


The Asset Forfeiture Regime in Malawi and its Implications for the Combating of Money Laundering

JEAN PHILLIPO

STUDENT NUMBER 3100708



Submitted in fulfilment of the requirements for the
Doctor of Laws in the Faculty of Law, University of the
Western Cape, Republic of South Africa

Supervisor:

PROFESSOR LOVELL FERNANDEZ

JUNE 2015

Declaration

I, JEAN PHILLIPO, declare that 'The Asset Forfeiture Regime in Malawi and its Implications for the Combating of Money Laundering' is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

Student: JEAN PHILLIPO

Signed

Date



Supervisor: PROFESSOR LOVELL FERNANDEZ

Signed

Date

TABLE OF CONTENTS

| | |
|---|-----------|
| TABLE OF CONTENTS | ii |
| DEDICATION | ix |
| ACKNOWLEDGMENTS | x |
| KEY WORDS | xi |
| LIST OF ABBREVIATIONS..... | xii |
| ABSTRACT..... | xiii |
| | |
| CHAPTER ONE: GENERAL INTRODUCTION | 1 |
| 1.1 Introduction | 1 |
| 1.2 Forfeiture | 1 |
| 1.2.1 Types of property subject to forfeiture | 2 |
| 1.2.2 Criminal forfeiture | 3 |
| 1.2.3 Civil forfeiture..... | 4 |
| 1.2.4 Relevance of civil forfeiture..... | 6 |
| 1.2.5 Relevance of asset forfeiture in the fight against money laundering | 7 |
| 1.3 Contextual background..... | 8 |
| 1.4 Statement of the problem..... | 11 |
| 1.5 Research question | 12 |
| 1.6 Objectives of the study | 12 |
| 1.7 Significance of the study | 13 |
| 1.8 Hypotheses | 14 |
| 1.9 Literature review | 15 |
| | |
| CHAPTER TWO | 20 |
| A CONCEPTUAL AND THEORETICAL FRAMEWORK FOR ASSET FORFEITURE | 20 |
| 2.1 Introduction | 20 |
| 2.2 Limited government through the lens of the social contract theory..... | 21 |
| 2.2.1 Thomas Hobbes’s social contract perspective..... | 22 |
| 2.2.2 John Locke’s social contract perspective | 24 |

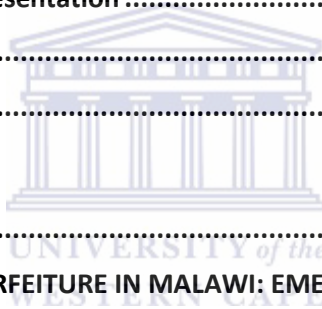
| | |
|--|----|
| 2.2.3 The social contract and the constitution | 27 |
| 2.2.4 Asset forfeiture vs human rights..... | 29 |
| 2.2.5 Locke’s views on property rights..... | 30 |
| 2.3 The Rationale for asset forfeiture..... | 31 |
| 2.3.1 Taking the profit out of the crime | 31 |
| 2.3.1.1 John Locke’s account of lawful acquisition of property | 32 |
| 2.3.1.2 Robert Nozick’s theory of justice..... | 32 |
| 2.3.2 Suppressing incentives for unlawful activities | 34 |
| 2.3.3 Compensation of victims | 36 |
| 2.3.4 Rationale for civil asset forfeiture..... | 37 |
| 2.4 Asset forfeiture as punishment | 40 |
| 2.4.1 Criminal forfeiture as punishment | 41 |
| 2.4.1.1 Forfeiture of proceeds of crime | 41 |
| 2.4.1.2 Forfeiture of instrumentalities of crime..... | 43 |
| 2.4.2 Civil forfeiture as punishment..... | 44 |
| 2.5 Government’s right to punish through asset forfeiture | 49 |
| 2.6 Theory of punishment in asset forfeiture..... | 50 |
| 2.6.1 Deterrence..... | 51 |
| 2.6.2 Retribution | 56 |
| 2.6.3 Mixed theory of punishment | 58 |
| 2.6.3.1 Hart’s account of mixed theory of punishment..... | 59 |
| 2.6.3.2 John Locke’s account of mixed theory of punishment | 59 |
| 2.6.3.3 Andrew Von Hirsch’s account of mixed theory..... | 61 |
| 2.6.3.4 John Rawls’s account of mixed theory | 61 |
| 2.7 Developing an asset forfeiture framework through Locke’s mixed theory of punishment | 63 |
| 2.7.1 Punishment must not be arbitrary | 63 |
| 2.7.2 Punishment of offenders, not the innocent..... | 64 |
| 2.7.3 Punishment to meet deterrent and reparative aims..... | 66 |
| 2.7.4 Proportionality of punishment | 68 |
| 2.7.4.1 Proportionality of the forfeiture of proceeds of crime | 69 |
| 2.7.4.2 Proportionality of the forfeiture of instrumentalities..... | 70 |
| 2.7.4.3 Proportionality of compensation..... | 72 |
| 2.7.4.4 Excessiveness of forfeiture ordered in addition to another penalty..... | 73 |

| | |
|---|------------|
| 2.8 Conclusion..... | 74 |
| | |
| CHAPTER THREE | 76 |
| THE INTERNATIONAL LEGAL FRAMEWORK FOR ASSET FORFEITURE | 76 |
| 3.1 Introduction | 76 |
| 3.2 International legal instruments | 76 |
| 3.2.1 The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances..... | 77 |
| 3.2.2 United Nations Convention against Transnational Organised Crime..... | 77 |
| 3.2.3 The United Nations Convention against Corruption..... | 78 |
| 3.2.4 African Union Convention on Preventing and Combating Corruption..... | 79 |
| 3.2.5 Southern African Development Community Protocol against Corruption | 80 |
| 3.2.6 Financial Action Task Force Recommendations | 80 |
| 3.3 Asset forfeiture | 81 |
| 3.3.1 Criminal forfeiture and civil forfeiture | 81 |
| 3.3.2 Establishment of asset forfeiture as a form of punishment..... | 83 |
| 3.3.3 In pursuit of a mixed theory of punishment | 85 |
| 3.3.3.1 Deterrence | 85 |
| 3.3.3.2 Compensation | 87 |
| 3.4 Forfeitable property | 89 |
| 3.4.1. Proceeds of crime: value-based and object-based models | 89 |
| 3.4.1.1 Object-based forfeiture | 89 |
| 3.4.1.2 Value-based Forfeiture..... | 91 |
| 3.4.1.3 Value-based forfeiture vs object-based forfeiture..... | 94 |
| 3.4.2 Instrumentalities of crime | 95 |
| 3.4.2.1 Property used in the commission of crime..... | 96 |
| 3.4.2.2 Property intended or destined for use in the commission of a crime | 96 |
| 3.5 Pre-forfeiture actions | 99 |
| 3.5.1 Identification, tracing and evaluation of forfeitable property | 99 |
| 3.5.2 Provisional measures: freezing and seizure of forfeitable property | 100 |
| 3.6 International co-operation..... | 100 |
| 3.6.1 Co-operation in asset forfeiture..... | 102 |
| 3.6.2 Investigative co-operation..... | 103 |
| 3.6.3 Co-operation in the return of forfeited property | 104 |

| | |
|--|-----|
| 3.6.4 State as a claimant or plaintiff in forfeiture proceedings | 104 |
| 3.7 Management and disposal of confiscated assets..... | 106 |
| 3.7.1 Disposal of assets confiscated domestically | 107 |
| 3.7.2 Disposal and return of property confiscated in a foreign country..... | 110 |
| 3.7.3 Asset sharing | 114 |
| 3.7.4 Deduction of expenses from forfeited property | 115 |
| 3.7.5 A proposed asset management framework..... | 116 |
| 3.7.5.1 Establishing an asset management authority..... | 117 |
| 3.7.5.2 Resources..... | 118 |
| 3.7.5.3 Planning | 118 |
| 3.7.5.4 Legal powers | 118 |
| 3.7.5.5 Transparency..... | 119 |
| 3.7.5.6 Management of foreign assets | 120 |
| 3.7.5.7 Disposal of property | 120 |
| 3.7.5.8 Convenience of civil forfeiture in asset management | 121 |
| 3.8 Third party rights..... | 121 |
| 3.8.1 Third party rights in proceeds of crime..... | 121 |
| 3.8.2 Third party rights in instrumentalities of crime | 124 |
| 3.8.3 Third party rights in international co-operation | 125 |
| 3.8.4 Third party rights in asset management..... | 126 |
| 3.9 Conclusion..... | 126 |
| | |
| CHAPTER FOUR | 128 |
| LEGAL AND INSTITUTIONAL FRAMEWORKS ON MONEY LAUNDERING AND ASSET FORFEITURE IN MALAWI | 128 |
| 4.1 Introduction | 128 |
| 4.2 Anti-money laundering legal framework..... | 130 |
| 4.2.1 Criminalisation of money laundering..... | 132 |
| 4.2.2 Scope of predicate offences for money laundering | 134 |
| 4.3 Legal framework for the forfeiture of proceeds of crime | 136 |
| 4.3.1 Proceeds of which crimes? | 137 |
| 4.3.2 Forfeiture of proceeds of crime: object-based model | 138 |
| 4.3.3 Forfeiture of proceeds of crime: value-based model..... | 140 |
| 4.3.4 Establishing ownership proceeds of crime | 141 |

| | |
|---|-----|
| 4.3.5 Lifting the corporate veil | 142 |
| 4.3.6 Failure to honour a forfeiture or pecuniary order | 144 |
| 4.4 Legal Framework for the forfeiture of instrumentalities of crime | 145 |
| 4.5 Conviction-based vs non-conviction based forfeiture | 148 |
| 4.5.1 Conviction-based forfeiture | 148 |
| 4.5.2 Non-conviction based forfeiture | 149 |
| 4.5.3 Notice of a forfeiture application: avoiding arbitrary orders | 154 |
| 4.5.4 Salient factors to consider when making a forfeiture order | 155 |
| 4.5.4.1 Proceeds of crime | 155 |
| 4.5.4.2 Instrumentalities of crime | 157 |
| 4.6 Provisional orders | 158 |
| 4.6.1 Search and seizure orders | 158 |
| 4.6.2 Restraining orders | 159 |
| 4.7 Asset management | 162 |
| 4.7.1 Management of seized and restrained assets | 162 |
| 4.7.2. Planning | 163 |
| 4.7.3 Management of confiscated property | 164 |
| 4.7.4 Sale of perishable property | 164 |
| 4.7.5 Disposal of confiscated property | 165 |
| 4.7.5.1 Compensation of victims of crime | 167 |
| 4.7.5.2 Restitution | 167 |
| 4.7.6 Transparency | 169 |
| 4.8 Third party interests | 170 |
| 4.8.1 Third party interests in seized property | 170 |
| 4.8.2 Third party interests in restrained property | 171 |
| 4.8.3 Third party interests in property liable to forfeiture | 173 |
| 4.8.4 Third party interests in forfeited property | 174 |
| 4.8.5 Third party interests in property subject to restitution | 174 |
| 4.9 Institutional framework for money laundering and asset forfeiture | 175 |
| 4.9.1 Prosecutorial and investigative authorities | 175 |
| 4.9.2 Financial Intelligence Unit | 179 |
| 4.9.3 Operational independence of prosecuting authorities | 181 |
| 4.10 Conclusion | 185 |

| | |
|--|-----|
| CHAPTER FIVE | 187 |
| THE CONSTITUTIONALITY OF PROVISIONAL ORDERS | 187 |
| 5.1 Introduction | 187 |
| 5.2 The constitutionality question | 187 |
| 5.3 Limitation of human rights under the 1994 Constitution | 192 |
| 5.4 Human rights contentions in relation to provisional orders..... | 194 |
| 5.4.1 Right to property | 194 |
| 5.4.1.1 Right to property vs provisional orders..... | 197 |
| 5.4.1.2 Limitation of the right to property..... | 198 |
| 5.4.2 Right to be heard | 202 |
| 5.4.3 Right to an effective remedy by a competent tribunal..... | 208 |
| 5.4.4 Right to engage in economic activity..... | 210 |
| 5.4.5 Presumption of innocence..... | 212 |
| 5.4.6 Right to legal representation | 214 |
| 5.4.7 Third party rights | 217 |
| 5.5 Conclusion..... | 219 |
| | |
| CHAPTER SIX | 221 |
| IMPLEMENTING ASSET FORFEITURE IN MALAWI: EMERGING LEGAL ISSUES..... | 221 |
| 6.1 Introduction | 221 |
| 6.2 Asset forfeiture in South Africa | 221 |
| 6.2.1 Criminal asset forfeiture..... | 224 |
| 6.2.2 Civil asset forfeiture | 224 |
| 6.3 Instrumentality test..... | 228 |
| 6.4 Proportionality analysis | 233 |
| 6.4.1 Proportionality of instrumentalities forfeiture | 234 |
| 6.4.2 Proportionality of proceeds forfeiture | 237 |
| 6.4.3 Making a forfeiture order in addition to any punishment | 242 |
| 6.4.4 Onus to prove proportionality | 243 |
| 6.4.5 Factors to consider when making a forfeiture order of instrumentalities of crime | 243 |
| 6.4.5.1 Degree of culpability..... | 243 |
| 6.4.5.2 Frequent use of property in the commission of a crime | 244 |
| 6.4.5.3 Welfare of children | 245 |



| | |
|--|-----|
| 6.4.5.4 Other factors in the determination of sentence in Malawi | 248 |
| 6.5 Constitutional rights vs civil asset forfeiture | 251 |
| 6.5.1 Arbitrary deprivation of property | 253 |
| 6.5.2 Right to legal representation | 256 |
| 6.5.3 Presumption of innocence..... | 262 |
| 6.5.4 Third party rights | 264 |
| 6.5.5 Double jeopardy concerns..... | 268 |
| 6.5.6 Right against self-incrimination | 273 |
| 6.6 Retroactive application of the law of civil forfeiture | 274 |
| 6.7 Criminal trial proceedings and civil forfeiture | 276 |
| 6.8 Conclusion..... | 278 |
| | |
| CHAPTER 7 | 280 |
| CONCLUSION AND RECOMMENDATIONS..... | 280 |
| 7.1 Conclusion..... | 280 |
| 7.2 Recommendations..... | 284 |
| 7.2.1 Establishment of an asset recovery unit..... | 285 |
| 7.2.1.1 Operational structure and independence | 286 |
| 7.2.1.2 Co-operation with other relevant authorities | 287 |
| 7.2.2 Asset management | 287 |
| 7.2.3 Establishment of an asset forfeiture fund | 289 |
| 7.2.4 Negotiated settlements..... | 290 |
| 7.2.5 Public-private partnership | 295 |
| 7.2.6 Funding | 296 |
| 7.2.7 Technical capacity of relevant authorities | 297 |
| 7.2.8 Civil recovery of illicit proceeds as a private claimant | 298 |
| BIBLIOGRAPHY | 300 |

DEDICATION

To

My loving parents, Hilda and McPetry Phillipso

and

My beloved uncle and aunt, Tony and Margaret Chimpukuso

THANK YOU!



ACKNOWLEDGMENTS

My sincere appreciation goes to God for ordering my steps and for the grace to complete this work. Special thanks to my supervisor, Professor Lovell Fernandez, for his guidance, inspiration and dedication throughout the writing of this thesis. Thank you, Prof! My appreciation goes also to Professor Raymond Koen whose constructive criticism and input at the doctoral colloquia have shaped this thesis.

My further gratitude goes to the DAAD for the scholarship which has made the completion of this thesis possible and my stay in Cape Town comfortable. Thanks also to Dr Moritz Vormbaum and Professor Gerhard Werle for their support. More gratitude to Windell Nortje, Hazel Jeftha, Anja Schekpe and Farieda Hendricks for their immense support in handling all administrative matters relating to my studies and my stay in Cape Town competently and cheerfully. I also thank my Ph.D colleagues: Marshet, Zainabu, Fatuma, Marian, Sostheness and Windell for the friendship and support. Thank you guys for 'the Chinese' moments!

Further, I acknowledge the support of my friends Stella, Salome, Ngcimezile, Memory, Peggy, Sellina and others too numerous to mention. To my family in Malawi, thanks for your support and patience. Special thanks to colleagues in Malawi who helped me to source most of the materials that I needed for this thesis.

Last but not least, special gratitude goes to my husband for being the wind beneath my wings. You have been an awesome source of strength and encouragement.

Thanks for your prayers and thanks for waiting ...

