Burdens and Standards of Proof in Possession of Unexplained Property Prosecutions

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Abstract

While *possession of unexplained property* (illicit enrichment) is expressly criminalized under Article 419 of the 2004 Criminal Code of Ethiopia, there are practical problems in its prosecution, *inter alia,* regarding burden and standards of proof. Cases such as *Workineh Kenbato & Amelework Dalie* demonstrate the confusion regarding *who* bears *what* burden, for *which facts* the burden would apply and the required *standard of proof* thereof. Despite efforts to use the prosecution of illicit enrichment as a weapon in the combat against corruption, there are concerns triggered by such prosecutions. There is public interest to punish and deter corruption and seize and confiscate the proceeds of corruption; meanwhile there is the need for precaution against endangering the right to fair trial of the accused (especially the right to presumption of innocence, right to remain silent, right against self-incrimination) and property rights of innocent persons. This Article examines issues of the allocation of burdens and standards of proof in the prosecution of illicit enrichment cases. It assesses the relevant legal framework in Ethiopia and examines some court practices. The author argues that the binding interpretation adopted in *Workineh Kenbato & Amelework Dalie* case is erroneous and calls for its rectification in future cases that involve similar issues.

Key words

Possession of Unexplained Property, illicit enrichment, burden of proof, standard of proof, easing of burden of proof, Criminal Code of Ethiopia

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Introduction

Since the entry into force of the 2004 Criminal Code of Ethiopia (as of the 9th of May 2005), prosecution of public servants for alleged commission of the

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offence of possession of unexplained property has become a recurrent phenomenon. This holds true both in the federal government and in various regional states. Apart from the *Workineh Kenbato & Amelework Dalie* case,[1] there are many other cases, some already decided and others still pending, before federal and some regional states courts. In many of these cases, litigants and judges are facing some practical problems, particularly regarding *who* must prove *what,* and *to what degree*. There is an enormous confusion on whether an *accused* in such prosecution bears some form of *burden of proof* and, if so, whether the type of burden is *evidential* or *persuasive*. There is no sufficient clarity on the idea of *easing* ("shifting" or *reversal) of burden of "proof",* and *under what circumstances* such an easing (reversal) of burden of proof comes to be operational, as well as, as to *what consequence(s)* would ensue. There is a crucial dilemma on whether the prosecution of illicit enrichment envisages a different approach from other normal criminal proceedings. As the offence is new to the Ethiopian legal system, legal professionals appear to be exceptionally perplexed with these and related issues arising in the criminal process. Such limitations and dilemmas have triggered crucial concerns and seem to pose serious threats to the protection of the right to fair trial of accused persons and the right to property of innocent persons.

In the fight against public corruption, the general public is interested in seeing the enforcement of the criminal law against corrupt public servants (and their criminal associates) and seeks the recovery of plundered public money and other property. However, society does not want to attain such goals at any cost. It seeks to realize these goals without setting aside other most cherished fundamental values such as the protection of the right to fair trial of accused persons. No society condones the erroneous (wrongful) conviction and punishment of innocent individuals and the wrongful confiscation of their legitimate private property.

Where public interest competes or clashes with the rights and interests of individual accused persons, there is the need to strike a proper balance between these rights and interests. This requires weighing all rights and interests (individual and public) at stake, and forging an appropriate, reasonable and proportional means toward an acceptable solution. As some court cases including the *Workineh Kenbato & Amelework Dalie* case demonstrate, it is very doubtful if due attention is given to competing and conflicting rights and interests arising in the prosecution of illicit enrichment cases. This raises serious concerns and provokes legitimate fears.

[1] See the decision of the Cassation Division of the Federal Supreme Court in Cassation File No. 63014, Judgment given on Miazia 9, 2004 E.C.

This Article sets out to examine the various burdens and standards of proof that arise in the prosecution of possession of unexplained property cases. The first section analyzes issues of burdens of proof. Section 2 is devoted to the analysis of issues of standard of proof arising in such prosecutions. Section 3 assesses the legal framework while Section 4 considers some court practices relating to issues of burden and standard of proof in Ethiopia. Finally, the author suggests that the binding interpretation adopted by the Cassation Division of the Federal Supreme Court be reconsidered in future cases.

1. Burdens of Proof in Illicit Enrichment Prosecutions

In this Section we shall closely examine how allocation of burdens of proof and presumption are embedded in the offence of illicit enrichment cases. Such an examination need to take into account the existence of varieties of 'burdens of proof' that become operational in different contexts. This author has tried to offer a succinct overview of the nature and operations of these varieties of burdens in a separate note which is concurrently published with this article. Such a general background of the nature and operations of evidential, tactical and persuasive burdens of proof facilitates our investigation of the specific nature and operations of the different forms of burdens of proof arising in the prosecution of illicit enrichment cases. This investigation also presupposes a sound knowledge of the relationship and mutual interactions between burdens of proof and various forms of presumptions. In this regard, it is necessary to pay attention of the form of presumption that is embodied in an offence-enacting provision. Furthermore, one has to carefully follow up the realization of the possible legal effect(s) which is/are intended to result from the interplay of the form of presumption with the form of burden of proof envisaged in a particular statutory provision.

1.1 Allocation of Burdens of Proof in the offence of Illicit Enrichment

There is the need to carefully examine the manner in which burdens of proof are allocated (in illicit enrichment cases) between prosecuting authorities and the accused. This issue further evokes questions such as *who* bears *what* burden and for *which* facts? Apart from other constitutive elements discussed elsewhere,[2]

[2] These pertain to 'persons of interest' and 'period of check'. The other constitutive elements fall within the *actus reus* and *mens rea* elements of the offence. 'Disproportionate assets' and 'absence of justifications' are components of the *actus reus* element of the offence. For a detailed discussion of the constitutive elements see this author's article "Criminalization of 'Possession of Unexplained Property' and the

the offence of illicit enrichment is said to be committed when all the legal, material and moral elements are found fulfilled. As is true in other criminal cases, the particular material and moral ingredients of this offence must be established before a court passes a judgement of conviction against an accused. How is this possible and which party bears the responsibility of proving/disproving these elements?

Due to the unique circumstances that surround the commission of public corruption offences and other variety of factors and reasons, it has been mentioned elsewhere that national jurisdictions and the international community at large are forced to recognize and to authorize different forms of special investigative, prosecutorial and adjudicatory methods and procedures.[3] It has also been noted that criminalization of illicit enrichment is one such weapon that is purposefully created to strengthen the fight against public corruption and to address the difficulty faced in respect of proof. At this juncture it is of paramount importance to appreciate how such criminalization measure strengthens the fight against public corruption and how it helps in addressing the difficulty in respect of proof. Part of the answer to these and related issues is to be found in the allocation of burdens of proof.

In view of the various challenges that prosecution of public corruption including illicit enrichment cases pose and the challenges encountered in respect of proof, national jurisdictions may, theoretically, decide to use different techniques or approaches to ensure that actual offenders do not escape justice. One possible approach is, arguably, to employ a *lesser standard of proof* than proof *beyond a reasonable doubt standard*.[4] Theoretically this could be either 'preponderant degree of proof' or a 'clear and convincing degree of proof'.[5] The

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Fight against Public Corruption: Identifying the Elements of the Offence under the Criminal Code of Ethiopia' in this same volume of *Mizan Law Review*, pages 45-84.

[3] For details See International Council on Human Rights Policy (2010), 'Integrating Human Rights in the Anti-Corruption Agenda: Challenges, Possibilities and Opportunities', at 63; available at:< www.ichratorg/files/reports/58/131b_report.pdf>, (last visited on 12/08/ 2013); Benjamin B. Wagner & Leslie Gielow Jacobs (2008-2009), 'Retooling Law Enforcement to Investigate and Prosecute Entrenched Corruption: Key Criminal Procedure Reforms for Indonesia and Other Nations', 30 *U. Pa. J. Int'l L.*, at 215-237.

[4] Ndiva Kofele-Kale (2006), 'Presumed Guilty: Balancing Competing Rights and Interests in Combating Economic Crimes', 40 *Int'l Law*, at 940; Guillermo Jorge (2007), 'The Romanian Legal Framework on Illicit Enrichment', at 15-16; Available at: <www.aats.americanbar.org/.../romania-illegal_enrichment_framework-2007>, (last visited on 12/06/ 2013).

[5] Ibid; Margaret K. Lewis (2012), 'Presuming Innocence, or Corruption, in China', 50 *Colum. J. Transnat'l L.*, at 302- 307; Kofele-Kale, (at 940), writes as follows:

second option could be to *ease or reduce the burden of the prosecutor* by using legal techniques that involve presumptions of law, i.e., by embracing some form of reversal (easing) of burden of proof.

However, such option (or resort to any other choice) is not put in place arbitrarily, or in violation of other fundamental values and due process rights such as the right to be presumed innocent until proven guilty, the right to remain silent and the privilege against self-incrimination which modern democratic states observe, protect and enforce.[6] This article deals with the second option (easing of the burden of the prosecutor) as it is this approach which is followed in the offence of illicit enrichment. We shall see to what element of the offence this reduction (relaxation) relates and what that means in practice. As a prelude to this discussion, the material and/or moral facts which the prosecutor should prove in illicit enrichment cases need to be identified, after which whether there is any fact the accused is required to prove or disprove can be examined.

As is the case for other offences, the principle of presumption of innocence and other fundamental due process values in criminal justice require the prosecutor to bear both evidential and ultimate (persuasive) burdens of proof in illicit enrichment prosecutions. No accused person is required to *prove his innocence* in this era of modernity. Putting innocent persons in such a peril is not within the public interest and does not enhance the fight against public corruption. Even putting *de facto* criminals in such a skewed position is not

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> In illicit enrichment cases, the accused is likely to enjoy considerable advantages in terms of access to relevant information, which creates an imbalance to the detriment of the prosecution in breach of the equality-of-arms principle. Something needs to be done to compensate for this inequality of arms between the parties. Part of the solution lies in making some adjustments on how the burden of proof and the requisite standard of proof are allocated between the prosecution and the accused. The accused public official should be made to assume a significant burden in going forward with evidence [evidential burden] while allowing the state to be able to prove its case on the less stringent balance of probabilities standard.

[6] As mentioned elsewhere …, the U.S, Canada, England, South Africa and most other developed (western) countries out rightly rejected the idea of criminalization of illicit enrichment mainly because they think that such a measure would unduly interfere against the principle of presumption of innocence and other vital components of the right to fair trial. Babu noted that "the delegations of the Russian Federation, the Member States of the European Union and others had expressed their strong wish to delete [Art 20 of the UNCAC]" at the negotiating stage of the UNCAC. See R. Rajesh Babu (2006), 'The United Nations Convention Against Corruption: A Critical Overview', at 14 (footnote 65), available at:
<http://ssrn.com/abstract=891898> (last visited 25 December 2013). It would be beyond the tolerable (acceptable) degree, if those national jurisdictions that recognize the offence of illicit enrichment, go further and embrace other approaches.

acceptable as it defeats the right to equality of arms and other components of the right to a fair trial. To obtain conviction, the prosecutor must therefore go forward with (lead) evidence and prove that the accused has committed the crime of illicit enrichment with a culpable state of mind. These burdens in turn require the prosecutor to establish at least some of the *actus reus* and/or *mens rea* elements of the offence (in addition to establishing those other constitutive elements).[7] The prosecutor must prove at least the following four *threshold* factual elements:[8]

a) that the accused is or has been a public official (servant) or any other 'person of interest';
b) that the accused public servant has acquired a certain total amount of income from lawful sources during a 'period of check';
c) that the accused public servant possesses a 'disproportionate asset' and/or demonstrates a living style which is far in excess of his income from lawful earnings; and
d) that the significant increase is made during the period of check- from the time the accused has been hired/assigned/appointed or elected to serve in public office or public undertaking.

Apparently, the prosecutor should prove the public servant's legitimate income. Yet, whether the prosecutor's burden of proving such legitimate income of the accused is confined only to establishing legitimate income deriving from salary and related benefits or whether it extends to the establishment of other legitimate sources (such as income from inheritance, prize, or income from other private investment, etc.), is open to debate.

Be that as it may, the prosecutor must establish the extent of money/asset under the control of the accused public servant. Further, the extent of money or other property which the accused acquired lawfully during the 'period of check' must be established. The prosecutor in addition needs to establish the discrepancy between the amounts of income derived from known legitimate sources and the one which is found under the control of the accused, or which is manifested in his living standards, during the period of interest. If the prosecutor succeeds to establish these basic elements to the required degree of proof, then it could be possible to theoretically and/or legally conceive of other techniques or approaches that may mitigate the stringency of the prosecutor's evidential and/or persuasive burdens.

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[7] Note that in ordinary crimes and in the normal course of things, the prosecutor is required to prove each and every ingredient of an offence in its charge.

[8] See Kofele-Kale, *supra* note 4, at 943 (including footnote 174). It appears that the *mens rea* is to be inferred from the proof of these elements.

As the formulation (definition) of the offence of illicit enrichment under the international/regional conventions and national laws shows, transfer ("shift" or "reversal") of burden of "proof" from the prosecutor to the accused is made only in relation to the fifth element of the offence ('*absence of justification*'). The nature of this "burden" and other related details are to be explained in the context of the operation of the form of presumption envisaged by the law. We have to note that the accused is required only to shoulder some form of burden of "proof", and this is only in respect of this element of the offence (i.e., '*absence of justification*'). It is thus wrong to take this transfer ("shift") as amounting to a total shift of burden of proof from the prosecutor to the accused in respect of every element of the offence. And this transfer of a form of burden of "proof" to the accused in respect of this one element of the offence does not in any way signify presumption of guilt. It is impossible to consider the transfer of burden in respect of this element before the prosecutor successfully proves the four threshold elements.

