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**THE CRIME OF ILLICIT ENRICHMENT IN NAMIBIA:  
NEW OPPORTUNITIES FOR ENFORCEMENT?**



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## INTRODUCTION

Corruption is on the rise in Namibia, and authorities are not able to effectively halt the rising tide. An editorial in *The Namibian* earlier this year argued that “the Anti-Corruption Commission is up and running, but most will agree that it is ineffective,”<sup>1</sup> rarely achieving convictions while corrupt practices seem to be multiplying. To be fair, this challenge is not uniquely Namibian: across the world, prosecutors are struggling to get convictions for corrupt officials as criminals become increasingly sophisticated. Crimes of corruption are by their nature hard to prove in the first place, given their inherent secrecy.

In response to these challenges, several countries have enacted laws that criminalise ‘illicit enrichment,’ an approach that has even been recommended by the United Nations Convention Against Corruption as well as other international conventions. These laws seek to make it easier to catch corruption: rather than having to prove the underlying crime (such as bribery or embezzlement) the prosecution can simply show that the official’s wealth exceeds what they should reasonably have from their legitimate income. If the defendant cannot show a legitimate source of the income, they are presumed to be corrupt.

This paper provides an introduction to the laws – their origins and recent increase in popularity, elements of the crime, as well as ways of implementing them in practice. One method of enforcement was raised by President Hage Geingob when he told an interviewer on Voice of America in 2016 that lifestyle audits for officials were on the horizon in Namibia.

This paper also looks at some of the challenges with these laws. Illicit Enrichment legislation has been subject to criticism on human rights grounds. Critics argue that these laws reverse the presumption of innocence, as defendants are assumed guilty of corruption if they cannot prove a legitimate source for their wealth. They further charge that illicit enrichment laws violate other important legal precepts, including the right to silence and the principle of legality. Finally, the paper looks at suggested alternatives to illicit enrichment laws.

Should these laws be introduced, they would face many operational obstacles – not to mention the ethical concerns and criticisms. Illicit enrichment laws cannot be viewed as a quick fix for corruption prosecutions. If underlying issues (such as poor compliance with financial disclosure regimes and a lack of political will to prosecute corruption at the highest level) are not addressed, illicit enrichment laws will not make a difference. Further, the ethical debates around illicit enrichment laws should not be taken lightly. It may be tempting, given the frustrating difficulty of getting convictions in corruption cases, to do everything to strengthen the hand of the prosecution. But the concerns around presumption of innocence, the right to silence, and other aspects of the law are not trivial, and would have to be carefully considered.

## CRIMINALISING ILLICIT ENRICHMENT

The first proposals for illicit enrichment crimes surfaced almost a century ago. An Argentinian lawmaker noticed a fellow public official ostentatiously showcasing his new-found wealth, and soon introduced legislation to punish officials who accrued wealth without accounting for its origin.<sup>2</sup> This particular bill did not pass straight away– but Argentina became the joint first country, with India, to criminalise illicit enrichment in 1964. The uptake of legislation then sped up: The UN reports that “by 1990, illicit enrichment had been criminalised in at least 10 countries, by 2000

<sup>1</sup> “Protecting Politicians and Co,” *The Namibian*, February 24, 2017, <http://www.namibian.com.na/161677/archive-read/Editorial--Protecting-Politicians-and-Co>.

<sup>2</sup> Lindy Muzila et al., “On the Take: Criminalizing Illicit Enrichment to Fight Corruption,” *Stolen Asset Recovery Initiative (The World Bank, 2012)*, 7, <http://star.worldbank.org/star/document/take-criminalizing-illicit-enrichment-fight-corruption>.



in more than 20 countries, and by 2010 in more than 40 jurisdictions.”<sup>3</sup>

This spread has been aided by international conventions that encourage the adoption of illicit enrichment laws. The first of these is the Inter-American Convention Against Corruption (IACAC), to which 33 countries in Central and Latin America are party, and which makes it mandatory for members to enact illicit enrichment legislation. The African Union Convention on Preventing and Combating Corruption (AUPCC) followed in 2003, as did the United Nations Convention Against Corruption (UNCAC). The UNCAC has been a very influential document in regard to illicit enrichment legislation, as it is a widely-adopted convention: as of December 2016, it had 140 signatories and 181 parties.<sup>4</sup> As a result, much of the analysis on issues surrounding illicit enrichment foregrounds the document. The discussions surrounding the drafting of the UNCAC also reflect important debates: in the final document, illicit enrichment is not a mandatory offence – because European states had doubts that such legislation would be compatible with their human rights framework (see page 8). As a result of these concerns, “illicit enrichment provisions can be found in most regions of the world, with the notable exceptions of North America and most of Western Europe.”<sup>5</sup>

#### UNCAC on Illicit Enrichment

##### Article 20. Illicit enrichment

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.