KEY WORDS

Asset recovery

Arbitrary

Civil forfeiture

Confiscation

Conviction-based forfeiture

Criminal Forfeiture

Deterrence

Deprivation

Forfeiture



Instrumentalities of crime

Justice in rectification

Mixed theory of punishment

Money laundering

Non-conviction based forfeiture

Proceeds of crime

Property

Social contract

LIST OF ABBREVIATIONS

| | |
|-------|--|
| ACB | Anti-Corruption Bureau |
| AFU | Asset Forfeiture and Recovery Unit |
| AML | Anti-Money Laundering |
| ARA | Asset Recovery Agency |
| AU | African Union |
| DPP | Director of Public Prosecutions |
| ECHR | European Court of Human Rights |
| FATF | Financial Action Task Force |
| FIU | Financial Intelligence Unit |
| G8 | Group of Eight |
| HC | High Court |
| MCP | Malawi Congress Party |
| MRA | Malawi Revenue Authority |
| MPS | Malawi Police Service |
| MSCA | Malawi Supreme Court of Appeal |
| NDPP | National Director of Public Prosecutions |
| OECD | Organisation for Economic Co-operation and Development |
| PAC | Public Appointments Committee |
| POCA | Proceeds of Crime Act |
| SADC | Southern African Development Community |
| UNCAC | United Nations Convention against Corruption |
| UDHR | Universal Declaration of Human Rights |

ABSTRACT

The international legal framework on money laundering encourages states to put in place effective systems for the identification, freezing, seizure and forfeiture of proceeds and instrumentalities of crime. While the international legal framework obligates countries to adopt conviction-based forfeiture (criminal forfeiture), it only encourages them to consider adopting non-conviction based asset forfeiture (civil forfeiture). This has led to a situation where countries, such as Malawi, adopt only criminal forfeiture and not civil forfeiture. This study analyses the efficiency of the existing Malawian criminal forfeiture regime in curbing and preventing the proliferation of underlying profit-generating crimes and money laundering.

This thesis contends, in part, that some countries have not adopted civil forfeiture because there is no international obligation to do so. It argues that the fact that states are not obligated to adopt civil forfeiture by international legal frameworks and national arrangements undermines the deterrent aim of the anti-money laundering and asset forfeiture systems in combating economic crimes. Some justify the casual approach to civil forfeiture by arguing that its implementation harbours the danger of violating human rights and constitutional guarantees. This thesis, however, advocates for the adoption of civil forfeiture within the limits of John Locke's social contract theory, which guides states on how they can pursue policies and implement laws without limiting the rights of their people arbitrarily.

CHAPTER ONE: GENERAL INTRODUCTION

1.1 Introduction

The adoption of both criminal and civil forfeiture of the proceeds and instrumentalities of crime is indispensable for the implementation of an effective anti-money laundering regime.¹ Generally, the theory is that asset forfeiture deprives criminals from profiting financially from economic or profit-crimes² and, therefore, it prevents the laundering of illicit proceeds.³ Forfeiture, hence, is regarded as the most important legal tool for depriving offenders of illegal profits and dealing with the problem of money laundering.⁴ Therefore, money laundering cannot be combated effectively without implementing both civil and criminal forfeiture procedures. This thesis examines the usefulness of asset forfeiture in Malawi's fight against money laundering. In order to recommend features of asset forfeiture that could work for Malawi, the thesis draws lessons from countries that have adopted both civil and criminal forfeiture, such as the United States of America, the United Kingdom and the Republic of South Africa. The study is informed by John Locke's social contract theory, and a mixed theory of punishment.

1.2 Forfeiture

Forfeiture implies the taking back of proceeds that were gained unlawfully, or of property used to facilitate the commission of a crime.⁵ It is referred to also as

-
- 1 FATF Guidance Document: Best Practices Confiscation (2010: 1).
 - 2 Levi (1997: 228).
 - 3 FATF Guidance Document: Best Practices Confiscation (2010: 1).
 - 4 Stessens (2000: 29).
 - 5 Eissa *et al* (2011: 3).

confiscation. It is termed asset forfeiture in the United States of America (USA) and confiscation in the United Kingdom (UK).⁶ It is defined generally as a governmental decision through which property rights can be affected as a consequence of a criminal offence.⁷ To clarify further, forfeiture is defined also as the permanent deprivation of property by order of a court or other competent authority.⁸ There are two main types of forfeiture. These are criminal or conviction-based forfeiture, and civil or non-conviction based forfeiture. There is yet another type of forfeiture, which is called administrative forfeiture.⁹

1.2.1 Types of property subject to forfeiture

Forfeiture applies to proceeds of crime, as well as to instrumentalities of crime.

Proceeds of crime refer to property which derives from a criminal activity.¹⁰

Instrumentalities of crime refer to property that is used in the commission of crime.¹¹

Furthermore, forfeiture applies to contraband, which is property, and the possession of which is illegal or subject to control.¹² This thesis, however, focuses on proceeds and instrumentalities of crime. The term 'property' will be used in this study to refer to funds and other assets.¹³

6 Levi (1997: 228).

7 Stessens (2000: 30).

8 Article 1(f) of the Vienna Convention. Adopted on 20 December 1988 in Vienna. Entered into force on 11 November 1990.

9 Greenberg *et al* (2009: 22). Administrative forfeiture is a non-judicial mechanism for uncontested non-conviction based asset recovery. In this type of forfeiture an officer other than a judicial officer issues a declaration of forfeiture.

10 Cassella (2007: 9).

11 Cassella (2007: 9).

12 Rainbolt *et al* (1997: 40).

13 FATF Guidance Paper on Forfeiture (2010: 3).

1.2.2 Criminal forfeiture

Criminal forfeiture is an effect by way of *in personam* order, that is, an order made against a person convicted of a criminal offence. The order directs a convict to surrender to the state either the proceeds of the crime or the instrumentalities with which the crime was committed.¹⁴ This simply means that where, say, a Mr Phiri is prosecuted for and convicted of drug trafficking, the court makes an order that he forfeit the funds and assets he has gained from such trafficking. The order may extend also to instrumentalities of drug trafficking, for instance, the car he used to transport the drugs. The order is part of the sentencing process in a criminal case¹⁵ and is pronounced at the end of the trial, at the sentencing stage.¹⁶

In the scenario sketched above, Mr Phiri is, himself, the subject of the proceedings, due to his involvement in drug trafficking. The forfeiture order is issued only after his conviction, in accordance with the procedural rule that criminal forfeiture can be ordered only against property belonging to the convicted person.¹⁷ This circumstance limits the reach of criminal forfeiture, as it cannot be ordered against property which the convict has transferred to a purchaser in good faith.¹⁸ Since forfeiture is based on conviction, if the latter is set aside on appeal, the forfeiture order, too, collapses for lack of a legal basis.¹⁹

14 Greenberg *et al* (2009: 13).

15 Greenberg *et al* (2009: 13).

16 Cassella (2009: 41).

17 Friedler (2013: 285).

18 Cassella (2009: 40).

19 Gaumer (2007: 24).

1.2.3 Civil forfeiture

Civil forfeiture is the permanent deprivation of illicit property through an order made by a civil court or any other competent authority, without a need for the conviction of an offender.²⁰ It is also called an *in rem* action because the application is made against an object, for the reason that the law ascribes “to the property a certain personality, a power of complicity and guilt in the wrong”.²¹ The guilt of the individual who commits the underlying crime has no bearing on the forfeiture order, which means that the order may be made against property which is in the hands of a person other than the perpetrator. Further, the order can be made where the individual has been acquitted of criminal charges, which is why it is referred to also as non-conviction based forfeiture. As the forfeiture order is made against the property and not the person, as is the case in criminal forfeiture,²² the parties to the forfeiture application would read, for example, *The State vs Toyota Corolla Registration Number 1234*, instead of *The State vs John Phiri*.

One could ask why the state chooses to proceed against property and not an individual? The answer is that the concept of civil forfeiture is based on the legal fiction that it is the property, and not the owner, that is guilty of wrongdoing.²³ However, this fiction is not compelling, for people, not things, commit crimes, and

20 Nikolov (2011: 17).

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

22 Greenberg *et al* (2009: 14).

23 Penna (1993: 363).

by doing so people use or gain things that become forfeitable to the state subsequently.²⁴

As it is the case with criminal forfeiture, the property that is subject to civil forfeiture ought to be linked to a criminal activity, either because it has a criminal provenance (proceeds) or it was used to commit the crime (instrumentality). In the case of the former, the state must prove on a balance of probabilities that the provenance of the title to the property lies in some criminal activity.²⁵ If that illicit provenance is proved, the court is then empowered to transfer the title to the state.²⁶ In the case of forfeiture of instrumentalities of crime, the court is to inquire into the property's usage. If it was used indeed to facilitate the crime, then the court may order its forfeiture to avoid its being used again for a criminal purpose.²⁷ A civil forfeiture order, therefore, is made against the property, solely for being linked to the violation of the law.²⁸

The hallmark of civil forfeiture is the *in rem* character that runs across all stages of the process, from application for a forfeiture order to its enforcement.²⁹

Consequently, the forfeiture action bears the characteristics of a civil action. For instance, if one John Phiri commits the offence of drug trafficking, using his Toyota Corolla, and as a result benefits to the tune of \$3000.00, the parties to the civil forfeiture action would be the state, the Toyota Corolla and the \$3000.00, hence the citation would be *The State vs Toyota Corolla and \$3000.00* and not *The State*

24 Cassella (2009: 42).

25 Simser (2009: 13). See also Cassella (2009: 44).

26 Simser (2009: 13). Property law abhors a void in title, and forfeiture ensures that the title is passed to the state in a seamless way.

27 Simser (2009: 13).

28 Nikolov (2011: 23).

29 Young (2009: 2).

vs Mr Phiri. So the government will be the plaintiff and the property will be the defendant, and persons objecting to the forfeiture are interveners, also referred to as claimants.³⁰ Claimants are people who have interests in the property that is subject to forfeiture, and who are allowed to appear in court to argue their interests in the property and show cause why it should not be forfeited to the state.

1.2.4 Relevance of civil forfeiture

Civil forfeiture does not require the presence of a suspect in court because the proceedings are against the property that is connected to a criminal activity, and not the suspect. Civil forfeiture, therefore, becomes relevant in cases where it is not feasible for the state to prosecute an offender first and then to apply for forfeiture on the basis of the offender's conviction. Such cases include instances where the individual has fled the jurisdiction; is unknown; is dead; is physically too ill to attend court; is immune from criminal process; or is too powerful to prosecute.³¹ Leaving such people to continue enjoying the proceeds of their crimes contradicts the commonly uttered axiom that 'crime does not pay'. The state has to meet a lower standard proof in civil than in criminal proceedings, as it only has to prove that the property is probably tainted or represents proceeds of crime.³²

Civil forfeiture proceedings can be resorted to also where property is found but a conviction could not be obtained for procedural or technical reasons, for example, that the statute of limitations has expired.³³ It is also appropriate where property is

30 Cassella (2008: 9). These claimants intervene so as to claim ownership in the property and to prevent the state from taking it away from them. This issue will be tackled in greater detail later, in the discussion of the forfeiture procedure.

31 Greenberg (2009: 1).

32 Brun *et al* (2011: 4).

33 FATF Guidance Document: Best Practices Confiscation (2012: 6).

found and substantial evidence exists to establish that it was generated from criminal activity, although there is insufficient evidence to meet the criminal burden of proof which is necessary for the conviction of a person before instituting criminal forfeiture.³⁴ Furthermore, civil forfeiture can be used in cases where a criminal investigation or prosecution is unrealistic or impossible,³⁵ or even where the perpetrator has been acquitted of the predicate offence because of insufficient admissible evidence or a failure to meet the burden of proof.³⁶

The various instances in which civil forfeiture may become handy, makes it a potent tool with which societies that are serious about fighting economic crimes can strip criminals of their ill-gotten profits. For instance, in cases of organised crime, civil forfeiture serves to take away illicit property from high-ranking criminals who plan and finance the commission of the crimes but leave the execution of the plans to low-ranking members. Given their clandestine participation in the actual perpetration of the crimes, in practice, high-ranking members of the criminal syndicate escape being prosecuted for want of sufficient evidence. This, thereby, renders their illicit property untouchable.³⁷ Civil forfeiture is one way of subverting their impunity.

1.2.5 Relevance of asset forfeiture in the fight against money laundering

Forfeiture is aimed at depriving criminals of the proceeds of the crimes they commit. The process by which criminals integrate the illicit proceeds of their criminal deeds into the lawful economy generally has accelerated over the past 30

34 Greenberg *et al* (2009: 15).

35 Greenberg *et al* (2009: 15).

36 FATF Guidance Document: Best Practices Confiscation (2012: 6).

37 Simser (2009: 13).

years. This process, otherwise known as money laundering,³⁸ is a criminal route used to make property obtained illegally to appear legal.³⁹ Forfeiture is thus a strategic weapon of which the state can avail itself to combat the harmful effects of money laundering on the economy. It serves as a complete deterrent for organised and economic crime, for it hits the criminal where it hurts most, namely, in the pocket.⁴⁰ Once forfeiture is implemented effectively, it will become hard for criminals to launder their criminal profits successfully. This is the link between forfeiture and money laundering.

Given the crucial role forfeiture can play in fighting economic criminality, international conventions and legal instruments encourage states to adopt forfeiture measures. The international legal instruments will be discussed in Chapter Three.



1.3 Contextual background

The history of asset forfeiture in Malawi dates back to 1966, when the Forfeiture Act⁴¹ was promulgated. This was soon after Malawi attained her independence from Britain.⁴² Malawi's first Republican president, Dr Hastings Kamuzu Banda, was a strong proponent of the enactment of this law.⁴³

Under Banda's rule, Malawi was a one-party state governed by the Malawi Congress Party, as proclaimed by the Republican Constitution of 1966.⁴⁴ A

38 Nikolov (2011: 16).

39 Bell (2004: 107).

40 Cabana (2010: 109).

41 Act Number 1 of 1966.

42 Malawi was under British colonial rule from 1889 to 1964.

43 Roberts (1966: 134).

44 Section 14 of the 1966 Constitution.

subsequent amendment to the Constitution made Banda life president of Malawi.⁴⁵

The 1966 Constitution did not provide expressly for civil and socio-economic rights.

The government instead recognised human rights by implication, through a declaration that it would uphold the sanctity of personal liberties enshrined in the United Nations Universal Declaration of Human Rights (UDHR)⁴⁶ and that it would adhere to international law.⁴⁷

Banda's one-party regime exercised total control over the state and society by intimidating would-be opponents and eliminating existing ones.⁴⁸ This iron grip on the affairs of state was accompanied by gross violations of the civil and political rights of the citizenry.⁴⁹ The suppression of socio-economic rights was reinforced by the implementation of the Forfeiture Act.⁵⁰ This law authorised, the responsible minister to order the forfeiture of the property of persons who, in his determination, had acted in a manner that prejudiced state security or the national economy, or in a way that subverted the authority of the government.⁵¹ The minister referred to in the Act was none other than the life president himself.⁵²

The then prime minister said in a speech that the Forfeiture Act was meant for people who fled to seek refuge in other countries. The people in question were those who fled in the aftermath of political turbulences, which were referred to commonly as the cabinet crisis. This political trouble, which took place in

45 Section 10(3) of the 1966 Constitution, under Amendment Act No 35 of 1970.

46 Proclaimed by the United Nations General Assembly in Paris on 10 December 1948.

47 Section 2(1)(iii) of the 1966 Constitution.

48 Phiri (1998: 9-10). See also Wanda (1996: 222) and Phiri (2013: 5).

48 Human Rights Watch (1990).

49 Human Rights Watch (1990).

50 Chirwa (2005: 209).

51 Section 2 of the Forfeiture Act.

52 Wanda (1996: 224).

September and October 1964, was regarded as an open challenge to Banda's authority.⁵³ According to the prime minister, the Act was intended also to expose Indian businessmen who were said to be transferring money abroad illegally.⁵⁴ The omnibus reach of the Act encompassed public servants who had stolen money or caused the loss of public funds through negligence.⁵⁵ The Forfeiture Act, in effect, allowed for the forfeiture of the property of the above-mentioned categories of people, yet it prohibited them challenging the forfeiture orders before Malawian courts.⁵⁶ Essentially, then, no one had the right to challenge a forfeiture order in court or in any other forum.⁵⁷ Suffice to say that forfeiture under this Act was not conviction-based.

Banda's autocratic rule ended in 1993 when the Malawian people chose, in a referendum, to replace the one-party state with democratic rule.⁵⁸ Thus, unlike the former Constitution, the new Constitution of 1994 contained a comprehensive bill of rights.⁵⁹ The new Constitution also marked the abolition of the notion of life presidency.⁶⁰ Importantly, it paved the way for the repeal of the notorious Forfeiture Act.

In 2006, following international pressure, Malawi enacted the Money Laundering, Proceeds of Crime and Terrorist Financing Act,⁶¹ which is the main legislative weapon against money laundering and terrorist financing. The Act re-introduced

53 Eight out of ten cabinet ministers opposed certain policies pursued by Kamuzu Banda.
54 Speech of the Prime Minister, Introducing the Forfeiture Bill (1966: 435).
55 Section 2 of the Forfeiture Act. Wanda (1996: 224).
56 Speech of the Prime Minister, Introducing the Forfeiture Bill (1966: 435).
57 Section 7 of the Forfeiture Act.
58 Chirwa (2005: 210).
59 See Chapter 4 of the 1994 Constitution.
60 Wanda (1996: 221).
61 Chapter 8:07 of the Laws of Malawi.

asset forfeiture, but this time stipulated that it should apply only to property of those convicted of a crime, a procedure commonly referred to as criminal forfeiture.

