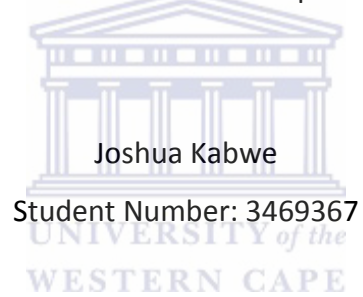


THE UNIVERSITY OF THE WESTERN CAPE

FACULTY OF LAW

**Criminalising Possession of Unexplained Wealth by Public Officials: Legal Perspectives
from Zambia**

Thesis submitted in partial fulfilment of the requirements of the LLM degree



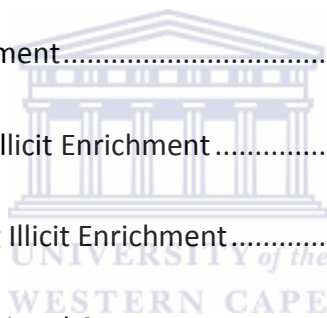
SUPERVISOR

Professor RA Koen

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Declaration

I, Joshua Kabwe, declare that '*Criminalising Possession of Unexplained Wealth by Public Officials: Legal Perspectives from Zambia*' is my own work, that it has not been submitted for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

Signature:.....

Date:.....



Supervisor: Professor RA Koen

Signature:.....

Date:.....

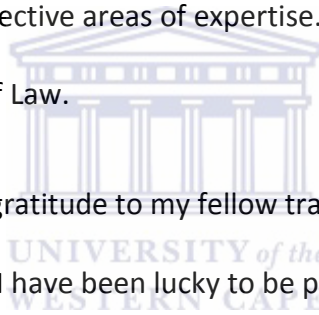
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List of Acronyms and Abbreviations

| | |
|---------------------------|--|
| ACC | Anti-Corruption Commission |
| AU Convention | African Union Convention on Preventing and Combating Corruption |
| IAD | Income and Asset Declaration |
| Inter-American Convention | Inter-American Convention against Corruption |
| MP | Member of Parliament |
| NCB | Non-Conviction Based |
| SADC Protocol | Southern African Development Community Protocol against Corruption |
| SITET | Special Investigations Team on Economy and Trade |
| UNCAC | United Nations Convention against Corruption |



Key Words

Asset declaration

Burden of proof

Corruption

Illicit enrichment

Lawful income

Presumption of innocence

Property

Public official

Reverse onus

Right against self-incrimination

Right to silence

Standard of living

Standard of proof

Unexplained wealth



Chapter One

The Offence of Illicit Enrichment

1.1 Background

Corruption is a fundamental problem faced by many countries. Reports of public officials accumulating unexplained wealth or emerging wealthier after serving in public office are widespread world over. It is estimated that more than \$40 billion is lost each year to theft by public officials in developing countries.¹

In many countries, especially developing countries, public office is viewed as a golden key to wealth. As noted by Mbaku, many societies view appointment to public office as an investment, similar to putting money in a bank or buying stock in a firm.² Appointment to an important public office is like winning the lottery: the new public office can be used to amass wealth for oneself and those around you.³ Economic mismanagement and misuse of public resources for personal gain is said to be a way of life for most public officials in Africa.⁴

In Zambia, incidents of public officials owning inexplicable wealth are reported constantly.⁵ In particular, the philosophy of the politics of benefits is common among politicians. For instance, in April 2013, one politician serving as a provincial minister stated publicly that his

1 Greenberg *et al* (2009) 7.

2 Mbaku (1998) 167.

3 Mbaku (1998) 167.

4 Udombana (2003) 7.

5 See, for example, Kayumba 'Zambia: Police Arrest Stella Chibanda over Her K2 Billion Property' - *The Post* 27 August 2002.

and his colleagues were in government “to eat”.⁶ It has been observed also that the country in the past has witnessed individuals considered indigent entering public office and emerging as some of the wealthiest citizens.⁷

In the absence of accountability or transparency, modestly paid public officials acquire assets that far exceed their wealth, or lead lavish lifestyles without the need to explain their source of wealth.⁸ Even those who are supposed to be fighting corruption often own property far beyond their income.⁹

A key question is how the law in Zambia can respond effectively to cases of this nature.

Zambia is a party to various international and regional instruments on corruption. These include the United Nations Convention against Corruption (UNCAC) and the African Union Convention on Preventing and Combating Corruption (AU Convention).

1.2 The Offence of Illicit Enrichment

Public attention and suspicion are aroused usually when there is an unjustified increase in the property of a public official which exceeds his known sources of income. Increased accountability and transparency are advocated when a modestly paid public official leads a lifestyle that cannot be justified by his or her income.¹⁰ In such cases, corruption or wrongdoing may be suspected, but in the absence of evidence to prove that an offence has been committed, prosecution is unlikely to follow.¹¹

6 See Kuwema ‘We all go into govt to eat – Munkombwe’ - *The Post* 4 April 2013.

7 Mwenda (2007).

8 See, for example, ‘Declaration of Assets’ - *The Post* 20 December 2013.

9 See ‘Declaration of Assets’ - *The Post* 20 December 2013.

10 Muzila *et al* (2013) 247.

11 Perdriel-Vaissiere (2011) 3.

In addition, the public official's assets usually are well-concealed, making the detection and prosecution of corruption very difficult. Consequently, recent efforts in the fight against corruption have shifted focus to monitoring the financial affairs of public officials.¹² To address the evidential challenges linked to proving corruption, and to curb unlawful accumulation of wealth by public officials, the offence of illicit enrichment has been developed in various legal instruments on corruption.¹³

The offence is defined variously in the different instruments that establish it. For the purposes of this paper, the definition in UNCAC, which is a global instrument, is adopted.

Article 20 of the Convention defines illicit enrichment as:

“the significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income.”

It is worth noting that this is a non-mandatory provision, meaning that there is no obligation on a State Party to criminalise illicit enrichment. States Parties merely are urged to criminalise illicit enrichment to the extent permissible under their domestic legislation.

Article 20 of UNCAC stipulates further that the introduction of the offence by a State Party is “subject to its constitution and the fundamental principles of its legal system”. If adopted, therefore, the offence will be tailored to the particular needs of a country and its legislative framework.

The offence is described in many ways, such as “possession of unexplained property” or “possession of property disproportionate to known sources of income”.¹⁴ Despite the variety of terms employed, its underlying purpose is to preserve transparency and

12 See, for example, Hope (2013), OECD (2011) and World Bank (2012).

13 See, for example, Article 20 of UNCAC, Article 9 of the Inter-American Convention on Corruption, Article 8 of the AU Convention on Corruption and section 10 of the Prevention of Bribery Ordinance (1997) of Hong Kong.

14 Muzila *et al* (2013) 247.

accountability in public office.¹⁵ In addition, there are a number of common minimum elements that form the basis of the offence. Among these are that the offence is aimed at public officials as persons of interest,¹⁶ there must be a significant increase in the official's assets and no justification for the increase by the official, and a specific period of time is considered when determining whether a public official has enriched himself.¹⁷

Illicit enrichment provisions allow for the prosecution of public officials on the basis of their failure to provide an explanation for excessive wealth, which is deemed as evidence of corruption.¹⁸ In this way, the offence overcomes the challenges of gathering evidence in corruption cases.

1.3 Rationale for Criminalising Illicit Enrichment

The rationale for criminalising illicit enrichment rests on the lack of tangible evidence that corruption has taken place in relation to a public official with unjustifiable assets.¹⁹

Establishing a nexus between the commission of a particular corruption offence and the disproportionate property of a public official often is challenging because of the clandestine nature of corruption.²⁰ Also, corrupt public officials go to great lengths to conceal their corrupt activities. With no victim or individual to complain, proving the offence will be very difficult.²¹ In these circumstances, the enrichment of the public official is the only tangible manifestation of corruption.²²

15 Manfroni (2003) 69.

16 Some countries extend the offence to private individuals. See generally Muzila *et al* (2013).

17 See generally Muzila *et al* (2012).

18 Muzila *et al* (2012) 7.

19 Muzila *et al* (2012) 7.

20 Clarke (2002) 15.

21 Perdriel-Vaissiere (2011) 2.

22 Muzila *et al* (2012) 5.

In response to these evidential challenges, many countries have adopted the offence of illicit enrichment. To establish the offence, the prosecution is obliged to show beyond reasonable doubt that the public official's wealth exceeds his lawful income. However, the prosecution is relieved of the full burden of proof as it does not have to show that the property in possession of the accused is the result of criminal activity or corruption.²³

Once the prosecution establishes that the public official's wealth cannot be justified from legitimate sources of income, a "presumption of corruption" arises and the official has to show the legitimate source of the income.²⁴ A failure by the public official to rebut this presumption leads to a conviction.

1.4 Advantages of Criminalising Illicit Enrichment

There are various advantages associated with criminalising illicit enrichment. The underlying assumption is that increasing the ability to detect and confiscate assets acquired illicitly will discourage would-be offenders from engaging in criminal activity.²⁵ In this manner, criminalising illicit enrichment helps to deter criminal activity. In addition, by taking away the illicit proceeds, it ensures that officials who enrich themselves illegally do not benefit from their illegal activity.²⁶ Finally, it has been observed that criminalising illicit enrichment fosters public confidence in the administration of justice by demonstrating that crime is not profitable.²⁷

23 Babu (2006) 32.

24 Lewis (2012) 287.

25 Jorge (2009) 14.

26 Bartels (2010) 4.

27 Lusty (2002) 345.

1.5 Human Rights and Constitutional Concerns

Despite its widespread recognition, the offence of illicit enrichment continues to generate resistance, particularly in North America and much of Western Europe.²⁸ Extensive debate and controversy are generated from these jurisdictions which view the offence as infringing upon constitutional liberties and violating human rights and due process protections.²⁹

In essence, opposition to the offence is based on two arguments, namely: violation of the presumption of innocence, with the consequent reversal of the burden of proof, in requiring the accused party to demonstrate the legitimate source of his property; and violation of the guarantee against self-incrimination, also because of the need for the public official to explain the source of his property.³⁰

Those who oppose legislation relating to illicit enrichment maintain, for example, that the public official could have been enriched through another type of illegal activity, such as drug trafficking, clandestine betting, or tax evasion.³¹ In this case, an official called upon to give an explanation regarding the source of his property will be subject nevertheless to a penalty for a corruption offence.³²

In contrast, support for the offence is justified on the basis that the public has the right to question the source and transparency of the earnings of public officials.³³ In support of this view, it is argued that a state has the right to require that public officials own only property they can justify through their legal activities, for reasons of administrative transparency,

28 Muzila *et al* (2013) 247.

29 See Muzila *et al* (2012).

30 See generally Lewis (2012) and Wilsher (2006).

31 Manfroni (2003) 70.

32 Manfroni (2003) 70.

33 Manfroni (2003) 69.

public trust, and criminal policy.³⁴ A further justification is that a more effective way to combat corruption is by resort to circumstantial evidence, thus shifting the burden of proof.³⁵

1.6 Illicit Enrichment in Zambia

In an effort to enhance the fight against corruption, and against unexplained wealth by public officials specifically, Zambia has enacted legislation criminalising the possession of unexplained property by public officials. Section 22 of the Anti-Corruption Act³⁶ criminalises the possession of property by a public official which cannot be supported by his known official income. In addition, a public official who maintains a standard of living that cannot be justified by his income is liable to prosecution if he fails to justify the source of his funds.

