Gauging the scope of theft as a corruption offence: A misnomer of misappropriation of public funds?

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SUMMARY

Across the globe, the siphoning of public funds has become the new normal within the national social fabric and governance structures. It is increasingly common to hear and see that senior state officials are wealthier than some businessmen. While some state officials have been imprisoned for misappropriating public funds, others have evaded accountability because of their allegiance to the system. However, it is nebulous whether the appropriate criminal charge and nomenclature of the offence should be misappropriating public funds or theft. In this article, we revisit the categorisation of this offense and argue from a jurisprudential analysis in Cameroon, Kenya, Nigeria, and South Africa that it is a misnomer to qualify the offense as the misappropriation of public funds. We contend that it should be given the nomenclature it deserves: theft. Even though we acknowledge that the offense is widely referred to as the misappropriation of public funds, we posit differently and firmly so that such categorisation is sugarcoating it and enabling its perpetrators to continue the act without impunity and fear of social stigmatisation. We rely on a social-legal research approach to investigate this issue.

Keywords: Corruption, governance, theft, misappropriation of public funds, South Africa, Kenya, Nigeria, Cameroon

1 Introduction: The limit of the law?

A noticeable mistake embedded in international, regional, and domestic laws dealing with the misappropriation of public funds is the lack of sufficient clarity and distinction of the term. For example, the United Nations Convention against Corruption (UNCOC),[1] the only international

1 Adopted October 2003 and entered into force in December 2005.

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binding anti-corruption multilateral treaty,[2] does not define misappropriation of public funds. Article 17 of the Convention criminalises misappropriation of property by a public official.[3] Similarly, at the African regional level, the African Union Convention on Preventing and Combating Corruption (AUCPCC) of 2003 neither defines nor explicitly references misappropriation of public funds.[4] The closest explanation of the term in the AUCPCC is Article 4(1)(d). In the African sub-regions, Article 3(1)d of the Southern African Development Community (SADC) and Article 6(1) of the Economic Community of West African States Protocol on the Fight against Corruption (ECWASPC) have similar provisions to Article 4(1)(d) of the AUCPCC.[5] Even though the East African Community (EAC) does not have a regional anti-corruption instrument, the primary commonalities with the above-mentioned instruments are that they do not define misappropriation of public funds. Rather, they urge State Parties to criminalise misappropriation as one of the acts of corruption.

There is an overt lack of definition of misappropriation of public funds, although we attempt to define the term in section 2 below. Even though misappropriation and theft are generally determined by national law,[6] there is still insufficient clarity as to why, until now, the misappropriation of public funds is not considered theft. We argue that this deficiency is catalysed by the failure of the UNCAC and the AUCPCC to explicitly categorise theft as an act of corruption, but urges States to domesticate the ratified instruments. Nonetheless, from an international and regional perspective, the only reference that UNCAC and AUCPCC may be deduced to reference theft is in the context of international cooperation.[7]

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2 D Lingelbach & V Rodríguez Guerra *The Oligarchs' grip: Fusing wealth and power* (2023) 247.

3 United Nations Convention against Corruption, United Nations General Assembly Resolution 58/4, UN GAOR, 58th Session, 51 meeting, UN Doc. A/RES/58/4 (2003).

4 African Union Convention on Preventing and Combating Corruption, July 11, 2003, 43 ILM 5.

5 Southern African Development Community, Protocol against Corruption, 2001.

6 See, for example, section 184 of the Cameroonian Penal Code. It defines misappropriation of public funds as:

> Whoever by any means takes or keeps dishonestly any property, movable or immovable, belonging to, in transmission to or entrusted to the State, or any authority of corporation either public or subject to the administrative control of the state, shall be punished:
> Where the value of the property is more than half a mission francs with imprisonment for life; and
> Where the said value is half a mission francs or less, but over one hundred thousand francs with imprisonment for from fifteen to twenty years;
> Where the said value is one hundred thousand francs or less with imprisonment for from five to ten years and a fine of from fifty thousand to five hundred thousand francs.

7 The Foreword of the UNCAC: 'requiring Member States to return assets obtained through corruption to the country from which they were stolen' and Article 19(3) of the AUCPCC refers to the repatriation of stolen assets.

Accordingly, we hypothesise that the failure to categorise the offence of misappropriation of public funds as theft is hugely problematic. It typifies a gross misnomer and should not be overlooked. The categorisation persuades African legislatures and judiciaries (as it is already the case) to sugarcoat and normalise stealing from the state as 'the misappropriation of public funds' or, better still, to accept that stealing is not corruption. Furthermore, the definition of misappropriation below relates to or raises concerns about theft. For instance, it has been argued that the misappropriation of public funds involves funds or property,[8] as such, we firmly posit that it should be appropriately qualified as theft. Thus, the intentional use of the term 'misappropriation of public funds' in legal instruments and judicial jurisprudence, functions as a euphemism that diminishes conduct that meet the definitional elements of theft. By framing 'theft' in bureaucratic language, legal instruments create a dual system of accountability: one where ordinary citizens steal, and the other where public officials misappropriate public funds. That said, whether the current problematic categorisation of the offence is deliberate or an oversight raises important ethical and intellectual questions about the weight of the offence and the extent to which it can be addressed.

In this article, we set out to critically examine the extent and scope of the offence of corruption as a misappropriation of public funds in Africa with a specific focus on Cameroon, Kenya, Nigeria, and South Africa. We argue that it is a misnomer to call it the misappropriation of public funds, not theft. The focus on these countries is because they represent different regional economic groups: ECOWAS, SADC, EAC, and Economic and Monetary Community of Central African States (known by its French acronym as CEMAC), and recommendations proposed here could have a twin effect on these countries and their Regional Economic Communities (RECs). Accordingly, we review the legal frameworks on the misappropriation of public funds in these countries and argue from a jurisprudential analysis that the jurisprudence in these countries has failed to clarify the qualification of the offence and insist on it being called the misappropriation of public funds. This limitation, in our view, is failing to recognise and criminalise the act of stealing public funds that manifests through misappropriation, embezzlement, diversion, conversion of public funds, and illicit enrichment as theft. This failure has arguably brought about the hoopla about public conduct and malfeasances amounting to corruption. Our argument here is promoted by the desire to provide intellectually stimulating debate that would change this narrative. By changing this narrative, we hope to provide a forward-looking approach to the 'new' categorisation of the crime of the misappropriation of public funds, as theft, and hope its perpetrators would be treated as such, and not as high-profile individuals who are often treated differently in the criminal justice system.

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8 Ashukem 'Towards operationalising Assets Declaration in Cameroon through political will' (2024) *African Journal of International and Comparative Law* 34. https://doi.org/10.3366/ajicl.2024.0472.

The article is structured as follows: In part 2 below, we provide conceptual and legal analysis of theft and misappropriation to set the tone for subsequent arguments raised herein. In part 3, we delve into the jurisprudential analysis of the misappropriation of public funds to highlight the dilemma between it and theft. The last part provides a conclusion and recommendations.

