UNIVERSITY *of the*
WESTERN CAPE

Recovering the Proceeds of Corruption: Why Kenya Should Foreground Civil Forfeiture

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

BY

TITUS BARASA MAKHANU

STUDENT NUMBER: 3208318

PREPARED UNDER THE SUPERVISION OF

PROF R KOEN

AT THE FACULTY OF LAW, UNIVERSITY OF THE WESTERN CAPE, SOUTH AFRICA.

OCTOBER 2012

Table of Contents

Key words I

Declaration II

List of Abbreviations III

Dedication X

Acknowledgment XI

CHAPTER1.....1

General Introduction.....1

1.1 Background of the Study.....1

1.2 Statement of the Problem.....3

1.3 Research Questions.....3

1.4 Research Objectives 4

1.5 Significance of the Research.....4

1.6 Research Hypotheses.....5

1.7 Research Methodology.....5

1.8 The Scope of the Research.....6

1.9 Literature Review.....6

1.10 Chapter Outlines.....7

CHAPTER TWO.....10

Asset Recovery in Kenya.....10

2.1 Introduction.....10

2.2 Definition of Terminology 11

2.2.1 Corruption.....11

2.2.2 Instrumentalities of Corruption.....11

2.2.3 Proceeds of Corruption.....12

2.2.4 Asset Confiscation or Forfeiture.....12

2.3 Justification for Asset Recovery.....12

2.3.1 Introduction.....12

2.3.1.1 Asset Recovery removes the instrumentalities of corruption from circulation.....13

2.3.1.2 Asset Recovery takes away the proceeds of corruption.....14

2.3.1.3 Asset Recovery generates alternative funding for law enforcement agencies and revenue for the government.....15

2.3.1.4 Asset Recovery provides compensation to victims.....16

2.3.1.5 Asset Recovery is a mechanism of deterrence.....17

2.3.2 Historical Background and Development of Asset Recovery.....17

2.3.3 The Legal Framework of Asset Forfeiture in Kenya 21

2.3.3.1 The Narcotics Act 21

2.3.3.2 The Anti-Corruption Act 23

2.3.3.3 The Anti-Money Laundering Act.....23

CHAPTER THRE.....25

Why Kenya Should Consider Adopting Civil Forfeiture.....25

3.1 Introduction.....25

3.2 The Hybrid Nature of section 55 of the Anti-Corruption Act.....26

3.3 The Need to Foreground Civil Forfeiture in Kenya 29

3.4 Strengths and Weaknesses of Civil and Criminal Forfeiture.....30

3.4.1 Strengths of Civil Forfeiture.....30

3.4.2 Weaknesses of Civil Forfeiture 32

3.4.3 Weaknesses of Criminal Forfeiture.....33

3.4.4 Strengths of Criminal Forfeiture.....34

3.5 Navigating between Civil and Criminal Forfeiture.....35

3.5.1 Where Criminal Prosecution is unavailable or unsuccessful.....36

3.5.2 Where Civil Forfeiture runs parallel to Criminal forfeiture.....37

CHAPTER FOUR.....39

Civil Forfeiture and Constitutional Rights.....39

4.1 Introduction.....39

4.2 The Right to Property and Presumption of Innocence.....42

4.2.1 The Rights to Property.....45

4.2.1.1 Under South African Law 45

4.2.1.2 Under American Law.....46

4.2.1.2.1 The Proceeds of Crime.....47

4.2.1.2.2 Instrumentalities of a Crime 49

4.2.13 Under UK Law.....52

4.3 Presumption of Innocence.....53

4.3.1 The Doctrinal Explanation 55

4.3.2 Legal Justification.....57

CHAPTER FIVE.....61

Conclusion and Recommendations.....61

5.1 Conclusion.....61

5.2 Recommendations.....63

BIBLIOGRAPHY.....66

Key Words

- Asset Recovery
- Civil forfeiture
- Corruption
- Criminal forfeiture
- Ethics and Anti-Corruption Commission
- Instrumentalities of Corruption
- Money Laundering
- Presumption of Innocence
- Proceeds of Corruption
- Right to Property

Declaration

I, **Titus Barasa Makhanu,** 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.

Name .....

Signature .....

Date .....

Supervisor .....

Signature .....

Date .....

List of Abbreviations

ARA	Asset Recovery Agency
AU	African Union
CAFRA	Civil Asset Forfeiture Reform Act
CAK	Court of Appeal of Kenya
CC	Constitutional Court
Cir.	Circuit
COE	Committee of Experts
EA	East Africa
ECHR	European Convention of Human Rights
eKLR	electronic Kenya Law Reports
ESAAMLG	Eastern and Southern Africa Anti-Money Laundering group
HCCC	High Court Civil Case
HCSA	High Court of South Africa
KAA	Kenya Airports Authority
KACC	Kenya Anti-Corruption Act
NARC	National Alliance Rainbow Coalition
OECD	Organisation for Economic Co-operation and Development

PCA	Prevention of Corruption Act
PIU	Performance and Innovation Unit
POCA	Prevention of Crimes Act
SCA	Supreme Court of Appeal (South Africa)
SADC	Southern African Development Community
UIOD	Uniform Innocent Owner Defence
UNCAC	United Nations Convention against Corruption
UNODC	United Nations Office on Drugs and Crime

Dedication

I dedicate this thesis to my dear mother Hellen Inzayi.

I will forever be grateful to her, for her encouragement, and continuous insistence that I should pursue education to its deepest canyons.

It is these principles, which she stood for, that have kept me going till the completion of this research, despite the grief and agony of losing her during the research period. Completion of this thesis has marked a big step towards my mother's wishes.

"MAMA" this is for you, may your soul Rest in Everlasting Peace.

Acknowledgement

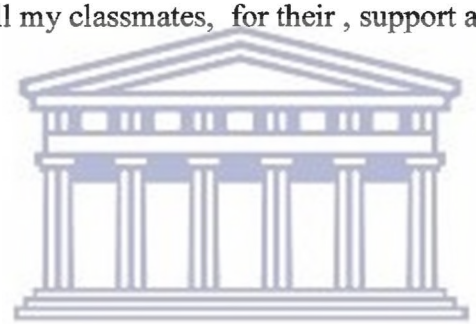
My sincere appreciation goes to God Almighty, for giving me the strength to undertake and complete this research.

Special recognition goes to my supervisor, Prof R Koen, for his plausible and astute insight and close supervision, but above all, for his persistence on the need for quality in this thesis.

I thank all the DAAD lecturers who have impacted positively on my scope of academia during the course of this LLM programme.

I will forever be grateful to DAAD giving me an opportunity, to achieve my dream of having an LLM degree.

Lastly, much appreciation to all my classmates, for their , support and encouragement.



CHAPTER ONE

General Introduction

1.1 Background of the Study

Today corruption is a major concern for most countries.[1] Civil forfeiture of the proceeds of corruption has been embraced as a key strategy by many states in recovering public funds lost through corruption.[2] It may be defined as a remedial statutory device designed to recover the proceeds of a crime as well as its instrumentalities.[3]

Originally, asset recovery regimes adopted by most states were predominantly criminal forfeiture. This mode of forfeiture is preceded by a conviction, after which the state takes possession of the proceeds of the crime from a convicted individual.[4] Its proceedings are *in personam* and the standard of proof is proof beyond a reasonable doubt. Thus, actual forfeiture only takes place after the issue of a conviction order. As a consequence, it is always lengthy and often results in delayed realisation of the proceeds of crime.[5]

The inherent weaknesses of criminal forfeiture gave birth to the idea of developing a civil forfeiture system.[6] This mode is different from the former in that its proceedings are *in rem.* Hence the standard of proof is proof on a balance of probabilities and a conviction order is not required.[7]

---

[1] Myint (2007).
[2] Chapter V of the United Nations Convention against Corruption (UNCAC).
[3] Young (2009: 133).
[4] Williford (2012).
[5] Young (2009: 49-50).
[6] Young (2009: 3).
[7] Pieth (2007: 137). See also Young (2009: 44).

Kenya is among the countries that have embraced asset recovery. It therefore enacted the Narcotic Drugs and Psychotropic Substances (Control) Act (the Narcotics Act), the Anti-Corruption and Economic Crimes Act (the Anti-Corruption Act), the Proceeds of Crime and Anti-Money Laundering Act (the Anti-Money Laundering Act), the Prevention of Organized Crimes Act (POCA), and the Criminal Procedure Code and the Evidence Act to facilitate asset recovery.[8] The Ethics and Anti-Corruption Commission (the Commission) is charged with the duty of investigating and prosecuting corruption and recovering the proceeds of corruption.[9]

Even though the Anti-Corruption Act envisages forfeiture of "unexplained assets" the model is based on the forfeiture of illicit wealth, which is a hybrid system and slightly different from the actual asset forfeiture regime. This is because the civil recovery proceedings it contemplates are those brought against any individual possessing unexplained assets, making them *in personam* and not *in rem* (see 4.1).[10] Only the Anti-Money Laundering Act provides expressly for civil forfeiture, although it is limited to money laundering. Also, it is enforced by the Asset Recovery Agency (ARA) and not the Commission.[11]

Efforts to recover stolen public funds seem to be futile since a Kenyan High Court has already terminated forfeiture of unexplained assets on the ground that sections 55(5) & (6) of the Anti-Corruption Act are unconstitutional for violating the presumption of innocence and the right to property.[12]

---

[8] Other laws include the Extradition (Contiguous and Foreign Countries) Act, Extradition (Commonwealth Countries) Act, Witness Protection Act, and the Mutual Legal Assistance Act.
[9] Sec 7 of the Anti-Corruption Act & sec 79 of the Kenyan Constitution.
[10] Sec 55(5) & (6) of the Anti-Corruption Act.
[11] Part VIII of the Anti-Money Laundering Act.
[12] *Kenya Anti-Corruption Commission v Stanley Mombo Amuti* (2011) eKLR HCCC No. 448 of 2008 (O.S) at page 8.

The aim of this research paper is to explain why civil forfeiture is the most appropriate regime to be used by Kenya in recovering the proceeds of corruption, as opposed to criminal forfeiture. The research will consider also the need to empower the Commission to commence civil forfeiture proceedings independently as opposed to being required to work with other agencies as contemplated by the Anti-corruption Act.

1.2 Statement of the Problem

This research paper seeks to assess the efficiency and adequacy of a civil forfeiture regime in recovering proceeds of corruption in the Kenya. This arises from the fact that the Commission has not made use of civil forfeiture in recovering the public funds lost through corruption, despite its numerous strengths. Most of the recovery proceedings commenced by Commission are forfeiture of unexplained assets, which often have been dismissed for being unconstitutional.

1.3 Research Questions

This research paper seeks to answer the following questions:

1. Does the current "forfeiture of unexplained assets" regime lack the capacity and ability to facilitate asset recovery in Kenya?
2. Will making use of civil forfeiture facilitate effective and efficient recovery of the proceeds of corruption in Kenya?
3. Should the Commission be invested with a full and independent mandate to commence civil forfeiture proceedings?

4. Are asset forfeiture laws unconstitutional especially now that a Kenyan High Court has held that section s 55(5) & (6) of the Anti-Corruption Act, which provides for forfeiture of unexplained assets are unconstitutional?

1.4 Research Objectives

The objectives of this research paper are as follows:

1. To find out why the Commission has been unable to facilitate recovery of the proceeds of corruption even though Kenya has adopted asset forfeiture laws;
2. To establish whether the proceedings provided for under sections 55(5) & (6) of the Anti-Corruption Act fall within the ambit of civil forfeiture;
3. To investigate whether civil forfeiture proceedings should operate independently or should be complemented by criminal forfeiture in recovering the proceeds of corruption; and
4. To analyse the legal framework on asset forfeiture in Kenya and ascertain whether it has the capacity to facilitate recovery of the proceeds of corruption.

1.5 Significance of the Research

This research paper may serve as an educational tool in the domain of asset forfeiture in Kenya through extending the existing knowledge base in this field. This is because currently there is limited information explaining the role that civil forfeiture may play in recovering the multi-billion Kenyan shillings lost through corruption. The research will therefore raise the awareness of those unacquainted with the potential of civil forfeiture through exploring its advantages and opportunities.

In addition, the study may serve as a benchmark for practical anti-corruption policy formulation and resource allocation by the government of Kenya in its primary goal of fighting corruption.

1.6 Research Hypotheses

This research is based on the following two main hypotheses:

1. Effective and efficient recovery of the proceeds of corruption will only be achieved if Kenya foregrounds civil forfeiture.
2. The current forfeiture of unexplained assets regime in Kenya lacks the capacity to facilitate effective and efficient recovery of the proceeds of corruption.

1.7 Research Methodology

This research is library-based. The method it employs is mainly the analysis of primary and secondary sources available in the library and from the internet. In its research method it will incorporate the technique of content analysis of the sources, selection of the relevant sources and compilation of chosen sources for purposes of referencing. It therefore adopts an analytical approach, relying upon available information to make evaluations, recommendations and draw conclusions.

In addition, the study is qualitative in that it deals with the subjective assessment of the information within the realm of recovering proceeds of corruption as opposed to quantification of such information.

1.8 The Scope of the Research

The scope of this research paper involves the study of the capacity of civil forfeiture to facilitate asset recovery. This will be enhanced by examining the strong points and the weaknesses of civil forfeiture in comparison to criminal forfeiture.

The research paper will analyse the features of the forfeiture of unexplained of assets, provided for in section 55 of the Anti-corruption Act for the purpose of establishing whether it falls under the realm of asset forfeiture laws. This will be followed by the drawing of recommendations on the way forward. In addition, the research paper will assess the constitutionality of civil forfeiture.

1.9 Literature Review

Although civil forfeiture is an emerging field of law, there is already a mass of literature available. For example, Young's *Civil Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime* deals with the perspectives on civil forfeiture, global proliferation of civil forfeiture laws and how civil forfeiture has been enhanced to facilitate effective asset recovery in various countries. However, he fails to consider the effect of civil forfeiture on the presumption of innocence and the constitutional right to ownership of property, which issues are dealt with in this research paper.

Similarly, Professor Pieth's *Recovering Stolen Assets,* while contributing useful information on the challenges facing asset recovery as well as success stories of asset recovery and technical assistance expected in UNCAC, unfortunately does not address the impact of the presumption of

innocence and constitutional proprietary rights on civil forfeiture. This research paper seeks to pick up from this point and address the legal position of these issues.

In its 2011 report, Transparency International (TI) Kenya recommend that the Bill creating the Ethics and Anti-Corruption Commission Act should be amended to include provisions on asset recovery and forfeiture that comply with the Kenyan Constitution. However, the report did not give the main reasons as to why it preferred the adoption of asset recovery and forfeiture as opposed to the already existing criminal forfeiture. Also, it does not give reasons as to why the existing criminal forfeiture under Anti-Corruption Act is unconstitutional or how the pitfalls could be dealt with under the asset recovery and forfeiture that it recommended. All these issues which have not been considered in the report will be discussed in this research paper.

In addition, this research paper disagrees with the 2003 report of TI Kenya which downplays the efficiency and effectiveness of civil forfeiture in asset recovery. TI Kenya holds the view that civil forfeiture is very complex and impracticable, hence it proposes criminal forfeiture. This research paper takes a contrary position, seeking to prove that civil forfeiture is more efficient and effective than criminal forfeiture.

1.10 Chapter Outlines

The remaining part of this research paper is divided into four chapters.

CHAPTER TWO: Asset Forfeiture in Kenya

This chapter will consider the general concept of asset forfeiture in Kenya. It will achieve this by explaining the concept of asset forfeiture, define terminologies used and give a justification for asset forfeiture in Kenya. It will also trace the development of asset forfeiture laws in Kenya,

identify the main forms of asset forfeiture available in Kenya and conclude by looking at the legal framework governing civil forfeiture in Kenya.