1.4 Statement of the problem

The first problem this thesis investigates is that the international anti-money laundering instruments place more emphasis on the need to adopt criminal forfeiture than civil forfeiture. Consequently, countries such as Malawi adopted criminal forfeiture, while ignoring civil forfeiture. The exclusion of civil forfeiture undermines one of the professed goal of the international AML legal framework, which is to deter money laundering by broadening the extent of illicit assets subject to forfeiture.

Furthermore, criminal forfeiture depends on the successful conviction of an offender. However, the complexity of the money laundering process, and its transnational character, make it a crime that is difficult to investigate and prosecute successfully.⁶² This is especially true of Malawi, with its limited investigative resources, more so since forfeiture depends on conviction.⁶³ The conviction requirement implies that there must be enough resources to cover both the criminal trial proceedings and the subsequent forfeiture proceedings. Government agencies in Malawi rightly have voiced their concern about the shortages of both human and technical resources, given the tasks they face.⁶⁴ All this has a bearing on

⁶² The different stages of money laundering, that is placement, layering and integration obscure the illicit nature of the assets being laundered. This renders the money laundering process complex.

⁶³ Brun *et al* (2011: 2).

⁶⁴ Mutual Evaluation Report for the Republic of Malawi (2008: 12).

Malawi's success in stripping criminals of their illicit gains and deterring them and others from committing further crimes.

In addition, given the historical abuse of forfeiture to suppress political opposition in Malawi, the current system of criminal forfeiture has to contend with human rights challenges before the courts. The rights include the right to property and the right to be presumed innocent. The same human rights objections arise in civil forfeiture proceedings in other countries, and are bound to arise in the Malawian courts also once civil forfeiture is introduced.

1.5 Research question

The overarching question that this study seeks to address is this: How is asset forfeiture implemented in Malawi and how effective is it in enabling Malawi to combat money laundering? A subordinate question is whether all states ought to adopt mandatory civil forfeiture to advance the deterrence of economic criminality.

1.6 Objectives of the study

The general objective of this thesis is to assess the adequacy and effectiveness of the existing criminal forfeiture regime in Malawi in combating money laundering. In this regard, the study will survey the legal and institutional frameworks in Malawi that relate to the successful forfeiture of proceeds and instrumentalities of crime under its current criminal forfeiture system. An issue worth examining is whether civil forfeiture is at all relevant for low capacity countries such as Malawi, where criminal forfeiture alone is relied upon to deter economic criminality by depriving criminals of their criminal profits. The study, therefore, will examine the need for

the introduction of civil forfeiture in Malawi, but this will be done with caution, bearing in mind the legacy left behind by the repealed Forfeiture Act of 1966.

It is helpful examining, too, why the international anti-money laundering regime does not set great store by civil forfeiture. This thesis will assess the merits and demerits of making civil forfeiture obligatory, in the light of its beneficial usage for the effective recovery of proceeds and instrumentalities of crime. This will be done by establishing the implications of introducing civil forfeiture, as well as suggesting the prerequisite safeguards that need to be put in place to avoid governments using it as a political tool, as was the case with Malawi during the Banda era.

1.7 Significance of the study

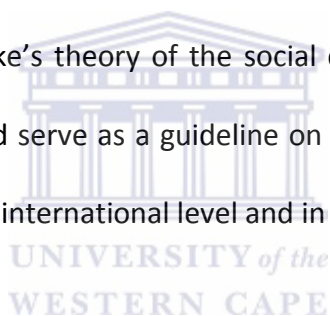
There are three main contributions this study makes. First, very little literature exists on the asset forfeiture regime in Malawi. The only comparatively detailed document on this topic is the Anti-Money Laundering and Combating the Financing of Terrorism Mutual Evaluation Report for the Republic of Malawi (2008), which does no more than evaluate Malawi's anti-money laundering system for compliance with the Financial Action Task Force Recommendations. This study, therefore, constitutes the first attempt to deal comprehensively with the subject of forfeiture in Malawi and its implications for the country's fight against money laundering.

It is hoped that the findings made in this study will help the Malawi government, as well as the criminal justice authorities and the courts, to pay particular attention to the crucial issues, raised here, which have been overlooked so far by both the

mutual evaluation assessment team and the legislature.⁶⁵ The conclusions drawn and the recommendations made in this study could prove useful and beneficial, not only for Malawi, but also for other jurisdictions which are grappling with the idea of implementing an effective system of forfeiture.

This thesis is argued from the standpoint that a criminal forfeiture regime alone is not a sufficient deterrent to a criminal lifestyle; it needs to be supplemented by a regime of civil forfeiture, which should be made obligatory for all states by international anti-money laundering and anti-corruption instruments.

Significant, too, is that this thesis studies the subject of asset forfeiture from the perspective of John Locke's theory of the social contract and his mixed theory of punishment, which could serve as a guideline on how best to implement a system of asset forfeiture at the international level and in Malawi.



1.8 Hypotheses

The study is based on the following hypotheses:

- The criminal forfeiture regime currently existing in Malawi is not adequate to combat money laundering and economic crimes effectively.
- The introduction of civil forfeiture would best complement criminal forfeiture in Malawi.

65 The evaluation process looked broadly at so many aspects of the Malawi legal and Institutional frameworks, touching on each of the FATF'S 40+9 Recommendations. As a result, the discussion on forfeiture was not extensive.

- Making the adoption of civil forfeiture mandatory at the international level will show the seriousness of the global community about preventing economic crimes and money laundering.

1.9 Literature review

Much has been written on forfeiture, asset recovery and money laundering, but very little has been produced on these topics in so far as they pertain to Malawi. The few authors that have written on Malawi have dealt with forfeiture only in passing, perhaps in a paragraph or two. Literature on this subject is, therefore, sparse.

Jai Banda, has commented on Malawian laws relating to forfeiture in his article titled “Institutional responses to organised crime in Malawi”.⁶⁶ The article discusses extensively the increase of organised criminal activities in Malawi since the advent of democracy, and evaluates the efficacy of Malawi’s measures against organised crime.⁶⁷ Banda highlights the misuse of the Forfeiture Act under President Banda’s rule and the events that led to its being repealed when Malawi became a democracy.⁶⁸ The article identifies existing pieces of legislation that have forfeiture provisions,⁶⁹ and it notes that all the laws provide for conviction-based forfeiture.⁷⁰ Banda concludes with a recommendation that the laws regulating crimes such as

66 Banda (2001: 2).

67 Banda (2001: 2).

68 Banda (2001: 9).

69 Penal Code, Corrupt Practices Act and the Exchange Control Regulations.

70 Banda (2001: 10).

money laundering, trafficking in dangerous drugs and firearms, as well as theft of motor vehicles, should make specific provision for forfeiture.⁷¹

Banda's article was written in 2001, before Malawi adopted the anti-money laundering law (AML) legislation in 2006. The article does not state how forfeiture was implemented after the repeal of the Forfeiture Act. This study will therefore go beyond this article, analysing the forfeiture regime as it now stands.

Banda wrote another article on anti-money laundering developments in Malawi, covering the period between 2004 and 2006.⁷² He comments on Malawi's adoption of an AML Strategy,⁷³ the adoption of the AML legislation and the challenges that delayed its adoption for four years.⁷⁴ His brief discussion of forfeiture starts by pointing out that Malawians are mistrustful of confiscation because of its previous misuse as a punitive tool against political opponents.⁷⁵ The article surveys Malawi's AML provisions, including those dealing with the forfeiture of both proceeds and instrumentalities of crime.⁷⁶ He contends that asset forfeiture needs to be balanced against the individual's right not to be deprived of property without due process of law.⁷⁷ He also points out that the forfeiture in the current law is conviction-based.⁷⁸

In essence, Banda gives an overview of the forfeiture provisions in the AML legislation as well as in the Corrupt Practices Act,⁷⁹ but does not examine how these laws are implemented in Malawi or what their implications are. This study will

71 Banda (2001: 10).
72 Banda (2007: 1).
73 Banda (2007: 1).
74 Banda (2007: 2-3).
75 Banda (2007: 14).
76 Banda (2007: 14).
77 Banda (2007: 14).
78 Banda (2007: 14).
79 Banda (2007: 14).

attempt to make good these omissions by analysing all the laws pertaining to forfeiture as well as their implementation, before discussing their implications for the fight against money laundering.

Goredema has written on money laundering in Malawi, though not particularly on forfeiture.⁸⁰ He overviews the dimensions of economic crimes and money laundering within Eastern and Southern Africa, focusing on countries that are members of the Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG).⁸¹ His is essentially a survey of economic crimes that are predicate crimes of money laundering in each country. For Malawi, such crimes include drug trafficking,⁸² tax evasion, fraud and corruption.⁸³ Goredema concludes that money laundering is rife in East and Southern Africa.⁸⁴ This observation is relevant for this thesis, especially when it comes to justifying why Malawi and other countries in the region need to have in place an efficient forfeiture regime, as a powerful AML tool.

Recently, the World Bank conducted research into the economic magnitude of ill-gotten money generated by criminal, illegal and unethical activities in Malawi and Namibia, and then estimated their impact on economic development.⁸⁵ The findings revealed that corruption and tax evasion are by far the largest sources of ill-gotten gains in Malawi.⁸⁶ The Malawi Revenue Authority is said already to have used the AML framework to track the proceeds from tax evasion, but the Anti-

80 Goredema (2003: 1).

81 The member countries are Botswana, Kenya, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe.

82 Goredema (2003: 3).

83 Goredema (2003: 8-9).

84 Goredema (2003: 16).

85 Yikona *et al* (2011: vii).

86 Yikona *et al* (2011: 46).

Corruption Bureau has yet to use the Financial Intelligence Unit's database to follow the trail of suspected proceeds of corruption.⁸⁷

The World Bank study further identified fraud, smuggling of counterfeit goods, the production and export of cannabis, organised motor vehicle theft, violent house-breaking, human trafficking and labour exploitation as profit-generating crimes prevalent in Malawi.⁸⁸ Money gained from these crimes is used mainly to buy food and household necessities, and the surplus is invested usually in luxury items such as mansions and posh cars, or hoarded in national bank accounts.⁸⁹

The study recommends, *inter alia*, that Malawi should focus significant law enforcement and Financial Intelligence Unit resources on using an AML framework to combat corruption and tax evasion.⁹⁰ However, the recommendations do not go as far as stating how best the AML framework can be used in this regard. This thesis will go a step further to show specifically that an effective forfeiture regime is an essential AML tool to recover the proceeds of crime in Malawi.

Several authors have written on forfeiture in general, while others have focused specifically on civil forfeiture. The World Bank's Stolen Asset Recovery Initiative (StAR), through Greenberg and others, has produced a good practices guide which advocates for civil forfeiture.⁹¹ It is a practical guide that identifies legal, operational and practical concepts that an effective asset forfeiture system should have in order to recover stolen assets. The guide proposes the implementation of civil forfeiture,

87 Yikona *et al* (2011: 47).

88 Yikona *et al* (2011: 28).

89 Yikona *et al* (2011: 46).

90 Yikona *et al* (2011: 89).

91 Greenberg *et al* (2009: 7).

especially in developing countries, the resources of which place constraints on their ability to overcome the challenges posed by criminal forfeiture.⁹² The guide has been written with reference to countries such as Switzerland, Kuwait, Ireland, Colombia, United Kingdom, Thailand, Guernsey and the Philippines.⁹³ This study will consider these concepts with respect to Malawi, on which there is as yet no elaborate literature on the subject.

In addition to the foregoing, the FATF has issued a guidance document on best practices to help countries in their implementation of Recommendations 3 and 38.⁹⁴ Recommendation 3 focuses on the measures required to identify, trace, locate and evaluate property subject to confiscation. Recommendation 38 requires states to take quick action in response to requests by other states to identify property which may be confiscated. The FATF supports both criminal and civil forfeiture, so as to achieve a robust AML and CFT regime. This study will assess the possibility of making the adoption of civil forfeiture regime mandatory, so as to have an effective global AML framework.

All in all, this thesis offers an in-depth consideration of the philosophical and legal questions pertaining to asset forfeiture, especially as they relate to Malawi.

92 Greenberg *et al* (2009: 7).

93 Greenberg *et al* (2009: xvii).

94 FAFT Best Practices on Confiscation (2010: 3).

CHAPTER TWO

A CONCEPTUAL AND THEORETICAL FRAMEWORK FOR ASSET FORFEITURE

“The great and chief end, therefore, of men’s uniting into commonwealths, and putting themselves under government, is the preservation of their property.”¹

2.1 Introduction

The global fight against economic crimes has propelled the adoption of asset forfeiture as a law enforcement tool. Malawi has embraced also the usefulness of this tool in its efforts to curb and combat economic crimes. However, the legacy of Malawi’s previous asset forfeiture regime that was marred with injustice and arbitrariness, poses a threat to the comprehensive implementation of asset forfeiture in the country. Malawi, therefore, needs to put in place guarantees for a just and fair asset forfeiture regime as an assurance that this tool will not bring back the injustices of the past.

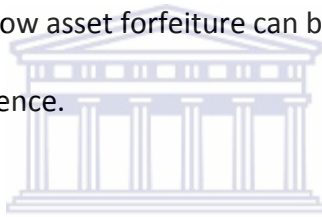
This thesis argues that, given the usefulness of civil forfeiture, as discussed in the previous chapter, it is imperative for Malawi to introduce civil forfeiture fully into its criminal justice system. However, this too will demand solid guarantees from the state that civil forfeiture will not lead to injustice and unfairness.

This thesis contends that the establishment of a just and fair asset forfeiture regime demands the limitation of state powers, where the state is limited to rule only in the best interests of the people and in recognition of their human rights. This is one way of ensuring that the state would not limit the rights (such as property rights) of

1 Locke (1990: 180) IX 124.

its citizens arbitrarily, in the guise of combating economic crimes through the tool of asset forfeiture. I will, thus, investigate Thomas Hobbes and John Locke's accounts of the social contract theory, in order to explain the philosophical underpinnings for limited state powers.

I embark also on a philosophical exposition of the principles and aims of punishment in order to develop a philosophical framework for asset forfeiture. I, therefore, discuss retribution and deterrence theories of punishment and depict their relevance to asset forfeiture. I go further to explore mixed theories of punishment as propounded by John Locke, Herbert Hart, Andrew Von Hirsch and John Rawls to illustrate how asset forfeiture can be explained within a mixed theory of retribution and deterrence.



2.2 Limited government through the lens of the social contract theory

A social contract is an agreement entered into by individuals to form a state or an organised society in pursuit of peace and protection, which entails the surrender of some or all personal liberties to a government.² There are different accounts of the social contract theory, but the thesis will compare only the versions of two philosophers, namely, Thomas Hobbes's and John Locke. The two accounts differ in that Hobbes' account defends absolutism while Locke's account supports limited constitutionalism.³ The thesis contends that unlike Hobbes's social contract, Locke's account meets the objectives of this thesis as it offers a better framework for a limited state. Locke's theory offers the foundation for minimum checks against the

2 Chirwa (2008: 296).

3 Olynyk (2010: 132).

abuse of the asset forfeiture tool unlike Hobbes' account that would justify the implementation of an unjust asset forfeiture regime.

2.2.1 Thomas Hobbes's social contract perspective

Hobbes based his ideas on a state of nature, which is a hypothetical condition in which people lived without a government. Everyone pursued their own interests because people were selfish, often leading to constant conflicts. Thus, life was generally solitary, poor, nasty, brutish and short.⁴ This led to perpetual conflict and war.⁵ To avoid such chaos, people entered into a social contract, which was a covenant not to harm one another in order to attain security and peace.⁶ However, compliance with the social contract required some coercive power which could be provided by a sovereign power only.⁷ Thus, the people agreed to surrender their rights of self-government and liberties to a sovereign power, a government, to rule over them and protect them from human predicaments that existed in the state of nature.⁸ But each person surrendered his rights and liberties to the state on the agreement that everyone gives up his governing power also.⁹ In Hobbes's words, this is how people in society gave power to a sovereign:

"I Authorize and give up my Right of Governing my selfe, to this Man, or to this Assembly of men, on this condition, that thou give up thy Right to him, and Authorize all his Actions in like manner"¹⁰

According to Hobbes, the sovereign is not a party to the social contract.¹¹ The sovereign is a mere recipient of the governing power from people who enter into

4 Hobbes (1651: 113) XIII.1.

5 Hobbes (1651 : 113) XIII.1.

6 Hobbes (1651 : 157-58) XVII.2.

7 Hobbes (1651 : 153-54) XVII.2.

8 Hobbes (1651: 157). See also Gauthier (1988: 134-137).

9 Hobbes (1651 : 118) XIV.

10 Hobbes (1651 : 158) XVII.2.

the contract amongst themselves.¹² For this reason, Hobbes asserted that the sovereign cannot be held accountable or responsible for anything, for he cannot be in breach of a pact to which he was not a party.¹³ In Hobbes' view:

“The Right of bearing the Person of them all, is given to him they make Sovereigne, by Covenant onely of one to another, and not of him to any of them; there can happen no breach of Covenant on the part of the Sovereigne.”¹⁴

Thus, the role of the sovereign (the state), Hobbes contends, is merely to enforce the social contract that the people entered into amongst themselves.

