

ROUTLEDGE RESEARCH IN TRANSNATIONAL CRIME AND
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Combating Economic Crimes

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

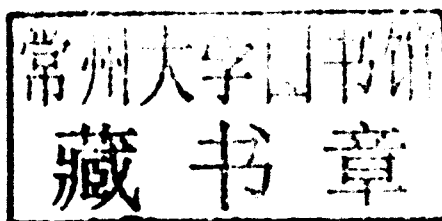
Ndiva Kofele-Kale



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First published 2012
by Routledge
2 Park Square, Milton Park, Abingdon, Oxon OX14 4RN

Simultaneously published in the USA and Canada
by Routledge
711 Third Avenue, New York, NY 10017

Routledge is an imprint of the Taylor & Francis Group, an informa business

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British Library Cataloguing in Publication Data

A catalogue record for this book is available
from the British Library

Library of Congress Cataloging in Publication Data

Kofele-Kale, Ndiva.

Combating economic crimes : balancing competing rights and interests in prosecuting the crime of illicit enrichment / Ndiva Kofele-Kale.

p. cm.—(Routledge research in transnational crime and criminal law)

Includes bibliographical references and index.

ISBN 978-0-415-77847-3 (hardback : alk. paper)—ISBN 978-0-203-22536-3 (e-book : alk. paper) 1. Unjust enrichment (International law)

2. Conflict of laws—Unjust enrichment. 3. Human rights.

4. International and municipal law. I. Title.

K920.K64 2012

345'.05—dc22

2011018390

ISBN 978-0-415-77847-3 (hbk)

ISBN 978-0-203-22536-3 (ebk)

Typeset in Garamond
by RefineCatch Limited, Bungay, Suffolk



Printed and bound in Great Britain by
TJI Digital, Padstow, Cornwall

This book is dedicated to my grandson, Motande.

Acknowledgements

I owe much gratitude to Southern Methodist University Dedman School of Law, its administration, its faculty and students for helping nurture this project, financially, professionally and intellectually. I benefited from a number of summer research grants that assisted me in my research, and I especially appreciate the moral support of Dean John B. Attanasio, the Judge James Noel Dean and Professor of Law and William Atwell Chair of Constitutional Law.

The assistance of the staff of the Underwood Law Library was indispensable—and I am particularly indebted to Tom Kimbrough, the Associate Director for Public Services, for his tireless work procuring so many of the resources I used in researching this book. He unfailingly responded with grace and promptness to my frequent requests. Deserving of special mention are Laura Justiss, Collection Development Librarian, and Angel S. Brown.

I would like to express my profound gratitude to my former and current students: Claudia Carballal, Esq., LL.M. (SMU 2007), of the International Practice Group at Godwin Ronquillo PC; Diego E. Gomez-Cornejo, Esq., JD (SMU 2010), now a corporate attorney with K & L Gates of Dallas; Adetokunbo Olowo, JD (SMU 2011) and Aisha U-Kiu, JD candidate (SMU 2012). Ernesto Gomez-Cornejo was responsible for translating a substantial volume of materials on Latin American law and practice from the original Spanish into English. I am sincerely grateful to him for undertaking this yeoman task. I also want to acknowledge indebtedness to Zena Crenshaw-Logal, Esq. and Dr. Andrew D. Jackson, co-administrators of “Drum Majors for Truth,” a good government advocate, for their invaluable help in reading various chapters of this book, for pointing out sources and suggesting changes. It is an honor to have worked with such seasoned practitioners. Thanks also are due to my Faculty Assistant, Michele Oswald, who painstakingly converted this manuscript into the format prescribed by the publisher.

I am grateful to Katherine Carpenter, Associate Editor at Routledge-Cavendish, for suggesting that I submit a manuscript to the Press and for her expert help in seeing the enterprise through to completion. I also thank the anonymous peer reviewers for the Press who provided many insightful comments that greatly improved the manuscript. The various project

managers for the book, Holly Davis, Senior Editorial Assistant and Editorial Assistants Eloise Cook, Khanam Virjee and Stephen Gutierrez, did a superb job shepherding the project along, and supervised admirably the production of a thorough index.

Portions of several chapters have been published previously in somewhat different form. Permission has graciously been granted by the American Bar Association for use in Chapter 5 of *Presumed Guilty: Balancing Competing Rights and Interests in Combating Economic Crimes* in 40 Int'l Lawyer, 919–24, 929–43 (2006) and for use in Chapter 6 of *The Right to a Corruption-Free Society as an Individual and Collective Human Right: Elevating Official Corruption to a Crime under International Law* in 34 Int'l Lawyer 149, 163–74 (2000). The author would also like to thank the Secretary of the Publications Board, United Nations, New York, for permission to reproduce materials from Legislative Guide for the Implementation of the United Nations Convention against Corruption (2006).

Ndiva Kofele-Kale
Dallas, Texas, USA
March 2011

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.