Laws criminalising illicit enrichment have certainly made an appearance close to Namibia. In Botswana, the Corruption and Economic Crime Act of 2005 lists “possession of unexplained property” as one of its offences. When there are “reasonable grounds to suspect” that a person “maintains a standard of living above that which is commensurate with his present or past known sources of income or assets” or has more property than fits their income, the person is guilty of the crime if they do not give a satisfactory explanation.<sup>6</sup> Zambia’s Anti-Corruption Act of 2012 contains almost verbatim language on maintaining a standard of living and controlling pecuniary resources as Botswana’s law. In addition, the Zambian law adds it is a crime if the official “is in receipt of the benefit of any services” that they received improperly, further broadening the definition of the offence.<sup>7</sup>

Namibia has no law of illicit enrichment. However, several other laws contain anti-corruption provisions, some of which look similar to components of illicit enrichment laws. The Anti-Corruption Act of 2003 allows investigators to investigate suspects’ lifestyle to see if they are living above their means (see below). The Prevention of Organised Crime Act of 2004 allows for the confiscation of the benefits from ill-gotten gains. And recently, President Geingob suggested in an interview that government may introduce lifestyle audits for officials, a tool often used for detecting illicit enrichment. But no law has outright criminalised the undue accumulation of wealth in the sense recommended by the United Nations Convention Against Corruption.

<sup>3</sup> Ibid., 8.

<sup>4</sup> UNODC, “Signatories to the United Nations Convention Against Corruption,” December 12, 2016, <https://www.unodc.org/unodc/en/treaties/CAC/signatories.html>.

<sup>5</sup> Lindy Muzila et al., “On the Take: Criminalizing Illicit Enrichment to Fight Corruption,” 9.

<sup>6</sup> Government of Botswana, “Corruption and Economic Crime Act,” Pub. L. No. 14 (2005), sec. 34.

<sup>7</sup> Government of Zambia, “Anti-Corruption Act,” Pub. L. No. 3 (2012), sec. 22.

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### **The Benefits of Criminalising Illicit Enrichment**

It is no surprise that anti-corruption crusaders have embraced laws against illicit enrichment, because they address the fact that corruption is a uniquely difficult crime to prove and prosecute. Consider a very simple hypothetical bribery case, where a businessperson bribes a government official to speed up the processing of an application. In the first place, law enforcement would struggle to find out this crime happened at all. Both parties to this crime will want to keep it secret, and therefore keep records to a minimum. There is no obvious victim who could go to the police and file a report – the victims are abstract norms like the rule of law and institutional integrity. Secondly, law enforcement will struggle proving the crime. In many cases, the perpetrators can “use power and influence to intimidate witnesses and destroy any evidence of their crimes.”<sup>8</sup> Prosecutors will struggle proving that one party bribed another, and that money was transferred for this specific service – especially given the complicated ways in which money can be held and transferred.<sup>9</sup> Thus “often, the only tangible evidence that a crime has taken place is the money that changes hands between the corrupt official and his partner in crime, thus the enrichment of the corrupt official becomes the most visible manifestation of corruption”<sup>10</sup>

Illicit enrichment laws make life easier for prosecutors by targeting this visible manifestation in itself. As Boles puts it, these laws act “as ‘catch-all’ legislation that benefit law-enforcement agencies when they lack sufficient evidence to prove that the public officials engaged in bribery, embezzlement, or another underlying predicate offence that generated the illicit proceeds in question”<sup>11</sup> They remove the primary incentive for corrupt officials – the acquisition of money – by targeting wealth directly. If officials know excessive wealth will get them in trouble, they will think twice about trying to acquire it. Finally, of course, the laws act as a deterrent: civil forfeiture means the illicit money will be gone anyway, prison sentences offer further punishment, and widespread coverage – and therefore public shaming – are virtually guaranteed. In short, laws criminalising illicit enrichment both reduce public officials’ appetite for corruption, and enable prosecutors to convict those who are corrupt nonetheless.

## **THE CRIME OF ILLICIT ENRICHMENT**

Naturally, there are differences in how various countries define this crime. While International Conventions such as the UNCAC try to provide a framework that can be followed across states, there are differences between the conventions.<sup>12</sup> Still, there are some significant similarities, and based on several conventions the United Nations Office on Drugs and Crime summarises the crime as follows:

Illicit Enrichment has five key elements: persons of interest, period of interest, conduct of enrichment (that is, the significant increase in assets), intent (including awareness or knowledge), and the absence of justification.

This section provides some more detail on these elements, based on a report by the UN Office On Drugs and Crime’s Stolen Asset Recovery Initiative.<sup>13</sup>

<sup>8</sup> Lindy Muzila et al., “On the Take: Criminalizing Illicit Enrichment to Fight Corruption,” 5.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

<sup>11</sup> Jeffrey R. Boles, “Criminalizing the Problem of Unexplained Wealth: Illicit Enrichment Offenses and Human Rights Violations,” *New York University Journal of Legislation and Public Policy* 17, no. 4 (2014): 848.

<sup>12</sup> Lindy Muzila et al., “On the Take: Criminalizing Illicit Enrichment to Fight Corruption,” 11.

<sup>13</sup> Lindy Muzila et al., “On the Take: Criminalizing Illicit Enrichment to Fight Corruption.”



