Take: Criminalizing Illicit Enrichment to Fight Corruption*: World Bank Publications at 6.

2 REVERSE BURDEN OF PROOF: A CONCEPTUAL ELUCIDATION

In conventional criminal cases, unlike civil litigation wherein the standard of proof is a preponderance of evidence,[15] the standard of proof is beyond a reasonable doubt.[16] Accordingly, before the burden shifts onto the accused, the prosecutor is required to prove each and every element of the alleged crime beyond a reasonable doubt.[17] However, recently, owing to the nature of some crimes, there is eccentricity from this classical criminal law rule. To put it concisely, in the prosecution of crimes such as the crime of illicit enrichment, the prosecution office, which has the support of the gargantuan hand of the State,[18] is not required to prove all the substantive elements of the crime. To be acquitted from the criminal charge, the accused is required to prove the absence of some of the elements of the crime; surprisingly, before the prosecutor proved its existence.[19] This is what is often called reverse onus of proof. Indeed, plainly, reversing the onus means that ''in a criminal trial, instead of the prosecution proving the guilt of the accused, the accused would have to prove her/his innocence''.[20] Nevertheless, the controversy comes not when the burden of proving all the elements of the crime is shifted to the accused[21] but only some or a single element.

To easily comprehend the notion of reversal of burden of proof in the context of the crime of illicit enrichment, the author finds it apposite to explain two typologies of burden of proof.

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15 Sedler R (1968) *Ethiopian Civil Procedure*: Faculty of Law, Haile Sellassie I University in association with Oxford University Press at 195. See also, James B (1982) ''Inevitable Errors: The Preponderance of the Evidence Standard in Civil Litigation'' 18 *Tulsa Law Review* at 79-80.

16 Boles (2014) at 858. For detail discussion of the notion of beyond reasonable doubt, see, Mandlenkosi D (1998) Proof beyond a Reasonable Doubt, PhD dissertation, Faculty of Law, University of Zululand**)** at 67-115.

17 Ashworth A (2006) ''Four Threats to the Presumption of Innocence'' 10 *The International Journal of Evidence & Proof* 241-278 at 250-251. See also, Gupta J (2012) ''Interpretation of Reverse Onus Clauses'' 5 *National University of Juridical Sciences Law Review* 5, 49-64 at 50, Kiros S (2012) ''The Principle of the Presumption of Innocence and its Challenges in the Ethiopian Criminal Process'' 6 *Mizan Law Review* 2, 273- 310 at 289; Amin Z *et al* (2016) ''Burden of Proof and Presumption of Innocence in the Prosecution of Illicit Enrichment with Reference to the Jordanian Legislation'' 49 *Journal of Law, Policy and Globalization* 25- 29 at 25. For detail discussion, see, Mandlenkosi (1998) at 228-281,

18 Amin Z *et al* (2016) at 25.

19 Singh R (2001) ''Reverse onus Clauses: A Comparative Law Perspective'' 12 *Student Advocate* 148-182 at 149. See also, Speville B (1997) ''Reversing the Onus of Proof: Is it Compatible with Respect for Human Rights Norms'' the 8th International Anti-Corruption Conference, available at http://8iacc.org.s3-website.eu-central-1.amazonaws.com/papers/despeville.html (visited 21 August 2018).

20 Singh (2001) at 149.

21 Because, in this case, it is an apparent violation of the constitutionally guaranteed rights of the accused.

2.1 Evidentiary burden of proof

Evidentiary burden also known as the ‘‘burden of production of evidence’’, ‘‘provisional or tactical burden’’, or the ‘‘burden of going forward with evidence’’,[22] is about ‘‘the obligation of a party to a dispute to lead evidence to show his/her case.’’[23] In this case, the party is not under duty to prove or disprove anything.[24] It is simply required to raise a reasonable doubt[25] as to the issue in question.[26] Its aim is to show that the party's claim and defence is not without any foundation. Succinctly, whereas the prosecutor is required to show evidence that is sufficient to prevent the court from dismissing its charge on the ground that there is no case to be defended, 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[27] towards certain evidence that make the issue in a case alive, and that further deliberation on the issue is required before coming to a decision.

2.2 Legal/Persuasive burden of proof

The legal burden of proof, unlike evidentiary burden, is about proving or disproving the claim of the parties. The legal burden of proof is mainly explained in light of the elements of the crime. In criminal cases, the prosecutor must prove the fulfilment of all of the elements of the crime by adducing the necessary evidences. Therefore, the accused is said to have assumed the legal burden of proof and the onus of proof is reversed if she/he is required to prove one or more element(s) of the crime.[28] When the accused assumes a legal burden, she/he must prove an ultimate fact necessary to the determination of guilt or innocence.[29] The same can also be said concerning the public prosecutor. Moreover, criminal law evidence principle dictates that while the legal burden of proof remains on a single party for the duration of the trial, by contrast the evidentiary burden may shift between parties over the course of the proceedings.[30] Further,

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22 Yaze W (2014 a) ‘‘Burdens of Proof, Presumptions and Standards of Proof in Criminal Cases’’ 8 *Mizan Law Review* 252-270 at 255.

23 Yaze (2014 a) at 255.

24 Yaze (2014 a) at 256. See also, Hamer D (2007) ‘‘The Presumption of Innocence and Reverse Burdens: A Balancing Act’’ 66 *Cambridge Law Journal* 142-171 at 143.

25 The question of when do we say that the person raises or not a reasonable doubt is debatable. However, since it is not the issue of this article, the writer reserves himself from making further discussion about it.

26 Hamer D (2011) ‘‘Dynamic Reconstruction of the Presumption of Innocence’’, 31 *Oxford Journal of Legal Studies* 417–435 at 418.

27 Not actually adducing them and proof the facts.

28 Hamer (2007) at 418.

29 Kofele-Kale (2006) at 927.

30 Speville (1997). The author submits that evidentiary burden can be shifted only when the court satisfied that the party (for example, the prosecutor) has pointed the existence of enough evidence that can show that its claim is not a mere allegation. If the prosecutor fails to point the presence of the evidence, the case would be throwing away and hence the accused would not be required to show any evidence. Similarly, if the failure was on the part of the accused, she/he would be convicted and hence the prosecutor would not have to move

unlike evidentiary burden where evidence is ‘‘adduced to raise an issue before the trier of fact’’,[31] in the case of legal burden of proof evidence is produced to prove or disprove the claim asserted by the party.

Generally, the question of reversal of the onus of proof is not in principle related to the evidentiary burden of proof. Reverse burden of proof comes into picture only when there is shifting of the legal/persuasive burden of proof. It occurs when the accused is required to prove or disprove all or some elements of the crime before the public prosecutor proves its existence beyond a reasonable doubt. Therefore, to determine whether there is reversal of onus of proof or not, it is necessary to determine which type of onus is assumed by the accused.