CHAPTER THREE: Why Kenya should consider adopting Civil Forfeiture

This chapter forms the backbone of this research paper since it seeks to justify its hypotheses. In this chapter, the research explains the main features of Kenya's forfeiture of unexplained assets provided for in section 55 of the Anti-Corruption Act, after which, it will consider whether this regime can be characterised as an asset forfeiture regime. This chapter will analyse also the strengths and weaknesses of both civil and criminal forfeiture with the view to supporting the hypothesis that civil forfeiture is a stronger tool than criminal forfeiture in recovering the proceeds of corruption. It will also investigate whether civil forfeiture should be commenced separately from or concurrently with criminal forfeiture proceedings. The chapter will end by giving a conclusion in support of the proposition that civil forfeiture is a better tool than criminal forfeiture in recovering proceeds of corruption.

CHAPTER FOUR: Civil Forfeiture and Constitutional Rights

The jurisprudence developed in the case of *Kenya Anti-Corruption Commission v Stanley Mombo Amuti,*[13] where the High Court of Kenya held that sections 55(5) and (6) of the Anti-Corruption and Economic Crimes Act are unconstitutional in the forfeiture of unexplained assets inspired the inclusion of this chapter .

[13] (2011) eKLR HCCC No. 448 of 2008 (O.S).

Constitutional challenges based on the right to property and the presumption of innocence have been the main pitfalls against the implementation of asset forfeiture laws in most countries. Kenya, too, is likely to be faced with these challenges should it adopt these laws.

This chapter seeks to enumerate the jurisprudence that has been developed and adopted by other countries to justify the constitutionality of asset forfeiture laws. More specifically, it will look at the approach taken by the US, the UK, and South Africa. This objective will be facilitated by looking at the landmark cases, for instance, *Deutschmann NO v Commissioner for the Revenue Service,*[14] *Austin v United States*,[15] *Bennis v Michigan*,[16] and the case of *Walsh v United Kingdom*.[17] The chapter will rely also on the opinion of reknown legal scholars, for instance, HLA Hart, Caro Steiker and Donald Dripp, whose comments are relevant to the objective of this chapter.

CHAPTER FIVE: Conclusion and Recommendations

This chapter includes a conclusion based on the findings of the research paper and recommendation as to what Kenya has to do to achieve sustained success in recovering the proceeds of corruption.

[14] 2000 (2) SA 106 (E).
[15] (1993) 509 US 622.
[16] (1998) 524 US 321.
[17] (2006) EHCR 1154.

CHAPTER TWO

Asset Recovery in Kenya

2.1 Introduction

Asset recovery is a process by which an illegally acquired property is traced, located or discovered, seized, and permanently transferred to the government or the rightful owner through a fair court process.[18] It could be defined also as 'a process of tracing, seizing, confiscating and restoring to the rightful owner any property established to be an instrumentality of corruption or the proceeds of corruption'.[19] Therefore, it includes asset forfeiture which is sometimes referred to as confiscation.[20]

The first ever statute to provide for asset forfeiture was passed by the US Congress in 1789.[21] It provided for seizure and forfeiture of foreign ships and cargos involved in custom offences.[22] Statutes providing for seizure and forfeiture of ships involved in piracy and slave trafficking followed.

Today, most states are parties to multilateral treaties which require them to domesticate asset recovery.[23] As a result, there has been a global proliferation of asset forfeiture laws.[24] It is noteworthy that only UNCAC contains specific provisions on asset recovery.[25] In most countries, the main types of forfeiture laws are civil and criminal forfeiture. However, in the US there

[18] Richards (1999: 191); art 2 (g) of UNCAC & Takahashi (1999: 14).
[19] International Center for Asset Recovery (2011: 2).
[20] Young (2009: 253-77) & Vettori (2006: 1-3).
[21] Act of 31 July 1789.
[22] Young (2009: 24). See also *United States v Bajakajian* (1998) 524 US 321 & 340-41; *United States v Ursery* (1996) 518 US 267-74.
[23] Arts 12 & 13 of UNCAC; art 5 of the 1988 Vienna Convention; art 3 of the Warsaw Convention (2005); art 2 of the Strasbourg Convention (1990) & the OECD Convention (1997). See also Greenberg *et al* (2009: 18).
[24] Young (2009: 23-253). See also Vettori (2006: 41-104) & Kennedy (2005: 9).
[25] Art 54 of UNCAC. See also Greenberg *et al* (2009: 18).

exists a third type called administrative forfeiture.[26] Essentially, the main objective of asset recovery is to prevent corrupt individuals from enjoying the proceeds of their crimes.[27]

2.2 Definition of Terminology

2.2.1 Corruption

The word corruption comes from a *Latin* word '*corrumpere'* which means 'to break or destroy'.[28] As yet, there is no universally accepted definition of corruption.[29] In fact, UNCAC does not define corruption expressly but only gives a list of crimes which constitute corruption.[30] However, corruption may be defined simply as the 'misuse of entrusted power for private gain'.[31]

2.2.2 Instrumentalities of Corruption

An instrumentality of corruption is anything that has a monetary value and is used to commit or facilitate corruption.[32]

[26] Young (2009: 37-39).
[27] Young (2009: 31-32) & Greenberg *et al* (2009: 13).
[28] Nicholls *et al* (2006: 1) & Stuart (1994).
[29] Holmes (2006: 17-43) & Mbaku (2007: 14-20).
[30] Nicholls *et al* (2006: 1); art 15 -22 of UNCAC; art 4 of the AU Convention & arts 1 & 3 of SADC Protocol; Secs 2, 39, 44, 46 & 47 of the Anti-Corruption Act. Compare with Sare *et al* (2005: 8).
[31] Transparency International (2009: 16). See also Chaikin & Sharman (2009: 8); Neild (2002: 5-8) & OECD Glossaries (2008: 22-23). Compare with Sare *et al* (2005: 27, 37-43, 53-54, 86-89, 138 & 190).
[32] Kennedy (2006: 155) & Greenberg *et al* (2009: 38). See also *NDPP v Parker* 2006 (3) SA 198 (SCA) at page 211 para B –C: Where Cameron J (as he then was) declared that 'the definition of an "instrumentality" has to be restrictively interpreted Not literally every material object or immovable property "concerned" in an offence can be liable to forfeiture, since that would cast an ocean –wide net. The link between the crime and the property must be reasonably direct and the property must be used in a way that is functional to the commission of the crime. This means it must be instrumental in, and not merely incidental to, the offence…'

2.2.3 Proceeds of Corruption

These are any benefits or advantages directly or indirectly obtained by a person who commits corruption or a person in whose favour corruption is committed. It could be defined as 'an asset of any kind, corporeal or incorporeal, movable or immovable, tangible or intangible, or any kind of document or legal instrument evidencing title to interests in such assets acquired as a result of corruption'.[33]

2.2.4 Asset Confiscation or Forfeiture

Asset confiscation or forfeiture is a legal process that leads to a final removal of a corruptly acquired property from the corruption offender. It could be defined also as any order of a competent court which results in a final deprivation of the instrumentalities of corruption or the proceeds of corruption from the corrupt individual.[34]

2.3 Justification for Asset Recovery

2.3.1 Introduction

As already said, corruption is a global problem.[35] Most countries considered to be successful in combating corruption have adopted and implemented asset recovery laws.[36]

Ordinarily, most people engage in corruption because of the desire to acquire material things. Therefore, a government's ability to forfeit corruptly acquired property may reduce the incentive

[33] Art 1 of the AU Convention; Greenberg *et al* (2009: 38); Williford (1999); art 2 of UNCAC & Pieth (2008: 63).
[34] Art 2 of the AU Convention. See also Barber & Eissa (2011: 2); Young (2009: 253-277); art 2 of UNCAC; art 1 of the AU Convention & art 1 of SADC Protocol. Compare with Vettori (2006: 1-3).
[35] Nicholls (2006: 10-13); the World Bank Group Report (2004) & Sagan (1997).
[36] Pieth (2008: 41& 111) & Young (2009: 28).

for corruption. Asset recovery seems to facilitate this ability since it may remove the fruits of corruption from the hands of corrupt individuals.[37]

The National Alliance Rainbow Coalition (NARC) government of Kenya was voted for overwhelmingly in 2002 on an anti-corruption agenda.[38] However, ten years down the line corruption is still thriving.[39] Perhaps it is time that Kenya considers putting more emphasis on the utilisation of asset recovery laws in order to combat corruption.[40] This assertion is based on the following reasons.

2.3.1.1 Asset Recovery and the Instrumentalities Corruption

Asset recovery can facilitate the forfeiture of the instrumentalities of corruption.[41] It targets any property which facilitates corruption.[42] The argument is based on the presumption that, in the event that the instrumentalities of corruption were absent, perhaps the corruption in question would not have been committed.[43] Therefore, forfeiture of the instrumentalities of corruption is significant since the corrupt individuals will no longer have access to them, thereby reducing their ability to facilitate corruption in future.[44]

Currently, the nature of asset recovery laws has been determined by the nature of corruption and organised crime. Ordinarily, corruption kingpins and masters of organised crime use their resources to distance themselves from the crimes they commit or facilitate.[45] They do so by

[37] International Institute for Asset Recovery (2009: 19); Madinger (2006: 65); Cassella (2008) & Williford (1999).
[38] Otieno (2005); Mati (2003: 1) & Mutua (2003).
[39] Clarke & Fletcher (2009); Zutt (2011) & Raghavan (2012).
[40] Young (2009: 43-50).
[41] International Institute for Asset Recovery (2007) & Kennedy (2005: 16).
[42] International Institute for Asset Recovery (2007) & Williford (1999).
[43] *Bennis v Michigan* (1996) 516 US 442 & 447. See also Casella (2008: 2-3).
[44] Young (2009: 31).
[45] Kennedy (2005: 10).

concealing the origin of their corruptly acquired assets. For this reason, it is extremely difficult to carry out successful criminal investigations leading to their prosecution and conviction.[46]

In the recent past, the rate of corruption and organised crime in Kenya has increased exponentially. The situation has been attributed to Kenya's weak criminal justice system, including a corrupt police force, judiciary and legislature.[47] In addition, Kenya is well endowed with international airports, sea ports and excellent banking infrastructures. These factors have promoted international business which in turn has attracted all forms of corruption and organised crime.

Consequently, it is imperative that Kenya make use of asset recovery laws. Because asset recovery laws can help to remove the instrumentalities of corruption from the hands of the corrupt, drug cartels and other prospective criminals would no longer have resources and capital to facilitate further corruption.[48]

2.3.1.2 Asset Recovery and the Proceeds of Corruption

Asset recovery ensures that criminals do not benefit from the proceeds of corruption.[49] Corrupt individuals invest the proceeds of corruption in most cases with the expectation of reaping profits.[50] Forfeiture laws can facilitate the recovery of the proceeds of corruption and any profit that has accrued on such proceeds. Consequently, asset forfeiture represents a paradigm shift from a punishment-based justice system to a prevention-based justice system.[51] Confiscation of

[46] Kennedy (2005: 10).
[47] Okoth (2011); Githongo & Wainaina (2011) & McConnel (2011).
[48] Kennedy (2005: 13 & 16). PIU (2000: para 5.12).
[49] PIU (2000: paras 1.5, 3.1 8 & 3.7).
[50] Kennedy (2005: 13) & PIU (2000: paras 1.3 & 3.14).
[51] Kennedy (2005: 10).

the proceeds of corruption prevents the corrupt individuals from committing or facilitating corruption in future since they will have no means to do so.[52]

For instance, it is estimated that about Kshs. 69 billion were lost through corruption in Kenya in the 1990s.[53] Hitherto, the money remains in the hands of the corrupt individuals. If the money can be recovered, perhaps the commission of corruption may not recur because the corrupt individuals will no longer have the ability and means to facilitate corruption.

2.3.1.3 Asset Recovery Generates Alternative Funding

Most law enforcement agencies in developing countries operate on budgets that are smaller than the costs of fighting corruption.[54] Generally, fighting crime requires immense resources, which most governments are unable to provide.[55] Kenya is not an exception.[56]

Perhaps one is left to question just how asset forfeiture provides alternative funding and additional revenue. Funds allocated to law enforcement agencies to fight corruption are redirected to other sectors of the economy, while properties seized and forfeited from corruption are given to the law enforcement agencies to facilitate their daily operations.[57]

The main problems facing law enforcement agencies in Kenya include underfunding, understaffing, underpaying and poor social amenities for the security officers.[58] According to the Republic of Kenya Budget Statement for the fiscal year 2012/2013, the Kenya police service was

[52] Kennedy A (2005: 10) & PIU (2000: para 1.3).
[53] Robitaillie (2005).
[54] Okpa ii (2009); Patriot News Editorial Board (2010); Stacy (2012).
[55] Speville (2008: 2) & International Anti-corruption Conference (2001).
[56] Independent Medico-Legal Unit Report (2012); Ndung'u (2011).
[57] PIU (2000: para 1.13); Worral (2008: 2).
[58] Mwendwa (2005: 16); Independent Medico-Legal Unit (2012); Ndung'u (2011).

allocated about Kshs. 4.2 billion.[59] As noted, money lost through corruption in the 1990s only was about Kshs. 69 billion.[60] If the money can be recovered, the funding of the Kenya police service certainly will be improved.[61] Moreover, additional revenue may be generated for the government since money meant to combat crime would be redirected to other sectors of the economy.

2.3.1.4 Asset Recovery and Compensation to Victims

Asset forfeiture may compensate victims of fraud and corrupt deals.[62] In Kenya, such cases have been witnessed in the land sector, the real estate sector and the banking sector.[63] Compensation aims at restoring victims to their situation before the fraud or corruption in question occurred. It may be achieved by establishing the innocent party's claim. This could be followed by the recovery of the proceeds of the fraud or the personal property of the corrupt individual.

Also, asset forfeiture may offset the valid claims against these fraudsters, based on the principle of Uniform Innocent Owner Defence (UIOD).[64] It is noteworthy that compensation may be given whether the corrupt individual has been convicted or not.[65]

The Syokimau defunct land deal is a most notable one. In that case, some Kenyans genuinely purchased land from vendors who claimed to have been issued land titles by the Municipal Council of Mavoko. However, the Kenya Airports Authority (KAA) was the lawful owner of the

[59] Public Relations office (2012: 10).
[60] Robitaillie (2005).
[61] Cramer (2010: 992).
[62] Greenberg *et al* (2009: 1); Kennedy (2005: 1); PIU (2000: para 5.12).
[63] Nyagah (2012) & Okoth (2012).
[64] Young (2009: 43) & Casella (2001: 653).
[65] Casella (2008) & Kennedy (2005).

land. It subsequently obtained eviction orders against the innocent Kenyans.[66] Much as the government condemned the eviction and demolitions, it could not pursue the fraudsters for the purpose of compensating these Kenyans. In the stock market sector, too, innocent Kenyans have lost their investments and there seems to be no hope of compensation.[67] From a global standpoint, asset recovery can facilitate compensation in such cases of fraud and corruption.[68]

2.3.1.5 Asset Recovery and Deterrence

Although asset recovery does not impose punishment expressly, it does so by implication because it takes away the instrumentalities of corruption and the proceeds of corruption.[69] It imposes punishment upon the corrupt individuals when it confiscates their corruptly acquired luxury cars, palatial houses, private jets and jewellery. It may impose punishment also when it freezes the bank accounts of the corrupt individuals, thereby preventing them from enjoying the proceeds of corruption.[70] Preventing corrupt individuals from enjoying their corruptly acquired assets sends a message to law abiding citizens not to engage in corruption.[71]

2.3.2 Historical Background and Development of Asset Recovery

Asset recovery is envisaged as a fundamental principle under UNCAC.[72] States parties to UNCAC are required to take all measures necessary to incorporate asset recovery in their

[66] Makali (2011) & Mwakilishi (2012).
[67] Ngigi (2011) & Michira (2011).
[68] PIU (2000: para 4.11) & Young (2009: 31).
[69] International Institute for Asset Recovery (2007); Williford (1999); PIU (2000: paras 1.5, 3.18 & 3.7).
[70] Kennedy (2005: 4); Cramer (2010: 993). See the Sunday Telegraph, 2 April 2000 where Willie Hofmeyr, Head of the Asset Forfeiture Unit, South Africa said that, 'Offenders smiled when they got a 15 or 20-year jail sentence, which they regard as an occupational hazard I suppose, but they literally burst into tears when they lost their favourite Rolls-Royce, the family home, the kids' private education and the wife's luxurious lifestyle. Police have started seeing forfeiture as a way of hurting and getting at these guys.'
[71] Young (2009: 32); Pieth (2008: 30) & PIU (2000: para 1.3 & 3.7).
[72] Art 51 of UNCAC.

national laws.[73] Kenya was the first state to ratify UNCAC, on 9 December 2003.[74] However, its commitment to preventing corruption had been in place long before 2003 because it already had enacted its own anti-corruption legislation.[75]

By 1956, Kenya had enacted the Prevention of Corruption Ordinance (PCO), which was later repealed and replaced by the Prevention of Corruption Act (PCA).[76]

In 1987, the PCA was amended to provide for the establishment of the Kenya Anti-Corruption Authority (KACA), although its first director was appointed only in 1997.[77] However, in 2000 the High Court of Kenya held that the existence of the KACA undermined the powers conferred on both the Attorney-General and the Commissioner of the Police by the Constitution. It further held that the statutory provisions establishing the KACA were in conflict with the Constitution. Hence, the KACA was abolished.[78]

The Narcotics Drug and Psychotropic Substances (Controls) Act (hereinafter referred to as the Narcotics Act) was enacted in 1994. Although it provided for asset recovery, it only envisaged criminal forfeiture.[79] Moreover, the Narcotics Act could not facilitate the anti-corruption war because of its narrow definition of corruption which is limited to bribery only and does not address other economic crimes such as money laundering and organised crime.[80]

[73] Arts 52 & 53 of UNCAC.
[74] The UNODC Report (2012) & KACC (2009: i).
[75] KACC (2009: i).
[76] Ethics and Anti-Corruption Commission (2012); Softkenya.com (2012); KACC (2004/5).
[77] Ethics and Anti-Corruption Commission (2012); Softkenya.com (2012); KACC (2004/5).
[78] *Gachiengo v Republic* (2000) 1 EA 52 (CAK).
[79] No. 4 of 1994 & Sec 41 of the Narcotics Act.
[80] Sare *et al* (2005: 78).