### Persons of Interest

A key feature of illicit enrichment legislation is that it specifically targets public officials. A UN review of national legislation found that every law covered singled out public officials. The UNCAC defines public official relatively broadly: apart from elected or appointed officials, the convention includes “any other person who performs a public function,” paid and unpaid positions, temporary and permanent employees. Some countries have broadened the net: Pakistan has applied illicit enrichment to a “holder of public office or any other person” and Colombia has a separate crime for illicit enrichment for private individuals.<sup>14</sup>

But if only public officials are covered, there is the risk that others could receive ill-gotten gains on their behalf. To prevent this sort of loophole, some countries include family members in the definition. El Salvador and Egypt include income and assets of the spouse and minor children of public officials; Paraguay considers “assets held by first- and second-degree bloodline relatives.”<sup>15</sup> Brunei casts the net even wider, allowing government to seize assets from any person who holds money or property on behalf of the accused. However, the UN report notes that the UNCAC definition will likely be sufficient: other international provisions, notably on monitoring of interactions with financial institutions, already covers the family of public officials.<sup>16</sup>

### Period of Interest

This regulates the time frame during which a person can fall foul of the law if they enrich themselves. By clearly defining the time frame, authorities want to demonstrate a relationship between the increase in wealth and the work as a public official.

At a minimum, the time frame contains the period in which a public official is employed or carrying out their functions. Several national laws specifically refer to the period of employment. Under this system, investigators simply establish a baseline at the beginning of employment and then see if the increase in wealth from that baseline is higher than what the official should have earned in their salary. The problem with this approach is that it could be easily circumvented: instead of receiving a bribe immediately, a politician could simply arrange that the transfer occurs a while after they leave office.

To combat this, other countries have extended the period of interest. In several South American countries, the period of interest includes two to five years after the official leaves employment. Other countries go even further, making the period open-ended and targeting everyone who was once a public official and now has a standard of living that does not match their earnings. There are other considerations that have to come into play, however. For one, many institutions will not keep records indefinitely, and so it will become harder to prove a case over a longer period of time. Secondly, it may be more difficult to identify a person’s legitimate earnings – and therefore whether they have accumulated excessive wealth – over a longer time period.<sup>17</sup>

### Significant Increase in Assets

All major conventions dealing with illicit enrichment require that the prosecution can show a “significant increase in assets.” But what counts as a “significant” increase – and what counts as an “asset”?

Most national laws leave it up to investigators and prosecutors to decide what is significant. Again there are various considerations at play. As a UN report on illicit enrichment laws around the world notes,

“Specifying a threshold for illicit enrichment in statutes may prevent prosecu-

<sup>14</sup> Ibid., 14.

<sup>15</sup> Ibid., 15.

<sup>16</sup> Ibid.

<sup>17</sup> Ibid., 16–17.

“If only public officials are covered, there is the risk that others could receive ill-gotten gains on their behalf.”



“Lifestyle audits seek to determine whether the standard of living of a public official is clearly not appropriate for their level of earnings.”

tions where the amounts concerned are trivial. However, it may also send a signal that a certain level of corrupt conduct will be tolerated, unless the threshold sets an extremely low bar.”<sup>18</sup>

In terms of what counts as assets, definitions are often broad. Paraguay, for example, includes services provided, rights granted, and even the cancellation of debt of the accused, their spouse, and bloodline relatives. Lesotho and Malawi, on the other hand, focus on whether the suspect enjoys a standard of living that does not match their known income. It is important to note that when countries use the term “lifestyle,” it is not an offence in itself – rather the lifestyle alerts authorities to investigate the underlying assets that make extravagant living possible.

There is some controversy over this part of the law. The key criticism is that “the conventions and legislation are not explicit with regard to the criminal conduct (*actus reus*) that constitutes the basis of the offence.”<sup>19</sup> It is a core feature of most legal systems that there should be no penalty without a law – legislation must clearly explain what the prohibited conduct is. Some proponents of illicit enrichment laws have argued that the law does not target conduct, but the omission: “A public official has a statutory duty to explain the origin of his wealth, and the failure to do so when required is an offence.”<sup>20</sup> Meanwhile, others argue that enrichment itself can be criminal, as enriching oneself requires active participation from the public official. “Property has to be purchased, maintained, and used,

and bank accounts have to be opened and used for transactions. There are obvious parallels with the offence of money laundering and the possession of drugs and arms.”<sup>21</sup>

#### **Intent**

This is not a universal component, but is mentioned explicitly in the UNCAC (though not in the IACAC and AUPCC). The UNCAC included intent in the definition of illicit enrichment so that the crime would not be used unreasonably. Under UNCAC, the intent does not have to be proved explicitly – it is enough to infer it from the facts of the case, for example a public official making large cash payments or receiving money from someone with whom they do not have a legitimate relationship.

#### **Absence of Justification**

Recall again the definition of illicit enrichment cited above, which states that it is “a significant increase in the assets of a public official that he or she *cannot reasonably explain*” As will be discussed below, this is perhaps the most controversial aspect of the law. It is this section that places the burden of proof on the accused, in the view of many observers, which raises difficult questions about the presumption of innocence. A detailed discussion follows from page 8.

## **ENFORCEMENT: HOW ILLICIT ENRICHMENT LAWS WORK IN PRACTICE**

If these laws make it a crime to have excessive wealth, it follows that authorities first need to establish how much wealth suspects have, before they can move on to proving that this is incommensurate with the accused’s legitimate earnings. There are several ways for the state to gain insight into its officials’ finances. It should be noted that a lot of information can already be gathered using existing investigative tools and practices. The Central Bureau of Investigations in India reports that more than half of illicit enrichment investigations are triggered by information gathered in

<sup>18</sup> Lindy Muzila et al., “On the Take: Criminalizing Illicit Enrichment to Fight Corruption.”

