

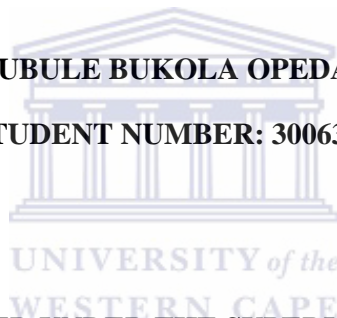
**CIVIL RECOVERY OF CORRUPTLY-ACQUIRED ASSETS: A
LEGAL ROADMAP FOR NIGERIA**

**Research Paper submitted in partial fulfilment of the degree of Master
of Laws: Transnational Criminal Justice and Crime Prevention**

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Key Words

Asset recovery

Forfeiture

Corruption

Embezzlement

Money laundering

Criminal forfeiture

Civil forfeiture

Anti-corruption

Asset freezing

Proceeds



Declaration

I **Okubule Bukola Opedayo** hereby declare that this dissertation is original. It has never been presented to any other university or institution. Where other people's ideas have been used, proper references have been provided. Where other people's words have been used, they have been quoted and duly acknowledged.

Student Name:

Signature:

Date:



List of Abbreviations and Acronyms

UNCAC : United Nations Convention Against Corruption

UNTOC : United Nations Convention Against Transnational Organised Crime

AU : African Union

ECOWAS : Economic Community of West African States

EFCC : Economic and Financial Crimes Commission

ICPC : Independent Corrupt Practices Commission

MLA : Mutual Legal Assistance

FATF : Financial Action Task Force

POCA : Proceeds of Crime Act

ARA : Asset Recovery Agency

CAFRA : Civil Asset Forfeiture Reform Act

CPS : Crown Prosecution Service



Dedication

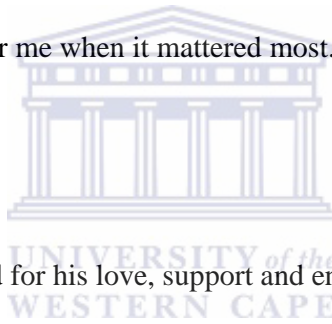
This thesis is dedicated to God Almighty who has been my help in ages past and who is also my hope for years to come. It is also dedicated to my dear husband who has always believed in my dreams.



Acknowledgment

My sincere appreciation goes to God Almighty for endowing me with strength to undertake a research work of this nature. Special thanks to my supervisor, Dr R Koen, for his immense contributions, support and painstaking attention to details.

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CHAPTER 1

GENERAL INTRODUCTION

1.1 Background to the Study

A major problem which many countries of the world have had to contend with is the problem of corruption. Corruption occupies a central place among the many unresolved problems around the globe. This is because of its far-reaching consequences for development.

Corruption hinders economic growth as it reduces foreign direct investment, increases income inequality and raises the cost of providing public services.¹ On the political front, it undermines good governance as it weakens public institutions and damages trust and public confidence in the rule of law. Although corruption is a global phenomenon, developing countries are the worst hit by its consequences because it reduces the effectiveness of aid received from donor countries through diversion of funds from intended projects.² The United Nations and the World Bank estimate that US \$45 billion are lost annually to corruption thereby aggravating the incidence of poverty, disease and environmental destruction across the globe.³

In spite of the wealth of discussion and consensus on the constituents of corruption, the term “corruption” has defied any precise definition. The World Bank has defined it as “the abuse of public office for private gain”.⁴ It has been defined also as “an illegal payment to a public agent to obtain a benefit that may or may not be deserved in the absence of pay-offs”;⁵ and as the promise or giving of any undue payment or other advantages in an attempt to influence

¹ Mauro (1997: 83-87).

² Mauro (1997: 83-87).

³ Moneylaundering.com News (2009).

⁴ World Bank (1997: 12).

⁵ Rose-Ackerman (1999: 9-10).

the decision of a public officer.⁶ Most of the definitions focus on holders of public office and upon bribery as a tool of corruption. However, it is recognised that public office can be abused also for personal benefits in the absence of bribery, through the theft of state assets, embezzlement or diversion of state funds and fraud.⁷

One of the measures developed to combat corruption and reduce its effects is the recovery of corruptly-acquired assets. Asset recovery has become a key policy issue in many countries pursuing national assets in the possession of former rulers and officials found to have engaged in corruption.

The aim of this research paper is to examine the legal framework for the recovery of corruptly-acquired assets, with particular emphasis on the Nigerian situation. Its primary focus is a detailed examination of the legal mechanisms for the recovery of such assets in the context of international asset recovery. Despite the success of the Nigerian government in recovering the *Abacha* loot,⁸ siphoning off of public funds by public office holders continues, and charges of fraud persist against top bank executives alleged to have converted depositors' funds fraudulently. The prevailing criminal or conviction-based forfeiture mechanism in Nigeria appears inadequate to deal effectively with these situations. The need to enhance capacity through the adoption of civil or non-conviction based forfeiture laws therefore becomes imperative.

1.2 Research Questions

The United Nations Convention Against Corruption (UNCAC) makes asset recovery a matter of fundamental principle and obliges States Parties to afford one another the widest measure

⁶ Shleifer and Vishny (1993: 108).

⁷ World Bank (1997: 8).

⁸ Daniel & Maton (2008: 63-78).

of co-operation and assistance in this regard.⁹ The Nigerian government, in response to the call to combat corruption, established the Economic and Financial Crimes Commission in 2003 as the “designated Financial Intelligence Unit (FIU) in Nigeria, which is charged with the responsibility of co-ordinating the various institutions involved in the fight against money laundering and enforcement of all laws dealing with economic and financial crimes in Nigeria”.¹⁰ The legal instrument establishing the Commission was the Economic and Financial Crimes (Establishment) Act of 2002, which was subsequently repealed and replaced by the Economic and Financial Crimes Commission (Establishment) Act of 2004. The latter Act, which contains extensive provisions on financial malpractices, provides only for criminal or conviction-based forfeiture of assets considered to be the proceeds of crimes.

In search of a more effective asset recovery mechanism and in keeping with the spirit and letter of Article 54(1)(c) of UNCAC,¹¹ the Economic and Financial Crimes Commission proposed an Asset Forfeiture bill which makes provision for civil or non-conviction based asset forfeiture.¹² This bill has met with serious opposition from the legislature. The following questions have attracted much debate and call for consideration:

- To what extent has civil forfeiture been effective in recovering corruptly-acquired assets which have been moved to a foreign state?
- Does the adoption of a civil forfeiture mechanism constitute an infringement of the constitutional guarantee of the presumption of innocence and fundamental property rights of an accused person?

⁹ Article 51 of UNCAC.

¹⁰ Section 1(2)(c) of the Economic and Financial Crimes Commission Act 2004. *Laws of the Federation of Nigeria*. Cap E1 2004.

¹¹ Article 54(1)(c) of UNCAC requires States Parties to “consider taking such measures as may be necessary to allow confiscation of such property without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases”.

¹² Ojiabor (2010: 1).

- Should proceedings for civil forfeiture be initiated before or simultaneously with criminal proceedings?
- Should a civil forfeiture law be applied retrospectively to recover criminal assets obtained prior to its enactment?
- Is a separate statute required or can the civil forfeiture law be incorporated into existing legislation?

These five questions constitute the main points of analytical discourse of this research paper.

1.3 Scope of the Research Paper

The thrust of this research paper is civil recovery, which is a remedial mechanism in which a state files a civil action *in rem*, against the property itself, and then proves on a preponderance of the evidence or balance of probabilities that the property was derived from or was used in furtherance of an unlawful activity.¹³ It does not contemplate private civil proceedings in which a state institutes an action *in personam* against a corrupt public official in the civil courts of the foreign jurisdiction where corruptly-acquired assets are found. Also, it does not cover “administrative forfeiture”, which is a non-judicial mechanism for uncontested non-conviction based asset recovery, in which a non-judicial officer issues a declaration of forfeiture.¹⁴

1.4 Significance of the Research Paper

A consideration of the consequences which would flow from the introduction of civil or non-conviction based forfeiture laws into the asset recovery framework of Nigeria is of high significance, not only in determining the measure of future success to be recorded in the area

¹³ Cassella (2009: 41).

¹⁴ Greenberg *et al* (2009: 22).

of asset recovery in Nigeria, but also in acting as a roadmap for other jurisdictions contemplating the introduction of a civil or non-conviction based asset forfeiture mechanism into their asset recovery framework.

1.5 Literature Review

Although asset recovery across borders is not novel, it is only in recent times that states have given consideration to more methodical asset recovery actions.¹⁵ Hence, there are relatively few practitioners with substantial expertise in this area. However, there is a growing crop of publications which deals exclusively with recovering corruptly-acquired assets. These publications emphasise the relevance of civil forfeiture in the fight against corruption.

A popular recent work is Pieth's *Recovering Stolen Assets*. This book is a collection of essays dealing with issues such as the challenges involved in asset recovery, asset recovery systems, success stories in asset recovery and technical assistance under UNCAC. The writers argue that without an effective framework to recover assets corruptly acquired by leaders, development efforts will remain impeded.

Another work that takes this argument in a new direction is Young's *Civil Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime*. It provides a detailed overview of the legal and practical dimensions of civil forfeiture laws, with particular emphasis on their application in ten diverse jurisdictions including the United Kingdom, the United States of America and South Africa. Young's work covers civil forfeiture of all proceeds of crime with little emphasis on corruption.

¹⁵ Smith, Pieth & Jorge (2007: 3).

Also, Greenberg's *Stolen Asset Recovery: A Good Practices Guide for Non-Conviction Based Asset Forfeiture* offers detailed practical guidelines necessary for successful recovery efforts. It features key concepts which are critical for designing and building an effective civil forfeiture regime. Like Young's *Civil Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime*, it relates to civil forfeiture of the proceeds of all crimes without specific reference to corruption.

In addition to the foregoing, there are a number of published articles on the subject. One important article that succinctly demonstrates the prevailing asset forfeiture regime in Nigeria is Olaleye-Oruene's *Nigeria: Confiscation of the Proceeds of Corruption*. Olaleye-Oruene specifically addresses the constraints associated with criminal forfeiture in Nigeria and advocates the adoption of a civil asset forfeiture mechanism. However, the article does not address the legal issues associated with the adoption of such a mechanism. These issues are set out in the research questions above and form the main points of discourse in this research paper.

There remains areas of controversy in the field of asset recovery which touch on serious legal issues, such as the right against self-incrimination in a criminal case, retrospective application of civil recovery laws, interference with property rights and violation of the presumption of innocence. This research paper seeks to complement the above works by considering these legal issues in relation to corruption offences.

1.6 Research Methodology

This research work will entail an analysis of the international instruments regulating asset recovery, particularly UNCAC, the domestic instruments on recovery of criminal assets in Nigeria, especially the Economic and Financial Crimes Commission Act of 2004, as well as a comparative analysis of the civil forfeiture laws of United Kingdom, the United States of America and South Africa. It will examine also recent case law on the subject. Secondary sources in the field of asset recovery such as books, articles and media publications will be utilised also. The methodology is desk-top research supported by internet and library searches.



1.7 Chapter Outlines

The remainder of this research paper is divided into four (4) chapters.

WESTERN CAPE

CHAPTER 2: Legal Framework for the Recovery of Corruptly-Acquired Assets

This chapter will present an analysis of the legal framework for asset recovery in the context of the following international conventions and domestic laws:

International Instruments

- United Nations Convention Against Corruption (UNCAC) of 2005.
- African Union Convention on Preventing and Combating Corruption and Related Offences (AU Convention) of 2003.

- Economic Community of West African Protocol on the Fight Against Corruption (ECOWAS Protocol) of 2001.
- United Nations Convention Against Transnational Organised Crime (UNTOC) of 2003.

Domestic Legislation

- The Constitution of the Federal Republic of Nigeria, 1999.
- The Criminal Code Act, 1961.
- Penal Code Law, 1959.
- Corrupt Practices and Other Related Offences Act, 2003.
- Economic and Financial Crimes (Establishment) Act, 2004.
- Money Laundering (Prohibition) Act, 2004.

CHAPTER 3: Processes and Mechanisms in Asset Recovery

UNIVERSITY of the

This chapter will examine the processes and legal mechanisms involved in the recovery of assets which are the proceeds of corruption, as well as the legal constraints upon said processes and legal mechanisms.

Processes in Asset Recovery

- Asset tracing;
- Asset freezing;
- Asset confiscation/forfeiture; and
- Asset repatriation.

Legal Mechanisms for Asset Recovery

- Criminal or Conviction-Based Asset forfeiture.
- Civil or Non-conviction Based Asset Forfeiture.

Policy and Legal Constraints in Recovery Efforts

Under this heading, an overview of the legal and policy constraints involved in recovering corruptly-acquired assets will be undertaken and reference will be made to the inadequacy of relying solely on a criminal or conviction-based forfeiture mechanism, particularly in seeking mutual legal assistance from a foreign country in which the proceeds of corruption are located.

CHAPTER 4: Issues in Civil Forfeiture

In this chapter, the research questions posed in section 1.2 above will be examined in relation to the practices of other jurisdictions that have incorporated a civil forfeiture mechanism into their domestic laws. The relevant case law will be considered also.

On the question of how effective civil or non-conviction based forfeiture has been in recovering corruptly-acquired assets which have been moved to a foreign state, reference will be made to the application of civil forfeiture laws in the United Kingdom, United States of America and South Africa.

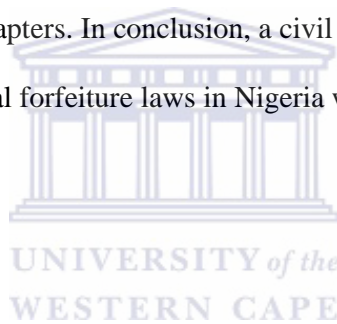
As to whether the adoption of a civil forfeiture mechanism constitutes an infringement of the constitutional guarantee of the presumption of innocence and fundamental property rights of an accused person, reference will be made to the English court's decision in *Walsh v United Kingdom* and emphasis laid on the need to balance the competing interests of the state and the defendant.

As to whether proceedings for civil forfeiture should be initiated before or concurrently with criminal proceedings, reference will be made to the English decisions in *Payton v R* and *Director of the Asset Recovery Agency v Ayodele Olusegun Olupitan & Another*.

Lastly, the question of whether a separate statute is required or whether the non-conviction based forfeiture laws can be incorporated into existing legislation will be examined by drawing inferences from other jurisdictions that have embraced civil forfeiture, as well as considering the consequences that will flow from either option.

CHAPTER 5: Conclusion and Recommendations

This chapter will contain findings based on the case law examined and the comparative analysis done in the previous chapters. In conclusion, a civil forfeiture law which will complement the existing criminal forfeiture laws in Nigeria will be recommended.



CHAPTER 2

LEGAL FRAMEWORK FOR THE RECOVERY OF CORRUPTLY-ACQUIRED ASSETS

Several efforts have been made by the international community and governments of individual states to combat corruption and reduce its adverse effects through the recovery of corruptly-acquired assets. In recent times, asset recovery has evolved as a potent anti-corruption tool. Holders of corruptly-acquired assets suddenly develop shivers when efforts are made to strike at their ill-gotten gains. On the international front, these efforts have found expression in a number of international instruments directed at assisting states in the fight against corruption. These include:

- United Nations Convention Against Corruption (UNCAC) of 2005.
- African Union Convention on Preventing and Combating Corruption and Related Offences (AU Convention) of 2003.
- Economic Community of West African States Protocol on the Fight Against Corruption (ECOWAS Protocol) of 2001.
- United Nations Convention Against Transnational Organised Crime (UNTOC) of 2003.

