Rethinking the Criminalization of Illicit Enrichment in Combating Corruption in the Public Sector

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***Abstract*: Some jurisdictions like Hong Kong have explicitly shown how illicit enrichment (IE) offenses under Article 20 of the United Nations Convention against Corruption (UNCAC) can be an effective legal tool to deal with grand corruption in the public sector. Nevertheless, many jurisdictions are unwilling to accept it even as a criminal offense. The primary purpose of this paper is to critically examine the reservations about the criminalization of IE expressly made by North America and most of the Western European Parties to the UNCAC. Their main argument is that such implementation would infringe the fundamental legal principles of criminal law, namely the right to remain silent and not to incriminate oneself, which guarantee the right to be presumed innocent. In assessing how some statutory legislation similar to the nature of Article 20 and the relevant decisional law has defined the scope of the said rights, particularly in the English common law context, this paper firmly argues that criminalizing illicit enrichment does not contravene any legal principle. Further, the report emphasizes why and how Article 20 should and can act as a direct legal tool to confront grand corruption in the public sector by closely scrutinizing the origins of public officials' unexplained assets and earning patterns.**

***Keywords*: illicit enrichment; corruption; assets disclosure of public officials; United Nations Convention against Corruption (UNCAC); the reverse burden of proof; the right to silence; the right not to incriminate oneself**

I. INTRODUCTION

The legal concept of illicit enrichment (IE) as a criminal offense can be traced back to its origin in Argentina in 1936. However, it had not been criminalized until 1964 in its legal system. India had used it as an evidential legal tool until it was criminalized as an offense in its legislation in 1964 (*see* Muzila *et al.*, 2011). Sri Lanka criminalized illicit enrichment as early as 1954, enacting its Bribery Act No. 11 of 1954.[1] The recognition of the elements of illicit enrichment and its driving force dates back to the 1930s. However, merely over 40 jurisdictions by 2010 had criminalized illicit enrichment, most representing developing countries (*ibid*).

To date, IE has been recognized as a criminal offense in the fight against corruption in the public sector by the 2005 United Nations Convention against Corruption (UNCAC) and other main multinational legal instruments. The nature of elements of IE as a criminal offense is laid down in Article 20 of the UNCAC, whereas the underlying legal principle of IE appears to be new to or unconstitutional under the domestic legal system of some States' Parties (*see* United Nations 2015). Under its Article IX as a mandatory obligation, the Inter-American Convention against Corruption ('IACAC'), adopted by the Organization of American States ('OAS') in 1996 and considered the first multilateral convention against domestic and transnational bribery[2], requests States Parties, 'subject to its constitution and the fundamental principles of its legal system,' to criminalize IE and consider it as an act of corruption for the IACAC.

Further, Article 6 of the Economic Community of West African States' Protocol on the Fight Against Corruption ('ECOWAS's Protocol') 2001[3] and Article 8 of the African Union Convention on Preventing and Combating Corruption 2003 ('AUCPCC')[4] have requested the Parties to criminalize IE as an act of corruption in the public sector. Article 20 of the 2005 UNCAC is also non-mandatory and provides Parties with broad discretion that the criminalization of IE is subject to their constitutions and the fundamental principles of their legal system. Hence, only IACAC has given a mandatory nature of the criminalization of IE.

It is also understandable that the jurisdiction of Hong Kong Special Administrative Region of PR China has become an exemplar of a leading jurisdiction that has firmly been deemed to enforce IE offense pursuant to Section 10 of its Prevention of Bribery Ordinance over decades, even before the aforementioned international conventions. In the case of Hong Kong, the reasonableness and effectiveness of such an offense have well been recognized and assessed by the decisional law to a greater extent. At the same time, it has become evident that anti-corruption academic body of some jurisdictions like Vietnam has firmly argued that IE offense laid down in the UNCAC can be used to confront a *myriad of corrupt offending*

[1] Refer to Article 23A of the Bribery Act No. 14 of 1954 of Sri Lanka as amended.

[2] The 1996 IACAC, signed and ratified by 33 States out of the 35 member States of OAS as of 2005, is available at https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/11/14/iacac.pdf

[3] ECOWAS's Protocol was adopted on 12 December 2001. It is yet to enter into force at the time of writing of this paper due to the lack of signatory parties and is available at https://eos.cartercenter.org/uploads/document_file/path/406/ECOWAS_Protocol_on_Corruption.pdf

[4] The AUCPCC 2003, ratified by 34 states from the African Union as of May 2016, is available at http://www.jus.uio.no/english/services/library/treaties/04/4-04/combating-corruption.xml

by public officials and also employed as a legal tool to recover the nation's stolen assets (*see, e.g.*, Bacarese *et al*., 2014).

Categorically two forms of challenges confront the adaption of IE as a criminal offense: conceptual and operational challenges. In conceptual challenges by the Parties to international anti-corruption conventions, it is noticeable that almost all the developed countries, particularly in both the North American and Western European common and civil jurisdictions, have no interest in the criminalization of IE as a direct legal measure to combat corruption based on fundamental principles of their legal systems and human rights (*see* Wilsher 2006; OECD 2013; Boles 2015; United Nations 2015). They have expressly stated that IE (Article 20 of the UNCAC) cannot be criminalized in their jurisdictions because such criminalization would be incompatible with the fundamental principles of their constitutional and/or legal system.[5]

By contrast, many developing countries that have already criminalized IE have been facing operational challenges. Most of such countries had criminalized it before the UNCAC, while, except for a few, some have only criminalized it in their legislation but with poor enforcement or have tended to exploit it for political gain in which the rule of law is deficient in one way or the other. Therefore, it is necessary to clarify why some countries have been reluctant to show solidarity with the legal concept of IE by emphasizing a series of incompatibilities pertinent to constitutional and fundamental legal principles of criminal law while others apply it to their anti-corruption enforcement without reservation. Additionally, such a situation would also pose another question of whether the countries using IE as a criminal offense have been undermining the fundamental legal principles emphasized by those countries that are against the criminalization of it.

The present paper mainly aims to objectively and critically assess the reasonableness of the reservations about the criminalization of IE laid down in Article 20 of the UNCAC. The reservations expressly made by the North American and most Western European Parties to the UNCAC are based on two main reasons, *i.e.*, the constitutional inconsistency and fundamental legal principles of criminal law. For example, the USA has made its reservations stipulating that the nature of the implementation of IE offense is inconsistent with their constitutional principles guaranteed by the Fifth Amendment to their Constitution read in conjunction with its Fourteenth Amendment that established, *inter alia*, the right not to incriminate oneself in the course of criminal proceedings. On the other hand, some Parties [6] have emphasized that criminalizing Article 20 would be contrary to the fundamental principles of their legal system or criminal law and existing laws on the Rights and Freedoms and/or Article 6 of the European Convention on Human Rights of 1950 ('ECHR').[7] For instance, the UK[8] has insisted that the criminalization of such an additional IE offense is unnecessary and '*would lead to a significant risk of convicting innocent individuals where their explanation was simply not believed*'[9], while highlighting the probable issues on the legal principles of English criminal law.

This article discusses the critical issues of the fundamental legal principles raised by many Parties to the UNCAC. In particular, these issues are mainly associated with the reverse burden of proof occasioned by the right to silence and the right not to incriminate oneself. As well known, there are two types of burden of proof: the legal and evidential burden of proof. The legal burden is the onus on the prosecution to establish certain facts in an issue that prove the accused person's guilt beyond a reasonable doubt, and thereby the accused is presumed innocent until proven guilty according to law, which is called the 'golden thread' of English common law on the criminal proceedings.[10] The evidential burden of proof is the onus on one party to raise an issue at trial to doubt the existence or non-existence of a fact in an issue. However, in English common law, the legal burden is also shifted on the defendant to disprove the prosecution allegations in some offenses similar to the nature of IE under Article 20 of the UNCAC. It is not uncommon in English common law jurisdictions to utilize the reverse burden of proof during certain substantive and procedural proceedings like controlled drugs and anti-terrorism offenses. This means that those rights are not absolute ones.[11]

Thus, it is reasonable to assess whether those States Parties, including the UK, could raise their concern about the criminalization of IE offense against the possession of unexplained wealth or property by public officials on the ground of the contravention of the said legal principles. Based on the doctrinal and analytical methodology, this paper examines some statutory legislation similar to the nature of IE offense and the decisional law of the European Court of Human

[5] For example, the Executive Summary Reports of the Implementation Review Group of the UNCAC and/or the Country Review Reports of the USA, Canada, the UK, Germany, and Switzerland clearly express their reservations on the criminalization of illicit enrichment. *Surf* https://www.unodc.org/unodc/en/corruption/uncac.html

[6] *See, e.g.*, Country Review Reports of Canada and the UK Self-Assessment for the UNCAC. Available at https://www.unodc.org/unodc/en/corruption/uncac.html

[7] For the European Convention on Human Rights, *see* http://www.echr.coe.int/Documents/Convention_ENG.pdf

[8] However, those Parties, including the UK, employ IE as evidentiary proof against public officials charged with corruption-related offenses. Some jurisdictions apply it to other offenses such as money laundering, tax evasion, drug trafficking, and other serious crimes to establish evidence against the accused. One of the other similarities between those countries is that their public officials, in particular senior-level, have been governed by a well-established comprehensive civil service code, including the obligation of assets disclosure of senior-level officials in the public sector.

[9] *See* the UK Self-Assessment for United Nations Convention against Corruption-Chapters III and IV. Available at https://www.unodc.org/unodc/en/corruption/uncac.html

[10] *Woolmington vs. DPP* [1935] UKHL1.

[11] *See, for example*, the decisional law of the UK and European Court of Human Rights in *Lambert v. R* [2001] UKHL 37; *Brown v. Stott* [2001] 2 WLR 817; Conjoined judgments of *Attorney General's Reference No 4 of 2002* and *Sheldrake v. Director of Public Prosecutions* [2004] UKHL 43; *C Plc v. P* [2007] 3 WLR 437; *X v. United Kingdom* (1972) ECHR 42 CD 135, 5877/72; Saunders v. the United Kingdom [1996] ECHR 65; John Murray v. United Kingdom [1996] IIHRL 9.

Rights ('ECtHR') and English common law jurisdictions to comprehend the practical reality and legitimacy of the reverse burden of proof that challenges the right to be presumed innocent and protection against self-incrimination in certain circumstances. In doing so, it shows how the said rights have been applied and affected the fundamental principles of criminal law in English common law. It has become apparent that the scope of the rights has proportionately been affected by the balance between the rights of the defendant and the effectiveness of substantive and procedural proceedings concerning statutory compulsion to obtain evidence from the defendant in circumstances where independent evidence is under his control the very same as the nature of IE offense.

This paper's primary purpose is to take the issue with reservations on the criminalization of IE under Article 20 of the UNCAC, particularly raised by the North American and many Western European States Parties. The analytical legal research method evaluated how certain criminal offenses similar to IE offenses are invoked without reservations in the same English common law jurisdictions concerned and why such a legal approach cannot be applied to accepting IE as a criminal offense in the public sector as laid down in Article 20 of the UNCAC in the same manner.

First, the paper briefly provides the historical background of the legal reasoning behind the right not to incriminate oneself in the prosecution proceedings. Secondly, it observes how the decisional law and statutory legislation have fathomed out the scope of the said rights and the reverse burden of proof in the context of certain offenses similar to IE offenses. Then, comparing the nature of certain similar offenses, the paper examines how some common law jurisdictions where IE has been criminalized as a direct legal device to fight corruption in the public sector have found the legitimacy of IE approach without prejudice to the fundamental principles of criminal law or human rights. Finally, the paper concludes that the balance between the acceptance into utilizing the reverse burden of proof that challenges the said fundamental rights of the accused and the need to ensure the effectiveness of IE offense should be evaluatively assessed to redress the unnecessary reservations on the IE criminalization.

II. HISTORICAL BACKGROUND TO THE LEGAL REASONING OF THE RIGHTS IN QUESTION

Those who have reservations about the criminalization of IE argue that accepting IE as a criminal offense mainly violates two fundamental legal principles of criminal law, namely the right to remain silent and not to incriminate oneself, that guarantee the right to be presumed innocent until proven guilty. The emergence of such legal doctrines can be extended as far back as the Roman era, in which '*no one is bound to betray himself*' was laid down in one of its canon law maxims (Maloney 1993). In other words, these fundamental legal principles grew out of theoretical ideas which challenged the appalling legal system of the day in which an injustice system for persecution on political and religious grounds had prevailed, and a criminal defendant was forced to confess under the religious oath and to be subject to the self-incrimination under extreme duress.