In addition, Hobbes asserted that the government is an absolute or near absolute sovereign with unlimited powers, and incapable of occasioning injustice on the people.¹⁵ He reasoned that there would be chaos again in the society if the people were to limit or challenge the sovereign's power and actions. Thus, the people cannot question the absolute sovereign.¹⁶ The sole task of the government is to keep order in the society. The government has the absolute power to deal with its citizens in any manner it deems fit, as long as that yields the peace and security towards which the citizens aspired. Further, the sovereign has the power to determine the means of achieving the ends, that is, the means to maintaining peace and safety.¹⁷

In relation to asset forfeiture, Hobbes' account means that the government would have unlimited powers to impose forfeiture of its citizens' property arbitrarily, as

11 Samek (1974: 98).
12 Gough (1936: 100).
13 Kelly (1992: 212).
14 Hobbes (1651: 161).
15 Hobbes (1651: 163) XIII.4.
16 Hobbes (1651: 163).
17 Hobbes (1651: 164) XIII.6.

long as doing so brings peace and safety to the people. Citizens would have no right to challenge such orders, since Hobbes states that the people cannot challenge the government in the first place. Such an outcome is contrary to what this thesis is advancing, *i.e.* an asset forfeiture regime that is just in both its means and its end. The means must justify the end. Focusing merely on the goal of asset forfeiture, *i.e.* crime reduction, while ignoring the need to protect the people's rights as much as possible, is acceptable only in Hobbes' account, but is rejected by this thesis. It leads to injustice through unjust practices such as asset forfeiture.

2.2.2 John Locke's social contract perspective

Locke's account of the social contract theory, like Hobbes', begins with a description of a state of nature. Contrary to Hobbes, in Locke's state of nature people exist in perfect freedom and are guided by laws of nature.¹⁸ In the state of nature, people had inalienable natural rights such as rights to life, liberty and property.¹⁹ Unlike Hobbes, Locke contends these natural rights are not dependent on the existence of a sovereign lawgiver, but they are an intrinsic part of human existence.²⁰ However, Locke contends that in the state of nature, there was no central authority to enforce laws or an impartial judge to hear cases, so everyone could be a judge in his own case.²¹ This could lead to chaos, a state of war, where everyone enforced the law and punished a transgressor as he pleased.²²

18 Locke (1990: 118) II.4.

19 Locke (1990: 118) II.4.

20 Roederer (2004: 44).

21 Locke (1990:123) II.13.

22 Locke (1990: 126) III.19.

In order to secure their peace and safety, and the security of their property, people joined together in a civil society and entered into a social contract to live in peace with one another (*pactum unionis*).²³ Further, they undertook to create and obey a civil government (*pactum subjectionis*), which was meant to provide remedies for the problems they encountered with the individual enforcement of natural law in the state of nature.²⁴ Thus, the civil government was tasked to exercise its power through clearly defined laws, through impartial judges and judgments, to ensure peace and liberty for the people.²⁵ Locke emphasised this when he said:

“The great and chief end, therefore, of men’s uniting into commonwealths, and putting themselves under government, is the preservation of their property.”²⁶

Until today, Locke’s account dictates that the government’s exercise of its powers is limited to the preservation of the people’s property, a general name he uses to refer to rights to lives, liberties and estates,²⁷ and its purpose is to achieve peace, safety and public good.²⁸ The government must act only within the limits of the power which the people had in a state of nature. The people did not have, and therefore, could not give unto the government the power to occasion injustice. For this reason, the state has no basis for causing injustice, because the people could not give more power than what they had.²⁹ Furthermore, men aspired for the amelioration and not the deterioration of their welfare when they entered into the social contract. Consequently, the government must strive to meet the people’s

23 Locke (1990: 179-180) IX.123.

24 Locke (1990: 123) II.13.

25 Roederer (2004: 44).

26 Locke (1990: 180) IX.124.

27 Locke (1990: 182) IX.131.

28 Locke (1990:182) IX.131.

29 Locke (1990: 185) XI.135. See also Nyamaka (2011: 5).

reasons for creating a civil government, “for no rational creature can be supposed to change his condition with an intention to be worse”.³⁰

Most importantly, the government’s powers are not absolute. The people merely entrust the governing power to the civil government and they may revoke their trust if the government fails to meet their ends.³¹ Unlike Hobbes, Locke’s account forms the bedrock of the democracy theory *i.e.* a government of the people, by the people and for the people.³² Locke’s contention that the people are the source of the governing power provides citizens with the ability to assert the inviolability of their natural rights against the positive law of the state.³³

Furthermore, Locke’s theory offers the basis and scope of the government’s power to punish, and for purposes of this thesis, the power to impose forfeiture of illicit property. According to Locke, punishment plays an integral role in defining, developing and presenting both individual rights and limited government power.³⁴ Hence, punishment becomes a measure of the rule of law and the final protection of individual rights.³⁵ By extension, too, the implementation of an asset forfeiture regime should be a measure of a government’s commitment to the rule of law and the protection of its people’s rights.

The emphasis on the limited government power is of particular importance to this thesis because asset forfeiture, by its nature, often borders on the limitation or

30 Locke (1690: 182) IX.131.

31 Locke (1690: 192).

32 Nyamwaka (2011: 9).

33 Roederer (2004: 44).

34 McBride (2007: 104).

35 McBride (2007: 115).

deprivation of property rights.³⁶ Thus, there ought to be a sound basis and justification for the limitation of rights by the government. Suffice to say that Locke's conception of natural rights is quite influential, as it has led to the current conception of fully justiciable constitutional rights.³⁷ Thus, Locke's account provides a sound framework for a limited government, requiring it to be accountable to its people in the manner in which it exercises the power to punish through asset forfeiture, in order to combat economic crimes and money laundering.

2.2.3 The social contract and the constitution

Modern day republican constitutions reflect the tenets of the traditional social contract. A constitution comprises a legal framework of a social contract among present and future members of a society.³⁸ Going by John Locke's account of the social contract, "a constitution is social contract implying the aspirations of the people and their government to comply with constitutional norms".³⁹ Since human beings no longer live in the state of nature, citizens consent to the rule of the government implicitly through residence in a given country, acceptance of benefits and through political participation.⁴⁰ Thus, modern day republican constitutions embody the spirit of Locke's contract that is based on consent.

A constitution articulates the general rights and responsibilities of the people and the state.⁴¹ The people make a pact among themselves to respect the government

36 Van der Walt (2005: 205).

37 Roederer (2004: 45).

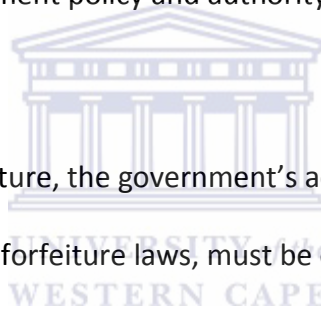
38 Norrie (1991: 226).

39 Nyamwaka (2011: 11).

40 Nyamwaka (2011: 3).

41 Norrie (1991: 226).

and to abide by its laws in accordance with agreed procedures.⁴² In addition, the government is mandated to secure the rights of the people, such as the right to property, life and liberty.⁴³ As a social contract, the constitution contains human rights guarantees and it empowers the people to enforce the realisation of their needs and aspirations.⁴⁴ Furthermore, the constitution addresses and circumscribes government action.⁴⁵ In the case of Malawi, the current Republican Constitution (1994) obligates the government to protect the interests of its people.⁴⁶ The government's actions will be deemed unconstitutional if it goes beyond the constitutional limits that are set by the people through the constitution. Therefore, the legitimacy of government policy and authority derives from the people, through the constitution.⁴⁷



In relation to asset forfeiture, the government's actions, through the creation and implementation of asset forfeiture laws, must be evaluated against the constitutional principles and limitations. This is because the constitution is the fundamental norm (*grundnorm*) in a legal system which forms the blueprint for the creation of other laws,⁴⁸ such as asset forfeiture laws. The trust relationship between the government and the people is enforced by the courts.⁴⁹ Courts make sure that the government does not limit the people's rights without due process.⁵⁰ Thus, courts must safeguard that the government does not limit people's rights

42 Henkin (1987: 265).

43 Henkin (1987: 265).

44 Nyamwaka (2011: 11).

45 Henkin (1987: 65).

46 Sections 12(1), 13, 14, and 44(4) of the Constitution of Malawi.

47 Okoth-Ogendo (1991: 7).

48 Kelsen (1945: 56).

49 Henkin (1987: 266).

50 Henkin (1987: 266).

arbitrarily through the implementation of asset forfeiture laws. Notably, from the social contract emerge constitutionalism, jurisprudence and human rights matters,⁵¹ which are relevant for the development of a comprehensive and justifiable asset forfeiture framework.

2.2.4 Asset forfeiture vs human rights

As defined in the first chapter, asset forfeiture is the government's disgorgement of the proceeds or instrumentalities of crime from the people.⁵² This definition indicates that asset forfeiture affects the property rights of the people, in one way or the other.

The significance of the right to property gained universal recognition through the Universal Declaration of Human Rights⁵³ (UDHR). The UDHR states that every person has the right to own property.⁵⁴ It also emphasises that no one should be deprived of his property, arbitrarily.⁵⁵ The concept of property cannot be delinked from ownership rights, and whenever rights attach to property, any interference with the property will invariably amount to an interference with the rights of a person who has an interest in the property.⁵⁶ This is why it is necessary for the government to justify its limitation of or interference with the people's rights when it implements measures such as asset forfeiture. Most importantly, the limitation of rights must not be arbitrary.

51 Nyamwaka (2011: 11).

52 Eissa (2011: 3).

53 Proclaimed by the United Nations General Assembly in Paris on 10 December 1948.

54 Article 17(1) of the UDHR.

55 Article 17(2) of the UDHR.

56 Pretorius (1988: 412).

The UDHR permits only limitations that are determined by law for the sole purpose of securing due recognition and respect for the rights and freedoms of others.⁵⁷ It permits also limitations that aim at meeting the just requirements of morality, public order and the general welfare in a democratic society.⁵⁸ Thus, the government's limitation of property rights through asset forfeiture for example, can be justified only if the limitation is necessary to maintain public order or welfare of the people through crime reduction.

2.2.5 Locke's views on property rights

The basis for the recognition of human rights, including the right to property, can be drawn from Locke's views on the government and its interaction with the property of its people. Locke reasoned that the government has a negative obligation to refrain from violating property rights, as well as an affirmative obligation to ensure their preservation.⁵⁹ He further emphasised that the government cannot take the property of any of its subjects arbitrarily.⁶⁰

In relation to asset forfeiture, the government should enact and enforce only asset forfeiture laws that aim at preserving all or any of the natural rights of its people. Any laws or actions by the government that are contrary to the preservation of the peoples' rights would be rendered unjustifiable and arbitrary. Such laws and actions would be beyond the scope of what the people agreed to when they gave up their executive power to the government. People did not give their power to a civil government for it to do things or pass laws that threaten the preservation of their

57 Article 29(2) of the UDHR.

58 Article 29(2) of the UDHR.

59 Locke (1990: 184) IX.124. See also Kochan (1998: 11).

60 Locke (1990: 188) XI.138.

rights. Neither did they empower the government to deprive them of their legally acquired property, anyhow.

2.3 The Rationale for asset forfeiture

It is imperative to understand the theories and motivations that justify asset forfeiture.⁶¹ There are different rationales for recognising asset forfeiture as a law enforcement tool. The identification of these rationales assists in the adoption of measures that are best suited for each type of forfeiture.

2.3.1 Taking the profit out of the crime

“The first thing the law should do is to ensure that those who break it...should not make any money out of their wrongdoing.”⁶² The argument is that “gains from unlawful activity ought not to accrue and accumulate in the hands of those who commit unlawful activity”.⁶³ Thus, criminals must not be accorded property rights and privileges that accrue in civil property law.⁶⁴ Since proceeds of crime refer to property which has been derived illegally, the rationale for their forfeiture is that the possessor has no rightful claim in them. Proceeds of crime, therefore, constitute property to which some other individual or society has a higher claim by virtue of the current possessor’s wrongful acquisition.⁶⁵ The forfeiture of the proceeds of crime finds its basis also in John Locke and Robert Nozick’s philosophical accounts on the acquisition of property, as discussed below.

61 Worrall (2003: 183).

62 Lawton J in *R v Waterfield* (17 February 1975, unreported).

63 Simser (2009: 13).

64 Simser (2009: 13).

65 Gupta (2002: 167). See also *United States v Bajakajian*, 524 U.S 321 (1988) (Kennedy J dissenting).

2.3.1.1 John Locke's account of lawful acquisition of property

In his account on acquisition of property, John Locke contended that a person acquires property legally only through their labour.⁶⁶ Thus, criminality does not constitute a basis for the acquisition of property. This justifies the forfeiture of proceeds of crime, as they are not proceeds of one's clean labour, but illicit labour. They are proceeds of criminal acts that threaten the peace and security which men strived for when they entered into a social contract and formed a civil government. No one, therefore, should be allowed to benefit from breaking the law, and the forfeiture of the proceeds of crime makes sure of this.

2.3.1.2 Robert Nozick's theory of justice

The principle of lawful acquisition of property and the need to disgorge unlawful gains can also be understood through Robert Nozick's entitlement theory. He propounds that whether a distribution (one's acquisition of property) is just or not depends entirely on how it came about.⁶⁷ Nozick's entitlement theory is concerned primarily with the distribution of property, and he argues that justice involves three principles. These are justice in acquisition, justice in transfer and rectification of injustice.

The justice in acquisition principle surveys how one acquires property rights over something that was not owned previously.⁶⁸ On this principle, Nozick was inspired

66 Locke (1990: 130) V.27.

67 Nozick (1974: 151).

68 Nozick (1974: 150).

by Locke's labour-mixing principle as the basis of property acquisition.⁶⁹ Nozick rejects acquisition of property through criminal acts such as theft and fraud.⁷⁰

Secondly, the justice in transfer principle determines how one acquires property rights over property that has been transferred (e.g. by gift or exchange) to them by someone else.⁷¹ Nozick stresses that the processes of change of property ownership through a transfer must preserve the thread of justice.⁷² Thus, a holding in property is just if it has been acquired through a legitimate transfer from someone who acquired it through a legitimate transfer or through legitimate acquisition.⁷³ If a person is entitled to a specific piece of property, then he can transfer it justly to any person.

Thirdly, the rectification of injustice principle expresses the need to restore property to its rightful owner, in case there was injustice in either its acquisition or its transfer.⁷⁴ The injustice must be rectified by returning the property to its rightful owner, such as victims of fraud. This is a way of "wiping clean the historical slate of injustices".⁷⁵

Asset forfeiture is, therefore, an important mechanism for achieving the rectification of both injustice of acquisition and injustice in transfer of illicit property. The acquisition of proceeds of crime is rooted in the impermissible and

69 Younkens (2002) No 102.

70 Nozick (1974: 150).

71 Nozick (1974: 150).

72 Nozick (1974: 151).

73. Nozick (1974: 151).

74 Nozick (1974: 152).

75 Nozick (1974: 152).

unjust mode of acquisition, *i.e.* criminal activities. Hence the transfer of such proceeds must be rectified through asset forfeiture.

In particular, civil forfeiture finds its explanation in Nozick's rectification of justice principle. Unlike criminal forfeiture which can be made only against the property owned by a convict, civil forfeiture order relates back to the date the property was acquired or used illegally, regardless of whether it is still held by the offender or a third person.⁷⁶ Thus, Nozick's reasoning justifies why the state should be allowed to recover tainted property without being required to prove the guilt of the person who holds the property, as long as the tainted nature of the property can be proved to the requisite standard of proof on a balance of probabilities. However, as will be explained later in the discussion, the pursuit of tainted property held by a third party may be halted if they prove that they are a *bona fide* purchaser or innocent owner who had no knowledge of the property's illegal use.

2.3.2 Suppressing incentives for unlawful activities

The forfeiture of proceeds of crime aims also at suppressing the conditions that lead to unlawful activities.⁷⁷ By taking away what does not belong to criminals, forfeiture of the proceeds of crime is intended to stop them from benefiting from crime, thereby, deterring them from committing more profit-crimes.