Moreover, it must be underscored that such transfer of burden of "proof" in respect of 'absence of justification' element of the offence from the prosecutor to the accused is different from the one that occurs in case of tactical burden of proof in other criminal proceedings. This transfer of burden of "proof" comes in the middle of the proceeding as soon as the prosecutor establishes the four threshold elements but before it is required to establish the other essential element of the offence in the charge. For example, if an accused raises an affirmative defence such as legitimate defence, or duress, or lawful order in a given criminal charge brought against him, a tactical burden of proof transfers from the prosecutor to the accused only after the prosecutor has comprehensively established every element of the offence in the charge. In the case of illicit enrichment, however, the "shift" of burden of "proof" comes into the picture only after the prosecutor has established the four basic elements and before it is required to prove 'absence of justification' element of the offence. This is made possible by the operation of presumption of law. Again, the nature, form and legal consequence of this "shift" of burden of "proof" eventuated by the operation of presumption of law should be identified by critically examining the kind of presumption that is adopted in the criminal law provision that creates the offence.

1.2 Burdens of Proof and the Operation of Presumption of law in Illicit Enrichment cases

The definition (formulation) of the offence of illicit enrichment in national, regional and international legal instruments employs a form of *presumption of*

law.[9] Such an employment of a presumption of law entails consequences upon the allocation of burdens of proof existing between prosecuting authorities and the accused. As can be gathered from the various definitions (formulations) of the offence of illicit enrichment, the embedded form of presumption pertains to the *disproportionate assets* of the accused person that is found under the possession of, or demonstrated in the life style of, the accused. The specific nature of the presumption needs closer scrutiny.

Theoretically, the formulation of *presumptions* in an offence of illicit enrichment case may take one of the following forms:[10]

a) *Irrebuttable* or *conclusive presumption:* This requires the prosecutor to prove the extra (disproportionate) assets of the accused that exceed lawful incomes/earnings. If that is successfully discharged, it requires the court to conclusively presume the illicit origin or illegality of such additional assets.[11]

b) *Provisional presumption:* This requires the prosecutor to prove the basic fact of assets out of proportion to lawful income. It further grants *discretionary* power to the courts to draw inference from those extra assets as originating from illicit sources.[12]

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[9] See Art IX of the 1996 Inter-American Convention Against Corruption (IACAC), Art 20 of the 2003 United Nations Convention Against Corruption (UNCAC), Art 1(1) of the 2003 African Union Convention on Combating and Preventing Corruption. (AUCPCC). Also see Art 419 of the Criminal Code as well as statutory laws of other countries in Lindy Muzila, Michelle Morales, Marianne Mathias, and Tammar Berger (2012), *On the Take: Criminalizing Illicit Enrichment to Fight Corruption*; Washington, DC: World Bank. DOI: 10.1596/978-0-8213-9454-0. License: Creative Commons Attribution CC BY 3.0, at Appendix 'A'; available at: <http://creativecommons.org/licenses/by/3.0> (last visited 15/8/2013), (hereinafter '*On the Take: Criminalizing Illicit Enrichment to Fight Corruption'*.

[10] See Lewis, *supra* note 5, at 305-307; See also Dennis I. H. Dennis (2002), *The Law of Evidence*, 2nd ed., (Reprinted, 2004), at 420-421. Normally, if it were not for the legislative recognition of presumption of law, the prosecutor would have been required to prove both the disproportionate assets that exceed the lawful income of the accused and the illicit sources of those extra assets.

[11] In this case the accused would not have any chance to rebut. This would tantamount to punishing a public servant for being found possessing property that exceeds his lawful income as such, with no proof of any illicit gain.

[12] Here the court has the discretion to draw or not draw a factual presumption of illicit gain. If the court draws such a presumption, the accused, in order to avoid the risk of losing on one's case, would be responsible to respond by adducing some form of evidence to rebut what has been presumed by the court. This refers to a situation of "shift" of a tactical or provisional burden of "proof" to the accused.

c) *Evidential presumption:* This requires the prosecutor to prove the basic fact of assets out of proportion to lawful income. It further requires courts to *mandatorily* draw thereof a rebuttable presumption about the illicit origin of the extra assets.[13]

d) *Persuasive presumption:* This requires the prosecutor to prove the basic fact of assets out of proportion to lawful income. It further requires the accused to produce some evidence of legal sources and *convince* judges that the assets were indeed from legal sources with a further mandatory obligation on the court to draw about the illicit origin of such property *unless the accused proves to the contrary*.[14]

While these are possible theoretical formulations and options, in practice it is necessary to specifically identify the particular form of presumption that is adopted by a particular legislative or judicial body. Failure to identify the kind of presumption adopted may not merely defeat the legislature's intention but can also be a source of injustice. It is thus necessary to identify whether a conclusive, or provisional, or evidential, or persuasive form of presumption has been envisaged under the offence-creating criminal law provision and/or the constitutional values such as the presumption of innocence, with a view to checking if that stands valid.

From the theoretical perspective, it is clear that the first formulation (i.e., conclusive presumption) conclusively assumes guilt. This stands in stark contrast to the presumption of innocence and many other fundamental values. As it creates an offence that is not susceptible for a contest otherwise it cannot be a tenable option in any modern country. The second formulation (provisional presumption) grants discretionary power to the courts to draw or not draw a presumption of illicit gain. From theoretical perspective this does not pose any problem. And, such a formulation is common in law-making. In the context of

[13] In this case, if the prosecutor proved the basic facts stated, the court *must* presume that the extra sources are from illicit origin. But, the accused can rebut this *evidential presumption* by adducing sufficient rebuttal evidence that raises the issue of whether the presumed fact (that the extra sources are from illicit origin) is true. The accused is not under duty to convince or persuade judges about the truthfulness of his side of story. It suffices if the accused succeeds in raising some doubt(s) as to the truthfulness of the conclusion drawn in respect of the presumed fact.

[14] In this case also, if the prosecution proves the basic facts stated, the court *must* presume that the extra sources are from illicit origin. But, the accused can rebut the presumption by adducing rebuttal (counter) evidence that *convinces* judges about the truthfulness of one's side of story. It is not sufficient for the accused to adduce evidence that sparks some doubt(s) against the presumed fact. The accused here bears legal or persuasive burden of proof and the accepted standard of proof imposed on the accused in such instances is balance of probabilities.

criminalization of illicit enrichment, however, such an approach may be criticized for being inadequate to address the difficulty encountered by prosecuting authorities in proving corruption offences. Such presumption does not significantly contribute to the effective enforcement of the criminal law against corrupt public officials as it leaves wide room for courts to exercise or not to exercise their discretionary power.

We are thus left with the other two formulations-evidential presumptions and persuasive presumptions. The question then will be: Which form of formulation (type of presumption of law) is adopted under the international and regional conventions and under the statutory laws of national jurisdictions dealing with the offence of illicit enrichment? To provide an answer for this question one has to refer to the relevant provisions of the UNCAC[15] and the two regional conventions -the Inter-American Convention against Corruption (IACAC)[16] and the AUCPCC[17]- as well as to the statutory formulations of the offence in individual national jurisdictions.[18]

The formulations of these regional and international legal instruments do not explicitly tell us whether evidential or persuasive presumption is envisaged. Nor do statutory laws of national jurisdictions squarely tell us whether the one or the other is adopted. However, the UN Legislative Guide for the implementation of the UNCAC makes it evident that only evidential presumption that entails shift

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[15] Article 20 of the United Nations Convention Against Corruption (UNCAC) provides:
"Subject to its constitution and the fundamental principles of its legal system, each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, illicit enrichment, that is, a significant increase in the assets of a public official *that he or she cannot reasonably explain in relation to his or her lawful income*" [Emphasis added].

[16] Article IX of this Convention stipulates:
"Subject to its Constitution and the fundamental principles of its legal system, each State Party that has not yet done so shall take the necessary measures to establish under its laws as an offense a significant increase in the assets of a government official that *he cannot reasonably explain in relation to his lawful earnings during the performance of his functions*" [Emphasis added].

[17] Article 8 (1) of the African Union Convention on Combating and Preventing Corruption (AUCPCC) reads:
"Subject to the provisions of their domestic law, State Parties undertake to adopt necessary measures to establish under their laws an offence of illicit enrichment" Article 1 (1) of the same runs as follows: "'Illicit enrichment' means the significant increase in the assets of a public official or any other person *which he or she cannot reasonably explain in relation to his or her income*" [Emphasis added].

[18] See *On the Take: Criminalizing Illicit Enrichment to Fight Corruption, supra* note 9, at Appendix 'A'.

of evidential burden is envisaged.[19] The case law of many national jurisdictions also recognizes *evidential presumption* and this approach is widely supported by many scholars.[20]

This has been the experience in Hong Kong (a jurisdiction well experienced in prosecuting public officials under this offence for more than forty years), India, Argentina, Egypt, Mozambique and many other countries that have criminalized illicit enrichment. As Professor Kofele-Kale observes, "extant jurisprudence reads reverse onus clauses as casting an evidential burden on the accused."[21] Lewis also notes that "[r]everse-onus illicit enrichment provisions *only shift* an *evidentiary burden of production* and do not relieve the prosecution of the ultimate burden of proving the defendant guilty of the crime charged."[22]

If the prosecutor successfully establishes the four threshold elements (highlighted earlier under Section 1.1.), judges *shall*, as per the operation of the evidential presumption, presume that the disproportionate money/asset found

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[19] The Legislative Guide provides (at 104) that the accused only bears *evidential burden* of proof, available at: <https://www.unodc.org/pdf/corruption/CoC_LegislativeGuide. pdf>; See also (2004), 'The United Nations Handbook on 'Practical Anti-Corruption Measures for Prosecutors and Investigators', at 61, available at: <https://www.unodc.org/pdf/crime/corruption/Handbook.pdf>.

[20] See Kofele-Kale, s*upra* note 4, at 943; *On the Take: Criminalizing Illicit Enrichment to Fight Corruption, supra* note 9, at 24-25; 30-31; Bertrand de Speville (1997), 'Reversing the Onus of Proof: Is it Compatible with Respect for Human Rights', paper presented to the 8th International Anti-Corruption Conference, available at: <http://8iacc.org/papers/despeville.html> (last visited on 21 November 2013), at 4-6; Nihal Jayawickrama, Jeremy Pope & Oliver Stolpe (2002), 'Legal Provisions to Facilitate the gathering of evidence in Corruption Cases: Easing the Burden of Proof', *2 Forum on Crime and Society, No.1*, at 28-31; Jorge, s*upra* note 4, at 60-61; Lewis, *supra* note 5, at 308 & 312; Lilian Y. Y. Ma (1991), 'Corruption Offences in Hong Kong: Reverse Onus Clauses and the Bills of Rights, *21 Hong Kong L. J*., at 318; Pedro Gomes Pereira and João Carlos Trindade (2012), 'Overview and Analysis of the Anti-Corruption Legislative Package of Mozambique-Legal analysis',at 33;available at <http://www.baselgovernance.org/fileadmin/.../Mozambique_Legal_analysis.pdf> (last visited 22 December, 2013).

[21] Ibid. Nevertheless, Professor Kofele-Kale argues (*supra* note 4, at 942-943) in favor of imposing persuasive burden of proof in respect of the presumed fact if such prosecutions involve senior public officials.

[22] Lewis, *supra* note 5, at 312 (footnoted omitted). As will be discussed, endorsement of evidential presumption has the effect of transferring or "shifting" evidential burden in respect of the fifth element of the crime of illicit enrichment ('absence of justification') to the accused.

under the direct or indirect possession of the accused public servant is a result of some illegal or illicit activity. The prosecutor is not required to prove any illegal transaction or activity ("predicate offence") that could explain the background.[23] From the proof of the disproportionate money/assets or the lifestyle of the accused public official the court presumes the commission of some illicit or illegal activity in relation to the public servant's position or service. In this regard, it has been noted:

> In illicit enrichment, the prosecution no longer is required to determine the unlawful origin of the assets. Instead, if they have proven that they cannot determine the legal origin of the assets, they can require the person under investigation to explain how this property derived from legal sources. There is thus no reversal of the burden of proof but an easing of the burden of proof on the prosecution: the prosecution does not have to demonstrate that the assets are criminal in nature, but it has to demonstrate that they cannot determine the legal origin of the assets.[24]

In prosecuting this offence, the prosecution is made a beneficiary of the evidential presumption. Its *burden of adduction of evidence* in respect of one of the ingredients of the offence (absence of justification) is relaxed (eased) by the presumption. Such measure contributes to effective law enforcement against corrupt officials and better intensifies the fight against public corruption. It helps prosecuting authorities to overcome the difficulty they face in proving some forms of corruption crimes which often take place in secret. The following observation illustrates the point:

> The intent behind the offence of illicit enrichment is to allow the prosecution to prove corruption much more easily by removing any requirement to demonstrate a nexus between a benefit gained by an official and a particular governmental action rendered by the official in exchange for the benefit. A relaxation of the state's burden is deemed necessary because proving that a public servant's unexplained accumulated wealth is the product of corruption presents serious evidential problems for the state.[25]

To some extent, such an approach interferes with the enjoyment of the right to be presumed innocent, right to remain silent and the right against self-incrimination. However, the approach is accepted (in those countries that have criminalized illicit enrichment) as a legitimate, necessary, reasonable and proportional response in view of the multi-dimensional severe threats that public corruption has posed against public interest. At this juncture, one should note

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[23] Jorge, *supra* note 4, at 16.
[24] See Pereira & Trindade , *supra* note 20, at 33.
[25] Kofele-Kale, *supra* note 4, at 912.

that this approach is not something unique envisaged only in the offence of illicit enrichment. With the proliferation of "acquisitive crimes" (crimes that generate profits such as money laundering, illicit drug market, corruption, trafficking in persons, arms, organs and migrants) traditional criminal law and enforcement theory has, in recent times, entered into some paradigm shift across the globe.[26]

As Professor Jorge notes "attacking criminal profits after they have been earned become a central objective of many criminal law systems."[27] Such a new approach increases the effectiveness of legal instruments to detect, seize and confiscate ill-gotten gains and reduces the motivation for engaging in such acquisitive criminal activities.[28] Thus, one has to see the evidential presumption endorsed in the offence of illicit enrichment and the attendant transfer of evidential burden from the prosecutor to the accused from this vantage point.