2 Conceptual and legal frameworks

2.1 The elements of theft

Theft is a universal crime.[9] The universality of the crime suggests that it is not restricted to jurisdictional or continental boundaries. Consequently, it is imperative to understand and identify the jurisdictional definitions of the crime. The Cambridge dictionary defines theft as 'the act of dishonestly taking something that belongs to someone else and keeping it'.[10] Similarly, and from a legal perspective, theft may be defined as the 'unlawful appropriation with intent to steal property capable of being stolen'.[11] Drawing from Snyman's definition of theft in South African criminal law, the unlawful and intentional appropriation ought to be of:

> … movable, corporeal property which
> a belongs to, and is in the possession of, another;
> b belongs to another but is in the perpetrator's own possession; or
> c belongs to the perpetrator but is in another's possession and such other person has a right to possess it which legally prevails against the perpetrator's own right of possession provided that the intention to appropriate the property includes an intention permanently to deprive the person entitled to the possession of the property, of such property.[12]

From the foregoing, it is possible to deduce crucial elements that apply to all forms of theft,[13] including: '(a) an act of appropriation; (b) in respect of a certain type of property; (c) which takes place unlawfully and (d) intentionally (including an intention to appropriate)'.[14] For the first element, as will be discussed below, the property must have been appropriated for theft to occur. Notwithstanding reference to South African criminal law, Snyman asserts that an act of appropriation consists of a negative and positive component.[15] The negative

9 RJ Herrnstein & JQ Wilson *Crime and human nature: The definitive study of the causes of crime* (1998)22.
10 C McIntosh (ed) *Cambridge Advanced Learner's Dictionary* 4 ed (2013).
11 J Burchell 'South Africa' in KJ Heller & MD Dubber (eds) *The handbook of comparative criminal law* (2011) 476.
12 SV Hoctor *Snyman's criminal law* 7 ed (2021) 421. At the time of final revision, the 8th edition of Hoctor's *Snyman's criminal law* was not yet accessible to the author.
13 The different forms of theft include removal of property, embezzlement, arrogation of possession, theft of credit, including the unlawful appropriation of trust funds.
14 Hoctor (n 12) 422.

component denotes an instance where an owner is excluded from the property, whilst the positive component occurs where a person exercises the rights of the owner with respect to the property in place of the owner.[16] Concerning the second element, as will be demonstrated below, the elements of theft in South Africa, Kenya, Nigeria, and Cameroon demonstrate that the property in question must be a movable corporeal, belonging to, or owned by someone else, and that the property is capable of being stolen, and being tradable.

Concerning unlawfulness, a person may not be deemed to have appropriated property or taken possession of property belonging to another when there is a ground of justification such as consent, presumed consent and necessity.[17] Furthermore, for intention, *animus furandi* must be present. Thus, negligence does not qualify as a form of culpability for the crime of theft.[18] As such, the intention to steal must include the intention to appropriate; to deprive the owner permanently of his property, or control of the property; knowing that the property is capable of being stolen; and knowingly acting unlawfully tantamount to taking it.[19]

It is important at this juncture to examine and understand the legislative standards and prescriptions of theft in Cameroon, Kenya, Nigeria, and South Africa.

2.1.1 Legislative comparative analysis of theft

2.1.1.1 South Africa

In South Africa, the Prevention and Combating of Corrupt Activities Act 12 of 2004 seeks to, amongst other things, strengthen preventative measures, combat corruption and related offenses, and provide for offences of corruption. Although Parts 1 and 2 are dedicated to offences of corruption, they do not explicitly list theft or misappropriation amongst the offences of corruption. Aside from this, theft is regulated by South African criminal law. The sources of South African criminal law include legislation and common law.[20] As a common law offence, theft is defined as the unlawful appropriation of movable corporeal property belonging to another with the intent to deprive the owner permanently of the property.[21] Disappointingly, the South African Criminal Procedure Act 51 of 1977 does not define theft. Instead, it makes several references to conducts that may be classified as theft. For instance, according to section 95(9) if a property that is claimed to have been stolen is not in

15 Hoctor (n 12) 434. See also, JM Burchell *Principles of Criminal Law* 3 ed (2005) 787.
16 Hoctor (n 12) 434. See also, Burchell (n 15) 787.
17 Hoctor (n 12) 428.
18 CR Snyman *Criminal Law* 6th edition (2014) 484.
19 Snyman (n 18) 484-485.
20 DG Kleyn & F Viljoen *Beginner's guide for law students* 4 ed (2010) 39.
21 South African Police Service 'Common law offences – definitions' https://www.saps.gov.za/faqdetail.php?fid=9 (accessed 27 March 2025).

the physical possession of the owner at the time of the theft, but in the custody of another person acting on behalf of the owner, in the charge of theft, it shall be sufficient to state that the property was in the lawful custody and control of that person.

Relatedly, section 100 provides that, if a person entrusted with money or property is charged with theft, the charge may state 'a general deficiency in a stated amount notwithstanding that such general deficiency is made up of specific sums of money or articles or a sum of money representing the value of specific articles, the theft of which extended over a period'.[22] In other words, it may not be necessary to list all instances of theft separately; rather, the prosecution may charge the shortfall in a specific amount even if it was over some time. Additionally, section 243 deals with evidence of receipt of money or property and general deficient on charge of theft. The section provides that when a person is charged with theft, evidence of receipt of money or property, and evidence of a general deficiency will be deemed admissible to prove the theft. Read together, sections 100 and 243 are framed for situations whereby a person entrusted with money or property diverts or misappropriates it – thus equally applicable to public officials. Thus, the Criminal Procedure Act accommodates the misappropriation of public funds within the framework of theft underscoring that the legislature recognises such conduct as theft. The hesitation or unwillingness of legal frameworks and judicial interpretations to describe such conduct as theft is unjustified. It is clear that the linguistic preference for misappropriation of public funds over 'theft' is a political choice in order to minimise accountability.

2.1.1.2 Kenya

The Anti-Corruption and Economic Crimes Act of 2003 is amongst Kenya's primary anti-corruption legislation enacted 'to provide for the prevention, investigation, and punishment of corruption, economic crimes, and related offences'.[23] Part V of the Act provides for offences and related offences. Misappropriation and theft are not included or classified as acts of corruption under Part V of the Act. Contradictorily, in defining corruption, section 1 of the Act stipulates that corruption means embezzlement or misappropriation of public funds. However, it does not define misappropriation.

Various legislative frameworks synonymise theft with stealing, and at times utilise both words interchangeably.[24] For instance, aside from the Anti-Corruption and Economic Crimes Act of 2003, the 2012 Kenyan Penal Code explicitly criminalises theft. Section 268 of the Kenyan Penal

22 South African Criminal Procedure Act 51 of 1977.
23 Anti-Corruption and Economic Crimes Act 3 of 2003. Other primary legislation includes the Anti-Bribery Act 47 of 2016 and the Ethnics and Anti-Corruption Commission Act 22 of 2011.
24 CA Lindberg (ed) *Oxford American desk dictionary & thesaurus* 3 ed (2010) 758.

Code defines stealing as fraudulently and without claim of right taking anything capable of being stolen, or fraudulently converting the property for use by any person other than the rightful owner. It further provides instances of intent in which a person commits fraud with the intent to take or convert property.[25] As stated in the section, the *actus reus* (physical element) consists of taking or converting property, capable of being stolen, and fraudulently and without a claim.[26] The *mens rea* (mental element) is set out in section 268(2) of the Penal Code.

2.1.1.3 Nigeria

In 2000, Nigeria enacted a national legislation to prevent and punish corruption practices and other related offences.[27] Sections 8-26 of the Corrupt Practices and Other Related Offences Act set out various punishable corrupt practices. In these sections, theft and misappropriation are not explicitly provided for nor mentioned.

Aside from the Corrupt Practices and other Related Offences Act, Nigeria has two Codes: the Penal and Criminal Code. The Penal Code came into force in September 1960 as applies in the Northern Region of Nigeria. The Criminal Code applies to the Southern Region and is the same as the 1916 Code.[28] Theft is explicitly defined in section 86(1) of the Penal Code. According to the section, anyone who dishonestly takes movable property from another person's possession without their consent, moves that property to take it, is considered to have committed theft. According to the section, the *actus reus* of theft consists of taking movable property, in possession of another, without consent. The element of the *mens rea* for the crime of theft is the intention to act dishonestly.