<sup>19</sup> Ibid., 20.

<sup>20</sup> Ibid.

<sup>21</sup> Ibid.



other corruption investigations.<sup>22</sup> Nevertheless, there are certain sources of information that are particularly suited to illicit enrichment investigations.

### Lifestyle Audits

Lifestyle checks are a way of detecting illicit enrichment that tend to make the news – and make intuitive sense to many people. President Geingob raised the possible introduction of lifestyle audits to detect corruption when interviewed on Voice of America's Straight Talk Africa show in September 2016. As *The Namibian* reported, "the Public Service Commission has also called for the introduction of lifestyle audits as one of the ways to detect graft among public officials."<sup>23</sup>

Lifestyle audits seek to determine whether the standard of living of a public official is clearly not appropriate for their level of earnings. In the course of an audit, investigators would examine not just the assets and spending, but also the activities of public officials. The concept of a lifestyle audit would likely make sense to many Namibians. In many towns, rumours abound around certain officials and how they can possibly afford their fancy cars, big houses, and extravagant holidays. Often, it is widely assumed that these government employees have an illicit second income stream – but in the absence of specific information of exactly where this money comes from, the public would not know how to report these people. Lifestyle audits, meanwhile, can often be triggered by complaints from the public. Ideally, there should be protection for whistleblowers, including a guarantee of anonymity.

Lifestyle audits are already conducted in many jurisdictions, often by tax collection agencies. The South African Revenue Service has a website which asks the public to report suspicious activities. Their list of suspicious activities includes: "A person is living beyond his obvious financial means – displaying unusually high lifestyle patterns for a person with similar forms of conduct."<sup>24</sup> SARS's audit procedures also include a lifestyle questionnaire,<sup>25</sup> and in 2010 the Service revealed that it had conducted "4,787 lifestyle audits since 2007 on individuals suspected of tax evasion or tax fraud."<sup>26</sup> The Ethics and Anti-Corruption Commission of Kenya announced earlier this year that that would carry out lifestyle audits of a large number of government officials before the election.<sup>27</sup>

In Namibia, the Anti-Corruption Act includes a provision that allows the Director-General of the Anti-Corruption Commission to require suspects to explain their wealth. This statement includes all assets "possessed by him or her in Namibia or elsewhere or held in trust for him or her in Namibia or elsewhere," and suspects must explain when and from where they acquired this wealth. But there is no indication, as of yet, that systematic lifestyle audits are being carried out on public officials – hence President Geingob's comments during that interview.

### Suspicious Transaction Reports

A person who illicitly enriches themselves will likely require the services of a financial institution. In this case, existing frameworks already exist to flag suspicious transactions. Specifically, Namibia's Financial Intelligence Act of 2012 requires financial institutions to conduct "on-going and enhanced due diligence" on their customers, which includes monitoring transactions. If an institution suspects that "it has received, or is about to receive the proceeds of unlawful activities" it has

<sup>22</sup> Ibid., 45.

<sup>23</sup> Shinovene Immanuel, "Geingob Promises Officials Lifestyle Audit," *The Namibian*, September 16, 2016, <http://www.namibian.com.na/155715/archive-read/Geingob-promises-officials-lifestyle-audit>.

<sup>24</sup> SARS, "Report a Suspicious Activity," 2016, <http://www.sars.gov.za/TargTaxCrime/ReportCrime/Pages/Report-a-suspicious-activity.aspx>.

<sup>25</sup> Ingé Lamprecht, "How Sars Could Single You out for an Audit," *Moneyweb*, April 22, 2014, <https://www.moneyweb.co.za/archive/how-sars-could-single-you-out-for-an-audit/>.

<sup>26</sup> Dion George, "SARS Has Conducted 4,787 Lifestyle Audits since 2007 - DA," *PoliticsWeb*, July 4, 2010, <http://www.politicsweb.co.za/news-and-analysis/sars-has-conducted-4787-lifestyle-audits-since-2007>.

<sup>27</sup> Nyambega Gisesa, "Governors Face Lifestyle Audit ahead of Election," *Daily Nation*, March 3, 2017, <http://www.nation.co.ke/news/politics/governors-face-lifestyle-audit-ahead-of-election/1064-3834830-i1bt81/>.



“Disclosures of financial interests are useful to investigators, as they can be used both to identify suspects in the first place, and to gather evidence for suspected cases.”

to report this to the Financial Intelligence Unit.<sup>28</sup> As Namibia does not have illicit enrichment laws, institutions are mostly on the lookout for money laundering, fraud, and similar crimes. But on-going due diligence can be a very useful source of information on illicit enrichment for investigators.

### **Financial Disclosure**

This is not a foreign concept to Namibian officials, at least not those at higher levels of government. The Constitution requires that Members of Parliament declare their financial interests in some shape or another. Further, it is long-established practice that Cabinet Ministers make a declaration to the President in addition to their Parliamentary declaration. Apart from these officials, regulation is scattershot rather than systematic, spread across various laws establishing certain bodies. Thus, members of the Electoral Commission have to disclose interests to the speaker of the National Assembly, and members of the Central Procurement Body have to declare interests – but only if a conflict comes up.