Table of cases

Agnew v. United States	84
Allan v. United Kingdom.....	67
Allenet de Ribemont v. France	59, 64, 65
Alsogaray, María Julia s/ recurso de casación e inconstitucionalidad	146
Annette Pagnouille (on behalf of Abdoulaye Mazou)	
v. Cameroon.....	59, 74
Ashingdane v. the United Kingdom.....	64, 74
Attorney General v. Cheung Chee-kwong.....	31
Attorney General v. Reid.....	96
Attorney-General of Hong Kong v. Hui Kin-hong.....	31, 96, 97, 127
Attorney-General of Hong Kong v.	
Lee Kwong-kut	95, 96, 106
Attorney-General of Hong Kong v. Sin Yau Min.....	96
Barbera, Messegue and Jabardo v. Spain.....	12, 93
Barnes v. United States.....	121
Bell v. Wolfish	83
Boumediene v. Bush.....	56
Civil Liberties Organisation, Legal Defence Centre,	
Legal Defence and Assistance Project v. Nigeria.....	59, 75
Coffin v. United States.....	79, 82-5
County Court of Ulster County v. Allen	54, 121, 122, 127
Dagenais v. Canadian Broadcasting Corp.....	120
Delcourt v. Belgium	61, 62, 113, 114
Director of Public Prosecutions v. Lambert.....	14, 91
Director of Public Prosecutions v. Sheldrake.....	13, 47, 48, 63, 67,
	81, 91, 121
Dubois v. The Queen.....	81, 93
<i>ex parte</i> Quirin	55

Falk v. the Netherlands	64
Fitt v. the United Kingdom [GC]	74
Fletcher v. Rylands	49, 50
Foucher v. France	89, 112
Funke v. France	60, 62, 67, 68, 70
Garrison v. Louisiana	34
Gilligan v. The Criminal Assets Bureau	46
Hall v. Dunlop	124, 125
Hamdi v. Rumsfeld	56
Hardy v. Ireland	45, 46
Heaney and McGuinness v. Ireland	60, 72
Heard v. State	53
Hernandez v. Johnson	53
Holland v. United States	117, 118
In Re Winship	89, 186
In Re Yamashita	55, 178
Interights <i>et al.</i> v. Botswana	77, 78
International Pen and Others v. Nigeria	59, 75, 76
Ives v. South Buffalo Railway	50
J.B. v. Switzerland	67
Jalloh v. Germany	73
Jayasena v. R	128
John Murray v. U.K.	15, 60, 62, 68–70, 124
Kaufman v. Belgium	89, 112
Keogh v. R.	48
Kevin Gumne <i>et al.</i> v. La République du Cameroun	143
Khan v. United Kingdom	74
Korematsu v. U.S.	55
Krause v. Switzerland	61
Law Office of Ghazi Suleiman v. Sudan	59, 77
Leary v. United States	122
Maharaj v. Attorney-General of Trinidad and Tobago, Privy Council	57
Maria v. McElroy	58
Martinez v. State	53
Media Rights Agenda v. Nigeria	59, 76, 77
Miranda v. Arizona	60

Mobile, J. & K. C. R. Co. v. Turnipseed	121
Moraël v. France	89, 112
Murray v. Director of Public Prosecutions	69, 123
Nauru v. Australia.....	133
New Zealand v. France	108, 110
Nuclear Tests Case	108
O'Halloran and Francis v. the United Kingdom	73
O'Leary v. The Attorney General	45, 46
P., R. and H. v. Austria.....	72
Prosecutor v. Clement Kayishema and Obed Ruzindana	114
Prosecutor v. Pauline Nyiramasuhko and Others	57
Prosecutor v. Slobodan Milošević.....	57
Prosecutor v. Milutinovic <i>et al</i>	114
Prosecutor v. Tadic.....	113, 114
R. v. Andrews.....	44
R. v. Big M Drug Mart Ltd.	98
R. v. Braithwaite	121
R. v. Chaulk	43
R. v. Cinous	129
R. v. Cowan.....	123, 124
R. v. Director of Serious Fraud Office <i>ex parte</i> Smith	61
R. v. Director of Public Prosecutions <i>ex parte</i> Kebilene.....	14, 47, 92, 95, 121
R. v. Downey	44, 95, 100, 101
R. v. Edwards	46, 120, 129
R. v. Edwards Books and Art.....	46, 120, 129
R. v. Evans-Jones.....	121
R. v. François	80
R. v. G. (T.).....	45
R. v. Hunt.....	46, 129
R. v. Jenkins.....	125
R. v. Keegstra.....	44
R. v. Johnstone.....	47, 92
R. v. Kevin Sean Murray.....	69
R. v. Laba	44, 45, 95
R. v. Lepage	80
R. v. Noble.....	80, 105, 123–5, 127
R. v. Nova Scotia Pharmaceutical Society	111
R. v. Oakes.....	42–4, 97–100, 106, 107, 110, 120, 129
R. v. P. (MB).....	127, 128, 130