In contrast, the Criminal Code of Nigeria does not use the term theft. Like the Kenyan Penal Code, the Nigerian Criminal Code uses the term stealing. According to Section 383(1) of the Criminal Code, '[a] person who fraudulently takes anything capable of being stolen, or fraudulently converts to his own use or to the use of any other person anything capable of being stolen, is said to steal that thing'.[29] Section 382 sets out things capable of being stolen; whereas section 383(2) sets out the intentions that lead a person to take or convert anything capable of being stolen. Consequently, the elements of the *mens rea* of theft are contained in section 383(2); and they include an intention to permanently deprive the owner or intent to use the thing as a pledge or security. The *actus reus* of the crime of theft is contained in the elements of fraudulently taking, converting, anything/a property capable of being stolen.

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25 Sec 268(2) of the Kenyan Penal Code.
26 Sec 268(1) of the Kenyan Penal Code.
27 The Corrupt Practices and other Related Offences Act 5 of 2000.
28 See OO Olomola 'Emerging trends in gender violence' in A Raufu, O Olomola & E Mendie *Gender-based violence, law, and African society* (2023) 129.
29 Criminal Code Act, Cap. C.38, Laws of the Federation of Nigeria, 2010.

2.1.1.4 Cameroon

In Contrast to Kenya, Nigeria, and South Africa, the Cameroonian Penal Code is the primary 'anti-corruption' and criminal legislation. Chapter IV, Part B of the Penal Code addresses theft-related offences.[30] While a legislative reading of section 318(1) suggest that it does not explicitly define theft, nevertheless, it provides that the conduct of theft occurs when a person causes loss to another by removing their property. Furthermore, according to section 319, the penalties set out in section 318(1)(c) apply to, amongst others, the unauthorised use of any property to deceive the owner. Moreover, the revised Penal Code of 2016[31] specifically refers to 'public property' for which the word 'property' denotes moveable and immoveable property.

From the foregoing, a comparative analysis of the crime of theft provide insights into the uniformity and differences in defining theft. The above jurisdictional comparison reveals the following criteria:

a The definitional characteristics of theft in Kenya, South, Nigeria, and Cameroon include the fraudulent or dishonest intent; unauthorised taking or appropriation of anything/property; and intent to deprive the owner of the property.
b Kenya and Nigeria do not explicitly use the term theft, in comparison to South Africa and Cameroon.
c The legislative frameworks set out the *actus reus* and *mens rea* in defining theft or the criminal act of stealing.
d The Kenyan Penal Code extensively defines theft.

Evidently, each jurisdiction defines theft in the context of depriving an owner or a person of a thing or movable property, in this context, money. While it is apparent in our view from the foregoing comparative analysis that some provisions do not explicitly refer to the state,[32] the general legal definition of a person includes natural and juristic persons (including the State). Consequently, we posit that the State (through its appointed and elected government officials who perpetrate the misappropriation of public funds) commits theft.

2.1 Misappropriation of public funds and embezzlement

Although businessmen and politicians are diverse groups with varying degrees of wealth, it can be argued that, because politicians often amass most of their wealth by misappropriating large sums of public funds, some might be richer than some businessmen. This view is informed by the fact that politics does not generate as much money as business does. But today, it is common to hear about politicians and top government officials having astronomical wealth gotten through misappropriation.

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30 Law 2016/007 of 12 July 2016 Relating to the Penal Code, amended the Penal Code.
31 See Law 2016/007 of 12 July 2016, Relating to the Penal Code.
32 See sec 268 of the Kenyan Penal Code and sec 318 of the Cameroon Penal Code.

For example, the Nguema family of Equatorial Guinea is reported to be the richest family in the country, and their wealth is reportedly linked to their reckless looting of the country's wealth. Relatedly, the late former Nigerian President, Sani Abacha's ill-gotten wealth is reported to be more than the state treasury. Furthermore, according to reports, large sums of money were discovered in the residence of late former National Assembly Speaker Cavaye Yéguié Djibril following the sealing of parts of the property after his death. Officials including judicial and security authorities reportedly carried out an operation during which cash allegedly estimated at about 155 million CFA francs was found inside a safe.[33]

However, as Urban has argued, the reverse will be possible if a businessman transitions into politics after making money from their businesses.[34] Despite the glaring difference between misappropriation of public funds and embezzlement,[35] we take it for granted to clarify that misappropriation of public funds and embezzlement are used in this article to mean the same thing because they are interrelated.[36] As Mangoyi points out, funds that are often lost through misappropriation or embezzlement are meant for the provision of public goods and are diverted for private gain.[37] As such, when public funds are misappropriated for private gain, it becomes embezzlement. As a manifestation of corruption,[38] misappropriation of public funds, or embezzlement, is a white-collar crime perpetrated by top government and appointed officials who intentionally misappropriate assets or

33 Gina's Inform (8 May 2026) https://www.facebook.com/ginainforms.17/posts/large-sums-of-cash-found-in-cavaye-y%C3%A9gui%C3%A9-djibrils-residenceaccording-to-reports/1648343686205595/ (accessed 28 May 2026).

34 J Urban 'Are businessmen a benefit to public policy? And if so, what specifically can they offer?' (2021) *SHS Web of Conference* 1-2.

35 See 'Embezzlement and the misappropriation of assets' https://www.mbmtlawfirm.com/blog/2024/10/embezzlement-and-the-misappropriation-of-assets/ (accessed 28 May 2026); 'Understanding embezzlement and the misappropriation of assets' https://grandlaw.com/blog/2021/07/understanding-embezzlement-and-the-misappropriation-of-assets/ (accessed 28 May 2026).

36 On the relationship between embezzlement and misappropriation of public funds, see CA Akujuru & WS Ajiegbu 'Public financial management and accountability in Rivers State: Addressing challenges in preventing fund misappropriation, 2015-2024' (2025) 2(6) *RJIP – Journal for Social Sciences* 761-772; AB El Yaqub, I Musa & S Magaji 'Impact of mismanagement and embezzlement of public funds on government parastatals' (2024) 8(1) *Indonesian Journal of Accounting and Governance* 1-18.

37 N Mangoyi 'The taxation of embezzled funds – Are expenses and losses incurred as a result of embezzlement activities tax-deductible?' (2025) 61 https://repository.up.ac.za/server/api/core/bitstreams/58b1b68b-c878-4592-b295-f5db9dd59c30/content (accessed 28 May 2026).

38 DO Odeleye 'Legal constitutional measures in curbing corruption in Nigeria Before 2000' (2009) *BiAnnual Journal of Public Law* 178 http://dx.doi.org/10.2139/ssrn.5041024 (accessed 10 March 2026).

property entrusted to them.[39] As indicated above, there is no clear definition of misappropriation of public funds in laws and policies across the globe. However, we rely on some definitions from dictionaries and scholarly works. According to Akuhfa and Galeha, embezzlement is the ‘act of fraudulently withholding funds or property belonging to the state or any public enterprise’.[40] To the authors, the embezzlement of public funds can deprive people of benefiting from funds to achieve their socio-economic development.[41] This is especially considering that the embezzlement of such funds ‘drains huge proportions of a country’s financial possibilities’,[42] as these funds are now used for private gains. This view was echoed in the Cameroonian jurisprudence of *Moutchipou Seidou et Autre c. Ministère Public*, where the Mfoundi High Court noted[43] that Cameroon’s public institutions have been transformed into personal estates by the political ruling elites and their associates. Akuhfa and Galega posit that embezzlement is nurtured by certain vices practiced in state institutions, including self-gratification, favouritism, greed, and the constant violation of laws regulating the award of public contracts.[44]