In the context of English common law, the Act of the Star Chamber[12] in 1487 first described that such criminal procedure was formally employed, whereby a man was brought before an English court under mere suspicion and forced to incriminate himself (*see* Kemp 1958).[13] The legal norm of the protection against self-incrimination began to contemplate into the English common law from the middle of the seventeenth century, in particular, as of the brute facts of the John Lilburne-like cases of the 1630s, because of the dreaded Star Chamber's adversarial judicial and prosecution system.[14]

Eventually, the John Lilburne and other contemporary cases marked the end of the slavish style- self-incrimination prosecution system of the dreaded Star Chamber and the beginning of the concept of the right to remain silent and not to incriminate oneself in the context of English common law. On the one hand, the right to remain silent and the protection against self-crimination did not develop as a full-scale right or privilege in Britain throughout its legal history (*e.g.,* Maloney

[12] Particularly, at the time, the Court of Star Chamber had notoriously become a Crown tool for oppressing political dissents (see Cheyney 1913; Maloney 1993). Ironically, the Star Chamber and the Privy Council were two sides of the same coin. The Star Chamber and the Privy Council only differed in terms of the 'time and place of sitting, of procedure, and above all, of functions,' meaning they did not differ in their members (Cheyney 1913). Privy Council was assigned to exercise a general, widely extended administrative power, while it, at its sitting in the Star Chamber, constituted 'a court of justice with a settled body of legal precedents and practices […] The Privy Council, at its regular sessions, got into deeper legal waters than it felt safe in and was glad to put off something' until the following Star Chamber sitting at a time when the legal opinions on controversial issues were to be given by some of its judges (Cheyney 1913). Such an adversarial system of Crown prosecution prevailed in the country until the abolition of the Court of Star Chamber in 1640.

[13] At the same time, it should be remembered the historical factor in the emergence of Puritans and the English Civil Wars (1642-1649) and a religiously oppressed society of the day, in addition to other political developments domestically. For example, according to the Religion Act 1592, in England, there was a criminal offense with imprisonment where there was anyone, with the exception of those under the age of sixteen, who failed to attend church and to encourage others to do so and who denied the monarchical authority in relation to region matters. For further understanding of the English Civil Wars, see George (1968); Davies (1984).

[14] Regarding the procedural law of the day, the Star Chamber enjoyed far more of the Roman procedural system than common law in which once the defendant received the written charge sheet against him, within eight days, the defendant was obliged to submit his written answer to it by confessing the truth or denying it, and his answer must be signed by counsel and be signed on oath of his willingness to answer solemnly any queries about the matter. At the interrogative stage, the defendant was to be questioned by the plaintiff or his counsel. The defendant was subjected to be examined in private by the examiner, a court official in the total absence of his counsel or any co-defendant, wherein the defendant was led to be advised by his counsel on his answer. Neither the defendant himself nor his counsel knew about those interrogatories until the examiner read them to the defendant in private. He was required to answer each inquiry briefly and sign his answers recorded by the examiner. The same general procedures applied to the examination of witnesses as well, including being examined on oath and in secret. The entire proceedings, such as bill, answer, replication, rejoinder, and examination of the witness, were initiated by subordinate court officials and produced by them for consideration (see Cheyney 1913).

1993). In contrast, the subjects of British colonial countries had hardly been able to enjoy such privileges in the colonist prosecution system over centuries, wherein the subjects had been forced to incriminate themselves even until the end of the last century. As to the latter point, some former colonials have expressly shown the mindset of their reaction to the offensive colonist criminal justice system in the way of proving themselves able to adopt a constitutional approach to the right not to incriminate oneself in the court proceedings immediately after they achieved independence from their colonial power. The Fifth Amendment to the Constitution of the USA in 1791[15], the Constitution of India of 1949[16], and the Constitution of the Republic of South Africa of 1996[17] have mirrored the feeling of their traumatic experience of the colonial prosecution system.

In a nutshell, the doctrines of the right to silence and protection against self-incrimination, which developed from a historically adverse prosecution system, have become salient features of the due process of law to date. They intended to safeguard not only the rights of the accused person when he is subjected to being under duress during the investigation and court proceedings but also the innocent of the accused where he is affected by criminal proceedings with the potential danger of convicting him. Nonetheless, the scope to apply these rights at legal proceedings has been proportionately affected by the balance between the proportion to the defendant's rights and the effectiveness of legal proceedings in particular criminal law.

III.THE SCOPE OF THE RIGHTS IN QUESTION UNDER CERTAIN OFFENSES REGIMES

The long history of enjoying the right to remain silent and not to incriminate oneself guarantees the right to the presumption of innocence until proven guilty according to law, which shows that they are subjected to the point of legal issues in both civil and criminal law. Unarguably, these rights '*lie at the heart of the notion of a fair procedure*'[18] being '*intended to enshrine the fundamental principle of the rule of law'*[19]. The underlying doctrine of the right to remain silent is to protect the accused person from self-incrimination (*i.e.,* the legal principle of '*no one can be compelled or coerced to become a witness against oneself*') and to guarantee the innocent party the prevention of miscarriages of justice. These rights are inextricably coupled with the fundamental legal principle of '*the presumption of innocence until proved guilty according to law*.'

Throughout legal history, it has proved that the factor in the need for such legal protection for the accused person has theoretically and pragmatically been well identified, whereby the investigatory and prosecution proceedings would be involved in forcing or coercing the accused to give evidence needed or to confess what he has done and to be incriminated himself under duress, in particular during the custodial interrogation. These rights inherently ensure the protection of the accused from a potential risk of disclosing additional evidence against him during both the custodial interrogation and trial, which would be irrelevant to the case but lead him or her to being prosecuted for another criminal offense in the immediate aftermath. Inevitably, these legal principles have generally been recognized as the fundamental human rights to a fair trial by most jurisdictions and by regional and international conventions.[20] For example, the elements of these rights lie in Article 6 of the European Convention on Human Rights of 1950 (ECHR).

In the criminal law context, the precise meaning of these rights or privileges is profoundly convened to the notion that the prosecution should bear the burden of proof and must establish the accused person's guilt beyond a reasonable doubt. The accused is 'not requested to bear the responsibility to disprove' the allegations made by the prosecution. Thus, the accused should be presumed innocent until proven guilty.[21] In other words, if the burden of proof is shifted from the prosecution to the accused person in a criminal case, from that onwards, the accused is no longer entitled to plead for the right to remain silent. He can remain silent without disproving the allegation or refusing the answers put to him at his trial or investigation, whereas he should also be acknowledged to determine the consequences. In this regard, the legal principle of the presumption of innocence is to be impugned since this principle is derived from the literal meaning of the right to remain silent and the right not to incriminate oneself.

Hence, a fundamental question arises here: whether the criminalization or implementation of offenses like IE offense would cause the infringement of the right to a fair trial or the due process of law; or whether it does occasion the limitation of the scope of these rights. To answer this question leads to

[15] The Fifth Amendment to the Constitution of the United States of America stipulates that 'no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.'

[16] Article 20 (3) of the Indian Constitution of 1949 stipulates that 'no person accused of any offence shall be compelled to be a witness against himself'.

[17] Article 35 of the Bill of Rights of the Constitution of the Republic of South Africa has a provision, inter alia, that 'every accused person has a right to a fair trial, which includes the right not to be compelled to give self-incriminating evidence' [Art. 35 (3)(j)].

[18] Saunders v. the United Kingdom [1996] ECHR 65 at [68].

[19] Salabiaku v. France [1988] ECHR 19 (App No 10519/83) at [28].

[20] Among such provisions under international and regional conventions are: Articles 10 and 11 of the United Nations Universal Declaration of Human Rights (1948); Article 6 of European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) (or European Convention on Human Rights); Article 14 of the International Covenant on Civil and Political Rights (1966); Articles 66 and 67(g) of the Rome Statute of the International Criminal Court (1998); Article 8 of the Inter-American Convention on Human Rights (1969); Article 7 of African Charter on Human and Peoples' Rights (1981); Article 7 of Arab Charter on Human Rights (1994) which never came into force, and so forth. Among individual constitutions are: Fifth Amendment to the United States Constitution in 1791; Article 20 (3) of the Indian Constitution of 1949; Article 35 of the Bill of Rights of the Constitution of the Republic of South Africa (1996) and so on.

[21] *Woodmington vs. Director of Public Prosecution* [1935] UKHL1.

reviewing several closed and open-ended questions. The first closed question is whether there is any other legal approach similar to the nature of IE offense being employed by any jurisdiction where the right to silence is challenged. The legal burden of proof is shifted to the accused person in the course of the investigation and/or trial (so as to 'release' the prosecution from the procedural requirement for the proof of the defendant's mental element or '*mens rea*'). Indeed, there are some similar offenses to the nature of IE in civil and criminal law. For example, the procedural requirement of the burden of proof concerning IE offense can also be manifested in the laws governing controlled drugs, terrorism, and insolvency.[22] The second closed question is whether these 'rights' or 'privileges' are absolute (or not). The answer is that they are not absolute ones in which they are subject to the drawing for the adverse inferences at a court trial in certain circumstances.[23] Thus, the open-ended question is to what extent the scope of these rights is subject to the limitation. Another question is whether the accused person's evidence obtained by a statutory compulsion that led to incriminating himself for another criminal offense would be admissible in a court of law.

For answering the above fundamental questions by considering answers to the follow-up questions mentioned, it is worthy for us to analyze the case law and the relevant statutory provisions in contravention of these rights in the context of the European Court of Human Rights (ECtHR) and the common law jurisdictions, especially in the British English jurisdiction.

3.1 The reverse burden of proof and presumption of 'innocence'

As per the underlying fundamental principle of presumption of innocence in criminal law, no defendant can be convicted of any offense without being proved against him beyond a reasonable doubt in the way of offering him to defend himself against the prosecution allegation in which he is entitled to raise a doubt in his favor at a fair trial. As such, the prosecution should bear the burden of proof and establish both the defendant's guilty act (*actus reus*) and guilty mind (*mens rea*) beyond a reasonable doubt. [24] At the same time, the onus on the prosecution to prove the physical and mental elements (*actus reus* and *mens rea*) that are the core elements of a criminal offense is subject to the defendant's insanity or any statutory exception.[25] Nevertheless, in some cases similar to IE offense, the prosecution is only requested to prove the guilty act of the defendant, thereby, the legal burden on the prosecution is shifted to the defendant to disprove his guilty mind[26]—called the *reverse burden of proof*. As such, the presumption of innocence is no longer embraced at court trials once the defendant's guilty act has been established by the prosecution beyond a reasonable doubt.

Consequently, the defendant is legally obliged to prove his innocence in which his right to remain silent and the right not to incriminate himself is challenged. Definitely, even though the defendant is entitled to maintain these rights at pre-trial or a court trial, he is also subjected to negative consequences whereby the court draws an adverse inference from his silence and/or he is charged with contempt of court. On the other hand, in some cases, it is permissible for the prosecuting authority to treat the evidence obtained from the accused person in the cause of investigation or court trial as admissible evidence for another criminal offense against him.[27]

Taken together, it is not uncommon or unusual for English common law to employ the reverse burden of proof. The doctrine of the legal burden on the prosecution to establish the defendant's guilt beyond a reasonable doubt is subject to '*the defense of insanity*' and '*any statutory exception*'[28] but has not been considered as an absolute one. [29] As a result, the provisional burden of proof exists where the onus is shifted on the accused person to disprove the prosecution allegations (*see* Edwards 1952; Edwards 1954). In other words, the legal burden of proof imposes on the defendant to disprove his knowledge of the committed crime in criminal law. This approach has been applied to certain criminal offenses in the context of English common law over a century-long period. Such an approach could be seen in the traditional rules of evidence law and in statutory law.

For instance, as far back as the 1880s, the Merchandise Marks Act of 1887 of the UK ('the 1887 Act') expressly shifted the burden of proof from the prosecution to the offender in most cases so that the offender must prove that he did not have any fraudulent intent. The 1887 Act was introduced as a result of which its previous act, namely the Merchandise Marks Act 1862, had been experiencing particular difficulties in the course of legal proceedings; one of them was proving the offender's '*intent to defraud was entirely thrown on the prosecution*' (*see* Payn 1888).