In 2003, various anti-corruption laws were passed by the newly elected NARC government of Kenya as a way of honouring its political mandate.[81] Amongst them was the Anti-Corruption and Economics Crimes Act (hereinafter referred to as the Anti-Corruption Act) which was to provide for the prevention and punishment of corruption and economic crimes. It repealed and replaced the PCA.[82] The Anti-Corruption Act established the Kenya Anti-Corruption Commission (KACC) whose main function was to enforce the above objective.[83]

Although the Anti-Corruption Act provides for asset forfeiture, it provides for forfeiture of unexplained wealth based on the illicit enrichment clause. Although the proceedings for the forfeiture of the unexplained asset are civil in nature, they are commenced against a person suspected to have unlawfully acquired property. Hence, they are *in personam* and not *in rem*.[84]

In support of the above, the KACC in its report of 2009, established that Kenya had not taken all the measures necessary to establish asset recovery laws. The KACC based its argument on the fact that the Anti-Corruption Act was enacted before the ratification of UNCAC and it focused more on preventing and combating corruption on a local level than an inter-state level.[85]

In 2009, the Proceeds of Crime and Anti-Money Laundering Bill of 2007 (hereinafter referred to as the Anti-Money Laundering Bill) was enacted as the Proceeds of Crime and Anti-Money Laundering Act (hereinafter referred to as the Anti-Money Laundering Act). The Bill was intended to provide for forms of asset recovery not provided for in the Anti-Corruption Act. As a

[81] Otieno (2005); Mati (2003: 1); Mutua (2003).
[82] Sec 70 of the Anti-Corruption Act.
[83] Secs 6 & 7 of the Anti-Corruption Act.
[84] Sec 55(2) of the Anti-Corruption Act. See also KACC (2009: XII). 'It recommended that there is need to enact relevant laws providing for comprehensive forfeiture for all properties obtained from crime as well as instrumentalities of crime'.
[85] KACC (2009: 120).

result, the Anti-Money Laundering Act provided for both civil and criminal forfeiture for the first time.[86]

However, it seems that the recommendations of the KACC report of 2009 were not considered in the passage of the Anti-Money Laundering Act. The report had proposed that the meaning of the word 'offence' should not include the offences listed under the Anti-Corruption Act in order to avoid duplication of roles.[87] It had proposed also that the Anti-Money Laundering Bill should exclude provisions on asset recovery and that the functions of the Asset Recovery Agency (ARA) established under the Anti-Money Laundering Act should be transferred to the KACC.[88]

The above situation undoubtedly created a duplication of functions between the Agency and the Ethics and Anti-Corruption Commission (hereinafter referred to as the Ethics Commission).The Ethics Commission is established under the Ethics and Anti-Corruption Commission Act (hereinafter referred to as the Ethics Act),[89] which repealed the entire Part III of the Anti-Corruption Act.[90] Duplication of functions arises from the fact that the Ethics Commission's functions include recovering the proceeds of crimes which are listed also in the Anti-Money Laundering Act.[91]

The KACC report also recommended that the Constitution be amended to provide for asset recovery in relation to the presumption of innocence and the right to own property.[92] This implied that the Committee of Experts (COE) on constitutional review that prepared the

[86] See parts VIII & IX of Anti-Money Laundering Act.
[87] KACC (2009: 120).
[88] Secs 53(1) & 54(1) of the Anti-Money Laundering Act & KACC (2009: 120).
[89] Act No. 22 of 2011 & Art 79 of the Kenyan Constitution.
[90] Secs 3 (1) & 37 of the Ethics Act.
[91] Secs 6 & 7 of Anti-Corruption Act.
[92] The Old Constitution.

Constitution of Kenya of 2010 ought to have considered and provided for seizure of unexplained wealth as provided for in section 55(5) of the Anti-Corruption Act.

This did not happen because the High Court of Kenya has held since that sections 55(5) & (6) of the Anti-Corruption Act are unconstitutional.[93] Besides, the asset forfeiture provisions in the Anti-Money Laundering Act apply only to money laundering offences.[94]

In 2010, Kenya's Parliament enacted the Prevention of Organised Crime Act (POCA).[95] This Act also contemplates criminal forfeiture only because the court may make an order to forfeit any money or property accruing from any offence under the Act only after a conviction order has been obtained.[96] In addition, it does not cover all corruption offences.[97]

2.3.3 The Legal Framework of Asset Forfeiture in Kenya

As seen, the Narcotics Act, the Anti-Corruption Act and the Anti-Money Laundering Act are the main statutes that envisage asset recovery. However, they differ in several ways since they are meant to recover different categories of instrumentalities or proceeds of different categories of crimes.

2.3.3.1 The Narcotics Act

This Act provides for the forfeiture of any property that is attributed to the illicit traffic of narcotic drugs and psychotropic substances.[98] It also provides for the forfeiture of any land

[93] *Kenya Anti-Corruption Commission v Stanley MomboAmuti* (2011) eKLR HCCC No. 448 of 2008 (OS) at Page 8.
[94] Part VII of Anti-Money Laundering Act. See also ESAAMLG Report (2011: 13)
[95] Act No. 6 of 2010.
[96] Secs 18 (1) & 18(2) of POCA.
[97] See the Long title of POCA.
[98] Long title of the Narcotics Act.

which is used for cultivation of prohibited plants.[99] Therefore, such land is taken as an instrumentality of a crime. However, forfeiture of the land is possible only once the owner or the holder of any interest in the land has been convicted of the offence of cultivating or facilitation of cultivation of the prohibited plants.[100]

Moreover, once the court convicts the accused person, in addition to imposing the penalty, it must make an order forfeiting the land or interest of the convicted person. The forfeiture order is therefore part of the sentencing process, making it a conviction-based forfeiture.[101]

The Act further provides for forfeiture to the government of any conveyance or implement used for the commission of any offence. However, the court may determine an application of any person who alleges to be the owner of the conveyance or implement on allegations that it was used without his or her knowledge.[102] It is noteworthy that 'once a person commits an offence under the Act, then all his or her property, as at the date of commission of the offence or acquired after such a date, shall be forfeitable'.[103]

Finally, the Act provides that restraint proceedings may be commenced against any person who is suspected of having committed an offence under the Act if an investigation on the allegation against the person has begun.[104] Thus, the proceedings are *in personam* since they are commenced against a person and not the property.[105]

---

[99] Sec 6 of the Narcotics Act & *Libretti v United States of America* (1995) 516 US 29 at pp 39-41.
[100] Sec 7 of the Narcotics Act.
[101] *Libretti v United States of America* (1995) 516 US 29 at 39-41 and Secs 41 & 42 of the Narcotics Act.
[102] Sec 20 of the Narcotics Act & Young (2009: 39).
[103] Sec 36 of the Narcotics Act.
[104] Sec 21 of the Narcotics Act.
[105] Young (2009: 39).

2.3.3.2 The Anti-Corruption Act

This Act provides for the prevention and punishment of corruption and economic crimes and the obligation is enforced by the Ethics Commission.[106] The Ethics Commission can commence proceedings to recover stolen public assets against any person.[107] These proceedings are evidently *in personam* since they are against any suspect of corruption and not an instrumentality of corruption.[108]

In further support of the above assertion, the Act provides that monetary compensation or restoration of the recovered asset to the rightful owner or government may be ordered only by the court after it has passed a conviction order against the corrupt individual.[109] This forfeiture is therefore conviction-based. In addition, the Act allows the court making the forfeiture order to pass a money judgment as compensation to the innocent victim.

2.3.3.3 The Anti-Money Laundering Act

This Act provides for 'the prevention, combating and recovery of the proceeds of money laundering'.[110] As already noted, it establishes ARA.[111] The ARA's main function is to implement parts VII, VIII and IV of the Anti-Money Laundering Act.[112] These parts provide for criminal forfeiture, civil forfeiture and general provisions relating to preservation and forfeiture of property respectively.

---

[106] Secs 3 (1) & 37 of the Ethics Act.
[107] Sec 7 (h) (1) of the Anti-Corruption Act.
[108] Young (2009: 39).
[109] Secs 54 (1) & (2) of the Anti-Corruption Act & *Libretti v United States of America* (1995) 516 US 29 at p 39-41.
[110] Long Title of the Anti-Money Laundering Act.
[111] Sec 53 (1) of the Anti-Money Laundering Act.
[112] Sec 54 of the Anti-Money Laundering Act.

Therefore, any person or body whose function is similar to the ARA's function, including the Ethics Commission, is required to help and co-operate with the ARA in fulfilling this function.[113]

The Anti-Money Laundering Act is the only statute which expressly provides for both criminal and civil forfeiture.[114] The criminal forfeiture aspect aims at recovery of the proceeds of a crime while the civil forfeiture aspect aims at recovering and preserving any property associated with money laundering.

Even though the Anti-Money Laundering Act provides for both criminal and civil forfeiture, it only applies to money laundering and the offences it contemplates, to the exclusion of corruption.[115] As already seen, there also exists duplication of roles between the Ethics Commission and the ARA.[116] The duplication of roles may lead to preliminary objections during hearings of recovery proceedings brought by either the Commission or ARA.

[113] Sec 55 of the Anti-Money Laundering Act.
[114] Parts VIII & IX of the Anti-Money Laundering Act.
[115] Long Title of the Anti-Money Laundering Act.
[116] Sec 2 of the Anti-Money Laundering Act.

CHAPTER THREE

Why Kenya Should Consider Adopting a Civil Forfeiture Regime

3.1 Introduction

The Anti-Corruption Act, which is Kenya's substantive statute dealing with the offence of corruption and economic crimes, does not envisage civil forfeiture. Instead, it provides for a hybrid system (see 3.2), combining the features of both criminal forfeiture and civil forfeiture. More specifically, the Act provides for this hybrid system in section 55 as 'forfeiture of unexplained wealth'.[117] Worse still, the section has been held to be unconstitutional by a Kenyan High Court in the case of *KACC v Stanley Mombo Amuti* (the *Mombo* case),[118] on the grounds that it contravenes the right to property and the presumption of innocence as enshrined in the Kenyan Constitution.

Following the ruling in the *Mombo* case, the question of the recovery of the proceeds of corruption in Kenya has been problematised. Section 55 of the Anti-Corruption Act, which was the only provision in Kenyan law that aspired to facilitate this recovery, has been sidelined. Perhaps this situation should signify the need for Kenya to consider the urgent adoption of properly constituted asset forfeiture laws, if the objective of recovering the proceeds of corruption is to be kept on course.

However, care should be taken in the formulation and adoption of Kenyan asset recovery laws. Although these laws could facilitate recovery of stolen assets, they are susceptible to

[117] Sec 55(5) & (6) of the Anti-Corruption Act.
[118] (2011) eKLR HCCC No. 448 of 2008 at Page 8.

constitutional challenges.[119] In most jurisdictions, constitutional challenges have been based on the grounds that these laws contravene the right to property and the presumption of innocence as shall be seen in chapter four.

Such objections should be expected in Kenya, since, as noted, the country's only provision of law providing for forfeiture of unexplained assets has been declared unconstitutional.[120]

In addition, the process of harmonising the application of civil and criminal forfeiture, especially if contained in the same statute may be an onerous one.[121] To regulate the similar and overlapping roles played by each one of them is quite challenging. Today, most jurisdictions have adopted asset forfeiture laws that incorporate both civil and criminal forfeiture under one statute.[122] Such incorporation has been heralded as cost effective and enables these two regimes to complement each other. Therefore, drafting of the asset forfeiture laws should be done in a meticulous manner to avoid duplication and overlapping of roles, which could scuttle the goal of recovering the proceeds of corruption.

3.2 The Hybrid Nature of Section 55 of the Anti-Corruption Act

Kenya's forfeiture of unexplained assets, as entrenched in section 55 of the Anti-Corruption Act, is neither civil nor criminal forfeiture. A cursory glance at the section reveals that it combines the characteristics of both civil and criminal forfeiture.

[119] Murphy (2010: 84) & Pogue (2005: 495).
[120] *KACC v Stanley Mombo Amuti* (2011) eKLR HCCC No. 448 of 2008 at page 8.
[121] Bersinger (2011: 845).
[122] Bersinger (2011: 844).

As regards criminal forfeiture, the section provides that, the Commission, [123] may commence proceedings against any person after it has conducted investigations and established that a person has unexplained wealth, and after such person has failed to explain the source of his wealth after being given such opportunity.[124] From this, it is evident that the defendant in these proceedings is a person and not the offending property.[125] This makes the proceedings *in personam*.[126] It is therefore safe to conclude that, at the stage of instituting the recovery suit, the proceedings fall under criminal forfeiture.

In addition, the section provides that the court may order the person suspected of being in possession of unexplained wealth to pay the government an amount equal to the unexplained wealth if the person has failed to disprove the allegation of the Commission. Today, it is not in contention that payment of money is possible only in a criminal forfeiture. In fact, the judgment obtained in such circumstances is referred to as a money judgment.[127] This fact is based on the argument that the accused person is known and would in most cases be party to the forfeiture proceedings. By contrast, the power to order a money judgment is not available in a civil forfeiture since the owner of the offending property is neither the accused person nor party to the recovery proceedings, but merely a claimant. Therefore, should the value of the offending property depreciate to a lower value than the original amount alleged to have been lost as a result of the corruption offence, it may be difficult to recover that amount.

[123] The Ethics and Anti-Corruption Commission established in section 6 of the Anti-Corruption Act.
[124] Secs 7(2)(h)(i) & 55(2) of the Anti-Corruption Act.
[125] Secs 7(2)(h)(i) & 55(2) of the Anti-Corruption Act. See also McCaw (2011: 187).
[126] Young (2009: 39).
[127] McCaw (2011: 188).

Regarding civil forfeiture, the section requires the Commission to prove its allegation on a balance of probabilities that a particular person has unexplained wealth.[128] Proof of an allegation on a balance of probabilities is required only in civil forfeiture.