On the other hand, the misappropriation of public funds involves the dishonest misuse of public funds entrusted to a public official, for which the official profits or enriches himself.[45] It is rightly described as the ‘intentional, unlawful use of another party’s property for purposes not authorised by the property’s owner. This includes the misuse of public or a company’s funds, trade secrets, data, or other assets by an individual who has access to those things but does not have ownership of them’.[46] Our focus here is on public funds, given the scope of this article. From Cameroon to Uganda, South Africa to Nigeria, Tunisia to Equatorial Guinea, Ghana to Madagascar, the issue of misappropriation of public funds has been normalised within the national social fabric of African governance, despite regulatory laws and policies prohibiting the act. The normalisation has made it impossible to deter its criminals as some have argued that ‘even when committed *en flagrante*, it is trivialised, and consequently, becomes under-reported, under-investigated and under-prosecuted’.[47] Relatedly, the misappropriation of public funds is a

39 Also see Hayes ‘What is embezzlement and how does it happen?’ (2023) https://www.investopedia.com/terms/e/embezzlement.asp (accessed 4 March 2025).
40 H Akuhfa & SD Galega ‘Proceeds of crime and the havoc it is causing to legitimate business in Cameroon’ (2019) *International Journal of Trends in Scientific Research and Development* 840.
41 Akuhfa & Galega (n 40) 840.
42 Akuhfa & Galega (n 40) 840.
43 See Arrêt No 78/CRIM du 27 Juin 2006.
44 See Akuhfa & Galega (n 40).
45 A Agbor ‘Greed and grand corruption nexus: Lessons from Cameroon’ in D Kuwali (ed) *Corruption proofing in Africa: A systems thinking approach* (2024) 29.
46 Helfend Law Group (n/d) ‘The Crime of ‘Misappropriation of Funds’ – What You Need to Know’ https://www.robertmhelfend.com/federal-defense/misappropriation-of-funds/ (accessed 28 February 2025).

serious criminal offence under section 308 and punishable under section 309 of the Nigerian Penal Code Law[48] as applicable to the northern state. Given the seriousness of the offense, one would have expected the Nigerian legislature to categorize the offense as theft, instead of misappropriation of public funds. Nevertheless, even though section 308 does not explicitly define misappropriation, it only prescribes the offence.

Article 184 of the Cameroonian Penal Code[49] defines misappropriation as:

> (1) Whoever by any means takes or keeps dishonestly any property, movable or immovable, belonging to, in transmission to or entrusted to the State, or any authority of corporation either public or subject to the administrative control of the state, shall be punished:
>
> a Where the value of the property is more than half a mission francs with imprisonment for life; and
>
> b Where the said value is half a mission francs or less, but over one hundred thousand francs with imprisonment for from fifteen to twenty years;
>
> c Where the said value is one hundred thousand francs or less with imprisonment for from five to ten years and a fine of from fifty thousand to five hundred thousand francs.
>
> (2) The penalties provided in subsection 1 above may be reduced by mitigating circumstances respectively below 10 (ten), 5 (five), or 2 (two) years, and a suspended sentence may be granted.

It follows from the above that the offence of misappropriation is synonymous with theft (defined above) because it is the intentional and dishonest taking of property (public funds) belonging to another person (the state). We argue that in satisfying the elements of misappropriation, the elements of theft are also met. In other words, misappropriation is synonymous with theft because it is the act of stealing something that you have been asked to take care of, and using it for yourself. Because the requirement of misappropriation is property, which is money (as this is what is often misappropriated),[50] we argue that it is logical to appropriately qualify the offence as theft. Along this line, we align our argument with the Cameroonian jurisprudence of *Tanyi Schwartz and Four Others v The People*,[51] which states that the wording of section 184, 'by any means' resonates with the act of theft and should be treated as such. In this case, the Court of Appeal held that even if the appellants broke into the public office where they took the property falling within

47 AA Agbor 'Prosecuting the offence of misappropriation of public funds: An insight into Cameroon's Special Criminal Court'(2017) 20 *Potchefstroom Electronic Law Journal* 3.

48 See Chap 13. Law to establish the Penal Code for Jigawa State amended by Law 14 of 2012.

49 See Law No 65-LF-24 of 12th November 1965 (Book I of the Penal Code) and Law No 67-LF-1 of 12th June 1967 (Book II of the Penal Code).

50 Ashukem (n 8) 35.

51 Court of Appeal, Northwest Province, Bamenda, Suit BCA/3C/94. Unreported case.

the ambit of section 184, it would be correct and logical to indict, prosecute, and convict them under section 184 because it provides that 'by any means takes or keeps'. Arguably, this wording of section 184 suggests that breaking in, the use of force in the acquisition or retention of the property, and climbing in are relevant constitutive material elements for its effective operation. Hence, it is logical, in our view, and as pointed out by the High Court of the Mezam Division in *The People of Cameroon v Killi James and Mbanong Christian*,[52] that the mode of participation under section 184 is immaterial if the taking or keeping was done dishonestly. These constitutive material elements, as echoed by the above jurisprudence, are analogous to the material elements of theft described above. As such, we argue that although not explicitly provided in the legislation as seen above, it would have been apposite for lawmakers to qualify the offence of the misappropriation of public funds as theft. Whether the courts in Cameroon, Kenya, Nigeria, and South Africa have been able to use their interpretative skills to read meaning into this offence is determined below.

3 A misnomer?

Generally, anti-corruption institutions such as Cameroon's National Anti-Corruption Commission (known by its French acronym as CONAC), or the Economic and Financial Crimes Commission (EFCC) of Nigeria, or the Ethics and Anti-Corruption of Kenya (EACC), and Anti-Corruption Task Team (ACTT), or the National Prosecuting Authority (NPA) of South Africa are some of the specialised institutions established to implement anti-corruption legislative frameworks or general criminal agencies that investigate allegations of corruption. African domestic courts, including the Special Criminal Court (SCC) in Cameroon and the anti-corruption institutions mentioned above, have been able to investigate and issue solid pronouncements on the misappropriation of public funds. Despite this laudable move, it is nonetheless disappointing that none of these judgments have been linked to theft. In the following section, we examine some jurisprudences from Cameroon, Kenya, Nigeria, and South Africa to highlight this gap.

3.1 Kenya

The EACC is the primary anti-corruption institution in Kenya. It was established by section 3(1) of the Ethics and Anti-Corruption Commission Act 22 of 2011. At the time of writing, the 2022 annual report is available on the EACC website. According to the report, 60 cases on corruption, economic crimes, and unethical conduct were finalised during the reviewed year: 30 convictions, 27 acquittals, and 3 withdrawals.[53]

52 Suit HCMB/24C/2014. Also see *Tanyi Schwartz, Egbe Samuel, Eyong Fidelis v The People* Suit No BCA/3C//94. Court of Appeal, North West Province, Bamenda; Emmanuel *et al* case.

53 Ethics and Anti-Corruption Commission 'Report of activities and financial statements for the financial year 2021/2022' (15 December 2022) 27.