Under Zambian law, the offence is known officially as “possession of unexplained property,” as opposed to illicit enrichment. In either case, the basis of the offence is the unexplained increase in the assets of a public official that he or she cannot justify. The terms “illicit enrichment” and “possession of unexplained property” therefore are used interchangeably in this paper.

At independence in 1964, Zambia inherited various British Acts that governed corrupt practices. The Penal Code, Chapter 146, was the principal law that governed acts related to corruption in Zambia.³⁷ Its focus was on corrupt acts committed by persons in the public service.³⁸ In order to prevent abuse of office by leaders and to regulate the possession of wealth by public officials, in 1974 the government introduced the Leadership Code that was

34 Manfroni (2003) 71.

35 Jayawickrama, Pope & Stolpe (2002) 2.

36 Act No 3 of 2012.

37 Ndulo (2014) 37.

38 Chikulo (2000) 173.

meant to reduce materialistic tendencies amongst public officials.³⁹ The Code, which covered all spheres of public service, prohibited leaders from owning businesses or earning income outside their regular employment in the government.⁴⁰ Also, the Special Investigations Team on Economy and Trade (SITET) was established in 1971 to investigate economic crimes.

In 1980, the Corrupt Practices Act was passed to consolidate all offences related to corruption and to establish the Anti-Corruption Commission tasked with investigating corruption-related offences under the Act.⁴¹ The Act extended jurisdiction to cover corrupt practices in both the public and private sectors. In 1996, the Anti-Corruption Commission Act⁴² repealed the 1980 Act.

The statutory framework of the offence of possession of unexplained property in Zambia reveals that it has existed in different pieces of legislation and survived repeated amendments and repeals of said legislation.⁴³ Section 37 of the Anti-Corruption Commission Act of 1996 criminalised the possession of unexplained property by public officials.

However, in December 2010, the Movement for Multiparty Democracy (MMD) government amended the 1996 Act and repealed this section, replacing it with an offence of concealment.⁴⁴

The leading argument for repealing section 37(2) of the Anti-Corruption Commission Act of 1996 was that it inconsistent with Article 18(7) of the Constitution, which provides that a person charged with an offence shall not be compelled to give evidence at his trial. It was

39 Tordof (1974) 32.

40 Ndulo (2014) 37.

41 Due to its unpopularity, the Code was repealed in 2002. See Ndulo (2014) 36.

42 Act No 42 of 1996.

43 Mbao (2011) 15.

44 'President Assents to ACC Act number 38' - *Lusaka Times* 10 December 2010.

contended that, by requiring a public official to give a satisfactory explanation of his wealth to the court, the section violated the constitutional protection granted to an accused not to testify at his trial.⁴⁵ Other reasons advanced were that the offence was ineffective in a liberalised economy and that it was discriminatory as it ignored the private sector.⁴⁶

Following the victory of the Patriotic Front (PF) government in the 2011 general elections, the offence was re-enacted, with slight modifications, in the revised Anti-Corruption Act of 2012.⁴⁷ During the parliamentary debates, opposition was raised to the re-enactment of the offence, citing reasons related to the infringement of due process rights guaranteed by the Constitution.

Despite opposition to its re-introduction, the offence of illicit enrichment has received support both from scholars and the general public. For example, Mwenda supports the introduction of techniques into the Zambian legal system that shift the burden of proof and lower the standard of proof to be met by the prosecution.⁴⁸ Similarly, it has been argued that procedural rights that are recognised worldwide are not absolute, and that there are instances when the courts have balanced the presumption of innocence and burden-shifting provisions of the law.⁴⁹

1.7 Research Objectives

This paper attempts a comprehensive analysis of the offence of illicit enrichment in Zambia. It focuses on how the offence fits into the broader legislative framework in Zambia. More importantly, the paper addresses aspects of the offence related to the presumption of

45 Report of the Committee on Legal Affairs and Governance (2010) 15.

46 Report of the Committee on Legal Affairs and Governance (2010) 15.

47 Act No 3 of 2012.

48 Mwenda (2007).

49 Ndulo (2014) 36.

innocence, the protection against self-incrimination and the presumption of legality in the light of the Zambian Constitution to determine whether the concerns raised are legitimate.

Also, considering the potential effectiveness of criminalising illicit enrichment by public officials, this study investigates whether the law in Zambia can be implemented to balance the constitutional rights of the accused and the right of society to recover illicitly obtained wealth. Finally, the research seeks to determine the possible challenges of implementing and prosecuting the offence, and its efficacy in the fight against corruption in Zambia.

1.8 Scope of the Research

This paper examines the legal provisions on possession of unexplained property by public officials in Zambia. Although the offence in other jurisdictions extends to private individuals, the law in Zambia limits it to public officials, which category has a broad definition. The paper analyses the range of public officials covered by the law and the material elements of the offence in Zambia. It investigates how Zambia has adapted the offence as defined in UNCAC.

1.9 Outline of Remaining Chapters

Chapter 2 is concerned with the Zambian legal framework on unexplained wealth. The chapter analyses conceptual issues surrounding the definition of the offence of illicit enrichment and, in the process, highlights the scope of the offence. It analyses further the elements of the offence in Zambia, and considers the definition of a public official, the period of interest, what amounts to property and unexplained property, what amounts to a significant increase, and the standard of proof required by the offence.

Chapter 3 deals with the human rights and constitutional issues raised by the offence. In particular, the chapter considers the Zambian Constitutional provisions and surrounding arguments relating to the presumption of innocence, reversal of the burden of proof, protection against self-incrimination and the principle of legality.

Chapter 4 assesses the effectiveness of the offence and the potential challenges of investigating and prosecuting the offence in Zambia. In addition, the chapter considers the penalties and forfeiture provisions, and assesses whether they are an adequate response to combating unexplained possession of wealth by public officials in Zambia.

Chapter 5 highlights the findings of the research and provides recommendations based on the challenges and limitations identified. Suggestions are drawn from international bodies and other jurisdictions on how best to improve and implement the offence.



Chapter Two

The Legal Framework of Possession of Unexplained Property in Zambia

2.1 Introduction

The offence of illicit enrichment has been identified widely as a useful tool for combating corruption. Zambia is a signatory to UNCAC and the AU Convention, both of which contain the offence of illicit enrichment.¹ As a result, its response to corruption has been influenced typically by the provisions of these international conventions. This chapter explains the basis and scope of illicit enrichment as an offence in Zambia. To this end, the offence will be considered in detail in order to determine its elements and the extent to which the law in Zambia adheres to international practice.

2.2 Possession of Unexplained Property

The key statute in the Zambian anti-corruption legal framework is the Anti-Corruption Act No 3 of 2012. The Act, *inter alia*, provides for the prevention, prosecution and punishment of corrupt practices and related offences,² and criminalises illicit enrichment by public officials.

As noted earlier, the offence is known officially as “possession of unexplained property”.

Section 3 of the Anti-Corruption Act defines unexplained property as:

“property in respect of which the value is disproportionate to a person’s known sources of income at or around the time of the commission of the offence and for which there is no satisfactory explanation.”

1 Zambia also is a party to the SADC Protocol. But the Protocol does not criminalise illicit enrichment.
2 Preamble to the Anti-Corruption Act of 2012.

Section 22(1) of the Act proscribes the possession of unexplained property by public officials in Zambia. It defines possession of unexplained property as follows:

- “Subject to the Constitution, any public officer who —
- (a) maintains a standard of living above that which is commensurate with the public officer’s present or past official emoluments or other income;
 - (b) is in control or possession of pecuniary resources or property disproportionate to the public officer’s present or past official emoluments; or
 - (c) is in receipt of the benefit of any services which the public officer may reasonably be suspected of having received corruptly or in circumstances which amount to an offence under this Act;

shall, unless the contrary is proved, be liable for the offence of having, or having had under the public officer’s control or in the public officer’s possession pecuniary resources or property reasonably suspected of having been corruptly acquired, or having misused or abused the public officer’s office, as the case may be.”

This kind of provision has existed in Zambian anti-corruption law at least since 1996. The wording of section 22(1) of the current Act corresponds with the definition of the offence in other jurisdictions, most notably Hong Kong.³

It is clear from the wording of section 22(1) that the offence is broad and criminalises possession of unexplained property by public officials in various respects. The following section analyses the individual elements of the offence in more detail. The courts in Zambia have not had the opportunity yet to provide guidance on the interpretation of this provision. Nonetheless, it is important to consider the scope and necessary elements of the offence to determine what the prosecution needs to prove before a conviction can be secured.

3 See section 10 of the Prevention of Bribery Ordinance (1997) of Hong Kong.

2.3 Scope and Elements of the Offence

There are a series of components of the offence that are essential to proving its commission. These common elements are found in almost all the definitions of the offence in international conventions, UNCAC included. They are: the subject of the offence, a standard of living incompatible with known official income, the relevant period of interest, a significant increase in property, possession of the benefit of any service reasonably suspected of having been acquired corruptly, intent and absence of an explanation. It is important to consider each element individually to determine its exact requirements.

2.3.1 Subject of Corruption

Section 22(1) of the Anti-Corruption Act identifies “any public officer” as the subject of the offence. From this reference, it is evident that the offence targets public officials. This is consistent with international instruments dealing with the offence and also with most national laws that have illicit enrichment provisions.⁴ Section 3 of the Act provides that a “public officer” is:

“any person who is a member of, holds office in, is employed in the service of, or performs a function for or provides a public service for, a public body, whether such membership, office, service, function or employment is permanent or temporary, appointed or elected, full-time or part-time, or paid or unpaid, and ‘public office’ shall be construed accordingly.”

The Act thus adopts an expansive definition of a public official and includes any person who works in a public body. A similarly broad definition of what amounts to a public body is adopted. This is defined in section 3 of the Act as:

“the Government, any Ministry or department of the Government, the National Assembly, the Judicature, a local authority, parastatal, board, council, authority,

4 Muzila *et al* (2012) 31.

commission or other body appointed by the Government, or established by, or under, any written law.”

In essence, this definition covers every type of worker who performs a public function, regardless of the title or position he or she holds. This approach is similar to the definition of a public official in Article 2 of UNCAC.⁵

The broad definition of a public official to include elected officials, overcomes a shortcoming in previous cases concerning the identification of a public officer. For example, in the case of *The People v Dr Frederick Titus Jacob Chiluba and two others*,⁶ the first defendant, who was the former President of Zambia, was acquitted on charges of theft by public servant on the basis that he was not a public officer because his office is elective, and that the Constitution does not describe him as a public servant. The all-encompassing definition of a public officer in the Anti-Corruption Act of 2012 means that this reasoning would have no foundation in proceedings commenced under the Act today. The wide definition encompasses the lowest- and the highest-ranked public official, from an office orderly to the President.