3 REVERSAL OF ONUS OF PROOF REGARDING THE CRIME OF ILLICIT ENRICHMENT

3.1 Theoretical underpinning of the crime

It is not uncommon to witness, when some people amass a huge sum of money or live a lavish lifestyle that is incomparable with their legitimate known source of income. This mismatch begs a question as to the source of the income. For many, even without having credible evidence, the presumption as to this asset is an illicit source. The crime of illicit enrichment comes in such scenario - when there is a misalliance between the legitimate known source of income and the asset at hand.

Although various international and regional anti-corruption instruments as well as domestic laws have incorporated and defined the crime of illicit enrichment, here, the author mainly uses the definition accorded by the Ethiopian anti-corruption law.[32]

Ethiopia, a party to United Nations Convention against Corruption (hereinafter UNCAC)[33] and the African Union Convention on Preventing and Combating Corruption (hereinafter AU Convention),[34] criminalises illicit enrichment by the 2015 Corruption Crimes Proclamation.[35] This proclamation under its Article 21 defines the crime of illicit enrichment as follows:

to adduce all her/his case to proof beyond a reasonable doubt. In other words, the accused right to be presumed innocent ceased to exist.

31 Kofele-Kale (2006) at 928.

32 The reasons are: First, there is no significant difference between the Ethiopian and other laws’ definition; second, whenever it is necessary and the Ethiopian law does not cover the issue, cross reference will be made with other laws; finally, the focus of the article is Ethiopian law.

33 It signed UNCAC on 10 December 2003 and ratified it on 26 November 2007.

34 It signed the AU Convention on 1 June 2004 and ratified it on 18 September 2007.

35 Corruption Crimes Proclamation, 2015, Proclamation, No. 881, Fed. Neg. Gaz. (hereinafter, Corruption Crimes Proclamation).

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 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.

Based on this definition, the offense of illicit enrichment has the following constituent elements.

3.1.1 Person of interest

Person of interest is about the subjects of the crime. Under Ethiopian law, the crime of illicit enrichment is mainly interested in public servants or employees of a public organisation. A public servant refers to 'any person, who is employed, appointed or elected to work either temporarily or permanently in a public office[36] or public enterprise[37] and includes a member of the management board'.[38] According to the Ethiopian anti-corruption law, public organisations refers to

[36] Corruption Crimes Proclamation, Art. 2(1).
[37] Corruption Crimes Proclamation, Art. 2(3).
[38] Corruption Crimes Proclamation, Art. 2(2).

> any organ in the private sector which in 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.[39]

From the above definition, one can understand that, unlike the international and regional anti-corruption instruments,[40] but relatively similar to the AU Convention,[41] the Ethiopian anti-corruption law in general; the crime of illicit enrichment provision in particular is also applicable to the private sector corruption but in a limited scope.[42]

3.1.2 Period of check

The period of check is about the time span during which the person could be held responsible for the crime of illicit enrichment.[43] According to the Inter-American Convention against Corruption (hereinafter, IACAC), in order for the suspect to be charged for the crime of illicit enrichment, it is not mandatory for her/him to actually start the official duty. They could be charged from the date they have been selected, appointed, or elected.[44] 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 office. This shows that although the period of check in principle overlaps with the officials' term of office, there is a chance that they still could be prosecuted while they did not actually start their official function or have already left their office.

Under the Ethiopian anti-corruption law, there is an ambiguity on the period of check. The law simply states that the person should be a public servant or an employee of a public organisation, being or had been in office, and the asset is disproportional to her/his present or past occupation or other means.[45] The law does not clearly provide the time-span until when the official could be charged after she/he has left office or before she/he actually starts the work. In this regard,

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39 Corruption Crimes Proclamation, Art. 2(4).

40 United Nations Convention against Corruption (hereinafter UNCAC), (2003) Art. 20; and, Inter-American Convention against Corruption (hereinafter, IACAC), (1996), Art. 9.

41 African Union Convention on Preventing and Combating Corruption (hereinafter, AU Convention) (2003) Arts. 1 cum 8.

42 Corruption Crimes Proclamation, Art. 21(1).

43 Muzila, Morales, Mathias, and Berger (2012) at 16.

44 Manfroni C and Werksman R (eds) (2003) *The Inter-American Convention against Corruption Annotated with Commentary*: Lexington Books at 71.

45 Corruption Crimes Proclamation, Art. 21.

Worku rightly argues that the period of check is open-ended.[46] However, this does not mean that there is no period of limitation at all. The period of limitation provided under the general part of the FDRE Criminal Code is applicable. Accordingly, the period of check is determined based on Articles 216 and the following provisions of the Criminal Code. Moreover, akin to the IACAC, it can be argued that although the proclamation is silent, for the person of interest to be prosecuted, it is not necessary to wait until they actually start the work. They could be charged since she/he has been selected, appointed, or elected.

3.1.3 Significant/Disproportionate increase in assets

In the crime of illicit enrichment context, asset constitutes, among others, the lifestyle of the accused person. Hence, it is not only about pecuniary resources or property. Regarding the magnitude of the disparity in asset, the international and regional anti-corruption instruments use the phrase 'significant increase'.[47] In comparison, the Ethiopian law employs 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' concerning the standard of living and control of pecuniary resources and property, correspondingly.[48] This means, in Ethiopia, as per the wording of the law, there is no minimum amount concerning the asset in question to constitute the crime of illicit enrichment.[49] How bagatelle the disparity may be, it can be a ground for illicit enrichment prosecution.[50]

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46 Yaze W (2014 b) ''Criminalization of 'Possession of Unexplained Property' and the Fight against Public Corruption: Identifying the Elements of the Offence under the Criminal Code of Ethiopia'' 8 *Mizan Law Review*, 45-83 at 77-78.

47 UNCAC, Art. 20; AU Convention 37, Arts. 1 cum 8; and, IACAC, Art. 9.

48 Corruption Crimes Proclamation, Art. 21(1) (a) & (b).

49 Unlike the Ethiopian approach, some countries expressly provided a minimum threshold in percentage. For instance, in India, the divergence in asset should be 10%. Nothing less than 10% can be a ground for illicit enrichment prosecution. See, Muzila, Morales, Mathias, and Berger (2012) at 18-19.

50 This approach is not acceptable by some writers such as Manfroni. Manfroni opines that the disparity in asset should be 'gross'. 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. Moreover, demanding such stringent standards would easily be manipulated. It could be used as a political weapon to attack political opponents. See, Manfroni (2003) at 72. However, there are also arguments in favour and against the approach taken by the international and regional anti-corruption instruments-, the requirement of 'significant disparity' or as Manfroni calls it 'gross disparity. 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. It may suggest that insignificant amount (petty corruptions) are acceptable or out of the realm of corruption. See, Muzila, Morales, Mathias, and Berger (2012) at 18.