Accordingly, it is generally accepted that in some cases, it is illogical to put on the prosecution the full burden of proving the defendant's guilty mind (*mens rea*) because such an approach, as emphasized in *X v. the United Kingdom* (1972)[30] and *Sweet v. Parsley* [1969][31], can pose an impossible difficulty inherent and cause many unjust acquittals. To avoid causing such unnecessary consequences, the '*parliament has not infrequently transferred the onus as regards mens rea to the accused so that, once the necessary facts are proved, he must*

[22] Among such statutory laws in the UK jurisdiction are the Sexual Offences Act 1956, Misuse of Drugs Act 1971, Criminal Evidence (Northern Ireland) Order 1988, and Insolvency Act1986.
[23] See, e.g., X v. United Kingdom (1972) ECHR 42 CD 135, 5877/72; Salabiaku v. France [1988] ECHR 19 (App No 10519/83); Deyemi & Anor, R v [2007] EWCA Crim 2060.
[24] Woolmington vs. DPP [1935] UKHL1.
[25] ibid.
[26] Reynolds v. G. H. Austin & Sons, Ltd. [1951] 2 K.B. 135.
[27] C Plc v. P & Anor [2007] 3 WLR 437.
[28] Woolmington vs. DPP [1935] UKHL1.
[29]Conjoined judgments of Attorney General's Reference No. 4 of 2002 and Sheldrake v. Director of Public Prosecutions [2004] UKHL 43 at [3 & 4].
[30] X v. United Kingdom (1972) 42 CD 135, cited in Conjoined judgments of Attorney General's Reference No 4 of 2002 and Sheldrake v. Director of Public Prosecutions [2004] UKHL 43 at [10].
[31] *Sweet v. Parsley* [1969] UKHL 1.

convince the jury that on the balance of probabilities, he is innocent of any criminal intention...'[32] Consider, as an example, how the onus of the burden of proof is undertaken under the drug offences regimes; in the UK jurisdiction under the Misuse of Drugs Act 1971 (amended)[33] ('the Drugs Act 1971'), Section 5(4) (read in conjunction with its subsections 2,5 & 6 as well as its Section 28) stipulates that where the prosecution proceedings for an offence under its Section 5(2) has proved that the person had a controlled drug in his possession, 'it shall be a defence for him to prove - **(a)** that, knowing or suspecting it to be a controlled drug, he took possession of it for the purpose of preventing another from committing or continuing to commit an offence in connection with that drug and that as soon as possible after taking possession of it he took all such steps as were reasonably open to him to destroy the drug or to deliver it into the custody of a person lawfully entitled to take custody of it; or **(b)** that, knowing or suspecting it to be a controlled drug, he took possession of it for the purpose of delivering it into the custody of a person lawfully entitled to take custody of it and that as soon as possible after taking possession of it he took all such steps as were reasonably open to him to deliver it into the custody of such a person.'[34]

Section 28 expressly stipulates that the onus is on the defendant to prove the lack of knowledge of the offense charged with, while the onus of the prosecution is only to prove the defendant's guilty act (*actus reus*) to establish evidence that the defendant had possessed the controlled drug. Section 28 (2) of the Drugs Act 1971, subject to its 28 (3)[35], stated that '*in any proceedings for an offence to which this section applies, it shall be a defence for the accused to prove that he neither knew of nor suspected nor had reason to suspect the existence of some fact alleged by the prosecution which it is necessary for the prosecution to prove if he is to be convicted of the offence charged*.'

As per Subsections 5(6) and 28(4), apart from the defense established in those subsections, any defense can be applied by a person charged with an offense under this act. *R v. McNamara* [1988][36] well identified what elements the prosecution should prove beyond a reasonable doubt under the said 1971 Act. The prosecution is only to establish that the defendant had the possession and/or control of a controlled drug, whereas it is not the onus on the prosecution to prove that the defendant did know he had such possession (*i.e., mens rea*). Thus, the defendant must prove his lack of knowledge of the possession of a controlled drug in question by applying one of the defenses laid in the act.

Likewise, among other things, there is also a provision under Section 30(2) of the Sexual Offences Act 1956 of the UK ('the Sexual Offences Act') that established the elements of the presumption of '*knowingly living on the earnings on prostitution*' concerning its 30(1) [37] . In *X v. the United Kingdom* (1972)[38], the ECtHR held that the relevant Section 30(2) was not in contravention of Article 6(2) of ECHR in which the right to the presumption of innocence is established while stipulating that '*...To oblige the prosecution to obtain direct evidence of "living on immoral earnings" would in most cases make its task impossible*.' (*original emphasis*). As reiterated in the decision of *R v. K* [2001][39]in relation to sexual offenses, the legal burden is solely on the defendant to prove his genuine belief that the girl involved was not underage because the prosecution is not required to prove that there had been reasonable grounds on such belief at the time of the incident.

Without such statutory expression, there have also long been used particular statutory offenses laid down in the absence of the word 'knowingly.' Although such omission has been subject to legal debate in the decisional law in some cases, the well-established decisional law of the English common law authorities is obvious, in which the omission of the word 'knowingly' is interpreted as the meaning of the burden of proof is shifted from the prosecution to the defendant. Clearly,

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[32] ibid.

[33] The Misuse of Drugs Act 1971 of the UK is available at http://www.legislation.gov.uk/all?title=Misuse%20of%20Drugs%20Act%201971

[34] Further, its Section 5(5) states that the above subsection (4) 'shall apply in the case of proceedings for an offence under section 19(1) of this Act consisting of an attempt to commit an offence under subsection (2) above as it applies in the case of proceedings for an offence under subsection (2), subject to the following modifications, that is to say—
(a) for the references to the accused having in his possession, and to his taking possession of, a controlled drug there shall be substituted respectively references to his attempting to get, and to his attempting to take, possession of such a drug; and
(b) in paragraphs (a) and (b) the words from "and that as soon as possible" onwards shall be omitted.'

[35] Its Section 28 (3) stipulates that 'where in any proceedings for an offence to which this section applies it is necessary, if the accused is to be convicted of the offence charged, for the prosecution to prove that some substance or product involved in the alleged offence was the controlled drug which the prosecution alleges it to have been, and it is proved that the substance or product in question was that controlled drug, the accused—
(a) shall not be acquitted of the offence charged by reason only of proving that he neither knew nor suspected nor had reason to suspect that the substance or product in question was the particular controlled drug alleged; but
(b) shall be acquitted thereof—
(i) if he proves that he neither believed nor suspected nor had reason to suspect that the substance or product in question was a controlled drug; or
(ii) if he proves that he believed the substance or product in question to be a controlled drug, or a controlled drug of a description, such that, if it had in fact been that controlled drug or a controlled drug of that description, he would not at the material time have been committing any offence to which this section applies.'

[36] R v. McNamara [1988] 87 Cr App R 246.

[37] Under Section 30(1) of Sexual Offence Act 1956 of the UK, 'it is an offence for a man knowingly to live wholly or in part on the earnings of prostitution', and its Section 30(2) stipulates that 'for the purposes of this section a man who lives with or prostitution. is habitually in the company of a prostitute, or who exercises control, direction or influence over a prostitute's movements in a way which shows he is aiding, abetting or compelling her prostitution with others, shall be presumed to be knowingly living on the earnings of prostitution, unless he proves the contrary.'

[38] X v. the United Kingdom (1972) 42 CD 135, cited in Conjoined judgments of Attorney General's Reference No 4 of 2002 and Sheldrake v. Director of Public Prosecutions [2004] UKHL 43 at [10].

[39] R v. K [2001] UKHL 41.

the authorities of English common law have long and well-recognized the reverse burden of proof.

For instance, in *R. v. Prince* (1875)[40], Brett J. stated that the proof of '*mens rea*' was essential to the conviction for a crime whether the epithet 'knowingly' was present or absent in an offense, though such presence or absence did mention altering the burden of proof. In *Sherras v. De Rutzen* [1895][41], Judge Day stipulated that the absence of 'knowingly' constitutes the reverse burden of proof in which the defendant must prove a lack of knowledge of the crime committed in the case. Further, Lord Goddard, in *Reynolds v. G. H. Austin & Sons, Ltd.* [1951][42], emphasized that the absence of 'knowingly' in the law only constitutes the meaning of shifting the burden of proof, thereby, unlike the other offenses under the wording of 'knowingly', the prosecution is to establish a prima facie case by proving a criminal act was committed by the accused.[43] In *Perumal v. Arumugam* [1939][44], where the accused person was charged with drug-related offenses for, *inter alia*, having the helm plant without a license, on its appeal to the Court of Appeal of Ceylon (now Sri Lanka), Soertsz, A.C.J. emphasized that '*this is one of those statutory crimes in which it is unnecessary to show anything more than that the accused committed the act forbidden by the statute under which he is charged. The legislature tends to create such offences when, in its view, the damage caused to the public by the offence is great, and the offence is such that there would be great difficulty in proving mens rea, if that degree of guilt was required*.'

It is logical to establish such a reverse burden of proof in criminal law in circumstances where the facts in question '*must* be *exclusively within his knowledge*.'[45] As such, the proof of knowledge on the part of the defendant in statutory criminal offenses can be classified into three degrees, *i.e.*, 'actual knowledge,' 'knowledge of the second degree,' and 'constructive knowledge,' as pointed out by Devlin J. in *Roper v. Taylor's Central Garages (Exeter) Ltd.* [1951][46]. The defendant's 'actual knowledge' is inevitably implied by the nature of what he has committed. As to the 'knowledge of the second degree,' the defendant involves in a crime being willful blindness in which the defendant willfully does not intend to inquire what he is involved in, but he knows it is not lawful. This willful blindness is also construed as actual knowledge. In the case of constructive knowledge, the defendant is tended to merely neglect to question his involvement as a reasonable and prudent person shall make (*see* Edwards 1952; Edwards 1954). Unarguably, the prosecution cannot prove the offender's intent that he has knowingly committed a crime in certain offenses (e.g., drug-related offenses), thereby reverse burden of proof is used to request the defendant to prove his lack of knowledge of the committed crime in question in the context of the English common law.

In the British jurisdiction, on the one hand, the presumption of innocence until proven guilty according to law is well recognized under Article 11 of the United Nations Universal Declaration of Human Rights (1948), Article 6(2) of ECHR, and its domestic Human Rights Act 1998. There has long been a proposition that burdens on the defense should only be an evidential burden. On the other hand, most interestingly, for example, there were '*219 examples, among 540 offenses triable in the Crown Court, of legal burdens or presumptions operating against the defendant*'. The presumption appears to be violated by no fewer than 40% of the offenses as found by Ashworth and Blake (1996)[47], whose study was to examine the frequency concerning the offenses triable in the Crown Court, which lays down a legal burden of proof on the defendant and impose a form of strict liability. Even though the legal notion of the presumption of innocence has been recognized from at least the early 19th century onwards in the authorities of England and Wales, it '*has not been uniformly treated by Parliament as absolute and unqualified*.'[48]

As the above brief overview, it has become evident that the approach of English common law to the legal notion of the presumption of innocence until proven guilty according to law is ready to be impugned by the application of the reverse burden of proof for certain selected offenses. Thus, it is evident that '*the process of enacting legal reverse burden of proof provisions continued apace*'[49]. Put differently, even though the approach of reverse burden of proof has been a well-established criminal justice measure in certain circumstances over a century-long period in English common law, it does not expect the prosecution to abdicate his main responsibilities to establish a prima facie case in which the defendant's guilty act (*actus reus*) must be proved beyond a reasonable doubt. Therefore, the shift of legal burden from the prosecution to the defendant only occurs with fulfilling the prosecution's obligations. These fundamental features are strictly applied to the enforcement of IE offenses without any restriction or derogation.