From the foregoing, the status and formal appointment of the person are not the decisive factors for qualification as a public official. Rather, a more functional approach is favoured, relying on the role performed by the person concerned.⁷ As a result, a public official is

5 Article 2 of UNCAC defines a public official as: “any person holding a legislative, executive, administrative or judicial office of a State Party, whether appointed or elected, whether permanent or temporary, whether paid or unpaid, irrespective of that person’s seniority; (ii) any other person who performs a public function, including for a public agency or public enterprise, or provides a public service, as defined in the domestic law of the State Party and as applied in the pertinent area of law of that State Party; (iii) any other person defined as a “public official” in the domestic law of a State Party. However, for the purpose of some specific measures contained in chapter II of this Convention, “public official” may mean any person who performs a public function or provides a public service as defined in the domestic law of the State Party and as applied in the pertinent area of law of that State Party.”

6 SSP/124/2004. It should be noted that the charges in this case were pursuant to the Penal Code and not the Anti-Corruption Commission Act of 1996. Nonetheless, the repealed Anti-Corruption Commission Act of 1996 did not include expressly elected officials other than those already specified in that Act.

7 Eser & Kubiciel (2005) 23.

anybody who performs tasks based on some state or public authority and thus is integrated into the public sector.⁸ The official status or title of the person concerned is simply an indicator of whether he or she performs public tasks.⁹

However, despite its expansiveness and the functional approach to its interpretation, the definition of a public official does not appear to extend to every type of worker who has access to public funds. For example, employees of a non-governmental organisation using public resources are excluded from the definition.¹⁰ Similarly, employees of non-state entities contracted by the government to perform typical public administration functions may not be held liable criminally as public officials.¹¹

As noted earlier, one of the reasons advanced for the amendment of the Anti-Corruption Commission Act of 1996 was that the offence was discriminatory for targeting public officials only.¹² Following its re-enactment in the Anti-Corruption Act of 2012, the offence was limited to public officials. This reflects international practice because the offence was created precisely to target corrupt public officials.

The justification for targeting public officials is that, owing to the special position that they occupy, more integrity and accountability are demanded from them than from the ordinary citizen.¹³ A state therefore has the right to require that public officials only own property that they can justify lawfully.¹⁴

8 Eser & Kubiciel (2005) 23. See also the OECD (2008) 33 which adopts a functional interpretation to the definition of a public official.

9 Kubiciel (2009) 143 and Doig (2012) 4.

10 Muzila *et al* (2012) 31.

11 Cohen & Marriot (2010) 144.

12 See the Report of the Committee on Legal Affairs (2010) 10.

13 Manfroni (2003) 87.

14 Manfroni (2003) 87. Nevertheless, some countries have gone a step further and extended the offence to private individuals. An example is India. See Muzila *et al* (2012) 31.

2.3.2 Standard of Living

Flamboyance in public office is invariably one of the clearest indicators of corruption and one of the easiest ways to draw attention to a public official's lifestyle.¹⁵ Section 22(1)(a) of the Anti-Corruption Act refers to a public officer who:

“maintains a standard of living above that which is commensurate with the public officer's present or past official emoluments or other income.”

The Act does not define the term “standard of living”. However, in this context, the term can be understood to mean the degree of material comfort or wealth that a public official enjoys.¹⁶

Furthermore, the Act does not stipulate the indicators to be considered when assessing the standard of living of a public official. This gives latitude to investigators and prosecutors to consider a wide range of factors when making this assessment. The most obvious factors that can be considered are the public official's bank accounts and his assets and liabilities. The standard of living can extend also to every aspect of the official's financial life, ranging from gifts made to liabilities cleared.¹⁷

The reference to the “public officer's present or past official emoluments or other income” makes it clear that income covers all earnings the official currently is receiving or previously received for his functions, or from performance of a function separate from his public functions.¹⁸ Indications of the type of official emoluments envisaged by the Act are evident from the way such emoluments are defined to include “an honorarium, a pension, gratuity

15 Coronel & Kalaw-Tirol (2002) 144.

16 OUP (2009) 1144.

17 OSCE (2004).

18 Manfroni (2003) 88.

or other terminal benefits”.¹⁹ This definition makes it easier for the prosecution to prove official emoluments by reference to official records of these payments.

It can be noted that the definition of official emoluments in the Act is very narrow. The definition appears to limit official emoluments to payments which appear on a public official’s payslip or payments that are supported by some documentation. A more comprehensive approach is to adopt the definition of earnings in the Income Tax Act,²⁰ which defines the term “emoluments” as:

“any salary, wage, overtime or leave pay, commission, fee, bonus, gratuity, benefit, advantage (whether or not that advantage is capable of being turned into money or money's worth), allowance, including inducement allowance, pension or annuity, paid, given, or granted in respect of any employment or office, wherever engaged in or held.”²¹

This definition is broad and provides an extensive range of the type of earnings that an official is capable of receiving. Such a broad definition provides a comprehensive understanding of the sources of income to be considered before judging that a public official’s standard of living or assets exceed his lawful income.

Despite the narrow definition of emoluments in the Anti-Corruption Act, where it is evident that the public official’s standard of living or assets, as defined here, are incommensurate with his income, a need arises for him to justify the source of his wealth. For example, this can be done by showing an inheritance, or support from other sources, such as family property.²²

19 Section 3 of the Anti-Corruption Act of 2012.

20 Cap 323 of the Laws of Zambia.

21 See section 2 of the Income Tax Act.

22 See generally Coronel & Kalaw-Tirol (2002).

2.3.3 Period of Interest

The period of interest refers to the period considered in the determination of whether a public official has enriched himself.²³ The relevant time period taken into account establishes a link between the excessive property or resources of an accused official and the beginning of his performance of a public function.²⁴

Section 22 of the Anti-Corruption Act does not provide expressly for the relevant period of interest to be taken into account. However, a reading of the Act suggests that the relevant period within which the illicit enrichment is taken to occur is the tenure of office of the public official. Here, the law of Zambia can benefit from the approach of countries that have adopted an express period of interest, using formulations such as “a public officer who during his term”. Alternatively, reference can be made to the date when a person begins performing public functions.²⁵



The obvious drawback to this interpretation is that a public official can maintain a moderate lifestyle until leaving office and then starting using his ill-gotten gains. Nevertheless, although the functions of a public official end when he leaves office, this in itself does not mean that the subsequent discovery of unexplained property acquired during the performance of his duties will be a bar to investigation or prosecution.²⁶

In this regard, lessons can be drawn from countries such as Argentina and Columbia which extend the period of interest to a number of years after a public official leaves office.²⁷

Another method that the law in Zambia can adopt is to leave the possibility of prosecution

23 Muzila *et al* (2012) 34.

24 Muzila *et al* (2012) 34.

25 Muzila *et al* (2012) 34.

26 Manfroni (2003) 74.

27 Muzila *et al* (2012) 34.

open and not limit or stipulate the number of years within which a public official can be prosecuted after leaving office.²⁸

2.3.4 Property Disproportionate to Income

Section 22(1)(b) of the Anti-Corruption Act refers to a public official who is in control or in possession of pecuniary resources or property disproportionate to his present or past official emoluments. This concerns an increase in wealth that cannot be justified by reference to the public official's income. In order to measure such an increase in wealth, it has been suggested that it is necessary to consider not only increases in assets, but also reductions in liabilities.²⁹

The Act defines the term "property" as:

"any real or personal property, money, things in action or other intangible or incorporeal property, whether located in Zambia or elsewhere, and property of corresponding value in the absence of the original illegally acquired property whose value has been determined."³⁰

This definition is broad, and covers assets such as foreign bank accounts, shares in foreign companies and property in other countries that a public official may own. Reference to "property of corresponding value" suggests that the definition extends to other property owned by the official in the event that the original illegally acquired assets cannot be located or have been transferred.

It is submitted that under this definition, a failure by a public official to justify the payment of a large debt with his lawful earnings would satisfy this element of the offence. The official

28 Muzila *et al* (2012) 34.

29 Manfroni (2003) 72.

30 Section 3 of the Anti-Corruption Act 2012.

still would have to justify how he was able to clear such a large debt, bearing in mind his known sources of income.

Regarding the quantum of the disproportion, the Act does not make it an express requirement that there should be a significant or substantial difference between the property in question and his official income. The Act requires only that the property in the possession of the public official be disproportionate to his known income. This is a departure from major international instruments, UNCAC included, that require a “significant increase in assets”. Be that as it may, section 22(1)(b) should not be taken to apply to any increase in wealth in excess of a public official’s lawful earnings. The difference ought to be large, significant or demonstrable.³¹

A possible reason for requiring a significant increase is that it would be burdensome and practically challenging to require public officials to demonstrate their earnings with complete accuracy.³² Negating the requirement of a significant increase risks making the offence a political tool through which opponents may level accusations against one another in the hope of finding some minimal difference in property that, owing to carelessness or negligence, the target is unable to justify.³³ Administrative and policy guidelines for investigators and prosecutors regarding the minimum discrepancy that warrants prosecution would be helpful in this regard.

As noted above, the possession of unexplained property provision in Zambia bears a striking similarity to the provision in Hong Kong. The courts there have had an opportunity to provide guidance on the elements that the prosecution should prove when establishing

31 Manfroni (2003) 72.

32 Manfroni (2003) 72.

33 Manfroni (2003) 72.

disproportionate income. For example, in *Attorney General v Hui Kin-hong*,³⁴ the Court of Appeal noted that the prosecution was required not only to prove that expenditure was greater than income, but also needed to show the following:

“(a) the amount of pecuniary resources and other assets in the accused’s control at the charge date; (b) the accused’s total official emoluments up to the same date; and a disproportion between (a) and (b). That is, the prosecution has to prove that the acquisition of the total assets under the accused’s control could not have been amassed reasonably, in all circumstances, by way of the total official emoluments earned up to that date.”³⁵

In other words, there should be a significant disproportion to warrant an explanation by the accused. It is submitted that a similar approach would be applicable in Zambia to the interpretation of section 22(1)(b) of the Act.

2.3.5 Benefit of Corrupt Services

Section 22(1)(c) of the Anti-Corruption Act refers to a public official who:

“is in receipt of the benefit of any services which the public officer may reasonably be suspected of having received corruptly or in circumstances which amount to an offence under this Act.”

Three issues warrant discussion here. Firstly, the Act extends the scope of benefit received by an official from property to “the benefit of any service”, which term is subject to wide interpretation.

Secondly, the Act introduces the concept of reasonable suspicion in relation to the benefit of any services received by an official. In *Hussien v Chong Fook Kam*,³⁶ Lord Devlin stated that “suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking: ‘I suspect but I cannot prove.’” As applied to section 22(1)(c), this dictum means

34 [1995] 1 HKCLR 227.

35 See also *Nicholls et al* (2011) 625.

36 [1969] 3 All ER 1626.

that there has to be a reason giving rise to the suspicion that an official corruptly received the benefit of some service. This suspicion has to be a reasonable one, meaning that an element of objectivity is required when assessing whether the suspicion satisfies section 22(1)(c).