Also, the section provides that before the court can order forfeiture of the unexplained assets, it does not need to convict the corrupt individual. All the court requires is for such a corrupt individual to fail to disprove the allegation made by the Commission.[129] Thus, conviction of the corrupt individual is not required before forfeiture is ordered. This amounts to non-conviction based forfeiture. Hence, at this stage, the proceedings fall under civil forfeiture.

Moreover, the Anti-Corruption Act provides that the section may be applied retrospectively to forfeit unexplained assets.[130] Retrospective application of substantive and procedural law is possible only in civil law procedure. By contrast, retrospective application of the law is not possible under criminal law as it is barred by the principle of *nullum crimen, nulla poena sine lege* ('no crime or penalty without existence of law'). This criminal law principle prohibits the imposition of sanctions against a particular conduct, if the law relied upon to impose such sanction was not in existence or did not criminalise the conduct as an offence at the time the conduct was committed. Thus, this stage of the recovery proceedings contemplated by the section falls under civil forfeiture.

Based on the peculiarities of section 55 of the Anti-Corruption Act, it may be concluded that, the model of forfeiture provided for under the Anti-corruption Act is neither civil nor criminal forfeiture, but a hybrid of the two.

---

[128] Sec 55(5) of the Anti-Corruption Act. See also Pieth (2007: 137); Young (2009: 44); McCaw (2011: 187); *United States v Bajakajian* (1998) 524 US 321 & 330-31.
[129] Sec 55(5) of the Anti-Corruption Act.
[130] Sec 55(9) of the Anti-Corruption Act.

The findings above support further the assertion that there is an urgent need for Kenya to consider the adoption of asset forfeiture laws proper.

3.3 The Need to Foreground Civil Forfeiture in Kenya

Most jurisdictions that have adopted asset recovery laws have settled for a single statutory model, which fuses civil forfeiture and criminal forfeiture under one roof. Such a model is preferred since it is easy to legislate and cheap to maintain. However, the option of enacting separate statutes providing for each of these regimes is available. Whichever option they settle on they would be required to prioritise either the civil or criminal forfeiture for the purpose of enhancing the efficiency and effectiveness of the asset recovery process.

Should Kenya consider adopting any of the regimes above, it would be required also to give priority of usage to one of them for the purpose of preventing the challenges which would result from their competing and overlapping roles in the recovery of stolen assets. Also, they have their discrete features, which determine their strengths and weaknesses.[131]

Assessment of these strengths and weaknesses is an exercise to be undertaken by any country wishing to adopt forfeiture laws. Kenya, too, would have to conduct such an assessment in order to decide on the route to follow. In this regard, it is submitted that, civil forfeiture is a stronger tool than criminal forfeiture to recover the proceeds of corruption.[132]

[131] McCaw (2011: 187).
[132] Cramer (2010: 995) & Bersinger (2011: 846).

3.4 Strengths and Weaknesses of Civil and Criminal Forfeiture

3.4.1 Strengths of Civil Forfeiture

Firstly, civil forfeiture requires a relatively low standard of proof.[133] The government is required to prove only that the property is forfeitable to it on a balance of probabilities.[134] This threshold is used to prove also that corruption was committed or that the property was derived from or facilitated corruption.[135] Proof on a balance of probabilities is lower and easier to satisfy than proof beyond a reasonable doubt which is common in criminal forfeiture.[136] Since proof on a balance of probabilities is the highest standard in civil forfeiture, it is applied during the actual forfeiture stage. Proof on probable cause is required when applying for freezing and seizure orders.[137]

Secondly, civil forfeiture does not require a criminal conviction.[138] Because civil forfeiture is *in rem,* the property itself is named as the defendant.[139] Therefore, there is no need to convict the owner of the property or any other person who has an interest in the property before it can forfeited.[140] Hence, civil forfeiture is the most appropriate tool to be used where the accused person is dead, where the forfeiture is uncontested, where the property belongs to a third party, where the accused person is a fugitive, where it is possible to prove that a particular property was used to commit a crime but impossible to establish the identity of the accused person, where

[133] Commonwealth Secretariat (2005: para 74).
[134] Pieth (2008: 138); Brun *et al* (2011: 9); McCaw (2011: 186); Greenberg *et al* (2009: 14).
[135] Young (2009: 44).
[136] Greenberg *et al* (2009: 58); Brun *et al* (2011: 9).
[137] Greenberg *et al* (2009: 59).
[138] McCaw (2011: 187); Cramer (2010: 995); Soto (2004: 369).
[139] Fozzard & Steele (2009: 17). See also Cramer (2010: 995); McCaw (2011: 186); Commonwealth Secretariat (2005 para74).
[140] Young (2009: 44); Greenberg *et al* (2009:14); Pieth (2008: 135 & 137); Cassella (2008: 11 & 18).

there is need to benefit a victim and to impose sanctions on the accused person, or where the accused person is prosecuted in a country other than where the property is located.[141]

Thirdly, civil forfeiture is not limited to property related to a particular transaction. Civil forfeiture may be applied to all the criminal proceeds which a corrupt individual has acquired over a long period of time.[142] Such an application is not possible in a criminal forfeiture because such forfeiture is part of the sentencing process. Hence, the forfeiture order can apply only to the property involved in the specific offence of which the accused has been convicted.[143]

Fourthly, civil forfeiture may apply to the property of third parties. If the state establishes the required nexus between the property and the criminal conduct after serving a proper notice upon all interested parties, it can obtain the forfeiture order regardless of who is the owner of the property. This scenario may be appropriate in a situation where the accused person colludes with a third party and uses the third party's property to commit corruption.[144] Such forfeiture may not be possible in a criminal context, since third parties are excluded from participating in the recovery proceedings; hence the third party's property is not subject to forfeiture.

Fifthly, civil forfeiture may involve less work than criminal forfeiture. Civil forfeiture proceedings require special skills. They are handled well by specialised prosecutors. In fact, in some jurisdictions civil forfeiture cases are handled separately by specialised prosecutors and not

---

[141] Young (2009: 44); Pieth (2008: 137); Greenberg *et al* (2009: 14-5); Commonwealth Secretariat (2005 para74); *United States v Real Property* at 40 Clark Road (1999) 52 F. Supp. 2d 254, 265; Casella (2008: 8).
[142] Young (2009: 45) & Greenberg *et al* (2009: 15). See also *United States v Two Parcels in Russel County* (1996) 92 F.3d at p. 1128 (11 Cir. Z).
[143] Young (2009: 45).
[144] Young (2009: 45). See also *United States v Real Property*...464 Myrtle Avenue (2003) WL21056786 (E.D.N.Y 2003) & *United States v Collado* (2003) 348 F3d 323 (2d Cir.).

by the ordinary criminal prosecutors.[145] This specialisation promotes division of labour, which in turn, may reduce the amount of work for the prosecutors handling asset recovery matters.

Furthermore, through a civil proceeding the government is able to take advantage of the discovery process, that is, the government can request the owner of the offending property to answer interrogatories, appear for depositions, and respond to any other requests for admissions.[146]

Finally, civil forfeiture makes possible the retrospective application of the law to recover the instrumentalities and proceeds of corruption, which predate the enactment of the forfeiture law.[147]

3.4.2 Weaknesses of Civil Forfeiture

Firstly, the state may have to pay the costs of any successful claimant in the event that its claim to forfeit a particular property alleged to be an instrumentality or the proceeds of a crime is dismissed. This is akin to any ordinary civil proceedings where a party who wins the case is compensated for the costs of the suit.[148]

Secondly, civil forfeiture is limited to the property traceable to the offence. The state must prove that the accused person's property is directly traceable to the criminal conduct. Consequently, the court cannot make a money judgment or substitute assets. This is common in cases where proceeds of corruption are co-mingled with other legal funds or dissipated.[149]

---

[145] Young (2009: 45).
[146] Cramer (2010: 995).
[147] Pieth (2008: 138).
[148] Young (2009: 47). See also sec 28 of the U S C & 22465(b). Compare with *United States v Douglas* (1995) 55 F. 3d 584 at pp. 587-588 (11 Cir.).
[149] Young (2009: 47-8).

Thirdly, as in any other civil proceeding, civil forfeiture is subject to a limitation of time.[150] Therefore, once the state has seized the property, it must move quickly and file the recovery suit within a specified period otherwise the cause of action may be extinguished due to delay.[151]

Fourthly, civil forfeiture may interfere with an ongoing criminal forfeiture. Civil forfeiture proceedings might interrupt a criminal investigation or trial unless the court orders a stay of the civil proceedings till the criminal forfeiture is concluded. Once a civil forfeiture has been commenced, the parties to it have a right to request information from each other in support of their case at the discovery stage. The claimants in the civil case are often the accused persons in the parallel criminal case. Such claimants may abuse the right to gain access to the state's most confidential information available in civil forfeiture, which is not permissible in criminal forfeiture.

3.4.3 Weaknesses of Criminal Forfeiture

Firstly, criminal forfeiture requires the conviction of the accused person. As noted, the most common feature of criminal forfeiture is that before the forfeiture order can be made, the offender must be convicted of the corruption offence.[152] Since criminal forfeiture is part of the sentencing process, it is impossible to forfeit the property before the conviction of the corrupt individual.[153] Consequently, criminal forfeiture is a weak tool to recover the proceeds of crime where the defendant is a fugitive, dead, or enjoys immunity.[154]

[150] Brun *et al* (2011: 31).
[151] Young (2009: 46) & Brun *et al* (2011: 31).
[152] Fozzard & Steele (2009: 14-5) & Greenberg *et al* (2009: 13).
[153] Fozzard & Steele (2009: 14-5); Madinger (2006: 72).
[154] Brun *et al* (2011: 30); Young (2009: 49); Fozzard & Steele (2009: 14-5); Brun*et al* (2011: 10)

In addition, if an accused person who faces several charges pleads guilty to one charge only, the forfeiture order can apply only to the property related to the particular charge to which he or she pleads guilty.[155] It is impossible to forfeit properties relating to offences to which the accused has not pleaded guilty.

Secondly, the property owned by third parties cannot be forfeited. Third parties are not parties to the criminal proceedings, hence they cannot be joined in the forfeiture. Therefore, the property of any third party used to commit a crime (with or without consent) is not forfeitable.

Thirdly, criminal forfeiture may result in a separate trial. Criminal forfeiture often leads to bifurcation of the trial. Subsequently, the court may have to make a special verdict. This may cause the trial to be longer than contemplated. Needless to say, the disposal of the seized property may take more years in criminal forfeiture than in civil forfeiture. Third parties' claims against the forfeiture order may have to be determined before the disposal, which could lead to time wasting before conclusion of the recovery proceedings.[156]

3.4.4 Strengths of Criminal Forfeiture

Firstly, criminal forfeiture includes both the conviction of the offender together with forfeiture of his or her property in the same proceeding. This attribute is based on the fact that the court is permitted to order of the forfeiture as part of the sentencing stage of the criminal trial, thereby saving the court's time and resources.[157]

[155] Young (2009: 49).
[156] Young (2009: 50).
[157] Young (2009: 47).

Secondly, the court can give a money judgment or substitute assets if the proceeds of the crime have been dissipated.[158] In such a case, the court can order also the forfeiture of any other property owned by the defendant to satisfy the money judgment.[159] This is possible since the offender is known and named as the defendant. However, a money judgment or substitution of assets is not possible in civil forfeiture.[160]

Thirdly, parties in criminal forfeiture have no right to recover attorney's fees. An award for costs, including attorney's fee, can be made in civil proceedings only. Recovery of the costs of the suit is not available in criminal proceedings, including the ancillary proceedings relating to the third parties.

Finally, there is no statutory limitation as to when to file a charge (indictment) after the property has been seized.[161]

3.5 Navigating between Civil and Criminal Forfeiture

The main objective of both criminal and civil forfeiture is to prevent corrupt individuals from enjoying the proceeds of their criminal enterprises.[162] Thus, there could be instances in which criminal and civil forfeiture may overlap with each other.[163] This could lead to practical challenges.[164] Hence, any state that adopts asset recovery laws should try to provide a remedy to such a situation.

---

[158] Young (2009: 48) & Pieth (2008: 136).
[159] Young (2009: 48) & Madinger (2006: 66 & 72).
[160] Young (2009: 48).
[161] Young (2009: 48).
[162] Young (2009: 58) & Murphy (1999: 163).
[163] Nikolov (2011: 8).
[164] Nikolov (2011: 8).

Civil and criminal forfeiture ought to complement each other and not substitute each other.[165] It is advisable not to commence civil forfeiture at the first instance if criminal forfeiture is available. Resorting to civil forfeiture at the first instance may intimate that criminals are able to avoid criminal sanctions by surrendering to civil proceedings. Resorting to civil forfeiture may undermine the deterrent objective of criminal law as well as citizens' trust in the criminal justice system.[166] So, prevention and combating of corruption may be enhanced if the justice system includes prosecution, conviction and forfeiture.

Accordingly, civil forfeiture may be commenced either where criminal prosecution is unavailable or unsuccessful, or it may operate parallel to criminal forfeiture.

3.5.1 Where Criminal Prosecution is Unavailable or Unsuccessful

Any state that adopts asset recovery laws ought to provide for civil forfeiture in case criminal forfeiture is unavailable or unsuccessful.[167] Criminal forfeiture is unavailable if the accused person cannot be traced or secured to attend the trial,[168] perhaps because the accused person is dead, has fled the jurisdiction, or enjoys immunity from prosecution.

Criminal forfeiture is unsuccessful if the accused person has been acquitted or the trial cannot proceed because of insufficient evidence to prove the guilt of the person beyond a reasonable doubt.

[165] Fozzard & Steele (2009: 17) & Brun*et al* (2011: 106).
[166] Greenberg *et al* (2009: 29).
[167] Greenberg *et al* (2009: 31 & 33).
[168] Greenberg *et al* (2009: 31).

3.5.2 Where Civil Forfeiture Runs Parallel to Criminal Forfeiture

The second option may be to permit the commencement of civil forfeiture simultaneously with criminal forfeiture. In such a scenario, the law ought to allow either the government or the claimant to obtain an order for the stay of civil forfeiture proceedings pending the conclusion of the criminal forfeiture proceedings.[169]

If the law allows for simultaneous proceedings, it should provide expressly that crucial information obtained in the civil proceedings is not admissible in the ongoing criminal proceedings. Failure to provide for such protection may prejudice the criminal proceedings,[170] since the claimant may be compelled to give self-incriminating evidence or could obtain crucial information during the discovery stage in the civil matter and use the information to frustrate the prosecution's case.

In the event that civil forfeiture is commenced before criminal forfeiture, the former may proceed to conclusion. However, if criminal forfeiture proceedings are commenced before such a conclusion, the law must provide for the adjournment and stay of the civil forfeiture if it appears to prejudice the criminal proceedings.[171]

In the light of the arguments in this chapter, it is safe to conclude that the adoption of asset recovery laws in Kenya is long overdue. As yet, there is no law in existence that entrenches a properly constituted asset forfeiture system, despite such a system being heralded as a strong tool for recovering the proceeds of corruption by most countries.

[169] Greenberg *et al* (2009: 29).
[170] Greenberg *et al* (2009: 30).
[171] Young (2009: 56).

Even though it is appreciated that the pressing need to pass these laws is long overdue, it should be remembered that foregrounding civil forfeiture is the way to go. It is submitted that emphasis should be given to the utilisation of civil forfeiture more than criminal forfeiture, since civil forfeiture is a stronger tool for recovering stolen assets.

The submission is based on the grounds that, civil forfeiture possesses more advantages and fewer weaknesses than criminal forfeiture. Hence, it may facilitate the recovery of the stolen assets than criminal forfeiture.

Proving a case is easier in civil forfeiture than in criminal forfeiture. The government is required to prove its case on balance of probabilities, which is lower than proof beyond a reasonable doubt required in criminal forfeiture. Conviction of the owner of the offending property is not required before such property can be forfeited. In criminal forfeiture, no forfeiture can be ordered before the owner of the property is convicted. Therefore, if the owner of the property is dead, a fugitive or immune to prosecution, criminal forfeiture cannot facilitate the recovery of his or her illegally acquired wealth. Civil forfeiture permits the government to make use of discovery to obtain crucial information in support of its case. Discovery may help the government to obtain the statement of the offender, any claimant or any witness of the defence.