3.2 The rights to remain silent and protection against self-incrimination

As briefly discussed above, once the legal burden of proof is shifted on the defendant to disprove his knowledge of the committed crime concerning some offenses under certain statutory legislation, the presumption of innocence is impugned in which the defendant would be convicted of the crime committed unless he rebuts the prosecution allegation on the balance of probabilities. Therefore, it could be argued that the

[40] R. v. Prince (1875) 2 C.C.R. 154.
[41] Sherras v. De Rutzen [1895] 1 Q.B. 918.
[42] Reynolds v. G. H. Austin & Sons, Ltd. [1951] 2 K.B. 135.
[43] The above cases are cited in Edwards (1952). For more details about the case law in relation to 'knowledge in statutory offences' in the British common law, see Edwards (1952); Edwards (1954).
[44] Perumal v. Arumugam [1939] 40 N.L.R. 532, cited in Jayasuriya (1981).
[45] R. v. Cohen [1951] 1 K.B. 505.
[46] Roper v. Taylor's Central Garages (Exeter) Ltd. [1951] 2 T.L.R. 284.
[47] Ashworth, A & Blake, M., 1996. The presumption of innocence in English criminal law (at 309), cited in Lambert v. R [2001] UKHL 37 at [32].
[48] Conjoined judgments of Attorney General's Reference No 4 of 2002 and Sheldrake v. Director of Public Prosecutions [2004] UKHL 43 at [9].
[49] Lambert v. R [2001] UKHL 37 at [32].

absolute necessity of obtaining evidence during the course of the investigation and court proceedings does pose the challenge of maintaining the absolute right to silence and protection against self-incrimination. The decisional law and relevant statutory legislation confirm that the British common law has been reluctant to uphold the full extent of these rights in certain circumstances [50] in which the 'right' to remain silent is construed as a privilege within some inherent limitation throughout English law.[51] Interestingly, the ECtHR has also shown to recognize the balance between the said rights and the importance of effective criminal proceedings, especially within the scope of Article 6 of ECHR in particular circumstances, meaning that they are not, at all times, absolute ones. [52]

Under certain legislation of the UK jurisdiction, such as the Criminal Evidence (Northern Ireland) Order 1988, the Supreme Court Act of 1981, and the Insolvency Act of 1986, including the above-mentioned Drugs Act 1971 and Sexual Offences Act, it is established that within the scope of judicial power at trial, *inter alia*, the court has the right to draw adverse inferences from the accused person's silence or his refusal to answer questions put to him by the competent authorities at both stages the custodial interrogation and court trial, which would cause his right to silence to be limited. For example, Criminal Evidence (Northern Ireland) Order 1988 ('the 1988 Order') enacted by the British Parliament, which exclusively amended the evidence law in criminal proceedings in Northern Ireland, was ironically designed to lose the rights of a criminal defendant to remain silent and not to incriminate himself in the interest of the national security policy.[53] According to Article 3, the fact-finder (a judge or jury) is allowed to draw adverse inferences from an accused person's refusal to answer questions or fail to mention particular facts at the pre-trial. Under Article 4, if the accused refuses to testify at a court trial, the court has the power to draw adverse inferences from his refusal to do so.

Further, Articles 5 and 6 authorize inferences to be drawn from the accused person's failure or refusal to account for objects, substances, or marks, his clothing or footwear, etc., in certain circumstances, as well as from his failure or refusal to account for his presence at a particular place about the time the offense for which he was arrested, among other matters.[54] Therefore, the provisions of the 1988 Order waive the rights to silence and not to incriminate oneself in certain circumstances. The court or jury, on the other hand, in determining the facts to decide the controversy, is allowed to draw inferences from an accused person's failure or refusal. Additionally, Section 3 of the Criminal Evidence Act (Northern Ireland) 1923 stipulated that '*in cases where the right of reply depends upon the question whether evidence has been called for the defence, the fact that the person charged has been called as a witness shall not of itself confer on the prosecution the right of reply.*'[55] It should also be borne in mind that the Drugs Act 1971, among other legislation, is led to impinge on the right to the presumption of innocence and rights to remain silent and protection against self-incrimination, as discussed above.

Under the insolvency regimes, the rights to silence and not to incriminate oneself are expressly restricted. For example, under Section 354(3) (a) and (b) of the Insolvency Act 1986 of the UK ('the 1986 Act'), '*the bankrupt is guilty of an offence if he without reasonable excuse fails…to account for the loss of any substantial part of his property incurred…*' and '*to give a satisfactory explanation of the manner in which such loss was incurred.*' [56] On the other hand, failing to fulfill such disclosure under the relevant statutory compulsion is subject to prosecution. Under Section 291 of the 1986 Act concerning the duties of the bankrupt to deal with the official receiver, the bankrupt is subject to prosecution for contempt of court and liable to be punished if he is not to comply with any pertinent obligation without reasonable excuse. Section 291, which is read in conjunction with the relevant amendments, has removed the privilege against self-incrimination. Thus, the bankrupt is obliged to disclose all details related to the subject's possession. Further, there is well-established case law that accepts the need for the limited scope of the pertinent privilege in the UK jurisdiction.

The USA bankruptcy legislation has specific provisions and stipulates that the bankrupt is legally obliged to answer any material question the court provides. If a bankrupt fails to do so or is intended to refuse to answer any inquiries, the discharge of the bankrupt's debts would also be refused because such disclosure is mandatory. This means that its bankrupt legislation contains a provision for waiving the privilege against self-incrimination or the right to remain silent during insolvency, thus challenging the Fifth and Fourteenth Amendments to its Constitution. Of course, a bankrupt seeking to file for bankruptcy is entailed to enjoy the right to silence in order not to incriminate himself at the court without being charged with contempt of court but such enjoyment of his fundamental legal right, therefore, concludes with the refusal of discharge of his debts. Further, it should be noted that the pertinent legal requirement for such disclosure by the bankrupt

[50] See, e.g., Brown v. Stott [2001] 2 WLR 817; Lambert v. R [2001] UKHL 37; R. v. Kearns [2002] EWCA Crim 748; Conjoined judgments of Attorney General's Reference No 4 of 2002 and Sheldrake v. Director of Public Prosecutions [2004] UKHL 43; C Plc v. P [2007] 3 WLR 437.

[51] It could be argued that the reason for that is mostly because of the development of implication of the dictum expressed by Jeremy Bentham, a nineteenth-century-eminent scholar, that 'innocence claims the right of speaking as guilt invokes the privilege of silence' has been drowned up to its jurisdiction to a greater extent (see Maloney 1993).

[52] See, e.g., X v. United Kingdom (1972) ECHR 42 CD 135 (App No 5877/72); Saunders v. the United Kingdom [1996] ECHR 65; John Murray v. United Kingdom [1996] IIHRL 9; O'Halloran and Francis v. United Kingdom [2007] (App Nos15809/02 and 25624/02).

[53] For the legal reasoning of the Criminal Evidence (Northern Ireland) Order 1988 in Great Britain and Northern Island political and historical context, see, e.g., Quinn (2004).

[54] The Criminal Evidence (Northern Ireland) Order 1988 is available at http://www.legislation.gov.uk/nisi/1988/1987/made

[55] For Section 3 of the Criminal Evidence Act (Northern Ireland) 1923, surf http://www.legislation.gov.uk/apni/1923/9/section/3

[56] For the Insolvency Act 1986 of the UK, surf http://www.legislation.gov.uk/ukpga/1986/45/contents

is immune from legal prosecution for criminal charges, and the filing for bankruptcy is not a criminal matter.

Further, despite certain Supreme Court decisions concerning the doctrine of the Fifth and Fourteenth Amendments, some court decisions affirmed the denial of discharge from the bankrupt's debts in the wake of his refusal to answer the questions. The fact remains that such a mandatory requirement for a bankruptcy-seeker lays down the very protection of the principle of justice and the interests of all the parties affected, so far as a 'dishonest' bankruptcy risk factor is concerned. In bankruptcy proceedings, the disclosure of the pertinent bankrupt's assets' nature, amount, and whereabouts are indispensable for determining the actual concentration on such insolvency to avoid the potential pitfalls of self-seeking by dishonest bankrupts (*see* Knoeller 1939; Fordham Law Review 1969; St. John's Law Review 2013).

In *R. v. Kearns* [2002][57], where Section 354(3)(a) of the said Insolvency Act of 1986 was concerned whether it would contravene the right to a fair trial guaranteed by Article 6 of ECHR, the Court of Appeal (Civil Division) of the UK emphasized the importance of such legislation to regulate insolvency regime: '*The 1986 Act is designed to deal with the social and economic problem of bankrupts. It is in the public interest that the affairs of bankrupts should be investigated, that the assets are traced and got in, and that the assets are then distributed to creditors. The bankrupt has a benefit in this regime, too, because, after a specified period of time, he obtains legal absolution from his debts. The bankrupt is frequently the only person who can provide the necessary information about the bankrupt estate. There is, in our view, an obvious need for a statutory regime that imposes a duty on a bankrupt to cooperate in providing full and accurate information to the person charged with administering the bankrupt's estate. Equally clearly, that duty should be backed up by appropriate statutory sanctions to ensure that the duty is carried out properly*.'[58]

Furthermore, under Article 72 of the Supreme Court Act 1981 of the UK, the privilege against self-incrimination is expressly withdrawn to a certain extent regarding the civil proceedings in the High Court '*for infringement of rights pertaining to any intellectual property or for passing off*' and so forth. Accordingly, no person should be excused '*from answering any question put to that person in the first-mentioned proceedings; or from complying with any order made in those proceedings*' no matter to what extent that person or his or her spouse would be exposed, among other things.[59] There are provisions to safeguard against the resultant disclosure. Thus, the person being bound by such testimonial obligations and his or her spouse likely to be exposed are immune from legal prosecution against them and/or for perjury or contempt of court according to Articles 72(3) and 72(4).[60]

Regardless of whether the nature of the relevant legislation is civil or criminal, such statutory compulsion to disclose in legal proceedings highlights the need for the absolute or significant reduction of the right to silence and protection against self-incrimination for certain offenses in order not to bring the rule of law into disrepute. As for compulsory disclosure under the insolvency regimes, though there is a very rare case that all people in a country would be affected by and suffer from the consequences of a given bankruptcy, rather than the people, namely creditors involved, such strict laws are aimed at minimizing its potential adverse effects and preventing the immediate parties involved from the possibility of dishonest bankruptcy. In other words, the bankrupt is legally bound to answer the material questions or to disclose the nature and scope of his assets when he files for bankruptcy. It is evident that certain regimes of criminal offenses impinge upon the right to silence and not to incriminate oneself.

3.3 Judicial Determination of the Rights in Question

In analyzing the nature of some criminal offenses similar to IE offenses and the relevant court decisions, we have examined how the arguments against criminalizing IE offenses are not necessarily valid. Furthermore, when inquiring into the case law of the authorities of the ECtHR of Strasburg and the UK, it is clear that they generally tended to find the balance between the said rights in circumstances where independent evidence is subject to the defendant's direct control.[61] The ECtHR has considered and recognized the extent of the scope of those rights, particularly within the scope of Articles 3, 6, and 8 of ECHR[62], among other provisions.

The fundamental features of the 'right to a fair trial' are laid down in Article 6 of ECHR. Yet, it has not deliberated about the wording of the right to remain silent and the right not to

[57] R. v Kearns [2002] EWCA Crim 748. In the present case, the appellant was indicted on for counts, and count 3 was that he 'between 11 September 1998 and 18 August 1999, being a bankrupt and having been required to do so by the Official Receiver, failed without reasonable excuse to account for the loss of a substantial part of his property, namely the sum of £22,400, incurred in the period between the presentation of the bankruptcy petition on 17 September 1998 and 11 November 1998, contrary to section 354(3) (a)**'** of the 1986 Act. On his appeal, the appellant argued that the relevant provisions of the 1986 Act were inconsistent with Article 6 of the ECHR, among other things. However, the appeal was dismissed. The Court held that Section 354(3)(a) of 1986 was consistence with the appellant's rights under Article 6 by reiterating the right to remain silent and the right not to incriminate oneself is not absolute rights according to the case law.

[58] R. v. Kearns [2002] EWCA Crim 748 at [55].

[59] Article **72 (1)** 'In any proceedings to which this subsection applies, a person shall not be excused, by reason that to do so would tend to expose that person, or his or her spouse, to proceedings for a related offence or for the recovery of a related penalty- (a) from answering any question put to that person in the first-mentioned proceedings; or (b) from complying with any order made in those proceedings.'
Article **72(2)** 'Subsection (1) applies to the following civil proceedings in the High Court, namely- (a) proceedings for infringement of rights pertaining to any intellectual property or for passing off, (b) proceedings brought to obtain disclosure of information relating to any infringement of such rights or to any passing off, and (c) proceedings brought to prevent any apprehended infringement of such rights or any apprehended passing off.'

[60] For the Supreme Court Act 1981 of the UK, serf http://www.legislation.gov.uk/ukpga/1981/54/pdfs/ukpga_19810054_en.pdf

[61] e.g. Saunders v. the United Kingdom [1996] ECHR 65.

[62] Articles 3, 6 and 8 of ECHR have respectively established the rights not to be tortured, right to a fair trial and right to respect for private and family life.

incriminate oneself. What the ECtHR has held is that the way of obtaining evidence should not be subject to the use of inhuman and coercive methods[63] , including physical or mental harm, even though statutory compulsion to disclose evidence or any statutory limitation of these rights is laid down.[64] The court has always deemed it necessary to preclude the possibility of unlawful practice in the course of substantive and procedural proceedings about the statutory compulsion to obtain evidence from the defendant in circumstances where independent evidence is under the defendant's tight control, as established well in the remarkable decisional law of the authorities of ECtHR.[65]

Despite having long been in view that Article 6 (1) of ECHR cannot be interpreted as a legal eschewer for the prosecution to discontinue criminal proceedings or to drop charges[66], the ECtHR, in some cases, has apparently shown to maintain a strong posture of the full-scale approach to these rights or privileges as seen in *X v. the United Kingdom* (1972)[67] and *Funke v. France* [1993][68], for example. Accordingly, the circumstances in which solitary confinement would contravene the meaning of the said rights of the ECHR should be understood. The decisional law of the ECtHR has well-identified the potential or perceived risks of infringing the values of the said rights. Article 3 of the ECHR has well established the broad scope of the prohibition on torture, though the notion of its absolute right has not been well defined. In contrast, the scope of its prohibition is dependent on subjective factors in the relevant case assessments (*see* Addo & Grief 1998).[69] Taken together, the case law of the ECtHR has widely recognized how to determine these rights through the balance of the absolute values of substantive and procedural proceedings in criminal law.