3.1.4 Mental element

In formulating the offense of illicit enrichment, as often as not, there is a tendency of omitting the required *mens rea*. For example, the Ethiopian law, akin to many other anti-corruption instruments,[51] provides no express *mens rea* requirement. For the author, this absence should be construed as intentional state of mind. This argument emanates from the understanding that intention is an overarching element in the definition of crimes. As such, it is not always mandatory to spell it out in every case.[52] Hence, if there is omission concerning mental element of a crime, the required *mens rea* is intention.[53]

3.1.5 Absence of justification

In any jurisdiction, accruing asset *per se* is not a crime. What matters is the means used to amass such asset. It may be, in principle, also possible to say that not every person may be required to call and prove the legitimacy of such asset. However, because of the nature of their official capacity, in illicit enrichment's context, some groups of persons are required to satisfactorily prove the legitimacy of the asset they have accumulated in excess of their legitimate source of income. For example, the Ethiopian anti-corruption proclamation, specifically the provision on the crime of illicit enrichment, requires the accused to prove satisfactorily before the court of law as to how she/he was able to 'maintain*s* a standard of living above that which is commensurate with the official income from his present or past occupation or other means' or how she/he 'is in control of pecuniary resources or property disproportionate to the official income from his present or past occupation or other means'.[54] In the words of the law, if the person of interests fail to adduce evidence that can prove the legitimacy of the asset satisfactorily, they would be criminally responsible. It should be noted that this burden on the accused is imposed not after the prosecutor proved the illegitimacy of the asset in question. What the law required the prosecutor in this regard is to merely show the incongruity between the living standard/pecuniary resource or property of the accused on the one hand and the official income from the accused's present or past occupation or other means on the other. Accordingly, this element of the crime of illicit enrichment is mystifying. It is not clear whether it is imposing evidentiary or legal burden of proof on the accused. Consequently, it is necessary to determine what it is and then assess it in view of the constitutionally guaranteed due process rights of accused persons to determine its constitutionality.

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51 For example, see, the AU Convention, Arts. 1 cum 8. See also, the IACAC, Art. 9.

52 Muzila, Morales, Mathias, and Berger (2012) at 21.

53 Moreover, Article 34 of the Corruption Crimes Proclamation supports this assertion. The provision allows the application of the FDRE Criminal Code's General Part.

54 Corruption Crimes Proclamation, Art. 21.

4 REVERSAL OF ONUS OF PROOF UNDER INTERNATIONAL AND REGIONAL ANTI- CORRUPTION INSTRUMENTS

Albeit debatable, various international and regional instruments have recognised the likelihood of shifting of onus of proof onto the accused. Of these instruments, although not in the crime of illicit enrichment context, the Vienna and Palermo Conventions are the front-runners. These Conventions, allow their states parties to reverse the onus of proof for the sake of mainly confiscating and seizing the proceeds of the crimes.[55] However, this reversal required to be in harmony with the principles of such states parties' domestic law and the nature of the judicial and other proceedings.[56] Moreover, though this reversal can play a significant role in fighting the perpetrators by going after their money, the inclusion of the approach in those Conventions was not made without a dispute. 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 provision; because, it is determined as incompatible with the fundamental rights of the accused.[57]

In the crime of illicit enrichment context, the first convention that encompasses the contentious notion of reversal of burden of proof is the IACAC.[58] Afterwards, the AU Convention[59] and UNCAC[60] accepted it almost in similar fashion.[61] Alike the Vienna and the Palermo Conventions, the inclusion of the notion under these Conventions had no unanimous support. For instance, Canada and the US in the case of the IACAC, and Switzerland in case of UNCAC strongly opposed the criminalisation of illicit enrichment in general and its justification element in particular. These countries argue that the adoption of illicit enrichment as one form of corruption crime in general and its justification element in particular would contradict with the constitutional rights of accused persons such as the presumption of innocence.[62] For these countries, the justification element imposed by the corruption crime of illicit enrichment is a

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55 The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (hereinafter, the Vienna Convention), (1988), Art.5 (7). See also, the United Nations Convention against Transnational Organized Crime (hereinafter, Palermo Convention) (2000), Art. 12(7). While the Vienna Convention is limited to trafficking in drugs, the Palermo Convention embraces other organised/transnational organised crimes.

56 The Vienna Convention Art. 5(7). See also, the Palermo Convention, Art. 12(7).

57 Kofele-Kale N (2012) *Combating Economic Crimes Balancing Competing Rights, and Interests in Prosecuting the Crime of Illicit Enrichment*: Routledge at 36.

58 The IACAC, Art. 9.

59 The AU Convention, Arts. 1 cum 8.

60 UNCAC, Arts.20 & 31(8).

61 Amin Z *et al* (2016) at 25.

62 The UNODC, the *Travaux Preparatoires* of the negotiations for the elaboration of the United Nations Convention against Corruption (2010) Vienna, available at https://www.unodc.org/unodc/en/treaties/CAC/travaux-preparatoires.html at 195 *(*visited 21 August 2018).

shift of a legal burden of proof to the accused. Further, similar to the Vienna and Palermo Conventions, the above major anti-corruption instruments require the reversal of burden of proof notion to be consonant with the principles of states parties' respective domestic law and the nature of their judicial and other proceedings. These qualification prefaces in the major anti-corruption conventions, besides showing the absence of unanimity during their deliberation stage on the notion, they also signify the necessity of checking whether the constitutionally guaranteed due process rights of accused persons such as the presumption of innocence and the protection against self-incrimination allows limitation or not. Put differently, the provisions are not mandatory but discretionary. If, in the domestic constitution of the states' parties, the protections are absolute to which limitations are not allowed, the notion of reverse burden of proof is not tolerable. Because the argument is that, among others, the qualification prefaces indicate the type of burden of proof imposed on the accused is a legal burden of proof. If it were evidentiary burden of proof, as argued by the supporters of the inclusion of the crime of illicit enrichment in the conventions, there would have been no need to have such conditional prefaces. To recap, at international and regional anti-corruption instruments level, there is no consensus concerning the nature of burden of proof imposed on the accused in case of the crime of illicit enrichment via its justification requirement.

5 REVERSAL OF ONUS OF PROOF IN CASE OF THE CRIME OF ILLICIT ENRICHMENT: THE ETHIOPIAN LAW CONTEXT

As indicated above, Ethiopia is a state party to the major anti-corruption instruments: UNCAC and the AU Convention. Moreover, while ratifying these instruments, it did not oppose the application of their position on the crime of illicit enrichment under its domestic legal tradition.[63] Indeed, Ethiopia's law explicitly criminalises illicit enrichment.[64]

Although there is no codified evidence law in Ethiopia yet,[65] under Ethiopian legal tradition, arguably, the public prosecutor has the duty to prove all elements of a crime beyond a

[63] This can be construed into ways: it may mean that Ethiopia is of the opinion that the rights provided to accused persons are not absolute – allows limitation; or, Ethiopia believes that the burden imposed on the accused by the crime of illicit enrichment is not a legal but an evidentiary burden of proof.

[64] Ethiopia did not introduce illicit enrichment first as a corruption crime but as evidentiary rule in 2001. Ethiopia criminalises illicit enrichment for the first time in 2004. Following then, in 2015, with the aim of making its anti-corruption law consonant with the continental and international instruments, it enacted a new proclamation on corruption crimes. See also, the Anti-Corruption Special Procedure and Rules of Evidence, 2001, Proclamation, No. 236. Fed. Neg. Gaz, Art. 37; and, Corruption Crimes Proclamation, preamble, paragraph, 1 & 2 and Art. 21.