2.1 United Nations Convention Against Corruption (UNCAC)¹⁶

UNCAC contains seventy-one articles and covers five major areas, namely, prevention, criminalisation, international co-operation, asset recovery and technical assistance. A groundbreaking achievement of the Convention is its asset recovery aspect. Article 51 of UNCAC

¹⁶ UNCAC was adopted by the General Assembly following its resolution 58/4 of 31 October 2003 and it entered into force on 14 December 2005. It has been signed by more than 140 countries and ratified by more than 130 countries. Nigeria ratified UNCAC on 14 December, 2004. See Maton & Daniel (2009: 453).

makes asset recovery a matter of fundamental principle and this is considered its main selling point by most observers.¹⁷ Chapter V of the Convention deals exclusively with asset recovery. However, measures relevant to asset recovery are also dealt with in other parts of the Convention.

2.1.1 Articles 14 and 23: Money Laundering.

Corruption offences are predicate offences for money laundering. The proceeds of corruption offences often are laundered to disguise their illegal origin. Article 14 provides for measures to prevent money laundering and requires that States Parties supervise and regulate financial institutions in order to monitor the movement of cash and negotiable instruments across borders. States Parties are required also to empower authorities engaged in combating money laundering with the means necessary to facilitate exchange of information and also to consider the establishment of a financial intelligence unit to serve as a national centre for the collation and dissemination of information relating to money-laundering.¹⁸

Article 23 obliges States Parties to enact domestic legislation criminalising the laundering of corruptly-acquired assets.

2.1.2 Article 31: Freezing and Confiscation

States Parties are obliged to enact domestic laws establishing measures and procedures for the identification, tracing, freezing and confiscation of assets which are the proceeds or instrumentalities of crimes defined in the Convention. With respect to proceeds of crime which have been transformed into other property, Article 31 provides that such proceeds also shall be liable to freezing or seizure and confiscation. The same measure applies to proceeds which have been intermingled with assets acquired from legitimate sources, with the

¹⁷ Schultz (2007: 2).

¹⁸ See also Article 58 of UNCAC.

exception that the intermingled property shall be liable to confiscation only up to the assessed value of the original proceeds.

2.1.3 Articles 37 and 38: Co-operation

Article 37 obliges States Parties to adopt measures necessary to elicit from suspects information required for purposes of investigation and evidence. Such measures, which are in the form of incentives, include mitigating punishment of suspects who have co-operated substantially in the investigation or prosecution of an offence or even granting immunity from prosecution in such circumstances. The same applies where the suspect gives such co-operation to the competent authorities of another State Party.

Article 38 provides for co-operation among law enforcement authorities and public officials in the supply of information required for evidence and investigation.

2.1.4 Article 46: Mutual Legal Assistance

States Parties are required to provide mutual legal assistance to one another in investigations, prosecutions and judicial proceedings. Article 46(3) provides, *inter alia*, that mutual legal assistance may be required for the recovery of assets under Chapter V of the Convention.

Mutual legal assistance, as required under UNCAC, also covers transmission of information between states where it is believed that such information would aid investigations and criminal proceedings. Although UNCAC recognises that a State Party may decline to process a request for assistance on grounds of absence of dual criminality,¹⁹ it provides an exception

¹⁹ Dual criminality in the context of asset recovery is the principle that a request for mutual legal assistance will be refused for acts alleged as crimes in the requesting state that are not defined as crimes in the requested state.

where the assistance requested does not involve coercive action.²⁰

2.1.5 Article 53: Measures for Direct Recovery of Property

States are required to ensure that appropriate measures are available to enhance direct recovery of assets by other States Parties through civil action. Such measures include compelling payment of compensation by offenders and recognition of a State Party's claim as a legitimate owner of criminal assets.

2.1.6 Articles 54 and 55: International Co-operation

Corruptly-acquired assets are moved abroad often. Hence, States Parties are required to ensure that appropriate measures are available to give effect to an order of confiscation issued by a court of another state. A State Party may also order the confiscation of foreign criminal assets within its jurisdiction. The duty of States Parties with respect to international co-operation also extends to freezing or seizure of assets.

Article 54(1)(c) specifically provides for civil forfeiture of assets. According to its provision, a state is allowed to recover corruptly-acquired property without a criminal conviction where it lacks jurisdiction over the accused person by reason of death, flight or absence.

In terms of Article 55, a requested State Party is required to submit a request received from another State Party for the confiscation of proceeds or instrumentalities of corruption crimes found in its territory to its competent authorities. The same applies to requests based on orders issued by foreign courts.²¹ In the same vein, a requested State Party must take measures to identify, trace and seize proceeds or instrumentalities of corruption crimes for the

²⁰ Informal assistance which does not involve the use of coercive powers by the requested state may be rendered in the absence of dual criminality. Examples include collating publicly available information, taking statements from co-operative witnesses or obtaining information from government departments. See Hofmeyr (2008: 139).

²¹ See Articles 31 and 54 of UNCAC.

purpose of eventual confiscation. The provisions on requests for mutual legal assistance under Article 46 apply, subject to additional requirements with respect to form and content.

2.1.7 Article 57: Return and Disposal of Assets

A State Party is required to dispose of confiscated property to its prior legitimate owners pursuant to the Convention and its domestic law. In doing so, the State Party must take cognisance of the rights of *bona fide* third parties. The requested State Party may deduct expenses incurred in investigations, prosecutions or judicial proceedings leading to the return of the confiscated assets. Also States Parties may enter into agreements or mutually acceptable arrangements for final disposal of such assets.²²

2.1.8 Article 59: Bilateral and Multilateral Agreements and Arrangements

With respect to enhancing international co-operation in all aspects covered by chapter V of the Convention, States Parties shall consider concluding bilateral or multilateral agreements or arrangements.



2.2 United Nations Convention Against Transnational Organised Crime (UNTOC)²³

UNTOC deals narrowly with the problem of corruption in Articles 8 and 9 while it provides for recovery of the proceeds and instrumentalities of crimes in Article 12. Articles 8 and 9 impose an obligation on States Parties to criminalise all forms of corruption and establish measures to prevent detect and punish corruption by public officials.

²² There has been much debate on whether a country returning corruptly-acquired assets is entitled to impose conditions or monitor the use of returned assets. On the one hand, it is argued that such exercise of power over repatriated assets by the requested state is necessary to ensure that the returned assets do not get into the wrong hands. Conversely, it is contended that the requesting state has sovereignty which gives it the right to make decisions on how its repatriated assets would be utilised. The solution lies in balancing both competing interests. For instance, Switzerland, Nigeria and the World Bank entered into an agreement on the use of the returned assets in the Abacha case. See Lugon-Moulin (2008: 303-304).

²³ UNTOC was adopted by the UN General Assembly in its resolution 55/25 of 15 November 2000 and it entered into force on 29 September 2003.

Article 12, which contains provisions on seizure and confiscation of proceeds or instrumentalities of crime, is virtually a replica of Article 31 of UNCAC discussed above.

However, it has been recognised that while there exists some common ground between organised crime and corruption, many forms of corruption do not necessarily involve “organised criminal groups” as defined by UNTOC.²⁴ The problem of corruption thus covers a wider scope and requires a separate convention. This has found expression in UNCAC.

2.3 African Union Convention on Preventing and Combating Corruption and Related Offences (AU Convention)²⁵

The AU Convention is a regional convention which relates exclusively to member states of the African Union.²⁶ The Convention aims at combating corruption and addressing its devastating impact on the political, economic, social and cultural stability of African states.²⁷

In Article 1, “proceeds of corruption” is defined as “assets of any kind, corporeal or incorporeal, movable or immovable, tangible or intangible and any document or legal instrument evidencing title to or interests in such assets acquired as a result of an act of corruption”.

Articles 16, 17 and 18 cover recovery of corruptly-acquired assets.

2.3.1 Article 16: Seizure and Confiscation

States Parties are obliged to enact laws that would enable the identification, freezing or seizure, confiscation and repatriation of the proceeds and instrumentalities of corruption.

²⁴ UNODC (2004: 24).

²⁵ The AU Convention was adopted on 11 July 2003 and it entered into force on August 5, 2006. U4 Anti-Corruption Resource Centre (2007: 1).

²⁶ See the Preamble to the AU Convention.

²⁷ See the Preamble to the AU Convention.

2.3.2 Article 17: Bank Secrecy

States Parties are required to adopt measures to empower its courts and other competent authorities to order seizure or confiscation of banking, commercial or financial documents for use in recovery proceedings. Bank secrecy cannot be used as a defence by unco-operative banks.

2.3.3 Article 18: Co-operation and Mutual Legal Assistance

Article 18 obliges States Parties to afford one another the greatest technical co-operation and assistance in dealing with requests aimed at preventing, detecting, investigating or punishing acts of corruption. This includes exchange of studies, research and expertise on combating corruption.

Nigeria ratified the AU Convention on 26 September 2006.²⁸

2.4 Economic Community of West African States Protocol on the Fight against Corruption (ECOWAS Protocol)²⁹

ECOWAS is a regional organisation formed in 1975 and comprising fifteen West African states. The ECOWAS Protocol was adopted to strengthen efforts in combating and eradicating corruption through co-operation among States Parties. The obligations of States Parties include the establishment of preventive measures against corruption, criminalisation of acts of corruption, international co-operation and follow-up mechanisms. Most importantly, the ECOWAS Protocol provides a framework for the seizure and confiscation of assets in Articles 13 and 15.

²⁸ African Union (2010: 1).

²⁹ The ECOWAS Protocol was adopted on 21 December 2001 but is yet to come into force.

Article 13 provides for the seizure and forfeiture of corruptly-acquired assets. States Parties are required to adopt appropriate measures to facilitate the identification, tracing and seizure of items for eventual forfeiture. Courts must be empowered to order the surrender or seizure of bank or financial documents. Bank secrecy is not a valid reason to refuse a request for assistance by another State Party.

Article 15 makes provision for mutual legal assistance and law enforcement co-operation. It emphasises the need for bilateral or multilateral agreements among States Parties for the purpose of facilitating investigations, prosecutions or other judicial proceedings. Requested States Parties are required also to expedite action on requests submitted by competent authorities of requesting States Parties.

Nigeria has been a member of ECOWAS since its inception.

2.5 Domestic Legislation

In Nigeria, the anti-corruption war has found expression in the establishment of anti-graft institutions and the enactment of a number of anti-corruption laws. The result is that Nigerian law on asset recovery is not contained in a single piece of legislation.³⁰ It is worth mentioning at the outset that the asset forfeiture regime in Nigeria is predominantly conviction-based.³¹ In other words, a criminal offence must be proved first in a court of law before corruptly-acquired assets can be recovered.

The applicable domestic legal instruments are:

- The Constitution of the Federal Republic of Nigeria, 1999.
- The Criminal Code Act, 1961.
- Penal Code Law, 1959.

³⁰ Redpath (2000: 6).

³¹ Redpath (2000: 6).

- Corrupt Practices and Other Related Offences Act, 2003.
- Economic and Financial Crimes (Establishment) Act, 2004.
- Money Laundering (Prohibition) Act, 2004.

2.5.1 The Constitution

The Constitution of the Federal Republic of Nigeria of 1999 is the source of all powers, whether legislative, executive or judicial, and is also the source of all anti-corruption laws.³²

Its most prominent feature is its supremacy.³³ The Constitution contains provisions directed at eradicating corruption through the power of investigation conferred on the legislature,³⁴ audit of public funds by the Auditor-General of the federation,³⁵ and the Code of Conduct for public officers.³⁶ Of all the mechanisms proffered by the Constitution to combat corruption, only the Code of Conduct contains provisions on asset recovery. Thus, in discussing the Constitution, preference will be given to the provisions of the Code of Conduct.

Section 11 of the Code of Conduct obliges a public officer to submit a written declaration of all assets to the Code of Conduct Bureau upon assumption of office or at the end of every four years or term of office. Any asset acquired after declaration which is not fairly proportional to income is deemed to have been acquired in breach of the Code, unless the contrary is proved. Section 15 establishes the Code of Conduct Tribunal to deal with complaints of corruption against public servants for breaches of the provisions of the Code.

³² Ojo (1987: 81-82).

³³ Section 1 of the Constitution provides as follows: "This Constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria." Thus, any law that is inconsistent with the provisions of the Constitution is null and void to the extent of its inconsistency. See section 1(3) of the Constitution.

³⁴ See sections 88 and 128 of the Constitution.

³⁵ See section 125 of the Constitution.

³⁶ Part 1 paragraphs 1-13 of the fifth schedule to the Constitution. The provisions of the Code of Conduct for public officers as they appear in the Constitution are also contained in the Code of Conduct Bureau and Tribunal Act Cap. 15 Laws of the Federation of Nigeria 2004.

Section 18(2)(c) vests the Code of Conduct Tribunal with the power to punish a public officer by means of seizure and forfeiture of assets acquired in abuse or corruption of office. Such seizure or forfeiture can occur only where the Tribunal has established a finding of guilt. A public officer may appeal as of right to the Court of Appeal against the decision of the Code of Conduct Tribunal.³⁷ The tenor of the Code of Conduct constantly emphasises that breaches of the Code are not offences, as an officer punished under the Code may be prosecuted or punished also for an offence in a court of law.³⁸

However, the Constitution contains provisions which place limits on the prosecution of public officers for acts of corruption. These limits no doubt have hampered efforts to recover corruptly-acquired assets. One such provision is section 308 of the Constitution which grants immunity from any civil or criminal proceedings during their terms of office to persons holding the office of President, Vice-President, Governor or Deputy-Governor against. In addition, chapter IV of the Constitution, which contains Fundamental Rights provisions on due process, requires that in criminal cases the guilt of the accused must be proved beyond reasonable doubt, in the absence of which he is presumed innocent.³⁹ This is used constantly as a shield by persons accused of acts of corruption.

2.5.2 The Criminal and Penal Codes

The history of anti-corruption law in Nigeria can be traced to the Criminal and Penal Codes. These are the two main codes dealing with crimes.⁴⁰ Both codes have been described as

³⁷ Section 18(2) of the Code of Conduct.

³⁸ Section 18(6) of the Code of Conduct.

³⁹ Section 36(4) and (5) of the Constitution. See also Oyelowo (2007: 7).

⁴⁰ The Criminal Code applies to the states in Southern Nigeria while the Penal Code applies to states in the North. See Ojukwu (2001: 3).

vestiges of imperialism because they were inventions of the colonial government and do not reflect current socio-cultural values.⁴¹

Anti-corruption provisions are contained in sections 98, 404 and 494 of the Criminal Code.⁴²

The Codes criminalise bribery by public officers. However, neither the Criminal nor the Penal Code prescribes forfeiture of assets as punishment for corruption.⁴³

2.5.3 The Corrupt Practices and other Related Offences Act

The Corrupt Practices and Other Related Offences Act of 2004 (otherwise known as the Anti-Corruption Act) was first enacted in 2000. The Act establishes the Independent Corrupt Practices and other Related Offences Commission (the Commission).⁴⁴ The Act considers the following acts of corruption as offences: accepting gratification,⁴⁵ offering a bribe to a public officer,⁴⁶ fraudulent acquisition of assets,⁴⁷ falsification of records,⁴⁸ bribery relating to the award of contracts,⁴⁹ and attempt or conspiracy to commit any of the above offences.⁵⁰ The Act relates essentially to acts of corruption in the public sector.

Section 47 provides for criminal forfeiture of corruptly-acquired assets. By virtue of section 47, the court can make an order for the forfeiture of assets where, in the course of prosecution, the offence is proved against the accused or the court is satisfied that neither the accused nor a purchaser in good faith for valuable consideration has title to the property.

⁴¹ Banire (2004: 265).

⁴² Sections 115-122 of the Penal Code contains similar provisions.

⁴³ The punishment recognised under both codes for acts of corruption is imprisonment.

⁴⁴ Section 3(2) of the Anti-Corruption Act provides that the Commission shall be a body corporate with perpetual succession and with power to sue and be sued in its own name.

⁴⁵ Section 8 of the Anti-Corruption Act.

⁴⁶ Section 9 of the Anti-Corruption Act.

⁴⁷ Section 13 of the Anti-Corruption Act.