Thirdly, section 22(1)(c) requires the prosecution to show that the receipt of the benefit of any services by an official occurred under circumstances which amount to an offence under the Act. This means that there has to be a reasonable suspicion that an offence under the Act was committed by a public official in order to receive the said benefit. The prosecution ought to show, for example, that there is a reasonable basis to believe that the official abused his office in return for the benefit of services received.

Section 22(1)(c) of the Anti-Corruption Act is a departure from the sections discussed previously which require a nexus between the standard of living or property of an official and his known sources of income. Under this section, the suspicion that the benefit of services was received under corrupt circumstances, and not the unjustifiable standard of living or property of an official, is what gives rise to the offence of possession of unexplained property.

2.3.6 Intent

Although Article 20 of UNCAC requires an element of knowledge, intent or purpose for the offence of illicit enrichment, Zambia's Anti-Corruption Act does not specify the necessary state of mind with which a public official ought to commit the offence. There is no express requirement that the offence be committed intentionally or otherwise.

Although section 66 of the Act establishes a presumption of corrupt intent, the section does not resolve the question of intent for illicit enrichment as it refers to proving first that a person offered or accepted a gratification, matters that are not relevant to establishing illicit enrichment.

Thus, a plain reading of the Act suggests that the prosecution need not prove that the accused was aware or should have been aware that he was maintaining a standard of living or was in possession of property beyond his income, and that he has no explanation for any of these circumstances.

However, it has been suggested that the *mens rea* can be inferred from the circumstances of the case, for example, by the continuous use of luxurious property by a public official, the origin of which cannot be explained, or huge cash payments that cannot be supported by the official's income.³⁷

Despite the omission of intent as part of the offence in Zambia, lessons can be drawn from courts in other jurisdictions that have interpreted similarly drafted provisions to include intention as part of the offence. For example, section 10 of the Prevention of Bribery Ordinance of Hong Kong makes provision for illicit enrichment but does not mention expressly intention as part of the offence. However, intention is inferred from the knowledge by an official that he or she has no explanation for the property in his or her possession.³⁸ It is submitted that a similar approach ought to be adopted when interpreting section 22 of the Zambian Anti-Corruption Act.

37 Article 28 of UNCAC provides that the requisite *mens rea* can be inferred from the objective factual circumstances. See also Muzila *et al* (2012) 21.

38 Muzila *et al* (2012) 40.

2.3.7 Absence of Explanation

The proviso to section 22(1) of the Anti-Corruption Act stipulates that where the elements discussed above have been established, a public official shall be liable “unless the contrary is proved”. The formulation of the proviso means that the burden of proof falls on the accused official once a *prima facie* case is established by the prosecution.³⁹ This means that once the prosecution proves all the elements of the offence, a rebuttable presumption that the property was acquired illicitly arises, and a duty or burden is placed on the official to prove the contrary.

The courts in Zambia have interpreted legislation couched in terms similar to the proviso to section 22(1) of the Anti-Corruption Act as amounting to a reversal of the burden of proof. For example, in *Patel v The People*,⁴⁰ the accused was charged under section 4(2) of the Exchange Control Act which provided that an act or omission was presumed to have been done without a permit “unless and until the contrary is proved by the accused person”. The court held that the section created a rebuttable presumption that an act or omission was committed without a permit, and that the section amounted to an express statutory reversal of the burden of proof.

The standard of proof in reverse onus cases is said to be proof on a balance of probabilities.⁴¹ This principle is well-stated in the English case of *R v Carr-Briant*.⁴² The accused was charged under section 2 of the Prevention of Corruption Act of 1916, which provided that a consideration shall be deemed to be given corruptly unless the contrary is proved. The court held that:

39 Hamer (2007) 167.

40 (1969) ZR 132 (HC).

41 *Attorney General v Hui Kin-hong* [1995] 1 HKCLR 227.

42 [1943] 2 All ER 156.

“In our judgment, in any case where, either by statute or at common law, some matter is presumed against an accused person “unless the contrary is proved”, the jury should be directed that ... the burden of proof required is less than that required at the hands of the prosecution in proving the case beyond a reasonable doubt: and that the burden may be discharged by evidence satisfying the jury of the probability of that which the accused is called upon to establish.”

The requirement is explained accurately in *Kalonga v The People*,⁴³ where the court stated that:

“An explanation which might reasonably be true entitles an accused to an acquittal even if the court does not believe it; an accused is not required to satisfy the court as to his innocence, but simply to raise a reasonable doubt as to his guilt. *A fortiori*, such a doubt is present if there exists an explanation which might reasonably be true; for the court to be in doubt does not imply a belief in the honesty generally of the accused nor in the truth of the particular explanation in question.”

Arising from the foregoing, the following will be the procedure required to establish a charge under section 22. The prosecution must establish that there is a clear discrepancy between an official’s standard of living or his property and his official emoluments. The accused will then bear the burden of proving that there is a reasonable explanation to justify his standard of life or the property he owns. The same procedure is applicable under section 22(1)(c) of the Act relating to the receipt of the benefit of services by an official.

If the prosecution cannot prove the essential elements of the offence, there is no case to answer.⁴⁴ This also will be the case where the prosecution’s evidence has been discredited to a point where the court cannot rely on it to convict the accused.⁴⁵ If the accused gives a reasonable explanation, an acquittal ordinarily should follow. If he fails to do so, he ought to be convicted.

The justification for imposing a duty on a public official to explain the source of his wealth once the prosecution proves a significant discrepancy is that it is reasonable to require

43 (1976) ZR 124 (HC).

44 See *The People v Mukemu* (1972) ZR 290 (HC).

45 *Mwewa Murano v The People* (2004) ZR 207 (SC).

public officials to demonstrate the basis of their enrichment and, in any case, no one is in a better position than the official to demonstrate that.⁴⁶

Despite this position, the shift of the burden from the prosecution to the accused is a contentious issue in most jurisdictions insofar as it relates to the obligation placed on the accused to explain the source of his property. Whether or not this infringes on constitutional principles in Zambia is discussed in detail in the next chapter.

2.4 Using Third Parties to Conceal Corruption

Proceeds of corruption can be concealed by a public official by transferring the property to a friend or relative, whilst retaining control of it.⁴⁷ Section 22(2) of the Anti-Corruption Act is a response to this possibility and provides as follows:

“Where a court is satisfied in proceedings for an offence under subsection (1) that, having regard to the closeness of the public officer’s relationship to the accused and to other relevant circumstances, there is reason to believe that any person was holding pecuniary resources or property in trust for or otherwise on behalf of the accused, or acquired such pecuniary resources or property as a gift, or loan without adequate consideration, from the accused, such pecuniary resources or property shall, unless the contrary is proved, be deemed to have been under the control or in the possession of the accused.”

The reference in this section to “the closeness of the public officer’s relationship to the accused” creates uncertainty regarding the meaning of the section. The target of the offence, as is clear from the remainder of the section, is the public official who invariably also will be the “the accused”. Thus it makes little sense to have regard to the relationship of the public officer to the accused, when the public officer is in fact the accused in question.

46 Manfroni (2003) 88.

47 OSCE (2004) 139.

A reference to the repealed Anti-Corruption Commission Act of 1996 provides guidance on what the drafters possibly could have intended section 22(2) of the Anti-Corruption Act of 2012 to mean. The relevant portion of the proviso to the repealed section 37(3) of the 1996 Act stipulates that:

“having regard to the closeness of his relationship to the accused, there is reason to believe that any person was holding pecuniary resources or property in trust for or otherwise on behalf of the accused ... such pecuniary resources or property shall, unless the contrary is proved, be deemed to have been under the control or in the possession of the accused.”

When compared with its predecessor provision, it is unclear what mischief the legislature intended to cure by formulating section 22(2) of the 2012 Act in its current form.

Nevertheless, it is evident that this section is directed towards assets held or acquired by close relatives, associates and third parties who have dealt with the accused under circumstances that raise suspicion, or who hold assets of his in order to conceal the fact that the public official has assets for which he cannot account.⁴⁸ The focus is on the public official as opposed to the third parties holding property on his or her behalf.

Section 22(2) employs the same wording as the proviso to section 21(1) and uses the clause “unless the contrary is proved”. Thus, once the prosecution shows that there is reason to believe that a third party is holding property on behalf of an accused official, or that he or she acquired property from the official without providing adequate consideration, a presumption arises that the property was under the control or in the possession of the public official. A burden is then placed on the public official to provide evidence that disproves this presumption.

48 OSCE (2004) 138.

2.5 Conclusion

The difficulty in detecting and proving corruption involving public officials makes section 22 of the Anti-Corruption Act a useful tool for combating corruption. Precise drafting to clarify the period of interest, the requisite mental element and whether there is a requirement of a significant disproportion between assets and income of a public official would benefit both the prosecution and the accused in the determination of the necessary elements and scope of the offence.

There is also a need for precision regarding the wording of section 22(2) of the Act which targets illicitly acquired assets held by third parties on behalf of a public official. The section in its current form has the potential to convey a meaning other than that which was intended by the drafters.

Be that as it may, it is worth noting that the elements of the offence as defined in section 22 of the Act conform to the approach taken by international instruments and other jurisdictions that make provision for illicit enrichment. This provides a wide resource base when guidance is needed in interpreting the elements and scope of the offence.

Chapter Three

Constitutional Concerns Relating to Illicit Enrichment

3.1 Introduction

Constitutional arguments arise routinely in relation to the offence of illicit enrichment. In many countries, the offence generates resistance on the basis that calling on an accused public official to prove the legality of his wealth infringes the presumption of innocence and the right against self-incrimination, rights that are recognised as cardinal by many international instruments and embedded in the constitutions of most countries.¹

In Zambia, it has been argued that the reversal of the burden of proof in illicit enrichment trials, by requiring an accused public official to prove the source of his wealth, violates Article 18(2)(a) of the Zambian Constitution, which guarantees the right to be presumed innocent during trial.²

In addition, critics of the offence in Zambia argue that it contravenes Article 18(7) of the Zambian Constitution which guarantees protection against self-incrimination, and is therefore unconstitutional.³ It is argued that an accused public official who decides to remain silent when charged with the offence will be found guilty automatically, thus violating his right to remain silent.⁴

1 Perdriel-Vaissiere (2012) 2.

2 Report of the Committee on Legal Affairs (2010) 10.

3 Report of the Committee on Legal Affairs (2010) 10.

4 Report of the Committee on Legal Affairs (2010) 10.

This chapter evaluates these arguments, and examines whether section 22 of the Anti-Corruption Act of 2012 is consistent with the presumption of innocence and the right against self-incrimination enshrined in the Zambian Constitution. The chapter considers also whether the offence violates the principle of legality. In the main, the chapter examines whether the concerns surrounding the illicit enrichment provision in Zambia are valid in view of the fair trial rights of an accused.

3.2 Presumption of Innocence

The presumption of innocence is recognised widely as a fundamental right of an accused.