[65] This absence of a codified evidence law in Ethiopia causes a problem; specifically, it is difficult to know the standard of proof recognised under the Ethiopian criminal justice system.

reasonable doubt.[66] Both the evidentiary and legal burden of proof are imposed on the prosecutor. At least, the latter type of burden cannot be shifted on to the accused before the prosecutor proves her/his case beyond a reasonable doubt. However, the observance of this rule in case of some crimes such as the crime of illicit enrichment is dubious. Nevertheless, except some scholars, the issue did not attract enough attention in Ethiopia. Hence, the subsequent section is, besides briefly summarising the position of some of these scholars, devoted to explicate the nature of burden of proof imposed on the accused in case of the crime of illicit enrichment in Ethiopian law.

5.1 Account on the Ethiopian law on the crime of illicit enrichment and burden of proof: Illustrative scholars' vs. the author's view

Of the corruption crime forms, there is no other crime that has been as debatable as the crime of illicit enrichment. The criminalisation of illicit enrichment at both international level and various domestic jurisdictions level, mainly owing to the nature of the burden it imposed on the accused, has attracted the attention of significant number of writers- those who argue in favour of its criminalization (believe that the burden is evidentiary burden) and against it (believe that the burden is a legal burden).

For example, Ndiva Kofele-Kale[67] and Margaret K. Lewis,[68] argue that in case of the crime of illicit enrichment, there is no shifting of legal burden of proof. According to them, what the accused bears is an evidentiary burden. In a relatively similar fashion, Nihal Jayawickrama *et al* argue that there is no shifting of burden of proof. They say the problem starts in the use of the phrase 'reverse onus'. For them, it is both unfortunate and inaccurate to use such phrase to refer to the situation.[69] They say, in case of the crime of illicit enrichment, there is no shifting of onus of proof but a mere easing of evidentiary burden of proof and they try to justify their position arguing that the measure is both necessary and desirable because it plays a role in 'deterring potential offenders and facilitate the investigation and successful prosecution of corruption offences'.[70] Furthermore, Bertrand de Speville holds a similar position.[71] Zainal

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66 For detail discussion, see, Mandlenkosi (1998) at 228. See also, Kiros (2012) at 289; Ashworth (2006) at 250-251; and, Gupta (2012) at 50. Specifically, for detail discussion on the Ethiopian legal tradition, see, Arayaselassie H (2014) ''The Standard of Proof in Criminal Proceedings: The Threshold to Prove Guilt under Ethiopian Law'' 8 *Mizan Law Review* 84-116. The writer concurs with the position of Hanna on the standard of proof required from the public prosecutor in case of criminal cases.

67 Kofele-Kale (2006) at 909-944.

68 Lewis M (2012) ''Presuming Innocence, or Corruption, in China'' *Columbia Journal of Transnational Law 287-369* at 312.

69 Jayawickrama, Pope, and Stolpe (2002) at 29.

70 Jayawickrama, Pope, and Stolpe (2002) at pp. 29-30.

71 Speville (1997) at 16.

Amin Ayub *et al*, on their part, adopted a systematic understanding of burden of proof and try to provide justification for the reversal of burden of proof than denying its presence. They say 'the burden of proof should be understood as an instrument to curb corruption and deprive corruptors from the proceeds of crimes rather than the exaggeration of the presumption of innocence.'[72] For them, the right of accused persons must be balanced against the interest of society so that 'preserving public fund is a strong argument to justify the shift of burden of proof partly to the defendant to explain the nexus of excessive wealth to legal sources, which eventually, does not constitute a violation against the presumption of innocence'.[73] Their position is relatively similar with Ndiva Kofele-Kale's argument of 'the collective right to a corruption-free society'.[74]

On the other hand, others such as Dan Wilsher and Jeffrey R. Boles do not concur with the argument of evidentiary burden. While Dan Wilsher argues that the defendant has the legal burden of disproving the presumption in case of the crime of illicit enrichment,[75] Boles argues that 'illicit enrichment violates fundamental human rights of the accused and therefore must be replaced by alternative enforcement mechanisms'.[76] Boles argues that 'illicit enrichment statutes aggressively combat governmental corruption, but the placement of the burden of proof upon the criminal defendant constitutes an impermissible presumption that violates the human rights of the accused'.[77] He even advices jurisdictions worldwide to resist using illicit enrichment offenses to combat corruption.[78] Moreover, for Snidert and Kidane, criminalizing illicit enrichment is 'a remedy that is worse than the ailment'.[79] Similar to Boles, they also recommend countries not to implement illicit enrichment provision of international and regional anti-corruption instruments at domestic level.[80] For them, illicit enrichment is 'fundamentally flawed as a matter of recognized principles of criminal justice.'[81]

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72 Amin Z *et al* (2016) at 25.

73 Amin Z *et al* (2016) at 28-29.

74 Kofele-Kale N (2000) ''The Right to a Corruption-Free Society as an Individual and Collective Human Right: Elevating Official Corruption to a Crime under International Law'' 34 *International Law* at 149 as cited in Kofele-Kale (2006) at 910.

75 Wilsher (2006) at 30. He states 'Inexplicable wealth crimes may take the form of employing a presumption of corruption upon proof of excessive wealth. The defendant then has the legal burden of disproving the presumption. Alternatively, the offence may be one of strict liability (the defendant is liable for the act of possessing excessive wealth) with a defence or exception of satisfactory (i.e. non-corrupt) explanation'.

76 Boles (2014) at 859-860.

77 Boles (2014) at 880.

78 Boles (2014) at 880

79 Kidane W and Snidert T (2007) ''Combating Corruption through International Law in Africa: A Comparative Analysis'' 40 *Cornell International Law Journal* 691- 748 at 729.

80 Kidane and Snidert (2007) at 729.

81 Kidane and Snidert (2007) at 729.

Ensuing to Ethiopian law, there are handful writers that put pen to paper on the issue of reversal of onus of proof in case of the crime of illicit enrichment.[82] Of all, the one who gives a due emphases for the issue is Worku. In his detail and successive works, he argues that under Ethiopian law, specifically concerning the crime of illicit enrichment, there is no reversal of onus of proof. He argues that 'what is provided under Art 419 (1) goes in line with the constitutional principle of presumption of innocence and under Arts 141 and 142 of the Criminal Procedure Code.'[83] Another writer Mesay also has more or less similar position with Worku.[84] Finally, in his article titled 'the Principle of the Presumption of Innocence and its Challenges in the Ethiopian Criminal Process',[85] Simeneh argues that presumption of innocence is being violated in Ethiopia by various subsidiary laws, procedures and practices.[86] He specifically states that there are ''various provisions in the criminal law that limit (or arguably disregard) the presumption of innocence''. For him, these criminal law provisions ''assume as proved the existence of some of the elements of certain crimes without requiring the public prosecutor to submit evidence.''[87] Moreover, he mentions the Criminal Justice Administration Policy adopted in 2011 and contemplates shifting the burden of proof to the defendant in selected serious crimes, and finally the courts also wrongly shift burden of proof to the accused regarding certain facts in various court decisions.[88]

However, compared to the above works, this article offers a different account on the question of reversal of burden of onus under the Ethiopian anti-corruption law. The author, based on the rationales and practical cases discussed below, argues that the burden imposed on the accused in case of the crime of illicit enrichment under the Ethiopian anti-corruption law is a legal burden of proof.