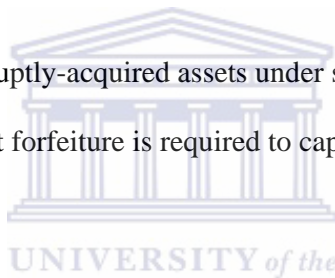
⁴⁸ Sections 15 and 16 of the Anti-Corruption Act.

⁴⁹ Section 22 of the Anti-Corruption Act.

⁵⁰ Section 26 of the Anti-Corruption Act.

Section 48 provides narrowly for non-conviction based asset forfeiture. With respect to section 48, the chairman of the Independent Corrupt Practices Commission, in the absence of prosecution or conviction and within a period of twelve months from the date of seizure of the corruptly-acquired assets, may apply to a judge of the High Court for an order of forfeiture. The judge is required to publish, in the official gazette and at least two national newspapers, a notice of court attendance by persons with interests in the property. Such persons must show cause why the property should not be forfeited to the government. Section 48(4) provides a time-bar for forfeiture applications. The application for an order of forfeiture must be brought within 12 months of the date of seizure, otherwise the property will be released to the person from whom it was seized.

However, civil forfeiture of corruptly-acquired assets under section 48 is inexhaustive. A comprehensive law on civil asset forfeiture is required to capture new forms of value or wealth.



2.5.4 The Economic and Financial Crimes Commission Act (EFCC Act).

The Economic and Financial Crimes Commission (Establishment) Act of 2004 repealed the Economic and Financial Crimes Commission (Establishment) Act of 2002. The Act establishes the Economic and Financial Crimes Commission (EFCC) as the designated financial intelligence unit (FIU) in Nigeria, vesting it with power to co-ordinate various institutions involved in the fight against money laundering and in the repression of all financial crimes.⁵¹ The Act was adopted in response to threats by the Financial Action Task Force (FATF)⁵² to blacklist Nigeria as a high-risk zone for economic and financial crimes.⁵³

⁵¹ Section 1(2)(c) of the EFCC Act.

⁵² The FATF is an inter-governmental body set up by a G-7 summit held in Paris in 1989, with the co-operation of the European Commission, to develop and promote policies to combat money laundering and terrorist financing. See Privacy International (2005).

⁵³ Arowolo (2006: 213).

The Act criminalises terrorist financing,⁵⁴ retention of proceeds of criminal conduct,⁵⁵ and acquisition and conversion of property which are the proceeds of crimes under the Act.⁵⁶ The Act also vests the Commission with power to enforce the provisions of all laws dealing with economic and financial crimes, which laws include the Money Laundering Act of 2004, the Advance Fee Fraud and other Related Offences Act of 1995, the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Act of 1994 as amended, the Banks and other Financial Institutions Act of 1991 as amended, the Miscellaneous Offences Act of 2004, as well as the Criminal and Penal Codes.⁵⁷ Thus, the EFCC does not deal only with acts of corruption in the public sector. In recent times, it has spread its tentacles to the private sector, as seen in the arrest, investigation and prosecution of ex-bank directors on charges of money laundering and corruption.⁵⁸

In relation to recovery of corruptly-acquired assets, the EFCC Act contains more detailed provisions than the Anti-Corruption Act, but provides only for criminal asset forfeiture in sections 20 and 21. Upon conviction for an offence under the EFCC Act, all assets which are the proceeds or instrumentalities of such offence are liable to forfeiture to the federal government. Forfeiture under section 20 is ordered in addition to any other sentence imposed under the Act as penalty for the offence. However, prosecution often is fraught with several procedural hurdles which result in very long delays and frustrate the entire asset recovery process.

⁵⁴ Section 15 of the EFCC Act.

⁵⁵ Section 17 of the EFCC Act.

⁵⁶ Section 18 of the EFCC Act.

⁵⁷ See section 7(2) of the EFCC Act.

⁵⁸ Iriekpen and Akinsuyi (2010: 5).

Consequently, within the last three years the EFCC has resorted to striking plea bargain deals with persons facing prosecution for acts of corruption.⁵⁹ Section 22 provides for forfeiture of foreign assets held by convicted persons which are the proceeds of crimes. The Act also provides for forfeiture of assets which are the gross receipts obtained by commission of a crime under the Act, as well as forfeiture of instrumentalities of crime such as means of conveyance, records, negotiable instruments and real property.⁶⁰

2.5.5 Money Laundering (Prohibition) Act of 2004

The Money Laundering (Prohibition) Act of Nigeria was adopted on 24 March 2004.⁶¹ The Act repeals the Money Laundering (Prohibition) Act of 2003 and prohibits the laundering of the proceeds of a crime or an illegal act.⁶²

It also provides penalties for offences and expands the scope of supervision of regulatory authorities on money laundering activities. Section 6 of the Act imposes obligations on financial institutions to verify customers' details and identity. In the case of suspicious transactions, they are to submit written reports to appropriate authorities. The Act seeks extensive collaboration with such regulatory bodies as the Central Bank of Nigeria, Nigeria Customs Service, Nigeria Security and Exchange Commission, National Drug Law Enforcement Agency, Economic and Financial Crimes Commission, Corporate Affairs Commission and the Federal High Court.⁶³

⁵⁹ A plea bargain is a quasi-criminal judgment secured by mutual agreement between the accused person and the prosecutor whereby the accused person pleads guilty on his own volition in exchange for lesser punishment. Proponents argue that it saves the time of the court and state resources. However, in Nigeria experience has shown that in many cases where plea bargaining has been employed, it only amounts to a slap on the wrist for accused persons. For instance, an ex-governor who was arraigned by the EFCC for looting billions of Naira while in office, was asked to pay only N3.5 million in terms of a plea bargain, an amount grossly unproportional to the loot. See Onyema (2009: 3).

⁶⁰ See sections 24 and 25 of the EFCC Act.

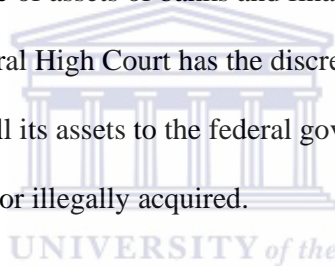
⁶¹ International Centre for Asset Recovery (2007: 1).

⁶² Explanatory memorandum, Money Laundering (Prohibition) Act 2004.

⁶³ Ameh (2004: 5).

The Act makes it an offence for any person to convert or transfer proceeds derived from illicit traffic in narcotic drugs or psychotropic substances or any illegal act with the aim of concealing the illegal nature of the transaction.⁶⁴ It is equally an offence to aid such illegal acts. It is also an offence for a director or an employee of a financial institution to alert the owner of the illicit funds of the report he is required to make or to destroy records required to be kept under the Act. The penalties imposed for the various offences under the Act include fines, imprisonment, and holding up and withdrawal of licences of corporate bodies.⁶⁵ It is no defence that the offence was committed in a different country or place.⁶⁶ It is in this regard that the Money Laundering (Prohibition) Act of 2004 provides a tighter noose.⁶⁷

Section 18 provides for forfeiture of assets of banks and financial institutions convicted of an offence under the Act. The Federal High Court has the discretion to wind up such a bank or financial institution and forfeit all its assets to the federal government. Forfeiture in this respect affects all assets, legally or illegally acquired.



The Nigerian asset recovery law is still in its budding phase. Although Nigeria has ratified UNCAC, it is yet to consider asset recovery as a fundamental principle of its anti-corruption scheme. It is expected that, with the ratification of UNCAC, domestic efforts will be directed at enhancing recovery of corruptly-acquired assets through civil asset forfeiture.

⁶⁴ See section 14 of the Money Laundering (Prohibition) Act 2004.

⁶⁵ Sections 14-17 of the Money Laundering (Prohibition) Act 2004.

⁶⁶ Section 14(2) of the Money Laundering (Prohibition) Act 2004.

⁶⁷ Chukwumerie (2006: 173-190).

CHAPTER 3

PROCESSES AND MECHANISMS IN ASSET RECOVERY

Recovering corruptly-acquired assets is often a broad and complex process. This is because offenders, especially in third-world countries, ensure that such assets are stashed away in foreign banks or concealed by way of acquiring properties in foreign countries. The reasons for this are obvious. Retaining the funds at home may draw the attention of investigators quickly as information is prone to travel fast through the rumour mills. Domestic currencies are also often too insecure or the offender may intend to leave the country in the future.⁶⁸

The steps involved in asset recovery may be categorised broadly into four, namely, asset tracing, freezing, confiscation or forfeiture, and repatriation. Although each of these steps presents its unique challenges, the steps are relational and inter-dependent.

3.1 Asset Tracing

Asset tracing involves tracking hidden assets through financial investigation. Although preliminary, it is an essential step forming the basis of recovery efforts. A country in which funds are kept will not repatriate the assets to the country of origin unless it is shown that the funds are the proceeds of an illegal activity.⁶⁹

Tracing corruptly-acquired assets is fast becoming an up-hill task. A country's borders no longer count in cross-border cash movement, as large sums of money may be transferred electronically at the click of a mouse. The offender, in a bid to avoid being identified with the corruptly-acquired assets, launders the assets to disguise their illegal origin.⁷⁰ For safe enjoyment of the proceeds of corruption, offenders employ a plethora of methods to create a

⁶⁸ Pieth (2008: 4).

⁶⁹ International Centre for Asset Recovery (2009: 19).

⁷⁰ Corruption offences are considered predicate offences for money laundering. International Centre for Asset Recovery (2009: 61).

distance between themselves and the assets, the assets and the form in which benefits are ultimately derived, and the mode of access to the benefits.⁷¹ Asset tracing therefore means “identifying assets with or from their criminal origins, through all mutations, if any, to the eventual form and state in which they exist at the time they are located”.⁷² Against this backdrop, an investigative process aimed at tracing the assets and collating evidence becomes an essential component in any asset recovery effort. Asset recovery practitioners have identified two ways by which evidence can be gathered. Firstly, law enforcement officials in the country where the act of corruption took place can open an investigation using all available legal authorities. Secondly, a private law firm can be retained to file a suit in the jurisdiction where the assets are found.⁷³

3.1.1 Goals of Investigation

Since the jurisdiction in which the funds are located will require that there exist a link between the assets and an illegal activity, investigation aims, firstly, at connecting the asset to the illegal activity. This often is achieved through the collation and presentation of direct or circumstantial evidence.⁷⁴

Secondly, investigation seeks to provide sufficient evidence to prosecute the corrupt official on criminal charges of corruption and money laundering. Finally, the evidence will enable the country of origin to trace and identify assets that have been stolen or misappropriated.⁷⁵

⁷¹ International Centre for Asset Recovery (2009: 81).

⁷² International Centre for Asset Recovery (2007: 23).

⁷³ International Centre for Asset Recovery (2007: 49).

⁷⁴ International Centre for Asset Recovery (2007: 49).

⁷⁵ International Centre for Asset Recovery (2007: 49).

3.1.2 Investigation in the Country of Origin

Upon assumption of power, a new government, desirous of recovering funds diverted by corrupt leaders of the predecessor regime, may embark upon an investigation. The new government may gain access to records of transactions which will disclose the monies that have been diverted or misappropriated and the methods used to achieve the diversion. Such records may include:

- i. records of the country's central bank;
- ii. records of other local banks to which the central bank can gain access;
- iii. government-awarded contracts in which corruption may have played a role; and
- iv. evidence from officials lower in the hierarchy who may have assisted the leaders.⁷⁶

For instance, in Nigeria the Abubakar government, led by General Abdulsalam Abubakar set up a Special Investigation Panel (SIP) to conduct investigations into the acts of corruption that were associated with the Abacha regime. The report of the SIP reflected evidence gathered from the Central Bank of Nigeria. The report also described the methods used to launder monies from the Central Bank to foreign accounts held by offshore front companies belonging to the Abacha criminal organisation.⁷⁷

However, investigations often are marred by a number of factors which prevent them from keeping pace with the growing sophistication in the methods used to launder proceeds of corruption. These factors include:

- i. insufficient investigative knowledge due to the inherent secrecy of the activities and inadequate resource allocation to financial aspects of crime;

⁷⁶ Daniel (2001: 1).

⁷⁷ Pieth (2008: 44).

- ii. inadequate co-ordination and intelligence exchange between police and the revenue department due to legislative prohibitions on data sharing;
- iii. inadequate use of suspicious transaction reports due to a lack of resources and the inherent difficulty of following up many reports without contacting the account holder for explanation; and
- iv. Inadequate powers to detain cash of unexplained origin, other than drug money, at borders.⁷⁸

3.1.3 Mutual Legal Assistance (MLA) in Tracing Corruptly-Acquired Assets

As foreign countries are often the destinations of ill-gotten gains, transnational co-operation is required in the tracing of corruptly-acquired assets. Police-to-police enquiries which constitute mutual administrative assistance may be initiated to trace assets suspected of being in other jurisdictions. This will help a state to determine whether mutual legal assistance would be required to further the investigation.⁷⁹

Mutual legal assistance is the provision of assistance on a formal basis, usually in the collation of evidence by an authority of one country to another, based on a request for assistance.⁸⁰

There are two types of formal mutual legal assistance. These are:

- a. Letters Rogatory

This is the traditional system of MLA. They consist of formal communications from the judiciary of one country to another requesting the performance of an act akin to criminal

⁷⁸ Levi (2003: 212-226).

⁷⁹ International Centre for Asset Recovery (2007: 23).

⁸⁰ International Centre for Asset Recovery (2007: 49).

investigation.⁸¹ They are extremely formal and usually slow. This system is out of tune with the sophistication of modern day money transfers.

b. Direct Mutual Legal Assistance

In contrast to letters rogatory, direct MLA is faster and requires less formality. Each country designates a central authority for direct communication, thus dispensing with intermediaries such as the Department of Foreign Affairs.⁸² Direct MLA can be achieved through:

- i. a bilateral treaty between two states;⁸³
- ii. a multilateral treaty which may be regional or crime-specific; or
- iii. domestic legislation.⁸⁴

MLA may take the form of investigations by the requested state, provision of information to the requesting state based on such investigations, and freezing of assets held in the requested state.⁸⁵ In the absence of an MLA treaty between two countries, it appears that UNCAC functions as a multilateral treaty for MLA, provided there is compliance with the formal requirements listed in UNCAC.⁸⁶

3.2 Asset Freezing

To prevent dealings in corruptly-acquired assets by dissipation or transfer, provisional measures are adopted to preserve assets which may eventually constitute the subject of

⁸¹ US Department of State (2009).

⁸² International Centre for Asset Recovery (2007: 120).

⁸³ Such a treaty exists between Nigeria and the United Kingdom.

⁸⁴ An example is Switzerland. Although previously known to be secretive about financial transactions, it is now much more willing to assist by launching investigations on its own. See Daniel (2001: 2).

⁸⁵ Daniel (2001: 2).

⁸⁶ See Article 46 of UNCAC.

confiscation. Such provisional measures are generally in the form of freezing or seizure of assets.⁸⁷

A freezing order can be used to freeze assets alleged to be the proceeds of corruption until the determination of the case or a further order of a court.⁸⁸ A freezing order is made against the offender in person and not his assets. The offender is prevented from dealing in the assets up to the maximum value of a state's claim while he retains access to any surplus assets that exceeds the claim.⁸⁹ It is an interim measure and does not confer any proprietary rights on the state over the assets.⁹⁰ A freezing order only gives the state a measure of control over any increases in expenses in order to prevent the offender from dissipating his assets indiscriminately with the aim of frustrating the state's claim.

Third parties, such as banks who are in control of the offender's funds, are bound by freezing orders and may incur stiff penalties in the event of non-compliance.⁹¹ The application for a freezing order often is made *ex parte*, that is, without notice to the offender who only receives notification when the order is served on him personally.⁹² A freezing order affects basic rights and, as with other interim applications, certain requirements must be satisfied by the applicant.⁹³

3.2.1 Good Arguable Case

The state must show that it has a good arguable case, that is, a serious case to answer. In other words, there must be some sort of evidence that the assets are the proceeds of corruption. For

⁸⁷ Gully-Hart (2008: 172).

⁸⁸ Greenberg *et al* (2009: 123).