Since civil forfeiture is stronger than criminal forfeiture, the instrumentalities and the proceeds of corruption under the control of the corrupt individuals in Kenya today could be recovered.

In Kenya today, successful cases of recovery of the proceeds of corruption are very few. Since the Anti-Corruption Act does provide for an asset forfeiture regime. The global experience shows that civil forfeiture can help in recovering the proceeds of corruption, despite the fact that recovery of these proceeds is challenging to most countries.

Most countries that have prioritised civil forfeiture have made considerable advances in recovering the proceeds of corruption. Kenya, too, could achieve recovery of the proceeds of corruption if it adopts civil forfeiture. Based on the submission above, this paper strongly urges that Kenya foregrounds civil forfeiture after adopting asset recovery laws.

CHAPTER FOUR

Civil Forfeiture and Constitutional Rights

4.1 Introduction

As enunciated in chapter three, civil forfeiture is a strong tool for recovering the proceeds of corruption based on its various advantages. Despite its strong features and the pressing need to adopt it in Kenya, it is prone to several constitutional challenges, which need to be regulated in order to guarantee its existence.

In many parts of the world today, it is has been acknowledged also that asset forfeiture laws are a strong tool for depriving the corrupt individuals of the fruits of their criminal enterprises.[172] However, it is conceded that these laws have faced and continue to face multiple constitutional challenges. These constitutional hurdles are advanced by the corrupt individuals since they are aware that the laws have the capacity obstruct their criminal enterprises.[173]

In the US, for instance, during the Congress debate on the bill that created the Civil Asset Forfeiture Reform Act (CAFRA) in 1998 and 1999, the bill faced strong resistance from those who saw their activities as being targeted by CAFRA. Eventually, the bill was passed, but only after concerted efforts of both the democrats and republicans and after the congress realised the vital role that could be played by these laws in recovering the proceeds of corruption.[174] In South Africa, the Constitutional Court has had the opportunity to deliberate also on the constitutionality of civil forfeiture laws provided for in POCA (SA).[175] The constitutionality of civil forfeiture

[172] Gupta (2002: 160).
[173] Gupta (2002: 159 & 163). See also Pilon (1994: 311).
[174] Gupta (2002: 163).
[175] Gupta (2002: 165). *Deutschmann NO v Commissioner for the Revenue Service* 2000 (2) SA 106 (E) at 124A.

laws has been an issue also in the UK. More specifically, it came up for determination in the famous case of *Walsh v United Kingdom*.[176]

Therefore, should Kenya adopt forfeiture laws, there is the likelihood that the same constitutional allegations of infringement on the right to property and the presumption of innocence will be raised.[177] This could happen since the High Court of Kenya decided in the *Mombo* case that sections 55(5) & (6) of the Anti-Corruption Act, providing for forfeiture of unexplained assets, are unconstitutional despite being merely a hybrid system and not a pure asset forfeiture regime.[178]

Accordingly, in order to address these challenges, it would be imperative for Kenya to adopt the guidelines and interpretation developed by other countries, for instance, the US, the UK, Ireland, Australia, Canada, and South Africa. This proposal is premised on the ground that these counties already have been faced with such constitutional challenges and have been able to contain them through meticulous court rulings.

In the South African case of *State v Makwanyane*,[179] the court held that:

> '[C]omparative … jurisprudence will no doubt be of importance, particularly in the early stages of transitions when there is no developed indigenous jurisprudence in this branch of law on which to draw.'[180]

In addition, the procedure and substance of forfeiture laws are of universal application. Thus, these the arguments used to justify the role of forfeiture laws in other parts of the globe could be

[176] (2006) EHCR 1154.
[177] Gupta (2002: 160).
[178] Sec 55 of the Anti-Corruption Act.
[179] 1995 (3) SA 391 (CC).
[180] *State v Makwanyane* 1995 (3) SA 391 (CC) at 414E .

transposed from one jurisdiction to another, particularly in the case of common law countries, such as Kenya, which embrace the doctrine of precedent.[181]

This chapter relies upon the arguments that have been advanced in other jurisdictions, particularly the US, the UK and South Africa, to justify the constitutionality of civil forfeiture laws while averting the common constitutional challenges. Reference will be made also to the plausible arguments of reknown legal scholars in the field.

4.2 The Right to Property and Presumption of Innocence

The antagonists of civil forfeiture argue that since corruption is a criminal offence, any mechanism applied to recover the proceeds of corruption must adhere strictly to all the procedural principles of criminal law.[182]

They contend that civil forfeiture infringes these principles since the standard of proof it applies is proof on a balance of probabilities, which is lower than proof beyond a reasonable doubt which is supposed to be applied in corruption matters. Also, civil forfeiture reverses the burden of proof from the prosecution to the defendant.[183]

The antagonists' assertion has been countered by the jurisprudence postulating that the fact that civil proceedings are *in rem* means that the fundamental rights and the presumption of innocence as well as the right to own property cannot be attached to the property. Such rights can be claimed only by individuals.[184] In addition, the guilt of the property owner need not be proved. Instead, the state is required to prove only the nexus between the property and the corrupt act.

---

[181] *State v Makwanyane* 1995 (3) SA 391 (CC) at page 414 para E.
[182] Bukola (2010: 60).
[183] Kennedy (2006: 139). Bukola (2010: 62).
[184] Bukola (2010: 61).

Hence, any owner asserting infringement of his or her constitutional rights obtains no defence on that ground alone.[185]

Deprivation of the right to property in Kenya is provided for under article 40 of the Kenyan Constitution, while the presumption of innocence is provided for under article 50(2(a) of this Constitution.

The deprivation of the right to property is specifically provided for in articles 40(3)(b)(ii) and 40(6) of the Constitution. Article 40(3)(b)(ii) provides that:

> 'The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation allows any person who has an interest in, or right over, that property a right of access to a court of law.'

Article 40(6) of the Kenyan constitution provides that:

> '[T]he rights under this Article do not extend to any property that has been found to have been unlawfully acquired.'

As regards, the right to a fair trial, the Constitution provides as follows:

> 'Every accused person has the right to a fair trial, which includes the right to be presumed innocent until the contrary is proved.'[186]

A cursory reading of article 40(3)(b)(ii) together with its paragraph 6, reveals that this article entrenches the right to property and provides for the procedure and the preconditions to be met before such deprivation can be declared as valid.[187]

Therefore, if the state intends to deprive a person of his or her property, such person must be allowed access to a court of law.[188] Therefter the state will be required to assert its claim and the affected party is expected to reply. It follows that the process of taking away someone's property

[185] Bukola (2010: 61) & Noya (1996: 495-6).
[186] Art 50(2) (a) of the Kenyan Constitution.
[187] Art 40 of the Kenyan Constitution.
[188] Art 40(3) (ii) of the Kenyan Constitution.

by the state invokes automatically the right to a fair trial, which includes the rights of the accused person.[189] Amongst these rights is the presumption of innocence.[190] However, protection against deprivation of property does not extend to unlawfully acquired property.[191]

The process of determining the lawfulness or unlawfulness of the property can take place only in a court of law. Thus, the state must prove its claim and the person accused of having acquired the property unlawfully must be afforded the right to a fair trial, which includes the right to be presumed innocent until proved guilty.

Therefore, there exists a nexus between the right to property and the presumption of innocence. Deprivation of the right to property must follow a court process, which should be a trial process. The only way such trial can be held to be fair and just is if the rights of a fair trial as guaranteed by the constitution are upheld.

To counter arguments based on the right to property and the presumption of innocence as propounded against civil forfeiture, it would be imperative that one begins by disproving the allegation that civil forfeiture infringes the right to property, and then disprove breach of the presumption of innocence.

4.2.1 The Right to Property

The most pertinent part of these provisions in relation to the objective of this chapter is the provision that whenever deprivation is to ensue, any person whose interest in the property is affected should have access to a court of law.[192] Essentially, the court's main duty would be to

[189] Art 50 of the Kenyan Constitution.
[190] Art 50(2)(a) of the Kenyan Constitution
[191] Art 40(6) of the Kenyan Constitution.
[192] Art 40(3) (ii) of the Kenyan Constitution.

decide whether the deprivation is lawful and commensurate with the purpose of article 40 of the Kenyan Constitution.

4.2.1.1 Under South African Law

In South Africa, the issue of deprivation of property was canvassed in the case of *Deutschmann NO v Commissioner for the Revenue Service.*[193] In this case, the state applied for warrants of search and seizure of property believed to be proceeds of a tax fraud and the warrants were issued. Subsequently, the targeted property was seized. The issue to be determined was whether the seizure infringed the right to property as envisaged in the South African Constitution. As regards deprivation of property, the South African Constitution provides that 'no law may permit arbitrary deprivation of property'.[194] The owners of the seized property contended that the seizure was arbitrary and unconstitutional. The Court held as follows:

> '[T]he provisions in terms of which the warrant was sought and obtained in both matters do anything but permit arbitrary deprivation of property-these provisions require an application supported by information supplied under oath and the exercise of discretion by a judge. The judge who authorises the warrant does not thereby affect the property or the rights to such property vesting in an individual. Any party remains free, in terms of the statute, to establish his entitlement and claim delivery.'[195]

This finding may be understood to mean that before a civil forfeiture law is deemed to preserve the right to property and not deprive owners of it, it must contain three key pillars, that is, the application for the seizure must be informed, preceded by discretionary judicial authorisation, and any claimant must be given an opportunity to establish his or her entitlement.[196]

---

[193] 2000 (2) SA 106 (E) at 124A.
[194] Sec 25(1) of the South African Constitution. See Gupta (2002: 165).
[195] See *Deutschmann NO v Commissioner for the Revenue Service* 2000 (2) SA 106 (E) at 124A-C.
[196] Gupta (2002: 166).

Therefore, the Court established that deprivation is possible only after an informed application and the exercise of judicial discretion. The opportunity to establish entitlement is left to the owner under an innocent owner defence proceeding. The Court concluded by asserting that POCA (SA), on which the seizure proceedings were based, contained all three key pillars. Thus, the deprivation was constitutional.[197]

4.2.1.2 Under American Law

In the US, the approach to determining the constitutional validity of civil forfeiture laws is somewhat different. It has been extended to assessing just how and when asset forfeiture laws can be said to impose excessive fines, which could be construed as unconstitutional. A better understanding of this issue is linked to whether the recovery involves the proceeds of corruption or the instrumentalities of corruption, and to whether the owner of the proceeds or the instrumentality is an innocent owner or not.[198]

4.2.1.2.1 The Proceeds of Crime

It worth noting that it is easier to justify the constitutionality of forfeiture laws when they are used to confiscate the proceeds of corruption, than in cases of forfeiting the instrumentalities of corruption.

The US courts have not found it difficult to order the forfeiture of the proceeds of a crime. They make forfeiture orders based on the jurisprudence, which postulates that such proceeds accrue from illegal activities. Thus, proceeds of a crime is property to which other individuals in the

[197] Gupta (2002: 167). See also sec 38(1) of POCA (SA).
[198] Gupta (2002: 166).

society have an indefeasible claim of ownership, which is superior to any person who acquired it through corruption.

In explaining the point, Kennedy J (as he then was), while deciding the case of *United States v Bajakajian,*[199] opined that:

> '[I]f the respondent acquired the money in an unlawful manner, it would have been forfeitable as the proceeds of the crime. As a rule, forfeiture of the criminal proceeds serve the non-punitive ends of making restitution to the rightful owners and of compelling the surrender of property held without right of ownership. Most forfeiture proceedings, as a consequence, are not fines at all let alone excessive fines.'[200]

Accordingly, the excessive fines and the proportionality pitfalls imposed by constitutions with a view to protecting the right to property and the presumption of innocence are by-passed by forfeiture of the proceeds of a crime, because the forfeiture of the proceeds of corruption is based on restitution and imposes no fines or punishment.[201]

The US Supreme Court, too, has had occasion to determine the proportionality of civil forfeiture in the case of *United States v A Parcel of Land (92 Buena Vista Avenue)*.[202] In this case, a drug dealer made a gift of $ 240 000, arising from the proceeds of a crime, to his girlfriend who, in turn, used the money to purchase "the defendant property" (*92 Buena Vista Avenue*). The question that the Supreme Court grappled with was whether proceeds of a crime, given to an innocent party (the girlfriend), could be forfeited, and whether the uniform innocent owner defence could be relied on by the girlfriend to avert the forfeiture.

---

[199] (1998) 524 US 321.
[200] Gupta (2002: 167) See also *United States v Ursery* (1996) 518 US 276 & 284 & *United States v Bajakajian* (1998) 524 US 349-50.
[201] Gupta (2002: 167).
[202] (1993) 507 US 111-3 SC 1126.

The Supreme Court held that the availability of the defence does not mean that forfeiture of the property in possession of the innocent party would necessarily be considered as excessive. Thus, analysis of the excessiveness ought to balance the policy interests on both sides.

It may be argued in favour of such innocent spouse that getting married to a criminal is not a crime. Therefore, the property vested in the innocent spouse does not amount to the proceeds of a crime and hence is not forfeitable. Moreover, the court ought to consider the reliance of such spouse on the interest that he or she claims to be entitled to in the property.

However, the arguments above have been countered. It has been argued that depriving an innocent spouse of the property that accrued from a crime is not as unjust as failing to restore the property to its rightful and lawful owner who worked hard to acquire it but now is deprived of it simply because of the illegal activities of a criminal who gives it to his spouse. Also, depriving people of the proceeds of their spouse's criminal acts would encourage individuals not to use properties they own jointly with their spouses to commit crimes.

The US courts have upheld the counter arguments, especially in view of the fact that if they held otherwise, the corrupt individuals would use their spouses to hide the proceeds of their criminal enterprises.[203]

4.2.1.2.2 Instrumentalities of a Crime

As regards the instrumentalities of corruption, the arguments justifying their forfeiture have been based on three grounds. Firstly, the forfeiture of the instrumentalities is remedial. This argument is based on the fact that an instrumentality of corruption is an integral component of a corruption

[203] Gupta (2002: 168). See also *Bennis v Michigan* (1998) 516 US 442-3, where the USSC held that forfeiture of an instrumentality owned jointly by the criminal's spouse was constitutional. Forfeiture of proceeds owned jointly by the spouse would not be excessive.

chain. Thus, removing the instrumentality of corruption delinks this chain of corruption, thereby curtailing recurrence of corruption.[204]

Secondly, forfeiture of the instrumentality is justified because the owner of such property is presumed to have been negligent by allowing it to be used to facilitate the commission of a crime.[205] Finally, if the proceeds are not available, an instrumentality of a crime is a fair approximation of the proceeds, which are presumed to have been obtained from commission of the crime facilitated by the instrumentality in question.

However, the courts have limited the ambit of the forfeiture using excessive fine clauses. The issue was dealt with at length in the case of *Austin v United States*.[206] In this case, the court held that 'forfeiture of the instrumentality of the defendants auto body shop and mobile home for possession of two grams of cocaine with the intent to distribute was limited by the Eighth Amendment's Excessive Fines Clause, hence, the forfeiture under the federal drug forfeiture provisions constituted payment to a sovereign as punishment for some offence, hence, is subject to the limitations of the Eighth Amendment's Excessive Fines Clause'.[207]

It is clear that the holding in the *Austin* case is a complete contradiction of the holding in *Bennis v Michigan,*[208] where the court analysed the constitutionality of the forfeiture of the instrumentality of an innocent party. Here, Bennis's husband used a vehicle, which they owned jointly, to commit an act of public indecency,[209] contrary to the Michigan federal state laws. The

---

[204] Gupta (2002: 168).
[205] Gupta (2002: 168).
[206] (1993) 509 US 622. While delivering itself, the Court cited the case of *Browning-Ferris Industries of Vermont Incorporation v Kelco Disposal Incorporation* (1989) 492 US 257 & 265. Gupta (2002: 168).
[207] *Austin v United States* (1993) 509 US 622.
[208] (1998) 516 US 442-3.
[209] Bennis's husband had sex with a prostitute in an automobile while it was packed on a Detroit city street. See the Bennis case (1996) 516 US 443.

question was whether the court could order the forfeiture of Bennis's interest in the motor vehicle. While holding that total forfeiture of the automobile was constitutional and Bennis's interest, too, must be forfeited, the Court pronounced as follows:

> 'We conclude today, as we concluded 75 years ago, that the cases authorising actions of this kind at issue are "too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced".'[210]

It is clear that the holdings in the *Austin* and *Bennis* cases manifest the contradictory nature of civil forfeiture laws and the resulting constitutional challenges thereto. That is, whereas in the *Bennis* case the innocent owner defence is immaterial in forfeiting an instrumentality of a crime, under the *Austin* case forfeiture is limited by the excessive fines doctrine. However, the overriding conclusion is that forfeiture of the proceeds of a crime from an innocent party does not amount to an excessive fine.