Disclosures of financial interests are useful to investigators, as they can be used both to identify suspects in the first place, and to gather evidence for suspected cases. In a UN study, 77 percent of countries that had criminalised illicit enrichment also had asset disclosure systems in place.<sup>29</sup> For disclosures to work effectively, however, it is important that they are complied with – and that information is verified, with sanctions for withholding and falsifying information.

Unfortunately, Namibia’s system is currently not in a state where it would be of much use to investigators in an illicit enrichment investigation, were such laws implemented. In fact, the existing framework is inadequate for bringing about almost any of the supposed benefits of asset declarations. As IPPR has previously reported, “Namibia’s current system suffers from shortcomings at every step of the way. Too few officials are covered; most of the executive and all of the judiciary are exempt from declarations, as are heads of SOEs. Those who do declare can easily get away with not complying.”<sup>30</sup>

## **CONSTITUTIONAL AND HUMAN RIGHTS CONCERNS**

As noted above, UNCAC does not make it mandatory for signatories to enact illicit enrichment legislation because several states raised concerns that these laws may not be compatible with their existing constitutional frameworks and human rights commitments. Thus, for example, the United States and Canada<sup>31</sup> have rejected criminalizing enrichment, as have European countries. There are several concerns with these laws, which are dealt with in turn here.

### **The Presumption of Innocence**

The main criticism of illicit enrichment laws is that, according to critics, they reverse the presumption of innocence in criminal cases. This presumption – that people are ‘innocent until proven guilty’ - has a long history, and is regarded as a key part of many justice systems. It is cited in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and is a part of most constitutions worldwide.<sup>32</sup> It is also explicitly mentioned in the Namibian Constitution: article 12, which deals with the right to a fair trial, states that “all persons charged with an offence shall be presumed innocent until proven guilty according to law.”

There is a contested – and unresolved – debate about whether illicit enrichment

<sup>28</sup> Government of Namibia, “Financial Intelligence Act” (2012), sec. 33.

<sup>29</sup> Lindy Muzila et al., “On the Take: Criminalizing Illicit Enrichment to Fight Corruption,” 42.

<sup>30</sup> Maximilian Weylandt, “Asset Declarations in Namibia” (IPPR, August 2016).

<sup>31</sup> Jeffrey R. Boles, “Criminalizing the Problem of Unexplained Wealth: Illicit Enrichment Offenses and Human Rights Violations,” 869.

<sup>32</sup> Ibid., 863.



laws violate this right. Detractors argue that illicit enrichment laws reverse this, and make suspects guilty unless they can prove themselves innocent. After all, the laws stipulate that a person is guilty of the offence unless they can prove a legitimate source of the wealth.

It should be noted that the presumption of innocence is not absolute, and courts have allowed for some limited exceptions – “as long as the principles of rationality (reasonableness) and proportionality are duly respected.” The central idea is that “the burden of proof can be temporarily ‘reversed’ based on the assumption that there is sufficient cause to seek out evidence” – what is called a *predicate offence*.<sup>33</sup> The European Court of Human Rights has ruled that this sort of reversal can occur “as long as (a) the primary responsibility for proving matters of criminal substance against the accused rests with the prosecution ... and (b) the presumptions are rebuttable.”<sup>34</sup>

Meanwhile, some have suggested a third way, which hinges on the difference between a legal burden and an evidential burden. An evidential burden is distinct from a legal burden of proof: “rather the party must simply tender sufficient evidence to raise a reasonable doubt as to the issue in question. Once this has been done, the prosecution must then disprove that evidence beyond reasonable doubt.”<sup>35</sup> In other words, the defendant shows evidence that raises a reasonable doubt about whether the wealth comes from illicit sources. The prosecution now has to prove beyond a this reasonable doubt that the money was illegally obtained.<sup>36</sup> Many people will be familiar with a famous example of this sort of burden, which occurs when a person accused of murder argues they were acting in self-defence. The defendant has to give enough evidence to raise a reasonable doubt – the prosecution then has to disprove that reasonable doubt again to get a murder conviction. This way, a defendant cannot simply attempt a whole variety of defences without any backing of evidence in the hope that one will succeed, but the onus of proof still lies with the prosecution, therefore preserving the important balance of rights at the foundation of the justice system. Thus, Wilsher argues that instead of creating a new criminal offence targeting illicit enrichment, which would create a legal burden, states should create an evidential burden which can be used in ordinary corruption cases. (His model language can be seen in Appendix 1). However, Boles rejects this distinction, arguing that “whether defendants face a legal or evidentiary burden, the practical ramifications essentially remain the same, in that the defendants must proffer substantive evidence as to the legitimacy of the disproportionate assets.”<sup>37</sup>

### The Right to Silence

Many nations also recognise that the accused have a right to silence: they do not have to answer questions put to them and, crucially, their silence “cannot traditionally be considered evidence against the defendant.”<sup>38</sup> It seems clear that illicit enrichment laws are in tension with this right, as “the explanation provided by the defense in an illicit enrichment case does expose the accused to the risk of self-incrimination.”<sup>39</sup> For example, a defendant could show that their wealth comes

“It may be tempting to welcome the uncovering of further crimes, and to dismiss privacy concerns as outliers that must be stomached for the greater good of securing more convictions.”