⁸⁹ Daniel and Maton (2008: 257).

⁹⁰ International Centre for Asset Recovery (2009: 90).

⁹¹ Daniel and Maton (2008: 257).

⁹² International Centre for Asset Recovery (2009: 91).

⁹³ See Daniel and Maton (2008: 259-260).

instance, failure to declare assets by a public official when such declaration is required may constitute the required evidence.

3.2.2 Real Risk of Dissipation of Assets

The state must show also that there is a real risk that the offender would dissipate or conceal his assets if the freezing order is not granted.

3.2.3 Duty of Full and Frank Disclosure

A state must disclose fully all matters relevant to the application, including anything which is detrimental to its own case. Failure to do so may lead to the discharge of a freezing order and cost sanctions.

3.2.4 Undertaking as to Damages

The state must give an undertaking to compensate the offender if the court later finds out that the freezing order should not have been granted and where, as a result of the order, the alleged offender has suffered loss.

3.2.5 Just and Convenient

The state must also show that the order is just and convenient in all circumstances.⁹⁴ In other words, the court must be satisfied that the likely effect of the freezing order will be to promote the doing of justice overall and not to work unfairly or oppressively.

A state must apply as early as possible for a freezing order once there is sufficient evidence to justify the preservation of the assets. However, a state may be compelled to move slowly due to lack of resources, length of time needed to conduct investigations, bureaucracy, ignorance of the options open to it in foreign courts and political resistance from public

⁹⁴ International Centre for Asset Recovery (2009: 91).

officials.⁹⁵ It is necessary that an interim order preventing dissipation of corruptly-acquired assets be obtained within a few hours of detection. Anything short of this will make a mockery not only of the recovery process but also of the entire anti-corruption scheme.

Besides freezing based on a court order, some jurisdictions permit administrative freezing or internal freezing by financial institutions.⁹⁶

3.3 Asset Forfeiture

As indicated above, asset freezing is a temporary measure. For permanent asset recovery, a judgment must be obtained through proceedings in criminal or civil law. The judgment operates as a forfeiture order. Asset forfeiture therefore refers to the confiscation by the state of assets which are considered proceeds or instrumentalities of crime.⁹⁷ It is pivotal to the entire asset recovery process. However, there exist considerable variations in the asset recovery process between jurisdictions, though certain principal asset recovery procedures are common to both common law and civil law jurisdictions.⁹⁸

The principal asset forfeiture mechanisms are:

- i. Criminal forfeiture;
- ii. Civil forfeiture.

⁹⁵ Daniel and Maton (2008: 260). In Nigeria, sections 28 and 34 of the EFCC Act, sections 37, 38(6) and 45 of the Anti-Corruption Act, as well as sections 16 and 18 of the Money laundering (Prohibition) Act all provide for freezing of accounts upon investigation and report of suspicious transactions. However, the need to gather sufficient evidence to link the assets with the crime often slows down the process of applying for freezing orders. See Ribadu (2008: 34).

⁹⁶ For instance, France allows administrative freezing by the Financial Intelligence Unit upon receiving a report of a suspicious transaction. See U4 Anti-Corruption Resource Centre (2007:1). In Switzerland, financial institutions may be mandated to freeze automatically reported transactions for 5 days, pending the review of the reasonableness of the measure by a magistrate.

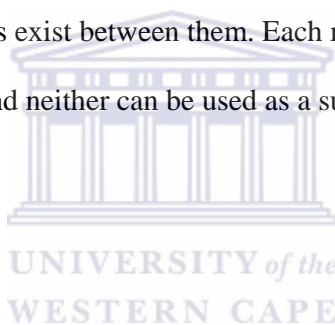
⁹⁷ Takahashi (1999: 431).

⁹⁸ World Bank/UNODC. (2009: 14).

In some situations, forfeiture may be sought through private litigation.⁹⁹

Civil forfeiture and criminal forfeiture mechanisms share certain features.¹⁰⁰ They are both judicial matters requiring the institution of formal actions in court, the success of which culminate in court orders directing the transfer of title in the assets to the state.¹⁰¹ In addition, they share rationales.¹⁰² First, corruptly-acquired assets should be forfeited as those who engage in illegal activities should not be allowed to benefit from their acts. The second rationale is hinged on deterrence. Forfeiting corruptly-acquired assets will help send out a message to offenders and potential offenders that corruption does not pay. Mutual legal assistance applies to both mechanisms, thus making it easier and cheaper to freeze assets.

However, remarkable differences exist between them. Each mechanism also has its advantages and disadvantages and neither can be used as a substitute for the other.



⁹⁹ Private litigation entails the state bringing a private action in exactly the same way as a private citizen would. It requires no conviction or initiation of criminal proceedings. It is appropriate in situations where criminal conviction is difficult to obtain. Foreign courts can hear such proceedings where the defendant lives in the country, or if the assets are within its jurisdiction or if the act of corruption was committed within its jurisdiction. The plaintiff, in addition to recovery of property, may be awarded damages also. The standard of proof in civil proceedings is on a balance of probabilities in common law countries, while in civil law countries the standard of intimate conviction applies. The mutual legal assistance route is dispensed with in private litigation as UNCAC makes no provision for it in such proceedings. Private litigation may be conducted in the defendant's absence provided the court is satisfied that he has been duly served with notice of the proceedings. Where the defendant evades personal service of court process, substituted service may be ordered. See Daniel and Maton (2008: 248). However, recovery of assets through the private litigation route is expensive and may not be an attractive option for poor countries because the state has to bear the upfront costs associated with the action. England has proved to be a suitable jurisdiction for recovery of assets through private litigation. Nigeria successfully recovered the sum of DEM 300 million in connection with the Ajaokuta steel plant buy-back scam involving the late Sani Abacha through private civil proceedings. See *Attorney-General of the Federal Republic of Nigeria v Australia and NewZealand Banking Group and others* 1999 folio 831 QBD Commercial Court. Judgment of 27 February 2001. See also Monfrini (2008: 46).

¹⁰⁰ Cassella (2009: 37).

¹⁰¹ Cassella (2009: 37).

¹⁰² Greenberg *et al* (2009: 13).

3.3.1 Criminal Forfeiture

Criminal forfeiture involves an *in personam* action against the defendant and constitutes part of the criminal charge.¹⁰³ Thus, it is unavailable where the defendant is absent by reason of death, elopement or immunity. Cases usually are instituted by public prosecutors in the country where the crime was committed and temporary freezing orders may be obtained pending judgment. It is imposed as part of the sentence in a criminal case.¹⁰⁴ Criminal forfeiture requires a conviction for the underlying offence. In common law countries, the guilt of the defendant must be proved beyond a reasonable doubt, while in civil law countries the court must be intimately convinced of the defendant's guilt.¹⁰⁵ Criminal forfeiture may be object-based or value-based.¹⁰⁶ The defendant forfeits his interest in the assets as his ownership of the assets becomes irrelevant once an order of forfeiture is granted.¹⁰⁷

3.3.1.1 Advantages of Criminal Forfeiture

Asset recovery through the criminal forfeiture route has several advantages. Firstly, a single proceeding takes care of the forfeiture of the defendant's interest in the tainted assets.¹⁰⁸

Criminal forfeiture enables the court to treat forfeiture as part of the sentencing process in a criminal trial and thus helps to save time and resources.

¹⁰³ *Waterloo Distilling Corp. v United States* 282 U.S 577, 581, 51 S.Ct 282, 75 L.Ed 558 (1931). The court in distinguishing criminal forfeiture from civil forfeiture, held that in criminal forfeiture proceedings it is the wrongdoer in person who is proceeded against, convicted and punished. See also, *Origet v United States*, 125 U.S 240, 245-247, 8 S.Ct. 846, 31 L.Ed 743.

¹⁰⁴ Cassella (2008: 9).

¹⁰⁵ World Bank/UNODC. (2009: 15).

¹⁰⁶ World Bank/UNODC (2009: 14). The term "object-based" implies that the prosecuting authority must show that the assets are the proceeds or instrumentalities of corruption while the term "value-based" means that the offender would be required to forfeit the value of the benefit accruing from the crime without proof of connection between the crime and the assets.

¹⁰⁷ Cassella (2009: 39).

¹⁰⁸ Cassella (2009: 39).

Secondly, the court can order the payment of a money judgment or forfeiture of substitute assets.¹⁰⁹ This is possible because criminal forfeiture may be object-based or value-based, in contrast to civil forfeiture in which the order of forfeiture must relate to the specific assets. Thus, where the defendant has dissipated the specific assets, a criminal forfeiture order is enforceable against substitute assets. Convicted co-defendants are liable equally for satisfying any money judgment of forfeiture.¹¹⁰

In addition, time limits do not exist for filing an indictment following seizure of property.¹¹¹

3.3.1.2 Disadvantages of Criminal Forfeiture

One disadvantage of criminal forfeiture is its requirement of a criminal conviction. Thus, criminal forfeiture is impossible where the defendant is dead, has eloped or where, in the interests of justice, the government has decided not to prosecute. However, Article 54(1)(c) of UNCAC envisages the above circumstances and requires states to take other necessary measures to allow forfeiture of assets without a criminal conviction. Such measures include civil forfeiture.

In addition, criminal forfeiture excludes the property of *bona fide* third parties. Thus, property belonging to a third party cannot be forfeited criminally. The forfeiture will be declared null and void where a third party establishes that he was the true owner of the property at the time of the crime or acquired it later as a *bona fide* purchaser for value.¹¹² Thus, assets held in the names of foreign companies and trusts may not be subject to criminal forfeiture.

Also, it is often difficult to obtain domestic convictions and enforceable forfeiture orders because of the bad influence of defendants who may want to challenge the proceedings, even

¹⁰⁹ Cassella (2009: 48).

¹¹⁰ Lee (2004: 276).

¹¹¹ Cassella (2009: 48).

¹¹² Cassella (2009: 49).

when a defence is obviously unsustainable. This results in adjournments and appeals which unduly lengthen the span of criminal proceedings.¹¹³

It is also more difficult to prove a criminal case beyond reasonable doubt than it is to prove a case on the balance of probabilities in civil actions.¹¹⁴ The higher standard of proof required in criminal cases is a disadvantage of seeking recovery of corruptly-acquired assets through criminal forfeiture.

3.3.2 Civil Forfeiture

Civil forfeiture of assets is by no means a recent phenomenon. Its origins have been traced to the biblical Old Testament and medieval history.¹¹⁵ Traditionally, and for the most part of the nineteenth century, civil forfeiture was limited to violations of customs and admiralty law under the English Navigation and Trade Acts.¹¹⁶ It was used often as a remedy in situations where the court lacked personal jurisdiction over owners of the property which are the subject of forfeiture. With time, its application was extended to combating organised crime, especially in relation to the enforcement of laws on the possession or sale of controlled substances and drug trafficking.¹¹⁷

Today, civil forfeiture has gained ground through the global proliferation of civil forfeiture laws and has been applied mostly in cases where criminal forfeiture has proved impossible.

¹¹³ Guidance Note (2007: 10).

¹¹⁴ Guidance Note (2007: 11).

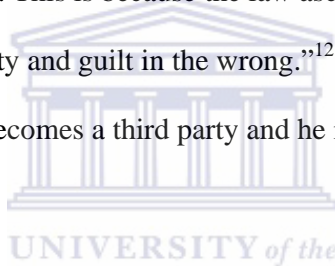
¹¹⁵ Verse 28 of the 21st Chapter of Exodus requires that the owner of an ox be deprived of his rights of ownership where the ox gores someone to death. Similarly, the Roman Twelve Tables required forfeiture of a four-footed animal which had injured anyone. The ancient Greeks also banished inanimate objects capable of causing death or which had caused death. Also, by the English common law of Deodands, chattels which caused the death of human beings were considered “guilty objects” and forfeited to the Crown. See Neill (1993: 2), Berman (1999: 25), Noyes(1995/1996: 312-313), Schwarcz and Rothman (1993: 289-290) and Noya (1996: 497-499).

¹¹⁶ Herpel (1998: 1916-1919).

¹¹⁷ Herpel (1998:1923). See also the US Racketeer Influence and Corrupt Organisations (RICO) Act chapter 96 of Title 18 of the US Code, 18 USC 1961-1968; and the Continuing Criminal Enterprise Act chapter 13 of Title 21 of the US Code, 21 USC 848.

Civil forfeiture entails an *in rem* action, that is, an action against the asset itself and not against the individual.¹¹⁸ It is an action distinct from the criminal proceedings and is filed before, during or after criminal conviction or even where there is no criminal charge against the individual.¹¹⁹ Thus, civil forfeiture does not depend on a criminal conviction. The state is required to show that the asset in question is tainted, either because it is the proceeds or an instrumentality of corruption. In contrast to criminal forfeiture, the standard of proof in civil forfeiture is proof on a balance of probabilities or preponderance of the evidence.¹²⁰

Civil forfeiture is object-based. Hence, forfeiture only relates to the assets and not substitutes. While in criminal forfeiture, the defendant forfeits his interest in the asset, civil forfeiture operates to forfeit the asset itself. This is because the law ascribes “to the property a certain personality, a power of complicity and guilt in the wrong.”¹²¹ The burden of proof shifts to the owner of the property who becomes a third party and he is required to show that the property is “innocent”.



Civil forfeiture is applied often in situations where criminal forfeiture is impossible or unavailable. These include situations:

- a. where the offender is absent by reason of death or flight;
- b. where prosecution is impossible because of the powerful influence of the offender or because the offender enjoys immunity from prosecution;

¹¹⁸ Greenberg *et al* (2009: 14).

¹¹⁹ Greenberg *et al* (2009: 14).

¹²⁰ Cassella (2009: 41).

¹²¹ *US v One 6.5mm Mainlicher-Carcano military rifle*, 250 F.Supp. 410 (N.D Tx.1966). In that case, the court ordered the forfeiture of the rifle used in assassinating President John. F. Kennedy. See Levy (2000).

- c. where the property is held by a third party who has not been charged with a criminal offence but is aware or wilfully blind to the fact that the property stems from an act of corruption;¹²²
- d. where there is insufficient evidence to sustain the charges against the offender.¹²³

3.3.2.1 Advantages of Civil Forfeiture

A number of factors combine to make civil forfeiture an attractive option in recovering corruptly-acquired assets.

Firstly, it is easier to discharge the burden of proof in civil forfeiture than it is in criminal forfeiture cases. This is because standard of proof is proof on a balance of probabilities or preponderance of the evidence, as against the onerous burden of proof beyond reasonable doubt required in criminal cases.

Secondly, the state need not go through the lengthy process of securing a criminal conviction against the offender. Thus, civil forfeiture is a potent weapon in cases where prosecution is not feasible, such as where the defendant is absent due to death or flight or is immune from prosecution. With civil forfeiture, there is less work for the prosecutor.

Civil forfeiture actions, unlike criminal forfeiture actions, can be brought against any property which is either the proceeds of or derived from a course of corrupt conduct. In other words, it is not limited to property related to a particular transaction.¹²⁴

While criminal forfeiture does not affect property held by third parties, civil forfeiture can forfeit the property of a third party who has no *bona fide* defence. Thus, once the state shows that the asset is tainted and proper notice of the forfeiture has been given to all interested

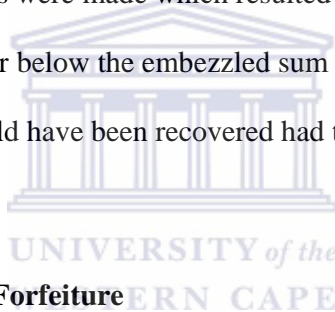
¹²² Greenberg *et al* (2009: 15).

¹²³ Greenberg *et al* (2009: 15).

¹²⁴ Cassella (2009: 44-45).

parties, an order of forfeiture may be issued regardless of who the owner of the property might be.¹²⁵ Moreover, since proceedings are civil, the law can be made retrospective to recover ill-gotten assets acquired prior to its enactment.