Yet, one may still doubt whether this approach of *evidential presumption* is compatible with the principle of presumption of innocence. While this can be debatable, the European Court of Human Rights in *Salabiaku v. France* and the Court of Appeals in Hong Kong in *Attorney General v. Hui Kin Hong* maintained that reversing evidential burdens of proof is compatible with the principle of presumption of innocence.[29] Countries that criminalized illicit enrichment do not see incompatibility between the embedded evidential presumption and the principle of presumption of innocence.[30]

Despite the evidential presumption taken against him, the accused has a chance to offer 'reasonable explanation' regarding the disproportionate money/assets that is established by the prosecutor. Apart from other grounds of

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[26] For some details read Jorge, *supra* note 4, at 13-20.

[27] Id, at 14.

[28] Ibid.

[29] See *On the Take: Criminalizing Illicit Enrichment to Fight Corruption, supra* note 9, at 25; Maud Perdriel-Vaissiere (January 2012), 'The Accumulation of Unexplained Wealth by Public Officials: Making the offence of illicit enrichment enforceable', *U4 Brief*, No 1, at 2-3, available at: <www.U4.no>, (last visited on 17/08/2013), at 2; de Speville, *supra* note 20, at 4-6; Kofele-Kale observes the experience of the European Court of Human Rights in some other criminal offences and notes: "The European Court of Human Rights was one of the first international tribunals to argue in favour of treating reverse burden clauses as no more than reasonable limits on the presumption of innocence since *they only place an evidential burden on the accused* with respect to *an element that would be otherwise difficult for the prosecution to prove* given the defendant's superior access to that information" [emphasis added] (Kofele-Kale, *supra* note 4, at 931).

[30] For the position of the U.S, Canada, South Africa and others one may again look at what has been briefly mentioned under footnote 6.

defense (e.g., alibi, false testimony, erroneous estimation, etc) which the accused may raise to discharge his tactical burden of proof, the accused in illicit enrichment prosecution is further allowed to rebut or counter the presumption drawn (by introducing evidence that shows the 'otherwise origin' of his money or assets).[31] To this effect, the accused may introduce evidence of inheritance, prize, lawful gifts or donations, income from bonus, or income from overtime, or part-time work, or per diem, or from renting, or other agricultural, trading or investment activities, etc. Whether this "otherwise origin" is confined to only such and other lawful sources or can extend to include unrelated illegal or illicit sources (unrelated with one's public position or service) is left open for judicial interpretation.

The fourth formulation (persuasive presumption) requires the prosecution to prove the four threshold elements, after which the court *must* presume that the extra sources are from illicit origin *unless the accused disproves* this presumption. The accused can rebut the presumption by adducing rebuttal (counter) evidence that *convinces* judges about the truthfulness of his side of story. It is clear that such an approach endorses the reversal of *persuasive burden* of proof from the prosecutor to the accused. Nevertheless, this approach of persuasive presumption has never been accepted so far in international and national legal regimes as well as in judicial jurisprudence as it may lead to wrongful conviction of innocent individuals in the face of reasonable doubts.[32]

This approach may annihilate one of the most universally accepted and cherished principles of criminal and criminal procedure laws i.e., the principle of presumption of innocence and jeopardize other components of the right to fair trial as well as the right to private ownership of property. Yet, some scholars such as Kofele-Kale support the adoption of this approach in cases where higher (senior) officials of a state such as "heads of state and government, senior government, judicial or military officials and senior executives of publicly-owned corporations who, soon after their appointment or election to office suddenly become rich without their being any rational explanation to such accumulation of wealth" are charged for committing the offence of illicit

[31] The accused can contest the assessment of the prosecutor that is said to constitute disproportionate assets. It is open for the accused to attack the prosecutor's establishment of preliminary facts based on 'person of interest', 'period of check', valuation of property, discrediting possession (ownership) of money or other property as his own, etc. If the prosecutor successfully discharges its evidential burden of proof on all the basic facts under its obligation, the accused is required to bear tactical burden of proof on these elements or other grounds of defense such as alibi defense. The accused is also required to bear evidential burden of proof on the fifth element of the offence, i.e., '*absence of justification*'.

[32] See the references under footnotes 19 & 20.

enrichment.[33] Kofele-Kale, however, notes that the prevailing approach and the extant jurisprudence only envisages shift of evidential burden of proof eventuated by endorsement of evidential presumption.[34]

2. Standards of Proof in Illicit Enrichment Prosecutions

Standard of proof pertains to the assessment or evaluation of probative materials, mainly of evidence. In criminal proceedings the standard is measured differently at the various stages of the criminal process. For example, the amount or intensity of evidence that is required to issue an arrest warrant is different from that which is required to decide to prosecute or prepare a formal criminal charge. Therefore, the different forms of standards of proof in criminal proceedings include those degrees of "proof" utilized in pre-trial proceedings to assess if there exists:

- '*probable cause*'- a prerequisite to issue summons or arrest warrant or search and seizure warrant;
- '*sufficient evidence*'- a prerequisite to decide to prosecute (prepare a criminal charge); and,
- the standard employed during trial proceedings such as '*prima facie* degree of proof', '*preponderance* degree of proof', '*clear and convincing* degree of proof', and '*proof beyond a reasonable doubt* degree of proof'.[35]

Here we are interested in identifying the standards of proof that are applicable in trial proceedings involving illicit enrichment cases. The themes involved in this regard include the respective standards of proof borne by the prosecutor and the accused over the factual matters falling under their respective burdens of proof. In other words, the inquiry relates to the degrees of proof that are required of the

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[33] Kofele-Kale (*supra* note 4, at 910 & 942-943). He (at 942-943) argues that "given the clandestine nature of official corruption, fairness and public policy demand that the burden of persuasion be placed on the accused. This should be the case given the accused public official's superior resources, which place him in a considerably better position than the prosecution to determine whether or not statements regarding the origins of his wealth are true or false.[…] in exceptional cases where the essential elements of the facts at issue in the case are peculiarly within the knowledge of the accused, then the evidentiary burden, as well as the burden of persuasion, can arguably be borne by the accused."

[34] Id, at 943.

[35] For further details See J. P. McBaine, 'Burden of Proof: Degrees of Belief', 32 *Cal. L. Rev.* (1944), at 242-268. See also Christoph Engel (2008-2009), 'Preponderance of the Evidence versus *Intime Conviction:* A Behavioral Perspective on a Conflict between American and Continental European Law', 33 *Vt. L. Rev*., at 435 *ff*; See the experience of some countries of the world from Craig M. Bradley (ed.) (2001), *Criminal Procedure: A Worldwide Study*, 2nd ed.

prosecutor to discharge its evidential and ultimate burdens of proof, and it also deals with the tactical and evidential burdens of proof borne by accused.

The degree of "proof" borne by the prosecutor to successfully discharge the *evidential burden* on those threshold facts is not specifically stated in any of the relevant conventions or in any other national statutory law. The same is true with regard to an accused person's tactical and/or evidential burdens of proof. Moreover, there is no particular mention of the standard of proof that is required of the prosecutor to discharge its persuasive (ultimate) burden of proof. In view of such state of affairs and in the face of the almost universally accepted principle of presumption of innocence, it is appropriate to follow the usual standards of proof that are applicable in other cases. In this regard, there is no difference between prosecutions involving illicit enrichment and prosecutions involving any other form of ordinary crimes. In effect, the prosecutor is required to establish the existence of all the threshold elements with a *prima facie* degree of proof, which in actuality has to be *proof beyond a reasonable doubt* degree of proof.

Thus, judges cannot lawfully order an accused to enter into his defense and to bear an evidential burden in respect of the 'absence of justification' element of the offence *before and until the prosecutor successfully discharges* its case with this degree of proof.[36] The commission of illicit enrichment by the accused must be demonstrated *prior to* and *independent of* the "explanation" of the accused.[37] The *satisfactory* or *reasonable explanation* requirement contained in the definition or formulation of the offence in the conventions as well as in statutory laws of national jurisdictions comes into the picture *only after* the prosecutor has sufficiently demonstrated the existence of disproportionate ("above commensurate") property or a lifestyle that demonstrates such a disproportionate wealth of the accused during the period of check.

If the prosecutor establishes those basic facts with such degree of proof, courts are mandatorily required to presume the *illegal or illicit* source or acquisition of the disproportionate assets unless they are provided with an otherwise reasonable explanation by the accused. Here lies the other unique feature of the offence. Following the successful discharge of evidential burden by the prosecutor on the threshold facts, the court is required to instruct the accused to give a *satisfactory* or *reasonable explanation* of the sources of the disproportionate assets found in his possession or on how he came to lead such a

[36] Jorge, *supra* note 4, at 60-61.

[37] *On the Take: Criminalizing Illicit Enrichment to Fight Corruption*, *supra* note 9, at 23.

standard of life that is above his commensurate official income or resource.[38] The presumption drawn by the court remains valid if the accused fails or cannot *give reasonable or satisfactory explanation*.

As has already been mentioned, an accused who contests the validity of such presumption and who would like to avoid conviction has to lead evidence with a view to rebut or counter it. He can do that by introducing evidence which explains the source of the money/assets found under his control. This evokes various questions: To *what extent* should the accused show or demonstrate that the extra money or property found under his control is from other legitimate sources? What does providing '*reasonable' or 'satisfactory' explanation* to the court mean? Does this mean that the accused can only 'spark some doubt' on the presumption drawn or on the basic facts that led into the drawing of such a presumption? Or, is the accused required to create or raise some 'reasonable doubt'? Or, is he required to '*prove* to a *preponderant degree* of proof' that the disproportionate asset is not a result of some illicit or illegal activity related to his position or service but is a result of some known legitimate sources (even unrelated illegitimate sources)? What would be the consequence if at the end of the trial, the judges remain at equipoise or at equilibrium regarding the assets found under the control of the accused?

As discussed earlier, evidential burden of proof only imposes upon the accused the duty of creating or raising 'reasonable doubt'. As the particular burden of "proof" borne by the accused in this case is one of evidential burden, it follows that the standard of proof borne by the accused is one of *creating or raising reasonable doubt against the presumed fact* or *against the evidence of the prosecutor*. The prosecution bears the ultimate burden of proof. It is the duty of the prosecutor to prove the guilt of the accused beyond reasonable doubt. Thus, the accused succeeds if he creates some reasonable doubt against the presumed fact or against the evidence of the prosecutor. The employment of such expression as "reasonable explanation" or "satisfactory explanation" in the three conventions and in the statutory laws of national jurisdictions reinforces this assertion. The accused is required to give or offer "reasonable explanation" or "satisfactory explanation" about the disproportionate money or property found under his control. The accused is not required to *prove* something to the satisfaction of judges. He is not expected of *convincing* judges about the truthfulness of his side of story because such a requirement does not apply to

[38] Note how Art IX of IACAC, Art 20 of UNCAC, and Art 1 of AUCPCC define the offence as a significant increase in the assets of a public/government official ("or any other person" adds the AUCPCC) which [the accused] "cannot reasonably explain" in relation to his/her (lawful) income/earnings.

evidential burden but only relates to reversal of persuasive burden of proof.[39] We have seen hereinabove that the Legislative Guide for the implementation of the UNCAC expressly provides for the transfer of *evidential burden* and not of *persuasive burden*. We have also noted that the practice of national jurisdictions does not involve such transfer of persuasive burden of proof from the prosecutor to the accused.

Therefore, the accused in illicit enrichment cases is not expected to prove the truthfulness of his side of story with a preponderant degree of proof. The accused would be the beneficiary of doubt if at the end of the trial judges remain at equipoise about the money or property that is found under his control. Judges would thus be able to pass a judgment of conviction if the prosecutor proves the guilt of the accused *beyond a reasonable doubt* degree of proof.

3. Appraisal of the Ethiopian Legal Framework on Burdens and Standards of Proof in Illicit Enrichment

3.1 General overview

There is the need to examine whether the Ethiopian legal framework is different from the three conventions and from the laws of other national jurisdictions. To this end, we need to have a closer look at the general organization, design and operation of the Ethiopian criminal justice system in general. This is because issues of burden and standard of proof are influenced or determined by, *inter alia*, the organizational structure and other peculiar features of the legal system in question.[40]

It is often claimed that the contemporary Ethiopian legal system in general is a result of the mix of the common law and civil law legal systems.[41] The manner

[39] See Kofele-Kale, *supra* note 4, at 943.

[40] Structures of legal systems are affected by theories of dispute resolution such as adversarial or inquisitorial systems which in turn are reflections of the role of governments in dispute resolution. For further details see Ronald J. Allen (2012), 'Burdens of Proof', at 2- 24; available at: <http://ssrn.com/abstract=2146184> (Visited on 2 December 2013).

[41] See Jacques Vanderlinden (1966-1967), 'Civil Law and Common Law influences on the developing law of Ethiopia', 16 *Buff. L. Rev.,* at 250- 266. It is a widely known that from 1955 through 1965 Ethiopia has adopted six codified laws in addition to the Revised Constitution of 1955. These were: the 1957 Penal Code, the 1960 Civil Code, the 1960 Commercial Code, the 1960 Maritime Code, the 1961 Criminal Procedure Code and the 1965 Civil Procedure Code. Except for the Civil Procedure Code, which was drafted by an Ethiopian (Mr. Nirayo Esayas), the other codes were drafted by European legal experts. The Penal Code was drafted by Professor Jean Graven, a Swiss criminal lawyer; the Civil Code was drafted by Professor Rene

in which the mix (combination) has been made in the laws and how it was put into practice requires extensive specific studies. Yet, a closer scrutiny of the legal design in the relevant codes of Ethiopian law shows that the substantive law codes were very much influenced by the civil law (Romano-Germanic) legal traditions and systems while the adjective (procedural) codes were influenced by the common law traditions and systems.[42] This is definitely true in the case of the 1957 Penal Code and the 1961 Criminal Procedure Code.[43]

Although the Penal Code is replaced by the new Criminal Code in 2004, the latter has substantially retained the substance and style of its predecessor. Yet, the Criminal Code has come up with new and additional forms of crimes.[44] One of the new crimes incorporated in this Code is the offence of Possession of Unexplained Property embodied under Art 419 of the Code.