<sup>33</sup> Craig Fagan, “Illicit Enrichment Regulations,” Anti-Corruption Helpdesk (Transparency International, 2013), 3, [http://www.transparency.org/whatwedo/answer/illicit\\_enrichment\\_regulations](http://www.transparency.org/whatwedo/answer/illicit_enrichment_regulations).

<sup>34</sup> Maud Perriel-Vaissiere, “The Accumulation of Unexplained Wealth by Public Officials: Making the Offence of Illicit Enrichment Enforceable,” U4 Brief, January 2012, 2, <http://www.u4.no/publications/the-accumulation-of-unexplained-wealth-by-public-officials-making-the-offence-of-illicit-enrichment-enforceable/>.

<sup>35</sup> Dan Wilsher, “Inexplicable Wealth and Illicit Enrichment of Public Officials: A Model Draft That Respects Human Rights in Corruption Cases,” *Crime, Law and Social Change* 45, no. 1 (February 2006): 30, doi:10.1007/s10611-006-9016-6.

<sup>36</sup> Jeffrey R. Boles, “Criminalizing the Problem of Unexplained Wealth: Illicit Enrichment Offenses and Human Rights Violations,” 860.

<sup>37</sup> Ibid.

<sup>38</sup> Ibid., 870.

<sup>39</sup> Lindy Muzila et al., “On the Take: Criminalizing Illicit Enrichment to Fight Corruption,” 32.



from a business they run on the side – but they may now be liable for tax evasion.

On another note, it is easy to imagine someone having received wealth from a completely legitimate source, but wanting to keep this a secret. Picture a prominent politician running on a family-values platform who received generous gifts from his lover, and fears ruining his career by disclosing his adultery. Or the firebrand youth league radical who knows he will be called a hypocrite when it is found out he receives a generous income from inherited shares in various companies.

It may be tempting to welcome the uncovering of further crimes, and to dismiss privacy concerns as outliers that must be stomached for the greater good of securing more convictions in the battle against corruption. But the right to silence must not be taken lightly. It should be noted that, as with the presumption of innocence, the right to silence is not absolute – that, in fact, “it is easier to find justification for interference with the right of silence as compared to the presumption of innocence.”<sup>40</sup> But any restrictions have to be very carefully considered, as the right is a key in protecting individual defendants from government coercion.<sup>41</sup>

### **The Principle of Legality**

Illicit enrichment provisions have also faced criticism of violating the principle of legality, which in simple terms requires that there is a clear law forbidding something before someone may be punished. Some critics of the law have argued that the laws do not “clearly define a prohibited conduct that constitutes the basis of the offence.”<sup>42</sup> If there are no clear guidelines, public officials will not know what behavior is legal and what is illegal – as the European Court of Human Rights argued, it is important that “the individual can know from the wording of the relevant provisions what acts and omissions will make him liable.”<sup>43</sup> A challenge based on this objection made it all the way to the Supreme Court of Justice in Argentina, but was dismissed.

### **Scope for Abuse**

Critics of Illicit Enrichment laws also worry that they may be used to target certain individuals – often political enemies – without any basis in law.<sup>44</sup> These laws could be used to harass people and subject them to undue, legal as well as often public, scrutiny that may not be deserved. Even if someone can prove their innocence, they will likely have faced reputational damage. Similarly, the U4 Anti-Corruption Resource Centre is very clear that illicit enrichment legislation must be used only as a tool of last resort. If not, the laws may be “used in an oppressive manner, such as for the purpose of obtaining incriminating information from the defendant.”<sup>45</sup>

These debates, about whether illicit enrichment laws are compatible with human and constitutional rights, have to be taken seriously. Snider and Kidane argue that it is:

“Highly doubtful that compromising the fundamental principle of the presumption of innocence in the interest of combating unexplained material gains by government officials is a desirable course. This is particularly true in Africa where, as the African Union Corruption Convention suggests, the crime of corruption is directly linked with the rule of law and good governance... The implementation of this provision as written in the domestic sphere should not be encouraged, because it might mean prescribing a remedy that is worse than the ailment.”<sup>46</sup>

<sup>40</sup> Dan Wilsher, “Inexplicable Wealth and Illicit Enrichment of Public Officials,” 30.

<sup>41</sup> Jeffrey R. Boles, “Criminalizing the Problem of Unexplained Wealth: Illicit Enrichment Offenses and Human Rights Violations,” 871.

<sup>42</sup> Lindy Muzila et al., “On the Take: Criminalizing Illicit Enrichment to Fight Corruption,” 33.

<sup>43</sup> Maud Perriél-Vaissière, “The Accumulation of Unexplained Wealth by Public Officials: Making the Offence of Illicit Enrichment Enforceable,” 3.

<sup>44</sup> Jeffrey R. Boles, “Criminalizing the Problem of Unexplained Wealth: Illicit Enrichment Offenses and Human Rights Violations,” 872.

<sup>45</sup> Maud Perriél-Vaissière, “The Accumulation of Unexplained Wealth by Public Officials: Making the Offence of Illicit Enrichment Enforceable,” 3.

<sup>46</sup> cited in Lindy Muzila et al., “On the Take: Criminalizing Illicit Enrichment to Fight Corruption,” 28.