The Nigerian government has lost several chances of recovering corruptly-acquired assets found within its territory because of its failure to take advantage of the attractions of the civil forfeiture mechanism. The most notable scenario was the case of Lucky Igbinedion, ex-governor of Edo state. In that case, criminal action was instituted against the ex-governor for offences of corruption, money laundering and embezzlement. However, due to insufficient evidence to sustain the requisite convictions that would lead to criminal forfeiture of his assets, plea bargain arrangements were made which resulted in the imposition of a fine. The fine imposed was ridiculously far below the embezzled sum which ran into billions of naira.¹²⁶ Much of the assets would have been recovered had there been a civil forfeiture law in place.



3.3.2.2 Disadvantages of Civil Forfeiture

Civil forfeiture is not without its shortcomings. To begin with, civil forfeiture is limited to the property directly traceable to the underlying criminal offence. Thus, the court will not order the forfeiture of substitute assets or make a money judgment.¹²⁷

Civil forfeiture follows essentially the rules of civil procedure. Hence, statute of limitations may be a defence. For instance, the US asset forfeiture law requires the filing of a complaint within 90 days where the property has been seized initially for the purpose of civil forfeiture.¹²⁸ Non-compliance renders the action time-barred.

¹²⁵ Cassella (2009: 44-45).

¹²⁶ Adepegba (2010: 5).

¹²⁷ Cassella (2002: 2).

¹²⁸ Cassella (2009: 46). See also 18 USC 983(a)(3).

Civil action for forfeiture of assets may interfere with criminal prosecution or trial. Unless a stay of proceedings is ordered in the civil case, the claimants who are also defendants in a concurrent criminal case stand the chance of having access to government evidence and witnesses.¹²⁹

3.3.3 Concepts in Civil Forfeiture

To aid the understanding of civil asset forfeiture as a mechanism for recovery of corruptly-acquired assets, Greenberg *et al* identify certain key concepts associated with civil asset forfeiture.¹³⁰ Some of these are outlined below.

3.3.3.1 Civil forfeiture as Complement to Criminal Prosecution.

Criminal prosecution, when available, remains the standard legal response in corruption cases. Substituting criminal prosecution for civil actions in recovery proceedings not only will undermine the effectiveness of criminal law but also will result in loss of confidence in law enforcement. The penal and deterrent effects of criminal prosecution on social order cannot be underestimated. Criminal prosecution should be pursued whenever possible to avoid the risk that prosecutors, courts and the public would consider asset forfeiture as sufficient penalty for corruption crimes.

Civil forfeiture of assets should be complementary to criminal prosecutions and convictions. Thus, civil forfeiture mechanisms should be reserved for cases where criminal prosecution is unavailable.

¹²⁹ Cassella (2009: 46).

¹³⁰ For a detailed discussion of the concepts, see Greenberg *et.al* (2009: 29-107).

3.3.3.2 Relationship between Civil and Criminal Proceedings

Criminal prosecution may coincide with civil forfeiture proceedings. The law should anticipate such scenarios. There are two options open to jurisdictions contemplating a civil forfeiture regime. On the one hand, a jurisdiction may choose to invoke civil forfeiture action only when criminal prosecution is unavailable. On the other hand, a jurisdiction may decide that both civil forfeiture proceedings and criminal prosecution should run concurrently.

Greenberg *et al* suggest that the latter approach is preferable, though both proceedings need not take place at the same time.¹³¹ A stay of proceedings in the civil forfeiture action may be sought until conclusion of the criminal case. In the absence of a stay of proceedings, both the criminal prosecution and civil forfeiture action may run concurrently, with a *caveat* that evidence or information from the asset owner cannot be used against him or her in the criminal prosecution.

3.3.3.3 Impossibility or Failure of Criminal Prosecution

The circumstances envisaged are where the offender has fled the country, is dead or enjoys immunity from prosecution. The view is that inability to prosecute should not hinder other legal mechanisms aimed at recovering the proceeds of corruption. In the same vein, official or diplomatic immunity, though generally recognised as a shield from criminal prosecution, should not constitute a shield from recovery of corruptly-acquired assets. Thus, civil forfeiture law must rule out immunity for assets liable to forfeiture.

Civil forfeiture should also be available where prosecution is unsuccessful. Examples are where the defendant has been acquitted or cannot be prosecuted due to insufficient evidence to sustain a conviction.

¹³¹ Greenberg *et al* (2009: 29).

3.3.3.4 The Rules of Procedure and Evidence

In the absence of such specificity the court may be compelled to fill in the gaps. In some cases, such “judicial legislation” may not represent the intention of the legislature. This would be counter-productive, especially in countries where corruption has eaten deep into the fabric of the justice system or where the judiciary is inexperienced in forfeiture matters.

3.3.3.5 Range of Offences

A comprehensive approach of subjecting all corruption crimes to civil forfeiture should be applied. This will help avoid definitional problems which may give rise to loopholes in recovery actions.

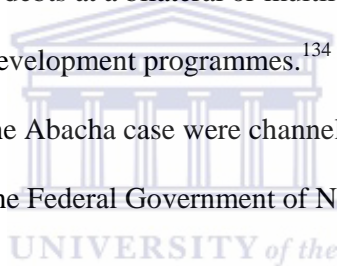


3.4 Asset Repatriation

This is the last step in the process of asset recovery. It involves returning the assets to the country from which they originated. Article 57 of UNCAC establishes the principles for the repatriation of corruptly-acquired assets. Article 57(3) sets out the requirements for return of assets. Where the assets are the proceeds of embezzlements or confiscated in accordance with Article 55 and on the basis of a final judgment in the requesting State Party, the assets must be returned to the requesting State Party. Proceeds of other corruption offences are to be returned on the requirement that the requesting State Party reasonably establishes prior ownership or the requested State Party recognises damage suffered by the requesting State Party as a basis for recovery. In all other cases, priority consideration must be given to returning the assets to the requesting State Party or to prior legitimate owners or to compensating the victims of the crime.

From the above provision it follows that, in the case of embezzled funds, the process is for the funds to be returned directly to the country of origin without the need for an intermittent act of appropriation by the state in which the funds are found. However, where the funds have been obtained as an illegal remuneration, as in bribery cases, confiscation or forfeiture is the basis of asset recovery. In some situations, states may resort to sharing the recovered proceeds.¹³²

It is noteworthy that there is no one-size-fits-all procedure for the return of corruptly-acquired assets. Much depends on the peculiarity of each situation as well as on pragmatic considerations. In cases where direct restitution is impracticable, the recovered assets may be used for the partial settlement of debts at a bilateral or multilateral level.¹³³ In the alternative, returned assets may be used in development programmes.¹³⁴ For instance, the assets recovered from Switzerland in the Abacha case were channelled towards execution of poverty-alleviation projects by the Federal Government of Nigeria.¹³⁵



3.5 Policy and Legal Constraints in Recovery Efforts

There are a number of impediments to recovering corruptly-acquired assets. Some of these relate to the conditions in the victim state, while others relate to difficulties encountered in seeking international co-operation in recovery matters.

3.5.1 Immunity of Politicians

The age-long concept of immunity from prosecution for public office holders is rooted in the need to ensure that public office holders are able to discharge their duties for the public good without undue interference. Thus, an incumbent president or governor should be able to

¹³² Pieth (2008: 15-16).

¹³³ Gully-Hart (2008: 183).

¹³⁴ Monfrini (2008: 46).

¹³⁵ Monfrini (2008: 46).

discharge his official duties without fear or favour. The rationale is to protect the office of the politician and not the politician.¹³⁶

Section 308 of the Constitution of the Federal Republic of Nigeria provides immunity from civil proceedings or criminal prosecution for some public office holders during their periods of office. On immunity, Article 40(2) of UNCAC provides as follows:

“Each State Party shall take such measures as may be necessary to establish or maintain in accordance with its legal system and constitutional principles, an appropriate balance between any immunities or jurisdictional privileges accorded to its public officials for the performance of their functions and the possibility when necessary of effectively investigating, prosecuting and adjudicating offences established in accordance with this convention.”

Thus, rather than do away with immunity, UNCAC advocates balancing competing interests in immunity issues and gives a wider discretion to states on the regulation of immunities of public office holders.

Except for crimes under international law, customary international law recognises immunity from prosecution for heads of states.¹³⁷ The exception does not extend to cases of corruption as they do not constitute crimes under international law. Hence, heads of states are immune from prosecution by another state for corruption offences.

Political immunity thus serves as a serious obstacle to recovering state assets plundered by public office holders during their terms of office. Lord Brown-Wilkinson, espousing the doctrine of immunity in the Pinochet case, states as follows:

“It is a basic principle of international law that one sovereign state (the forum state) does not adjudicate on the conduct of a foreign state. The foreign state is entitled to procedural immunity from the process of the forum state. This immunity probably grew from the historical immunity of the person of the monarch. In any event, such personal immunity of a head of state persists to the present day; a head of state is entitled to the same immunity as the state itself.”¹³⁸

¹³⁶ Pujas (2004: 90).

¹³⁷ Chaiken (2005: 31). See also *R v Bow Street Magistrate ex parte Pinochet* (No.3) 2001 1 AC 147.

¹³⁸ See *R v Bow Street Magistrate ex parte Pinochet* (*supra*) at 210 G.

An interesting case in point on immunity is the case of Chief Diepreye Alamieyeseigha,¹³⁹ the former governor of Bayelsa state of Nigeria. Chief Alamieyeseigha was arrested in London and charged with three counts of money laundering under the Criminal Justice Act of 1998 and the Proceeds of Crimes Act of 2002. During a search conducted in his London residence, a cash sum of £1 million was discovered. He was remanded in custody and later released on bail. He thereafter challenged his arrest and prosecution on the ground that he enjoyed sovereign immunity from prosecution by virtue of his position as governor and chief executive of Bayelsa state, a constituent part of the Federal Republic of Nigeria. The English court rejected this argument on the ground that Bayelsa state, being a sub-state or a constituent state, enjoyed no such immunity. Consequently, the court dismissed the claim of Chief Alamieyeseigha. The case would have been decided otherwise had he been the President of Nigeria.

3.5.2 Problems associated with seeking mutual legal assistance

Mutual legal assistance is an important concept in recovering corruptly-acquired assets deposited in foreign states. This is because generally courts will have to depend on evidence gleaned from other cases.

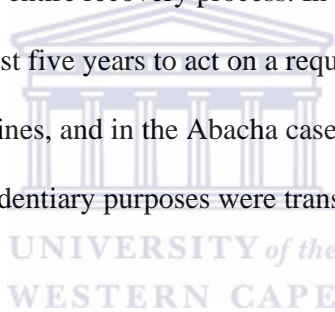
Jurisdictional differences, such as those which exist between common and civil law countries, often impede recovery efforts. The problem is heightened where there are no bilateral or multilateral treaties between the countries.¹⁴⁰ In addition, most jurisdictions require dual

¹³⁹ See *R (on the application of Diepreye Solomon Peter Alamieyeseigha) v Crown Prosecution Service*. (2005) EWHC 2704 (Admin). In contrast, see *Mellenger v New Brunswick Development Corporation* [1971] 1WLR 604.

¹⁴⁰ In the more recent case of former governor James Ibori of Delta state, who was arrested in Dubai by the London Metropolitan Police on charges of money laundering, the United Kingdom has requested his extradition because it has an extradition treaty with the United Arab Emirates. Although charges of corruption and money laundering are also pending against him in Nigeria, an extradition request could not be made because Nigeria has no extradition treaty with the United Arab Emirates. See Emah *et al* (2010: 1).

criminality as a pre-condition of mutual legal assistance.¹⁴¹ Thus, the offence for which the offender is charged in the requesting State Party must also constitute an offence in the requested State Party for co-operation to take effect. This may be a problem where new offences are developed.¹⁴²

Laws on mutual legal assistance often exclude fiscal, political and military affairs from legal assistance.¹⁴³ Also, mutual legal assistance may be denied where the requesting state violates human rights. Furthermore, requesting States Parties have to pay attention to formal requirements under the law of the requested States Parties.¹⁴⁴ Even where these hurdles have been crossed successfully, the processing of requests for mutual legal assistance often takes a long time. This may frustrate the entire recovery process. In the case of Ferdinand Marcos, it took the Swiss government almost five years to act on a request to transmit bank documents to the government of the Philippines, and in the Abacha case, it took nearly four years before bank documents required for evidentiary purposes were transmitted to the Nigerian government.¹⁴⁵



Obtaining mutual legal assistance also depends to a large extent on the legitimacy of the foreign government. A mutual legal assistance request from a radical or revolutionary government which succeeds a dictatorship may be turned down by the requested State Party unless the new government can show a plan for the integration of democratic principles.¹⁴⁶ In other words, the requested State Party must have a measure of confidence and trust in the legal system of the requesting State Party for international co-operation to thrive.

¹⁴¹ Pieth (2008: 24).

¹⁴² Hofmeyr (2008: 144).

¹⁴³ Pieth (2008: 13).

¹⁴⁴ An example is the language requirement. France turned down Nigeria's request for assistance because the request was in English. See U4 Anti-corruption Resource Centre (2008: 3).

¹⁴⁵ Chaiken (2005: 35-36).

¹⁴⁶ Chaiken (2005: 30).

3.5.3 Lack of Political Will

Political commitment to the asset recovery process in both requesting and requested States Parties is vital to the success of any asset recovery effort. In the requesting State Party, direct involvement of key government officials in the looting of state assets may hinder the asset recovery process. This is demonstrated often during the gathering of evidence, where it is foreseen that the evidence requested will expose public office holders other than those targeted. A lack of political will is demonstrated also where there is reluctance to legislate measures to enhance accountability and to promote asset recovery efforts. For instance, the Nigerian Civil Asset Forfeiture bill hit the rocks when, at its second reading, a majority of the members of the Nigerian legislature voted against it.¹⁴⁷ This demonstrates that instead of the much-needed political will, decision-makers often pay only lip service to the fight against corruption.

Also, a lack of political will on the part of the requesting State Party may pose a threat to recovering corruptly-acquired assets lodged in the territory of the requested State Party. The requested State Party may have little interest in recovery efforts where it derives economic benefits from the proceeds of corruption and money laundering activities.¹⁴⁸ A request for mutual legal assistance may be turned down also if such proceedings threaten other higher interests of the requested State Party. The requested State Party may be reluctant to proceed against powerful interest groups such as banks, especially where banks are involved directly in facilitating the transfer of the tainted assets.¹⁴⁹

¹⁴⁷ Nzeshi (2010: 6).

¹⁴⁸ U4 Anti-corruption Resource Centre (2008: 4).

¹⁴⁹ UNODC (2004: 584).

3.5.4 Lack of Adequate Legal Framework

From the discussions of the different legal mechanisms available in the process of asset recovery, it is clear that there is no standard procedure or mechanism for recovery. Much depends on the peculiarities of each case and what is expected to work best in the country where the assets are found.¹⁵⁰ The lack of a comprehensive legal framework is likely to impede the asset recovery process.

3.5.5 Lack of Technical Capacity

As more complex and sophisticated means of disguising and diverting corruptly-acquired assets are developed, recovery of assets also will require high-level technical capacity to keep up with the trends. Much expertise is required in conducting financial investigations, forensic accounting, requesting mutual legal assistance and in understanding the legal requirements of the requested States Parties.¹⁵¹ Unfortunately, there are relatively few practitioners with expertise in these areas. This often frustrates asset recovery efforts.

¹⁵⁰ UNODC (2004: 584).

¹⁵¹ UNODC (2004: 587).

CHAPTER 4

ISSUES IN CIVIL FORFEITURE

This chapter examines questions relating to the adoption of civil forfeiture laws. The questions concern the use of mutual legal assistance where assets have been moved to other states, the issue of retrospectivity, the impact of a civil forfeiture law on fundamental rights, its relationship to criminal proceedings, as well as mechanisms for its incorporation into a state's asset recovery framework.