On the other hand, the Criminal Procedure Code (1961) is still in force despite its many flaws and lacunae which were mainly identified in the aftermath of its promulgation.[45] This Code exhibits more of adversarial criminal procedure systems and styles. This is especially true in respect of pre-trial and trial procedural designs and operations. For instance, the Code endorses partisan form of criminal investigation. The charging and trial and presentation of evidence are designed in the fashion of adversarial systems. The gathering and

David, a French Comparative lawyer, and the Commercial and Maritime codes were prepared by other French Professors, Professor Escarra and after his death by Professor Jauffret. The Criminal Procedure Code was initially drafted by Professor Jean Graven but his draft was substantially set aside and it was again prepared by Sir Charles Mathew, a British common lawyer. Sir Charles Mathew's draft was highly influenced by the then Malayan Criminal Procedure Code, which had a pronounced common law flavour (See Vanderlinden, *supra* note 76, at 257; Stanley Z. Fisher (1969), *Ethiopian Criminal Procedure: A sourcebook*, at ix-xii).

[42] Ibid.

[43] To properly grasp how issues of burden and standard of proof are accommodated in possession of unexplained property cases, we need to first know how the system of criminal justice is structured and what roles and responsibilities are assigned to participants in the criminal process. These are primarily determined by the Constitution, and the substantive criminal and criminal procedure laws. Thus our assessment involves these and other relevant normative and institutional elements of the present criminal justice system.

[44] To a certain extent, this Code has been influenced by the values and principles that are incorporated in the Federal Democratic Republic Constitution of Ethiopia (1995), hereinafter the Constitution.

[45] See what Fisher noted in 1969 (*supra* note 41, at xi-xii).

collection of evidence is undertaken by law enforcement agencies, mainly the regular police.[46]

Even if the Criminal Procedure Code is still in force, it has been complemented by various laws. Other than the regular police, there are some specialized bodies that undertake criminal investigation in certain specific forms of crimes such as the Federal Ethics and Anti-Corruption Commission. The Ethics and Anti-Corruption Commissions of each Regional State are also entrusted with the power of criminal investigation and prosecution of cases involving corruption.[47] At present, Ethiopia essentially follows the system of mandatory prosecution.[48] In ordinary criminal offences, the decision to prosecute or not to prosecute is made by the regular public prosecutor. In the case of corruption offences this power is granted to the respective Ethics and Anti-Corruption Commission bodies.[49] The roles and responsibilities of courts in the pre-trial and charging phases of the criminal processes are somehow similar to what is found in common law legal systems.[50]

At the trial phase, the Ethiopian criminal justice system is substantially similar to, and it follows, that of the common law- adversarial style of litigation. Litigating parties are responsible to select and adduce their respective evidence.

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[46] See for example Arts 9, 22-37 of the Criminal Procedure Code (Cr. P. C). Also, see Art 7 of the Federal Police Commission Proclamation No. 313/2003, apart from Regional States laws that establish and grant powers to the Regional Police bodies.

[47] See, for example, Arts 6 (3), 7 (3) - (7), & 8 of the Revised Federal Ethics and Anti-Corruption Commission Establishment Proclamation No. 433/2005 (hereinafter Proc No. 433/2005).

[48] See Art 40 Cr. P.C endorsing system of mandatory prosecution. But, see also Art 42 (1) (d). In cases of corruption offences see Arts 7(4) & 9 of Proc No. 433/2005. The Criminal Justice Policy of the country which was adopted on 25 Yekatit 2003 (March 4, 2011) seems to envisage, under 3.12 of Section Three, a system of non-mandatory (discretionary) prosecution to some extent.

[49] See, for example, Arts 7 (4) & 9 of Proc No. 433/2005.

[50] They do not actively participate in the gathering and collection of evidence; they do not participate in the determination of the preliminary assessment of the evidence to gauge if there is sufficient evidence that leads into prosecution by the prosecutor. Their participation is confined to the supervision, controlling and granting or denial or restriction of the employment of coercive measures by police and other specialized bodies such as in cases of arrest and detention, remand and bail, search and seizure (Art 19 of the Constitution, Arts 26, 32-34, 49-56, 59, 63-79 & 93 of the Cr. P. C). To some extent, they participate in the recordation and preservation of evidence- such as recording statements or confessions of suspected persons (Art 35 Cr. P.C), and recording and preserving of statements of suspected persons, testimony of witnesses in circumstances where preliminary inquiry is preferred to by the prosecuting authorities (Arts 80-92 Cr. P.C).

Parties are responsible for the presentation and examination of evidence and witnesses.[51] Examination of witnesses is accomplished in three interrelated phases: namely, examination-in-chief, cross-examination and re-examination, all of which are typical features of the common law adversarial systems. The roles and responsibilities of judges are somehow limited.[52] Accused persons are guaranteed with the right to fair trial including the right to be presumed innocent until proved guilty according to law, the right to counsel, the right to full access to any evidence presented against them and the right to examine witnesses testifying against them.[53] All these are applicable to any accused person without discrimination as it is expressly provided that every person is entitled to equality and the equal protection of the law.[54]

Generally the criminal process in Ethiopia starts with partisan investigation, with judges having no role in the collection and gathering of incriminatory and exculpatory evidence. Preliminary assessment of the sufficiency of evidence collected by investigative authorities and the decision to prosecute or not prosecute are entirely accomplished and determined by prosecuting authorities. Litigating parties have pronounced roles and responsibilities during the trial and presentation of evidence. The Ethiopian criminal process is thus closer to the common law adversarial systems. Professor Fisher has also noted that the Ethiopian system of criminal procedure is predominantly adversarial with some fragments of inquisitorial elements.[55] Hence what has been discussed in the previous sections in respect of issues of burden and standard of proof in the context of common law adversarial systems generally hold true to the Ethiopian criminal justice system.

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[51] Art 20 (4) of the Constitution; Arts 136 – 142 & 147 Cr. P. C.

[52] Apart from generally controlling/supervising the parties' presentation and examination of evidence and ruling on issues of admissibility of evidence as provided under Arts 137, 139 & 144-146, judges have some limited roles in the presentation and examination of evidence (Arts 136 (4) & 143 Cr. P. C). Unlike the typical common law systems, however, there are no juries; and, all judges, both at the federal and regional states levels, are legally trained, though their level of education may vary.

[53] The Constitution, ratified treaties and the Criminal Procedure Code provide for a number of due process guarantees to suspected and/or accused persons. See Arts 20 (1)-(7), 22, & 23 of the Constitution; also, see Art 11 of the UDHR, Art 14 of the ICCPR and Art 7 of the African Charter as these are also binding laws in Ethiopia (Arts 9 (4) and 13(2) of the Constitution).

[54] Art 25 of the Constitution & Art 4 of the Criminal Code.

[55] Fisher, *supra* note 41, at xii.

3.2 The Legal Framework on Burdens of Proof in Possession of Unexplained Property Cases

Whether Ethiopian law on possession of unexplained property envisages an approach different from the UNCAC, the AUCPCC and the statutory laws of other jurisdictions in respect of allocation of burdens of proof [56] requires close scrutiny of relevant laws such as the stipulations in the Ethiopian Constitution, the provisions of relevant international and regional human rights instruments, the Criminal Code and the Criminal Procedure Code. Art 20(3) of the Constitution embodies the principle of the presumption of innocence. It reads: "During proceedings, accused persons have the *right to be presumed innocent* until proved guilty according to law and *not to be compelled to testify against* themselves." Art 11(1) of the Universal Declaration of Human Rights (UDHR), Art 14(2) of the International Covenant of Civil and Political Rights (ICCPR) and Art 7 (1) (b) of the African Charter have similar stipulations.

One of the basic legal effects of the principle (right) of presumption of innocence is to impose evidential burden of proof upon prosecuting bodies. By virtue of this principle, the prosecutor in possession of unexplained property cases, as is true in all other criminal cases, is required to *open its case* and to *lead evidence*. Art 136 of the Criminal Procedure Code also partly provides:

(1) After the plea of the accused has been entered, the public prosecutor shall open his case explaining shortly the charges he proposes to prove and the nature of the evidence he will lead. […]
(2) The public prosecutor shall then call his witnesses and experts, if any. […]

Art 141 of the same Code provides: "When the case for the prosecution is concluded, the court, if it finds that no case against the accused has been made out which, if unrebutted, would warrant his conviction, shall record an order of acquittal." These provisions show that it is the prosecuting authorities that bear evidential burden of proof in all criminal cases including those involving corruption offences. Whether the prosecution of illicit enrichment envisages some distinctive approaches in this regard can be examined based on substantive criminal law.

[56] The author would like to emphasize the need to have clarity on the particular sense of "burden of proof". As there are varieties of senses in which this term could be employed (in the literature, in statutory laws, in speech), it is vital to try to identify in which sense this term is to be employed or has already been employed.

To this end, we can examine the allocation of evidential burden of proof under Art 419 of the Criminal Code.[57] The constitutive elements of the offence under Art 419 of the Criminal Code are: 'persons of interest', 'period of check', 'existence of disproportionate assets', '*mens rea'*, and 'absence of justification'. Of these five essential ingredients of the offence, the prosecutor, is required to prove:

a) that the accused is or has been a public servant (person of interest), [58]
b) the amount of salary the accused public servant has been paid during the period of check,
c) that the accused had or has a disproportionate amount of money or property, or had a standard of life or is living a standard of life that is not commensurate with his official legitimate income (disproportionate assets); and
d) the *mens rea*- an element which is to be inferred from the other proved factual facts.

Prosecuting authorities bear *evidential burden of proof* on these facts; and the accused is not required to lead and prove or disprove with evidence any of these four elements of the offence. There is no single word or expression in the provision that warrants or implies any other interpretation. What has been noted above in the context of the international and regional conventions and other national jurisdictions also holds true to Ethiopia.

Following a successful discharge of the evidential burden by the prosecutor on those facts, the court would instruct the accused to give an *explanation* regarding the "disproportionate pecuniary resources or property" found in his possession or "how he was able to maintain such a standard of living" that is "above that which is commensurate with the official income from his present or

[57] Art 419 provides:

(1) Any public servant, being or having been in a public office, who:
a) maintains a standard of living above that which is commensurate with the official income from his present or past employment or other means; or
b) is in control of pecuniary resources or property disproportionate to the official income from his present or past employment or other means,
shall, unless he gives a satisfactory explanation to the Court as to how he was able to maintain such a standard of living or how such pecuniary resources or property came under his control, be punished, without prejudice to the confiscation of the property or the restitution to the third party, with simple imprisonment or fine, or in serious cases, with rigorous imprisonment not exceeding five years and fine.

[58] Also, read Art 419 *cum* Art 33 of the Criminal Code. The scope of 'person of interest' includes other non-public servants who may participate in the commission of this crime.

past employment or other means". The court cannot order the accused to enter into his defence without a prior establishment of the four elements by the prosecutor to the standard of degree required. What is provided under Art 419(1) goes in line with the constitutional principle of presumption of innocence as well as with that provided under Arts 141 & 142 of the Criminal Procedure Code.

Once the prosecutor sufficiently establishes the four elements of the offence, it is not required to adduce (further) evidence that supports and establishes the lack of justification for the disproportionate money or other property found in the possession of the accused or for the manifestations in the lifestyle of the accused. Based on the proof of the four elements, Art 419 explicitly provides that the court *shall* draw a legal presumption that the accused has committed the offence of possession of unexplained property "*unless* he [the accused public servant] gives a satisfactory explanation to the Court as to how he was able to maintain such a standard of living or how such pecuniary resources or property came under his control".

This stipulation creates rebuttable presumption of law in favour of the prosecutor and against the accused. It is clear that it is the accused that is required to adduce evidence with a view to provide a satisfactory explanation of the sources of the disproportionate money or other property. This is therefore an instance where one observes the easing or transfer ("shift") of the prosecutor's evidential burden on an essential element of the offence, i.e. as to how the accused was able to maintain such a standard of living or how such pecuniary resources or property came under his control. The court is required to draw a presumption about the commission of the offence only "unless the accused gives satisfactory explanation." This is different from requiring courts to draw a presumption *until and unless the accused proves/disproves* an element of an offence. Art 419 does not thus envisage transfer ("shift") or reversal of persuasive burden from the prosecutor to the accused.

To avoid the risk of the mandatory presumption of law, the accused needs to lead evidence that shows the 'otherwise origin'[59]of the money or property found

[59] Whether this 'otherwise origin' is only confined to legitimate sources or could include other illegitimate but unrelated sources appears to be open for debate on both sides. Yet, there is no qualification under Art 419 for it to be only from lawful or legitimate sources. The accused is only required to give satisfactory explanation as to "how he was able to maintain such a standard of living or how such pecuniary resources or property came under his control." Apart from this ground of defense that is related to source of income, the accused may adduce evidence that may counter or rebut any of the four elements which might have been tentatively (provisionally) established by the prosecutor. For example, he may contest the fact relating to his status as a public servant, or the time of check, or the amount of official income, or

in his control or that which is manifested in his living standard. The accused is only required to *give satisfactory explanation* and the explanation is required in respect of "how he was able to maintain such a standard of living or how such pecuniary resources or property came under his control". Clearly, the accused is not required to *prove* any element of the offence or any other under Art 419 of the Criminal Code.[60] There is a distinction between 'giving an *explanation* about something' and '*proving* something'. Yet it is to be noted that the explanation required from the accused has to be *satisfactory*. This requirement of "satisfactory" explanation implies the degree of "proof" (in its loose sense) required of the accused. If the accused fails to introduce evidence, or even if he adduces some if that fails to provide "satisfactory explanation" regarding "how he was able to maintain such a standard of living or how such pecuniary resources or property came under his control", the court is required to convict the accused for committing the offence of possession of unexplained property.