76 Van der Walt (2000: 5).

77 Simser (2009: 13).

This point was also expressed by Lawton J in *R v Waterfield* when he said:

“This Court is firmly of the opinion that if those who take part in this kind of trade know that on conviction they are likely to be stripped of every penny of profit that they make and a good deal more, then the desire to enter it will be diminished.”⁷⁸

For example, if a drug trafficker is sent to prison and his drug profits remain with him, the profits would constitute his capital for more drug trafficking after serving his prison sentence.⁷⁹ Leaving a criminal with the illicit proceeds would also serve as an incentive for him and others to engage a criminal lifestyle because it makes such a life profitable. Forfeiture, therefore, would have a deterrent effect.

Furthermore, although forfeiture does not incapacitate offenders in the sense that traditional punishment of imprisonment usually does by removing individuals from society, it seeks to incapacitate criminal organisations and 'reduce their power and influence' by 'divesting major criminals of their ill-gotten gains'.⁸⁰ Forfeiture, therefore, introduces the concept of financial incapacitation on criminals, which can lead to the overall reduction of organised economic crimes.

In addition, the forfeiture of instrumentalities of crime ensures that tools of crime are removed from circulation so that they should not be used again either by the offender or anyone else to commit further crimes.⁸¹ This, in turn, works as a deterrent.⁸² The argument here is that for example, leaving to a criminal a house that he used as a base for drug production and distribution, would create an

78 (17 February, 1975, unreported).

79 Simser (2009: 13).

80 Campbell (2013: 451). See also Meade (2000: 17).

81 Cassella (2009: 31).

82 Greenberg *et al* (2009: 13).

environment for further drug activities.⁸³ Forfeiture of instruments of crime, therefore, ensures that law enforcement authorities do not only arrest an offender and put him in jail, but they also remove the tools for crime from circulation so that they are not used again by either the offender or his associates.⁸⁴ The bottom line is that property, regardless of its illegal or dangerous nature, is hazardous in the hands of an owner who either uses it to commit crimes, or allows others to do so. The owner should be held accountable for the misuse of the property.

Going back to Locke's account of the social contract, one can argue that when entering into the social contract, people undertook to observe the law, which included a promise to use their property to the best interests of the society, and not as a tool for the commission of a crime. In the state of nature, people had the power to restrain an offender from reoffending.⁸⁵ Furthermore, people had the power to destroy anything that is noxious to them.⁸⁶ These powers were transferred to the state at the creation of a civil government. Hence, the state must use measures such as asset forfeiture to restrain offenders from reoffending, and also to remove of property that is noxious to the society, such as instrumentalities of crime.

2.3.3 Compensation of victims

Forfeiture also serves as a means for recovering property and compensating victims of crime.⁸⁷ This relates to victims of property offences such as theft and fraud.⁸⁸ In

83 Simser (2009: 13).

84 Cassella (2009: 31).

85 Locke (1990: 121) II.8.

86 Locke (1990: 121) II.8.

87 Cassella (2009: 31).

88 Cassella (2009: 31).

such cases, forfeiture is said to have a reparative function. Locke states also that in the state of nature, the compensation of victims of crime is one aim of the aims of punishment.⁸⁹ Nozick argues for the compensation of victims of crime as well, through his rectification of injustice theory.⁹⁰ Thus, asset forfeiture is one way of ensuring that there is property through which a victim can be compensated. In cases where it is difficult to identify individual victims, the society becomes a victim deserving compensation for the negative effects of crime.⁹¹ Such effects include non-delivery of building materials for a village bridge or school due to embezzlement of public funds, or the lack of order and security in a society due to drug crimes and organised criminal activities.

2.3.4 Rationale for civil asset forfeiture

As stated in Chapter One, civil asset forfeiture is the deprivation of either proceeds of instrumentalities of crime, without requiring the conviction of an offender.⁹² The state has to prove merely on a balance of probabilities that the property in question is related to an offence, either as an instrumentality or proceeds.⁹³ Because of the irrelevance of a conviction, civil asset forfeiture has attracted criticism due to its potential of violating property rights and fair trial rights, such as the right to be presumed innocent.⁹⁴ It allows the state to limit the people's rights without proving their guilt to the requisite standard of proof beyond reasonable doubt first.

89 Locke (1990: 121) II.8.

90 Nozick (1974: 152).

91 Van der Walt (2000: 7).

92 Nikolov (2011: 17).

93 Simser (2009: 13).

94 Sanbei (2012: 6).

Given all the risks that civil forfeiture poses, this thesis submits that it is still a relevant and necessary law enforcement tool. The argument is that it is a necessary tool for the establishment of a comprehensive crime prevention scheme. Civil forfeiture emerges in response to the shortcomings of the criminal forfeiture model.⁹⁵ It has been established earlier in the discussion that the forfeiture of proceeds and instrumentalities of crime is necessary as a deterrent tool and also for the compensation of victims of crime. These aims of forfeiture must not be put to a halt just because the situation at hand does not allow the state to prosecute offenders first because they are ill or immune from prosecution, before the state can touch their illicit possessions. Civil forfeiture does not allow an offender who has chosen to flee the jurisdiction to continue holding illicit property. It makes certain that people do not continue using their property as instruments of crime. Civil forfeiture ensures also that the family of a dead offender does not benefit from an illicitly-acquired estate.

Allowing criminals to enjoy their illicit gains just because they cannot be prosecuted would encourage them to continue committing profit-crimes, as long as they evade an arrest and prosecution. Criminals would take advantage of the conviction requirement for criminal forfeiture and decide to avoid prosecution at all costs. Thus, a system that is serious about combating economic crime ought to include civil forfeiture in its laws to cater for situations where a prosecution and conviction cannot be obtained.

95 Young (2009: 3).

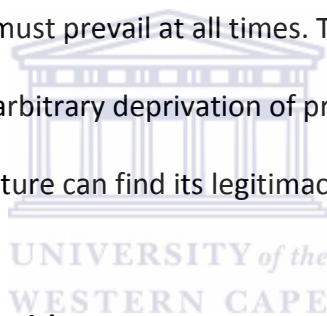
Turning to the social contract theory, leaving an offender with criminal proceeds would be contrary to Locke's principle that property must be acquired through clean labour and not through criminal activities. Further, leaving criminals with illegal proceeds would encourage them and others to breach the social contract by breaking the law, which is a violation of the covenant that people will obey the law. The government must be empowered to get hold of criminal proceeds through civil forfeiture. Otherwise, its inability to confiscate such proceeds, owing to its failure to prosecute offenders, would result in chaos (a state of war) and the perpetual breach of the social contract by people.

Furthermore, Nozick's justice in distribution theory offers also the basis for non-conviction-based forfeiture of proceeds of crime. The acquisition of the proceeds is unjust because they derive from criminality, not labour, and this injustice must be rectified. There should be nothing, therefore, to stop the state from rectifying this injustice through forfeiture, even when a prosecution is impossible. The same applies to criminal proceeds that have been transferred to another person. The transfer of the proceeds is unjust because they originate from an unjust acquisition. Hence, civil forfeiture must rectify this injustice even when the law breaker is not available for his prosecution.

In relation to victims of crime, it would be unjust to fail to compensate them from the proceeds of crime, just because the state cannot prosecute an offender. Victims would be left uncompensated, while an offender or his family or friends benefit from the proceeds of the very same crime that has led to the victim's ordeal. There would be no rectification of this injustice should the state be precluded from

getting hold of that property for purposes of victim compensation, in the event that it must obtain a conviction first.

However, even though justice would demand the use of civil forfeiture in situations where the state cannot obtain the conviction of an offender, the state must avoid using this mechanism to perpetrate injustice on property owners. The state must stick to the tenets of Locke's limited government as discussed earlier, in order to avoid the arbitrary use of the civil forfeiture mechanism. The usefulness of civil forfeiture must not cloud the need to avoid the arbitrary limitation of the people's rights. The interests of the public, as anticipated by the people when they entered into the social contract, must prevail at all times. Thus, there must be due process safeguards to avoid any arbitrary deprivation of property. This is the only way through which civil forfeiture can find its legitimacy.



2.4 Asset forfeiture as punishment

There is an ongoing debate about whether or not asset forfeiture in general constitutes punishment. Asset forfeiture carries with it punitive elements that arise from the deprivation of property, through either criminal or civil forfeiture. It is imperative to assess if the punitive elements make forfeiture a form of punishment. Punishment is defined as an unpleasant experience imposed on someone as a result of a criminal or wrongful act.⁹⁶

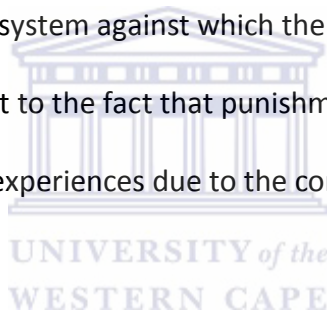
John Locke defined punishment as "some evil, some inconvenience, some suffering; by taking away or abridging some good thing, which he who is punished has

96 Oxford English Dictionary (2006: 826).

otherwise a right to".⁹⁷ Furthermore, Hart defined punishment by listing the following elements:

- "(i) It must involve pain or other consequences normally considered unpleasant,
- (ii) It must be for the 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."⁹⁸

All these definitions point to the fact that punishment is unpleasant. It is an inconvenience that one experiences due to the commission of a criminal or wrongful act.



2.4.1 Criminal forfeiture as punishment

Criminal forfeiture is said to be part of the sentence in a criminal case.⁹⁹ A forfeiture order is, thus, pronounced at the end of the criminal trial, in the judgment of the court at the sentencing stage.¹⁰⁰ Is criminal forfeiture of proceeds and instruments of crime punishment in itself or just because it is ordered after a conviction?

2.4.1.1 Forfeiture of proceeds of crime

According to Locke's definition, punishment concerns the deprivation of something to which the punished person has a right. In light of the argument made earlier that

97 Locke (1990: 47).
98 Hart (1968: 4-5).
99 Greenberg *et al* (2009: 13).
100 Cassella (2009: 41).

an offender does not have any property rights in the proceeds of crime, it would seem, at first glance, that on Locke's terms, forfeiture of the proceeds of crime would not constitute punishment *per se*. Nonetheless, even though a criminal has no clean title to criminal gains, he still treats them as his. Hence losing them should be unpleasant because he commits crime to gain some benefit.

However, going by Hart's definition of punishment, forfeiture of the proceeds of crime does constitute punishment. This forfeiture involves pain and an unpleasant consequence of a criminal losing his criminal gains which are the very incentive for his engagement in economic crimes. The basis of forfeiture is the commission of an offence and it affects the property of an actual or supposed offender on account of his engagement in an offence. Here again, even though an offender has no clean title to criminal gains, he still treats them as his property, and losing them should be an unpleasant consequence. Further, forfeiture is administered intentionally by human beings other than the offender, *i.e.* officers of the court and prosecutors. Finally, forfeiture is imposed and administered by an authority (the courts) constituted by a legal system against which the offence is committed. Thus, proceeds forfeiture constitutes punishment, according to Hart's definition.

Others have argued that forfeiture of the proceeds of crime is a typical example of a penalty which returns the offender to the position he was in before committing the offence.¹⁰¹ They further submit such forfeiture has more in common with civil restitution than with traditional punishments because, like restitution, it merely

101 Fried (1988: 333).

restores the *status quo ante*.¹⁰² It, therefore, lacks the expressive quality of traditional punishments which have the capacity to express the moral scorn of the community.¹⁰³ But is the disgorging of criminal proceeds not an expression of the moral scorn of the community at the tendency of committing crimes for economic gain? It is submitted that it is. A punitive expression is registered when an offender is deprived of the proceeds of crime.¹⁰⁴ It is, therefore, punishment even though it also restores the *status quo ante*.

2.4.1.2 Forfeiture of instrumentalities of crime

The deprivation of instrumentalities of crime also amounts to punishment. This is because through a forfeiture order, one suffers the inconvenience of losing one's legally acquired property because it was used in the commission of a crime. This resonates with Locke's definition that punishment concerns the deprivation of something that an offender had rights to.

In the same way, Hart's definition of punishment captures the forfeiture of instrumentalities. The forfeiture involves an unpleasant consequence which a property owner experiences for using or letting others to use his property in the commission of a crime. The basis for the forfeiture is the commission of an offence. Forfeiture is administered intentionally by human beings other than the offender, *i.e.* court officials and prosecutors. In addition, forfeiture is imposed and administered by an authority constituted by a legal system against which the offence is committed. Hart also said that the punishment must be of an actual or

102 Fried (1988: 333).

103 Fried (1988: 333).

104 Fried (1988: 334).

supposed offender for his offence. This last element ensures that punishment, and in this case, forfeiture, is imposed only against the property of a person who is culpable of wrong doing.

2.4.2 Civil forfeiture as punishment

Does the punitive nature of the forfeiture of proceeds and instrumentalities of crime change when it comes to civil forfeiture? Having established that civil forfeiture is not based on the conviction of an offender, it begs to question whether it constitutes punishment. One argument is that civil forfeiture is not punishment under a penal system; rather, it is a specific adverse consequence of a crime, unlike criminal forfeiture, which is based on a conviction.¹⁰⁵

It is also argued that civil law's primary aim is not punishment, but rather to facilitate that things should go back to the way they were, the *status quo ante*, so as to restore the position of an injured party.¹⁰⁶ Another argument is that just because in civil forfeiture proceedings the state is required to establish the underlying offence which taints the property in question, this does not make civil forfeiture punishment.¹⁰⁷ The establishment of the offence serves merely as basis for the removal of the tainted property.¹⁰⁸

But is civil forfeiture not "criminal forfeiture dressed up in sheep's clothing?"¹⁰⁹

This question stems from a criticism that civil forfeiture achieves the same punitive objectives as criminal forfeiture, yet without the procedural safeguards and human

105 Nikolov (2011: 17).

106 Kennedy (2004: 8).

107 Kennedy (2004: 8).

108 Kennedy (2004: 12).

109 Young (2009: 4).

rights protections that apply to criminal proceedings.¹¹⁰ Others claim that civil forfeiture is not characterised by search, arrest, charge, conviction and sentence, hence it is not criminal.¹¹¹

It should be mentioned at this point that the USA and the UK have comprehensive jurisprudence on asset forfeiture, hence, this thesis will make reference to some of American and English case law to clarify certain elements of the subject. While trying to illustrate the difficulty of categorising civil asset forfeiture, the court in *R (Mc Cann and Others) v Crown*¹¹² reasoned that:

“What is criminal, as opposed to civil proceedings, is a matter which can be difficult to determine ... To some extent, it is like describing an elephant; it is recognised when seen but it is difficult extremely to describe.”¹¹³

Furthermore, the quasi-criminal nature of civil forfeiture was noted in the case of *Boyd v United States* in which the Court said:

“We are ... clearly of opinion that proceedings instituted for the purpose of declaring the forfeiture of a man’s property by reason of offences committed by him, though they may be civil in form, are in their nature criminal.”¹¹⁴

It is further contended that civil forfeiture belongs to the public law sphere, since it relates to public relations in which the state possesses ‘imperium’.¹¹⁵ Another argument is that it is a branch of public law because invariably the state seeks to have private property forfeited pursuant to legislation that has high public policy

110 Young (2009: 4).

111 Kennedy (2004: 11).

112 Court at Manchester (2001) 1 WLR 358.

113 Court at Manchester (2001) 1 WLR 358.

114 116 US 633-34 (1886).

115 Nikolov (2011: 17).

content and undertones.¹¹⁶ In the case of *United States v Ward*,¹¹⁷ the US Supreme Court offers further guidance on this matter. It outlined criteria for determining whether a particular proceeding is criminal or civil. The court stated that it must establish first whether the legislature, in introducing the mechanism, indicated either expressly or impliedly, a preference for the label of civil or criminal. If an intention to establish a civil penalty is established, the court must second, determine if the statutory scheme was so punitive, either in purpose or effect, as to negate that intention.

It is important to determine whether civil forfeiture is as punitive either in purpose or effect as a criminal forfeiture, because if it is in fact punitive, then it must be subject to all the constitutional safeguards that apply in criminal proceedings.¹¹⁸ It would seem that it is the civil nature of the civil forfeiture proceedings that gives rise to all this debate. The thesis argues, however, that the punitive element of civil forfeiture cannot be determined by looking merely at the civil nature of its form and procedure. Thus, this thesis agrees with Justice Frankfurter's reasoning in the case of *United States ex rel. Marcus v. Hess*¹¹⁹ that punitive ends may be pursued in civil proceedings. The mere labelling of a proceeding as civil or penal can never be decisive of its nature in actual fact.¹²⁰ Hence, the punitive nature of civil forfeiture should not be overshadowed by the fact that proceedings are civil in both procedure and enforcement.

116 Young (2009: 2).

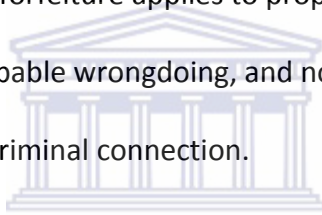
117 (1980) 448 US 242.