The presumption entails that an accused does not have to prove his innocence when charged with an offence. Instead, the prosecution has the obligation of proving his guilt, and such proof must be beyond a reasonable doubt.⁵ The classic formulation of this principle is contained in the House of Lords decision in *Woolmington v Director of Public Prosecutions* in which Lord Sankey stated that:

“No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained ... throughout the web of English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner’s guilt.”⁶

As a result of the operation of this principle, an accused is taken to be innocent until proved guilty. The rationale of the presumption is to ensure that the criminal justice system protects an innocent defendant from being convicted wrongly.⁷ To implement the presumption fully, the prosecution is required to adduce proof beyond a reasonable doubt, thus ensuring that judicial officers are “satisfied so that they feel sure of the defendant’s

5 Ashworth (2006) 69.

6 [1935] AC 462 HL.

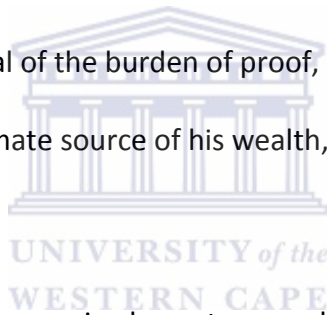
7 Ashworth (2006) 72.

guilt before they proceed to convict”.⁸ Accordingly, in criminal cases the prosecution is required to prove all the elements of an offence with which an accused has been charged. The burden of proof thus is said to be on the prosecution.

3.2.1 Reversal of the Burden of Proof

Article 20 of UNCAC establishes illicit enrichment as a non-mandatory offence. This means that there is no obligation on a State Party to introduce the offence if its introduction constitutes a violation of such State Party’s constitutional and fundamental legal principles.⁹

In most countries that have made provision for the offence, the question that arises is whether illicit enrichment is an unconstitutional offence. Those who answer this in the affirmative argue that the reversal of the burden of proof, in requiring an accused public official to demonstrate the legitimate source of his wealth, violates the presumption of innocence.¹⁰



The offence of illicit enrichment is premised on a temporal reversal on the burden of proof, based on the assumption that there is sufficient cause for a public official to prove the source of his wealth.¹¹ It allows for the conviction of public officials on the basis of their failure to prove the lawful origin of their excessive wealth. The offence establishes a presumption of corruption once it is shown that a public official owns property that exceeds his income or leads a lifestyle that cannot be supported by his income.¹²

8 Ashworth (2006) 72.

9 Babu (2006) 15.

10 See, for example, Wilsher (2006).

11 Fagan (2012) 3.

12 Perdriel-Vaissiere (2012) 4.

Illicit enrichment provisions highlight the difficult question of who bears the burden to adduce evidence, and the standard of proof that is required.¹³ Some critics argue that the offence requires an impermissible shift or reversal of the burden of proof which infringes the presumption of innocence.¹⁴ Accordingly, Snider and Kidane¹⁵ conclude that:

“It is highly doubtful that compromising the fundamental principle of the presumption of innocence in the interest of combating unexplained material gains by government officials is a desirable course ... In fact, it directly conflicts with the principles enshrined under recognized universal human rights instruments as well as the African Charter on Human and Peoples’ Rights. The implementation of this provision as written in the domestic sphere should not be encouraged, because it might mean prescribing a remedy that is worse than the ailment.”

In some countries, illicit enrichment provisions have been challenged on the basis that they are unconstitutional.¹⁶ For example, in 1994, the Italian Constitutional Court held that the illicit enrichment provision in that country was unconstitutional on the basis that it violated the presumption of innocence.¹⁷



3.2.2 Position in Zambia

The Constitution of Zambia¹⁸ guarantees the presumption of innocence during criminal trial.

Article 18(2) provides that:

“Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved or has pleaded guilty.”

The courts in Zambia have affirmed the common law principles related to the burden of proof in criminal cases. In *Mwewa Murano v The People*,¹⁹ the court held that:

13 Lewis (2012) 16.

14 See Muzila *et al* (2012) 28 for a detailed discussion of these criticisms.

15 Snider and Kidane (2007) 728.

16 Jurisprudence from South Africa, for example, reveals that the Constitutional Court on several occasions found reverse onus provisions to be unconstitutional. See, for example, *S v Coetzee* [1997] ZACC 2 and *S v Manamela* [2000] ZACC 5.

17 See Muzila *et al* (2012) 47.

18 Chapter 1 of the Laws of Zambia.

19 (2004) ZR 207 (SC).

“In criminal cases, the rule is that the legal burden of proving every element of the offence charged, and consequently the guilt of the accused lies from beginning to end on the prosecution. The standard of proof must be beyond all reasonable doubt.”

To establish a charge of illicit enrichment under Section 22(1) of the Anti-Corruption Act of 2012, the prosecution bears the burden of proving the following elements beyond a reasonable doubt: (a) that the accused is or was a public official (b) that his standard of living is incommensurate with his known official income; (c) that he owns or is in control or possession of assets that are disproportionate to his known income; and (d) that he received the benefit of services which are suspected to have been obtained corruptly.

Once these requirements are satisfied, section 22(1) of the Act creates a rebuttable presumption that the public official’s assets were acquired corruptly. The effect of this presumption is that:

“When matters in that section have been fulfilled, the burden of proof is lifted from the shoulders of the prosecution and descends on the shoulders of the defence.”²⁰

It has been argued that the formulation of section 22 of the Anti-Corruption Act is inconsistent with Article 18(2) of the Constitution because it violates the presumption of innocence, and relaxes the burden on the prosecution to prove its case beyond reasonable doubt.²¹ The operation of section 22 of the Act is such that once the prosecution proves the elements above, the onus is on the accused public official to prove, on a balance of probabilities, that the assets in his control or possession were not acquired corruptly. Thus, it is unnecessary for the prosecution to show beyond reasonable doubt that the public official acquired his assets through corrupt activity.

20 Law Commission (1998) 31.

21 Ndulo (2014) 43.

However, in the context of Zambian laws, this argument is untenable. Article 18(12)(a) of the Constitution provides an exception to the presumption of innocence and permits reverse onus provisions in certain circumstances. It says that:

“Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of paragraph (a) of clause (2) to the extent that it is shown that the law in question imposes upon any person charged with a criminal offence the burden of proving particular facts.”

The Constitution recognises, therefore, that in certain instances an obligation may be placed on the accused to prove certain facts. This includes the onus of rebutting a particular presumption. Section 22 of the Anti-Corruption Act is an example of a circumstance envisaged by article 18(12)(a) of the Constitution when an accused bears the onus of rebutting a particular presumption. In this sense, section 22 of the Act is consistent with the provisions of the Constitution and does not violate the presumption of innocence.

Also, it is worth noting that the exception to the presumption of innocence in article 18(12)(a) of the Constitution of Zambia finds support in the constitutions of other countries.

For example, section 36(5) of the Constitution of Nigeria²² contains a similar exception. It provides that:

“Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved guilty; Provided that nothing in this section shall invalidate any law by reason only that the law imposes upon any such person the burden of proving particular facts.”

3.2.3 Inroads into the Presumption of Innocence

Further support for the conclusion that the Zambian provision on illicit enrichment does not violate the presumption of innocence can be found in justifications other than the express

22 Available at <http://www.nigeria-law.org/ConstitutionOfTheFederalRepublicOfNigeria.htm> (accessed 1 October 2014).

constitutional exception to the principle of the presumption of innocence. In countries that do not have such an express exception in their legislation, illicit enrichment provisions have been found still to be constitutional.

In most of these jurisdictions, it has been held that the presumption of innocence does not preclude the legislature from creating illicit enrichment provisions that contain a presumption of law, provided that the principles of rationality and proportionality are observed.²³ This rationale originates from an important decision of the European Court of Human Rights in *Salabiaku v France*.²⁴ Although the case does not deal with the offence of illicit enrichment, it considered the relationship between presumptions of fact or law that have the effect of shifting the burden to the accused, on the one hand, and the presumption of innocence, on the other hand. The court stated that:

“Presumptions of fact or of law operate in every legal system. Clearly, the Convention does not prohibit such presumptions in principle. It does, however, require the Contracting States to remain within certain limits in this respect as regards criminal law ... It requires States to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence.”

Therefore, it is necessary to strike a balance between the interests of the prosecution and the rights of the accused. The *Salabiaku* case test was affirmed by the House of Lords in *R v Lambert*,²⁵ where it was held that:

“In a constitutional democracy limited inroads on the presumption of innocence may be justified. The approach to be adopted was stated by the European Court of Human Rights in *Salabiaku v France* (1988) ... It follows that a legislative interference with the presumption of innocence requires justification and must not be greater than is necessary. The principle of proportionality must be observed.”

When the principles above are applied to the offence of illicit enrichment, the question becomes whether the infringement of the rights of an accused can be justified on the basis

23 Muzila *et al* (2012) 49.

24 (1988) 13 EHRR 379.

25 [2001] 3 All ER 577.

of the public interest in convicting corrupt public officials.²⁶ This question was considered in Hong Kong in the case of *Attorney General v Hui Kin Hong*²⁷ in which the validity of section 10 of the Prevention of Bribery Ordinance was challenged on the basis that it violated the presumption of innocence enshrined in that country's Bill of Rights. Whilst accepting that reverse onus provisions deviate from the principle that the burden is on the prosecution to prove the guilt of an accused, the court held that:

“There are exceptional situations in which it is possible compatibly (*sic*) with human rights to justify a degree of deviation from the normal principle that the prosecution must prove the accused's guilt beyond reasonable doubt.”

The court held that section 10 of the Prevention of Bribery Ordinance that establishes the offence of illicit enrichment in Hong Kong was dictated by necessity and went no further than necessary, and was therefore consistent with the constitutional guarantee of the presumption of innocence. In arriving at this conclusion, the court relied on the decision of the Privy Council in *Attorney General v Lee Kwong-Kut*²⁸ where the Council held that:

“Whether [such exceptions] are justifiable will in the end depend upon whether it remains primarily the responsibility of the prosecution to prove the guilt of an accused to the required standard and whether the exception is reasonably imposed, notwithstanding the importance of maintaining the principle which article 11(1) enshrines. The less significant the departure from the normal principle, the simpler it will be to justify an exception. If the prosecution retains responsibility for proving the essential ingredients of the offence, the less likely it is that an exception will be regarded as unacceptable.”

What emerges from the jurisprudence considered above is that even in countries that do not have an express exception to the presumption of innocence, illicit enrichment provisions can be said still to be consistent with the principle of the presumption of innocence. The crucial point is that the responsibility of proving that an official is guilty should rest with the

26 Muzila *et al* (2012) 49.

27 [1995]1 HKCLR 227 (CA).

28 [1993] AC 951 (PC).

prosecution, as opposed to the accused proving his innocence.²⁹ Also the conditions of reasonableness and proportionality are observed.³⁰ If interpreted in this manner, the conclusion is that there is no absolute prohibition against the application of reverse onus provisions to the offence of illicit enrichment.