Some people assume that Art 419 of the Criminal Code shifts persuasive burden of proof from the prosecutor to the accused thereby violating presumption of innocence embodied in Art 20(3) of the Constitution. However, the discussion in Sections 1 and 2 above indicates that this assumption is not tenable. As mentioned elsewhere, Art 419 is an exact copy of Hong Kong's provision dealing with the same offence. In Hong Kong and other jurisdictions including Argentina and India (jurisdictions where the idea of criminalization of illicit enrichment originated), similar provisions on illicit enrichment are being enforced, and they merely envisage the reversal of evidential burden without being incompatible with the principle of presumption of innocence.

3.3 The Legal Framework on Standards of Proof in Possession of Unexplained Property Cases

It is essential to be clear with respect to the various forms of standards of proof that surface in relation to:

a) the (initial) evidential burden of proof of the prosecutor,
b) the tactical (provisional) burden of an accused that may arise in the middle of the trial,

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the calculation made to show the disparity between official income and what is found under his control, or still he may contest the fact of owning/possessing or controlling, etc. In this regard, the accused bears tactical burden of proof and is thus required, if he wants, to adduce some rebuttal evidence for mere denial or contest does not count as such.

[60] See also the Amharic version which goes in part as "**የዚህ ዓይነቱ የኑሮ ደረጃ እንዴት ሊኖረው እንደቻለ ወይም ያለው ንብረት ወይም የገንዘብ ምንጭ በእጁ እንዴት ሊገባ እንደቻለ ለፍርድ ቤት ካላስረዳ በስተቀር**....." Note the distinction between the Amharic terms "**ማስረዳት**" and "**ማረጋገጥ**".

c) the evidential burden of an accused in respect of some elements (or an element) of an offence that may arise in the middle of the trial following the operation of an evidential presumption,
d) the persuasive burden of an accused in respect of some or just an element of an offence that may arise in the middle of the trial following the operation of a persuasive presumption, if any, and
e) the ultimate (persuasive) burden of proof of the prosecutor.

The degree of "proof" borne by the prosecutor to successfully discharge its *evidential burden* on those four basic facts is not specifically stated in any of the conventions and under Art 419 of the Criminal Code. Moreover, there is no particular mention of any special *persuasive* or *ultimate burden* borne by the prosecutor in such prosecutions.

In view of such state of affairs and in the face of the constitutional principle of presumption of innocence,[61] it is appropriate to follow the normal course of things as are determined by the constitutional principle of the presumption of innocence and the explicit stipulations of Arts 141 and 142 of the Criminal Procedure Code. Accordingly, the standard of proof which the prosecutor bears to discharge its evidential burden for the four basic elements of the offence of possession of unexplained property under Art 419 of the Criminal Code is the *prima facie* degree of proof, which in effect is *proof beyond a reasonable doubt*. This author does not share the view of some people who regard Art 33 of the Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation No. 434/2005 as one which envisages a lesser standard of proof in criminal cases involving corruption (possession of unexplained property included).[62] What this provision stipulates has to do with the determination of whether an accused person *has benefited from* an identified criminal conduct in a charge or it has to do with the determination of *the amount of money [or other property] to be recovered* from an accused charged of committing some identified offence of corruption.

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[61] It is important to recall that one other legal consequence of the principle of presumption of innocence pertains to the evidential burden of the state (prosecutor). For a brief overview of the contemporary narrow and wider meanings of the principle of presumption of innocence and for attendant implications and legal consequences see Worku Yaze Wodage, 'Presumption of Innocence and the Requirement of Proof Beyond Reasonable Doubt: Reflections on Meaning, Scope and their Place under Ethiopian Law', at 116-118 in Wondwossen Demissie (Ed.) (2010), 'Human Rights in Criminal Proceedings: Normative and Practical Aspects', *Ethiopian Human Rights Law Series,* Vol. III.

[62] See, for example, Simeneh Kiros Assefa (2012), 'The Principle of Presumption of Innocence and its Challenges in the Ethiopian Criminal Process', 6 (2*) Mizan Law Review*, at 292.

The provision reads: "The standard of proof required to determine any question arising as to *whether a person has benefited from criminal conduct*, or *the amount to be recovered* shall be that applicable in civil proceedings [emphasis added]."[63] The legislature has, under Art 33, reduced the *evidential burden* borne by the prosecutor in respect of two elements- 'getting of benefit from a criminal conduct' and 'amount of money/property to be recovered from' the accused. Yet this provision does not reduce the *degree of proof* that is required to establish other elements of the *actus reus* and *mens rea* of a particular offence of corruption. The alleged criminal conduct and *mens rea* elements need to be established at the same threshold as is required in other crimes, of course subject to other more specific stipulations, if any.

If the prosecutor successfully discharges its evidential burden by securing a *prima facie* degree of proof, the court orders the accused to enter into his defense (as per Art 142 of the Cr. P. C) and to give a satisfactory explanation regarding the disproportionate money or property proved to be under his control as per Art 419 of the Criminal Code. In such cases the accused bears *tactical (provisional) burden* in respect of the four basic elements that are tentatively established by the prosecutor, and *evidential burden* in respect of the fifth element of the offence of possession of unexplained property (giving satisfactory explanation "how he was able to maintain such a standard of living or how such pecuniary resources or property came under his control"). For the former burden of "proof", it suffices if the accused produces evidence the *intensity* of which is *sufficient to spark some doubt(s)* against those elements established by the prosecutor.

As has been elaborated, the accused is not required to *disprove*; the accused is not under duty to *convince* even to a preponderant degree about the truthfulness of his side of the story in respect of any or all of these four elements of the offence. By virtue of the operation of the principle of presumption of innocence, it is the prosecutor that is expected to *convince* judges *beyond* a reasonable doubt when the court (in respect of a similar fact situation) assesses the evidence submitted by the prosecutor against the evidence of the accused.

With regard to the *evidential burden* of the accused in respect of the fifth element of the offence of possession of unexplained property he is not required to *disprove* or to *prove* - he is only required to give explanation.[64] But the

[63] The Amharic equivalent goes: "**አንድ ሰው በሙስና የወንጀል ድርጊት ሳቢያ ጥቅም ያገኘ መሆኑን ወይም አለመሆኑን ወይም ተመላሽ የሚሆነውን ገንዘብ መጠን መወሰንን አስመልክቶ የሚነሱ ክርክሮችን ለማስረዳት** [**ለማረጋገጥ**] **የሚቀርበው የማስረጃ ደረጃ በፍትሐብሔር ክርክር ጊዜ እንደሚቀርበው የማስረጃ ደረጃ ይሆናል**::"

[64] As Ashworth observed in relation to evidential burden imposed on accused persons, "... the burden is much lighter than the onus of proving an issue on the balance of

explanation has to be *satisfactory* to the court. This could be only accomplished by introducing evidence. The adduced evidence must have the intensity to satisfy judges as to "how he was able to maintain such a standard of living or how such pecuniary resources or property came under his control." He is expected to secure the inner conviction (belief) of judges to some extent (satisfactorily) though he is not under duty to persuade (convince) them about the truthfulness of his assertion in his explanation. As the specific form of presumption drawn against him is not one of persuasive presumption, he is *not even required to convince judges to a preponderant degree* (50%+1) of proof.[65]

Unlike the situation in the case of the tactical burden of "proof", where the evidence of the two opposing parties are to be compared and evaluated to know which side of the evidence is closer to the reality, in this case of evidential burden only the evidence of the accused is gauged (evaluated) in view of the presumption drawn. 'Presumption of law' is a legal stipulation, and thus cannot be measured in terms of its intensity in the mind of judges. As Kofele-Kale notes:

> […] in truth, nothing tips the scale but evidence, and a presumption, being a legal rule or a legal conclusion, is not evidence. It may represent and spring from certain evidential facts and these facts may be put in the scale; but that is not putting in the presumption itself. It may in a sense, be called 'an instrument of proof' or something 'in the nature of evidence,' in that it determines from whom evidence shall come; or it may be called a substitute for evidence, in the sense that it counts at the outset for evidence enough to make a *prima facie* case; but it is not evidence in the true sense. It is not probative matter, which may be a basis of inference and weighed and compared with other matter of a probative nature (Footnote omitted).[66]

Although the evidence of the accused in not gauged in comparison with any other evidence (for the prosecutor is not required to adduce any evidence in respect of the fifth element of the crime), it should still be measured in itself to check its intensity in the minds of judges. This is something subjective which judges internally feel. If the intensity of the evidence of the accused is felt to be a *satisfactory explanation*, the accused is said to have met the required standard of "proof" envisaged under Art 419 of the Criminal Code.

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probabilities..." (See Andrew Ashworth (2006), 'Four Threats to the Presumption of Innocence', 10 *Int'l J. Evidence & Proof*, at 269).

[65] For details and better clarity see this author's note titled 'Burdens of proof, Presumptions and Standards of Proof in Criminal Cases' published in this same volume of *Mizan Law Review*.

[66] Kofele-Kale, *supra* note 4, at 921.

The true and proper sense of standard of proof in criminal trials, including in possession of unexplained property, comes at the end of the trial and presentation of evidence stage of the process when all the evidence of each party is assessed both individually (separately) and in combination (holistically). At this stage, the other third legal effect of the operation of the principle of presumption of innocence comes into the picture. As many scholars in the field explained and as the Human Rights Committee of the United Nations interpreted it in its General Comment 13, the principle of presumption of innocence imposes upon the public prosecutor an *ultimate burden of proof* that is met by a *proof beyond a reasonable doubt* standard of proof.[67] Thus the prosecutor is required to prove the guilt of the accused in possession of unexplained property to this degree of proof. In this author's understanding, the degree of proof required to establish the *guilt of an accused* is not affected by Art 33 of Proclamation No 434/2005. As already stated, the question of determination of 'obtaining/getting of benefit from a criminal conduct' and the 'amount of money/property to be recovered from' the accused are different from establishing the existence of the four basic elements of the offence of possession of unexplained property. Art 33 of Proclamation No 434/2005 and Art 419 of the Criminal Code are meant to give different answers for the different questions that arise in different contexts.[68]

[67] See, for example, Ashworth, *supra* note 64, at 243-251; P. J. Schwikkard (1998), 'The Presumption of Innocence: What is it?', 11 *S. Afr. J. Crim. Just*., at 406; General Comment of the Human Rights Committee of the UN adopted in its 21st Session, 13 May 1984, available at: <http://www.unhchr.ch/tbs/doc.nsf> (last visited 17 Dec. 2013).

[68] Art 33 gives an answer to the following questions. (i) Has the accused got some benefit from the alleged crime of corruption in the charge? (ii) What is the amount of money or other property that the accused has to return? Unlike Art 33 of Proclamation No. 434/2005, Art 419 of the Criminal Code gives answers for the following four questions: (i) Is the accused a "public servant" as defined in the Code or is he a person who has associated with a public servant accused of committing an offence of possession of unexplained property? (ii) What is the amount of income this public servant obtained from present or past employment or from other source? (iii) Is the money or property found under the control of the public servant or which is manifested in his way of life above (disproportionate to) the income he earned from present or past employment or from other source? And, (iv) Did the public servant obtain this disproportionate income during the period of check?

4. Practice of Ethiopian Courts in handling Issues of Burden and Standard of Proof in Possession of Unexplained Property Cases

Apart from the *Workineh Kenbato & Amelework Dalie* case, there are many decided and still pending cases before the federal and some regional state courts.[69] The brief assessment (made in this section) on the practice of courts in handling issues of burden and standard of proof arising in such prosecutions is limited to highlighting some cases decided by the Federal High Court at Addis Ababa, and a few others decided by the Hawasa City High Court, by the Appellate Division and Cassation Division of the SNNP Regional Supreme Court, and one case decided by the West Gojjam High Court of the Amhara National Regional State. *Workineh Kenbato & Amelework Dalie'*s case offers a broad picture of the confusions and dilemmas arising in these areas. As the Cassation Division of the Federal Supreme Court adopted a binding interpretation of Art 419 in this case, we shall examine at some depth how the Cassation Division handled issues of burden and standard of proof in this case.

4.1 FEACC *v.* Elethabet W/Gebriel *et al*

In *FEACC v. Elethabet W/Gebriel et al,* the 4th count brought against the 5th defendant, Mulugeta Y. is relevant for our discussion. Mulugeta Y., who has been a marketing manager since Sene 15, 1990 E.C. (22 June 1998) in the

[69] Some of these cases are listed and referred to in the author's other work. The cases consulted now include: 1) Cases decided by the Cassation Division of the Federal Supreme Court such as the *Workineh Kenbato & Amelework Dalie v. SNNP EACC* (Cassation File No. 63014), *Hankara Harqa v. SNNP EACC* (Cassation File No. 58514), *Adem Abdu et al v. FEACC* (Cassation File No. 57938), and *Tarekegn Teklu et al v. SNNP EACC* (Cassation File No. 67411); 2) Cases decided by the Federal High Court at Addis Ababa such as the *FEACC v. Yared Getaneh* case (File No. 106020), *FEACC v. Abdulkerim Adem et al* case (File No. 97668), *FEACC v. Seyfe Desta et al (*on 6th count against 2nd defendant, *Ahmed Seid Ebrahim*) case (File No.66210), and *FEACC v. Elethabet W/Gebriel et al* case (particularly the 4th count against 5th defendant, Mulugeta Yayeh) (File No. 62293) and *FEACC v. Birhanu Hika Roba* case (File No. 83936); 3) Cases decided by the Awassa City High Court of the Southern Nations, Nationalities and Peoples' Regional State (SNNP Regional State) such as the *SNNP EACC v. Hankara Harqa & Hirpitu Hankamo* case (File No.06693), *SNNP EACC v. Tarekegn Teklu et al* case (File No. 6646); *4)* Cases decided by Supreme Court appellate Division of SNNP Regional State *SNNP EACC v. Hankara Harqa & Hirpitu Hankamo* case (File No. 31614), *SNNP EACC v. Tarekegn Teklu et al* case (File No. 33970). See also the cases that were decided by different high courts in the Amhara Regional State (ANRS) such as the *ANRS EACC v. Dagim Dessalegn* case (West Gojjam High Court, File No. 41634).