In other words, it has been fathomed out the scope of the said rights and taken the view that they are not absolute ones in certain circumstances. For instance, in cases such as *Salabiaku v. France* [1988][70], *Saunders v. the United Kingdom* [1996][71], *John Murray v. the United Kingdom* [1996][72], *Heaney and McGuinness v. Ireland* [2000][73] , and *Jalloh v. Germany* [2006][74], the ECtHR has recognized the possibility of balancing the said rights within the meaning of effective criminal proceedings. As emphasized by Lord Hoffmann in *R. v. Hertfordshire County Council, Ex Parte Green Environmental Industries Ltd and Another* [2000][75], in the context of English domestic law, a defendant is not entitled to refuse to give information on the basis that it may incriminate himself. This explanation makes it clear that those rights are not construed as absolute ones, as identified and established well in *Salabiaku v. France* [1988][76], *Saunders v. the United Kingdom* [1996][77] , and *O'Halloran and Francis v. the United Kingdom* [2007][78].

Concerning IE offense, the nature of the compulsion to disclose pre-existing or independent evidence (*i.e.*, the requirement for the disclosure about the means of unexplained wealth in question) is inevitably a testimonial obligation. Thus, it is always excluded from any highly debatable inhuman or coercive methods for obtaining evidence in the cause of investigation or court trial proceedings but rather the shifting legal burden of proving the defendant's knowledge of the means of unexplained wealth in question from the prosecution to the defendant, where the defendant may be led to incriminating himself if his means are involved in another illegal activity.

IV. DISCUSSION

As discussed so far, it is evident that, on the one hand, lawmakers have not failed to acknowledge the fact that the establishment of the full-scale right to silence and privilege against self-incrimination can absolutely be unnecessary for some offenses in both civil and criminal law because of not allowing such privileges to mock the values of rules of evidence. Not least, the UK jurisdiction has long been employing substantive law against these rights or privileges, as seen in its controlled drugs, anti-terrorism, insolvency, intellectual, and road traffic regimes, including sexual offenses. On the other hand, the decisional law has also fathomed out the scope of these rights on balance between the absolute values of due process. Precisely, the case law concerning such offenses provides a realistic picture of the reason for shifting the burden of proof to the accused person and the extent of the standards of the proof on both the prosecution and the accused person.[79] Thus, it is clear that legislators and judicial decisions are ready to ensure an even balance between the said rights or principles

[63] It is also noted that, under the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984, obtaining evidence by using inhuman or degrading treatment in the course of investigation and court proceedings in both civil or criminal law is also prohibited (refer to the pertinent provisions of its Article 1, 15 and 16).

[64] See, e.g., Saunders v. the United Kingdom [1996] ECHR 65; Jalloh v. Germany [2006] ECHR 721 at [90].

[65] See, e.g., X v. the United Kingdom (1972) ECHR 42 CD 135 (App No 5877/72); Salabiaku v. France [1988] ECHR 19; Saunders v. the United Kingdom [1996] ECHR 65; John Murray v. United Kingdom [1996] IIHRL 9; Jalloh v. Germany [2006] ECHR 721; O'Halloran and Francis v. United Kingdom [2007] (App Nos 15809/02 and 25624/02).

[66] X v. the United Kingdom (1972) ECHR 42 CD 135 (App No 5877/72).

[67] ibid.

[68] Funke v. France 10828/84 [1993] ECHR 7.

[69] cf. Funke v. France 10828/84 [1993] ECHR; Saunders v. the United Kingdom [1996] ECHR 65; Heaney and McGuinness v. Ireland [2000] ECHR 684; Jalloh v. Germany [2006] ECHR 721 (Application no. 54810/00); Babar Ahmad & Others v. the United Kingdom [2010] ECHR 1067 (App No 24027/07); Garycki v. Poland [2007] ECHR 112 (App No 14348/02).

[70] Salabiaku v. France [1988] ECHR 19.

[71] Saunders v. the United Kingdom [1996] ECHR 65.

[72] John Murray v. the United Kingdom [1996] IIHRL 9.

[73] Heaney and McGuinness v. Ireland [2000] ECHR 684.

[74] Jalloh v. Germany [2006] ECHR 721 (Application no. 54810/00) at [70-73].

[75] R. v. Hertfordshire County Council, Ex Parte Green Environmental Industries Ltd and Another [2000] 2 AC 412.

[76] Salabiaku v. France [1988] ECHR 19.

[77] Saunders v. the United Kingdom [1996] ECHR 65.

[78] O'Halloran and Francis v. the United Kingdom [2007] (App Nos 15809/02 and 25624/02).

[79] For such case law of the UK and some Asian countries, see Jayasuriya (1981).

and the values of effective proceedings of criminal law in certain offenses regimes.

Nevertheless, it is unusual for us to see that even some State Parties to the UNCAC, like the UK, where the reverse burden of proof has long been utilized in the context of some criminal offenses, express their reservations about the criminalization of IE by reference to violating fundamental principles of criminal law, namely the rights to remain silent and not to incriminate oneself that challenge the right to be presumed innocent until proven guilty. Therefore, it is worthwhile for us to advance our reasoned argument in favor of the enactment and implementation of IE as a criminal offense against public officials whose possession of unexplained assets is disproportionate to their lawful income or means.

First, let's consider the key elements that establish the occurrence of IE in the public sector. They are as follows:

a) the person of interest (i.e., public official);
b) the possession of unexplained wealth or an appreciable increase in their assets (i.e., the physical element of the offense);
c) the period of interest (during his position of power); and
d) his inability to reasonably account for the significant increase in his assets compared to his lawful income (which is related to the disclosure of his assets)

As discussed earlier, for some countries, the debate over accepting IE as a criminal offense is directly related to the reverse burden of proof wherein the fundamental legal notion that the accused is presumed innocent until proven guilty according to law is challenged. In the case of IE, an offense against public officials, the onus on the prosecution is to verify that the accused public servant has unexplained wealth, which is disproportionate to his lawful income and means, as mentioned in his own disclosure. This means that the public servant in question has unlawful means to have such unexplained wealth, but the prosecution need not prove such means unlawful. Accordingly, the legal burden of proving the accused public servant's knowledge of the origin of such means of possessing such unexplained wealth is shifted from the prosecution to the accused. In other words, the onus on the prosecution is to prove the accused public servant's 'possession' of unexplained wealth (*i.e.*, wrongful act or *actus reus*) beyond a reasonable doubt. In contrast, the accused should bear the burden of proof to disprove the fact that his means of possessing such unexplained wealth are unlawful. At this point, the accused can be led to incriminating himself if his means are linked to illegal activities like corruption.

We have already examined how criminal laws on some offenses and court decisions have readily understood the necessity of employing the reverse of the burden of proof. In drug offense regimes, the onus on the prosecution is to prove the defendant had 'possession' of a controlled drug (physical act or *actus reus*) beyond a reasonable doubt, but there is no need to prove the defendant's knowledge of 'possession' (mental element or *mens rea*). The onus on the defendant is to prove his lack of knowledge that he had possession of it or he had no purpose of supplying it on the balance of probabilities.[80] As such, the prosecution should prove physical 'possession' while the alleged 'knowledge' or 'purpose' of the 'possession' should be disproved by the defendant, or otherwise, the defendant must be guilty of it.

What elements are interpreted as 'possession' here? In *R v. Warner* [1969][81], the House of Lords went on to look into the definition of 'possession' in the Dictionary of English Law (Earl Jowitt 1959): '"*Possession" is the visible possibility of exercising physical control over a thing coupled with the intention of doing so, either against all the world or against all the world except certain persons. There are, therefore, three requisites of possession. First, there must be actual or potential physical control. Secondly, physical control is not possession unless accompanied by intention; hence, if a thing is put into the hand of a sleeping person, he has no possession of it. Thirdly, the possibility and intention must be visible or evidenced by external signs, for if the thing shows no signs of being under the control of anyone, it is not possessed ...*'[82] (*original emphasis*). In other words, as explained in *R v. Cox* [1990] [83] and *Simon v. R* [2007][84], 'possession' comprises two elements, *i.e.*, the physical element and the mental element. The physical element is seen in the exercise of actual or potential custody of or control over such 'possession,' while the mental element (*mens rea*) is the knowledge and intention; the knowledge is nothing other than the accused person's awareness of the presence of 'possession', and '*an intention to exercise control over it.*'[85]

Control in the sense of custody '*involves the idea of a person having the power to direct what happens to the object*.' Further, in *Warner v. Metropolitan Police Commissioner* [1968][86], Lord Pearce emphasized that 'the term "possession" is satisfied only by knowledge of the existence of the thing itself and not its qualities and that ignorance or mistake as to its qualities is not an excuse. This would comply with the general understanding of the word 'possession.'

Consequently, under drug offenses, the knowledge on the part of the accused is presumed wherein the burden of proof of *mens rea* is shifted from the prosecution to the accused, as expressly laid down in the above-said Drugs Act 1971 of the UK. In *R v. Warner* [1969][87], Lord Morris stated that '*in order to establish possession, the prosecution must prove that an accused was knowingly in control of something in circumstances which*

[80] Lambert v. R [2001] UKHL 37.
[81] R v. Warner [1969] 2 AC 256 (HL).
[82] R v. Warner [1969] 2 AC 256 (HL) at [265], cited in Simon v R [2017] NZCA 277.
[83] R v. Cox CA343/89 [1990] NZCA 13.
[84] Simon v. R [2017] NZCA 277.
[85] ibid. at [14].
[86] Warner v. Metropolitan Police Commissioner [1968] 2 All E.R. 356.
[87] R v. Warner [1969] 2 AC 256, cited in R v Cox CA343/89 [1990] NZCA 13.

showed that he was assenting to being in control of it.'[88] As identified and emphasized in *R v. Mcnamara* [1988][89], *R v. Cox* [1990][90], and *Lambert v. R* [2001][91], it is obvious that the prosecution should only prove the knowledge on the part of the accused that he was on 'possession' of a prohibited object.

In firearms offense regimes, when the term 'the possession of a prohibited weapon' is considered in the absence of the word 'knowingly' or '*mens rea*,' an accused person is to be convicted of merely being in possession of a prohibited article. Thus, the omission of *mens rea* leads to permission for consideration of an accused person's state of mind in which, as emphasized in *R. v. Waller* [1991][92], there is no room for a defendant to pled *innocent possession*. Logically it follows that imposing '*a draconian prohibition on the possession of firearms* is '*for the obvious social purpose of controlling the dangerous weapon*.'[93] Especially such a strict liability offense, which would capture the absolute nature of an offense, is not in contravention of Article 6(1) or 6(2), as held in *Deyemi & Anor, R v* [2007][94] where the decision was held that Section 5(1) of the Firearms Act 1968 of the UK was a strict liability in the sense of absolute offense and such nature did not infringe Article 6, among other things. Again, the decision of *Zahid v. R* [2010] [95] well established that the offenses under Section 5 of the above 1968 Firearms Act of the UK are construed as ones of strict liability wherein the prosecution is only requested to prove possession of such a prohibited article. There was no defense for the appellant as a matter of law in such circumstances. Laws governing the possession of a prohibited object (e.g., controlled drugs, an offensive weapon, or child pornography) do not require the prosecution to establish that the accused person knew that he had possession of such a prohibited object.

Regarding IE offense in the public sector, the person of interest is obviously a public official possessing unexplained wealth or property. Therefore, the essential part to be proved by the prosecution is that the defendant is a public official, and he has possession of the unexplained property during the period of his assumption of power. The wording of unexplained wealth or property is meant to be that his assets have increased by a noticeably significant amount which is so disproportionate to his lawful income in comparison to the disclosure of his assets that he has been unwilling or failed to account for such an appreciable increase in his assets. It is mainly because of the dubious legitimacy of the origin of his unexplained wealth belonging to him or his close family members.