118 Pretorius (1998: 392).

119 317 US 537 (1943).

120 *Halper v United States* 490 US 447; *Montana Department of Revenue v Kurth Ranch* 511 US 796 (1994).

But why should we labour with the question of punishment when the defendant in civil proceedings is an object or property and not a human being? The legal fiction stated earlier in Chapter One is that the civil forfeiture action is instituted against the property, for its illicit provenance or use. However, Cassella argues that it is people, and not objects, who commit crime.¹²¹ Hence, civil forfeiture actions are in essence actions against property owners and not the property itself. The forfeited property is a mere means to an end, *i.e.* punishing a perpetrator for unlawful conduct.¹²² However, the nexus between an offence, the property earmarked for forfeiture and the conduct of its owner, should at no time be too far removed.¹²³ This is to make sure that forfeiture applies to property that belongs to a person who is guilty of some culpable wrongdoing, and not property of an innocent person or property that has no criminal connection.



UNIVERSITY of the
WESTERN CAPE

This argument was tackled in the case of *Austin v United States*,¹²⁴ where the court characterised civil forfeiture of real property as punishment. In determining whether forfeiture is punitive or remedial, the court examined the historical origins of forfeiture and eventually concluded that forfeiture constitutes payment to a sovereign as punishment for some offence. The State in this case argued that forfeiture is remedial rather than punitive because it removes the instrumentalities of the drug trade, “thereby protecting the community”.¹²⁵

Nevertheless, the court reviewed previous Supreme Court forfeiture case law and held that forfeiture had long been viewed as imposing punishment in the least part,

121 Cassella (2009: 41-42).

122 Van Jaarsveld (2006: 140).

123 Van Jaarsveld (2006: 146).

124 113 S. Ct. 2801 (1993).

125 *Austin v United States* 113 S Ct. 2811.

upon the owner of property which has been tainted by criminal activity.¹²⁶ Justice Scalia stated that the object of punishment in forfeiture is more realistically the property owner rather than the property itself.¹²⁷ The court in *Austin v United States*¹²⁸ therefore, abandoned reliance on the old 'guilty property' or personification of property fiction that characterised *in rem* or civil forfeitures. It held instead that such forfeitures should be based on the notion that the owner was negligent in letting his property be used in the commission of a crime, so he should be punished for his negligence.¹²⁹

Cassella argues further that the civil proceedings in civil asset forfeiture offer only procedural convenience to the government to facilitate forfeiture.¹³⁰ It is indeed procedurally convenient to the state to achieve the aims of asset forfeiture, *i.e.* deterrence and victim compensation, in cases where it cannot prosecute an offender. This argument is buttressed by the fact that even though the proceedings are civil in nature, civil forfeiture of proceeds of crime, just as is the case with criminal forfeiture, is an inconvenience to offenders, and it serves also as deterrence to both an offender and the public at large. It carries with it the message that crime does not pay.

Civil forfeiture of instrumentalities of crime carries also the message that property owners must not use or let their property be used in the commission of crimes.

Notably, this deterrence message is not directed at the property, but at the

126 Harrington (1994-95: 421).

127 *Austin* 509 US 602.

128 509 US 602 (1993).

129 509 US 602 (1993) 615.

130 Cassella (2009: 41-42).

property owners. The legal fiction of *in rem* forfeiture ought not to be given any weight in any modern democratic society, because if property were to replace a person as an offender, constitutional guarantees would become obsolete.¹³¹ This would lead to injustice since property owners would not be given a chance to challenge forfeiture orders.

Therefore, one can conclude that civil forfeiture is indeed punitive in nature. It punishes offenders and owners of illicit property, while carrying with it a deterrent message. With this conclusion, civil forfeiture demands also a good measure of due process protections so as to avoid unjustified limitation of the people's rights.

2.5 Government's right to punish through asset forfeiture

Having established that asset forfeiture is indeed punishment, it begs to question where the government gets the power to punish offenders, and therefore, the power to order forfeiture. As stated earlier, individuals in the state of nature have a right to punish transgressors and to destroy all things that are noxious to them.¹³² Every man in the state of nature has the general right to preserve mankind, and this gives each one of them the right to punish anyone who breaks the law and threatens other people's peace and safety. By committing an offence, an offender breaks his promise not to bring harm to his fellow men.¹³³ The explanation is that when one commits a crime, he violates the law of nature, which forbids him "to take away, or impair the life, or what tends to the preservation of the life, the

131 Pretorius (1988: 412).

132 Locke (1990: 121) II.8.

133 Locke (1990: 121-22) II.8.

liberty, health, limb, or goods of another.¹³⁴ This justifies the society's right to punish.¹³⁵

However, upon entering into a civil society, members relinquish to a civil government the right to punish offenders.¹³⁶ Thus, the government gets the power to punish from the people. This, then, indicates also where the government gets the power to impose forfeiture of illicit property. The government must enforce forfeiture laws only in the best interests of the people, thus, to preserve their natural rights. Using forfeiture to meet the aspirations of the people should be the yardstick for assessing the legitimacy of the government's exercise of forfeiture powers.



2.6 Theory of punishment in asset forfeiture

What aims of punishment should guide the government in the enforcement of asset forfeiture laws? There are three major theories of punishment, *i.e.*

deterrence, retribution and rehabilitation.¹³⁷ Deterrence is forward-looking or consequentialist in nature. It justifies punishment by its good consequences.¹³⁸

Retribution, however, is backward-looking and non-consequentialist. It justifies punishment on the basis that an offender has broken the law, and not because of

134 Locke (1990: 120) II.6. These forbidden acts are only permissible if they are inflicted in order to punish an offender.

135 Dagger (2011: 349).

136 McBride (2007: 116).

137 Mujuzi (2009: 36).

138 Duff (2003: 3). See also Bronsteen (2009: 1130).

the consequences that punishment will yield. Rehabilitation is also forward-looking as it aims at reforming an offender.¹³⁹

The argument in this thesis is that asset forfeiture has both retributive and deterrent elements. In addition, forfeiture of proceeds of crime has reparative undertones. Thus, this thesis argues for an asset forfeiture regime which finds itself within a context of a mixed theory of punishment. This is a theory which recognises that the competing theories of retribution and deterrence are not mutually exclusive.

2.6.1 Deterrence

Deterrence is an application of the general utilitarian theory of morality to the specific issue of punishment.¹⁴⁰ Bentham, in his account of the utilitarian theory, resonates with John Locke's contention that the chief end of a government is the preservation of the people's rights to life, estate and liberty. Bentham states that the sole end of the legislator (the state) is the happiness of people in a community, which manifests in their pleasures and their security.¹⁴¹ Thus, the test for the necessity of government's actions is whether the actions ameliorate the welfare of the people.

Utilitarian or consequentialist theorists define punishment as the infliction of pain on a person in order to deter him from repeating a crime, or to deter others from imitating a crime which they believe he has committed.¹⁴² Deterrence operates on

139 Duff (2003: 5).

140 Bagaric (2001: 41).

141 Bentham (1781: 27).

142 Armstrong (1961: 478-479).

two levels. There is specific deterrence and general deterrence. Specific deterrence aims at deterring the offender from committing further crimes, while general deterrence aims at deterring other people from committing crimes.¹⁴³

Unlike retributivists, utilitarian theorists have a forward-looking approach because they place the justification of punishment in future results of deterrence by severely punishing the offender.¹⁴⁴ The overall good consequence is crime reduction through deterrence.¹⁴⁵ Jeremy Bentham's utilitarian account on punishment states that the threat of punishment discourages people from committing crime, and therefore, it increases utility by acting as a deterrent.¹⁴⁶

However, he says punishment must not be imposed if it cannot deter further crime, if it is unprofitable, needless, or groundless.¹⁴⁷

Notably, deterrence is one of the main aims of punishment in the state of nature.¹⁴⁸

It is contended that by virtue of their membership to society, men submit themselves to societal controls, such that when someone does something out of order, society will try various means to cease the damaging activity.¹⁴⁹ Therefore, the implicit assumption of deterrence is that without certain controls, society would return to a state of war, so we need laws and policing to be kept in line.¹⁵⁰

Consequently, deterrence must obtain also in the new social order ruled by a civil government. This proposition is based on the understanding within the context of

143 Christopher (2002: 856).

144 Mujuzi (2009: 35).

145 Duff (2003: 4).

146 Bentham (1781: 134).

147 Bentham (1781: 134).

148 Locke (1990: 121-22) II.8. See also II.11.

149 Pollock (2010: 391).

150 Pollock (2010: 391).

Locke's social contract theory, when man surrendered to the civil government his power to punish, he anticipated also that punishment should have the same deterrence and reparative aims which applied in the state of nature.

However, it begs to question whether deterrence should apply to asset forfeiture also, bearing in mind that deterrence attracts some significant criticism. Critics have questioned the efficacy of deterrence as a sound basis for punishment. One of the criticisms is that there is no evidence that punishment really achieves deterrence and that it makes offenders more likely to become law abiding citizens in the future.¹⁵¹ The argument is that forfeiture does not achieve deterrence because it merely recoups what was not legitimately owned. Therefore, it does not render an offender any worse off than he was before the criminal conduct.¹⁵² In response to this criticism, this thesis argues that deterrence is bound to work when it comes to economic crimes such as fraud, bribery and tax evasion. This is because the economic benefit is the actual incentive for committing economic crimes. If criminals are convinced that 'crime does not pay' and that if caught, they will be unable to retain criminal proceeds, then presumably, at least they and other would-be criminals will be deterred from committing economic crimes for gain.¹⁵³ In addition, this thesis contends that just because not all people are deterred, does not mean that no one is deterred.¹⁵⁴

In addition, some have argued that deterrence assumes that people behave rationally and weigh up the advantages and disadvantages of a proposed course of

151 Bagaric (2001: 143).

152 Fried (1988: 371-2).

153 Levi (1997: 228).

154 Levi (1997: 228).

conduct.¹⁵⁵ An example would be the commission of an offence such as a murder that is committed in the heat of passion. One may argue that in such a case, the fear of being punished does not exercise the mind of an offender because the offender has no or very little time to do a cost-benefit analysis of the killing. However, this criticism would not apply to most of the economic crimes, which an offender commits solely for their economic incentive. There is, therefore, some considerable level of prior calculation or anticipation of the benefits of the crime, on the part of the offender. Therefore, asset forfeiture's deterrent assumptions that people weigh the advantages and disadvantages of economic crime could be valid.

Furthermore, it is argued that a consequentialist approach to punishment would justify the infliction of sentences that are too harsh.¹⁵⁶ Disproportionately harsh sentences yield to injustice, which cannot be justified morally even if they can achieve crime reduction. However, Jeremy Bentham, a utilitarian theorist, diverts from pure utilitarianism by arguing that punishment must not be excessive.

Punishment must not be more than what is necessary to achieve deterrence.¹⁵⁷ This is Bentham's way of bringing proportionality within a consequentialist framework.

Finally, critics argue that the utilitarian theory might justify the punishment of the innocent, as long as the punishment yields a good consequence.¹⁵⁸ Some have responded to this criticism by saying that an understanding of the concept of punishment itself implies that punishment should result from wrongdoing, hence,

155 Bagaric (2001: 145).

156 Duff (2003: 8).

157 Bentham (1781: 143).

158 Bradley (2003: 28). See also Hart (1968: 40-44); Duff (2003: 8).

utilitarians do not envisage the punishment of the innocent.¹⁵⁹ However, some consequentialist proponents would respond to this criticism by arguing that undesirable results, *i.e.* punishing the innocent must be accepted if doing so contributes to crime reduction.¹⁶⁰ However, there is injustice in punishing the innocent. Innocence gives one the right not to be punished, so the state must refrain from punishing the innocent.¹⁶¹ The state must establish first the guilt of a person before the imposition of punishment.¹⁶² Thus, “punishment must not only be for an offender; it must also be for her offence”.¹⁶³ But a purely consequentialist theory would have no regard to an innocent person’s right not to be punished.¹⁶⁴

Owing to the weaknesses highlighted by the criticisms discussed above, this thesis objects to the reliance on deterrence which stems from a pure consequentialist theory, to justify asset forfeiture. This is owing to the injustice the forfeiture of innocent people’s property may occasion, for that would be arbitrary forfeiture, to which this thesis objects. Such a deterrence theory has no strong foundation for the prohibition of punishing the innocent, or the meting out of disproportionately harsh punishments in order to achieve deterrence. Even though its consequential aspects resonate with the deterrent rationale for asset forfeiture, the theory in its pure state does not offer a solid framework for a fair and just asset forfeiture scheme. Thus, it is prudent to look elsewhere for a framework that is consequentialist in its aims, but prohibits expressly both the punishment of the innocent and the imposition of disproportionately harsh punishments.

159 Rawls (1955: 7).

160 Duff (2003: 8).

161 Duff (2003: 10).

162 Duff (2003: 10).

163 Duff (1986: 152). See also Bagaric (2001: 94).

164 Duff (2003: 10).

2.6.2 Retribution

The retributive theory defines punishment as the infliction of pain by an appropriate authority, on a person because he is guilty of a crime *i.e.* for a crime that he committed.¹⁶⁵ Retributivists argue that a person should be punished only because he has performed a culpable wrongdoing,¹⁶⁶ not because we want to deter him or others from committing the same offence. Kant, a retributivist, argued that a person ought to be punished for committing a crime and not for the purpose of promoting some good for the society or the individual.¹⁶⁷ This is why retributivists are said to approach punishment from a backward-looking perspective.¹⁶⁸

Retribution advances the notion that punishment must fit the crime through the just desert notion of retributive justice. The just desert notion stresses that the state must punish a person because he deserves hard treatment due to, and in proportion to his offence. The worse his offence, the harsher his penalty should be.¹⁶⁹ The ground for desert or punishment is a person's wrongdoing.¹⁷⁰ Just desert or deserved punishment gives a guilty person the harm they deserve for breaking a just law, culpably.¹⁷¹ The concept of blaming the guilty entails that the subject of desert is a person because only a person can be morally responsible for his or her actions.¹⁷²

165 Armstrong (1961: 478).

166 Kershnar (2001: 17).

167 Pincoffs (1966: 2).

168 Mujuzi (2009: 35).

169 Roederer (2004: 566).

170 Kershnar (2001: 4).

171 Roederer (2004: 570).

172 Kershnar (2001: 2).

In relation to asset forfeiture, the just desert theory addresses the shortcomings of pure consequentialist deterrence discussed earlier. It offers guidance on how much property should be forfeited, to make sure it is proportional to the offence one has committed. An offender must lose only the property he deserves to lose. If he has benefitted \$5000.00 from fraud, his just desert will be the forfeiture of property valued at \$5000.00 plus any other income made from the investment of the stolen money. The just desert notion will not justify the forfeiture of any property on top of the value of the criminal gains. Forfeiture of property which exceeds criminal gains would be arbitrary and unjustifiable.

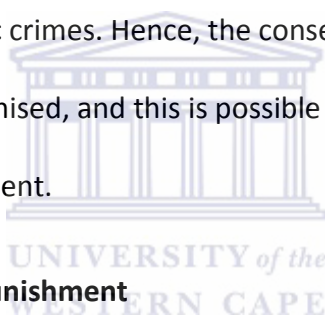
Furthermore, the retribution theory's emphasis on punishing a person because he is guilty of an offence ensures that forfeiture does not apply to the property of innocent people. Thus, it can be distinguished from pure consequentialism, which does not rule out expressly the need to reserve punishment for the guilty only, and to spare the innocent in the quest for deterrence and crime reduction.

But utilitarian theorists contend that if there is no good that would accrue to society as a result of punishing an individual or individuals, then it amounts to revenge and not punishment.¹⁷³ This thesis agrees with this observation, because an eye for an eye approach bears vengeful undertones. Is it feasible to have a forfeiture regime that does not find its aims and justification in the future, but in the past only as retribution does? Going by the rationale for asset forfeiture discussed earlier, the answer is no. The overall aim of asset forfeiture is to combat economic crimes, and not merely to wreak revenge on people who benefit from

173 Mujuzi (2009: 39).

economic crimes or who use their property to commit crimes. Further, the power to punish that was handed over to a civil government within the social contract context has the aims of punishment sprayed with consequentialist undertones. It is consequentialist, while acknowledging retributive elements of proportionality and the sparing of the innocent from punishment.

Notably, if punishment were just a matter of censuring offenders as retribution suggests, then traditional forms of punishment such as imprisonment would be sufficient punishment. The addition of asset forfeiture offers a more direct deterrent effect than imprisonment, because forfeiture targets the very incentive for engaging in economic crimes. Hence, the consequentialist element of asset forfeiture must be recognised, and this is possible only within the context of a mixed theory of punishment.