There are several cases and investigations on misappropriation of public funds conducted by the EACC. In *Ethics & Anti-Corruption Commission v Geoffrey Kimonge Mbogho*,[54] the EACC sought judgment against Mbogho, a government official; declaring that the sum of Ksh. 13 977 978,00 was illegally and fraudulently acquired by Mbogho.[55] According to the EACC, Mbogho fraudulently acquired public funds in the said amount in the form of imprest, allegedly taken as allowance for County Assembly Wards and staff of the County Government of Taita Taveta.[56] The funds were never paid to the officers. Moreover, the EACC alleged that Mbogho unjustly enriched himself at the expense of the public.[57] Notwithstanding the inconsistency in the alleged amount, the Court held that Mbogho fraudulently obtained public funds and was ordered to pay the sum of Ksh.12 458 990 to the Government of Kenya.[58]

In the 2020 EACC Third Quarterly Report, the EACC initiated an investigation following reports of misappropriation of public funds by the Governor, Migori County Government. The findings of the investigation were that several companies were established, run by the Governor's proxies and County employees; they received a total of Ksh. 1 293 003 349,29 from the Migori County Government for services rendered. Whilst the EACC was unable to determine whether the tenders were lawfully awarded to the companies, it was revealed that after the payments were made, some funds were transferred to the Governor's children's bank accounts and used to pay school fees, medical bills, upkeep, and to purchase vehicles. Moreover, one of the proxies also bought a house. Consequently, the EACC submitted a report to the Director of Public Prosecutions recommending prosecution.[59]

The recommended investigations by the Commission of the Governor of Migori County Government were not classified as theft despite the conduct clearly depicting the unlawful taking of public funds for private gain. Similarly, in the *Mbogho* case, the defendant was not charged nor accused of theft despite the act of justified enrichment of public funds. Instead, the EACC characterised the conduct as illegal and fraudulent acquisition of funds and a breach of public trust. The defendants' conduct satisfies the elements of theft outlined above – this buttressed the argument that law and judicial interpretation systemically and intentionally shield public officials from criminal accountability. All these cases demonstrate a consistent and deliberate framing of acts public officials who take public funds for private gains as misappropriation and not theft.

54 Chief Magistrate's Court at VOI, Civil Suit E 131 of 2022.
55 Para 1.
56 Para 4.
57 Para 7.
58 Paras 50-51.
59 The Ethics and Anti-Corruption Commission 'The 3rd Quarterly Report covering the period from 1st July 2020 to 30th September 2020' (September 2020) 5.

3.2 South Africa

There are several anti-corruption institutions in South Africa. The primary anti-corruption institutions include the NPA, the Office of the Public Protector (OPP), the South African Police Service Crime Intelligence (SAPS Crime Intelligence), and the Special Investigating Unit (SIU). Besides reports by the OPP, these institutions do not provide detailed reports following the outcomes of their investigations.

In 2025, the SIU reported that it had obtained an interim interdict from the Special Tribunal to prevent the sale of an immovable property owned by Adv William Elias Huma, following ongoing corruption-related investigations. Whilst serving as a board member of the National Lotteries Commission, the findings of the SIU investigations reveal that Adv Huma misappropriated funds allocated for community projects. Adv Huma allegedly transferred the funds through various entities controlled by his family.[60]

The OPP is an independent state institution established in terms of section 181 of the South African Constitution.[61] The primary mandate of the OPP is to investigate, report on, and provide recommendations regarding improper conduct in state affairs.[62] Similar to the EACC, the OPP has issued several corruption-related reports. An example of a report of misappropriation of public funds is the 2008 report on the allegations of the misappropriation of public funds by Mr Malusi KN Gigaba, former Deputy Minister of Home Affairs (DOHA). The report offers insights into the investigation of allegations of misappropriation by Deputy Minister Gigaba.[63] This investigation was prompted by several reports alleging that Mr Gigaba sent his wife bouquets of flowers at the expense of the DOHA. [64] Moreover, it was alleged that the office of Mr Gigaba purchased flight tickets, rented cars for several individuals who were associated with a private organisation he established to manage his ministerial office.[65] In responding to the allegations, Mr Gigaba admitted to the alleged and stated that he will reimburse the Department for the expenses incurred.[66] The OPP was satisfied that the allegations of misappropriation of public funds were substantiated,[67] and

60 The Republic of South Africa 'Special Investigating Unit obtains interim interdict against former NLC board member' (27 February 2025) https://www.gov.za/news/media-statements/special-investigating-unit-obtains-interim-interdict-against-former-nlc-board#: ~ :text = The % 20SIU % 20investigation % 20has % 20uncovered,projects % 20that % 20were % 20never % 20completed (accessed 29 March 2025)
61 The Constitution of the Republic of South Africa, 1996.
62 Sec 182 of the Constitution of the Republic of South Africa, 1996.
63 Report of the Public Protector, *Report on An Investigation into Allegations of the Misappropriation of Public Funds by The Deputy Minister Of Home Affairs,* Mr M K N Gigaba MP (2009) para 1.
64 Para 2.1.
65 Para 2.1.
66 Para 2.2.
67 Para 11.1.

recommended that the Speaker of the National Assembly take appropriate action.[68] From this report, it is clear that the classification of Mr Gigaba's conduct as 'irregular and fruitless wasteful expenditure' illustrates sugar-coating of unlawful conducts by public officials.

In March 2014, the OPP released a *Report on an Investigation into Allegations of Impropriety and unethical conduct relating to the installation and implementation of security measures by the Department of Public Works at and in respect of the private residence of President Jacob Zuma at Nkandla in the KwaZulu-Natal province.* The investigation concerned allegations of improper conduct and expenses to the state for security installations and related measures at the private dwelling of the former president, Jacob Zuma.[69] The Public Protector found, among other things, that the expenses the state incurred were excessive and constituted misappropriation of funds. Moreover, the former president was ordered to pay a reasonable percentage of the cost as determined by the National Treasury.[70] In March 2016, the Constitutional Court found that the remedial action taken by the Public Protector (requiring the former president to repay the money) was binding.[71] The National Treasury recommended that R7.81 million be paid back.[72] In September 2016, the National Treasury confirmed that the former president paid back the money.[73] This is a classic case illustrating the use of public funds for private gains, yet the diversion of public funds was not classified as theft. The OPP's findings were not premised on the legal conclusion that the former president stole public funds – instead, they found that his conduct was improper, unethical, and thus maladministration. Unsurprisingly, the recommendation by the OPP administrative was repayment and disciplinary actions.

In another October 2021 report, the OPP released findings concerning allegations of corruption and misuse of public funds amounting to R1 million by government officials from the Mbizana Local Municipality (the MLM) and the Eastern Cape Provincial Government Departments (ECPG) with the assistance of a local businessman, Mr L E Bam (Mr Bam) in respect of the memorial service of Ms Winnie Madikizela-Mandela.[74] The OPP found that at least R1 100 000 was irregularly deposited and subsequently misappropriated to improperly benefit certain government

68 Para 16.1.
69 *Report on an Investigation into Allegations of Impropriety and unethical conduct relating to the installation and implementation of security measures by the Department of Public Works at and in respect of the private residence of President Jacob Zuma at Nkandla in the KwaZulu-Natal province*, Report 25 of 2013/24, paras 4-78 &106-126.
70 As above, paras 11.1.2.
71 See *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC 11.
72 N Turkson 'A bill for the South African President' (2016) *The Atlantic*.
73 Corruption Watch 'Zuma pays back the money, but the damage is done' (2016) https://www.corruptionwatch.org.za/zuma-pays-back-money-damage-done/ (accessed 23 April 2025).

officials and/or private persons, which was substantiated.[75] Similar to the *Nkandla* report, the findings were not premised on theft, nor did the OPP recommend a criminal investigation for prosecution. In fact, the outlined OPP reports demonstrate institutional practice by the OPP not labelling conduct that clearly depicts theft as either issues of maladministration or improper conduct.

The South African case studies underscore the softening of systemic diversion of misappropriation of public funds and recommended remedial actions that are administrative or civil in nature. Arguably, this preference excludes classifying the conduct as theft and the legal consequences arising from such criminal conduct.

3.3 Cameroon

In a country like Cameroon, where underground networks for the commission of crimes, such as the misappropriation of public funds, are the rule rather than the exception, the prevalence and stakes of corruption are very high.[76] Indeed, it is common knowledge that public contracts and public service functions in Cameroon are reserved for close relatives of top government officials. For example, Nathalie Moudiki, wife of the Director General of Cameroon's National Hydrocarbon Corporation (known by its French acronym, SNH), recently created a new energy company, CSTAR. The company signed a contract with Tradex, Ariana Energy, and SNH to build a new oil storage facility in Kribi. Her appointment to lead the new extraction company has sparked

74 See *Report on an investigation into allegations of corruption, maladmnistration or misuse of public funds by senior and executive government officials from the Mbizana local municipality and Eastern Cape Provincial Government Department(s)* (2021) Report 49 of 2021/2.