4.1 International Co-operation in Civil Forfeiture Cases: The United Kingdom, the United States of America and South Africa

Just as international co-operation applies in criminal asset forfeiture cases, it is indispensable in civil asset forfeiture where a victim state desires to recover corruptly-acquired assets found outside its territory. Mutual legal assistance exists in civil forfeiture not only in respect of investigation and restraint of assets but also in the foreign enforcement of confiscation orders obtained in the courts of the victim state.¹⁵² Mutual legal assistance is facilitated through bilateral treaties between countries, multilateral agreements or conventions and domestic legislation. Thus, where the victim state has in place a civil forfeiture law and has chosen to recover off-shore tainted assets, mutual legal assistance may be invoked to give effect to its request to restrain the assets or enforce civil forfeiture orders made by its courts.¹⁵³ This is more cost-effective than bringing private civil proceedings in the court of the foreign state.¹⁵⁴

Against this backdrop, it is essential that a jurisdiction has both the capacity as a requesting State Party to secure a forfeiture judgment against property located outside its territory and

¹⁵² Chamberlain (2002: 158).

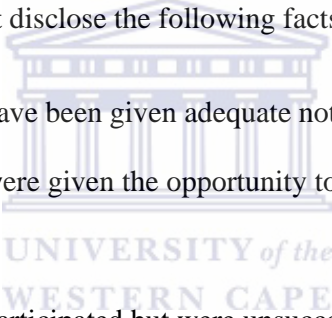
¹⁵³ Chamberlain (2002: 158).

¹⁵⁴ Chamberlain (2002: 158).

the capacity to enforce a forfeiture judgment of another country when it is the requested State Party.¹⁵⁵

Where a forfeiture order is obtained in a jurisdiction in respect of property located in another jurisdiction, the requested State Party needs to forward the judgment to the competent authority in the jurisdiction where the property is found on the basis of a legal assistance request seeking enforcement of the judgment.¹⁵⁶ For foreign enforcement to take effect, it is required that the judgment be final, certified by a competent court in the requesting State Party and considered valid for execution under the domestic law of the requested State Party.¹⁵⁷

The legal assistance request must disclose the following facts:¹⁵⁸

- 
- i. that affected parties have been given adequate notice of the proceedings;
 - ii. that affected parties were given the opportunity to participate in the proceedings;
- and
- iii. that affected parties participated but were unsuccessful or that they refused to participate.

A study of selected jurisdictions¹⁵⁹ that have incorporated civil forfeiture into their asset recovery framework would throw more light on how international co-operation works in relation to recovery of corruptly-acquired assets deposited abroad. However, it is important to state from the outset that there is no uniform or global civil forfeiture structure in place.¹⁶⁰

Hence, some jurisdictions have more robust and well-developed civil forfeiture laws than

¹⁵⁵ Greenberg *et al* (2009: 100).

¹⁵⁶ Greenberg *et al* (2009: 101).

¹⁵⁷ Greenberg *et al* (2009: 102).

¹⁵⁸ Greenberg *et al* (2009: 102).

¹⁵⁹ Jurisdictions that have adopted civil forfeiture laws include the United Kingdom, the United States of America, Australia, Canada and South Africa.

¹⁶⁰ Leong (2009: 227).

others, while many jurisdictions do not have them at all. This serves as a crucial factor in determining the measure of support available in cross-border civil forfeiture cases.

4.1.1 The United Kingdom

The Proceeds of Crime Act (POCA) of 2002 provides for civil forfeiture of criminal assets. Part V of POCA essentially recognises two main streams for recovery of assets without a criminal conviction.¹⁶¹ The first stream deals with civil recovery proceedings in respect of property (other than cash) which has been obtained through unlawful conduct. Section 241 of POCA defines unlawful conduct.¹⁶² Section 242(1) defines property obtained through unlawful conduct as obtained “by or in return for the conduct”. This first stream procedure is initiated by the Asset Recovery Agency (ARA) through proceedings in the High Court.¹⁶³ Before the ARA can adopt a case for civil recovery investigations, the following criteria must be satisfied:

- i. The case must have been referred to it by a law enforcement agency or prosecution authority.
- ii. The value of the recoverable property must not be less than £10,000.¹⁶⁴
- iii. The stolen asset must be recovered within 12 years of the theft.¹⁶⁵
- iv. There must be evidence of criminal conduct on the balance of probabilities.

Where there is a real risk or threat of dissipation of assets, they may be preserved by an application for a freezing injunction under Part 25(1)(f) of the Civil Procedure Rules or by

¹⁶¹ Leong (2009: 208). POCA 2002 applies only to England, Wales, Northern Ireland and Scotland.

¹⁶² Unlawful conduct refers either to conduct occurring in any part of the United Kingdom which is unlawful under the criminal law of that part or conduct which occurs outside the UK and which is unlawful under the criminal law of the country and would have been unlawful had it occurred in a part of the UK. The second leg of the provision subtly envisages dual criminality.

¹⁶³ Leong (2009: 208). The ARA is a non-prosecuting authority headed by “The Director” who is appointed by the Secretary of State. Civil recovery is one function that is unique to the ARA. The ARA reviews and assesses cases referred to it by law enforcement agencies before they are considered for civil recovery investigations.

¹⁶⁴ Fortson (2003: 1).

¹⁶⁵ See section 288 of POCA.

means of a property freezing order pending conclusion of investigation.¹⁶⁶ Where the case involves a substantial amount of overseas property, the ARA may apply for an interim receiving order (IRO).¹⁶⁷

The second stream deals with cash forfeiture proceedings. Such ill-gotten cash is recoverable in the Magistrates' Court. POCA provides for cash seizure anywhere in the UK where there are reasonable grounds to suspect that the cash relates to unlawful conduct or is intended for use in unlawful conduct.¹⁶⁸

Part XI of POCA provides for international co-operation in asset freezing and recovery.

However, because civil forfeiture mechanisms for recovery of corruptly-acquired assets do not exist in every jurisdiction, the effectiveness of international co-operation in civil recovery proceedings under POCA is limited.¹⁶⁹ Seeking mutual legal assistance in civil forfeiture actions often turns out to be a lengthy and tortuous process as a higher standard of proof may be required since most jurisdictions are yet to adopt civil forfeiture laws. In addition, there are no treaties providing for assistance for such civil investigations. Only the interim receiver, who acts independently of the ARA, has recorded some success in seizing property from foreign jurisdictions by the use of powers of attorney.¹⁷⁰

In contrast, Ireland has a unique civil forfeiture regime which is considered more radical than the UK POCA model. The Irish civil forfeiture law is contained in the Proceeds of Crime (Amendment) Act which came into effect on 12 February 2005.¹⁷¹ The statute extends the definitions of "criminal conduct" and "property" so that the proceeds of extra-territorial

¹⁶⁶ Leong (2009: 210).

¹⁶⁷ An IRO is "a worldwide freezing injunction prohibiting the person to whose property the order applies from dealing with the property and also requiring him to repatriate property or documents abroad to the UK." The court appoints an interim receiver to establish ownership of the property, the location of the property and its extent. See section 247 of POCA. See also Leong (2009: 211).

¹⁶⁸ Leong (2009: 211).

¹⁶⁹ Fortson (2003: 3).

¹⁷⁰ Dayman (2009: 242).

¹⁷¹ McKenna and Egan (2009: 74).

criminality fall within its scope. In addition, it contains provisions to enhance procedures for international exchange of information. Most significantly, it has empowered the Irish Criminal Assets Bureau (CAB) to assist in international asset recovery efforts through the introduction of an enhanced warrant which includes a pre-designed production order for the purposes of enforcement.¹⁷²

4.1.2 The United States of America

The United States of America has an unrivalled system of asset forfeiture. This is because its forfeiture laws are considered more developed and complex than those available in other jurisdictions.¹⁷³ As in other jurisdictions, the American civil forfeiture regime provides American prosecutors with a degree of flexibility to manoeuvre between the civil and criminal forfeiture routes.¹⁷⁴

The US asset forfeiture law developed over centuries. As noted by Cassella, “the procedures and policies that govern the application of forfeiture laws did not spring full grown from a single Act of Congress. Nor were the various statutes that were enacted piecemeal over many years accepted by the courts without scepticism and controversy”.¹⁷⁵ However, by the late 20th century, the focus had shifted to the use of civil forfeiture in combating drug offences.¹⁷⁶ The civil forfeiture system was expanded to cover other federal crimes which include proceeds of white collar crimes, which crimes invariably include corruption.¹⁷⁷

Because civil forfeiture involves filing a separate *in rem* action against the property itself, civil forfeiture cases in the US are titled after the names of the property which is the subject

¹⁷² Dayman (2009: 243).

¹⁷³ Fortson (2003: 3).

¹⁷⁴ Evans (1995: 4).

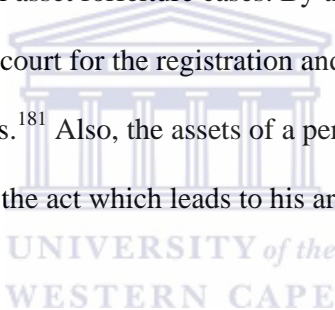
¹⁷⁵ Young (2009: 23).

¹⁷⁶ 21 USC § 881(a)(6) of 1978 and 21 USC § 881(a)(7) of 1984 provided for forfeiture of proceeds and instrumentalities of drug crimes.

¹⁷⁷ Young (2009: 28).

matter of the forfeiture action. Examples include *United States v Ninety-three (93) Firearms*¹⁷⁸ or *United States v All funds on deposit in any accounts maintained in the names of Meza or de Castro*.¹⁷⁹

As much as the US civil forfeiture system thrived domestically, it is only in recent times that consideration has been given to civil forfeiture of proceeds of crimes committed in the US which are lodged abroad or the proceeds of foreign crimes lodged in the US. As Samuel notes, “there were no laws to facilitate the introduction of foreign bank records and other foreign evidence in US court proceedings especially in civil forfeiture cases”.¹⁸⁰ The Civil Asset Forfeiture Reform Act (CAFRA) of 2000 introduced significant reforms with respect to international co-operation in civil asset forfeiture cases. By the Act, the Attorney-General is empowered to apply to a federal court for the registration and enforcement of foreign civil and criminal forfeiture judgments.¹⁸¹ Also, the assets of a person arrested abroad may be restrained where it is shown that the act which leads to his arrest can give rise to a civil forfeiture action in the US.¹⁸²



The enactment of the USA Patriot Act of 2001¹⁸³ occasioned the amendment of US money laundering laws to cover international co-operation in civil forfeiture cases, where proceeds of crime have been moved outside the US or are found in the US. The list of foreign crimes which are predicate offences under the money laundering laws has been expanded to include bribery, misappropriation, theft and embezzlement of public funds by foreign officials.¹⁸⁴

Unfortunately, very limited success has been recorded in recovering cross-border assets using the civil forfeiture mechanism. This is because often the US has been denied assistance from

¹⁷⁸ 330 F.3d 414 (6th Cir.2003).

¹⁷⁹ 63 F.3d 148 (1995); cert. denied, 116 S.Ct. 1541 (1996).

¹⁸⁰ Samuel (2005: 2).

¹⁸¹ 28 USC § 2467.

¹⁸² 28 USC § 981(b)(4).

¹⁸³ This is also known as the US Anti-terrorism Act of 2001.

¹⁸⁴ Samuel (2005: 3)

jurisdictions that are yet to introduce civil forfeiture laws into their asset recovery framework. However, a partial remedy exists under 28 USC § 1355(b)(2) of 1994, which vests US district courts with extra-territorial jurisdiction and venue over assets found outside the US. This provision is helpful in situations where a foreign jurisdiction cannot assist in forfeiting property because it has no civil forfeiture laws in place but could take other steps that could assist the US in forfeiting the assets under US laws.¹⁸⁵

The application of 28 USC § 1355(b)(2) of 1994 is well illustrated by the case of *US v All funds on Deposit in any accounts maintained in the names of Meza or de Castro*.¹⁸⁶ Although the case borders on proceeds of drug trafficking offences, it vividly demonstrates the application of civil forfeiture laws where proceeds of crime have moved outside the jurisdiction in which the crime was committed. The case concerned funds which were the proceeds of drug trafficking offences committed in the US by Jose Santacruz Londono (a drug trafficker) but lodged in a number of London bank accounts. The accounts were maintained in the joint names of Heriberto Castro Meza and Esperanza Rodriguez de Castro, Santacruz's parents-in-law.

Prosecution of Santacruz was initiated but proved impossible as he had left the US.

Simultaneously, the government sought to freeze the London accounts to preserve the *res* till a conviction could be secured. A formal request for restraint of the assets was made to the UK Crown Prosecution Service (CPS). The CPS thereafter applied to the English High Court, which granted restraint orders under the Drug Trafficking Offences Act of 1986 and Drug Trafficking Offences Act of 1986 (Designated Countries and Territories) Order of 1990. The US was one of the countries listed in the 1990 Order as a country whose proceedings might

¹⁸⁵ See 31 USC § 5332. Examples include seizure of the property, enforcement of US judgment or repatriation of the assets.

¹⁸⁶ 63 F.3d 148 (1995). See also 116 S.Ct. 1541 (1996). For a detailed discussion, see Smith (1996: 902-909). See also *Asset Recovery Agency v Virtuoso* [2008] EWHC 149 (QB) where the English court held that foreign evidence is admissible evidence under POCA.

lead to forfeiture of assets found in the UK. Therefore, the assets were restrained on the basis of the criminal prosecution contemplated in the US. Prosecution, however, could not proceed because of the death of Meza and because extradition arrangements could not be made with Colombia, where Santacruz was residing.

The US government sought to recover the assets by way of civil forfeiture. It commenced civil forfeiture proceedings in New York in 1993 and a warrant of arrest *in rem* was issued, commanding the US marshal to arrest the London accounts. A UK detective constable, pursuant to a request by the US marshal, served copies of the warrant of arrest on the London banks concerned. Esperanza Rodriguez (Santacruz's mother-in-law) challenged the New York court's jurisdiction over the funds in the London banks and also sought to discharge the restraint order. On the issue of jurisdiction, she contended that the 1986 Act and 1990 Order, under which the restraint orders were granted, applied only to criminal forfeiture. The English court, however, held that it equally applied to *in rem* proceedings. The civil forfeiture proceedings in the US court continued. The court relied heavily on 28 USC 1355 (b)(1) of 1994 to justify the jurisdiction of the New York court over the London funds, on the ground that the court had constructive control of the *res* at the commencement of the proceedings. The control was derived from the fact that the English High court issued and enforced a restraint order on the accounts based on a request by the US government. The court also relied on the service of warrants of arrest on the London banks by a UK constable based on a request by US authorities.

Although the basis on which the New York court assumed jurisdiction over the funds in the London bank accounts has been subject to criticism, the case describes how international co-operation can be used to facilitate civil recovery of corruptly-acquired assets found outside a state's borders.

4.1.3 South Africa

The South African Prevention of Organised Crime Act (POCA) of 1998 provides for both criminal and civil asset forfeiture.¹⁸⁷ For the first time in South Africa, a civil asset forfeiture regime targeted at the proceeds and instrumentality of crimes was established through POCA. The Act creates the offences of money laundering and racketeering.¹⁸⁸ To recover corruptly-acquired assets through the civil forfeiture route, a unit known as the Asset Forfeiture Unit¹⁸⁹ obtains an interim preservation order pending the determination by the court as to whether the assets concerned fall to be permanently forfeited to the State. As in many jurisdictions, proof in South African civil forfeiture proceedings is on a balance of probabilities, as against proof beyond a reasonable doubt required in criminal confiscation.

With respect to international co-operation, the International Co-operation in Criminal Matters Act 75 of 1996 provides the framework for mutual legal assistance. Section 2 of the Act provides for the issue of a letter of request to a foreign state for the gathering of evidence in such state where investigations into a particular crime have been initiated in South Africa.¹⁹⁰ Conversely, section 7 deals with foreign requests for assistance in gathering evidence. More importantly, Chapter 4 provides for the confiscation and transfer of proceeds of crime. Where a person against whom a confiscation order is made owns property in a foreign state, the South African court issuing the confiscation order may issue also a letter of request for the confiscation of the foreign assets.¹⁹¹ In the same vein, section 20 provides for the registration of foreign confiscation orders in respect of assets located in South Africa, provided that:

- i. the order is final and not subject to review or appeal;

¹⁸⁷ See Chapters 5 and 6 of POCA.