When considering Section 10 of the Prevention of Bribery Ordinance (PBO) of Hong Kong, where IE offense has been criminalized, the decisional law of Hong Kong has precisely fathomed out the balance between the said fundamental rights and the need to ensure the effectiveness of anti-corruption substantive and procedural law, including the salient feature of IE offense[96]. For instance, the wording of the effectiveness of IE offense in its jurisdiction has been evaluated in *Attorney General v. Hui Kin Hong* [1995][97], where it is emphatically highlighted that '*in case after case over the years, section 10 has proved its effectiveness in the fight against corruption. Although less visible, its deterrent effect must have been even greater. Chapter 201 of the Laws of Hong Kong is rightly named the Prevention of Bribery Ordinance; Section 10's worth is well-established.'* [98] In *Hui Kin Hong* [1995] *supra*, the central question was whether Section 10(1) of PBO was inconsistent with the Hong Kong Bill of Rights Ordinance. When determining the reasoning of and balance between the fundamental rights and corruption offenses from the decisional law viewpoint, it is evident that the obvious rationale for seeking an acceptable balance between the rights of the defendant and the values of effective criminal proceedings under anti-corruption regimes is to confront corruption, but it comes at a price.[99]

Understandably, like controlled drug offenses and similar ones, IE legislation involves an element of compromise. The price is that '*the onus on the accused to provide an explanation deviates from the Common Law principle that it is for the prosecution to prove the accused's guilt beyond a reasonable doubt, which principle is now entrenched in article 11(1) of the* [Hong Kong] *Bill of Rights* [Ordinance], *which provides that "Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law"*[100][...] *by parity of reasoning, the offence under section 10(1)(b) is the control of pecuniary resources or property which cannot be explained, the burden of giving that explanation resting upon the defendant*.'[101] Thereby, it is necessary to strike a balance between fundamental rights and the effectiveness of criminal law.

Concurring with the precedents by the authorities of the UK Privy Council like *Mok Wei Tak v. The Queen [1990]*[102]and *Attorney General for Hong Kong v. Reid* [1993][103], the Court of Appeal in *Hui Kin Hong* [1995] *supra* held that Section 10(1) of the Hong Kong PBO, where IE offense is established, is consistent with the Bill of Rights emphasizing that '*it is dictated by necessity and goes no further than necessary. The balance is right*.'[104]

[88] Simon v. R [2017] NZCA 277 at [15].
[89] R v. Mcnamara [1988] 87 Cr. App.R.246.
[90] R v. Cox CA343/89 [1990] NZCA 13.
[91] Lambert v. R [2001] UKHL 37.
[92] R. v. Waller [1991] Crim LR 381, cited in Deyemi & Anor, R v [2007] EWCA Crim 2060 at [13].
[93] Deyemi & Anor, R v [2007] EWCA Crim 2060 at [23].
[94] ibid. at [27].
[95] Zahid v. R [2010] EWCA Crim 2158.
[96] See Alastair Blair-Kerr's First Report (July 1973) of Hong Kong; Alastair Blair-Kerr's Second Report (September 1973).
[97] Attorney General v. Hui Kin Hong [1995] HKCA 351.
[98] ibid. at [10].
[99] Attorney General v. Hui Kin Hong [1995] HKCA 351 at [15-27].
[100] ibid. at [11].
[101] ibid. at [33].
[102] Mok Wei Tak v. The Queen [1990] 2 AC 333.
[103] Attorney General v. Reid [1993] UKPC 2.
[104] Attorney General v. Hui Kin Hong [1995] HKCA 351 at [15].

Most importantly, the decision reached by the Privy Council in *Mok Wei Tak v. The Queen [1990]*[105], where the legitimacy of the reverse burden of proof under IE offense is fully recognized, was greatly considered in *Hui Kin Hong* [1995] *supra*. Having considered the long title of the Hong Kong Prevention of Bribery Ordinance, Chap. 201 – which stipulates that 'To make further and better provision for the prevention of bribery and for purposes necessary to that or connected therewith,' their Lordships continued to stress that ''*…it is notorious, as indeed the decided cases make all too clear, that for many years corruption has been endemic in Hong Kong. The provisions of the Ordinance, which has been successively amended since it was first introduced in 1970, are clearly designed to enable corruption, especially in the case of Crown and public servants, to be more readily established and, when proven, drastically punished. Draconian described Section 10(1) itself has been as. Since, unusually, in criminal law, the subsection casts a burden of proving the absence of corruption upon a defendant, the epithet is not inappropriate. But it is the language in which this Draconian provision has been enacted by the legislature which has given rise to differences of opinion as to the meaning of the subsection and as to doubts as to the true character of the offence thereby created.*'[106]

Meanwhile, Article 20 of the UNCAC also requires the States Parties to establish the element of '*mens rea*' or 'intention' in IE offense by express wording *'when committed intentionally.*' Article 28 states 'knowledge,' 'intent,' or 'purpose' as the elements of a corrupt offense established in the Convention 'may be inferred from objective factual circumstances.'

Nevertheless, the other multinational anti-corruption legal instruments mentioned elsewhere in this paper have not expressly established the element of the guilty mind or '*mens rea*' of the offense because criminalizing IE offense by deliberately omitting the wording of 'knowingly' or 'intentionally' can lead the prosecution to treat it as a strict liability to avoid those accused who are '*genuinely ignorant of their unexplained income and increase in net worth*' from the escape of '*liability by pleading ignorance, where society is concerned with the prevention of harm and wishes to maximize the deterrent value of the offence*' (Muzila *et al*., 2001, p 22).

In particular, concerning Article 20 of the UNCAC, its process of enforcement and intrinsic impact is closely or directly linked to several other articles of the UNCAC. By extrapolating from the overall impact of IE offense, it is evident that the effectiveness of its enforcement per se positively affects the extent to which many of the preventive measures under Chapter II, apart from some other areas. For example, Article 8 requires that non-elected and elected public officials should be bound by comprehensive and effective codes of conduct that maintain and enhance 'integrity, honesty, and responsibility' in the public sector. These codes or standards of conduct should be applied for '*the correct, honorable, and proper performance of public functions.*' Furthermore, established measures and systems are necessary for '*public officials to make declarations to appropriate authorities regarding, inter alia, their outside activities, employment, investments, assets, and substantial gifts or benefits from which a conflict of interest may result concerning their functions as public officials*' (Article 8 par. 5). Further, there should also be '*disciplinary or other measures against public officials who violate the codes or standards*' (Article 8 par. 6).

Logically it follows that establishing such a nature of strict liability offense in the context of the public sector is legitimately acceptable to avoid continuing to deteriorate the absolute values of fiduciary obligations and integrity of the public sector in the way of deliberating on the proceedings of other criminal offenses regimes similar to IE offense. It may be immaterial here whether IE should be criminalized with a characteristic feature of strict liability, the same as an absolute nature offense. Yet, it is worth emphasizing that this offense has a potential impact on the public sector to directly and adequately address itself the insidious effects of corruption in the public sector in a way that the accused public official should bear the legal burden to prove the legitimate origin of his possession of unexplained wealth or property. It is mainly because putting a legal burden on the prosecution makes it impossible to obtain direct evidence of '*living on immoral earnings*' from the defendant, as held in *X v. United Kingdom* (1972)[107], as mentioned above.

In some cases, such public officials' behavioral patterns of extravagant spending can also be applicable to the scope of IE offense. Most importantly, the prosecution for IE's offense cannot be based on merely fallacious or flimsy evidence against an accused person, but rather the prosecution, for his part, should establish concrete evidence of the defendant's physical element (*actus reus*) beyond a reasonable doubt. If not, the court has the judicial power, as it is, to dismiss the case even without calling the defendant before the court trial.[108]

Hence, in practice, the extent of the defendant's possession of such appreciable or unexplained wealth is centrally concerned to be proved to constitute a dramatic contrast with his known income during the period concerned. Basically, the concept of this offense is thoroughly underlain by the public trust principle in which public officials are obliged to disclose both their own assets, including the other legal income (in addition to the salaries plus lawful allowance for their possessions) and their immediate family members' assets, and to account for the increase in the assets involved. As a result, on the one hand, the

[105] Mok Wei Tak v. The Queen [1990] 2 AC 333.
[106] Mok Wei Tak v. The Queen [1990] 2 AC 333 at p. 342 B-D, cited in Attorney General v. Hui Kin Hong [1995] HKCA 351 at [34].
[107] X v. United Kingdom (1972) 42 CD 135.
[108] In Director General, Commission to Investigate Allegations of Bribery and Corruption Vs. S.B. Dissanayake CALA 299/2005 (Reported in 2005 2SLR 258), the Appeal Court of Sri Lanka upheld the dismissal of the case by its lower court (High Court) at the first stance without calling the accused person for the trial by virtue of failure of the prosecution to establish evidence as required. The Court of Appeal held that the low court 'has correctly concluded that 'there is cogent and compelling evidence' to establish that the income is 'known income' and the Accused need not prove that the acquisitions were not bribery. No presumption could be drawn, and the prosecution did not prove a 'basic fact.' High Court Judge correct in law and on the facts.'

asset disclosure of public officials[109] is used as a reliable major legal device to prosecute public officials involved for their IE. On the other hand, it can play a proactive role by itself in promoting the integrity of the public sector as opposed to corruption.

Here, the element of 'possession' in IE in the public sector is not potentially confusing to the prosecution compared with controlled drug offenses and the like, thereby preventing innocent public officials from the potential risk of a miscarriage of justice or a political witch-hunt.[110] On balance, to obtaining evidence where the rights of the defendant can be challenged, it is hard to assume that the nature of IE investigation and court proceedings could develop any potential complications which could be similar to the facts of *John Murray v. the United Kingdom* [1996] [111], *Heaney and McGuinness v. Ireland* [2000] [112], or *Jalloh v. Germany* [2006] [113] and the like. For instance, in *Jalloh v. German* [2006], the applicant was regurgitated by the administration of emetics in defiance of his will to obtain the evidence that he had swallowed.[114] As such, 'possession' of unexplained wealth in IE offense can hardly make a mockery of justice in such a way because, except for beneficiary ownership to some extent, the elements of unexplained possession can well be proved by the prosecution through the property law approach or the like, to the extent which legal standards of proof of 'possession' in the context of controlled drugs offenses must be met by the prosecution as emphasized in *R v. Warner* [1969], *Lambert v. R* [2001] and *Simon v. R* [2017] *supra*.

Meanwhile, the fact that once the prosecution proves the allegation against the accused public official beyond a reasonable doubt, it can be construed as both the proof of the physical element of the offense and the knowledge on the part of the accused that he is in 'possession' of such unexplained wealth. In other words, it is not incumbent on the prosecution to establish how the accused has acquired such possession or which ways and means are involved in the case. In this regard, after proving the prosecution allegation, the presumption is that the ways and means of such a significant increase in the accused person's wealth may be involved in corruption.[115] It is the onus on the accused to disprove the prosecution allegation because the ways and means of increasing his wealth in question are entirely within his knowledge. If the facts in question '*must be exclusively his knowledge*,' as stipulated in *R. v. Cohen* [1951] [116], the onus of proof is shifted from the prosecution to the accused in certain criminal offenses. Like controlled drug offenses where the legal burden is shifted on the defendant to disprove his knowledge of the possession of a controlled drug, the presumption of corruption should be disproved by the accused public official in establishing the means of such unexplained wealth on the balance of probabilities, or '*something more than a reasonable probability*'[117]. It should be emphasized here that in *C Plc v. P & Anor* [2007] [118], such evidence is legally admissible for another charge even at a criminal trial in the context of English common law, even though the commonly accepted legal notion of the right of the accused not to incriminate oneself is contravened.

However, the central issue in the IE case is not merely based on the defendant's knowledge of unexplained possession but rather the means and methods of such a significant increase in his wealth. Undoubtedly, every public official has the right to acquire and possess or develop the property by his own or his family members' legal title during his position of power, the same as the other citizens. Yet, the question is whether such an increase in his wealth can reasonably be explained by the accused public official and is proportionate to his lawful income concerning his asset disclosure. If unable to furnish such reasonable explanation in the course of investigation proceedings, the presumption is that the means and methods of increasing such unexplained wealth are involved in illegal activities like corruption.

What is more important here is to understand that the evidence against the accused public official in the IE case should not, in nature, be obtained by a statutory or any other compulsion method. In other words, unlike the facts of *Saunders v. the United Kingdom* [1996] [119] or *Heaney and McGuinness v. Ireland* [2000] [120], the investigation proceedings do not require the accused to testify or provide statements, documents, or

[109] Although there are no internationally accepted standards for the relevant income and asset disclosure requirements yet, the nature and the scope of such criteria have been recognized by the pertinent academic body and prestigious institutions (Martini 2013). In general, the asset disclosure requirements need to be outlined 'the coverage of assets, declaration, types of information to be declared, the frequency of filling, monitoring and enforcement, sanctions, and availability of information to the wider public' (Martini 2013). An effective legal measurement of such asset disclosure is key to the effectiveness of the prosecution of illicit enrichment in a given jurisdiction.