Be that as it may, in his dissenting opinion in the *Bennis* case, Steven J declared that:

> '[T]he forfeiture of the petitioner's half interest in the car is surely a form of "excessive" punishment. For an individual who merely let her husband use her car to commute to work, even a modest penalty is out of all proportion to her blameworthiness; and when the assessment is confiscation of the entire car, because the illicit act took place once in the driver's seat, the punishment is plainly excessive.'[211]

Perhaps the only reason to accept the reasoning of the majority of the bench in the *Bennis* case is because counsel for Bennis did not base his arguments on the excessive fines clause, which was the main ground against the forfeiture in the *Austin* case. Thus, the outcome was justifiably different from that in the *Austin* case. Had Bennis's counsel relied on the excessive fines clause

[210] See the *Bennis* case (1996) 516 US 453 & Gupta (2002: 169).
[211] See the *Bennis* case (1996) 516 US 471. Gupta (2002: 169).

contained in the Eighth Amendment, there is high chance that Bennis could have retained the car.[212]

If such a situation arises in Kenya after adoption of forfeiture laws, it would be imperative upon the Kenyan Constitutional Court to appreciate the interests being explored in the *Austin* and *Bennis* cases. Therefore, the Kenyan legislature ought to draft the forfeiture laws while conscious of the jurisprudential challenges that already face them. The Kenyan courts, too, ought to follow this trend and be alive to these jurisprudential pitfalls in their interpretation of the forfeiture laws.

It is clear that the approach of the deprivation of property in the South African case of *Deutschmann*[213] lacks the capacity to resolve this conundrum. It is recommended that, while recognising the interests propounded in both the cases of *Austin* and *Bennis*, the Kenyan Courts ought to refrain from drawing a line between the contradicting positions enunciated in these cases in the same way the US Supreme Court did.[214]

4.2.13 Under UK Law

In the UK, reference is made to the landmark case of *Walsh v United Kingdom.*[215] The case was heard before the European Court of Human Rights after a lower court ordered the forfeiture of Walsh's assets. Walsh argued that the proceedings to recover his assets were criminal not civil. Therefore, the fundamental principle requiring the applicant to be presumed innocent until proved guilty would apply, as required by article 6 of the European Convention of Human Rights. Hence, before the determination of his guilt, his assets could not be forfeited. In deciding the case, the Court considered the domestic classification of the matter, the nature of the charge

[212] Gupta (2002: 169).
[213] 2000 (2) SA 106 (E) at 124A.
[214] Gupta (2002: 170).
[215] (2006) EHCR 1154.

and the penalty to which a person becomes liable.[216] The Court held that under the UK domestic law, the recovery proceedings were regarded as civil and not criminal. Also, the proceedings were meant to recover assets to which the applicant was not entitled, as opposed to punishing or deterring the applicant.[217] The Court concluded that, since the recovery proceedings were civil in nature, article 6 of the European Convention of Human Rights did not apply and dismissed Walsh's application.

In summary, civil forfeiture does not violate the right to property so long as it is informed, preceded by discretionary judicial authorisation and any claimant is given the opportunity to assert his or her claim. Moreover, courts need to appreciate the fact that civil forfeiture laws target properties acquired unlawfully, which the corrupt individuals are not entitled. Hence, it is a remedial mechanisms and not a punitive one. Therefore, Kenyan courts ought to adopt such arguments to prove that these laws do not infringe the right to property.

4.3 Presumption of Innocence

As noted, once the government proves that the right to property has not been violated in the course of deprivation by allowing the owner of such property access to a court of law, it would true to submit that such owner would have been presumed to innocent as required under the Constitution.

In addition, infringement of the presumption of innocence is based on whether the owner of the property forming the subject matter of the forfeiture proceedings is regarded as an accused person under the constitutional definition or a claimant in the context of civil forfeiture. Once

[216] Bukola (2010: 61).
[217] Bukola (2010: 62). See also *Butler v United Kingdom* (2002) ECHR IV.

these questions have been determined, the next question to be answered would be whether the forfeiture would interfere with such person's rights as an accused person or not.

Therefore, whether the owner of the property can be declared to be either an accused or a claimant it depends on whether the forfeiture proceedings are criminal or civil.[218]

Since it is now established that civil forfeiture are civil proceedings, the owner of the offending property in such proceedings is therefore a claimant and not an accused person. The import of this assertion is that any objection grounded in the presumption of innocence will not apply to civil forfeiture, since the owner of the offending property is not accused of any offence. Instead, it is his or her property that is accused of having facilitated a corruption offence.[219]

Also, the presumption of innocence does not apply to civil forfeiture, since, to disprove innocence, the alleging party must prove its case beyond a reasonable doubt. Thus the presumption of innocence applies only to proceedings in which the owner of the property is considered to be the accused. It therefore does not apply to civil forfeiture, since the owner of the property is not an accused but a mere claimant. Moreover, civil forfeiture requires one to prove his or her case on a balance of probabilities.

In support of the point above, reliance is placed on the case of *State v Zuma,*[220] where the court the held that:

[218] Gupta 2010: 170). See also *Nel v Le Roux No and others* 1996 (3) SA 562 (CC) at 571B-G. In this case, the Constitutional Court examined whether subpoenaed witnesses, were entitled to the rights conferred upon arrested, detained or an accused person, as provided for in section 35 of the South African Constitution. The Court held that a subpoenaed person is not entitled to the rights in section 35, since such person is not an accused liable to criminal prosecution.
[219] Young (2009: 16).
[220] 1995 (2) SA 642 (CC) at 656 E-F. See also Gupta (2010: 177).

> [I]n… South Africa the presumption of innocence is derived from the centuries old principle of English law, … it was always for the prosecution to prove the guilt of the accused person, and …the proof must be proof beyond a reasonable doubt.[221]

Accordingly, the court adopted two principles. Firstly, the presumption of innocence is breached whenever the accused is liable to be convicted despite the existence of a reasonable doubt.

Secondly, if by the provisions of a statutory presumption an accused is required to prove or disprove, on a balance of probabilities, an element of an offence or an excuse, then it contravenes section 11(d) of the South African Constitution since such a provision would permit a conviction in spite of reasonable doubt.[222]

Under POCA (SA), the state is required to prove its claim on a balance of probabilities.[223] Thus, the first principle adopted by the court is violated, since a reasonable doubt could exist even after the standards of a balance of probabilities have been met.[224]

At this stage, it is important to establish whether the innocent owner defence accorded to the owner of the offending property violates the second principle. The answer is yes. Based on the ground that the owner of the property in civil forfeiture is required to prove an excuse on a balance of probabilities.

Also, before a person is rendered an accused person, he or she must be facing some criminal prosecution. Since it is now settled that civil forfeiture is *in rem,* the owner of the property is not liable to any criminal prosecution.

---

[221] 1995 (2) SA 642 (CC) at 656 E-F. See also Gupta (2010: 177).
[222] 1995 (2) SA 642 (CC) at 656 E-F. See also Gupta (2010: 177).
[223] Gupta (2010: 177).
[224] Gupta (2010: 177).

In any event, before a person is rendered as an accused person in civil forfeiture, it depends on whether the forfeiture aims to punish such owner. The issue can be understood even better through assessing the doctrinal approaches as established by legal scholars and the jurisprudence of courts.

4.3.1 The Doctrinal Explanation

According to Hart, there are five basic factors upon which the nature of punishment is based.[225] They are:

> 'i. Punishment must involve pain or other consequences normally considered unpleasant;
>
> ii. It must be for an offence against legal rules;
>
> iii. It must be of an actual or supposed offender for his offence;
>
> iv. It must be intentionally administered by human beings other than the offender; and
>
> v. It must be imposed and administered by an authority constituted by a legal system against which the offence is committed.'[226]

In addition to Hart's guidelines, contemporary scholars, such as Steiker and Dripps have argued also that it is vital to identify the element of criminal prosecution. Steiker refers to this element as the blaming function while Dripps posits that 'punishment is accompanied not by the reluctance of sad necessity, but by the self-congratulatory emotion of blame. The convict is held up for hatred as well as confined; the government inflicts the pain with self-conscious attitude of moral superiority.'[227]

---

[225] Steiker (1997: 775 & 880).
[226] Hart (1959: 1 & 4-5).
[227] Dripp (1996: 204).

As regards civil forfeiture, its main intention is to prevent the corrupt individuals from profiting from their criminal enterprise by taking away the fruits of their crime. Accordingly, Hart's guidelines i, iv, and v will be satisfied loosely in that case. This is because the deprivation of the proceeds of corruption is usually unpleasant for the corrupt individual, it is normally applied by the anti-corruption agency and its officers, who derive their authority from the same legal authority that determines the offences for which the forfeiture proceeding is instituted.

Asset recovery laws generally create the derivative offence of knowing or wilfully blind ownership of tainted property. In the event that the innocent owner defence is raised, it is this offence on which the forfeiture is based. Thus, the qualification that it must be an offence against the legal rules is satisfied. The requirement that there must be an offender or supposed offender is satisfied also *ipso facto* in the case of an innocent owner defence. The final issue is whether the blaming function is satisfied. The first question is what is the state's intent? Asset recovery laws mainly aim to ensure that no one benefits from criminal activities. Such aim certainly does not focus on blaming. Instead the goal is restitution and to scuttle corruption. Hence, these laws are remedial and not punitive. Therefore, they do not pass the test of fulfilling the blaming function.

The second question is what is the effect on the defendant? In Steiker's opinion, it can be discerned that persons targeted are normally rich since they engage in organised crime, corruption and money laundering. Thus, they are perceived not to be petty criminals and may have a high status in the society. Therefore, deprivation of assets is visible in the communities where the corrupt individuals live and whenever they are deprived of such illegally acquired assets, they are usually very humbled.

The third question is what is the public message or social meaning of the forfeiture of the defendant's property by the government. This question is not easy to answer since it is difficult to know the perception of the public or the social meaning of forfeiture. Similarly, it is plausible that the social meaning of forfeiture is the self-congratulatory emotion of blame, in the sense that forfeiture aims to clean up corruption in the society.

Since civil forfeiture does not answer all four questions above, identified by Hart, it may be safe to conclude that it does not qualify to be considered to enhance punishment. The remaining conclusion is that it is meant to enhance restitution. In addition, it fails also to pass the test set out by Steiker and Dripps, since it lacks the element of criminal prosecution.

4.3.2 Legal Justification

To justify asset recovery laws, the government may argue that a suit meant to forfeit property lacks the potential for imprisonment, which is an essential element of criminal prosecution.[228]

In South Africa, this assertion has been legitimised by the South African Constitution in section 35, which provides for the rights of the 'arrested, detained and accused persons'.[229] The first two sets of rights (arrested and detained persons) are circumscribed by the physical restraint of the person.

Based on the fact that forfeiture of the proceeds of corruption holds no potential to confine the owner of the property, its subject falls outside the constitutional definition of 'accused'. In fact,

[228] McCaw (2011: 189-92).
[229] Sec 35 of the South African Constitution.

the South African Constitutional Court has held since that 'to coerce the will' is civil, while measures aiming to punish the body for a completed violation are criminal in character.[230]

The rights of an arrested, detained and accused person are provided for in the same manner under the Kenyan Constitution. Therefore, because the legal justification has been found to be true in South Africa, the same justification could be applied to the Kenyan situation, since, as noted, the concept of civil forfeiture is of universal application.

Kenyan Courts could seek assistance from the jurisprudence of the US Supreme Court, since, in multiple decisions, it has held that civil forfeiture is not a criminal proceeding disguised as a civil proceeding. In the case of *United States v Ursery,*[231] the US Supreme Court justified the point above as follows:

> '[T]here is no requirement in the statute that we currently review that the government demonstrate scienter in order to establish that the property is subject to forfeiture; indeed, the property may be subject to forfeiture even if no party files a claim to it and the government never shows any connection between the property and a particular person.'[232]

In the realm of asset recovery laws there is no scienter requirement in the government's *prima facie* case in civil forfeiture. Thus, a proceeding against property, which does not require the identification of a person, cannot require showing a state of mind and hence does not fall within the ambit of criminal prosecution.

Should Kenya enact an asset recovery law, Kenyan courts stand to learn from the wisdom of the US Supreme Court as enunciated in the *Ursery* case. In this case, the court was in support of the non-punitive goals of civil forfeiture. It held that 'requiring the forfeiture of property used to

[230] *State v Baloyi* 2000 (2) SA 425 (CC) at 439A.
[231] (1996) 518 US 291-2.
[232] *United States v Ursery* (1996) 518 US 291-2.

commit federal narcotics violations encourages property owners to take care in managing their property and ensures that they will not permit their property to be used for illegal purposes'.[233] Therefore, the court concluded that the proceedings are civil in nature and not criminal.

Notwithstanding the above, it would be wrong to say that the mere existence of a remedial effect makes a prosecution civil in nature and not criminal. Therefore, a balance between the features of both civil and criminal must be struck in order to determine the nature of each of them.[234]

In the light of these arguments, it may be concluded that civil forfeiture laws are not unconstitutional since they are based on restitution and not punishment. Thus, they are civil in nature and lack the elements of a criminal prosecution. Also, deprivation of corruptly acquired property does not amount to an excessive fine and the owner of the property blamed for facilitating a corruption offence is not an accused person but a claimant, who can still assert his or her claim under the uniform innocent owner defence. Therefore, civil forfeiture infringes neither the right to property nor the presumption of innocence.

[233] *United States v Ursery* (1996) 518 US at page 290. See also Gupta (2010: 174).
[234] Gupta (2010: 175).

CHAPTER FIVE

Conclusion and Recommendations

5.1 Conclusion

Corruption affords the corrupt individuals an unfair advantage over other members of society. Asset recovery laws were invented to take away this unfair advantage. Criminal forfeiture was the first form of asset recovery to be used. However, because of its inherent weaknesses it could not facilitate asset recovery fully. Consequently, it was held to be a weak tool to facilitate the recovery of stolen assets.

Following these developments, civil forfeiture was developed and adopted to fill the gaps in criminal forfeiture. Today, civil forfeiture stands tall in the field of asset recovery. It has been heralded as a strong tool for recovering the proceeds of corruption in various jurisdictions.

Even though it is appreciated that civil forfeiture can never be a substitute for criminal forfeiture and that the regimes should complement each other, it is trite that civil forfeiture contains more advantages than criminal forfeiture, which render it a stronger tool to recover the proceeds of corruption than criminal forfeiture.

Currently, there is no statute in Kenya that provides for civil forfeiture of the proceeds of corruption. The only statute that contains civil forfeiture is the Anti-Money Laundering Act, but unfortunately, it applies to money laundering only.

The Anti-Corruption Act, which is Kenya's substantive statute dealing with corruption and economic crimes, does not provide for civil forfeiture. Instead, it provides for a hybrid system of

"forfeiture of unexplained assets". However, this system cannot be relied upon to facilitate recovery the proceeds of corruption, because it has been held since to be unconstitutional. Needless to say, this system has minimal chance of facilitating the recovery of the proceeds of corruption, since there is not even an offence called illicit enrichment in Kenya.