¹⁸⁸ Racketeering is described as “the crime of continuously or repeatedly committing offences such as fraud, corruption, theft and the like in an organised or planned fashion.” See Deneys Reitz Attorneys (2010).

¹⁸⁹ Deneys Reitz Attorneys (2010). The AFU is a unit within the South African National Prosecuting Authority.

¹⁹⁰ Dugard (2005: 236).

¹⁹¹ See section 19 of the International Co-operation in Criminal Matters Act 75 of 1996.

- ii. the order was made by a court having jurisdiction;
- iii. the person against whom the order was made was given an opportunity to defend himself;
- iv. the person holds property in South Africa;
- v. the order cannot be satisfied in full in the requesting state; and
- vi. the order is enforceable in the requesting state.

There is a limited number of judicial decisions reflecting the application of the International Co-operation in Criminal Matters Act (Co-operation Act) in trans-border civil forfeiture cases.¹⁹² However, it is recognised that when the South African government either makes a request to a foreign state for assistance or treats a request for assistance by a foreign state, it must act lawfully.¹⁹³ In *Thint Holdings (Southern African) (Pty) Ltd v National Director of Public Prosecutions; Jacob Gedleyihlekisa Zuma v The National Director of Public Prosecution*,¹⁹⁴ the court had to determine, *inter alia*, the lawfulness of the issue of a letter of request, under section 2(2) of the Co-operation Act requesting the Attorney-General of Mauritius to transmit to the Republic of South Africa certain documents in possession of Mauritian authorities. These documents were intended to be used as evidence in the subsequent criminal trial of the applicants on charges of corruption and/or fraud arising out of an arms deal. Mr Jacob Zuma and the Thint companies challenged the request on the ground that section 2(2) was inapplicable and its application was a threat to their constitutional rights to a fair trial. The Constitutional Court of South Africa dismissed this contention. It held that the request did not amount to a denial of the right to a fair trial as no evidence could be tendered in the eventual trial without the applicants being given an opportunity to engage with and challenge such evidence.

¹⁹² Katz (2005).

¹⁹³ Katz (2005). See also *Thatcher v Minister of Justice and others*, unreported judgment of the Cape High Court, dated 24 November 2004.

¹⁹⁴ [2008] ZACC 14.

So far, the level of international co-operation which exists in civil forfeiture cases is very limited when compared to that which exists in criminal forfeiture cases. Hence, civil forfeiture has witnessed limited success in the international arena. It is expected that a greater level of international cooperation would be achieved in the not too distant future as more states incorporate civil asset forfeiture laws into their asset recovery frameworks.

4.2 Civil Forfeiture and Fundamental Rights

For the most part, acts of corruption constitute matters to which criminal law applies. Thus, embezzlement, bribery, trading in influence, concealment and laundering are commonly regarded as criminal offences. To safeguard the accused person from the retributive scourge of criminal sanctions until ascertainment of guilt, the law prescribes the observance of due process in judicial proceedings. By due process is meant that all legal rights of the accused person must be respected. The underlying rationale stems from the fact that in the administration of justice, society places upon itself the entire risk of error, thus requiring the state to prove its case against the accused beyond a reasonable doubt.¹⁹⁵ The rights which are contested often in civil forfeiture proceedings are the right to be presumed innocent and the right to property. These rights are affirmed by international and regional declarations of human rights.¹⁹⁶

Civil forfeiture of assets is considered an absurd process because it seeks to apply the standard of proof in civil proceedings to matters that are essentially criminal in nature. In many jurisdictions that have adopted civil forfeiture laws, the standard of proof in civil

¹⁹⁵ Stahl (1992: 291).

¹⁹⁶ Article 11 of the Universal Declaration of Human Rights provides as follows: "Everyone charged with a penal offence shall have the right to be presumed innocent until proved guilty according to law". See also Article 6(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Article 7(1) of the African Charter on Human and Peoples' Rights also provides for the right of the accused person to be presumed innocent until the contrary is proved. The Constitution of the Federal Republic of Nigeria reinforces this right in section 36(5). It provides that "every person who is charged with a criminal offence shall be presumed to be innocent until he is proved guilty". Sections 43 and 44 of the Constitution safeguard the citizen's right to property.

forfeiture proceedings is proof on a balance of probabilities, which is lower than proof beyond a reasonable doubt required in criminal matters.¹⁹⁷ Thus, the state is eased of its burden of proving the guilt of the accused as it need only establish the unlawful conduct on a balance of probabilities. Anyone laying claim to the tainted assets in a corruption case is required to prove absence of corruption. This reversal of the burden of proof has been criticised severely and contested as being contrary to the fundamental right to be presumed innocent. It is for this reason that civil forfeiture is referred to ironically as “criminal forfeiture dressed up in sheep’s clothing”.¹⁹⁸ However, with the rate at which corruption is perpetrated and the increasing sophistication of mechanisms adopted to conceal corruptly-acquired funds and frustrate attempts at criminal proceedings, it is imperative to render laws enforceable by relying on circumstantial evidence.¹⁹⁹ The difficulty lies in striking a balance between the defendant’s fundamental right to a fair hearing, which includes the presumption of innocence, and the state’s desire to combat corrupt practices.²⁰⁰ This difficulty is aggravated by the failure of international human rights treaties and national constitutions to prescribe procedural and substantive norms applicable in civil forfeiture. As noted by Young:

“these instruments bifurcate the world of adjudication into criminal and non-criminal proceedings with the former given superior rights protections and the latter only minimal ones. In this bifurcated world, civil forfeiture sits well in neither of the two realms”.²⁰¹

In relation to property rights, civil forfeiture also places the claimant in a rather unfavourable position. This is because civil forfeiture actions are actions *in rem*, that is, actions against property. Thus, the property is the defendant. Any assertion of ownership by the claimant is

¹⁹⁷ Kennedy (2006:139). Examples include the UK, Ireland, Australia, New Zealand and South Africa. In most civil law jurisdictions, the standard of proof in civil forfeiture cases is proof beyond a reasonable doubt or intimate conviction. Variations, however, exist from jurisdiction to jurisdiction, giving rise to a few exceptions. See also Greenberg *et al* (2009: 17).

¹⁹⁸ Young (2004: 4).

¹⁹⁹ Jayawickrama (2002: 23).

²⁰⁰ Jayawickrama (2002: 23).

²⁰¹ Young (2009: 4).

met quickly with the argument that the property in itself has no constitutional rights. This argument is reinforced by the fact that, in civil forfeiture proceedings, the guilt of the property owner is irrelevant. Hence, a claim of owner's right to property will afford no defence.²⁰²

In *Walsh v United Kingdom*,²⁰³ a case based on an action for civil recovery of the applicant's assets, the applicant contended that the proceedings for recovery of his assets were not civil but criminal in nature and were proceedings to which the right to be presumed innocent under Article 6 of the European Convention on Human Rights applied.²⁰⁴ The European Court of Human Rights had to decide whether the recovery proceedings involved the determination of a criminal charge such as to invoke the provisions of Article 6. The court considered three important criteria, namely, the domestic classification of the matter, the nature of the charge and the penalty to which a person becomes liable. Firstly, the court found that, according to the UK domestic law, the recovery proceedings were regarded as civil and not criminal. Secondly, the purpose of the proceedings was not punitive or deterrent but to recover assets to which the defendant lawfully was not entitled.²⁰⁵ The court further confirmed that there was no finding of guilt of specific offences and that though the recovery order made by the lower court involved a huge sum (£70 250), it was not intended to be punitive.²⁰⁶ Having regard to the above findings, the European Court of Human Rights held that the proceedings, being civil in nature, were outside the scope of Article 6 of the European Convention of Human Rights. Therefore the application was declared inadmissible.

Civil forfeiture of assets is viewed with great distrust because of the infringement of the right to be presumed innocent. Expressing its fear of the growing rate of civil forfeiture

²⁰² Noya (1996: 495-496).

²⁰³ [2006] ECHR 1154.

²⁰⁴ Article 6(2) of the European Convention on Human Rights provides that "everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law".

²⁰⁵ See also *Butler v United Kingdom* [2002] ECHR IV.

²⁰⁶ See also *Porter v United Kingdom* [2003] 37 EHRR CD 8.

applications, the United States Court of Appeals for the second circuit has recognised that, while Congress may have intended civil forfeiture to be a potent weapon, “it would indeed be a Pyrrhic victory for the country, if the government’s relentless and imaginative use of that weapon were to leave the constitution itself a casualty”.²⁰⁷ Nevertheless, judicial decisions have tilted in favour of strictly excluding the right to be presumed innocent and the right of property from civil forfeiture cases.

This trend is justified by the need to rescue society from the alarming growth of corruption and conquer the ingenuity with which perpetrators conceal corruptly-acquired assets in order to frustrate the state’s recovery efforts.

4.3 Relationship between Proceedings in Criminal and Civil Forfeiture

Given that civil forfeiture arises from criminal conduct, there are situations in which criminal forfeiture proceedings may coincide with civil forfeiture proceedings. Thus, it is left to the state to define the relationship between the proceedings.²⁰⁸ First, the law may require that criminal forfeiture proceedings should remain the standard response in corruption cases, with civil forfeiture proceedings being initiated only where criminal prosecution has failed or is impossible.²⁰⁹ In the alternative, the law may provide for parallel or simultaneous application of both procedures.

Each of these approaches comes with its pros and cons.²¹⁰ Where criminal proceedings are concluded first, there would be no need to apply for a stay of the civil proceedings to protect confidential information. The defendant also cannot claim privilege against self-incrimination in respect of evidence already disclosed in the criminal trial. However, the disadvantage is that no civil remedies can be obtained until the criminal case is concluded.

²⁰⁷ *United States v Lasanta* 978 F. 2d. 1300, 1305 (2d Cir. 1992).

²⁰⁸ Greenberg *et al* (2009: 62).

²⁰⁹ Greenberg *et al* (2009: 62).

²¹⁰ See generally Edgeworth (2004: 168-170).

By contrast, where civil proceedings are taken first, the state has the advantage of a lower standard of proof. Also, the defendant, in a bid to defend the civil proceedings vigorously, may waive his right against self-incrimination and give evidence which may assist the prosecution in a subsequent criminal prosecution. The disadvantage of civil proceedings lies in the fact that the asset owner may use the extensive discovery available in the civil proceedings to obtain information that could be used to thwart a subsequent criminal prosecution.

The third approach is to conduct both proceedings concurrently. While this enables concurrent imposition of criminal penalties and civil sanctions, it gravely affects the defendant's right against self-incrimination. The defendant may be discouraged from vigorously pursuing the civil proceedings to avoid incriminating himself in the criminal case. The right most affected is the defendant's right against self-incrimination.²¹¹

In *Payton v R*,²¹² the defendant was charged with a criminal offence before the Crown Court. Concurrently, civil proceedings were instituted in the Magistrates' Court in respect of the sum of £7800 alleged to be the proceeds of the offence. In his appeal to the Court of Appeal, it was argued on his behalf that the civil proceedings constituted an abuse of process resulting in unfairness to the defendant. The defendant was caught between giving evidence on oath in the civil proceedings about matters which could affect his criminal trial before the trial took place, and refusing to give evidence which might result in forfeiture of the cash seized before the conclusion of the criminal trial. The court, stressing the importance of a fair trial, held that a defendant's right to a fair trial should not be prejudiced by anything arising in civil

²¹¹ The right against self-incrimination (also known as privilege against self-incrimination) "confers immunity in criminal proceedings from an obligation to provide information tending to prove one's guilt." Thus, the defendant is not bound to give evidence that may expose him to conviction for a crime. See McDougall (2008: 2). Section 36(11) of the Constitution of the Federal Republic of Nigeria provides for the right to silence in criminal proceedings as follows: "No person who is tried for a criminal offence shall be compelled to give evidence at the trial."

²¹² [2006] EWCA Crim. 1226.

proceedings in the Magistrates' Court and steps to prevent such abuse should be taken by law enforcement authorities. The court recommended effective liaison between the police acting in respect of the civil forfeiture proceedings and the prosecuting authority.

However, it is noteworthy that criminal prosecution does not in itself constitute a bar to civil forfeiture actions. In *Ayodele Olusegun Olupitan and another v Director of the Assets Recovery Agency*,²¹³ the Court of Appeal considered an appeal against a civil forfeiture order under section 5 of POCA in relation to two properties acquired as a result of mortgage fraud. The appeal was dismissed on the ground that a property acquired as a result of mortgage fraud was recoverable property within POCA. It was not necessary for the Director of the ARA to allege and prove a specific criminal offence. The proceedings were not the same as a criminal prosecution and so the Director of the ARA was not bound by any concession in the criminal proceedings.

Where there exists sufficient evidence to allow criminal or civil proceedings, the popular view is that it is preferable to institute criminal proceedings. The UK model supports this approach.²¹⁴ This idea has been described as a safeguard to prevent law enforcement from cutting corners to deprive respondents of rights available in criminal trials.

To avoid the difficulties inherent in concurrent civil and criminal forfeiture proceedings, the US model provides for a stay of the civil proceedings where civil discovery will prejudice the government's ability to conduct a criminal investigation or prosecution.²¹⁵ A stay of civil proceedings may be granted also at the instance of the respondent, subject to the following conditions being met:

²¹³ [2008] EWCA Civ. 104.

²¹⁴ Section 2 of the POCA. See also Kennedy (2006: 151).

²¹⁵ Kennedy (2006: 151).

- i. He must be the subject of a related criminal investigation.
- ii. He must have standing to assert a claim in the civil forfeiture proceedings.
- iii. The continuation of the forfeiture proceedings would affect adversely his right against self-incrimination in the related criminal investigation.²¹⁶

From the foregoing, it is apparent that none of the approaches is devoid of difficulties.

Whatever approach is adopted, the state has an obligation to provide appropriate safeguards, through its asset forfeiture laws, to preserve the defendant's right to a fair trial and to prevent an abuse of process.

4.4 Retrospective Application of Civil Forfeiture Laws

It is a general principle of law, recognised under the Constitutions of many countries of the world, that a crime or punishment cannot arise from an act which was not criminal or punishable at the time of its commission.²¹⁷ Thus, it is necessary to consider whether deprivation of property by means of civil forfeiture contravenes this basic principle of law where such assets were acquired before the enactment of the civil forfeiture legislation.

This issue has been the subject of much judicial deliberation in jurisdictions with civil forfeiture legislation. The courts, in most cases, have held that the rule against retrospectivity is not applicable in civil forfeiture proceedings because forfeiture in this regard is not criminal or penal but “a civil law consequence of the fact that a perpetrator or other beneficiaries had obtained assets from an unlawful act”.²¹⁸ Thus, in *US v Four Tracts of*

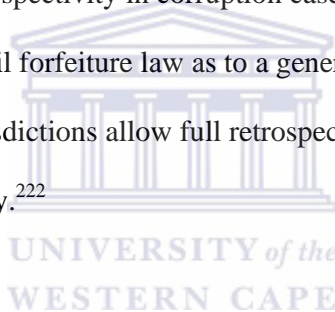
²¹⁶ Kennedy (2006: 151). See also 18 United States Code 981(g)(1) and (2) USA.

²¹⁷ See Section 36(8) of the Constitution of the Federal Republic of Nigeria; Article 11b of the Universal Declaration of Human Rights; Article 7(2) of the African Charter on Human and People's Rights.

²¹⁸ Greenberg *et al* (2009: 44).