2.6.3 Mixed theory of punishment

From the discussion above, it appears that a fair and just asset forfeiture regime would demand a framework that accommodates aspects of both deterrence and retribution. This is a framework that has consequentialist aims, but prohibits the punishment of the innocent and the imposition of disproportionately harsh sentences. Is it possible, philosophically, to explain the concept of forfeiture using the two competing theories of retribution and deterrence within one framework? Can asset forfeiture be really backward-looking in its distribution, yet forward-looking in its aims?

2.6.3.1 Hart's account of mixed theory of punishment

At first glance, the reconciliation of the two theories seems impossible. However, Hart reasoned that the reconciliation of the two theories seems impossible because most people have made the mistake of using them to answer the general question of the justification of punishment. He argued that it is untenable to have a penal system that is absolutely retributive or consequentialist, due to the shortcomings of each theory.

According to Hart, the utilitarian aim of crime reduction provides the general justification of punishment, which he terms "the general justifying aim of punishment".¹⁷⁴ However, the pursuit of this consequentialist goal is constrained by a notion of justice which he refers to as "retribution in distribution".¹⁷⁵ Retribution determines two questions of punishment: who should be punished and to what extent.¹⁷⁶ These two questions ensure that only the guilty are punished, and they are punished in proportion to their offence or harm caused by their offence. Hart's main reason for invoking the two principles of retribution to act as side constraints on the utilitarian tenets is that these principles cannot be derived from pure utilitarianism.¹⁷⁷

2.6.3.2 John Locke's account of mixed theory of punishment

John Locke also confirmed the possibility of having a penal framework that looks both backwards and forward. He reasoned that we must 'retribute' or punish an offender, in proportion to his offence, so as to achieve deterrence and

174 Hart (1968: 8-12).

175 Hart (1968: 8).

176 Bagaris (2001: 48).

177 Bagaris (2001: 48).

reparation.¹⁷⁸ This situates deterrence and reparation as aims of forfeiture, while affirming retribution as the determinant of who must be punished and to what extent.

As stated earlier, pure utilitarianism suggests that punishment must be viewed in terms of what it produces and not how it achieves this goal.¹⁷⁹ Locke has a contrary view. He submitted that the government exists within a special relationship with the law. It has the power to punish, but the manner in which punishment is imposed becomes the key to perceiving whether it uses this power within or beyond the bounds that were set by the people.¹⁸⁰ This is Locke's rejection of pure utilitarianism which, arguably, does not prohibit expressly the use of unjust means such as punishing the innocent and imposing disproportionately harsh sentences in pursuit of deterrence and reparation of victims. Indeed, Locke's social contract prohibits the use of unjust means in the implementation of asset forfeiture in order to combat economic crimes.

Locke is, therefore, consequentialist, but only as far the consequentialist aims are achieved through the just means. Thus, both retribution and deterrence find their place in John Locke's account of punishment within the social contract theory. He, like Hart, makes deterrence and reparation the aims of punishment, and retribution its constraint.

178 Locke (1990: 120) II.7.

179 McBride (2007: 106).

180 McBride (2007: 115).

2.6.3.3 Andrew Von Hirsch's account of mixed theory

Retribution critics argue that there should be reasons for punishment, other than the mere impulse to punish.¹⁸¹ Andrew Von Hirsch contended that even though deterrence is not a sufficient reason for punishment, he claims it is a necessary one.

He said

“If punishment has no usefulness in preventing crime, there should ... not be a criminal sanction.”¹⁸²

He is a consequentialist in part, because he recognises retribution as the primary justification for punishment, and deterrence as its secondary objective.¹⁸³ His theory of punishment is contingent upon punishment having a deterrent effect. The only difference with Hart and Locke's accounts is that Hirsch used both retribution and deterrence to answer the same question of what is the objective of punishment. He said retribution is the primary objective, while deterrence is a secondary objective.¹⁸⁴ However, it is untenable to use both theories to answer one question of punishment, that is the justification of punishment, and this makes it impossible to reconcile the two within one framework as Hirsch has suggested. Only one of the theories must be the objective of punishment, within a given penal framework.

2.6.3.4 John Rawls's account of mixed theory

John Rawls argued that crime reduction should be the aim of punishment, and legislators should have this goal at the back of their minds when they set up

181 Bagaris (2001: 60).

182 Hirsch (1985: 53).

183 Bagaris (2001: 67). Following his most recent attempt at justifying punishment he has been interpreted as even further shying away from what he terms a bifurcated account of punishment:

184 Hirsch (1993: 115).

institutions for the realisation of this aim.¹⁸⁵ They must focus into the future, not the past. Nevertheless, courts must take a retributive approach and look into the past in order to determine who committed an offence and what punishment he deserves.¹⁸⁶

Rawls disapproves also with the punishment of the innocent. He argues that utilitarian legislators should reject the practice of “telishment,” by prohibiting judges or other relevant officials from punishing the innocent in order to achieve deterrence.¹⁸⁷ However, one criticism for his theory is that if judges are to be left to determine punishment on purely retributive tenets, then the crime reduction aim of the legislature would be reduced to an abstract justifying aim of punishment “whose important details would be filled in by retributive aims and concerns”.¹⁸⁸ Or could the legislators set up a punishment framework which aims at achieving deterrence, but leave the courts to determine punishment on a case by case basis using retributive principles? The answer is yes.

Rawls’ account would lead us to a penal framework that is similar to the one that is suggested by Hart and Locke. This framework is one way of avoiding the achievement of deterrence through the unjust means of punishing the innocent and imposing disproportionately harsh sentences. An asset forfeiture regime that is grounded within this framework would be fair and just.

A just asset forfeiture system must be limited to the property of those who are culpable of wrong doing and the amount of the forfeited property must be

185 Rawls (1955: 6).

186 Rawls (1955: 6).

187 Rawls (1955: 11-12).

188 Lipkke (2006: 278).

proportional to the offence and to the damage it caused to victims. This is where retribution comes in, as a constraint on how we should arrive at the deterrent and reparative aims of forfeiture. Unlike Hart, Hirsch and Rawls' accounts of mixed theory of punishment, Locke's account is most suited at explaining asset forfeiture, for his recognition of both deterrence and reparation of victims as aims of punishment. These are aims of asset forfeiture.

2.7 Developing an asset forfeiture framework through Locke's mixed theory of punishment

Locke explained different principles on punishment in the following statement:

*"And thus in the State of Nature, one Man comes by a Power over another; but yet no Absolute or Arbitrary Power, to use a Criminal when he has got him in his hands, according to the passionate heats, or boundless extravagancy of his own Will, but only to retribute to him, so far as calm reason and conscience dictates, what is proportionate to his Transgression, which is so much as may serve for Reparation and Restraint. For these two are the only reasons, why one Man may lawfully do harm to another, which is that [which] we call punishment."*¹⁸⁹

From this statement, one can decipher a comprehensive framework for punishment, which can also serve as the ideal framework for asset forfeiture.

2.7.1 Punishment must not be arbitrary

The first principle that Locke raised is that the power to punish is not absolute or arbitrary. Thus, the state should not punish arbitrarily. In relation to asset forfeiture, this means that the forfeiture of illicit property must not be arbitrary.

189 Locke (1990: 120) II.8.

This is the limitation which must guide the state when implementing asset forfeiture laws.

If punishment is within the boundaries of the law, it will be acceptable.¹⁹⁰ But this is an assumption that the law itself is a good law. Is it just any law, or the law which reflects the aspirations and interests of the people? Shall we take a positivist approach to accept a law just because it has been made by the relevant authorities, or must we determine its goodness by looking at its effects on the people? To this end, Locke introduced a notion of a limited legislature. This is the law-making institution that must pass only laws that reflect the interests of the people.¹⁹¹ The legislature must not act against the trust of the people, by refraining from making laws that limit the rights of the people arbitrarily.¹⁹²

In relation to the asset forfeiture discourse, Locke's approach would disapprove of a legislature that passes anti-money laundering and asset forfeiture laws that do not reflect the interests of the general populace. People make clear their best interests when they enter into a civil society and surrender their liberties power to a civil government. They cannot be said to have agreed to an arbitrary rule through arbitrary and unjust laws that may be passed by the legislature.¹⁹³

2.7.2 Punishment of offenders, not the innocent

Forfeiture may target proceeds or instrumentalities of crime that belong to, or are in the possession of a person other than the offender. It is prudent and just to let

190 McBride (2007: 117).

191 Locke (1990: 189) XI.142.

192 Locke (1990: 228) XIX.221.

193 Zalman (1996: 218-19).

innocent owners continue to enjoy their rights in that property, since any limitation of any of their property rights would be arbitrary.

As stated earlier, Locke stressed that punishment must be imposed on offenders and not the innocent. Locke further explained that “to punish men for that, which it is visible cannot be known whether they have performed or no, is so palpable an injustice.”¹⁹⁴ From this statement, Locke is affirming that the state must not punish the innocent, or people who cannot be known to have committed the crime.¹⁹⁵ This is a retributive notion of punishing offenders only, which is consistent with the social contract theory.¹⁹⁶ The same notion must apply to asset forfeiture. The state must target only property of offenders.

But what if an offender transfers or sells quickly illicit property to an innocent person in a bid to escape the tentacles of the law on asset forfeiture? Or what if an offender uses property which belongs to an innocent person as an instrumentality of crime? Here, the interests of an innocent property owner must be balanced with the interests of the public in order to avoid occasioning some injustice. The state must be aware that offenders can collude with innocent people to transfer title of their illicit proceeds so as to avoid forfeiture. Thus, innocent owners must be given a chance to exclude their property from forfeiture proceedings. How can this be done?

First, the law must give an opportunity to innocent owners to show that they were not aware that their property was being used in criminal activities, or that they did

194 Locke (1990: 79).

195 Tuckness (2010: 725).

196 Pollock (2010: 388).

all that could be reasonably expected of them to prevent the criminal use of their property.¹⁹⁷ Second, the law must exclude the property of good faith purchasers who did not know of the tainted nature of the property at the time they acquired their interest in it.¹⁹⁸

As Stevens J noted in his dissenting judgment in the *Ursery*¹⁹⁹ case, linking forfeiture directly to the commission of an offence, coupled with the innocent owner defence, strongly indicates that culpability is a requirement for forfeiture. Kennedy J in the same *Ursery* case argued also that in the forfeiture of real property used to facilitate a drug offence, only the culpable stand to lose their property. No interest of any owner is forfeited if he can show he did not know of or consent to the crime. However, in his opinion, the key distinction is that in the case of forfeiture of instrumentalities, statutes are not directed at those who carry out the crimes, but at owners who are culpable for the criminal misuse of the property.

In principle, any law that allows for the forfeiture of property without giving the owners an opportunity to show why their property must be excluded from forfeiture would be arbitrary and unjustifiable.

2.7.3 Punishment to meet deterrent and reparative aims

To sum up his thoughts on punishment, Locke said that punishment must serve two purposes, restraint and reparation. He emphasised on deterrence by saying that “each Transgression may be punished to that degree, and with so much Severity as

197 Doyle (2015: 12).

198 Doyle (2015: 12).

199 *United States v Ursery* (1996) 135 L Ed 2D54.

will suffice to make it an ill bargain to the Offender, give him cause to repent, and terrify others from doing the like".²⁰⁰

Further, Locke presents punishment as a means of repairing the social order as can be appreciated from his emphasis on deterrence, public safety, and restitution as aims of the punishments which must be administered by the government.

Forfeiture, being punitive, must aim also at deterrence of offenders and the public, as well as the reparation of victims.

Locke recognised the harm that some offences cause to specific individuals in a society, (victims), so there is need to undo that harm and to compensate the victims. He said a victim of crime has the right to punish an offender, as well as the right to seek reparation from an offender. The right to reparation can be exercised by the victim himself, or any other person may join the victim to seek such reparation, to such an extent as it may be required in order to satisfy the harm he has suffered.²⁰¹

The most concrete form of reparation is the payment of compensation.²⁰² When Locke says that besides the right to punish, a victim has a right to seek reparation, he recognises the need to deal with an offender at two levels. First, punish him for the offence. Second, cause him to make reparation for the harm that his transgression has occasioned the victims of his offence.

One must note though, that Locke does not describe reparation as either forward-looking or backward-looking, adequately. It is rather as a rationale of punishment

200 Locke (1990: 122) II.12.

201 Locke (1990: 121) II.10.

202 Zedner (1994: 235).

which allocates future benefits on a victim, on the basis of historically grounded claims.²⁰³

2.7.4 Proportionality of punishment

As mentioned earlier, retributivists emphasise that punishment must fit the crime.²⁰⁴ This is the basis for the proportionality principle in retributive justice.

Locke advanced the retributive justice principle of proportionality when he said that punishment must be enough to retribute or punish the offender, and the amount of punishment must be proportionate to the transgression. In terms of asset forfeiture, this means that the amount or value of the property which is subject to forfeiture must be proportionate to the offence in question.

Can proportionate forfeiture achieve deterrence? In relation to economic crime, the answer is in the affirmative. Proportionate punishment such as proportionate forfeiture orders can achieve deterrence. This answer is based on the argument made earlier, that the incentive for engaging in economic crimes is the economic gain. Hence, forfeiture of every criminal benefit is likely to have a deterrent effect because offenders and other members of a society will know that the state is focused on disgorging all illicit gains.

Can proportionate punishments really have a deterrent effect on offenders, especially where the detection of crime and the apprehension of offenders do not seem likely?²⁰⁵ It is indeed questionable if deterrence can be achieved if there is less likelihood of detection of the economic crimes and the apprehension of the

203 Tuckness (2010: 721).

204 Reiman (1995: 279). See also Kershner (2001: 173).

205 Goldman (1979: 48-9).

offenders by law enforcement authorities. Similarly, it is questionable if proportionate forfeitures can have a deterrent effect if offenders and the public are convinced that there is very little likelihood that the state can detect economic crimes and trace illicit property. This, then, calls for states to put in place measures for ensuring the detection of crimes and the tracing of illicit property which may be liable for forfeiture. Only then can proportional forfeitures have a deterrent effect on offenders and the public.

2.7.4.1 Proportionality of the forfeiture of proceeds of crime

The forfeiture of proceeds of crime can be proportional if what is forfeited is what represents the totality of the unlawful gain. There is nothing disproportional about depriving someone of something he did not deserve or own in the first place. This is why it is said that proceeds of crime which are in the possession or ownership of a culpable owner are never excessive.²⁰⁶ Advancing this argument, Justice Kennedy in *Bajakajian* contended as follows:

“As a rule, forfeitures of criminal proceeds serve the nonpunitive ends of making restitution to the rightful owner and of compelling the surrender of property held without right of ownership. Most forfeitures of proceeds, as a consequence, are not fines at all, let alone excessive fines”.²⁰⁷

Justice Kennedy’s reasoning, which I agree with, stresses the point that the issue of excessiveness of forfeiture will not arise as long as what is forfeited is the amount that was gained or acquired unlawfully. The state must, therefore, make sure it observes the proportionality principle when imposing forfeitures.

206 *United States v Bajakajian*, 524 US 321 (1988) Kennedy, J dissenting.

207 *United States v Bajakajian*, 524 US 321 (1988) Kennedy, J dissenting.

2.7.4.2 Proportionality of the forfeiture of instrumentalities

The proportionality of the forfeiture of instrumentalities of crime ought to be considered carefully, to avoid occasioning injustice. It has been stated earlier that instrumentalities are in most cases property that was acquired legally, but used illegally. Thus, there are property rights that are usually at stake. The forfeiture of instrumentalities of crime that are in the hands of a culpable owner may be sometimes excessive.²⁰⁸ Furthermore, the forfeiture of instrumentalities that are in the hands of an innocent owner, are usually excessive.²⁰⁹ This calls for the application of the principle of proportionality. The value of instrumentalities that are liable to forfeiture must be in proportion to an offender's culpability in the use of property to commit a crime.

Nevertheless, to say that punishment must be proportional to an offence sounds immediately appealing, though we are confronted with the problem of how best to determine proportionality in cases where it does not seem obvious what proportionate punishment ought to be.²¹⁰ The principle of proportionality on its own does not give guidance on how much a penalty should be.²¹¹ It sounds very abstract.

Be that as it may, I argue that the forfeiture of instrumentalities would be disproportional only if it applies to property that cannot be regarded as an instrumentality in the first place. An example would be a hotel guest who engages

208 Austin case.

209 See Bennis case.

210 Zedner (1994: 230).

211 Zedner (1994: 230).

in an isolated drug sale in the hotel foyer. The forfeiture of the hotel would be excessive. It would be excessive because the question of excessiveness of the forfeiture of an instrumentality of crime is not how much the confiscated property is worth, but whether the confiscated property has a close enough relationship to the offence.²¹² One needs to ask whether the offence could be committed elsewhere apart from this hotel, or whether the hotel was specially designated and designed to facilitate the sale of drugs.