75 As above, para 6.

76 For details on corruption in Cameroon, see Ashukem (n 8); A Munyai & J-CN Ashukem 'The political economy of political corruption in 21st century Africa: Perspectives from Cameroon and South Africa' (2023) 27 *Law, Democracy & Development* 330-359 https://doi.org/10.17159/2077-4907-2023-ldd.v27.13; Agbor (n 47); CM Fombad 'Endemic corruption in Cameroon: Insight on consequences and control' in KR Hope & BC Chiluko (eds) *Corruption and development in Africa: Lessons from country case-studies* (2000) 234-260; RTE Orock & OT Mbuagbo '"Why government should not collect taxes": Grand corruption in government and citizens' views on taxation in Cameroon' (2012) 39(133) *Review of African Political Economy* 479-499 https://doi.org/10.1080/03056244.2012.710837; Agbor (n 47) 50-75.

controversy over the award of public contracts.[77] Corruption and the misappropriation of public funds are evident in the private and public sectors of Cameroon. Even so, the focus will be on the public sector, given our article's thematic concern. Nevertheless, sections 134 and 134-1 of the Penal Code criminalise active and passive bribery as aspects of corruption. The Cameroonian Penal Code has partially criminalised embezzlement and misappropriation in sections 184, 135, 318, and 319. Yet, it is disappointing that these sections do not cover the full range of embezzlement, misappropriation, and other diversions of property or funds for the benefit of a public official or another person or entity.[78] Indeed, it is argued that no jurisprudence has demonstrated that private property is covered.[79]

In combatting public sector corruption among elected and appointed government officials in Cameroon, who often misappropriate public funds, the SCC was established in 2011.[80] It has exclusive jurisdiction over certain types of corruption-related offences that meet a certain threshold.[81] It is mandated to investigate, prosecute, and convict government officials and appointees who misappropriate public funds to the value of 50. 000. 000 francs CFA.[82] Over the years, the SCC has ruled against government officials who violated the provisions of section 184 above.[83] In these cases, it is noted that the perpetrators misappropriated astronomical sums of money that are disproportionate to their normal earnings, for which they must account.[84] But in dictatorial regimes such as Cameroon, accountability only occurs when the perpetrator is a

77 Noubissi 'la présidence de l'épouse du DG de la SNH crée la controverse' https://mimimefoinfos.com/la-creation-dune-filiale-petroliere-a-kribi-sous-la-presidence-de-lepouse-du-dg-de-la-snh-cree-la-controverse/ (accessed 5 April 2025).

78 BG Nwnadum 'A legal review of implementation of Chapter Three of the United Nations Convention Against Corruption in Cameroon' (2020) *International Journal of Legal Development and Allied Issues* 159.

79 Nwnadum (n 78) 159.

80 See Law 2011/028 of 14 December 2011 Establishing the Special Criminal Court by amending Law No 2012/011 of 16 July 2012.

81 Ashukem (n 8). Sec 2 of the Law 2011/028 of 14 December 2011 provides: 'The Court shall be competent to hear and determine matters, where the loss amounts to at least 50 000 000 CFA relating to misappropriation of public funds and other related offences provided in the Penal Code and International Convention ratified by Cameroon'. However, there seems to be a contradiction with section 2 of the amended version of Law 2012/011 of 16 July 2012 which provides: 'The Court shall be competent to hear and determine matters of misappropriation of public property and related offences where the value of the loss is at least fifty million (50, 000, 000) francs CFA as provided for by the Penal Code and International Conventions ratified by Cameroon'.

82 Law 2011/028 of 14 December 2011.

83 See for example, Ashukem (n 8) 27; Agbor (n 47) 1-31; Munyai & Ashukem (n 76) 330-359.

84 Ashukem (n 8) 34-35.

presidential aspirant. For example, in *Affaire Ministère Public et Etat du Cameroun c. Atangana Mebara Jean Marie et Jérôme Mendouga*[85] the SCC convicted the defendants of 25 years imprisonment for misappropriating 2.907.500.000 billion FCFA for the purchase of a new presidential jet – a Boeing Business Jet 2 (BBJ-2) – contrary to article 184 of the Penal Code.[86] It should be noted that this was an appeal decision from the Mfoundi High Court and a very controversial political case, given the personalities involved, such that some viewed it as political witch-hunting of these personalities.[87] Detainees like former Minister of Health Urbain Olanguena Awono posited in his book *Mensonges d'Etat* (or *Lies of the State*) that they were prisoners of conscience.[88] Yet, others claimed that their arrests, long detentions, and imprisonments were politically induced.[89] In *Affaire Ministère Public et Etat du Cameroun: La Liquidation CAMAIR c. Yves Michel Fotso*,[90] the defendant was convicted of life imprisonment for misappropriating over 32.4 billion USD.[91] Furthermore, in *Ministère Public et Etat du Cameroun (Ministère de l'Education de Base – Partie Civile) c. Haman Adama nee Halimatou Kangue Maonde, Baoro nee Azo'o Nkoulou Christine, Malonga Isoa nee Nnoukou Annick Joelle, Willayi Richard, Zega Stanislas, Mvondo Nyina Barthelemy, Mbeng Boniface Blaise, Besong John Besong, Ntsama Zoa Pierre, Ngo Um Deborah Angele, Fouda Francois, Matat Joseph, Mekougou Ondoa Joseph and Lebongo Blaise,* the accused were convicted for misappropriation of money for the Department of Basic Education, although judicial processes were later stopped because the defendant promised to paid back the money.[92]

85 See Arrêt No 019/CRIM/TCS of 22 June 2016. Role Général: No 003/RG-TCS/2016.

86 See BBC 'Cameroon "Albatross" jet affair: Ministers arrested' 2012 https://www.bbc.com/news/world-africa-17739359 (accessed 5 March 2025); CamerounWeb 'Inside The Albatross: Anatomy of a corruption scandal' 2024 https://www.camerounweb.com/CameroonHomePage/features/Inside-The-Albatross-Anatomy-of-a-corruption-scandal-315365 (accessed 5 March 2025); Kindzeka 'Cameroon's Anti-Corruption Jailings Questioned' 2014 https://www.voanews.com/a/cameroons-anti-corruption-jailings-questioned/1916162.html (accessed 5 March 2025).

87 Kindzeka 'Cameroon: Corruption crackdown or political witch hunt?' 2016 https://www.voanews.com/a/cameroon-corruption-crackdown-or-political-witch-hunt/3232197.html (accessed 5 March 2025).

88 As above.

89 As above.

90 See Arrêt 011/CRIM/TCS of 29 April 2016. Role General 020/RG-TCS/2015.

91 Independent Corrupt Practices and Other Related Offences Commission 'Former Cameroon airlines boss jailed for life for $ 56M graft' (2016) https://icpc.gov.ng/former-cameroon-airlines-boss-jailed-life-56m-graft/ (accessed 7 March 2025). Also see KH Ndukong 'Cameroon: Special Criminal Court – Yves Michel Fotso gets another life sentence' (3 May 2016) *AllAfrica* https://allafrica.com/stories/201605030623.html (accessed 7 March 2025).

92 Tribunal Criminel Special, Yaoundé, Arret 026/CRIM/TCS du 19 September 2023. Also see V de Paul Tabouli Gornaibele 'Réflexion sur les Fonctions Pénales du Paiement au Cameroun' (2020) *International Multilingual Journal of Science and Technology* 826.