Property on the Waters of Leiper's Creek,²¹⁹ the court held that retroactive application of civil asset forfeiture laws is not penal in nature because the claimant's conduct has been criminal always and the claimant never had a vested right to property. Similarly, in *Dassa Foundation v Liechtenstein*,²²⁰ the European Court of Human Rights had to decide whether civil forfeiture legislation could be applied retroactively to forfeit proceeds of bribery without offending section 61 of the Liechtenstein Criminal Code and Article 7 of the European Convention on Human Rights. The court held that civil forfeiture law was comparable to civil law restitution of unjust enrichment and retroactive application of the law would not constitute a penalty.

In resolving the question of retrospectivity in corruption cases, much depends on the provisions of a jurisdiction's civil forfeiture law as to a general statute of limitations on civil proceedings.²²¹ While some jurisdictions allow full retrospectivity, some other jurisdictions allow only limited retrospectivity.²²²



²¹⁹ 181 F.3d 104, 1999 WL 357773 at p 3-4 (6th Cir. 1999). See also *United States v Certain Funds Located at the Hong Kong and Shanghai Banking Corp.*, 96 E 3d.20, 25-27 (2nd Cir. 1996). However, in *United States v \$814, 254.76 in US currency contents of Valley National Bank account no. 1500-8339* 51 F.3d 207 63 USLW 2643, the United States Court of Appeals had a different view based on the facts of the case. Here, the state sought retrospective application of 18 USC Sec 984 for the forfeiture of the seized \$814, 254.76 being alleged proceeds of money laundering lodged at Valley National Bank in Arizona. At the time of the seizure the relevant civil forfeiture legislation was 18 USC Sec.981(a) (1)(A) which required that, to be capable of forfeiture, the funds must be involved in or traceable to the money laundering enterprise. The only relationship between the funds seized and the illegal activity was that the tainted funds had previously passed through the same inter-bank account. The account did not contain any of the money the perpetrator was given to launder or any proceeds from the laundering enterprise. 18 USC section 984 permits forfeiture of money in a bank account even when the money seized is not directly traceable to the laundered funds, so long as the account previously contained the funds involved in or traceable to the illegal activity. The court held that section 984 attaches new legal consequences to events completed before its enactment and therefore could not be given retrospective effect.

²²⁰ ECHR Application number 696/05 (10 July 2007).

²²¹ Kennedy (2006: 135-136).

²²² For instance, the Irish civil forfeiture law provides for forfeiture of proceeds of crime obtained at any time, whether prior to or after the enactment of the legislation. However, the UK civil forfeiture law stipulates that civil recovery proceedings must be brought within 12 years of the date when the Director of Asset Recovery's cause of action accrued, that is, the date of unlawful acquisition of the original property. Section 316(3) of the UK POCA. For a detailed discussion of the approaches adopted by different jurisdictions, see Kennedy (2006: 132-163).

Retrospective application of civil forfeiture laws is justifiable because perpetrators of acts of corruption should not be allowed to benefit from unlawful conduct on the basis of time elapsed. It is also important for recovering assets corruptly acquired by rulers who have been in power for a long time and have had ample opportunity to siphon off state funds.²²³

For the purposes of certainty and to avoid loopholes in recovery efforts,²²⁴ civil forfeiture legislation should provide specifically that proceeds of corruption are forfeitable, irrespective of when the civil forfeiture law comes into force, as long as the act from which the proceeds are derived was criminal at the time of its commission.

4.5 Appropriate Legislation for Civil Forfeiture

A jurisdiction intending to adopt civil forfeiture laws must decide whether such laws are to be incorporated into the existing body of laws or whether a separate statute on civil forfeiture is required.²²⁵ For instance, Articles 70-72 of the Swiss Criminal Code contain provisions on civil forfeiture.²²⁶ In contrast, other jurisdictions enact separate statute dealing with civil forfeiture. Typical examples include the Proceeds of Crime Act of 2002 in the UK and Law 793 of 2002 in Colombia. In South Africa, the Prevention of Organised Crime Act of 1998 provides for both criminal and civil forfeiture in the same statute. It is argued that this dual approach makes for the creative use of the provisions of the statute in a way that best suits the needs of each particular case, as the statute does not stipulate when criminal, as opposed to civil forfeiture proceedings, must be instituted.

²²³ Greenberg *et al* (2009: 44).

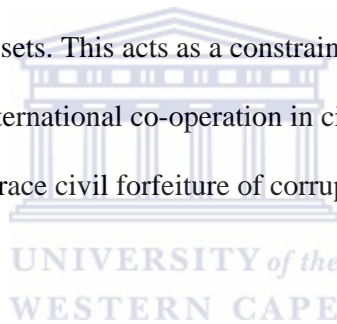
²²⁴ In the South African case of *National Director of Public Prosecution of South Africa v Carolus and others* 2000 (1) SA 1127 (SCA), the state lost the chance of recovering the criminal assets involved in the suit due to uncertainty with regard to the question of retrospectivity under the Prevention of Organised Crime Act. The Supreme Court of Appeal held that the Act could not be applied retrospectively to civil forfeitures because it did not state “whether before or after the commencement of the Act” in the relevant sections. This decision prompted Parliament’s amendment of the definitions of proceeds and instrumentalities to include this wording. See section 1 of Act 38 of 1999.

²²⁵ Greenberg *et al* (2009: 22).

²²⁶ The same applies under the Anti-Money Laundering Act of Thailand.

Although civil forfeiture is a potent and needed tool for law enforcement, it raises significant legal issues. Much of the criticisms levelled against civil forfeiture concern issues of fundamental rights. It is essential that the investigative means applied or the decisions taken to identify, trace, freeze, and confiscate assets do not violate fundamental rights. A balance must be struck between the need to apply civil forfeiture of assets as a disincentive to corruption and the need to respect the fundamental rights of persons whose assets are targeted for forfeiture.

Asset recovery can be a highly complex field of work especially where corruptly-acquired assets have been moved abroad. Currently, only few jurisdictions use civil forfeiture in recovering corruptly-acquired assets. This acts as a constraint upon international co-operation. It is envisaged that international co-operation in civil forfeiture efforts will be strengthened as more states embrace civil forfeiture of corruptly-acquired assets.



CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

Corruption continues to affect all areas of life and impede sustainable development. The importance of asset recovery in both national and international anti-corruption campaigns cannot be over-emphasised. Asset recovery is an indispensable tool in the fight against corruption as it helps to ameliorate the effects of corruption. Recovered assets may be channelled towards development projects which will help improve the living standards of citizens. Also, successful asset recovery efforts serve as a deterrent to others and demonstrate that no one, however powerful or privileged, should profit from crime.

Traditionally, states confiscate assets only on the basis of criminal convictions. However, criminal forfeiture is incapable of dealing with the many vagaries of asset recovery such as the accused person dying, fleeing, or enjoying immunity as a result of which he cannot be prosecuted. Recent years have witnessed a marked increase in the number of jurisdictions that are enacting legislation permitting civil forfeiture of corruptly-acquired assets. These jurisdictions have strengthened their asset recovery regimes by taking advantage of the many benefits of civil forfeiture.

The statutory framework for asset recovery constitutes a challenge in many jurisdictions. In Nigeria, in spite of the tough anti-corruption instruments available, much is still left to be desired in the area of asset recovery. This study has identified policy and legal constraints associated with forfeiture of corruptly-acquired assets. Prominent among this is the lack of political will. This chiefly explains the refusal by the Nigerian legislature to pass into law the

Civil Asset Forfeiture bill, as a result of which Nigeria is yet to join the league of countries with civil forfeiture statutes.

While it is conceded that civil forfeiture should not be a substitute for criminal prosecution, civil forfeiture may be the only suitable legal response to the difficult issues involved in dealing with politically exposed persons who enjoy immunity from criminal prosecution. Nigeria should take advantage of the experience of countries like the US, the UK and South Africa by fast-tracking its efforts at fighting corruption through the enactment of a civil forfeiture statute to recover corruptly-acquired assets.

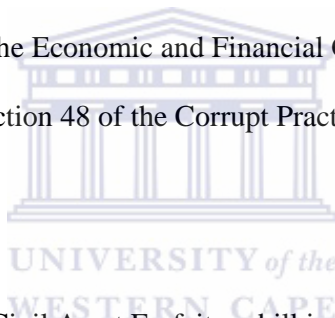
5.2 Recommendations

It is not sufficient simply to adopt or agitate for a civil forfeiture statute. An appropriate law enforcement mechanism is required for the successful application of civil forfeiture laws in the recovery of corruptly-acquired assets. Against this backdrop, a two-pronged approach is proposed to enhance asset recovery measures in Nigeria. Firstly, an appropriate statute is required for the adoption of civil forfeiture. Secondly, there is need to establish effective law enforcement structures for the eventual application of the law.

5.2.1 Finding Appropriate Legislation

In the current absence of a civil forfeiture statute, it is essential to search through existing anti-corruption legislation for provisions that may be used to forfeit corruptly-acquired assets without the need for prosecution or conviction. Only the Corrupt Practices and Other Related Offences Act of 2004 makes provision for non-conviction based forfeiture of corruptly-acquired assets. Section 48 of the Act succinctly provides that where there has been no prosecution or conviction for an offence under the Act, the Chairman of the Independent Corrupt Practices Commission may apply to a High Court judge for an order of forfeiture

within twelve months of the seizure of the asset. Such application must be followed by a publication calling on third parties with interests in such asset to attend court and defend their interests in the asset. An order of forfeiture may be made if the judge is satisfied that the property is the subject matter or an instrumentality of a corruption offence and no genuine third-party interest exists. However, this provision has never been utilised because the Independent Corrupt Practices Commission, which is saddled with the responsibility of implementing the provisions of the Act, is in practice, not an independent body. Although it is protected legally from political interference, it is influenced often by political incentives, with the result that only a few high-level investigations have taken place since its establishment.²²⁷ In contrast, the Economic and Financial Crimes Commission has been more proactive, but its enabling law (the Economic and Financial Crimes Commission Act) contains no provision akin to Section 48 of the Corrupt Practices and Other Related Offences Act of 2004.



While the future passage of the Civil Asset Forfeiture bill is awaited, it is suggested that a merger of the EFCC and ICPC should be effected. The statute giving effect to such merger should empower the newly formed body to apply the provisions of the Corrupt Practices and Other Related Offences Act of 2004, which includes a non-conviction based asset forfeiture provision.

5.2.2 Specific Recommendations in Respect of a Future Forfeiture Statute

A Nigerian civil forfeiture statute should include a provision to the effect that assets which are the proceeds of corruption acquired prior to the enactment of the statute are subject to

²²⁷ Thomson Reuters Foundation (2010).

forfeiture. This is important for the recovery of assets held by public officers who have been in office for a long time and have had enough opportunity to embezzle state funds.

Also, the civil forfeiture statute should contain provisions protecting whistle-blowers. This is to enhance detection of corruption and encourage reporting of cases of corruption. It will help also to promote transparency in the public sector.

In addition, the civil forfeiture statute should contain provisions aimed at safeguarding fundamental rights. This may entail including provisions which explain how a person with an interest in the asset can contest or object to the forfeiture action and the time within which such a claim must be filed.

Finally, the statute should contain provisions specifying the extent to which a claimant may use forfeitable assets for the purposes of contesting the forfeiture action or for living expenses. This is to prevent wanton dissipation of assets before an order of forfeiture is obtained.

5.3 Law enforcement

Globalisation and technological innovation enhance the disguise and rapid transfer of proceeds of corruption from one jurisdiction to another. Today, success in recovering corruptly-acquired assets depends largely on the effectiveness of a nation's law enforcement system. Asset recovery experts have suggested the creation of law enforcement structures that would enable seizure of assets within 24 hours. Anything short of this may frustrate recovery efforts as assets are capable of being dissipated rapidly before freezing orders are obtained.

Overly burdensome judicial procedures, lack of technical capacities in asset recovery and absence of co-ordination among anti-corruption agencies are factors which may pose a threat to recovering corruptly-acquired assets through the civil forfeiture route. Based on these and all other issues discussed in this text, the following structures are recommended.

5.3.1 Special Courts for Corruption Cases

Congestion in Nigerian courts, coupled with procedural technicalities, slows down the prosecution of corruption cases. Defendants often take advantage of these weaknesses in the judicial system to frustrate the asset recovery process. *Ex parte* orders are granted in some cases to restrain anti-corruption agencies from investigating certain individuals and corporate bodies. This provides immunity to some ex-public office holders who are under investigation, even when constitutional immunity is no longer available.²²⁸

Special courts with special rules of procedure will provide efficiency and expertise in the prosecution of corruption cases. Special courts would entertain and hear civil forfeiture proceedings expeditiously without the undue technicalities of the conventional courts.

Countries such as Kenya, Indonesia, Ghana and South Africa have resorted to the use of special courts in corruption cases and such courts have proved effective.

5.3.2 Asset Forfeiture Unit

Nigeria requires an Asset Forfeiture Unit to give teeth to the seizure and forfeiture provisions in its laws. Asset Forfeiture Units are a common feature of the criminal justice system of countries adopting civil forfeiture laws and have been used as law enforcement tools in such countries. International experience has shown that the application of civil forfeiture laws on a

²²⁸ Waziri (2009: 3)

large scale requires the creation of a special unit dedicated to that purpose.²²⁹ Confiscation and forfeiture systems involve a complex combination of criminal and civil laws, as well as a range of concepts new to both criminal and civil law.²³⁰ Forfeiture specialists are required to build up the necessary expertise in order to ensure the effective application of the relevant legislation.

In South Africa, for instance, corruption offences are among the priority crimes targeted by the Asset Forfeiture Unit.²³¹ Since its establishment in 1999, the Asset Forfeiture Unit has recorded notable success in recovering assets linked to high-profile figures like Jacob Zuma's former financial adviser, Schabir Shaik, former Nigerian state governor Diepreye Alamieyeseigha and former owner of Wheels of Africa and Hyundai Motors distributor, Willie Rautenbach.²³²

In the United States of America, the Asset Forfeiture Unit handles all civil forfeitures and provides advice and substantial assistance to Criminal Division attorneys with forfeiture or potential forfeiture issues in their criminal cases.²³³ The unit works on proactive criminal and financial investigations. It trains Criminal Division attorneys and support staff on forfeiture-related matters to ensure that Criminal Division personnel remain current on asset forfeiture law and trends in order to facilitate the successful resolution of forfeiture matters. Also, it monitors all ancillary hearing procedures and consults with criminal prosecutors in selecting the best forfeiture method for recovering the proceeds of crime. In addition, the Asset Forfeiture Units perform traditional asset forfeiture functions, such as the collection and maintenance of statistical and forfeiture-related information in automated and other records systems.

²²⁹ Kempen (2006: 2).

²³⁰ Kempen (2006: 3).

²³¹ Kempen (2006: 3).

²³² Global Advice Network (2010).

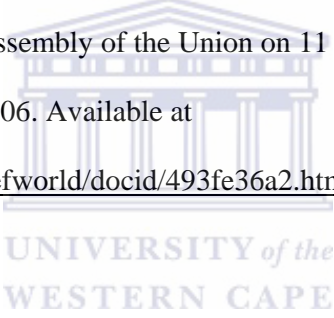
²³³ United States Attorney's Office (2007).

Experience has shown that the war against corruption can never be won on the basis of moral appeal. It is best fought through the instrumentality of the law. Holders of corruptly-acquired assets must be divested of such assets to drive home the message that crime does not pay and to ensure the availability of the funds for proper public purposes. The introduction of a civil forfeiture law into Nigeria's asset recovery framework is thus long overdue. The prevailing one-sided approach to recovering corruptly-acquired assets falls short of the lofty ideals and principles of UNCAC and leaves a huge gap in Nigeria's anti-corruption effort. Its commitment to the fight against corruption is best demonstrated through fortification of its asset recovery laws.



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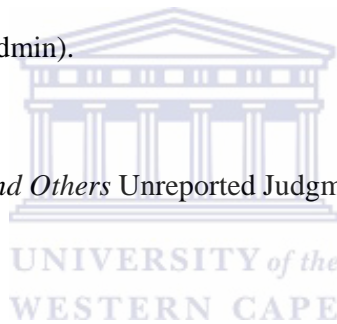
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