Akaki Steels Factory, a government owned enterprise, was (apart from other accusations in other counts) accused of possessing unexplained money and many other properties. The prosecutor stated in its charge the amount of salary the accused was being paid until the time of charge and included the list of money and properties alleged to constitute the offence.[70] It adduced various pieces of documentary evidence in support of its charge.[71] The accused denied committing this and other offences. After examining the contents of these documents, the judges, in a majority vote, ordered the accused to enter into his defence. Accordingly, the accused first moved to give his statement in accordance with Art 142(3) and then produced five witnesses to show that:

- Some of the immovable properties were constructed before the entry into force of the Criminal Code,
- The estimation of the immovable properties submitted by the prosecutor is too exaggerated and is not congruent to labour cost and construction expenses during the period of construction;
- Some of the money belonged to other individuals, and
- Other money and property listed in the charge were derived from legitimate sources such as inheritance, from saving of salary, bonus and other benefits, and income deriving from renting of house.[72]

The Court proceeded to assess if the accused succeeded in rebutting the evidence of the prosecutor. It then held: 'Because the prosecutor's charge states the accumulation of unexplained property by the accused until 2000 E.C, the accused's objection relating to the house (which he said has been constructed before the entry into force of the Criminal Code) is not acceptable'; 'the testimony of the defence witnesses in respect of income from inheritance and house rent is not sufficiently credible to rebut prosecution evidence', and the 'extent of income derived from bonus and other benefits is not supported with evidence'. It further held: 'even though there is some documentary evidence which proves that some of the money deposited in various banks belonged to other persons, these alone could not sufficiently prove the legitimate sources of all the money and properties found under the control of the accused'. Accordingly the court convicted the accused under Arts 438(1)(b) of the

[70] The list went from No. 1 through No. 9.

[71] These included documents that were alleged to establish ownership of residential buildings (house certificates) and estimations thereof, documents that testify defendant's membership to various cooperatives established with a view to secure vacant lands for housing constructions, documents that establish amount of money deposited in saving accounts in different banks, and other documents that establish lease transaction.

[72] He has further introduced some documentary evidence to show that some of the moneys belonged to other persons.

previous Penal Code and under Art 419(1)(a) & (b) of the Criminal Code, and imposed three years rigorous imprisonment and a penalty of Birr 2,000. The court also ordered the confiscation of the money (subject to some reduction) and other properties listed in the charge.[73]

The accused appealed to the Federal Supreme Court. After assessing the appellant's arguments, and the response of the prosecutor, the Supreme Court partly quashed and partly confirmed the judgment and decision of the High Court.[74] The Appellate Court noted that no shift of burden of proof could take place under Art 419 before the prosecutor establishes its case as it asserted in its charge. It reads:

> ...**የወንጀል ሕግ አንቀጽ** 419 (1) **ምንጩ ያልታወቀ ንብረትና ገንዘብ የሚለውን በፊደል ተራ "ሀ" እና "ለ" ላይ ከዘረዘረ በኋላ በፊደል "ለ" [...] ስለተከሳሹ የማስረዳት ሸክም የሚገልጽ ሆኖ ቢገኝም ይህ ማለት ከሳሽ የሚሆነው አካል ይህንን የሕግ አንቀጽ ጠቅሶ በተከሳሹ ላይ የወንጀል ክስ ማቅረቡ ብቻ በክሱ ላይ የተገለጸው ንብረት ወይም ገንዘብ ምንጭ የታወቀና ከሕጋዊ ገቢው የተገኘ ስለመሆኑ የማስረዳት ሸክም ወዲያውኑ ወደተከሳሹ ይዛወራል የሚል ትርጉም የሚሰጠው አይደለም፡፡ ከሳሽ የሆነው አካል በሌሎች የወንጀል ጉዳዮች በቅድሚያ እንደ ክሱ አገላለጽና አቀራረብ የማስረዳት ሸክም እንዳለበት ሁሉ በእንዲህ ዓይነቱ የወንጀል ክስና ክርክርም የተከሳሹ የኑሮ ደረጃ ከሕጋዊ ገቢው የበለጠ ስለመሆኑ ወይም ያለው ንብረት ወይም የገንዘብ ምንጭ ከሚያገኘው ወይም ሲያገኝ ከነበረው ሕጋዊ ገቢ ጋር የማይመጣጠን መሆኑን ማስረዳት ይጠበቅበታል፡፡ የማስረዳት ሸክሙ ወደተከሳሽ የሚዛወረው ከሳሽ ባቀረበው ማስረጃ ያስረዳበት ሆኖ ሲገኝ ነው፡፡ በወንጀል ሕግ አንቀጽ** 419 (1) **መሠረት የሚቀርብ ክስ ከዚህ የሥነ-ሥርዓት አካሄድ ውጭ ሊሆን አይችልም፡፡**

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[73] These included a house that is proved to be (i) built and completed until 1984 E.C, (ii) a vacant land which the accused obtained as one member to a cooperative that was established in 1996 E.C, (iii) another vacant land which the accused secured in a contract of lease from the City Administration, and (iv) money which other persons sent to the accused for other lawful purposes.

[74] On the basis of the principle of non-retroactivity of criminal law, it quashed the judgement that pertained to the house built before the promulgation of the Criminal Code. It also revoked the judgement that included confiscation of vacant land (wherein no construction work was undertaken yet). The Court noted that the Prosecutor did not produce any evidence that proved the accomplishment of any construction work over the plot of land. It has also modified the judgment relating to the amount of money found deposited in the name of the accused by subtracting that amount which belonged to his brother (which the latter sent from Jimma). The Court also decided that the amount of money which this appellant deposited until 1996 E.C in closed account with a view to secure residential plots of land in three different cooperatives should not be confiscated. Furthermore, this Court revoked the decision relating to a vacant land which it said the appellant obtained from the City Administration with a contract of lease. It affirmed the judgment and decision of the High Court relating to other money and the buildings that are still underway and which the accused obtained as a member in the three cooperatives.

The High Court has properly stated that charging of an accused under Art 419(1) of the Criminal Code does not entail transfer of burden of proof from the prosecutor to the accused. However, the High Court did not identify the facts that should have been established by, and the extent of proof required of, the prosecutor. It also did not consider the operation of the presumption embodied under Art 419 (1) and did not identify the burden of "proof" borne by the accused and the extent of "proof" thereof. This Court did not attempt to assess the issues in the case from the perspective of the principle of presumption of innocence. Nor did it sort out the respective burdens and standards of proof required of each party. It merely focused on whether the oral and documentary evidence produced by the accused are sufficiently credible to rebut the evidence of the prosecutor.

The Appellate Court, on the other hand, tried to specifically determine if the prosecutor succeeded in discharging its burden of proof, though it did not point out the nature of burdens and standards of proof borne by the prosecutor both at the initial and at the ultimate stages of the presentation of evidence.[75] Again, this Court did not state how the presumption contained under Art 419(1) enters into operation and how evidential burden (as distinct from tactical burden of proof) transfers from the prosecutor to the accused. It did not expressly state that it was the prosecutor that shouldered evidential and legal burden to establish the actual amount of salary, bonus and other related benefits which the accused used to receive until the time of charge and to prove that what was found under the control of the accused was above those identified lawful sources of income.

[75] This Court has rightly identified that 'period of check' is one of the crucial points in this offence. It has rightly applied the principle of non-retroactive application of the criminal law to the house that was built before the promulgation of the Criminal Code. But, it has wrongly maintained that it is the burden of the appellant to prove that the money paid to the partial construction of the other three buildings was before the entry into force of the Criminal Code. It said: "**እነዚህ ሦስት የቤት ሥራ ማኅበሮች የተደራጁትና በቅድሚያ በገዘግ የባንክ ሂሳብ የሚቀመጠው ገንዘብ የተያዘው በ**19[9]6 **ሆኖ ቢገኝም ይግባኝ ባይ ለሦስቱ ጅምር ቤቶች ማሠሪያ ክፍያለሁ ወይም አውጥቻለሁ የሚለው ገንዘብ የወንጀል ሕጉ ከመውጣቱ በፊት ስለመሆኑ ካለመገለጹም በተጨማሪ ያቀረበው ማስረጃ የለም።**" It seems that the Court has appreciated the issue of 'disproportionate assets' as a vital constitutive element of the offence, though there are some flaws in trying to fix the burden of the prosecutor in that regard. It seems that it has, to some extent, appreciated the burden which the accused shouldered in respect of some of the money found deposited in his name in the different banks, though it did not appreciate that the accused was only required to "give satisfactory explanation"- it said "**የሌላ ሰው ገንዘብ ነው፤ የእኔ አይደለም የሚለውን የማስረዳት ሸክም ያለበት ይግባኝ ባይ ነው።**"

4.2 FEACC *v.* Yared Getaneh, *ANRS EACC v. Dagim Dessalegn* and other cases

The accused, who was a public servant (and later on a First Instance Court judge at Addis Ababa, but a lawyer at the time of charge), was accused of accumulating unexplained money and other properties from Sene 18, 1993 E.C through Sene 9, 2002 E.C. (25 June 2001 to 16 June 2010). The amount of money and the value of other properties was generally estimated to reach Birr 1,399,377.35. The prosecutor listed and adduced a number of documentary evidence to prove this accusation. The accused pleaded not guilty and claimed that he can produce evidence to show the lawful origin of all the money and property alleged to have been found under his control. The High Court immediately ordered the accused to enter into his defence on this count. The accused produced four defence witnesses and some documentary evidence. Although the accused claimed that he earned Birr 266,000 as a lawyer fee in 2003 E.C and produced documentary evidence to that effect, the Court held it 'not credible' stating that this declaration of income to the tax authority was made after the institution of the charge. The court also maintained that the testimony of the three witnesses was not credible. Finally, it convicted the accused and imposed punishment.

As this judgment stands to demonstrate, the Court in this case did not attempt to specifically indicate the particular burdens and standards of proof borne by each party. It ordered the accused to enter into his defence without first checking if the prosecutor has successfully discharged its evidential burden. It did not try to analyse issues from the perspective of the principle of presumption of innocence; it did not say anything in respect of the requirement of giving of 'satisfactory explanation' provided under Art 419 of the Criminal Code. With due respect, the Court did not even consider that the 'period of check' was only between Ginbot 1, 1997 (9 May 2005) and the date of charge.

The same holds true for the decision of West Gojjam High Court in the Amhara Regional State in the *ANRS EACC v. Dagim Dessalegn* case. The accused was prosecuted for possessing an amount of money and property totally worth of birr 721,191.35 while working in various public institutions from 1983 through 2002 E.C. In this case, the court did not notice the 'period of check' and did not attempt to sort out if the money and other properties were accumulated since the entry into force of the Criminal Code. Its assessment rather went back to 1983 E.C. The Court did not say anything regarding the principle of presumption of innocence, the particular burdens and standards of proof and the operation of the presumption. It did not consider the case in light of the requirement of giving of 'satisfactory explanation' under Art 419 of the Criminal Code. Yet it has rightly tried to figure out some of the legitimate sources which the accused might have earned from salary and part-time work.

There are other cases that show contradictory holdings among the different levels of courts on similar issues and similar evidence. Accused persons who were acquitted by lower courts have been convicted by Appellate and/or Cassation courts. The main cause of such reversals and inconsistencies is attributable to the variation in the standards of proof employed. For instance, in *SNNP EACC v. Hankara H. & Hiripato H.*[76] and in *SNNP EACC v. Tarekegn T. et al*,[77] the High Court acquitted the accused persons in the two separate files. In both cases, the *SNNP EACC* appealed to the Regional Supreme Court. The Appellate Court reversed the decisions of the lower court and passed conviction on all the respondents.[78] It also imposed punishment and ordered for the

[76] *Hankara,* who was a public servant from 1985 E.C through Ginbot 30, 2000 E.C and whose earning from salary during this time was assessed to be not more than Birr 52,958, and his wife *Hiripato H.*, alleged to be unemployed house wife, were accused of accumulating money and property estimated to reach to Birr 4,159,497.80. The two accused pleaded not guilty. After examining the various documentary evidence of the prosecutor the High Court ordered the accused to enter their defence. Accordingly, they produced documentary and oral evidence to establish that a substantial amount of the money belonged to other persons (loan from individuals and church money) and that the other are derived from different agricultural activities such as sale of *chat, enset*, eucalyptus tree, coffee, and maize. After assessing the evidence in the case the High Court acquitted the accused saying that the accused have rebutted the evidence of the prosecutor.

[77] *Tarekegn T.,* who was a public servant from Sene 10, 1996 E.C through Megabit 30, 2000 E.C and whose earning from salary was assessed not to exceed Birr 70, 000, his wife, alleged to be unemployed house-wife (2nd accused) and, his brother-in-law, alleged to be a student, an unemployed one (3rd accused), were accused of accumulating money and properties estimated to reach to Birr 3,602,262.84. The three accused pleaded not guilty. After examining the various documentary evidence of the prosecutor the High Court ordered the accused to enter their defence. Accordingly, they produced documentary and oral evidence to establish that most of the money and properties included in the charge were bought and/constructed before the promulgation of the Criminal Code at lesser price and that the remaining money was one which the 2rd accused received (through bank transfer and through other persons) lawfully from her brother living outside of Ethiopia and one which was obtained from agricultural activities. After assessing the evidence in the case, the High Court acquitted the accused stating that the accused have rebutted the evidence of the prosecutor. The court ascertained that most of the immovable properties were bought and/or constructed before 1997 E.C and their estimated price is less than that has been expressed in the charge. It also expressed that it ascertained that accused had other lawful means of income.

