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Combating Economic Crimes

Balancing Competing Rights and Interests in
Prosecuting the Crime of Illicit Enrichment

Ndiva Kofele-Kale



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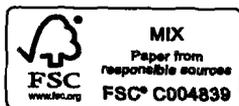
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Ndiva Kofele-Kale
Dallas, Texas, USA
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Preface

The last two decades have witnessed a paradigmatic shift in criminal law, more particularly in the area of acquisitive crimes, i.e. crimes that generate profit, from the traditional restriction of personal freedom paradigm towards a strategy of confiscating ill-gotten gains. This new “profit-oriented” paradigm—a term whose paternity can be traced to Guy Stessens’ groundbreaking study: *Money Laundering: A New International Law Enforcement Model*—is premised on the belief that increasing the effectiveness of legal instruments to detect, seize and confiscate illicitly acquired wealth will cause a decline in the motivation for engaging in criminal activities. *Combating Economic Crimes* is conceived in this vein but with a heavy, albeit, narrow focus on one aspect of recovering the proceeds of corruption, i.e. criminal as opposed to civil proceedings. The latter approach avoids the criminal standards of proof that must be met in criminal prosecutions and raises no compelling constitutional issues. Illicit enrichment being principally a penal offense that entails individual criminal responsibility and for which some form of punishment is warranted, quite naturally fits in the alternative social control paradigm with its primacy on depriving officials found to have unjustly enriched themselves of their fundamental right of personal freedom.

Combating Economic Crimes builds on my previous writings advocating the recognition of the right to a corruption-free society as a fundamental human right. And, as a corollary, recognizing that the systematic plunder of a nation’s wealth by constitutionally responsible officials is a crime of universal interest, breach of which entails individual criminal responsibility and punishment. My writings also acknowledge the fact that although all human rights are by definition equal, some rights are considered more equal than others. As a result, in the process of asserting these fundamental rights, conflicts inevitably arise between competing rights. One such unavoidable conflict arises when the *individual* right to be presumed innocent is pitted against the *collective* right to a corruption-free society. It is this doctrinal clash implicit in the crime of illicit enrichment that is the focus of this study. Recent developments in the global war against official corruption have inadvertently set the stage for this clash by providing for the controversial criminal offense of *illicit enrichment* in almost every multilateral anti-corruption convention. Illicit

enrichment is defined in each of these conventions as “a significant increase in the assets of a public official or any other person which he or she cannot reasonably explain in relation to his or her income.” Built into this definition is a reverse burden clause which triggers an automatic presumption that any public official found in “possession of inexplicable wealth” must have acquired it illicitly. It is then up to that official to explain how he acquired such wealth, and failing to “reasonably explain” the sudden increase in his wealth, in relation to his lawful earnings during the performance of his functions, the official could be found guilty of the offense of illicit enrichment. This has become a very powerful weapon in the global war against official corruption because, by design, reversing the onus helps in easing the prosecution’s burden by placing it on the accused on the assumption that the facts to be proved are peculiarly within the knowledge of the accused.

Of course, reversal of the burden of proof clauses raises important human rights issues with respect to the right to fair trial, which implies the right of the accused to be presumed innocent and the right against self-incrimination. It should, however, be pointed out that the international and domestic legal guarantees referred to with respect to an accused’s right to the presumption of innocence until proven guilty apply only in criminal cases and do not extend to civil cases. To the extent, therefore, that illicit enrichment is treated as a penal offense, as is the intent in this study, then it can be observed that the three recent international conventions that specifically establish this offense provide no clear guidelines on how to proceed in balancing the right of the accused to be presumed innocent against the competing right of society to appropriately punish corrupt public officials while stripping them of their illicitly acquired national wealth. *Combating Economic Crimes* therefore sets out to address what has been left unanswered by these multilateral conventions, to wit, (1) the type of burden of proof that should be placed on a public official who is accused of illicitly enriching himself from the resources of the State and (2) the right balance to be struck between the accused individual’s procedural fair trial rights and the protection of legitimate community interests and expectations of a corruption-free society. The book explores, from a comparative perspective, the different factors that courts consider as they try to balance the competing rights and interests that come into play in illicit enrichment proceedings: the collective right to a corruption-free society (or as an anonymous reviewer put it “the communal rights to public goods (officials enrich themselves by feeding on resources that would otherwise be widely distributed—through tax, social services or otherwise—amongst the wider populous”) versus the individual right to presumption of innocence and the right to silence.

This study is important for a couple of reasons. First, three multilateral anti-corruption conventions (African Union, Organization of American States and the United Nations) contain provisions for the offense of illicit enrichment and quite a number of countries have enacted legislation criminalizing this conduct. As social pressures to curb ostentatious impunity build up

around the globe more countries will respond by adopting illicit enrichment statutes to punish significant increases in public officials' wealth that cannot be reasonably explained in relation to their lawful income. Faced with the reversal/sharing of burden issues inherent in the crime of illicit enrichment, courts in these jurisdictions will have to address "criminal standards of proof" *not* "evade" them. They will need to come up with a legal framework that will reconcile the burden of proof requirement for illicit enrichment with traditional interpretations of the presumption of innocence and the right not to self-incriminate. A study such as this one, which seeks to elaborate a legal framework for reconciling the competing human rights claims implicit in the crime of illicit enrichment, will prove useful and helpful to law-makers as well as those who interpret and practice the law.

Second, this book is not intended as a primer for prosecutors trying to go around *criminal standards of proof* in favor of *civil proceedings for asset recovery* in corruption-related cases. Instead, it sets out to explore the inherent tension between legitimate community expectations that public officials in positions of trust should be held accountable and responsible for acts of unjust enrichment, on the one hand, and individual rights, as encompassed in the human rights safeguards of presumption of innocence and the right to silence, on the other. Finally, the focus on criminal proceedings is driven by the fact that illicit enrichment is principally a penal offense that entails individual criminal responsibility and for which some form of punishment is called. While there are several strategies in criminal law aimed at curbing acquisitive crimes, the strategy of assets recovery through civil proceedings, favored by several commentators, is one but by no means the only, or most effective, one. The crime of illicit enrichment, as an alternative social control policy, would deprive officials found to have unjustly enriched themselves of their fundamental right of personal freedom. However, these two strategies are not mutually exclusive in the context of illicit enrichment proceedings, though this book advocates the latter.

Needless to say, the views expressed in the book are the author's own unless otherwise stated. And responsibility for errors and omissions rests solely with him.

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