Therefore, adoption of civil forfeiture laws is imperative for Kenya, especially that now there is no law to facilitate the recovery of the proceeds of corruption. This proposal rests on the fact that civil forfeiture could enable the Kenyan government to remove the instrumentalities and the proceeds of corruption from the hands of the corrupt individuals while generating alternative revenue for the government, thereby empowering the law enforcement agencies. All these efforts could help the Kenyan government to deter the further commission of corruption.

While appreciating the numerous advantages of asset forfeiture, it is worth noting that drafting a statutory framework for asset forfeiture is one of the biggest challenges that jurisdictions which have adopted these laws long before Kenya have faced.

Kenya should be prepared also to face the common constitutional challenges should it contemplate adopting these laws. Moreover, justifying asset recovery laws is an elusive process, hence the arguments to support the existence of and the role played by these laws ought to be put in a skilful and subtle way in order to avert their being held unconstitutional.

Chapter four showed how other states that have enacted asset forfeiture laws, for instance, the US, the UK and South Africa, have been able to justify the constitutional validity of these laws and how they do not infringe upon the right to property or the presumption of innocence. In bolstering this justification, the courts in these countries have placed their reliance on the proposition that asset forfeiture laws are civil and not criminal in essence and hence their

proceedings are meant to recover the assets to which the corrupt individual is not entitled and restoring such assets to the rightful owners, as opposed to punishing or deterring such corrupt individuals.

The arguments advanced in the UK, the US and South Africa should be the benchmark for the Kenyan Courts in case constitutional challenges are raised against a Kenyan asset forfeiture regime.

5.2 Recommendations

Adoption of asset recovery laws should not be done merely for the sake of meeting obligations imposed upon a state by a convention. On the contrary, drafting of asset recovery laws ought to be meticulous and preceded by proper planning. If such approach is not followed carefully, chances are that the forfeiture laws enacted may be halted on the grounds of unconstitutionality. Therefore, the main recommendation of this research paper is that:

- Kenya should enact a single statute on asset forfeiture, providing for recovery of the proceeds of corruption and related crimes.

In Kenya today, there is no law that provides for the forfeiture of the proceeds of corruption, despite the fact that Kenya is a long standing State Party to UNCAC. Perhaps this could be attributed to poor policy and legislative planning.

Firstly, a single statutory model encompassing both civil and criminal forfeiture systems would be best for Kenya, since this system is easy to enact and manage, and allows for complementarity between civil and criminal forfeiture. However, it would be imperative to provide explicitly in such statute that in case of conflicting roles, civil forfeiture should take precedence. This is

premised on the fact that civil forfeiture is a stronger tool than criminal forfeiture for recovering the proceeds of corruption.

Secondly, the statute should be comprehensive enough not only to provide for the recovery of the proceeds of corruption, but also for other crimes, such as money laundering, for which corruption is a predicate offence.

Of course, the most foreseeable challenge will be the limitation by the principle of legality. The principle provides that no conduct can be prosecuted if at the time of its commission, it had not been outlawed or criminalised by any law. However, as noted, this kind of argument is not applicable to civil forfeiture, since its proceedings are civil and the principle of legality, as a criminal law principle, cannot apply against civil forfeiture.

Thirdly, the statute should establish a single body or institution, for instance, an Asset Recovery Agency, Commission, or Unit, which is to be given the full mandate for the recovery of the proceeds of corruption and related offences. This proposal is premised on the ground that definition of "offence" under the Anti-Corruption Act includes some offences which are included also in the definition of "offence" under the Anti-Money Laundering Act.

This situation may lead easily to duplication of roles between the Ethics Commission established under the Anti-Corruption Act and the ARA of the Anti-Money Laundering Act, since each of them has the mandate to recover the proceeds arising from offences established under their aegis.

Fourthly, the statute should amend all the laws that currently purport to facilitate the recovery of the proceeds of corruption and related offences, and incorporate the strongest provisions of such amended laws, which could facilitate the recovery of the proceeds of corruption.

Finally, the statute should provide explicitly that it would apply retrospectively so as to cover the proceeds of corruption and related offences acquired by the corrupt individuals prior to the statute coming into force. In any case, the rule against non-retrospective application of the law does not apply to civil forfeiture, since it is now a settled fact that its proceedings are civil and not criminal in nature.

BIBLIOGRAPHY

Primary Sources

Case Law

1. *Austin v United States* (1993) 509 U S 602.
2. *Bennis v Michigan* (1996) 516 U S 442.
3. *Butler v United Kingdom* (2002) IV ECHR.
4. *Calero Toledo v Pearson Yacht Leasing Co.* (1974) 416 US 663.
5. *Deutschmann NO v Commissioner for the Revenue Service* 2000 (2) SA 106 (E).
6. *Gachiengo v Republic* (2000) 1 EA 52 (CAK).
7. *In the matter of Director of Assets Recovery Agency and in the Matter of Cecil Stephen Walsh* (2004) NIQB 21.
8. *Kenya Anti-Corruption Commission v Stanley Mombo Amuti* (2011) eKLR CACA No. 39 of 2011.
9. *Kenya Anti-Corruption Commission v Stanley Mombo Amuti* (2011) eKLR HCCC No. 448 of 2008 (O.S).
10. *Libretti v United States* (1995) 516 US 29.
11. *NDPP v Kyriakou* 2004 (1) SA 379 (SCA).
12. *NDPP v Parker* 2006 (3) SA 198 (SCA).
13. *Porter v United Kingdom* (2003) 37 EHRR CD 8.
14. *State v Baloyi* 2000 (2) SA 425 (CC).
15. *State v Zuma* 1995 (2) SA 642 (CC).
16. *The United States v Bajakajian* (1998) 524 US 321.

17. *United States v Collado* (2003) 348 F3d 323(2d Cir. 2003).

18. *United States v Douglas* (1995) 55 F. 3d 584 (11 Cir.1995).

19. *United States v Real Property*...464 Myrtle Avenue (2003) WL 21056786 (E.D.N.Y).

20. *United States v Real Property* at 40 Clark Road, 52 F. Supp. 2d 254.

21. *United States v Two Parcels in Russel County* (1996) 92 F.3d 1128 (11 Cir. 1996).

22. *United States v A Parcel of Land 92 Buena Vista Ave*... (1993) 507 US 111.

23. *United States v Ursery* (1996) 518 US 267.

24. *Walsh v United Kingdom* (2006) ECHR 1154.

Reports

1. Commonwealth Secretariat (2005) 'Report of the Commonwealth Working Group on Asset Repatriation'. Available at <*http://www.thecommonwealth.org/Shared_ASP_Files/UploadedFiles/E6642A80-04E0-4848-A2FE-0397BADBC2DE_LMM05_AssetRepatriationReport.pdf*> [Accessed on 14 October 2012].

2. Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG) (2011) 'Mutual Evaluation Report: Anti-Money Laundering and Combating the Financing of Terrorism, Republic of Kenya'. Available at <*http://www.esaamlg.org/userfiles/Kenya_Mutual_Evaluation_Detail_Report(2).pdf*> [Accessed on 5 August 2012].

3. International Anti-Corruption Conference (2001)'Prerequisites for effective Ombudsman's Offices and Anti-Corruption Strategies'. Available at <*http://www.google.co.za/url?sa=t&rct=j&q=Adequate+resources+are+necessary+for+Fighting+corruption+&source=web&cd=9&ved=0CG8QFjAI&url=http://iacconference.org/*

documents/10th_iacc_workshop_Prerequisites_for_effective_ombudsmans_offices_and_anti-corruption_strategies.doc&ei=NgweULfmKo6AhQfRnoCYCQ&usg=AFQjCNEva2eDlb-wzYwvBmihrV6eTphmoA> [Accessed on 5 August 2012].

4. International Center for Asset Recovery (2011) 'Capacity Building in Asset Recovery'. Available at <*http://www.baselgovernance.org/fileadmin/docs/publications/books/Capacity_Building_in_Asset_Recovery.pdf*> [accessed on 1August 2012].
5. Independent Medico-legal Unit (2012) 'Under-Funding Constitutional Bodies Worrying'. Available at <*http://www.imlu.org/?p=1333*> [Accessed on 5August 2012].
6. Kenya Anti-Corruption Commission (2004-5) 'Kenya: Kenya Anti-Corruption Commission'. Available at <*http://www.google.co.za/url?sa=t&rct=j&q=History+of+anti-corruption+laws+in+kenya+&source=web&cd=5&ved=0CFkQFjAE&url=http://www.track.unodc.org/LegalLibrary/LegalResources/Kenya/Authorities/Kenya%2520authorities.pdf&ei=fJkeUKPyF4KnhAftioCQCg&usg=AFQjCNE0l9MGaoL4L9dK-lMDosTuWaos_A*> [Accessed on 5 August 2012].
7. Kenya Anti-Corruption Commission (2009) 'Kenya: UN Convention against Corruption Gap Analysis Report and Implementation Plan'. Available at <*http://www.eacc.go.ke/docs/kenya-uncac-gap-analysis-report.pdf*> [Accessed on 5 August 2012].
8. Kroll Associates (2003) 'The Kroll Report'. Available at <*http://www.politicalarticles.net/downloads/free/Looting-in-Kenya-Kroll-Report.pdf*> [Accessed on 21 April 2012].
9. Mwendwa A (2005) 'A review of the Kenya Police Force Budget and its effect on Crime Management'. Available at

<*http://www.humanrightsinitiative.org/publications/police/kenya_budgetary_report.pdf*>

[Accessed on 5 August 2012].

10. Public Relations Office (2012) 'Republic of Kenya Budget Statement for the Fiscal Year 2012/2013'. Available at <*http://www.statehousekenya.go.ke/publications/14-06-2012-13-BudgetSpeech-Distribution%20Final%20_MF.pdf*> [Accessed on 11 September 2012].
11. Transparency International (TI) Kenya (2003) 'Is Kenya Ready for Asset Recovery'. Available at <*http://www.google.co.za/url?sa=t&rct=j&q=%E2%80%98Is+Kenya+Ready+for+Asset+Recovery%E2%80%99+&source=web&cd=1&ved=0CCIQFjAA&url=http://www.ipocafrica.org/index.php%3Foption%3Dcom_docman%26task%3Ddoc_download%26gid%3D328&ei=zruUT_2qCOqf0QXxzqD3AQ&usg=AFQjCNEk8Sdb8p7vsgPmhGPYzuCshlhOhw&sig2=DAziElvcL8dOkNtnA8CIFA*> [Accessed on 18 April 2012].
12. Transparency International (2009) 'Reporting on the 10th Principle against Corruption'. Available at<*http://www.unglobalcompact.org/docs/issues_doc/Anti-Corruption/UNGC_AntiCorruptionReporting.pdf*> [Accessed on 26 August 2012].
13. Transparency International Kenya (2011) 'Right to Know: The Missing Link in Key Governance Processes and Sectors'. Available at <*http://www.google.co.za/url?sa=t&rct=j&q=%E2%80%98Right+to+Know:+The+missing+link+in+Key+governance+processes+and+sectors%E2%80%99&source=web&cd=1&ved=0CCIQFjAA&url=http://www.tikenya.org/index.php%3Foption%3Dcom_docman%26task%3Ddoc_download%26gid%3D86%26Itemid%3D146&ei=OLqUT_WtM-qn0AXGl_nrAQ&usg=AFQjCNEE9_9hVMV7V5EbKSQRI98-81jEcw&sig2=tyX2F4Jo19zVJK4ULcmf5Q*>[Accessed on 18 April 2012].

14. Performance and Innovation Unit (2000) 'Recovering the Proceed of crime'. Available at <*http://webarchive.nationalarchives.gov.uk/+/http://www.cabinetoffice.gov.uk/media/cabinetoffice/strategy/assets/crime.pdf*> [Accessed on 3 August 2012].
15. United Nations Office on Drugs and Crime Report (2012) 'UNCAC Signature and Ratification Status as at 12 July 2012'. Available at <*http://www.unodc.org/unodc/en/treaties/CAC/signatories.html*> [Accessed on 5 August 2012].

Conventions

1. African Union Convention on Preventing and Combating Corruption (AU Convention). Adopted on 11 July 2003 and entered into force on 5 August 2006.
2. Council of Europe Convention on Laundering, Search, seizure and Confiscation of the Proceeds from Crime (Strasbourg Convention). Adopted on 8 November 1990 and came into force on 1 December 2009.
3. Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on Financing Terrorism (Warsaw Convention). Adopted on 16 May 2005 and entered into force on 1 May 2008.
4. Inter-American Convention against Corruption. Adopted on 29 March 1996 and entered into force on 6 March 1997.
5. Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. Adopted on 21 November 1997 and entered into force on 12 February 1999.
6. United Nations Convention against Corruption. Adopted on 31 October 2003 and entered into force on 14 December 2005.

7. United Nations Convention against the Illicit Traffic in Narcotics drugs and Psychotropic Substances (1998; Vienna Convention). Adopted on 20 December 1988 and entered into force on 11 November 1990.
8. United Nations Convention against Transnational Organized Crime (UNTOC) and the Protocols Thereto. Adopted on 15 November 2000 and entered into force on 25 December 2003.
9. South African Development Community (SADC) Protocol Against Corruption adopted on 14 August 2001and and entered into force on 6 July 2005.
10. Southern African Development Community (SADC) Protocol on Mutual Legal Assistance in Criminal Matters Adopted on 3 October 2002 and entered into force on 23 June 2010.

Kenyan Laws

1. Anti-Corruption and Economic Crimes Act Chapter 65, Laws of Kenya. Assented to on 30 April 2003 and commenced on 2 May 2003.
2. Criminal Procedure Code Chapter 75, Laws of Kenya, commenced on 1 August 1930.
3. Ethics and the Anti-Corruption Commission Act No. 22 of 2011, Laws of Kenya. Assented to on 27 August 2011 and commenced on 5 September 2011.
4. Evidence Act Chapter 80, Laws of Kenya. Commenced on 10 December 1963.
5. Extradition (Contiguous and Foreign Countries) Act, Chapter 76, Laws of Kenya. Commenced on 29 March 1966.
6. Extradition (Commonwealth Countries) Act Chapter 77, Laws of Kenya. Commenced on 30 December 1968.
7. Mutual Legal Assistance Act No. 36 of 2011, Laws of Kenya. Assented to on 11 November 2011 and commenced on 2 December 2011.

8. Narcotic Drugs and Psychotropic Substances (Control) Act No. 4 of 1994, Laws of Kenya. Assented to on 8 July 1994 and commenced on 26 August 1994.
9. Prevention of Organized Crimes Act No. 6 of 2010, Laws of Kenya. Commenced on 23 September 2010.
10. Proceeds of Crime and Anti-Money Laundering Act No. 9 of 2009, Laws of Kenya. Assented to on 31 December 2009 and commenced on notice.
11. The Constitution of Kenya, 2010. Adopted during the 2010 referendum and promulgated on 27 August 2010.
12. The Constitution of Kenya. Revised edition 2009 (2008). Commenced vide legal Notice No.3 of 2008.
13. Witness Protection Act, Chapter 79, Laws of Kenya. Commenced on 1 September 2008.

Foreign Legislation

1. Constitution of the Republic of South Africa of 1996. Promulgated on 18 December 1996 and commenced on 4 February 1997.
2. Prevention of Organised Crime Act No. 121 of 1998 (POCA SA). Assented to on 24 November, 1998 and commenced on 21 January 1999.
3. Proceeds of Crime Act No. 30 of 1996 (POCA Ireland). Assented to on 4 August 1996.