[78] The lawyer for *Hankara & Hiripato* argued before the Appellate Court, "...**አዲሱ የወንጀል ሕግ ከሌሎች ሕጎች የተለየ አዲስ ነገር አልፈጠረም፡፡ ... የማስረዳት ሸክሙ ወደ መልስ ሰጭዎች መዛወሩ የማስረዳት ደረጃ ጭምር የሚያዛውር አይደለም፡፡ መልስ ሰጭዎች ክጥርጣሬ በፀዳ መልኩ ማስረዳት**

confiscation of the moneys and other properties found under the control of each accused.[79]

In both cases, the accused persons, petitioned to the Cassation Division of the Regional Supreme Court but their petitions were not accepted. Finally, they petitioned to the Cassation Division of the Federal Supreme Court which confirmed the decisions of the Regional Supreme Court.[80]

4.3 The Binding Interpretation adopted in the *Workineh Kenbato & Amelework Dalie* Case

The Cassation Division of the Federal Supreme Court has rendered a binding interpretation in the *Workineh Kenbato & Amelework Dalie* case. The propriety of its interpretation needs to be critically investigated in the light of fundamental constitutional values and principles such as the principle of presumption of innocence, right to liberty, and the right to private property. It must also be assessed based on the perspectives of what the legislature has expressly stipulated under Art 419 of the Criminal Code, and in the light of the UN Legislative Guide and the experience (and judicial jurisprudence) of other jurisdictions.

4.3.1 Synopsis of the Case

In *Workineh Kenbato & Amelework Dalie,* the prosecutor (i.e. the SNNP EACC), charged Ato Workneh (1st Accused) and his wife, W/ro Amelework (2nd Accused) alleging that they were found possessing of unexplained property in violation of Art 419 (1) of the Criminal Code. In the particulars of the charge filed at the Hawasa City High Court of the SNNP Regional State, the prosecutor stated that Workineh was a public servant from Meskerem 1984 E.C (September 1991) until the time of the charge. According to the charge the amount of salary paid to Workineh during this period was a total of Birr 90,220 while his wife remained an unemployed house-wife. The charge stated that the two defendants were found possessing a total asset of Birr 2,081,468 and 90 cents[81].

አይጠበቅባቸውም፤ ሚዛን በሚደፋ መልክ ማስረዳት ስለመልስ ሰጭዎች በቂ ነው።" The Appellate Court convicted all the accused in these two cases stating that the evidence of the accused is not sufficient to rebut the evidence of the prosecutor.

[79] In the second case it partly confirmed the decision of the lower court and excluded some moneys and properties from the order of confiscation.

[80] See the files cited under footnote 69.

[81] The details of the Charge describes that the two accused deposited Birr 332,363.63 at Dashen Bank in the name of 2nd Accused; Birr 1,646,371.24 at Dashen Bank and Birr 46,802.11 at the Commercial Bank of Ethiopia in the name of 1st Accused; and have a residential house which is estimated to worth Birr 55,931.92 in the name of their son.

The accused persons pleaded not guilty, and the prosecutor adduced documentary evidence[82] to prove the commission of the offence. After examining the contents of the various pieces of documentary evidence, the High Court ordered the accused to enter into their defence. Accordingly, the two accused introduced oral and documentary evidence. In their defence, they alleged having other legitimate sources of income (from cultivation of chat, coffee, *enset* and sugar-cane). They further argued that Birr 1,120,500 belonged to two private limited companies, i.e., Gararamu Lanito Animal Husbandry PLC and Galma Cultural Lodge PLC. Moreover, they claimed that that amount deposited in the name of 1st defendant at Dashen Bank was obtained as loan from an individual person; they said that this money was initially deposited in the name of the 2nd defendant, but later on transferred to 1st accused for another legitimate purpose. Submitting all these grounds of defence and oral and documentary evidence[83] they prayed for acquittal. After having examined the evidence on both sides, the High Court acquitted the two defendants stating that they have successfully rebutted the evidence of the prosecution.

The Prosecutor appealed to the Regional State Supreme Court which confirmed the decision of the High Court after hearing additional witnesses. The prosecutor took its petition to the Cassation Division of the Regional Supreme Court alleging that the two courts committed fundamental error of law. The Cassation Division of the Regional Supreme Court found that the evidence submitted by the accused persons lacked cogency and credibility to rebut the evidence of the prosecutor. It found both defendants guilty of possession of unexplained property and imposed rigorous imprisonment of three years and one year against the 1st and 2nd defendants[84] respectively. It further ordered for the confiscation of their money (deposited at the two banks) and the house mentioned in the charge.

Aggrieved with this decision, the defendants petitioned to the Cassation Division of the Federal Supreme Court requesting that the Division quash the

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[82] These are documents purported to establish/prove (i) the amount of salary paid to 1st accused since Meskerem 1984 E.C until the time of charge, (ii) that 2nd accused remained unemployed house-wife, (iii) amount of money deposited in 1st accused's name in the Commericial Bank of Ethiopia and in Dashen Bank, (iv) amount of money deposited in 2nd accused's name in Dashen Bank, and (v) the two accused have a residential house in the name of their son, Desta Workineh.

[83] Apart from adducing the documents written by the Kebele Administration and the Zonal Agriculture Office regarding the income they alleged to have collected from two agricultural sites, they have introduced the minutes of the two private limited companies that state about the 1,120,5000 birr deposited in the name of 1st accused. Also, some shareholders of these two companies have testified before the court.

[84] The Division ordered that the 1 year rigorous imprisonment remain in suspension.

judgment rendered against them. The prosecutor, on its part, argued otherwise and prayed for confirmation.

4.3.2 The Holding of the Cassation Division of the Federal Supreme Court

After an extensive and thorough review of the case, the Cassation Division of the Federal Supreme Court found that the Cassation Division of the SNNP Regional State Supreme Court committed fundamental error of law. It observed that the Cassation Division of the Regional State Supreme Court does not have power to review errors of fact as well as to review the assessment of evidence conducted by the lower courts. It revoked both the conviction and the sanctions imposed on the accused. The FSC Cassation Division found that the High Court and the Regional Supreme Court committed fundamental error of law because they failed to frame the right issues and to order the accused persons carry out their respective burden of proof as per the requirement of Art 419 (1) of the Criminal Code.[85]

The FSC Cassation Division stated that it is not sufficient for the accused to merely produce evidence that raises some doubts against the evidence of the prosecution. It maintained that the accused persons bear the burden of establishing or proving the source of the extra money and other property found in their name in a manner that ascertains the legitimate source of each money and property.[86] The Cassation Division of the Federal Supreme Court quashed the decision of the Cassation Division of the SNNP Regional State Supreme Court and remanded the case for re-trial by the High Court providing detailed

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[85] The decision reads: "...**የሥር ፍርድ ቤትና ይግባኝ ሰሚው ችሎት አመልካቾች ያቀቧቸው ማስረጃዎች አንደኛ አመልካች ከሚሠራው የመንግሥት ሥራ በተጨማሪ ሌላ የገቢ ምንጭ የነበረው መሆኑን የሚያሳዩ ማስረጃዎች መሆናቸውን በመመልከት መጣራት የሚገባቸው ፍሬ ጉዳዮችን ሳያጣሩና በተለይም አመልካቾች በዐቃቤ ሕግ ክስና ማስረጃ ከሕጋዊ ገቢያቸው በላይ የያዙ መሆናቸውን ብር** 2,081,468.90 **ያገኙበትን ትክክለኛ የገቢ ምንጭ የወንጀል ሕጉ አንቀጽ** 419 **ንዑስ አንቀጽ** 1 **በሚደነግገው መሠረት የማስረዳት ግዴታቸውን ተወጥተዋል ወይስ አልተወጡም የሚለውን ጭብጥ በመያዝ በሕጉ በአመልካቾች ላይ የተጣለውን የማስረዳት ግዴታ**/burden of proof/ **መሠረት በማድረግ ተገቢውን ማጣራት አድርገው መርምረውና መዝነው ውሳኔ የሰጡ አለመሆናቸውን ከውሳኔያቸው ይዘት ለመረዳት ችለናል።**"

[86] The Cassation Division framed this issue reads "**አመልካቾች (በመንግሥት ሠራተኛነት ለ**1**ኛ ተከሳሽ ይከፈለው ከነበረው በላይ)... በባንክ ሂሳብ ቁጥራቸው የተገኘው ጥሬ ገንዘብና በልጃቸው ስም ቤት የሠሩበት ሀብት ማለትም ብር** 2,081,468.90 **ትክክለኛ ምንጭ የማስረዳት ግዴታና ኃላፊነት አለባቸው ወይስ የዐቃቤ ሕግን ክስና ማስረጃ ሊያስተባብሉ የሚችሉ አንዳንድ ፍሬ ጉዳዮችን ለፍርድ ቤት ማቅረባቸው በቂ ይሆናል ወይስ አይሆንም ?**"

Then it reasoned and concluded as follows: "...**ዐቃቤ ሕግ በግልጽ ከሚታወቀው ሕጋዊ ገቢ በላይ ነው በማለት በክሱ የገለጸውንና በማስረጃ ያረጋገጠውን ሀብት ትክክለኛ ምንጭ የማስረዳት ግዴታ** /burden of proof/ **በተከሳሾች ላይ የሚወድቅ መሆኑን ነው። የተከሳሾች የማስረዳት ግዴታም ዐቃቤ ሕግ በክሱ ከገለጸውና በማስረጃ ከረጋገጠው ውጭ ተከሳሾች ሌላ ገቢ የሚያገኙበት ሥራ ወይም የገቢ ምንጭ ያላቸው መሆኑን ብቻ ለፍርድ ቤቱ በማሳየት የሚወሰን ሳይሆን በዐቃቤ ሕግ ክስና ማስረጃ ከተረጋገጠው ገቢ ውጭ በእጅ እንደተገኘ የተረጋገጠው ገንዘብና ሀብት ትክክለኛ ምንጭ ምን እንደሆነ የማስረዳት ግዴታና ኃላፊነት ያለበት መሆኑን ከወንጀል ሕግ አንቀጽ** 419 **ንዑስ አንቀጽ** 1 **ሦስተኛው ፓራግራፍ ድንጋጌ አቀራረጽና ይዘት ለመረዳት ይቻላል።**"

instructions to the court in respect of the specific burden of proof borne by the accused as well as the nature of examination and assessment of the defence evidence.

4.4 Observations and Critique on the Binding Interpretation adopted in the *Workineh Kenbato* & *Amelework Dalie Case*

As some of the cases consulted demonstrate, the Amharic term "**የማስረጃ ሸክም**" or "**የማስረዳት ግዴታ**" are often indiscriminately used to refer to burdens borne by the parties without clearly identifying the distinction between *evidential burden* (**ማስረጃ የማቅረብ ሸክም**) and *legal burden of proof* (**በማስረጃ የማረጋገጥ ሸክም**). The *Workineh Kenbato & Amelework Dalie Case* and many other reported cases demonstrate this fact. Furthermore, in almost all cases highlighted above the courts did not attempt to indicate the particular standards of proof required from the respective parties to successfully discharge their respective burdens of proof. Besides, issues of burden and standard of proof have not been related with the constitutional principle of presumption of innocence and its legal implications. Most importantly, the natures and implications of the interrelationships between burdens of proof and presumptions, and between burdens of proof, presumptions and standards of proof should have been observed. This has led to lack of clarity on the operational features of the presumption embodied under Art 419 of the Criminal Code.

As the cases indicate, judges could have paid particular attention to the specific factual matters towards which each of the litigating parties bears evidential and/or persuasive burdens of proof. The Cassation Division of the Federal Supreme Court has rightly identified some of the principal *ingredients* of the offence of possession of unexplained property which the public prosecutor bears the burden of proving in the *Workineh Kenbato & Amelework Dalie Case*. The Division held that the prosecutor bears burden of proof and must prove:[87] the amount of income which an accused public servant (present or previous) is (or has been) earning; and, the extra (disproportionate or incommensurate) amount of money or property (vis-à-vis his lawful income) found in the possession of the accused, in his own name or in the name of his family.

Moreover, the Cassation Division has rightly, though implicitly, recognized that proving the status of the accused during the alleged commission of the crime as a *public servant* (or as one who is or used to associate with a public servant accused of committing this crime during such time) is borne by the

[87] "**ከወንጀል ሕግ አንቀጽ** 419 **ንዑስ አንቀጽ** 1 (**ሀ**) **እና** (**ለ**) **ድንጋጌዎች ለመረዳት የሚቻለው ዐቃቤ ሕግ የመንግሥት ሠራተኛ የሆነው ወይም የነበረው ሰው ያገኝ የነበረውና የሚያገኘው ገቢ ምን ያህል እንደሆነና የመንግሥት ሠራተኛው በራሱ ስምም ሆነ በቤተሰቡ ስም ከሕጋዊ ገቢው ውጭ ይዞት የሚገኘውን የገንዘብና የንብረት ግምት የማስረዳት ግዴታ ያለበት መሆኑን በግልጽ ደንግጓል።**"

prosecutor. But the Division did not take note that such an assessment of the income of the accused public servant has to be made *within the period of check*. It did not confine the search of extra amount of money or property of the accused to be within the period of interest after the entry into force of the Criminal Code. It has accepted what the prosecutor stated in its charge and tried to establish with evidence starting from Meskerem 1984 E. C (thirteen years before the criminalization of possession of unexplained property in Ethiopia). Of the estimated Birr 2,081,468.90 (alleged to be found under the control of the accused), the portion of money acquired during the period of check (from Ginbot 1, 1997 E.C until the time of charge) has not been duly established by the prosecutor. The Cassation Division did not comment, let alone quash, the decision of the Regional Supreme Court from this perspective. Nothing has been stated in any of the judgements regarding the *mens rea* element of the offence.