[110] Compare with some controlled drug cases like R v. Warner [1969] 2 AC 256 (HL); Zahid v. R [2010] EWCA Crim 2158; Simon v. R [2017] NZCA 277; Salabiaku v. France [1988] ECHR 19.

[111] John Murray v. the United Kingdom [1996] IIHRL 9.

[112] Heaney and McGuinness v. Ireland [2000] ECHR 684.

[113] Jalloh v. Germany [2006] ECHR 721.

[114] In Jalloh v. Germany [2006] ECHR 721, the facts were that: on 29 October 1993, the applicant was arrested under the suspicion of selling drugs in the way of keeping tiny plastic bags ('bubble') in his mouth. When his being arrested, he swallowed the bubble which he had put in his mouth. After the arrest, the bubble was regurgitated by the administration of emetics. The applicant's allegation was that he was forced to regurgitate the substance that he had been observed to put into his mouth by the administration of emetics against his will to find evidence of a drugs offense, which underwent inhuman and degrading treatment, thus infringing Article 3 of ECHR. Further, the use of such evidence at his trial, he contended, violated his right to a fair trial laid in Article 6, including the essence of the right not to incriminate. The ECtHR held that there was a violation of the applicant's right due to the methods of obtaining evidence from the defendant, among other things.

[115] Wanigasekar Vs. Republic of Sri Lanka (79 NLR 241).

[116] R. v. Cohen [1951] 1 K.B. 505.

[117] Director General, Commission to Investigate Allegations of Bribery and Corruption Vs. S.B. Dissanayake CALA 299/2005 (Reported in 2005 2SLR 258). In the instance case, the Court of Appeal of Sri Lanka held that '…the burden is on the prosecution to prove 'basic fact' that the known income of the accused was less than his own expenditure during the relevant period. Evidence produced by the prosecution can be classified as 'known income' and found to be true as per the investigator's evidence...'

[118] C Plc v. P & Anor [2007] 3 WLR 437.

[119] Saunders v. the United Kingdom [1996] ECHR 65.

[120] Heaney and McGuinness v. Ireland [2000] ECHR 684.

objects by using compulsory methods to establish defendant's own guilty at a court trial. Therefore, the element of a '*significant increase in his wealth*' or the possession of the unexplained property must be revealed and proved by the prosecution without forcing the accused to provide evidence against him. In this regard, unlike the administration of emetics for 'regurgitating evidence' as seen in *Jalloh v. Germany* [2006] *supra*, the accused public official is not subject to self-incrimination at the stage of the absolute necessity of obtaining evidence against his significant unexplained property because such a requirement is not laid down in IE offense to obtain evidence by the prosecution or investigator from the defendant to find the possession of his unexplained property (i.e., the physical element of the offense) and the ways and the origin of means of increasing his property or wealth (i.e., the mental element) to bring a case against him.

Conversely, as discussed before, it is the onus on the prosecution to establish beyond a reasonable doubt that the defendant has possessed such unexplained wealth and increased his assets disproportionate to his lawful income compared to his asset disclosure. [121] Further, unlike the bankrupt governed by the Insolvency Act 1986 or the defendant under the Supreme Court Act 1981 of the UK, any of his refusals to answer the questions put to the accused public official by investigators or competent authorities in IE offense is not considered as the offense of contempt of court in almost all IE regimes.[122]

However, considering the defendant charged with IE offense where he is subjected to the statutory requirement to account for the origin means of his unexplained wealth, his rights to silence and protection against self-incrimination would be challenged to such an extent that the origin of his proceeds is illegitimate. Especially, there would be an issue if the origin of his other earnings is engaged in another illegal activity rather than corruption. In this respect, the question is whether such evidence related to unlawful methods of earning irrelevant to IE offense in the public sector can be used as admissible evidence for other criminal charges against the defendant.

Like the admission to the road traffic regime[123], entering into the public sector is also an entirely voluntary agreement in general, whereby no one is forced to do so. All who voluntarily decide to become a member of the public sector know that by being a public official, they are subjected to a regulatory regime. They are explicitly and formally to be acknowledged that the conduct of the public sector is thoroughly aligned with the principles of fiduciary obligations since public officials are assigned to represent the interest of public resources in exercising particular powers of representation to protect or pursue the interest of people. In a word, absolutely, they are trustees directly or indirectly appointed by the people.

The underlying legal concept of IE as a criminal offense formed from the bedrock of the basic theory of '*public officials who acquire wealth without being able to prove its legitimate source*' (Muzila *et al*., 2011).[124] It firmly hinges on the very principle of the fiduciary duty of loyalty in the public sector context. Thus, the line of reasoning is obvious and sophisticated, whereby public officials who have been engaging in or responsible for the decision-making and allocation of the entire state resources on behalf of the entire nation should not be allowed to obtain any illicit income. The point is that public officials should continuously be scrutinized to prevent taking any advantage of their official duties for their private gain in the name of public interests.

Accordingly, it is rational for a senior-level public servant to be prosecuted for IE offense if he fails to reasonably explain the origin of his unexplained property where he is claimed to possess an enormous amount of financial resources that exceed the total value of the official emoluments of his entire period of assumption of position until the retirement or the entire period of his retirement. In some cases, the effectiveness of such legislation to govern the public sector could be less visible, but its deterrent effect has become even greater. [125] Well-established decisional law will act where the balance between the proportion to the defendant's rights and efficacy of anti-corruption substantive and procedural law has been clearly identified (*see*, *e.g.*, Fok 2015; Yang 2012).

As such, there is a statutory requirement under the IE regime for a public servant in question to reasonably explain the means of his possession of unexplained property disproportionate to his lawful income. It is not a question of *why* he has had such property but a question of *how* he has acquired it through the means of his known income. If he genuinely intended to provide a satisfactory explanation of the property in the investigation stage, there would be no IE prosecution against him in a court of law. It is obvious that an honest public official has nothing to conceal, but a dishonest one has something. Thus, such dishonest public officials would always seek the privilege against self-incrimination. Therefore, there is no reason to

[121] Director General, Commission to Investigate Allegations of Bribery and Corruption Vs. S.B. Dissanayake CALA 299/2005 (Reported in 2005 2SLR 258).

[122] For the analysis of the nature of illicit enrichment provisions in 43 jurisdictions, see Annex 1 in Muzila et al. (2001).

[123] In Brown v. Stott [2001] 2 WLR 817, Lord Steyn emphasized that, inter alia, 'it is a notorious fact that vehicles are potential instruments of death and injury…The effective prosecution of drivers causing serious offences is a matter of public interest. But such prosecutions are often hampered by the difficulties of identifying the drivers of the vehicles at the time of, say, an accident causing loss of life or serious injury or potential danger to others. The tackling of this social problem seems in principle a legitimate aim for a legislature to pursue.'

[124] Illicit enrichment as a legal tool was proposed by Rodolfo Corominas Segura, an Argentinean Congressman. He tried in vain to introduce the first-ever illicit enrichment bill to the Argentinean legislature in 1936. Yet, it took nearly three decades to criminalize illicit enrichment in the Argentinean legislature, i.e., in 1964. The reason behind this bill was the fact that Rodolfo Corominas Segura, the pioneer of the concept of illicit enrichment, tended to contemplate dealing with public officials of the day who had been showing off their illicit assets (Muzila et al. 2011).

[125] *Attorney General v. Hui Kin Hong [1995] HKCA 351 at [10]. See also The State of Malawi v. Mzumara (Crim. Case Number 47 of 2010).*

blindly advocate the full-scale privilege of remaining silent at a court trial.

Overall, compared with the case law and the above-mentioned statutory legislation similar to the nature of IE offense, it is evident that there are no compelling reasons to dissent from the criminalizing of IE or Article 20 of the UNCAC on the ground of its nature. Accordingly, the criminalization and enforcement of IE do not contravene any fundamental legal principle of criminal law in which the scope of the said rights is legitimately subject to a balanced approach in certain circumstances. This denotes that some IE regimes, like Hong Kong, have effectively been employing IE offenses as a direct legal device to combat corruption and/or certain wrongdoings without prejudice to the defendant's rights.

V. CONCLUSION

It has become evident that the English common law has never totally been absent from the mutation of the burden of proof, i.e., the legal burden to evidential burden in which the right to be presumed innocent until proved guilty according to law is directly challenged, thereby the right to silence and right not to incriminate oneself are not construed as absolute ones. As per the nature of certain offenses similar to IE and the decisional law of the authorities of both the ECtHR and British jurisdictions, a well-established balance is found between the said rights or legal principles of criminal law and the absolute values of effective criminal proceedings in obtaining the independent evidence under the defendant's direct and tight control. Such a statutory compulsion to disclose pre-existing documentary or explanatory evidence in legal proceedings has recognized a real need for a practical limitation of the absolutes of the said rights in certain circumstances not to bring the rule of law into disrepute.

Consequently, there is no reason to endorse the notion that the nature of the substantive law on IE offence established in Article 20 of the UNCAC would contravene the said fundamental legal principles and rights of criminal law to shift the legal burden of proving the defendant's knowledge of the origin of his possession of unexplained wealth or property in question from the prosecution to the defendant on the balance of probability. Therefore, the fact that some Parties to the UNCAC, including the UK particularly, whose domestic legal system is English common law, have made reservations about the criminalization of Article 20 does not lend weight to the present argument.

When considering the decisional law of the authorities in the illicit enrichment regimes and English common law jurisdictions and the underlying legal concepts of some other criminal offenses, it is logically necessary for public officials to be legally bound to account for the legitimate origin of their possession of unexplained wealth disproportionate to their lawful income to avoid the deterioration of the required absolute values of fiduciary obligations and integrity of the public sector. Equally important, the legislative remedy against corruption in the public sector should be proportionate to the magnitude of the significant negative impact on the whole governmental process since corruption involves matters of public financial cost and does profoundly diminish public trust in the entire government body and the rule of law.

People have the inalienable right not to be corrupted by positions of power or public officials paid by taxpayers and represented over the people's interest. Thus, it would be illogical to compromise on the people's fundamental rights to incite corrupt public officials to the execution of any form of corruption at the expense of public resources as a way of circumventing the existing law. By extrapolating from the underlying concept of IE offense and the success in utilizing it as a direct legal tool by some jurisdictions like Hong Kong, it should be emphasized that the effectiveness of its enforcement can enhance the capacity to confront grand corruption in the public sector without prejudice to the said fundamental legal principles of criminal law.

REFERENCES

Books/Journal Articles/Official Reports

[1]. Addo, K. Michael & Grief, Nicholas, 1998, 'Does Article 3 of the European Convention on Human Rights Enshrine Absolute Rights?', *European Journal of International Law* 9, 510-524, retrieved from http://www.ejil.org/pdfs/9/3/665.pdf.

[2]. Alastair Blair-Kerr's First Report (First Report of the Commission of Inquiry under Sir Alastair Blair-Kerr), July 1973, Hong Kong, retrieved from http://www.icac.org.hk/en/about/report/others/index.html.

[3]. Alastair Blair-Kerr's Second Report (Second Report of the Commission of Inquiry under Sir Alastair Blair-Kerr), September 1973, Hong Kong, retrieved from http://www.icac.org.hk/en/about/report/others/index.html.

[4]. **Bacarese, A., Chien, H. M., Dung, N. T., & Huong, P. T., 2014, 'Criminalizing illicit enrichment: A change to fight corruption and recover Vietnam's stolen assets', Vietnam Law & Legal Forum, viewed 19 January 2018, from** http://vietnamlawmagazine.vn/criminalizing-illicit-enrichment-a-chance-to-fight-corruption-and-recover-vietnams-stolen-assets-3791.html**.**

[5]. Boles, J. R., 2015, 'Criminalizing the problem of unexplained wealth: illicit enrichment offenses and human rights violations', *Social Science Electronic Publishing*, retrieved from http://www.nyujlpp.org/wp-content/uploads/2015/03/Boles-Criminalizing-the-Problem-of-Unexplained-Wealth-17nyujlpp836.pdf.

[6]. Cheyney, Edward P., 1913, 'The Court of Star Chamber', *The American Historical Review* 18 (4), 727-750, Oxford University Press, retrieved from http://www.jstor.org.

[7]. Edwards, J., 1952, 'Knowledge in Statutory Offences', *The Modern Law Review* 15(2), 223-229, retrieved from http://www.jstor.org.