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82 These scholarly works were written before the promulgation of the current anti-corruption law (Corruption Crimes Proclamation (2015)).

83 Yaze W (2014) ''Burdens and Standards of Proof in Possession of Unexplained Property Prosecutions'' 8 *Mizan Law Review* 1-44 at 24. Worku further explain that 'the binding interpretation adopted in *Workineh Kenbato & Amelework Dalie* case is erroneous and calls for its rectification in future cases that involve similar issues'.

84 Tsegaye M (2012) The Legal Framework of Illicit Enrichment in Ethiopian Anti-Corruption Law, LL.M. thesis, Faculty of Law, University of the Western Cape (South Africa) & Humboldt University (Germany) at 47. For further reading, one could also read Girma T (2007) Possession of Unexplained Property as a Crime under the Criminal Code 2007, LL.B. thesis, Faculty of Law, Addis Ababa University.

85 Kiros (2012) at 273 - 310.

86 Kiros (2012) at 273.

87 Kiros (2012) at 273, 303, 304, 309.

88 Kiros (2012) at 273.

5.1.1 The presumption on the source of the asset in question

Once the public prosecutor proves the fulfilment of the other elements, the law assumes, though rebuttable, the asset in question is an ill gotten. Put differently, it requires the accused to proof its legality. Meaning, rather than requiring the prosecutor to prove the illegality of the asset amassed by the accused, the law demands the latter to prove its legality. This suggests that in case of the crime of illicit enrichment, the punishment is not merely for possessing a disproportionate asset or a lavish lifestyle, which is incompatible with the legitimate source of income. But, the punishment is for the mere presumption that the asset is proceed of a criminal activity- a corrupt practice. Transliterated, what the prosecutor is required to show is causing a doubt for the presumption of illegality to set in motion. However, the accused is required to satisfactorily prove the legality of the asset. If she/he fails to do so, the result would be conviction for the crime of illicit enrichment. Hence, logically, one can safely conclude that the burden imposed on the accused is far more cumbersome than the prosecutor. This signifies that proving the legality of the asset in question is the essential element and question in case of the crime of illicit enrichment; however, it is imposed on the accused. The onus of the prosecutor is limited to the extent of adducing circumstantial evidence that show the possible commission of a corrupt practice. This circumstantial evidence is limited to the extent of showing disproportionality. Stated differently, it is almost equal to causing a reasonable doubt, which is much less than the standard of proof required in case of criminal prosecutions- beyond a reasonable doubt.[89] On the other hand, the close examination of the burden imposed on the accused revealed that it is not about causing doubt but proving the legality of the asset satisfactorily.[90] Therefore, the burden assumed by the accused is a clear instance of a legal burden of proof and hence there is reversal of onus of proof.

5.1.2 The wording or expression used under the law

The wording of the law that criminalise illicit enrichment can also be counted as an additional evidence that confirms the existence of reversal of burden of proof under the Ethiopian criminal justice system, at least, concerning the crime of illicit enrichment. To be specific, the proclamation that introduced the notion of reversal of burden of proof in Ethiopia, Proclamation No. 236/2001, used the expression 'shifting of burden of proof'.[91] Moreover, the Criminal Justice Administration Policy that was adopted by the Council of Ministers in 2011

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89 Albeit, in Ethiopian, there is debate whether the standard of proof in case of criminal cases is beyond a reasonable doubt or not, it is but unanimously agreed that it is higher than preponderance of evidence.

90 Corruption crimes proclamation, Art. 21(1).

91 Anti-Corruption Special Procedure and Rules of Evidence Proclamation, 2001, Proclamation, No. 236, Fed. Neg. Gaz, Art. 37.

also anticipates the shifting of burden of proof onto the defendant in some serious crimes.[92] It should be noted that corruption is among the crimes mentioned as serious in the policy.[93] Further, the current Ethiopian anti-corruption law, unlike the previous laws[94] and international and the African anti-corruption instrument to which Ethiopia is a state party,[95] clearly require the accused to *prove* the legitimacy of the asset satisfactorily.[96] Therefore, the cumulative reading of the above facts strengthens the argument of the shift of legal burden of proof onto the accused and hence there is reversal of onus of proof in case of the crime of illicit enrichment. The writer, as explained above, is duly aware that this burden is imposed on the accused following the prosecutor has sufficiently shown the disparity between the official income and the unknown. However, the writer is of the opinion that such burden imposed on the prosecutor is much easier and circumstantial when it is compared to the onus imposed on the accused.

5.1.3 Practical consequence on the accused

Effect wise, specifically from the perspective of the accused, there is no difference between evidentiary and legal burden of proof. In both cases, failure on the part of the accused results her/him to conviction for the crime of illicit enrichment. To state it plainly, if someone assumes that the burden imposed on the accused is an evidentiary burden, it means that after the prosecutor shows the existence of evidence, which indicates the presence of disparity between the official income and the unknown, the burden shifts onto the accused to cast evidence as to the legitimacy of the asset in question. If the accused fail to do so, there will be an immediate conviction, which is also true in the case of legal burden of proof. However, if the accused

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92 This is what the policy provides on the issue:
4.4 *<u>የማስረዳት ሸክም ወደ ተከሳሽ ስለሚዛወርበት ሁኔታ</u>*
ማንም ሰው በወንጀል ጥፊተኛ ሊሰኝ የሚችለው ሥልጣን ባለው ፍርድ ቤት አቃቤ ሕግ በሚያቀርበው ማስረጃ ጥፊተኝነቱ ሲረጋገጥ ብቻ ነው። ይሁንና ተከሳሹ በሕገ-መንግሥታዊ ሥርዓት ላይ አደጋ ማድረስ፣ እንደ ሽብርተኝነት፣ ሙስና ወይም በተደራጁ ቡድኖች በተፈፀሙ ወንጀሎች የተከሰሰ እንደሆነ አቃቤ ሕግ የማስረዳት ሸክምን ወደ ተከሳሽ ለማዛወር የሚችል መሠረታዊ ፍሬ ነገሮችን ካስረዳ የማስረዳት ሸክም ወደ ተከሳሹ ሊዛወር የሚችልበትን ሥርዓት የሚመለከቱ ድንጋጌዎች አግባብነት ባላቸው ሕጎች ውስጥ ይካተታሉ። see, The Criminal Justice Administration Policy of Ethiopia adopted on 4 March 2011 by the Council of Ministers. For further discussion on the policy, see, Kiros (2012) at 282-284.