The Cassation Division has addressed the question of *burden of proof* in relation to the accused. It stated that the defendant in such cases bears "burden of proof". Although the Cassation Division did not indicate whether the term *burden of proof* (**የማስረዳት ግዴታ**) specifically refers to evidential burden or legal burden, further reading of the details in the judgment show that it refers to legal burden of proof.[88] The Division held that an accused public servant and an

[88] "(**ሀ**) **አመልካቾች በስማቸው እንዳለና ጫት፣እንሰት፣ቡናና ሽንኩራ አገዳ እያለማን ገቢ እናገኝበታለን ያሉትን** 2.25 **ሄክታር መሬት በተመለከተ አመልካቾች የእርሻ መሬቱ ባለይዞታ ናቸው ወይስ አይደሉም? የእርሻ መሬቱ ባለይዞታ ከሆኑ የእርሻ መሬቱን በይዞታነት የያዙት መቼ ነው? መሬቱን በማልማት ኢኮኖሚያዊ ጠቀሜታ ያላቸው የተለያዩ ተክሎች በማልማት ምርት ገቢ ማግኘት የጀመሩት መቼ ነው? ከመሬቱ የሚገኘው ገቢና መሬቱን ለማልማትና ምርቱን ለገበያ ለማቅረብ የሚወጣው ወጭ ምን ያህል ነው? አመልካቾች ከመሬቱ ተጣርቶ የሚደርሳቸው ገቢ ምን ያህል ነው? የሚለው ፍሬ ጉዳይ በአግባቡና በገለልተኛ ባለሙያ ተጣርቶ ባልታወቀበት ሁኔታ ከቀበሌና ከዞኑ ግብርና ጽ/ቤት የተጻፉ ደብዳቤዎችን ብቻ መሠረት በማድረግ አመልካቾች ከእርሻ የሚያገኙት ገቢ መጠን ከፍተኛ እንደሆነ መወሰኑ በወንጀል ሕጉ አንቀጽ** 419(1) **በአመልካቾች ላይ የሚደነግገውን የማስረዳት ግዴታ** /burden of proof/ **መሠረት በማድረግ ጉዳዩ ተጣርቶ የተወሰነ አለመሆኑን የሚያሳይ በመሆኑ፣**

(**ለ**) **አመልካቾች በባንክ ሂሳባቸው ውስጥ ከተገኘው ገንዘብ ውስጥ ብር** 1,120,500 […] **በአንደኛው አመልካች ስም የተቀመጠ ከፊሉ የጋራራሙ ላንቶ የእንስሳት ማድለብ ኃላፊነቱ የተወሰነ የግል ማኅበር ገንዘብ ከፊሉ ደግሞ የጋልማ ባህላዊ ሎጅ ኃላፊነቱ የተወሰነ የግል ማኅበር መሆኑን ለማስረዳት የማኅበራቱ ቃለ-ጉባዔና አባላት በማስረጃነት የቀረቡ መሆኑ በሥር ፍርድ ቤትና በይግባኝ ሰሚው ችሎት ውሳኔ ተገልጿል፡፡ ሆኖም በመጀመሪያ ደረጃ ኃላፊነታቸው የተወሰኑ የግል ማኅበራት የሚመሠረቱት የማኅበሩ ዋና ገንዘብ ልክና የማኅበሩ ዋና ገንዘብ በሙሉ መግባቱን የሚያስረዳ መግለጫ ሲቀርብ መሆኑ በንግድ ሕጉ አንቀጽ** 519 **ንዑስ አንቀጽ /መ/ እና /ሰ/ በአስገዳጅነት የተደነገገ በመሆኑ እነዚህ የንግድ ማኅበራት ሕጋዊ ሰውነት አግኝተው ተመዝግበው ከሆነ ሲመዘገቡ ያስመዘገቡትና ገቢ ያደረጉት የማኅበሩ ዋና ገንዘብ ምን ያህል ነው? ማኅበራቱ በካፒታልነት ካስመዘገቡት ካፒታል በላይ በአመልካቾች ስም ለማኅበር መመሥረቻ የተዋጣ ገንዘብ አለ በማለት የሚጽፉአቸው የተለያዩ ማስረጃዎች ሕጋዊ ተቀባይነት ያላቸው ናቸው ወይስ አይደሉም? የሚሉት ነጥቦች ኃላፊነቱ የተወሰነ የግል ማኅበር አመሠራረት፣መዋጮ አከፋፈል፣የማኅበሩ ዋና ገንዘብና ገንዘቡ ገቢ ስለሚሆንበት ሁኔታ የተቀመጡ ሕጋዊ መሥፈርቶችን መሠረት በማድረግ መጣራት የሚገባቸው ፍሬ ጉዳዮች ተጣርተውና ማስረጃዎቹ አመልካቾች በወንጀል ሕጉ አንቀጽ** 419 **ንዑስ አንቀጽ** 1 **ያለባቸውን የማስረዳት ኃላፊነት መሠረት በማድረግ ተጣርተው ውሳኔ የተሰጠበት ሆኖ አላገኘንም፡፡**"

accomplice non-public servant bear burden of proof on one of the elements of the offence: namely, burden of proving the legitimate source (origin) of the extra amount of wealth found in one's possession other than that amount which the prosecutor already established to be a legitimate income.[89] While the Cassation Division has rightly identified this element of the offence which falls under the shoulder of the accused, the Division has unduly interpreted Art 419(1) as imposing persuasive burden of proof on the accused, contrary to the principle of presumption of innocence.

The Division arrived at such conclusion by focusing on the expression "….unless he *gives a satisfactory explanation* to the Court as to *how he was able to maintain such a standard of living* or *how such pecuniary resources or property came under his control*…" (**"የዚህ ዓይነቱ የኑሮ ደረጃ እንዴት ሊኖረው እንደቻለ ወይም ያለው ንብረት ወይም የገንዘብ ምንጭ በእጁ እንዴት ሊገባ እንደቻለ *ለፍርድ ቤት ካላስረዳ በስተቀር*"**) (Emphasis added). The Division did not consider the limited scope of this expression "**… *ለፍርድ ቤት ካላስረዳ በስተቀር*"** ("….unless he *gives a satisfactory explanation* to the Court"). This phrase does not imply persuasive burden of proof. What is required rather is *explanation (**ማስረዳት**)*, not *proving (**ማረጋገጥ**)*.

Moreover, the Division did not notice that the explanation has to relate to "*how he was able to maintain such a standard of living or how such pecuniary resources or property came under his control* [emphasis added]." Contrary to the law, it maintained that the accused should prove the exact amounts of net-incomes obtained from every identified and specific source. It required the defendants to convince the court about the amount of the net-income they derived from agricultural activities by producing a balance sheet that has been checked by a neutral a professional auditor. It further required them to convince the court about the truthfulness of their allegation regarding the amount of money claimed to be belonging to the two private limited companies by producing what has been registered during the registration of the two companies. All these requirements are not envisaged under Art 419 of the Criminal Code; there is no single word or expression in this provision that requires an accused to produce evidence that establishes (proves) the exact amount of money/property derived from specific sources. Nor does the provision require the accused to *convince* judges about the truthfulness of each gross income, expenditure and net-income.

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[89] The Court maintained: "**በሌላ በኩል የመንግሥት ሠራተኛ የነበረው ሰውና ከእሱ ጋር በልዩ አባሪነት የተከሰሰ ሰው የመንግሥት ሠራተኛው ሊያገኝ ከነበረውና ከሚያገኘው ገቢ በላይ ይዞት የተገኘው ገንዘብ ወይም ሀብት ትክክለኛው ምንጭ ምን እንደሆነ የማስረዳት ግዴታ እንዳለበት በወንጀል ሕጉ አንቀጽ** 419 **ንዑስ አንቀጽ** 1 **ሦስተኛ ፓራግራፍ** […] **በግልጽ ይደነግጋል። ከዚህም የምንረዳው ዐቃቤ ሕግ በግልጽ ከሚታወቀው ሕጋዊ ገቢ በላይ ነው በማለት በክሱ የገለጸውንና በማስረጃ ያረጋገጠውን ሀብት ትክክለኛ ምንጭ የማስረዳት ግዴታ** (Burden of Proof) **በተከሳሾች ላይ የሚወድቅ መሆኑን ነው።**"

The Cassation Division has also considered the issue of *standard of proof borne by the accused*. Without saying anything about the standard of proof borne by the prosecutor, the Division first framed the issue of whether the accused persons bear the burden of persuasion or whether it suffices if they merely introduce some evidence that rebut some of the facts established by the prosecutor.[90] The FSC Cassation Division invoked Art 419(1) of the Criminal Code, third paragraph, and concluded that the defendants bear the burden of persuading the court about the legitimate source of the extra amount of money and wealth which they possessed.[91] Whether the accused are required to convince judges with a standard of proof that is 'less than preponderant degree of proof', or 'equivalent to preponderant degree of proof', or 'equal to clear and convincing degree of proof', or 'equal to beyond a reasonable doubt standard of proof', or 'absolute certainty degree of proof' is not explicitly stated.

The analysis in the Cassation Division's final order seems to endorse and impose a requirement of an absolute certainty degree of proof upon the accused.[92] Such an interpretation clearly violates the principle of presumption of innocence enshrined under Art 20(3) of the Constitution and international instruments (which are integral part of Ethiopian law by virtue of Art 9(4) of the Constitution), namely: Art 11(1) of the UDHR, Art 14(2) of the ICCPR and Art 7(1)(b) of the African Charter on Human and People's Rights. It also deviates from the experience and judicial jurisprudence developed in other jurisdictions including the countries of origin of the idea of criminalization of illicit enrichment. The approach taken by the Cassation Division allows conviction of an accused person who fails to persuade judges about the truthfulness of one's side of the story. According to the Division's holding, it is possible to convict an accused person even if there are reasonable doubts about the truthfulness of the prosecutor's allegations or even if the prosecutor's and the defendant's evidence are at equipoise.

Conclusion

In jurisdictions where the problem of corruption is widespread, the criminalization of illicit enrichment is adopted as a vital tool to reinforce the

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[90] [ተከሳሾች በዐቃቤ ግ ማስረጃ የተረጋገጠባቸውንና ሕጋዊ ከሆነው ገቢ በላይ የያዙትን ገንዘብና ሀብት] "ትክክለኛ ምንጭ የማስረዳት ግዴታና ኃላፊነት አለባቸው ወይስ የዐቃቤ ሕግን ክስና ማስረጃ ሊያስተባብሉ የሚችሉ አንዳንድ ፍሬ ጉዳዮችን ለፍርድ ቤት ማቅረባቸው በቂ ይሆናል ወይስ አይሆንም?"

[91] It concluded: "የተከሳሾች የማስረዳት ግዴታም ዐቃቤ ሕግ በክሱ ከገለፀውና በማስረጃ ካረጋገጠው ውጭ ተከሳሾች ሌላ ገቢ የሚያገኙበት ሥራ ወይም የገቢ ምንጭ ያላቸው መሆኑን ብቻ ለፍርድ ቤቱ በማሳየት የሚወሰን ሳይሆን በዐቃቤ ሕግ ክስና ማስረጃ ከተረጋገጠው ውጭ በእጅ እንደተገኘ የተረጋገጠው ገንዘብና ሀብት ትክክለኛ ምንጭ ምን እንደሆነ የማስረዳት ግዴታና ኃላፊነት ያለበት መሆኑን ከወንጀል ሕግ አንቀጽ 419 ንዑስ አንቀጽ 1 ሦስተኛው ፓራግራፍ ድንጋጌ አቀራረጽና ይዘት ለመረዳት ይቻላል።"

[92] *Supra*, notes 88-91.

fight against this social evil. However, countries which are not severely threatened with corruption resort to civil and/or administrative measures and remedies to address the problem. Yet, the criminalization of illicit enrichment is increasingly gaining acceptance as a legitimate instrument against corruption.

Apart from the incorporation of this offence in the 2004 Criminal Code, Ethiopia is a party to the UNCAC[93] and the AUCPCC[94]. Article 419 of the Criminal Code is clearly significant in the combat against corruption and as a tool to punish corrupt public servants and deprive them of their ill-gotten gains. Yet, there is the need for sufficient clarity on issues of burdens and standards of proof applicable in such prosecutions and on how this provision can be enforced without violating the right to presumption of innocence and other components of the right to fair trial and the right to private property.

A case in point is the need to distinguish between *evidential* and *legal* burdens and the need to analyze and determine whether Art 419 of the Criminal Code imposes *evidential* or *legal* burden of proof upon the accused. Moreover, clarity is required regarding the degree of proof that has to be met to trigger the operation of the legal presumption, and also to obtain conviction of an accused. The element or issue which requires *satisfactory explanation* from the accused also needs to be clearly identified. Furthermore, clarity is required regarding the degree of 'proof' imposed on the accused to meet 'satisfactory explanation'.

The Cassation Division of the Federal Supreme Court gave an erroneous interpretation to Art 419 of the Criminal Code stating that the accused in such prosecutions is required to shoulder a persuasive burden of proof. The Division further erroneously implied that such a burden can only be discharged by a standard of proof that reaches to a proof beyond a reasonable doubt. This author hence submits that the Federal Supreme Court Cassation Division should re-consider and rectify such interpretation of Art 419 when it comes across another case that bears similar issues.

The Division is indeed expected to identify the initial evidential and ultimate burdens of proof borne by prosecuting authorities, on the one hand, and the tactical and evidential burdens of "proof" borne by accused, on the other. This calls for the need to be clear on how the evidential presumption recognized under Art 419 becomes operational in each case and with regard to the various standards of proof applicable in such prosecutions throughout the trial and adjudication process.

Prosecutions under Art 419 of the Criminal Code are meant to deter corrupt public servants, deprive them of ill-gotten gains and facilitate the recovery of

[93] The United Nations Convention against Corruption (UNCAC), 2003.
[94] The African Union Convention on Combating and Preventing Corruption (AUCPCC), 2003.

plundered public money and other assets. Meanwhile, it is of paramount importance to take all the necessary precaution against the violation of the constitutional principle of presumption of innocence until proven guilty and other fundamental human rights of accused persons. Moreover, utmost caution has to be taken not to interfere against the lawful property of accused individuals, their families and other third parties. As the experience of other jurisdictions such as Argentina, India, Hong Kong and many others demonstrate, Art 419 can indeed be enforced without unduly restricting and violating the right to fair trial and other fundamental human rights enshrined in the FDRE Constitution and international human rights instruments ratified by Ethiopia. ■