Is it worth enacting legislation that could weaken the rights of defendants, and may be used to target certain individuals, in the interest of convicting more suspects of crime? It is a good idea to strengthen the hand of prosecutors in environments where state power already too often goes unchecked? The answers to any of these questions are unclear, and they need to be seriously debated.

## OPERATIONAL CONCERNS

If Namibia enacts illicit enrichment legislation, success is far from guaranteed. To begin with, as noted above, asset declarations are often incomplete or non-existent, which would severely hamper evidence collection. Investigators would also have to consult a variety of databases to gain information on properties, businesses, and other assets. Further, the valuation of properties presents a challenge as the values might be manipulated – for example, people who are related could transfer the property at below market value. Investigators would have to consider the officially registered value, therefore undercounting the wealth of the suspect.<sup>47</sup> The use of shell companies, straw men, and other third parties to hide wealth is also a significant obstacle to investigations – “especially where evidence is layered through a series of corporate vehicles in multiple jurisdictions.”<sup>48</sup> In the absence of investigators with highly specialised skills it is unlikely many investigations will result in success.

### International Cooperation

Even if prosecutors and investigators could overcome general operational concerns, it is not clear that Namibia would be able to count on international cooperation in regard to illicit enrichment cases. There are two reasons this cooperation may not materialise. For one, states may “decline to render assistance if they consider that due process standards have not been followed.”<sup>49</sup> Depending on other states’ interpretations of how illicit enrichment laws affect the rights of the accused, this could be a relevant factor.

International cooperation could falter due to the absence of *dual criminality*. This means that if a state requests assistance, the crime that is being prosecuted has to be a crime in both countries involved. The degrees of strictness vary – but some equivalence must be shown. This is where illicit enrichment prosecutions run into trouble, as many countries have not criminalised illicit enrichment. Unfortunately, the countries which have opted out are rather significant:

“Given that developed countries are the main destinations for cash flowing out of developing countries ... and that very few of the former have criminalized the offence of illicit enrichment ... the dual criminality requirement is likely to pose a major obstacle in transnational asset recovery cases.”<sup>50</sup>

### Legal Challenges

Should Namibia enact legislation to criminalise illicit enrichment, it is foreseeable that this law would be challenged very quickly. Such challenges have in fact happened in many countries with illicit enrichment laws, sometimes with success. Italy’s Constitutional Court, in 1994, and the Cassation Court in Egypt in 2004, struck down provisions related to illicit enrichment because they ruled that the laws violated the presumption of innocence. A Romanian court ruling in 2010 forced the government to change its law.<sup>51</sup> Those accused of illicit enrichment are likely to be

“Should Namibia enact legislation to criminalise illicit enrichment, it is foreseeable that this law would be challenged very quickly.”

<sup>47</sup> Ibid., 51.

<sup>48</sup> Ibid.

<sup>49</sup> Maud Perriell-Vaissiere, “The Accumulation of Unexplained Wealth by Public Officials: Making the Offence of Illicit Enrichment Enforceable,” 3.

<sup>50</sup> Ibid.

<sup>51</sup> Lindy Muzila et al., “On the Take: Criminalizing Illicit Enrichment to Fight Corruption,” 29–30.



well-off and thus able to afford excellent legal representation, and a challenge to Namibian laws may well go all the way to the Supreme Court. This process would take many years, in the meantime casting doubt over the law and hindering its effective use. Thus, if a law were to be passed it would possibly be stalled for a long time before being used consistently.

### **Alternative Proposals**

In light of the concerns about the human rights implications of illicit enrichment laws, as well as operational difficulties, some authors have suggested that similar effects can be achieved through alternative means. The question is, how can the state catch and prosecute those making illicit gains from corruption without resorting to illicit enrichment laws *per se*?

The first way to do so is to significantly improve financial disclosure systems, and to impose sanctions for misconduct related to disclosures. Disclosure systems can help in identifying corrupt practices as suspicious assets can be flagged and investigated. The state can also legitimately impose sanctions for non-compliance or false reporting, providing a way of punishing officials for illicitly enriching themselves without invoking the problems that come with illicit enrichment legislation. Individuals who become public officials know that when they enter office, they implicitly agree to provide financial information.<sup>52</sup>

In addition, many people who would be guilty of an illicit enrichment crime might feasibly be convicted of tax-related crimes. Those who benefit from illicit enrichment are unlikely to fully declare this additional money as taxable income. In the United States, the Internal Revenue Service often uses the “net worth” method of proving tax evasion: “If a taxpayer has more wealth at the end of a given year than at the beginning of that year, and the increase does not result from non-taxable sources such as gifts, loans, and inheritances, then the increase is a measure of taxable income for that year.”<sup>53</sup> The prosecution makes its case by showing that the net worth of the accused increased the taxable income they reported. This method of proof has been widely recognised by the courts,<sup>54</sup> and it stands to reason that it could be effective in Namibia. One recent case can illustrate this point: a doctor in Oshakati recently made headlines because authorities seized N\$22 million from his bank accounts. He had claimed unusually large amounts from the Public Service Employees Medical Aid Scheme, but this is not what got him in trouble. Instead, tax authorities noted that he had declared an income of N\$6 million over more than twenty years. Meanwhile a report from the Financial Intelligence Centre found that he had claimed N\$26 million from PSEMAS in only two years, indicating that he had clearly underreported his taxable income. The case was still pending at time of writing, but the High Court had already dismissed the Doctor’s urgent application to retrieve the money.<sup>55</sup>

## **CONCLUSION**

This paper has sought to provide an overview of illicit enrichment laws – their purpose, general contents, and operational features – as well as discussing some of the controversies surrounding this type of legislation. The impetus for Illicit enrichment legislation is born from a frustration with the difficulties of obtaining convictions related to corruption cases, and the belief that this sort of law can act as a ‘catch-all’ for all corrupt offences, removing much of the incentive for corruption and punishing those who try their luck anyway.