[8]. Edwards, J., 1954, 'The Criminal Degrees of Knowledge', *The Modern Law Review (Criminal Law)* 17(4), retrieved from http://www.jstor.org.

[9]. Fok, PJ, 2015, 'The importance of the rule of law to a corruption-free future', in *A Future Without Corruption – One Vision, Multiple Strategies,* 6thICAC Symposium, Keynote Address, Hong Kong, May 11-13, 2015, retrieved from http://www.icac.org.hk/symposium/2015/pdf/Justice%20Fok.pdf .

[10]. Fordham Law Review, 1969, 'Discharge in Bankruptcy and Self-Incrimination', *Fordham Law Review* 37, 450-464, retrieved from www.heinonline.org.

[11]. Hechler, H., Zinkernagel, G. F., Koechlin, L & Morris, D., 2011, 'Can UNCAC Address Grand Corruption? A Political Economy Analysis of the UN Convention against Corruption and its Implementation in Three Countries', *U4 Report*, Anti-Corruption Resource Center, retrieved from www.U4.no.

[12]. Jayasuriya, D. C., 1981, 'The Burden of Proof in Drug Offences in Asian Countries and the Influence of English Law', *The International and Comparative Law Quarterly* 30(4), 906-917, retrieved from https://www.jstor.org/journal/intecomplawquar.
[13]. Kemp, John A., 1958, 'The Background of the Fifth Amendment in English Law: A Study of Its Historical Implications', *William & Mary Law Review* 1(2), 247-286, retrieved from http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=3341&context=wmlr.
[14]. Maloney, Richard, 1993, 'The Criminal Evidence (N.I) Order 1988: A Radical Departure from the Common Law Right to Silence in the U.K.?', *Boston College International and Comparative Law Review*, 16(2), 425-465, retrieved from http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1332&context=iclr.
[15]. Martini, M.， 2013, 'Asset declaration regimes in selected Asian countries (U4 Expert Answer 381)', *U4 Anti-Corruption Resource Centre*, pp.1-11, CMI, Norway, retrieved from https://assets.publishing.service.gov.uk/media/57a08a01e5274a27b2000391/expertanswer-381.pdf.
[16]. Muzila, L., Michelle M., Marianne M., & Tammar B., 2012, *On the Take: Criminalizing Illicit Enrichment to Fight Corruption*, World Bank, Washington, retrieved from https://star.worldbank.org/star/publication/take-criminalizing-illicit-enrichment-fight-corruption.
[17]. Payn, Howard, 1888, *Merchandise Marks Act 1887 with Special Reference to the Importation Sections and the Custom Regulations & Orders Made Thereunder*, Stevens & Sons (Law Publishers & Booksellers), London.
[18]. OECD, 2013, *Investigation and Prosecution of Corruption: Bribery, Illicit Enrichment and Liability of Legal Persons*, Proceedings of the Regional Seminar at Batumi, Georgia on 25 – 26 September 2012, retrieved from http://www.oecd.org/corruption/acn/ACNBatumiSeminarProceedingsSep2012ENG.pdf.
[19]. St. John's Law Review, 2013, 'Privileged Testimony Under the Bankruptcy Act', *St. John's Law Review* 28(2), retrieved from http://scholarship.law.stjohns.edu/lawreview/vol28/iss2/5.
[20]. United Nations, 2006, *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, United Nations, New York.
[21]. United Nations, 2015, *State of Implementation of the United Nations Convention against Corruption*. United Nations, New York.
[22]. Wilsher, D. , 2006), 'Inexplicable Wealth And Illicit Enrichment Of Public Officials: A Model Draft That Respects Human Rights In Corruption Cases', *Crime, Law and Social Change, 45(1), 27–53*.
[23]. **Yang, Eric, 2012, 'Experience of the Independent Commission Against Corruption', in** OECD, 2013, *Investigation and Prosecution of Corruption: Bribery, Illicit Enrichment and Liability of Legal Persons, Proceedings of the Regional Seminar,* Batumi, Georgia, September 25 – 26, 2012, pp. 50-71, retrieved from http://www.oecd.org/corruption/acn/ACNBatumiSeminarProceedingsSep2012ENG.pdf.

Constitutions

[24]. The Amendments to the Constitution of the United States of America, retrieved from https://www.gpo.gov/fdsys/pkg/GPO-CONAN-1992/pdf/GPO-CONAN-1992-7.pdf.
[25]. The Constitution of India 1949 (As modified up to the 1st December, 2007), retrieved from http://lawmin.nic.in/coi/coiason29july08.pdf..
[26]. The Constitution of the Republic of South Africa 1996 (as amended), retrieved from http://www.justice.gov.za/legislation/constitution/SAConstitution-web-eng.pdf.

Legislation

[27]. The Bribery Act, No 11 of 1954 of Sri Lanka as amended, retrieved from https://www.ciaboc.gov.lk/images/Publications/Bribery_Act_english.pdf
[28]. Criminal Evidence Act (Northern Ireland) 1923, retrieved form http://www.legislation.gov.uk/apni/1923/9.
[29]. Criminal Evidence (Northern Ireland) Order 1988, retrieved from http://www.legislation.gov.uk/nisi/1988/1987/made.
[30]. Firearms Act 1968 of the United Kingdom retrieved from http://www.legislation.gov.uk/ukpga/1968/27/contents.
[31]. Hong Kong Bill of Rights Ordinance, Chapter. 383, 1991, retrieved from http://www.hab.gov.hk/file_manager/en/documents/references/papers_reports_others/human_rights/CAT2_Annex2_e.pdf.
[32]. Hong Kong Prevention of Bribery Ordinance, 1971, retrieved from https://www.elegislation.gov.hk/hk/cap201.
[33]. Human Rights Act 1998 of the United Kingdom, retrieved from http://www.legislation.gov.uk/ukpga/1998/42/contents.
[34]. Insolvency Act 1986 of the United Kingdom, retrieved form http://www.legislation.gov.uk/ukpga/1986/45/pdfs/ukpga_19860045_en.pdf.
[35]. Misuse of Drugs Act 1971 (Chapter 38) of the United Kingdom, retrieved from http://www.legislation.gov.uk/ukpga/1971/38/contents.
[36]. Road Traffic Act 1988 of the United Kingdom, retrieved from http://www.legislation.gov.uk/ukpga/1988/52/contents.
[37]. Road Traffic Offenders Act 1988 of the United Kingdom, retrieved from http://www.legislation.gov.uk/ukpga/1988/53/contents.
[38]. Sexual Offences Act 1956 of the United Kingdom, retrieved from http://www.legislation.gov.uk/ukpga/Eliz2/4-5/69/contents.
[39]. Supreme Court Act 1981 (Chapter 54 Arrangement of Sections) of the United Kingdom, retrieved from http://www.legislation.gov.uk/ukpga/1981/54/pdfs/ukpga_19810054_en.pdf.

International/Regional Conventions

[40]. African Charter on Human and Peoples' Rights (1981), retrieved from https://treaties.un.org/doc/Publication/UNTS/Volume%201520/volume-1520-I-26363-English.pdf.
[41]. African Union Convention on Preventing and Combating Corruption (AUCPCC) 2003, retrieved from http://www.jus.uio.no/english/services/library/treaties/04/4-04/combating-corruption.xml.
[42]. Arab Charter on Human Rights (1994), retrieved from http://www.humanrights.se/wp-content/uploads/2012/01/Arab-Charter-on-Human-Rights.pdf.
[43]. Economic Community of West African States' (ECOWAS) Protocol 2001, retrieved from https://eos.cartercenter.org/uploads/document_file/path/406/ECOWAS_Protocol_on_Corruption.pdf.
[44]. European Convention for the Protection of Human Rights and Fundamental Freedoms (or European Convention on Human Rights) (1950), retrieved from https://www.echr.coe.int/Documents/Convention_ENG.pdf.
[45]. Inter-American Convention against Corruption (IACAC) 1996, retrieved from https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/11/14/iacac.pdf.
[46]. Inter-American Convention on Human Rights (1969), retrieved from https://treaties.un.org/doc/Publication/UNTS/Volume%201144/volume-1144-I-17955-English.pdf.
[47]. International Covenant on Civil and Political Rights (1966), retrieved from https://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf.
[48]. Rome Statute of the International Criminal Court (1998), retrieved from https://treaties.un.org/doc/Treaties/1998/07/19980717%2006-33%20PM/English.pdf.
[49]. United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984, retrieved from http://www.un.org/documents/ga/res/39/a39r046.htm.
[50]. United Nations Convention against Corruption 2004, retrieved from https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf.

[51]. United Nations Universal Declaration of Human Rights (1948), retrieved from http://www.jus.uio.no/lm/un.universal.declaration.of.human.rights.1948/portrait.a4.pdf.

Case Law

[52]. *Attorney General for Hong Kong v. Hui Kin Hong* [1995] HKCA 351.
[53]. *Attorney General for Hong Kong v. Reid* [1993] UKPC 2.
[54]. *Babar Ahmad & Others v. the United Kingdom* [2010] ECHR 1067 (App No 24027/07).
[55]. *Brown v. Stott* [2001] 2 WLR 817.
[56]. *C Plc v. P & Anor* [2007] 3 WLR 437.
[57]. Conjoined judgments of *Attorney General's Reference No 4 of 2002 Lambert v. R* [2001] UKHL 37.
[58]. *Deyemi & Anor, R v* [2007] EWCA Crim 2060.
[59]. *Director General, Commission to Investigate Allegations of Bribery and Corruption Vs. S.B. Dissanayake* CALA 299/2005 (Reported in 2005 2SLR 258).
[60]. *Funke v. France* 10828/84 [1993] ECHR 7.
[61]. *Garycki v. Poland* [2007] ECHR 112 (App No 14348/02).
[62]. *Heaney and McGuinness v. Ireland* [2000] ECHR 684.
[63]. *John Murray v. United Kingdom* [1996] IIHRL 9.
[64]. *Jalloh v. Germany* [2006] ECHR 721 (Application no. 54810/00).
[65]. *Lambert v. R* [2001] UKHL 37.
[66]. *Mamatkulov and Askarov v. Turkey* [2005] ECHR 64 (App No 46827/99 ; 46951/99).
[67]. *Mok* ***Wei Tak v. The Queen*** [1990] 2 AC 333.
[68]. *O'Halloran and Francis v. United Kingdom* [2007] (App Nos15809/02 and 25624/02).*Ltd v. Z* [2005] EWHC 238 (Ch).
[69]. *Perumal v. Arumugam* [1939] 40 N.L.R. 532.
[70]. *R. v. Cohen* [1951] 1 K.B. 505.
[71]. *R v. Cox* CA343/89 [1990] NZCA 13.
[72]. *R. v. Hertfordshire County Council, Ex Parte Green Environmental Industries Ltd and Another* [2000] 2 AC 412.
[73]. *R v. K* [2001] UKHL 41.
[74]. *R. v. Kearns [2002]* EWCA Crim 748.
[75]. *R v. McNamara* [1988] 87 Cr App R 246.
[76]. *R. v. Pince* (1875) 2 C.C.R. 154.
[77]. *R. v. Waller* [1991] Crim LR 381.
[78]. *R v. Warner* [1969] 2 AC 256 (HL).
[79]. *Reynolds v. G. H. Austin & Sons, Ltd.* [1951] 2 K.B. 135.
[80]. *Rochin v. California*, 342 U.S. 165 (1952).
[81]. *Roper v. Taylor's Central Garages (Exeter) Ltd.* [1951] 2 T.L.R. 284.
[82]. *Salabiaku v. France* [1988] ECHR 19 (App No 10519/83).
[83]. *Saunders v. the United Kingdom* [1996] ECHR 65.
[84]. *Sherras v. De Rutzen* [1895] 1 Q.B. 918.
[85]. *Sheldrake v. Director of Public Prosecutions* [2004] UKHL 43.
[86]. *Simon v R* [2017] NZCA 277.
[87]. *Sweet v. Parsley* [1969] UKHL 1.
[88]. *The State of Malawi v. Mzumara* (Crim. Case Number 47 of 2010).
[89]. *Tehan v. Shot* 382 U.S. 406 (1966).
[90]. *Ullmann v. the United States* [1956] 350 U.S. 422.
[91]. *Wanigasekar Vs. Republic of Sri Lanka* (79 NLR 241).
[92]. *Warner v. Metropolitan Police Commissioner* [1968] 2 All E.R. 356.
[93]. *Woolmington vs. DPP* [1935] UKHL1.
[94]. *X v. United Kingdom* (1972) ECHR 42 CD 135 (App No 5877/72).
[95]. *Zahid v. R* [2010] EWCA Crim 2158.