93 See, The Criminal Justice Administration Policy of Ethiopia adopted on 4 March 2011 by the Council of Ministers.

94 The FDRE Criminal Code Article 419(1) used to require the accused only to give satisfactory explanation. Indeed, the interpretation of the Federal Supreme Court Cassation Division on this provision, however, clearly indicates that the burden imposed on the accused was much more than reasonable doubt and explanation but prove.

95 UNCAC, the AU Convention and the IACAC use the expression 'reasonably explain' rather than proves satisfactorily. See, UNCAC, supra note 36, Art. 20; the IACAC, Art. 9; and, the AU Convention, Arts. 1 cum 8.

96 Corruption crimes proclamation, Art. 21.

indicates the presence of evidence that shows the legality of the asset in question, contrary to the rule in case of evidentiary burden, the burden would not be reverted to the public prosecutor to prove the illegality of the asset in question; instead, the accused would be acquitted. Therefore, from this specific scenario perspective, the difference made between evidentiary and legal burden of proof is merely theoretical. It is more of game of words that does not appreciate its implication on the ground. Indeed, under Ethiopian law context, in both practice and theory, evidentiary burden is not even recognised.[97]

To conclude, as affirmed by the next section, based on the existing Ethiopian anti-corruption law, contrary to what some argues, the burden imposed on the accused in case of the crime of illicit enrichment is a legal burden of proof; hence, there is a reversal of onus of proof.

5.2 Exploration of illustrative illicit enrichment cases before the federal courts

Albeit the offense of illicit enrichment is a relatively new crime under the Ethiopian law, there have been numerous cases before the Federal and Federating Units' Courts. In this regard, Worku, 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'[98] 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, in this section, this author does not find it necessary to make a discussion to show the fact that the provision is practically being used in Ethiopia; rather, he directly proceeds to the question of reversal of onus of proof.

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97 The only provisions, but very arguably, that seem to recognize evidentiary burden of proof under the Ethiopian legal tradition are Article 136(1) and 142(2) of the Criminal Procedure Code. While Article 136(1) 'After the plea of the accused has been entered, ***the public prosecutor shall open his case explaining shortly the charges he proposes to prove and the nature of the evidence he will lead***. He shall do so in an impartial and objective manner', Article 142(2) in a similar fashion states 'The ***accused or his advocate may then open his case and shortly explain his defence stating the evidence he proposes to put forward***. He shall then call his witnesses and experts, if any, who shall be sworn or affirmed before they give their testimony. Emphasis added. For the author, these two provisions hardly constitute evidentiary burden of proof; and; unlike the requirement provided in case of the crime of illicit enrichment under Article 21 of Proclamation No. 881/2015, the 'burden' imposed on the two parties, the public prosecutor and the accused, is to briefly explain the charge and defence; respectively, not to satisfactorily prove, which is the case in case of the crime of illicit enrichment.

98 Yaze (2014 b) at 42.

5.2.1 The Federal Ethics and Anti-corruption Commission (FEACC) v. Yared Getaneh T/Haymanot[99]

The FEACC's prosecutor brought two charges against the accused, Yared Getaneh T/Haymanot. The first charge is based on Article 419(1) (a) (b) of the FDRE Criminal Code while the second charge is based on Article 684 (1) of the same code.[100] In his amended charge, the prosecutor claimed that the accused has amassed a disproportionate amount of asset from 25 June 2001(18 *Sene* 1993 E.C) to 16 June 2010(9 *Sene* 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 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 prosecutor counted witnesses and listed various documents. The prosecutor's charge is detailed and clear enough. However, it does not indicate the mental element of the accused.

After verifying the identity of the accused and reading out 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 prosecutor showed the asset is disproportional to the known sources of income and its ownership is admitted by the court; the Court is satisfied by the charge brought against the accused and ordered him to defend himself. 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 prosecutor has finished adducing evidence that showed the existence of disproportionality between the known source of income of the accused and the actual asset he has amassed, what follows was conviction and punishment. Then after, following appeal, the Federal Supreme Court confirms the decision of the Federal High Court. The case also appeared before the Federal Supreme Court Cassation Division. However, the Cassation Division decided that there is no basic error of law.

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99 Yared Getaneh T/Haymanot v. The FEACC (Federal Supreme Court, Cassation File No. 107480/2015) Federal Supreme Court Cassation Decisions.

100 Since the focus of this work is the crime of illicit enrichment, the question of reversal of onus of proof, the discussion is limited to the first charge.

First, it is good to note that Yared Getaneh T/Haymanot's case, arguably, 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. Hence, although it might be a bit debatable, the conclusion reached based on this case can safely be transposed to other crime of illicit enrichment cases in Ethiopia.

In criminal cases, the prosecutor has a legal duty to prove the commission of a criminal conduct to the required standard, beyond a reasonable doubt.[101] The prosecutor must prove the fulfilment of all the elements of the alleged crime before the burden shifts to the accused.[102] The evidence used by the prosecutor to prove the commission of the crime should not also be acquired by incriminating the accused person.[103] Furthermore, it should not also violate the accused's rights to be presumed innocent until proven guilty and the right to remain silent. The burden of proof imposed on the prosecutor is derived from the constitutionally guaranteed rights of accused persons. In the same vain, it is often agreed and logical that the accused is not required to disprove the case against her/him to the extent of beyond reasonable doubt standard. On this point, Worku argues that the accused is needed only to produce evidence that causes reasonable doubt on the prosecution's evidence.[104]

However, in case of the crime of illicit enrichment, as demonstrated by the case at hand, the prosecutor did not prove the illegality of the asset. Indeed, the law that criminalises illicit enrichment does not require the public prosecutor to do so. The prosecutor did not show that the disproportionate asset is an ill-gotten but simply assumed as such by the law.[105] It was up to the accused to show the lawfulness of the asset in question. In other words, as witnessed from the above case, the moment the accused admitted the ownership of the asset in question, the Court ordered him to defend the prosecutor's charge. 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.

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101 Mandlenkosi (1998) at 228. See also, Kiros (2012) at 289, Ashworth (2006) at 250-251; and, Gupta (2012) at 50. Specifically, for detail discussion on the Ethiopian legal tradition, see, Arayaselassie (2014) at 84-116.

102 Mandlenkosi (1998) at 228. See also, Kiros (2012) at 289, Ashworth (2006) at 250-251; and, Gupta (2012) at 50 and, Arayaselassie (2014) at 84-116

103 See, for example, the FDRE Constitution, 1995, Year 1, Fed. Neg. Gaz., Arts. 19(5) & 20(3). See also, the the International Covenant on Civil and Political Rights (ICCPR) (1966), Art 14(3)(g).

104 See, Yaze W (2010) "Presumption of Innocence and the Requirement of Proof Beyond Reasonable Doubt: Reflections on Meaning, Scope and their Place under Ethiopian Law" in Wondwossen D (ed.), *Human Rights in Criminal Proceedings: Normative and Practical Aspects,* 3 *Ethiopian Human Rights Law Series* at 128 as cited in Arayaselassie (2014) at 93.