3.3 Right against Self-Incrimination

The protection against self-incrimination refers to the right of an accused not to be compelled to provide information that might be used against him in a criminal trial.³¹ It commonly is accepted that the privilege against self-incrimination has its origins in seventeenth-century England, and developed in opposition to the unfair methods of compulsory interrogation that existed then, particularly in the Star Chamber.³² Since the abolition of these methods, the rule has developed that an accused cannot be compelled to testify, especially where the resultant evidence may expose him to a criminal charge or penalty.³³

One of the manifestations of the right against self-incrimination is the right to silence. The right to silence has many dimensions.³⁴ In broad terms, it centres on the right of an accused to say nothing before and at his trial. As a result, the accused can refuse to answer when questioned or requested to supply information relating to the commission of the offence, the participants, and their respective roles.³⁵ As part of the right to silence, an accused has

29 Jorge (2007) 61.

30 Jorge (2007) 61.

31 Redmayne (2007) 1.

32 Henchcliffe (1997) 3.

33 Hogan (1997) 19.

34 See, for example, Hocking & Manville (2001) 63-92 and the case of *Smith v Director of Serious Fraud Office* [1992] 3 All ER 456 where the court discussed the bundle of rights associated with the right to silence.

35 Hocking & Manville (2001) 1.

the right not to have his election to remain silent be used against him during trial.³⁶

Accordingly, unfavourable inferences against the accused should not be drawn on the basis of his exercising his right to remain silent.³⁷

The right to silence is regarded as fundamental and finds expression in various international instruments and national constitutions. For example, Article 14(3)(g) of the International Covenant on Civil and Political Rights provides that an accused shall not “be compelled to testify against himself or to confess guilt”. Notably, the Fifth Amendment of the US Constitution provides that:

“No person shall be compelled in any criminal case to be a witness against himself.”

Overall, the rationale of the right against self-incrimination is that it guards against the risk of miscarriage of justice by ensuring that there is no improper compulsion of an accused by the authorities.³⁸ Hence, the case against an accused must proceed without requiring him to provide information that might assist to convict him of the crime.

3.3.1 Illicit Enrichment and the Right against Self-incrimination

Illicit enrichment provisions are opposed usually on the basis that they violate the right to silence, because of the requirement that an accused public official explain the source of his wealth.³⁹ This requirement appears to compel an accused to give evidence to exculpate himself.

Furthermore, in trying to ascertain whether his assets were acquired illicitly, the accused public official may be exposed to adducing self-incriminating evidence in relation to other

36 Hocking & Manville (2001) 1.

37 Hocking & Manville (2001) 1.

38 Ndulo (2014) 42.

39 Derenčinović (2009) 20 and Jorge (2009) 50.

offences that are not under probe.⁴⁰ For example, a public official could have been enriched through unlawful activities such as drug trafficking, betting, tax evasion or other conduct incompatible with his employment as a public official, but will be liable still to sanctions for an offence of corruption.⁴¹ Whilst these activities may demonstrate amply the source of the public official's wealth, revealing them in evidence or as a defence to the charge exposes him to self-incrimination by offering evidence of other crimes, evidence that would be admissible in proceedings against the official for such other offences.⁴²

Thus, where the public official decides not to give evidence that proves the lawful origins of his assets, he may be convicted for electing to remain silent when an explanation is demanded from him. In these circumstances, it is argued that the offence of illicit enrichment violates the right against self-incrimination and the right to remain silent.

3.3.2 Position in Zambia

In Zambia, there has been wide debate about the potential constitutional limitation on the offence of illicit enrichment.⁴³ In 2010, Parliament repealed section 37(2) of the Anti-Corruption Commission Act of 1996 which provided for the offence of illicit enrichment, on the basis, *inter alia*, that it violated the right against self-incrimination.⁴⁴ It was argued that requiring an accused public official to provide an explanation for the source of his wealth deprived him of the constitutional protection of not being compelled to give evidence at trial. Following a change of government, the offence was re-instated in section 22 of the Anti-Corruption Act of 2012.

40 Fagan (2012) 2.

41 See Manfroni (2003) 69 and Muzila *et al* (2012) 50.

42 Manfroni (2003) 69.

43 See, for example, Silwamba & Wangwe (2010) and *Lusaka Times* 9 November 2010.

44 'President Assents to ACC Act number 38' – *Lusaka Times* 10 December 2010.

Article 18(7) of the Constitution of Zambia guarantees the right of an accused not to produce evidence during a criminal trial. It provides that:

“A person who is tried for a criminal offence shall not be compelled to give evidence at the trial.”

The import of this provision is that it embodies the right against self-incrimination explained above, and includes the right of an accused to remain silent during the trial.

It is worth noting that, unlike Article 18(7) of the Constitution which allows an exception to the presumption of innocence enshrined in Article 18(2)(a), there is no equivalent article in the Constitution that allows an exception to the right of an accused not to give evidence during a criminal trial. In other words, there is no exception in the Constitution that envisages a scenario where an accused will be compelled to provide evidence during a criminal trial.



The requirement in section 22 of the Anti-Corruption Act of 2012 for an accused public official to prove the legitimate source of his wealth once the prosecution establishes the elements of the offence has the appearance of violating the terms of Article 18(7) of the Constitution. In *Re Thomas Mumba*,⁴⁵ section 53(1) of the Corrupt Practices Act of 1980 was challenged on the basis that it violated the constitutional right of an accused not to give evidence. The section excluded the possibility of an accused making an unsworn statement, and permitted him to give evidence only on oath if he decided to testify. The High Court declared the section unconstitutional because an accused person cannot be compelled to give evidence on oath if he elects to make an unsworn statement.

45 (1984) ZR 38 (HC).

In terms of the offence of illicit enrichment, it is difficult to imagine how the presumption established in section 22 of the Anti-Corruption Act can be rebutted without the accused adducing evidence that contradicts the evidence of the prosecution. If the public official elects to remain silent in the face of evidence against him, the presumption of corruption operates and he faces conviction. Thus, on the one hand, the Constitution permits provisions that impose a burden of proving particular facts on an accused and, on the other hand, provides that the accused cannot be compelled to give evidence.

The courts in Zambia have had an opportunity to examine provisions that require an accused to rebut a particular presumption, and have held that such provisions do not violate the right of an accused to remain silent. In the case of *Musengule and Sibande v The People*,⁴⁶ the High Court considered section 49(2) of the repealed Anti-Corruption Commission Act of 1996, which is similar to section 67 of the Anti-Corruption Act of 2012. The section provided for a presumption of corrupt intention in the absence of a satisfactory explanation from the accused. The appellants argued that the provision was unconstitutional as it violated the right to remain silent. The court, consisting of a panel of three judges, held that:

“We find that Section 49(2) of the Act which requires an explanation from the accused person is not in contravention of Article 18(2) of the Constitution ... the ACC Act merely gives an opportunity to the accused person to give a satisfactory explanation if the accused person is charged with an offence ... We accordingly dismiss this ground of appeal as it lacks merit.”⁴⁷

Although the High Court gave very little insight into the operation of the presumption in the light of the right of the accused not to give evidence, what can be gleaned from this decision is that, while the right not to give evidence is fundamental, an attempt can be made to

46 HPA/16/2009.

47 It is worth noting that the judgment of the High Court has been appealed to the Supreme Court, which, at the time of writing, had not delivered its judgement.

reconcile it with the use of presumptions to prove certain elements of an offence.⁴⁸ The law envisages that there will be instances where it will be permissible to leave an accused with a choice of adducing evidence to rebut a presumption.⁴⁹

In addition, there are instances where those who subject themselves to a regulatory regime may be required to prove certain matters. For example, those who drive motor vehicles may be required to prove that they possess the necessary licence to drive. The same logic applies to the possession of weapons or tax related offences. This logic can be extended to public officials, who take up positions of trust by virtue of their employment. In this case, they are subject to a regulatory regime which requires them to show that they have not abused this trust to amass wealth. Thus, requiring them to provide evidence of the source of the wealth does not violate the right against self-incrimination.⁵⁰

In any case, the primary responsibility for proving the elements of the offence beyond a reasonable doubt rests with the prosecution. The onus of proof will shift to the accused only after the prosecution establishes a *prima facie* case that his standard of living or property exceeds his known income.⁵¹

The effect of an accused public official electing to remain silent, as he is entitled to do, is explained in *Kenious Sialuzi v The People*,⁵² where the court held that:

“There is no obligation on an accused person to give evidence, but where an accused person does not give evidence, the Court will not speculate as to possible explanations for the event in question. The Court’s duty is to draw the proper inferences from the evidence it has before it.”

48 Wilsher (2006) 30.

49 Wilsher (2006) 30.

50 Muzila *et al* (2012) 33.

51 See De Speville (1997).

52 (2006) ZR 87.

Hence, even where an accused decides to remain silent, a conviction should follow only if the evidence before the court shows beyond reasonable doubt that the offence of illicit enrichment has been committed by the public official. As explained in *Maseka v The People*:

“Even in the absence of any explanation, either at an earlier stage or during the trial, the inference of guilt cannot be drawn unless it is the only reasonable inference to be drawn from all the circumstances.”⁵³

In the light of these authorities, the position in Zambia, as established by the courts, is that illicit enrichment provisions do not violate the right of an accused not to produce evidence. The courts are reluctant to declare as unconstitutional reverse onus provisions, as seen from the *Musengule* case and cases considered under section 319 of the Penal Code,⁵⁴ which similarly provides for an accused to give an account of how he came into possession of property which reasonably may be suspected of having been stolen.

Additionally, the position in Zambia regarding the potential conflict between the offence of illicit enrichment and the right against self-incrimination is not as easy to resolve as the presumption of innocence. Until the Supreme Court resolves this perceived conflict, the position remains open to further debate and challenge.

3.4 Principle of Legality

In addition to the constitutional challenges discussed above, illicit enrichment provisions are criticised often on the basis that they violate the principle of legality. This principle requires that all offences should be defined clearly, be ascertainable and non-retrospective.⁵⁵ The

53 (1972) ZR 9 (CA).

54 Chapter 87 of the Laws of Zambia.

55 See Muzila *et al* (2012) 33 and Fagan (2012) 3.

principle ensures that conduct is criminalised and its punishment is established in law before any prosecution is initiated.⁵⁶

In relation to the offence of illicit enrichment, it is argued that there are insufficient guidelines on the prohibited conduct that constitutes the basis of the offence.⁵⁷ In other words, it is argued that it is not clear what a public official needs to do in order to commit the offence.

In the case of Zambia, section 22(1) of the Anti-Corruption Act establishes illicit enrichment as a crime of commission, which consists of a standard of living or possession or control of assets that are disproportionate to a public official's known income, coupled with a failure by the public official to justify his excess wealth.

Given this formulation, it is difficult to sustain the argument that section 22(1) of the Act violates the principle of legality as the proscribed conduct is defined sufficiently in the Act. Whilst leading a flamboyant lifestyle or owning property by a public official is not an offence, maintaining a standard of living or owning assets that cannot be justified by his income is what gives rise to the offence.