Even though these cases were correctly decided under section 184 of the Penal Code, there was no direct or indirect link to section 320 relating to aggravated theft. Perhaps, it is because of the calibre of persons involved and the offices they hold that the legislator decided to sugarcoat it as the misappropriation of public funds, for which the courts do not see a need to read further meaning into it.

3.4 Nigeria

As elsewhere in Africa, corruption and the misappropriation of public funds have been described as 'a bane to socio-economic development in Nigeria'.[93] This is notwithstanding the statutory provisions[94] empowering the Attorney General and the EFCC as the competent relevant authorities to inspect and prosecute public officials for the misappropriation of public funds.[95] It is reported that the EFCC has investigated over 250 individuals against alleged misappropriation of public funds.[96] According to the EFCC website, some government officials and appointees have been investigated and convicted for misappropriating public funds. For example, in 2020, the EFCC investigated and convicted over 976 cases of government officials and appointees,[97] 2220 cases in 2021,[98] and 3785 cases in 2022.[99] Furthermore, Nigerian courts have been proactive in combating this governance disease. One of the controversial and highly sensitive cases was *Sambo Dasuki (former National Security Adviser) and 5 Others v Federal Republic of Nigeria*.[100] This case involves the investigation of the former Nigerian National Security Adviser, Sambo Dasuki (applicant), who purchased a 127-acre horse farm in South Carolina in 2002.[101] The applicant served as the head of Nigerian security printing and minting, which was charged with, among other duties, printing Nigeria's currency. According to an investigation by the Organized Crime and Corruption Reporting Initiative (OCCRP), the applicant's wife told the US government that her husband obtained the funds through a lobbying contract when he was head of Nigeria's minting operation.[102] In 2015,

93 D Olika 'Taxpayers' right in challenging the mismanagement of public funds in Nigeria: Towards a liberal approach' (2021) *Italian Journal of Public Law* 569-570.
94 See for example, Money Laundering (Prohibition) Act 2011 as amended.
95 Olika (n 93) 569.
96 Ogundipe 'EFCC investigates misappropriation of public funds' 2016 https://www.lexology.com/library/detail.aspx?g=53a5b018-0237-47a6-a89 6-cb153d383b04 (accessed 6 March 2025).
97 Economic and Financial Crimes Commission (2020) https://www.efcc.gov.ng (accessed 5 April 2025).
98 As above.
99 As above.
100 ECW/CCJ/APP/01/16; ECW/CCJ/JUD/23/16) [2016] ECOWASCJ 23 (4 October 2016).
101 PPLAAF 'Nigeria: Disgraced Security Chief buys US horse farm with dubious funds' 2025 https://www.pplaaf.org/2025/02/24/nigeria-disgraced-security-chief-buys-us-horse-farm-with-dubious-funds.html (accessed 10 March 2025).
102 As above.

the applicant was indicted for misappropriating billions (over 2 100 000 000 USD) for the purchase of ammunition and other military equipment to protect the Federal Republic of Nigeria from attacks by Boko Haram insurgents.[103] The Abuja High Court ruled against the applicant. Dissatisfied with the judgment, the applicant appealed to the ECOWAS Community Court of Justice.[104]

Also, in *F.R.N. v EsaiDangaba & 5 Others* the accused were charged on a 20-count amended charge for converting to their use N27.2 billion belonging to the Police Pension Office contrary to section 308 of the Nigerian Penal Code, which provides that 'whoever dishonestly misappropriates or converts to his use any movable property, commits criminal misappropriation'. At the Abuja High Court, they were sentenced to 2 years imprisonment with an option to pay a fine of N250, 000 for each of the 3 counts in the 20-Count amended charge.

The above examples align with the core elements of theft distilled in section 2 above and contextualised in section 3 above. However, it is important to note that the Criminal Code Act and the Penal Code Act do not have the same nomenclature for the offense of 'theft'. This difference in appellation is because the Criminal Code Act applies in Southern Nigeria, while the Penal Code Act applies in Northern Nigeria.[105]

Section 390 of the Criminal Code foreground the offence of stealing and stipulates that 'any person who steals anything capable of being stolen is guilty of a felony, and is liable, if no other punishment is provided, to imprisonment for three years'. Furthermore, section 383(1) of the same Code clarifies on what constitutes stealing by providing that 'a person who fraudulently takes anything capable of being stolen, or fraudulently converts to his own use or to the use of any other person anything capable of being stolen, is said to steal that thing'.

Under section 383 of the Criminal Code Act, theft is qualified as 'stealing.' According to the section, a person steals if they fraudulently and dishonestly take or convert another persons' property capable of being stolen, intending to permanently deprive the owner of it. Section 383(2) enumerates the forms of stealing. It emerges clearly that under the code, the taking of or converting a property is considered fraudulent if done with the intent to permanently deprive the owner or any person with a special interest in the property of its use, pledge the property as security for a loan, put part of the property under conditions the accused knows cannot be fulfilled, or deal with the goods in a manner that prevents them from being returned to their initial state.[106]

103 As above.
104 Suit ECW/CCJ/APP/01/16.
105 VE Ndarake 'A critique of the offences of stealing and theft under the Nigerian criminal jurisprudence' (2024) *Law and Social Justice Review* 47.
106 Ndarake (n 105) 47.

On the other hand, while the Penal Code Act qualifies theft as 'theft', section 286(1) of the Penal Code creates the offence of theft by providing that 'whoever intending to take dishonestly any movable property out of the possession of any person without that person's consent, moves that property in order to take it is said to commit theft'. It is also an offence of theft under section 286(2) of the Penal Code to dishonestly abstract, divert, consume, or use any electricity or electric current. The Penal Code punishes the offense of theft with imprisonment for five years, or with a fine, or both.[107]

Even though this different categorisation in the nomenclature may be misleading and suggest that they are different, we argue that they mean the same thing. Because the appropriation of public funds satisfies the elements of theft (that is, the dishonest and fraudulent taking of money meant to provide social benefits to the public), it should rightly be categorised as such. Our position is informed by the consideration of whether a public official is accused of stealing or theft, the offence is serious since it negatively affects the economic stability of a country.[108]

4 Misappropriation of public funds or theft? A doctrinal analysis

Based on the above jurisprudential analysis, we argue that there is a fundamental disconnect between the misappropriation of public funds and theft. This disconnect is premised on the way that laws and policies have (mis)construed the qualification of the offence of misappropriation of public funds by sugar-coating it. This disconnect is evident from the fact that the legal frameworks governing the misappropriation of public funds in Cameroon, Kenya, Nigeria, and South Africa have failed to criminalise the offence as theft or make a useful connection to it. This is concerning especially given that the act satisfies the core elements of theft: *actus reus* and *mens rea*. The former relates to the actual taking or fraudulent conversion of property (in this case, funds) belonging to the public (citizens). The property in question must be tangible and capable of being stolen, such as money or public funds. In cases of misappropriation of public funds, when tangible property, such as public funds, is stolen by top government officials and appointed officials, it makes sense to qualify the offense accordingly. The latter is the intention to 'fraudulently' (under the Criminal Code) or 'dishonestly' (under the Penal Code) take a (tangible) property.

Instead, the offences are treated differently, although one would have expected the contrary. For example, in Cameroon, the Penal Code has classified the offence of theft into simple and aggravated theft.[109] Indeed, section 318 of the Cameroonian Penal Code relating to theft,

107 Sec 287 of the Nigerian Penal Code
108 Ndarake (n 105) 47.
109 See Law 2016/007 of 12 July 2016 Relating to the Penal Code as amended.

misappropriation, and false pretence explicitly stipulates that 'provided that this paragraph shall apply neither to money loan nor to a consumer goods loan'.