R. v. Pratt	44, 45
R. v. Vaillancourt	43
R. v. Whyte	43, 82, 106
Raby v. State	53
S. v. Bhulwana, S Gwadiiso.....	49, 95
S. v. Coetzee and Others	10, 49, 104
S. v. Fransman	105
S. v. Julies	177
S. v. Mbatha, S v. Prinsloo.....	49, 95, 102
S. v. Ntsele.....	49
S. v. Zuma and Others.....	49
S. v. Manamela and Another.....	14, 102–6
S.N. v. Sweden	74
Salabiaku v. France	62–4, 74, 93–5, 106
Saramaka People v. Suriname.....	143
Saunders v. the United Kingdom.....	67–71, 74
Scagell and Others v. Attorney-General of the Western Cape and Others.....	49
Schenk v. Switzerland.....	73
Sekanina v. Austria.....	59, 65, 66
Shannon v. United Kingdom.....	72
Sheldrake v. Director of Public Prosecutions.....	13, 47, 48, 63, 67, 81, 91, 121
Shurbet v. State	53
State v. Novoa Robles.....	26
Suárez Rosero Case	59, 78, 79
Sullivan v. New York Times.....	34
Taylor v. Kentucky.....	83
Teixeira de Castro v. Portugal.....	73
Torres v. State	53
Tot v. United States	121, 122
Trompert v. Police.....	124
Turner v. United States	122
U.S. v. Ardito.....	51, 52
U.S. v. Johnson.....	51, 117
U.S. v. Sablan	52, 53
U.S. v. Wedgewood Inc. <i>et al.</i>	51
United States v. Anderson	118
United States v. Bakeas.....	58
United States v. Buffalano	52
United States v. Duarte-Acero	58
United States v. Dworkin	117

United States v. Feola	51
United States v. Giacalone	117
United States v. Goldstein	118
United States v. Gomez- Soto	117
United States v. Jennings	52
United States v. Mastropieri	118
United States v. Moon	52
United States v. Reed	52
United States v. Romano	122
United States v. Schafer	117
United States v. Vardine	118
United States v. Yermian	51
 Weh v. Austria	 72
Woolmington v. DPP	46, 80, 82

Table of legislation, treaties, and conventions

LEGISLATION

Algeria

Order No. 156-66 of 8 June 1996	29
---------------------------------------	----

Argentina

Ethics in the Exercise of Civil Service Duties Law No. 25.188 [Ética en el Ejercicio de la Función Publica] of 1999	19, 111, 152
art. 38	19
art. 39	19
Law on Public Ethics n. 25.188	
art. 268(2)	192
Penal Code of the Argentinean Nation [Código Penal de la Nación Argentina]	19, 146, 147, 152, 156
art. 268(1)	19
art. 268(2)	19, 146–9, 154, 155
art. 268(3)	19

Austria

Criminal Procedure Act	66
Motor Vehicles Act	72

Bahamas

Penal code, chap.	20
art. 235.	20
Proceeds of Crime Act, 2000, chap. 93.	19
art. 6	19
art. 46	19
art. 59	19

Bolivia

Law against Corruption, Illicit Enrichment and Fortune Investigation, art. 149 [Proyecto de Ley de Lucha contra la Corrupción, Enriquecimiento Ilícito e Investigaciones de Fortunas]	20
New Code of Criminal Procedure [Nuevo Código de Procedimiento Penal] art. 6	85
Penal Code art. 149	20

Cameroon

Constitution

Constitution of Cameroon	108, 118
--------------------------------	----------

Canada

Constitution

Canadian Charter of Rights and Freedoms.	14, 42, 62, 100, 101
---	----------------------

Statutes

Narcotics Control Act (NCA)	43
Liquor Control Act	45
Motor Vehicle Act	44

Chile

Code of Criminal Procedure [Código Procesal Penal] art. 4	85
Penal Code [Código Penal de la República de Chile] art. 241	20

Colombia

Constitution

Constitution of Colombia	108, 118
art. 122	108, 118
Code of Criminal Procedure [Código de Procedimiento Penal] art. 7	85

Statutes

Penal Code	20
art. 14	20
art. 412	20

Costa Rica

Code of Criminal Procedure [Código Procesal Penal]	
art. 9	85, 86
Law against Corruption and Illicit Enrichment in the Civil Service [Ley contra la Corrupción y el Enriquecimiento Ilícito en la Función Pública]	20
art. 45	20
Penal Code	20
art. 45	20

Croatia

Penal Law	
art. 338	17

Cyprus

Confiscation of Proceeds of Trafficking of Narcotic Drugs and Psychotropic Substances Law of 1992	
art. 4(1)	17

Dominican Republic

Code of Criminal Procedure of the Dominican Republic [Código Procesal Penal de la República Dominicana]	
art. 14	86
Penal Code of the Dominican Republic, [Código Penal de la República Dominicana]	21

Ecuador

<i>Constitution</i>	
Constitution of Ecuador	78

Statutes

Code of Criminal Procedure [Código de Procedimiento Penal]	
art. 4	86
Penal Code bk. 2 tit. III, ch. VIII	21

El Salvador

<i>Constitution</i>	
Constitución de la República de El Salvador	21