3.5 Observations

Reconciling illicit enrichment provisions with the presumption of innocence often rests on how the burdens of the prosecution and the accused are framed.⁵⁸ Depending on the words

56 Spigelman (2005) 17.

57 See Muzila *et al* (2012) 33 and Fagan (2012) 3.

58 Lewis (2012) 16.

used by the drafters, illicit enrichment provisions have been said in many jurisdictions not to infringe the presumption of innocence.⁵⁹

In addition, the offence of illicit enrichment has the potential of being an effective tool in the fight against corruption. Whilst serious concerns arise in relation to the requirement that a public official disprove the evidence of the prosecution, some commentators conclude that it is neither excessive nor unreasonable to require persons who occupy positions of trust to own only assets that they can account for lawfully.⁶⁰ It is for this reason that the offence is restricted to public officials. The offence punishes a lack of transparency and accountability on the part of public officials and, as a consequence, the illegal activity from which the assets could have been derived is an extraneous issue.⁶¹

Evidence from jurisdictions that make provision for the offence reveals that it is an essential tool in purging corruption among public officials.⁶² In the case of Zambia, however, it is difficult to arrive at a similar conclusion. Considering the debates surrounding illicit enrichment in Zambia, it is disappointing that there have been very few prosecutions for the offence. On the contrary, despite the obvious evidential benefits of the offence, there are more prosecutions for corruption cases to which presumptions do not apply.⁶³ In other words, there is an inclination among the authorities to prosecute public officials for offences that are more difficult to prove than illicit enrichment.

59 See Jayawickrama, Pope & Stolpe (2002) 7 and de Speville (1997).

60 Manfroni (2003) 70.

61 Manfroni (2003) 70

62 Perdriel-Vaissiere (2012) 2.

63 A perusal of the Zambia Law Reports at the date of writing reveals that there are no reported cases involving illicit enrichment.

3.6 Conclusion

In summary, it bears noting that where legal provision is made for the offence of illicit enrichment, such provisions cannot operate in isolation. There is a need also for effective provisions relating to income and assets disclosure by public officials, legislation protecting whistleblowers who reveal a public official's alleged illicitly acquired assets, and effective laws on forfeiture of unexplained property. These areas of the law are cardinal to the success of any provision dealing with illicit enrichment by public officials, and are considered in the next chapter.



Chapter Four

Efficacy of the Illicit Enrichment Regime in Zambia

4.1 Introduction

Criminalising illicit enrichment can help to combat corruption by public officials. However, the successful operation of the offence is dependent on other factors, such as accurate income and assets disclosure systems, constant lifestyle checks, and effective penalties for convicted public officials.¹ These factors have been identified widely as being crucial to the successful prevention, investigation and prosecution of the offence of illicit enrichment.²

An assessment of the effectiveness of the offence of illicit enrichment requires an equivalent consideration of the challenges of investigating and prosecuting the offence. To this end, this chapter proceeds in two parts. The first part identifies the challenges related to the offence, and the second part assesses the implementation of the offence in Zambia. In the main, the chapter will seek to determine whether the offence and its operation are an adequate response to the problem of illicit enrichment by public officials in Zambia.

4.2 Challenges

4.2.1 Income and Asset Declaration (IAD)

The disclosure of income and assets by public officials is one of the key instruments of determining whether illicit enrichment has occurred.³ In particular, the requirement that public officials disclose their income and assets provides an important foundation for any

1 OECD (2011) 12.
2 Martini (2013) 1.
3 Chene (2008) 2.

subsequent prosecution of illicit enrichment.⁴ Declarations made by a public official can be used to identify cases of illicit enrichment, and also as evidence against him.⁵

Income and asset disclosure statements have been recognised internationally by anti-corruption instruments as a means of ensuring integrity in public office.⁶ For example, Article 8 of UNCAC addresses in general terms the need for States Parties to ensure probity in public office. Specifically, Article 8(5) requires States Parties to establish systems that require public officials to declare, *inter alia*:

“their outside activities, employment, investments, assets and substantial gifts or benefits.”

Article 7(1) of the AU Convention provides a similar requirement for public officials to declare their assets before, during, and after serving in public office. These Conventions accept the significant role that financial disclosure by public officials plays in combating corruption.



In general, IAD systems identify the principal assets and liabilities of a public official.⁷ In this manner, the net worth of a public official can be monitored, and an explanation may be required from him if the declarations reveal a disproportionate increase in his assets or expenditure.⁸ Where suspicions arise regarding the assets of an official, reference can be had to declarations made previously to determine whether they can support his standard of

4 Chene (2008) 2.
5 World Bank (2012) 14.
6 World Bank (2013) 1.
7 Muzila *et al* (2012) 41.
8 Messick (2009) 7.

living or the assets he owns.⁹ Finally, IAD systems serve as deterrents to would-be offenders, as the fear of discovery ensures that they refrain from acquiring assets illicitly.¹⁰

4.2.1.1 Income and Asset Declaration in Zambia

One of the challenges to the effective operation of illicit enrichment provisions in Zambia is the IAD system. Three pieces of legislation govern the declaration of income and assets by public officials in Zambia. These are the Constitution,¹¹ the Anti-Corruption Act of 2012,¹² and the Parliamentary and Ministerial Code of Conduct Act.¹³

Given the recognition of the significance that IAD systems play in preventing and detecting corruption among public officials, several important questions follow. Who should make this disclosure? To whom should the disclosure be made? How often should these declarations be made? And, in some cases, who should have access to IAD records?¹⁴

Overall, the answers to these questions reveal that the IAD system in Zambia is insufficient. For example, the range of public officials required to declare their assets is limited to the President, Ministers, Members of Parliament and officers of the Anti-Corruption Commission. Article 34(5)(b) of the Constitution requires presidential candidates to declare their assets and liabilities before taking part in an election. The provision is limited to presidential candidates, who only make the declaration once.

Section 14 of the Anti-Corruption Act of 2012 provides for the declaration of assets and liabilities by officers of the Anti-Corruption Commission. The Act does not extend this

9 Messick (2009) 7.

10 Messick (2009) 7.

11 Cap 1 of the Laws of Zambia.

12 Act No 12 of 2012.

13 Act No 35 of 1994.

14 See generally OECD (2011).

obligation to public officials as defined in the Act. Without imposing an obligation on public officials to declare their assets, the Act proceeds in section 87 to create an obligation on every public body to keep a register of gifts, to be administered by the chief executive of that body.¹⁵

The Parliamentary and Ministerial Code of Conduct Act governs the conduct of Ministers, their deputies and Members of Parliament (MPs) in Zambia. Section 10 of the Act requires the aforementioned officials to submit to the Chief Justice a declaration of their assets, income and liabilities within thirty days of their appointment or election. These officials are required further to submit annual declarations of their assets.¹⁶

It emerges from these provisions that other public officials that possess significant decision-making authority are excluded from making declarations. Consequently, middle- and lower-ranked public officials are excluded from this important monitoring mechanism. Considering the wide diversity of public officials included in the offence of illicit enrichment in Zambia, the law here appears to be insufficient. Also, there is no requirement for immediate family members to declare their financial affairs. Privacy concerns are raised usually in this regard.¹⁷

In terms of the information to be disclosed, the law in Zambia limits itself to income and assets. Best practices in other jurisdictions show that this requirement extends to information such as debts owed, gifts, and expenditures from non-official sources.¹⁸ This information provides a comprehensive understanding of the financial affairs of a public official.

15 Section 87 of the Anti-Corruption Act 2012.

16 Section 10(2)(b) of the Parliamentary and Ministerial Code of Conduct Act.

17 Messick (2009) 8.

18 Messick (2009) 8.

A further impediment relates to the frequency of the declarations. Whilst Ministers and MPs are required to file declarations annually, there is no provision for the President to make a declaration subsequent to entering or leaving office.¹⁹ Establishing that a public official's standard of living or assets are disproportionate to his known income is rendered difficult in the absence of periodic declarations that show the changes in his financial affairs.²⁰

Other challenges related to the IAD system in Zambia that have an impact on the investigation and prosecution of illicit enrichment include the following: the lack of certainty regarding the nature of assets, liabilities and interests that public officials are required to disclose;²¹ the absence of a clear mechanism for the verification of the declarations made by public officials;²² and the lack of clarity regarding the sanctions for a failure to disclose or making a false declaration.²³

The relationship between IAD and the detection of illicit enrichment is an important one. Accountability of public officials relies heavily on the availability of information relating to their financial affairs.²⁴ Given the pitfalls in the law considered above, it is difficult to identify discrepancies between a public official's income and his standard of living or the assets he owns or controls.²⁵

19 See <https://www.agidata.org/pam/ProfileIndicator.aspx?c=223&i=3212>.

20 Burdescu *et al* (2009) 4.

21 The statutory declaration forms annexed to the Act not indicate the exact particulars of the information to be declared. However, in the past, presidential candidates have indicated the value of each asset declared. See *Lusaka Times*, 12 August 2011.

22 Except for officers of the Anti-Corruption Commission, income and asset disclosures by the President, Cabinet Ministers and MPs are made to the Chief Justice, whose office has neither the power nor the capacity to confirm the accuracy of the disclosures submitted.

23 For example, section 16 of the Parliamentary and Ministerial Code of Conduct Act, which makes provision for complaints of breaches to be made to the President, does not stipulate any sanctions for failure to make a declaration.

24 Djankov *et al* (2010) 3.

25 Burdescu *et al* (2009) 4.

4.2.2 Lifestyle Checks

The detection of illicit enrichment requires periodic lifestyle checks for public officials. One of the ways of doing this is to monitor changes in the financial affairs of a public official.²⁶

Also known as an asset consistency check, a lifestyle check is an inquiry that determines whether the standard of living or assets owned by a public official is consistent with his income.²⁷ This involves an examination of the financial activities of a public official, which may extend to a valuation of all the property he owns, verification of his income, family background checks and his general expenditure.²⁸

In Zambia, investigations into illicit enrichment are impeded by the lack of mechanisms for monitoring the financial affairs of public officials who exhibit extravagant lifestyles.²⁹ Unless complaints are filed against a public official, or allegations are raised in the media, lifestyle checks are not conducted routinely. This makes the detection of illicit enrichment difficult. Added to this is the lack of a centralised database giving access to registries and relevant information that can be used to identify assets.

4.2.3 Use of Third Parties

Investigating and prosecuting illicit enrichment is complicated further by the use of third parties and front entities to disguise the true ownership of assets.³⁰ For instance, a public official may enrich himself illicitly and transfer the assets to a family member or a front entity. Additionally, a spouse may assert ownership over the assets, or the assets may be registered in the names of the children, who may be able to demonstrate legal ownership of

26 Messick (2009) 13.

27 Salentes (2004) 1.

28 Muzila *et al* (2012) 61.

29 See 'Declaration of Assets' - *The Post*, 23 December 2012.

30 See generally de Willebois *et al* (2011).

the assets and claim that they are not the target of an investigation.³¹ In these scenarios, identifying the assets that a public official owns or controls will be difficult. The problem is compounded where the assets are layered through a complex web of corporate vehicles in which the official has no identifiable interest.³²

4.2.4 Autonomy of Anti-Corruption Commission

Another challenge affecting the operation of the illicit enrichment provision is the autonomy of the Anti-Corruption Commission, which is tasked with investigating and prosecuting the offence. Article 6(2) of UNCAC requires States Parties to ensure that anti-corruption agencies have the necessary independence and function without undue influence. This obligation essentially entails that a State Party has the duty to ensure that the anti-corruption body or bodies established in its jurisdiction are protected from undue interference from the state itself and from third parties.³³

Although section 5 of the Anti-Corruption Act of 2012 guarantees the autonomy of the Anti-Corruption Commission, politicians often issue statements that intrude upon the independence of the Commission. For example, in 2012, the Commission was investigating allegations of corruption relating to two ministers in the government. In response, the President, Michael Sata, castigated the Commission for not obtaining permission from him before investigating senior members of the government.³⁴ This assertion by the President has no legal backing. The implicit undue influence exerted by claims such as these on the Commission impedes the successful investigation and prosecution of corruption offences. In

31 Muzila *et al* (2012) 70.

32 De Willebois *et al* (2011) 32.

33 Hussmann, Hechler & Peñailillo (2009) 13.

34 See *Lusaka Times*, 6 December 2012.

particular, such actions do not aid the successful prosecution of illicit enrichment, especially if they shield public officials from investigations.