In contrast, South Africa's Prevention and Combating of Corrupt Activities Act 12 of 2004 does not explicitly provide for misappropriation of public funds nor theft as an offence of corrupt activities.[110] That said, the legislature, in enacting the legislation, could have criminalised theft as an act of corruption in section 4(2)(g).[111] This is premised on how the provision satisfies the requirements of theft set out above. That is to say: the act of 'diverting' qualifies as unlawful appropriation; 'any property belonging to the state' also qualifies as the state as an owner; and the act of 'diverting' the property deprives the state of use of the property, and the diversion is done intentionally, considering their entrusted power. The problem seems to stem from what the lawmakers envisaged at the time and from the perceptions of some government officials and politicians. For example, the Nigerian former Chairman of the Independent Corrupt Practices and Other Related Offences Commission is quoted to have said, that 'stealing is erroneously reported as corruption. We must go back to what we were taught at school to show that there are educated people in Nigeria. We must address issues as we were taught in school to do'.[112]

While it is correct, from the jurisprudences above, that the criminal or alleged criminal was guilty of misappropriation of public funds, we strongly feel that the courts and anti-corruption institutions, such as the EACC, could employ their interpretative expertise to read meaning into this crime and refer to it as theft. This is premised on public officials essentially stealing from the state for their private gains and running the economy dry. Consequently, invoking the legislative provision on the misappropriation of public funds is misleading, as it enables government officials to enrich themselves at the expense of local people. Returning to the Dasuki example above and to buttress this submission, Jimmy Kande PPLAAF's Director for Western Africa, posits that

> Dasuki has continued to profit while the Nigerian people bear the brunt of the perpetual misappropriation of public funds in the country. This case is a critical test of the US and Nigerian authorities' commitment to fighting financial crime.[113]

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110 See Chapter 2 of the Prevention and Combating of Corrupt Activities Act 12 of 2004:

111 '(g) diverting, for purposes unrelated to those for which they were intended, any property belonging to the state which such officer received by virtue of his or her position for purposes of administration, custody or for any other reason, to another person …'

112 RA Uzoechi 'Reshaping the amorphous nature of the offence of corruption in Nigeria' (2017) *International Journal of Innovative Research and Development* 114.

113 PPLAAF (n 101).

From the foregoing, we posit that corruption is a sure way of making government officials and other appointees extremely rich. If we agreed that corruption perpetrates the abuse of power for private gains and illegal benefits and enrichment, we concur with Uzoechi that 'monies and funds are things capable of being stolen and are subject to state or public ownership'.[114] For this reason, it is logical that the misappropriation of public funds or embezzlement, diversion, and conversion of public funds typifying acts of corruption amount to stealing and should be investigated, prosecuted, and punished as such. This is because they involve the abuse and misuse of public office for unlawful private gain and illicit enrichment.[115] Hence, stealing should be viewed as corruption and *vice-versa* because it involves embezzlement of public funds. Returning to the earlier argument above that the embezzled funds are things capable of being stolen, it would have been reasonably expected for the lawmakers to correct this anomaly and criminalise the offence as theft. Ultimately, the analysis of legislative frameworks has revealed that most jurisdictions classify the act of taking property without authorisation (for private gains) as misappropriation or abuse of office.[116] The deliberate exclusion of theft as an element of corruption from anti-corruption laws and penal codes creates a legal loophole that allows public officials who divert public funds for their own gain to be charged with misappropriation rather than theft. Consequently, this advances selective accountability. When ordinary citizens unlawfully take another's property with the intent to deprive the lawful owner, they are charged with and convicted of theft. However, when public officials unlawfully divert public funds for their private gains, it is either categorised as mismanagement of state or public funds, misappropriation, or, at times, abuse of office. It is quite clear that there are contradictory standards in criminal law. Truthfully, when a public official takes or diverts public funds for their gains, this amounts to theft. The exclusion of theft as one of the acts of corruption constrains prosecutorial authorities and judicial bodies from charging and convicting for theft, respectively, when the conduct of an alleged accused (public official) meets the legal requirements of theft. We argue that anti-corruption legal frameworks should be amended to explicitly include theft as an unlawful act alongside misappropriation of public funds and other corruption-related offences. Alongside this line of reasoning and from a judicial perspective, we posit that where an alleged corrupt offence falls outside or is not captured within the ambit of the respective anti-corruption law but meets the legal requirements of an offence under criminal law of the respective state, the courts must convict for that offence. In this way, public officials who unlawfully divert, i.e. steal public

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114 Uzoechi (n 112) 114.

115 On 27 October 2017, the Paris Correctional Court sentenced the Vice President of Equatorial Guinea, Teodoro Nguema Obiang Mangue on charges of laundering of proceeds of misappropriation of funds, breach of trust and misuse of corporate assets.

116 See sec 184(4) of the Cameroonian Penal Code and S46 of the Kenyan Anti-Corruption and Economic Crimes Act 3 of 2003.

funds for private gains, should be charged with and convicted of theft and not sugarcoat the offence to misappropriation.

In a sense, the analysis of the legal frameworks of South Africa, Kenya, Nigeria, and Cameroon have demonstrated a major disparity and hypocrisy in accountability for the diversion of public funds by public officials for their private gains. This is primarily due to their anti-corruption legislation failing to explicitly include and criminalise theft as a corrupt offence. Going forward, we rely on the provision of section 6 of the Cameroon Penal Code relating to the abolition of offences, penalty, and measures. According to this section, when a criminal offense such as theft is not explicitly included or explicitly criminalised in anti-corruption legal frameworks, it culminates in selective criminal accountability. It is imperative for anti-corruption legal frameworks to clearly and explicitly classify corrupt offences to promote more than equal justice and accountability, but also the rule of law.

5 Conclusion

Irrefutably, corruption has seeped deep into the fabric of the African polity and system, such that it is now convenient to justify public malfeasances as a class of public misconduct outside the realm of corruption. Indeed, corruption through the misappropriation of public funds is normalised within the ranks and files of selected and appointed government officials in Africa as a way of life, while ignoring the dire socio-economic implications on local people. This statutory limitation, catalysed by the misclassification and/or exclusion of theft, shields public officials from being convicted of thievery following their act of stealing public funds for their private gains. Truly, it is more probable to see government appointees and officials entrusted with the management of state affairs for the benefit of the greater majority, transform state funds into their personal property. They achieve this by looting public resources, giving rise to what is now called grand corruption.[117] Considering that these political elites and other government appointees involved in the misappropriation of public funds, as demonstrated by the jurisprudence above, wield considerable political power, there are often no checks and balances, allowing them to continue looting government coffers as they see fit.

In this article, we have demonstrated the dishonest misuse and abuse of public funds often implicit in legal regimes. We have argued that this categorisation is a misnomer and distorts proper engagement with this wide ranging issue. We further argued that it should be given its proper appellation: theft, because political elites as well as appointed government officials, are stealing from the state's public funds, meant to benefit the people and advance their socio-economic livelihoods. Through this kind of sugar-coated categorisation, convicted government

117 See Munyai & Ashukem (n 76) 330-359.

officials or those found to have acted improperly are not held accountable and given preferential treatment. In other words, the failure to prosecute public officials who misappropriate public funds for their private gains as thieves undermines the principle of equality before the law.[118] Categorising their crime as theft may reduce the unfounded protection they receive. Through this approach, the constitutional right of equality will be strongly enhanced, respected, and protected.

Along these lines, we recommend that legislative provisions in the countries discussed above and in other African countries be amended to reframe the qualification of the crime of misappropriation of public funds as theft. Reframing it in this way will go a long way to addressing the existing misnomer. Accordingly, we strongly believe that it is time for lawmakers and judges to be true and honest to themselves and criminalise the misappropriation of public funds the way it should be criminalised: theft.

118 The principle of equality before the law is a universal principle that is enshrined in Article 7 of the Universal Declaration of Human Rights.