Secondary Sources

Books

1. Barber R & Eissa A (2011) *Confiscation Law Handbook.* West Sussex: Bloomsbury Professional Limited.

2. Beare E M (ed) (2003) *Critical Reflections on Transnational Organized Crime, Money Laundering, and Corruption*. Toronto: University of Toronto Press.
3. Brun J P, Gray L, Scott C & Stephenson K M (eds) (2011) *Asset Recovery Handbook: A Guide for Practitioners*. Washington, DC: The World Bank.
4. Chaikin D & Sharman J C (2009) *Corruption and Money Laundering: A symbiotic Relationship*. New York: Palgrave Macmillan.
5. Edgeworth D R (2004) *Asset Forfeiture: Practice and Procedure in State and Federal Courts*. Chicago: ABA publishing.
6. Fozzard A & Steele T (eds) (2009) *Stolen Asset Recovery: Towards a Global Architecture for Asset Recovery*. Washington, D C: The World Bank.
7. Greenberg T S, Samuel L M, Grant W & Gray L (2009) *Stolen Asset Recovery: A Good Practices Guide for Non-Conviction Based Asset Forfeiture*. Washington, DC: The International Bank for Reconstruction and Development/World Bank.
8. Holmes L (2006) *Rotten States? Corruption, Post Communism and Neoliberism.* Durham: Duke University Press.
9. International Centre for Asset Recovery (2009) *Tracing Stolen Assets: A Practitioner's Handbook.* Switzerland: Basel Institute of Governance.
10. Jordan S D & Stradder J K (2009) *White Collar Crime: Cases, Materials, And Problems* (2 ed) San Francisco: Lexis Nexis Group.
11. Madinger J (2006) *Money Laundering: A Guide for Criminal Investigators* (2 ed) Boca Raton, FL: CRC Press Taylor & Francis Group.
12. Mbaku M J (2007) *Corruption in Africa: Causes, Consequences, and Cleanups.* Plymouth: Lexington Books.

13. Mitchell S Tatlor & K Talbot (eds) (1997) *Confiscation and the Proceeds of Crime.* London: Sweet & Mawell.

14. Neild R (2002) *Public Corruption: The Dark Side of Social Evolution.* London: Anthem Press.

15. OECD Glossaries (2008) *A Glossary of International Standards in Criminal Law.* Paris: OECD Publications.

16. Pieth M (ed) (2008) *Recovering Stolen Assets.* Berlin: Basel Institute on Governance.

17. Reuter P & Truman E M (2004) *Chasing Dirty Money: The Fight against Money Laundering.* Washington, DC: Institute for International Economics.

18. Richards J R (1999) *Transnational Criminal Organizations, Cybercrime, and Money Laundering: A Handbook for Law Enforcement Officers, Auditors, and Financial Investigators.* Boca Raton: CRC Press.

19. Rider B (ed) (1997) *Corruption: The Enemy Within.* The Hague: Kluwer Law International.

20. Sagan C (1997) *Billions and Billions: Thoughts on Life and Death at the Brink of the Millennium.* New York: Ballantine.

21. Sare R, Das D K, Albretcht H J (eds) (2005) *Policing Corruption: International Perspectives.* New York: Lexington.

22. Stapenhurst R, Johnson N & Pelizzo R (eds) (2006) *The Role of Parliament in Curbing Corruption.* Washington, DC: The World Bank.

23. Oxford Dictionaries (2007) *Shorter English Oxford Dictionary* (6 ed). New York: Oxford University Press Inc.

24. Stradder J K (2006) *Understanding White Collar Crime* (2 ed) San Francisco: Lexis Nexis.

25. Vettorri B (2006) *Tough on Criminal Wealth: Exploring the Practice of Proceeds from Crime Confiscation in the EU* Dordrecht, The Netherlands: Springer.
26. Wright A (2006) *Organised Crime:* Devon: William Publishing.
27. Young SNM (ed) (2009) *Civil Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime.* Cheltenham: Edward Elgar Publishing Limited.

Chapters in Book

1. Fei X & Fong SK 'the Confiscation System in Main Land China' in Young S N M (ed) (2009) *Civil Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime* Cheltenham: Edward Elgar Publishing Limited.
2. Stuart M G 'The Costs of Grand Corruption' in Stuart M G (ed) (1994) *Grand Corruption in Third World Development.* Berlin: Transparency International.

Journal Articles

1. Bersinger A S (2011) 'Grossly Disproportional to Whose Offense? Why the (Mis) Application of Constitutional Jurisprudence on Proceeds Forfeiture Matters' 45 *Georgia Law Review* 841-874.
2. Brown G R (2012) 'Reforming Civil Forfeiture Law: The Case for an Automatic Stay Provision' 67(4) *St John's Law Review* 705 -719.
3. Blumenson E D & Nilsen E (1998) 'Policing for Profits: The Drug War's Hidden Economic Agenda' 65(35) *The University of Chicago Law Review* 1-113.
4. Cassella S D (2004) 'Overview of Asset Forfeiture Law in the United States' 17 *South African Journal of Criminal Justice* 347-367.

5. Cassella S D (2008) 'The Case for Civil Forfeiture: Why *In Rem* Proceedings are an Essential Tool for Recovering the Proceeds of Crime' 11(1) *Journal of Money Laundering Control* 8-14.
6. Casella S D (2001) 'The Uniform Innocent Owner Defence to Civil Asset Forfeiture' 89 *Kentucky Law Journal* 653-707.
7. Cramer J (2010) 'Civilizing Criminal Sanctions - A Practical Analysis of Civil Asset Forfeiture under the West Virginia Contraband Forfeiture Act' 112 *West Virginia Law Review* 991-1022.
8. Eaddy L M (1993) 'How Much is Too Much? Civil Forfeiture and the Excessive Fine Clauses after Austin v United States' 45 *Florida Law Review* 709-712.
9. Enonchong N (2002) 'The African Charter on Human and Peoples' Rights: Effective Remedies in Domestic Law?' 46 *Journal of African Law*. 197-200.
10. Gupta D (2002) 'Republic of South Africa's Prevention of Organised Crime Act: A Comparative Bill of Rights Analysis' 37 *Harvard Civil Rights-Civil Liberties Law Reviews* 159-183.
11. Hart H L A (1959) 'The Presidential Address: Prolegomenon to the Principles of Punishment' 60 *Proceedings of the Aristotelian Society* 1-26.
12. Kennedy A (2006) 'Designing a Civil Forfeiture System: An Issues List for Policy Makers and Legislators 13(2) *Journal of Financial Crime* 132-163.
13. Kennedy A (2005) 'Justifying the Civil Recovery of Criminal Proceeds' 12 1 *Journal of Financial Crime* 8-23.
14. McCaw C E (2011) 'Asset Forfeiture as a Form of Punishment: A Case for Integrating Asset Forfeiture into Criminal Sentencing' 38 *American Journal of Criminal Law* 181-219.

15. Murphy M (2010) 'Race and Civil Asset Forfeiture: A Disparate Impact Hypothesis' 16 *Texas Journal on Civil Liberties & Civil Rights* 77-99.

16. Mushtaq H K (1998) 'Patron-Client Networks and the Economic Effects of Corruption in Asia' 10 *European Journal of Development Research* 15-39.

17. Myint U (2007) 'Corruption: Causes, Consequences and Cures' 7(20) *Asia-Pacific Development Journal* 33-57.

18. Nicgorski A (1996) 'Continuing Saga of Civil Forfeiture, the War on Drugs, and the Constitution: Determining the Constitutional Excessiveness of Civil Forfeitures Comments' 91 *Northwestern University Law Review* 374-412.

19. Nikolov N (2011) 'General Characteristics of Civil Forfeiture' 14 1 *Journal of Money Laundering Control* 16-31.

20. Noya S T (1996) 'Hoisted by Their Own Petard: Adverse inferences in Civil Forfeiture' 86(2) *Journal of Criminal Law and Criminology* 497-499.

21. Pogue A C (2005) 'If it Weren't for the Flip Side--Can the USA PATRIOTIC ACT Help the U.S. Pursue Drug Dealers and Terrorists Overseas, without Overstepping Constitutional Boundaries at Home?' 14 *Cornell Journal of Law & Public Policy* 477-498.

22. Schroth P W (2003) 'National and International Constitutional Law Aspects of African Treaties and Laws against Corruption' *13 Transnational Law and Contemporary Problems, University of Iowa* 83-103.

23. Soto J (2004) 'Show Me the Money: The Application of the Asset Forfeiture Provisions of the Trafficking Victims Protection Act and Suggestions for the Future' 23 *Penn State International Law Review* 365-380.

24. Steiker C S (1997) 'Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide', 85 *Georgetown Law Journal* 775-814.

25. Tripp D (1996) 'The Exclusivity of the Criminal Law: Toward a Regulatory Model of, or "Pathologocal Perspective" on the Civil-Criminal Distinction' *Journal of Contemporary Legal Issues* 199-222.

26. Weber R (ed) (2007) 'Asset Forfeiture' 55(6) *United States Attorneys' Bulletin* 1-76.

Internet Articles

1. Basel Institute on Governance: International Centre for Asset Recovery (2007) 'Asset Forfeiture (Civil)'. Available *at <http://www.assetrecovery.org/kc/node/da89ddc3-c6e9-11dc-805e-916f90ca8fa4.0;jsessionid=31AA0B11D3A2FC8357014856C8C0BE5A>* [Accessed on 2 August 2012].

2. Clarke D & Fletcher P (2009) 'Kenya Corruption Back to Moi-era Levels'. Available at <*http://www.reuters.com/article/2009/03/06/idUSL6163777*> [Accessed on 2 August 2012].

3. Ethics and Anti-Corruption Commission (2012) 'About Ethics and Anti-Corruption Commission: History'. Available at <*http://www.eacc.go.ke/default.asp?pageid=2*> [Accessed on 5 August 2012].

4. Felkin L (2010) 'Asset Forfeiture: Unconstitutional Property Theft by our Governments'. Available at <*http://perspicuity.net/forfeiture/forfeit.html*> [Accessed on 10 August 2012].

5. Githongo J &Wainaina N (2011) 'Kenya: Drugs - the Final Frontier in the War against Corruption'. Available at <*http://allafrica.com/stories/201112190255.html*> [Accessed on 3 August 2012].

6. Interpol (2012) 'Money Laundering'. Available at <*http://www.interpol.int/Crime-areas/Financial-crime/Money-laundering*> [Accessed on 5 August 2012].

7. Makali D (2011) 'Kenya: Syokimau Symptom of Rot at Lands Ministry'. Available at<*http://allafrica.com/stories/201111171070.html*> [Accessed on 5 august 2012].

8. Mati M (2003) 'Beyond Illusions: A Report on the Status of the Struggle against Corruption in Kenya'. Available at<*http://www.agoraparl.org/sites/default/files/beyond_illusions_kenya.pdf*> [Accessed on 2 August 2012].

9. McConnel T (2011) 'U.S Concerned about Kenyan Drug Trade, Plans DEA Office'. Available at <*http://www.globalpost.com/dispatches/globalpost-blogs/africa-emerges/us-concerned-about-kenyan-drugs-trade-plans-dea-office*> [Accessed on 3 August 2012].

10. Michira M (2011) 'Kenya: Collapsed Brokers Get NSE Shares Ahead of Public Sale'. Available at <*http://allafrica.com/stories/201107150007.html*> [Accessed on 5 August 2012].

11. Mutua M (2003) 'The Case of Judicial Rot and Reform Politics'. Available at <*http://www.law.buffalo.edu/Faculty_And_Staff/submenu/MutuaM/The%20case%20of%20Judicial%20Rot%20and%20Reform%20politics_Sunday%20Nation_10-12-2003.pdf*> [Accessed on 12 August 2012].

12. Mwakilishi (2012) 'The Conspiracy That Saw Homeowners' Lofty Dreams in Syokimau Come Tumbling Down". Available

at<*http://www.mwakilishi.com/content/articles/2012/07/14/the-conspiracy-that-saw-homeowners-lofty-dreams-come-tumbling-down.html*> [Accessed on 5 August 2012].

13. Ndung'u W (2011) 'Kenya: Police Reforms are a Key to Rule of Law'. Available <*http://allafrica.com/stories/201110210753.html*> [Accessed on 5 August 2012].

14. Ngigi G (2011) 'Kenya: Stockbrokers End Four-Year Collapse Jinx'. Available at <*http://allafrica.com/stories/201112290029.html*> [Accessed on 5 August 2012].

15. Nyagah N (2012) 'Is a Property Bubble Imminent in Kenya?'. Available at <*http://www.tradeinvestafrica.com/feature_articles/1136780.htm*> [Accessed on 6 August 2012].

16. Organisation of American States (1996) 'Reservations to the Inter-American Convention against Corruption'. Available *at* <*http://www.oas.org/juridico/english/sigs/b-58.html*> [Accessed on 20 October 2012].

17. Okoth J (2012) 'East African Banks Lose Kshs. 4 Billion to Fraudsters'. Available at <*http://www.standardmedia.co.ke/?articleID=2000063082*> [Accessed on 5 August 2012].

18. Okoth D (2011) 'Why Kenya is a Safe Haven for Drug Traffickers'. Available at <*http://www.standardmedia.co.ke/?id=2000045809&cid=4&articleID=2000045809*> [Accessed on 3 August 2012].

19. Okpa ii E (2009) 'West Africa: A Drug Smuggling and Terrorism Hub?' Available at <*http://www.africanexecutive.com/modules/magazine/articles.php?article=4288*> [Accessed on 5 August 2012].

20. Otieno G (2005) 'The Narc's Anti-Corruption Drive in Kenya Somewhere over the Rainbow?'Available at <*http://www.iss.co.za/pubs/ASR/14No4/EOtieno.htm*> [Accessed on 2 August 2012].

21. Patriot News Editorial Board (2010) 'State Police are Overburdened, Underfunded'. Available at<*http://www.pennlive.com/editorials/index.ssf/2010/08/state_police_woes_commonwealth.html*> [Accessed on 5 August 2012].

22. Raghavan S (2012) 'Web Site Strives to Fight Corruption in Kenya'. Available at<*http://www.washingtonpost.com/world/web-site-strives-to-fight-corruption-in-kenya/2012/02/04/gIQA9lP9sQ_story.html*> [Accessed on 12 August 2012].

23. Redpath J (2000) 'Forfeiting Rights? Assessing South Africa's Asset Forfeiture Laws'. Available at <*http://www.iss.co.za/pubs/ASR/9No5And6/Redpath.html*> [Accessed on 16 April 2012].

24. Robitaillie N (2005) 'Rehabilitating Kenya's Judicial System'. Available at <*http://www.idrc.ca/EN/Themes/Governance/Pages/ArticleDetails.aspx?PublicationID=705*> [Accessed on 12 September 2012].

25. Stacy W (2012) 'The Consequences of Underpaying Chesterfield Police Officers'. Available at<*http://www.chesterfieldmonthly.com/index.php/in_their_words/the-consequences-of-underpaying-chesterfield-police-officers*> [Accessed on 5 August 2012].

26. Softkenya.com (2012) 'Corruption in Kenya'. Available at <*http://softkenya.com/law/corruption-in-kenya-2/*> [Accessed on 5 August 2012].

27. Somafeni (2012) 'Money Laundering'. Available at<*http://www.oppapers.com/essays/Money-Laundering/1015932*> [Accessed on 5 August 2012].

28. Speville DB (2008) 'Failing Anti-Corruption Agencies -Causes and Cures'. Available at<*http://ancorage-net.org/content/documents/de_speville.pdf*> [Accessed on 5 August 2012].

29. United Nations Office on Drugs and Crime (UNODC) (2012) 'Organized Crime'. Available at <*http://www.unodc.org/unodc/en/organized-crime/index.html*> [Accessed on 6 August 2012].

30. Williford E (1999) 'LII Background on Forfeiture'. Available at <*http://www.law.cornell.edu/background/forfeiture/*> [Accessed on August 2012].

31. Worrall J L (2008) 'Asset Forfeiture'. Available at <*http://www.popcenter.org/Responses/pdfs/asset_forfeiture.pdf*> [Accessed on 6 August 2012].

32. Zutt J (2011) 'Corruption in Kenya'. Available at<*http://blogs.worldbank.org/africacan/corruption-in-kenya*> [Accessed on 12 August 2012].

Thesis

1. Bukola O O (2010) *Civil Recovery of Corruptly Acquired Assets: A Legal Roadmap for Nigeria* (Unpublished LLM thesis, University of the Western Cape).