105 The author appreciates the doubt as to the legality of the asset amassed by the accused. But, he is with the opinion that the doubt is not equivalent to beyond the shadow of doubt.

5.2.2 The Southern Regional State's Anti-Corruption Commission v. Mr. Workneh Kenbatu et al[106]

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 an asset worth of 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 persons have adduced various evidences. Afterwards, arguing that defendants have presented evidences that rebutted the case of the prosecution, 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 its petition to the Regional State's Supreme Court Cassation Division arguing that the lower Courts have committed a basic error of law. The Division has accepted the petition and reversed the decision of the lower Courts. To do so, the Regional State's Supreme Court 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 Federal Supreme Court 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. They argued, its power is limited to determining the existence or otherwise of a basic error of law. The Federal Supreme Court Cassation Division accepted the petition but confirmed the decision of the Regional State Supreme Court's Cassation Division decision. To resolve the case, besides others, the Federal Supreme Court 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 case of the crime of illicit enrichment proceeding. Is it to prove the accurate legitimate source of the asset in question or simply causing a doubt? To give response to the above questions, the Cassation Division opted to analyse the onus of proof imposed on both parties by Article 419 of the FDRE Criminal Code, the then law on the crime of illicit enrichment.[107]

For the Cassation Division, once the prosecution shows the existence of disproportionality in asset, the burden of proof shifts onto the accused. The court interprets Article 419 of the FDRE

[106] Workneh Kenbatu et al. v. SNNPR Ethics and Anti-Corruption Commission Prosecutor (Federal Supreme Court, Cassation File No. 63014/2012) Federal Supreme Court Cassation Decisions, Vol. 13, pp. 359- 365).

[107] It is necessary to note that there is no difference between Article 419 of the FDRE Criminal Code and Article 21 of the contemporary Corruption Crimes Proclamation No. 881/2015 Article 21.

Criminal Code and states that 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 other criminal cases, causing a reasonable doubt on the prosecutor's charge or evidence(s) is not enough but proving the legitimacy of the asset accurately.[108]

The writer believes that the above 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.[109]

To recap, the above illustrative cases clearly show the existence of a reversal of onus of proof in case of the crime of illicit enrichment under Ethiopian anti-corruption law. The cases show that the onus imposed on the accused is to exactly prove the legitimacy of the asset in question – simply- a legal burden of proof.

6 REVERSAL OF ONUS OF PROOF IN CASE OF THE CRIME OF ILLICIT ENRICHMENT: APPRAISAL ON ITS CONSTITUTIONALITY

Besides ending impunity and the misappropriation of public property, the battle against the 'cancer' of corruption complements the protection of constitutionally guaranteed rights. Effective anti-corruption measures and protection of human rights are mutually reinforcing.[110] However, owing to its reversal of onus of proof element, there is a doubt concerning the compatibility of criminalisation of illicit enrichment as a tool to fight corruption on the one

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108 "ከዚህም የምንረዳው ዓቃቤ ህግ በግልፅ ከሚታወቀው ሀገዊ 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 ከገለፀውና 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**።" This position of the Federal Supreme Court's cassation is contrary to the Cassation Court of Egypt. In one case, their Court held that 'if the accused failed to prove the origin of the significant increase of the wealth, which does not commensurate with the lawful sources of his wealth, this is not sufficient *per se* to come to a decision of criminalizing and convicting the accused, due to the deficiencies in ground of the judgment" because it will be contrary to the principle of the presumption of innocence. See, Amin Z *et al* (2016) at 26.

109 In order to understand the implication of this interpretation, it is necessary to note the legal effect of the Federal Supreme Court Cassation Division interpretations. The interpretation is binding on federal as well as regional courts; see, the Federal Courts Proclamation, 1996, Proclamation No. 25, Fed.Neg.Gaz, as re-amended, Federal Courts Proclamation, 2005, 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.

110 The United Nations Human Rights Office of the High Commissioner, The Human Rights Case against Corruption, available at http://www.ohchr.org/EN/NewsEvents/Pages/HRCaseAgainstCorruption.aspx, p. 5, (visited 23 April 2018).

hand; and, the protection of the constitutionally guaranteed rights of accused persons on the other. From this point of view, in other jurisdictions, there have been discussions concerning the constitutionality of the crime of illicit enrichment. However, in Ethiopia, despite the apparent application of the crime in practice; and as argued before, the existence of a reversal of onus of proof; hitherto, the constitutionality issue has not been raised before the appropriate organs.

Consequently, the next section is devoted to scrutinise the reversal onus of proof element of the crime of illicit enrichment in light of the various rights of accused persons guaranteed under the FDRE Constitution.

6.1 Scrutiny in light of the principle of presumption of innocence

Various key international and regional human rights instruments,[111] as well as domestic jurisdictions have recognised the presumption of innocence as a bedrock principle.[112] Moreover, in almost all domestic jurisdictions, it has the status of a higher constitutional norm.[113] The principle gives every person the right to be presumed innocent until proven guilty; in doing so, protecting innocent defendants is its main aim.[114]As a generic notion, the presumption of innocence contains three fundamental components: the onus of proof first lies on the prosecution; the standard of proof is beyond a reasonable doubt; and the method of proof must accord with fairness.[115]

However, with the birth of very complicated and new crimes such as the crime of illicit enrichment, countries have started setting different standards concerning the principle of presumption of innocence mainly for the effective administration of the criminal justice. Accordingly, many countries allow an express limitation to the principle of presumption of innocence.[116] 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.[117] These tests are developed following the decision of the European Court of Human Rights(hereinafter, ECHRs) in *Salabiaku v. France.*[118] In line with the Court's argument, although countries have

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111 For example, see, the African Charter on Human and Peoples Rights (ACHPR) (1981), Art. 7(2). See also, the ICCPR, Art. 14(2); and, the Universal Declaration on Human Rights (UDHR) (1948), Art. 11.

112 See, for example, the UK, Canada, the US, Indian and Ethiopian law.

113 Wilsher (2006) at 29.

114 Ashworth (2006) at 253.

115 Jayawickrama, Pope, and Stolpe (2002) at 25.

116 Wilsher (2006) at 29.

117 Muzila, Morales, Mathias, and Berger (2012) at 49.

118 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, requires 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 consider the importance of what is at stake and maintain the rights of the defence'.

no express exception in their legislation, limiting the presumption of innocence have been found still to be constitutional. The limitation is justified based on the public's interest in convicting corrupt public officials and the severity and pervasiveness of public-sector corruption.[119] Similarly, under the international instruments, albeit they seem absolute, in practice, courts have held that this right can be qualified.[120] The question is: Is it valid to adopt the same construal under the Ethiopian legal system?

The FDRE Constitution provides that 'During proceedings accused persons have the right to be presumed innocent until proven guilty according to law and not to be compelled to testify against themselves.'[121] While the English version of this provision has the phrase 'according to law' as to how guilty should be proven, the same requirement could not be found in the Amharic version that has a final legal authority.[122] However, in this specific provision, the English version is more persuasive and untarnished.[123] Be the translation problem as it may, the question remains whether the presumption of innocence under the FDRE Constitution is an absolute or a qualified protection.