4.3 Effectiveness of the Illicit Enrichment Regime

As noted earlier, there is a paucity of illicit enrichment prosecutions in Zambia. This is so despite the fact that the offence has existed for a long time. The lack of case law does not mean that public officials in Zambia do not possess assets that exceed their known legitimate income.³⁵ However, it casts doubt on the efficacy of the offence if it is relegated to a mere paper offence. Be that as it may, an overall perception of the potential effectiveness and impact of the offence can be gleaned from its sanctions.

4.3.1 Sanctions

Article 30 of UNCAC requires each State Party to ensure that the commission of an offence established by the Convention is penalised by appropriate sanctions, depending on the gravity of the offence. Among the objectives of the sanctions for illicit enrichment are the following: to punish the public official, to deprive him of the illicit gains, and to restore the assets to the state.³⁶ In Zambia, these objectives are achieved through a combination of penalties for conviction and forfeiture of proceeds of illicit enrichment.

4.3.2 Penalties for Illicit Enrichment

The Anti-Corruption Act of 2012 provides for general penalties applicable to any person convicted of corrupt activities under its provisions. A person so convicted is liable, upon first conviction, to imprisonment for a period not exceeding fourteen years. Upon a second or

35 See Mwenda (2007).

36 Muzila *et al* (2012) 71.

subsequent conviction, a person is liable to imprisonment for a term of not less than five years but not exceeding fourteen years.³⁷

In addition, the Act specifies sanctions applicable to public officials. A public official who is charged with an offence under the Act is liable to suspension, at half pay, from the date of the charge.³⁸ Such suspension is subject to administrative powers and disciplinary codes applicable to the official, and does not apply in instances where the law limits or specifies the grounds for removal.³⁹ Upon conviction, the suspension is without pay, pending the outcome of any appeal.⁴⁰

A convicted official also is disqualified automatically from holding office in any public body for a period of five years, though the Act envisages the possibility of re-integration of such an official.⁴¹ This is consistent with Articles 30(7) and (10) of UNCAC, which urge States Parties to establish procedures for disqualification and re-integration respectively. In terms of jurisdiction, the Subordinate Court is competent to try an offence under the Act.

4.3.3 Forfeiture of Proceeds of Illicit Enrichment

In most jurisdictions, forfeiture of the proceeds of illicit enrichment is conviction based.⁴²

This means that forfeiture is regarded as part of the criminal prosecution, and a conviction is a prerequisite for the forfeiture of proceeds of the crime.⁴³ By contrast, non-conviction

37 Section 41(a) and (b) of the Anti-Corruption Act 2012.

38 Section 47(1) of the Anti-Corruption Act 2012.

39 Section 47 (4) of the Anti-Corruption Act 2012.

40 Section 48 (1) of the Anti-Corruption Act 2012.

41 Section 49 (1) and (2) of the Anti-Corruption Act 2012.

42 Muzila *et al* (2012) 72.

43 Lusty (2014) 2.

based (NCB) forfeiture means that the state can recover illicitly acquired assets without the requirement of a conviction.⁴⁴

In the case of Zambia, the question of forfeiture of proceeds of illicit enrichment is non-conviction based. Section 62 of the Anti-Corruption Act 2012 allows the ACC to recover assets acquired illicitly without first securing a conviction. Proceedings therefore can be instituted directly against the alleged unexplained assets.

In terms of the procedure, the public official will be afforded an opportunity to give an explanation to the ACC when investigations reveal that there is a disproportion between his assets and his known legitimate income. If the official fails to give an adequate explanation, forfeiture proceedings may be commenced in relation to the unexplained assets.⁴⁵

Although NCB forfeiture may apply to proceeds of corruption crimes, a significant distinction exists regarding proceeds of illicit enrichment. For forfeiture of proceeds of illicit enrichment, there is no requirement to establish a connection between the unexplained assets of an official and the commission of an offence. In relation to the forfeiture of proceeds from other corruption offences, section 75 of the Anti-Corruption Act provides that the Forfeiture of Proceeds of Crime Act⁴⁶ shall be applicable. This Act allows also for NCB forfeiture of tainted property. However, under this Act, the definition of tainted property requires the prosecution to show a nexus between the alleged tainted assets and the commission of an offence before the property can be forfeited.⁴⁷ This distinction makes

44 Lusty (2014) 2.

45 Section 62 of the Anti-Corruption Act 2012.

46 Act No 19 of 2010.

47 See section 3 of the Forfeiture of Proceeds of Crime Act and the case of *Austin Liato v The People* HPA/40/2012.

it easier to forfeit proceeds of illicit enrichment as compared to proceeds of other corruption crimes, and adds to the advantages of the illicit enrichment provision.

4.4 Conclusion

The foregoing discussion reveals the challenges related to the offence in Zambia. Research indicates that asset declaration increases the levels of transparency and accountability of public officials, and is crucial to the success of illicit enrichment provisions.⁴⁸ The success of the provision is enhanced when public officials make truthful and complete declarations. When the source of the declared assets is unclear, a public official may be asked to provide an explanation.

In assessing whether the provision is adequate for combating illicit enrichment in Zambia, a review of the law demonstrates that the combination of administrative, penal and forfeiture sanctions are adequate to deter public officials. These sanctions should serve ordinarily as sufficient dissuasive measures against illicit enrichment, especially where there is an effective IAD system.

The foregoing discussion reveals also that whilst the declaration of income and assets by selected public officials in Zambia is well intended, it is of little or no practical value to the prevention and prosecution of illicit enrichment. The existence of these measures has not prevented public officials from amassing assets that exceed their lawful income.⁴⁹ As a result, the illicit enrichment regime has not worked effectively in Zambia. This, however, should not detract from the value of enacting the criminalisation provision.

48 See generally Burdescu *et al* (2009).

49 'Declaration of Assets' - *The Post*, 23 December 2013.

Chapter Five

Conclusion and Recommendations

5.1 General Conclusion

The research has shown that inexplicable wealth provisions gradually are becoming a part of the global campaign against corruption. Given the clandestine nature of corruption and the difficulty associated with its investigation and prosecution, many consider the offence to be an appropriate response to corruption by public officials. The research has highlighted the increasing value of the offence to combating corruption among public officials in Zambia.

An analysis of the legislative framework of the offence in Zambia shows that the scope of the offence is wide, which gives it an advantage over other corruption offences. However, there are inconsistencies in the law that add doubt as to the elements of the offence.

Examples are the period considered for purposes of prosecutions, the requisite mental element and the measure of the disproportion between assets and known income of a public official.

In addition, the research has revealed that in terms of the Zambian legal framework, it is easier to justify interference with the presumption of innocence than with the right to silence. Be that as it may, a balancing act is required to protect the rights of an accused public official, on one hand, and the right of the society to demand transparency and to recover illicitly acquired property, on the other hand. Hence, the possible tension with constitutional principles needs to be borne in mind when applying the offence. The legislative guide to UNCAC is alive to these difficulties, and concludes that illicit enrichment

provisions are not contrary to the constitutional rights of an accused, provided that the criteria of rationality and proportionality are met.¹

Also, where an investigation has been conducted thoroughly, and sufficient evidence is gathered, it should be possible to bring a charge of corruption that does not require the use of presumptions and reverse onus provisions as the offence of illicit enrichment does.

Indeed, experience from countries that make provision for the offence also shows that it is used as an offence of last resort.²

Whilst the decision to introduce the offence of illicit enrichment is a popular one amongst developing countries, it is unhelpful to introduce laws purely for the sake of complying with international standards, especially if they may carry the risk of being disputed for infringing fundamental constitutional provisions. The challenge, therefore, is to ensure that such provisions operate effectively by ensuring that a framework is created which is capable of respecting constitutional rights and also of preventing and detecting corruption among public officials.

In summary, the lack of prosecutions of cases of illicit enrichment in Zambia is a concern, considering the relatively good chances of success posed by the offence. To date, the main challenge to the offence is not the possible tension with constitutional principles, but the lack of supporting mechanisms to detect the offence. Undoubtedly, the offence is needed in Zambia. However, in the current institutional context, there are insufficient supporting mechanisms for the offence to be operationalised effectively.

1 See UNODC (2007) and Muzila *et al* (2012) 39.

2 Muzila *et al* (2012) 57.

5.2 Recommendations

5.2.1 Amending the Anti-Corruption Act

The research has underscored the need for precision in the definition of the offence. It is proposed that section 22 of the Anti-Corruption Act be amended to include matters such as the intention required to commit the offence, the requirement that the disproportion between assets and known income be significant, and the period considered for purpose of determining whether the offence has been committed. Also, there is a need to widen the definition of “official emoluments” to include other sources of income on which an official may rely. There also is a need for drafting precision as to the relationship of a public official to third parties, as stipulated in section 22(2) of the Act.

Regarding the relevant period of interest considered, lessons can be drawn from countries such as Argentina and Columbia which extend the period of interest to a number of years after a public official has left office.³ Another method that the law in Zambia can adopt is to leave the possibility of prosecution open and not limit or stipulate the number of years within which to commence a prosecution.

These proposed amendments would allow for an easier interpretation and understanding of the constituent elements of the offence.

5.2.2 Revising Income and Asset Disclosure Laws

As revealed by the research, the law on income and asset disclosure in Zambia is insufficient. It is proposed that this area of the law be revised to redirect its focus to ensuring that it provides support for the investigation and prosecution of illicit enrichment.

3 See Muzila *et al* (2012) 16.

There is a need to expand the range of public officials required to declare their income and assets to correspond with the wide range indicated in the definition of a public official in the Anti-Corruption Act of 2012.

In addition, there is need to introduce express provisions that govern the frequency of the declarations, the information that should be included, the verification of information submitted, the agency to administer the disclosure regime, the imposition of sanctions for failure to comply, and the extent to which the disclosures are made public.

The proposed amendments would ensure an effective monitoring and enforcement system.

With the participation of the public and civil society in general, this mechanism can play a significant role in ensuring that public officials do not enrich themselves unlawfully.



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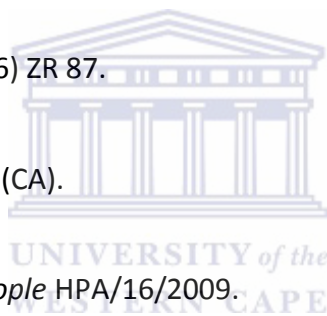
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