<sup>52</sup> Jeffrey R. Boles, “Criminalizing the Problem of Unexplained Wealth: Illicit Enrichment Offenses and Human Rights Violations,” 877.

<sup>53</sup> US Department of Justice, cited in *ibid.*, 879.

<sup>54</sup> *Ibid.*, 880.

<sup>55</sup> Werner Menges, “Doctor Loses N\$22 Million Tax Battle,” *The Namibian*, May 22, 2017, [http://www.namibian.com.na/54717/read/Doctor-loses-N\\$22m-tax-battle](http://www.namibian.com.na/54717/read/Doctor-loses-N$22m-tax-battle).



But an illicit enrichment law is no panacea. It is not clear that a law would function in Namibia: a dearth of specialised skills may hamper investigations, global co-operation is likely to be lacking, and any law can expect extended court challenges that would take many years to resolve. Finally, there are several human rights concerns to consider, touching on vital concepts such as the right to be presumed innocent and the right to silence, among others.

In short, illicit enrichment laws are not the easy solution they may at first appear to be. If Namibia were ever to consider enacting such a law, it should proceed with caution. It would have to draft legislation with the emphasis on rights being respected, and would have to ensure that operational capabilities are in place. In the meantime, other efforts promise greater returns on the effort expended.

## RECOMMENDATIONS

First, Namibia needs to seriously commit to fixing and expanding its financial disclosure systems. Information on officials' interests provides a useful baseline for investigators in corruption cases, and can provide leads. Asset declarations need to be expanded to uniformly cover all senior public officials. Unlike now, their mandatory nature needs to be enforced across their board, and non-compliance punished. Declarations should also be audited – both to ensure the veracity of information supplied by officials and to provide potential leads for investigators should suspicious transactions be flagged.

Secondly, lifestyle audits for high-ranking officials should become a common practice. Privacy concerns will have to be considered, but as noted above public officials implicitly agree to subject themselves to a certain level of scrutiny when entering public service. For practical concerns, these audits could be carried out on a randomly chosen subset of senior officials – and of course on those who are being investigated already.

Finally, authorities should aggressively use tax laws to prosecute corrupt behaviour in cases where other crimes are difficult to prove. Hopefully, the soon-to be established independent Revenue Agency will have both the legal authority and human capacity to pursue cases of tax evasion and other tax crimes.

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## APPENDIX 1 – MODEL DRAFT PRESUMPTION OF CORRUPTION

The following language is taken verbatim from Wilsher (2006).

### **Presumption of corruption; excessive pecuniary resources**

1. This section applies in any prosecution for a corruption offence.
2. If the prosecution proves beyond reasonable doubt that the defendant was during the charge period;
  - (a) a government official and;
  - (b) in control of excessive pecuniary resources or propertythen it shall be presumed, subject to section 3 below, that such excessive pecuniary resources or property represent the proceeds of corruption.
3. Where section 2 applies and the defendant adduces evidence which is sufficient to raise an issue with respect to the presumption that such excessive pecuniary resources or property represent the proceeds of corruption then it shall be for the prosecution to disprove that evidence beyond reasonable doubt.
4. For the purposes of subsection 2, an official is to be deemed to have been in control of excessive pecuniary resources or property where D exceeds the total of A + B + C according to the following definitions:

A is the total of any pecuniary resources or property under his control that he declared upon his assumption of office;

B is the total of any declared income or property or pecuniary resources (not being his official emoluments) that he acquired during his term of office up to the end of the charge period;

C is the total of his official emoluments up to and including the charge period;

D is the total value of the pecuniary resources or property found to be under his control during the charge period.

### **Presumption of corruption: Excessive standard of living**

1. This section applies in any prosecution for a corruption offence.
2. If the prosecution proves that during the charge period the defendant;
  - (a) was a government official and;
  - (b) maintained an excessive standard of livingthen it shall be presumed that, subject to section 3, that excessive standard of living was funded from the proceeds of corruption and/or was conferred upon the defendant as the benefits of corruption.
3. Where section 2 applies and the defendant adduces evidence which is sufficient to raise an issue with respect to the presumption that such excessive standard of living was funded from the proceeds of corruption and/or was conferred upon the defendant as the benefits of corruption, then it shall be for the prosecution to disprove that evidence beyond reasonable doubt. For the purposes of this subsection an official is to be deemed to have maintained an excessive standard of living where C exceeds the total of A + B according to the following definitions:

A is any declared income or wealth, beyond his official emoluments, that he acquired during the charge period;

B is his official emoluments during the charge period;

C is the total value of the standard of living found to have been maintained by him during the charge period.



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