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 provided under the FDRE Constitution, it is safe to say that the presumption of innocence has no limitation.[124] Hence, for the author, in Ethiopia, 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 is unconstitutional.

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 corruption by solving the problem in relation to gathering evidence. However, the author submits that this fight should be carried out in a manner consistent with the fountainhead of laws, the FDRE Constitution. In

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).

119 Hong Kong Court of Appeals, 1995.

120 Salabiaku v France (EHRR, 1988).

121 The FDRE Constitution, Art.20(3).

122 The FDRE Constitution, Art. 106.

123 The omission of the phrase in the Amharic version creates an ambiguity on how guilty should be proved

124 Other writers such as Simeneh also confirm this stand. See, Kiros (2012) at 274.

Ethiopia, at least theoretically, the presumption of innocence is an absolute right. Put differently, the public prosecutor should prove the fulfilment of all elements of the crime beyond a reasonable doubt. Any procedure or crime that contradicts this constitutional norm is not tolerable. The FDRE Constitution as it is today allowed no limitation to ease the prosecutors' burden or shift it onto the accused for whatsoever reason. Moreover, unlike some countries such as South Africa,[125] there is no general limitation clause in it. Therefore, under the current Ethiopian constitutional system, not only shifting (legal) burden of proof but also easing burden of proof is not tolerable. It is contrary to the accused right to be presumed innocent until proven guilty.

6.2 Analysis in light of the protection against self-incrimination

Akin to the presumption of innocence, the protection against self-incrimination is recognised under various human rights instruments[126] and domestic jurisdictions.[127]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. This protection is justified by the inherently cruel and immoral nature of making anyone an instrument of his/her own conviction.[128]

Moving to the nature of the protection, unlike the presumption of innocence, thus far, although there is no a supranational organ that has ruled on the relation of the protection against self-incrimination and the crime of 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 is considered as contrary to the accused persons' protection against self-incrimination.[129] Under Ethiopian law, akin to the presumption of innocence, although in a limited scope, the protection 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.

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125 Kassie A (2011) ''Human Rights under the Ethiopian Constitution: A Descriptive Overview'' 5 *Mizan Law Review* 41-71 p. 58. See also, Kassie A (2011) ''Limiting Limitations of Human Rights under the FDRE and Regional Constitutions'' in Yonas B (ed) *Some Observations on Sub-national Constitutions in Ethiopia* 4 *Ethiopian Constitutional Law Series* (2011) Faculty of Law, Addis Ababa University at 63, 69-73, 74.

126 For example, see, the ICCPR, Art 14(3)(g).

127 For example, See, the FDRE Constitution, Arts. 19(5) & 20(3).

128 Louisell D (1965) ''Criminal Discovery and Self-Incrimination: Roger Traynor Confronts the Dilemma'' 89 *California Law Review* 89-102 at 95.

129 Stapenhurst R, Johnston N, and Pelizzo R (eds) (2006) *The Role of Parliament in Curbing Corruption* The International Bank for Reconstruction and Development / The World Bank at 230. See also, Kabwe J (2014) Criminalising Possession of Unexplained Wealth by Public Officials: Legal Perspectives from Zambia, LL.M. thesis, Faculty of Law, University of the Western Cape (South Africa) & Humboldt University (Germany), at 40-41.

However, the offense of illicit enrichment requires accused persons to adduce evidence that could exonerate them from conviction. It demands the accused to *say* something to *prove satisfactorily* about their disproportionate amount of asset or lavish living standards. Refusal or failure to do that will lead him/her to criminal conviction. This consequence, be convicted for the offense of illicit enrichment, shows how the accused is 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 'proves satisfactorily' requirement is not consonant with the constitutional protection accorded to accused and arrested persons. Therefore, even if the protection against self-incrimination is not primarily about burden of proof, the shifting of burden of proof may indirectly force the accused to speak something that incriminates her/him.

6.3 Exploration in light of the right to remain silent

Although the right to remain silent is another manifestation of the presumption of innocence and the protection against self-incrimination, for the sake of clarity and owing to its special nature, the author decides to make a separate discussion. Similar to the FDRE Constitution,[130] various human right instruments[131] have recognised the right to remain silent. This right entitles arrested persons the right not to say a word in response to any question that may be poses to them by the investigators and/or prosecutors. In various domestic jurisprudences, most often, the right to remain silent is not considered as an absolute right. Indeed, the ECHRs also affirms it.[132]According to the Court, 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 implications. It should 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 exhibited a *prima facie case*, and/or only common-sense inferences are permissible.[133] However, since reversal of onus of proof came into picture during a prosecution stage, one question that needs an answer is whether the right to remain silent is guaranteed to accused person or not. On this point, the author is of the opinion that since the right is a manifestation of the protection against self-incrimination and the presumption of innocence, accused persons should have such right.

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130 The FDRE Constitution, Art. 19(2).

131 The ICCPR, Art. 14(3)(g).

132 See, Murray (John) v UK (EHRR, 1996). The author submits that the manner how the court interprets this right cannot by and in itself be conclusive evidence to conclude how this right should be understood in Ethiopia. Here, it is used only to show the practice.

133 For further discussion, see, Jorge G, 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, (visited 8 October 2018).

Moving to the compatibility or otherwise of the crime of illicit enrichment and the right to remain silent as a constitutional right, not unlike the presumption of innocence and the protection against self-incrimination, in Ethiopia, the right to remain silent is formulated in an absolute form but only for arrested persons.[134] Therefore, the accused persons' right to remain silent has no a constitutional ground. Accordingly, even logically, the same strict protection for arrested persons cannot be guaranteed for accused persons. The author believes that 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 be acquitted from the criminal charge. Therefore, there is no violation of the right to remain silent in case of the crime of illicit enrichment.

7 CONCLUSION

Corruption is a global problem. It indiscriminately affects both the developed and developing countries albeit the extent may differ. 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 is one.

Since its introduction, the crime of illicit enrichment has been not only 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 *prove* satisfactorily (in Ethiopian context) how she/he amassed the asset in question. There is no unanimity concerning the interpretation of this onus imposed on the accused. It is debatable whether it is a mere evidentiary burden or a legal burden of proof and hence constitutes reversal of onus of proof or not.

This author argues that the burden is a legal burden of proof and is not in tandem with the FDRE Constitution as it violates the constitutional provisions on the principle of presumption of innocence and protection against self-incrimination. However, the author also believes that criminalising illicit enrichment is necessary and it needs to be validated than be nullified. Accordingly, in order to validate it, the constitutional provisions on the presumption of innocence, and the protection against self-incrimination should be amended and should expressly allow for limitation;[135] because, the revision would provide a better protection for the interest of the society by validating the important kit in fighting corruption.

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134 The FDRE Constitution, Articles 19 and 20.

135 The author clearly is aware of what is provided under Article 9(1) of the FDRE Constitution and its effect. But, he is of the opinion that in this specific scenario the constitution has a limitation and needs to be reconsidered.