Stretching the argument a bit further, suppose there is one room in a five-roomed mansion that is constantly used for the production and packaging of drugs. How much of the house should be forfeited? Should it be just that specific room or the whole house? If it should be just the one room, how shall we sever it from the rest of the house so as to satisfy a forfeiture order made against the room? Shall the court require the owner to pay the value of that one room instead? Or the house must be sold in order for the state to deduct the value of that one room and return the balance to the owner? These are some of the difficult, yet practical questions that exercise one's mind when considering the issue of proportionality. Whether a court decides to order the sale of the whole house or to order forfeiture of the value of that one room, or to order an offender to pay an amount to the value of the room, is an issue for the courts to determine. Whichever option the court picks, proportionality must be of paramount concern to avoid occasioning some injustice and arbitrariness.

212 Austin case, 509. Scalia J.

2.7.4.3 Proportionality of compensation

Proportionality should also apply to the reparative aim of punishment. The right of reparation demands that an offender must compensate the victim of a crime for the harm suffered through the injustice that is occasioned by crime.²¹³ Thus, reparative justice derives its proportionality in the harm suffered by the victim.²¹⁴ According to the principle of strict proportionality, the amount of reparation should be limited to that which is necessary to compensate the victim fully. This means that there should not be over-compensation or under-compensation.²¹⁵ Notably, this sounds appealing to the victim, but what happens in cases where the value of the property that has been recovered is too little to satisfy full compensation within the tenets of strict proportionality?

In practice, and in fairness to an offender, the amount of compensation is scaled down below what is proportional to the harm, just to accommodate the circumstances of the offender.²¹⁶ Consequently, courts would face the challenge of ordering the compensation of a victim, based on the property that has been traced and recovered. In case of criminal forfeiture, since the proceedings are *in personam*, the court may make a money judgement requiring a convict to pay compensation through any of his property, other than the proceeds of crime. But in relation to civil forfeiture, because proceedings are instituted against specific property, it means that compensation will be made only out of property that has been recovered. Thus, in civil forfeiture proceedings, the reparative aim of

213 Younkens (2000).

214 Zedner (1994: 248).

215 Zedner (1994: 248).

216 Zedner (1994: 245).

forfeiture is limited by the amount or value of property which the state manages to trace and recover. This places an obligation on the state to ensure that there are measures for the effective tracing and recovery of property, so that victims are fully compensated.

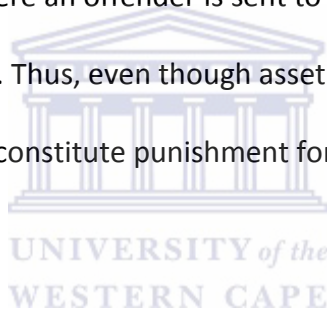
2.7.4.4 Excessiveness of forfeiture ordered in addition to another penalty

Since forfeiture is punitive, should the courts choose not to order forfeiture on top of an imprisonment sentence in order to avoid violation of the double jeopardy principle? This was a bone of contention in the USA, where most of the current civil asset forfeiture jurisprudence developed first. In *United States v Usurey*,²¹⁷ the state instituted civil forfeiture proceedings against the property of the defendant on the basis that he was cultivating marijuana. The defendant entered into a settlement agreement where he was to pay money instead of forfeiting his residence. Shortly after, the defendant was convicted in a criminal case for manufacturing marijuana and he was sentenced to 63 months' imprisonment.

The Court of Appeals (Sixth Circuit) reversed the conviction, arguing that because the civil forfeiture constituted punishment for the drug offence, the criminal conviction constituted an unconstitutional second sentence which violated the double jeopardy principle. This reasoning would mean that the court has to decide whether to punish an offender through the traditional punishments of imprisonment or fines, or asset forfeiture. Ordering forfeiture would, according to this reasoning, amount to double jeopardy. But is this situation desirable?

217 59 F 3d 568 (1995).

Going by the retributive distribution of punishment, the answer to the question asked above would be no. If we recover stolen property, or if a person repays the money obtained by fraud, then, although restitution has been made, the retributivists would say that punishment was still due, *i.e.* the loss has been annulled by the restitution but the crime has not.²¹⁸ Only physically are things as they were before the crime.²¹⁹ But the forfeiture is not regarded as a second *in personam* punishment for the offence, which is all the double jeopardy principle prohibits.²²⁰ The retributive distribution of punishment would, therefore, justify ordering of forfeiture on top of imprisonment. Holding otherwise would take a society to a situation where an offender is sent to prison, but is allowed to keep illicit property to himself. Thus, even though asset forfeiture constitutes punishment, it does not constitute punishment for double jeopardy purposes.



2.8 Conclusion

A good asset forfeiture regime is one that is within the constraints of a social contract, as propounded by John Locke. Locke's idea of limited state powers presents the best framework for the realisation of a just asset forfeiture regime. It offers also the basis for the inclusion of civil forfeiture in the overall asset forfeiture scheme.

The state's power to punish offenders through asset forfeiture derives from the people. Hence the state must exercise this power to the best interests of the people, to augment the welfare of the people, and not to diminish it. Thus, the

218 Armstrong (1961: 483).

219 Armstrong (1961: 483).

220 Pretorius (1998: 402).

state's power to impose forfeiture of illicit property must not be arbitrary. Asset forfeiture should not result into unjustified limitation of the people's rights. Forfeiture would be arbitrary if it targets property of innocent people, and also if it is unduly proportional to the underlying offence.

Finally, forfeiture must serve two aims, *i.e.* deterrence and compensation of victims. The forfeited property must be enough to deter an offender and others from breaking the law. It must be enough to compensate victims also. However, deterrence and compensation of victims must be achieved within the constraints of the retributive justice theory.

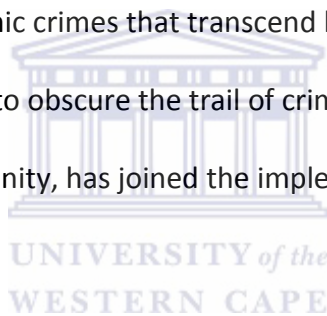


CHAPTER THREE

THE INTERNATIONAL LEGAL FRAMEWORK FOR ASSET FORFEITURE

3.1 Introduction

Several international legal instruments have been adopted as a result of the need for concerted international action to combat economic crimes and the laundering of the proceeds of economic crimes.¹ The legal instruments encourage states to put in place various law enforcement measures such as asset forfeiture. Consequently, there has been a proliferation of forfeiture laws in response to the increasing sophistication of economic crimes that transcend borders, and perpetrators use every innovative means to obscure the trail of criminal income.² Malawi, as part of the international community, has joined the implementation of the international legal instruments also.



This chapter investigates the extent to which the international legal framework on asset forfeiture offers a model for a just and fair asset forfeiture regime that was discussed in Chapter Two of this thesis.

3.2 International legal instruments

The following are the international legal instruments which constitute the international legal framework on asset forfeiture.

1 Zagaris (1991: 446).

2 Young (2009: 1-2).

3.2.1 The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances

The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (The Vienna Convention)³ is the first international treaty against money laundering. It obliges States Parties to criminalise drug cultivation, manufacture, transportation, and sale, among other drug-related offences.⁴

Further, it requires States Parties to criminalise the laundering of drug-related proceeds.⁵ This Convention is thus considered as a landmark instrument in the development of a coordinated international response to global money laundering.⁶ This is despite the fact that it focuses only on the laundering of proceeds of drug-related offences.

The Vienna Convention is also the first international legal instrument to tackle the issue of forfeiture, albeit the fact that it applies only to the forfeiture of proceeds of drug offences.⁷



3.2.2 United Nations Convention against Transnational Organised Crime

The United Nations Convention against Transnational Organised Crime (The Palermo Convention)⁸ is the first international legal instrument to tackle organised crime holistically. It is also the first Convention to tackle the laundering of all serious crimes, unlike the Vienna Convention which focused only on the laundering of drug-

3 Adopted on 20 December 1988 in Vienna. Entered into force on 11 November 1990.

4 Article 3(a) of the Vienna Convention.

5 Article 3 (b) of the Vienna Convention.

6 Richards (1999: 224).

7 Aldridge (2009: 93). However, the first serious venture of the UN in this area was the Single Convention on Narcotic Drugs (520 UNTS 204, 1961). This Convention provided for the seizure and confiscation of drugs substances and equipment under its article 37. This Convention was followed by the 1971 Convention on Psychotropic Substances.

8 Adopted by the UN General Assembly in its resolution 55/25 of 15 November 2000. Entered into force on 29 September 2003.

related assets. In order to curb organised crime, the Palermo Convention urges countries to criminalise conduct such as participation in an organised criminal group,⁹ the laundering of the proceeds of crime,¹⁰ corruption,¹¹ and obstruction of justice.¹²

The Palermo Convention is also the first international legal instrument to include the liability of companies and corporations which participate or profit from money laundering and organised criminal activities.¹³ Making corporations liable is commendable because criminals often launder their transnational profits through legitimate businesses.

3.2.3 The United Nations Convention against Corruption

The United Nations Convention against Corruption (UNCAC)¹⁴ is a global anti-corruption legal instrument.¹⁵ UNCAC is special when compared to other international legal instruments in terms of the weight that is given to asset recovery. It is the first convention to position asset recovery as a fundamental principle.¹⁶ It places asset recovery as the most important legal tool to deprive offenders of their ill-gotten gain, and the regime it promotes is organised around the concept of the forfeiture of proceeds of crime.¹⁷ This contrasts with the Vienna and Palermo Conventions, in which the recovery of criminal proceeds appears as a

9 Article 5 of the Palermo Convention.

10 Article 6 of the Palermo Convention.

11 Article 8 of the Palermo Convention.

12 Article 23 of the Palermo Convention.

13 Article 10 of the Palermo Convention.

14 Adopted by the UN General Assembly following its resolution 58/4 of 31 October 2003 entered into force on 14 December 2005.

15 Larson (2005: 191).

16 Article 51 UNCAC.

17 UNCAC Technical Guide (2009: 91-92).

somewhat important, but subordinate element.¹⁸ These conventions address asset recovery by merely including a generalised forfeiture article, without being as elaborate as UNCAC.¹⁹

3.2.4 African Union Convention on Preventing and Combating Corruption

The African Union Convention on Preventing and Combating Corruption (AU Convention)²⁰ signifies a regional collective stand against corruption among African Union (AU) member countries. The Convention recognises the negative effects of corruption in Africa. It affirms that corruption undermines accountability in the management of public affairs and acknowledges the need to address the root causes of corruption in the African continent.²¹

The Convention obliges its States Parties to criminalise corrupt acts and other related offences such as bribery (both soliciting and offering bribes), embezzlement of public funds and trading in influence²² and the laundering of proceeds of corruption.²³ Further, it obligates States Parties to confiscate proceeds of corruption.²⁴

Notably, this Convention is human rights-centric as it provides expressly for minimum guarantees for fair trial for those alleged to have committed corrupt acts.²⁵ This is a commendable provision as it ensures that governments must not

18 Claman (2008: 337). See Palermo Convention Article 13 (1) and Vienna Convention Article 5 (4)(a).

19 Claman (2008: 337).

20 Adopted in Maputo on 11 July 2003. Entered into force on 5 August 2006.

21 Preamble for the AU Convention.

22 Articles 4(1) (1) (a), (b), (d) and (f) of the AU Convention.

23 Article 6 of the AU Convention.

24 Article 16 of the AU Convention.

25 Article 14 of the AU Convention. This is not surprising, given the fact that The African Charter on Human and Peoples' Rights came into force on 25 January

subject their citizens to any law enforcement measures, proceedings or actions arbitrarily.

3.2.5 Southern African Development Community Protocol against Corruption

The Southern African Development Community Protocol against Corruption (SADC Protocol)²⁶ is a sub-regional instrument that binds member states of the Southern African Development Community (SADC). Its focus is on corruption and it has 14 member countries.²⁷ The Protocol reflects the concern of the States Parties on the adverse and destabilising effects of corruption,²⁸ and that corruption is a serious international problem which calls for concerted action.²⁹ The Protocol calls for the criminalisation of corrupt acts, such as bribery,³⁰ diversion of public funds³¹ and trading in influence³² and the laundering of the proceeds of corruption.³³

3.2.6 Financial Action Task Force Recommendations

The Financial Action Task Force (FATF) is an inter-governmental body established in 1989 by the G7 countries.³⁴ It was established for the sole purpose of setting up global standards for the combating of money laundering.³⁵ Currently, its mandate has been extended to the promotion of effective implementation of legal,

2005, seven months before the AU Convention.

26 Adopted on 14th August, 2001. Entered into force on 6th July, 2005. The Protocol was Established pursuant to Article 21 of the Treaty establishing the Southern African Development Community which enjoins Member States to cooperate in all areas necessary to foster regional development, integration and cooperation. Article 22 of the Treaty mandates member States to conclude Protocols as may be necessary in each area of Cooperation.

27 Angola, Botswana, Democratic Republic of Congo, Lesotho, Malawi, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.

28 Paragraph 2 of the Preamble for the SADC Protocol.

29 Paragraph 3 of the Preamble for the SADC Protocol.

30 Article 3 (1) (a) and (b) of the SADC Protocol.

31 Article 3 (1) (d) of the SADC Protocol.

32 Article 3 (1) (f) of the SADC Protocol.

33 Article 3(1)(g) of the SADC Protocol.

34 The G7 countries are the USA, France, Canada, Britain, Germany, Italy and Japan.

35 World Bank (2009: 24).

regulatory and operational money laundering, terrorist financing and the financing of proliferation of weapons of mass destruction.³⁶

The FATF sets the global standards through a set of recommendations. Currently, there is a set of forty recommendations that have so far been adopted by 180 countries. The recommendations are recognised universally as the blueprint for combating money laundering, terrorist financing and also the financing of the proliferation of weapons of mass destruction.³⁷ The recommendations are in the form of soft law.³⁸ This means that they are merely best practice guidelines that are not legally binding. They just offer guidance to countries on what measures they should put in place in order to combat crimes.



3.3 Asset forfeiture

The international legal framework recognises both criminal and civil forfeiture.

3.3.1 Criminal forfeiture and civil forfeiture

At first glance, it is not clear if the SADC Protocol and the Vienna, Palermo and AU Conventions provide for criminal or civil forfeiture because they do not mention expressly whether the forfeiture they refer to should be conviction-based or not.³⁹

Notably, UNCAC and the FATF provide expressly that states should consider adopting non-conviction-based forfeiture also. Therefore, this thesis concludes that the other instruments envisage only conviction-based forfeiture.

36 FATF Recommendations (2012: 7).

37 FATF Recommendations (2012: 7).

38 Blazejewski (2008: 10).

39 Article 5 of the Vienna Convention, Article 12 of the Palermo Convention and Article 16 (1)(b) of the AU Convention.

The FATF recommends that states should consider adopting measures that allow the forfeiture of proceeds or instrumentalities of crime without requiring a criminal conviction.⁴⁰ It says “countries should adopt” criminal forfeiture, but when it comes to civil forfeiture, the tone changes. It says “countries should consider” adopting civil forfeiture. This places the adoption of civil forfeiture as a weak recommendation, and a country will not be taken to task during mutual evaluation exercises if it chooses not to adopt civil forfeiture at all.

Among the conventions, UNCAC is revolutionary for being the first convention to contain a specific provision on civil forfeiture. UNCAC encourages States Parties to adopt civil forfeiture, and use it in cases where an offender cannot be prosecuted for reasons such as the offender’s death, flight or absence from a jurisdiction.⁴¹ Thus, the Convention ensures that States Parties pursue remedial action in such cases, through civil forfeiture. Usually, in countries where corrupt officials control the principal organs of the state, asset recovery efforts cannot begin until after the corrupt official has died or absconded.⁴² This is why it is commendable for each country to adopt civil forfeiture, to enable the recovery of proceeds of corruption committed by such public officials, even after they have died or fled.

In the case of death of a corrupt official, it is an established principle that criminal sanctions cannot be imposed on heirs.⁴³ Nevertheless, States Parties must use forfeiture as remedial or reparative action on the premise that transfer or

40 FATF Recommendation 4.

41 Article 54 (1) (c) of UNCAC.

42 Claman (2008: 347).

43 UNCAC Technical Guide (2009: 208).

conversion of assets cannot alter their illegality.⁴⁴ In addition, transfer or conversion cannot alter the right of a victim State Party to reclaim illicit property from heirs of an offender.⁴⁵

Furthermore, relying on Nozick's justice in distribution theory, victim States Parties must institute civil forfeiture proceedings in pursuit of illicit property that has been passed on to an offender's heirs. Nozick calls for the rectification of the injustice that occurs when illegally acquired property is transferred to people such as heirs of an offender.

It is, therefore, surprising that most of the international legal instruments, do not provide for civil forfeiture at all, and that the FATF and UNCAC introduce it but they do not make its adoption mandatory. Jorge Godinho suggests that historically, civil forfeiture has been a common law tradition, and it remains an alien concept for civil law jurisdictions.⁴⁶ For this reason, it is difficult to obtain support for its inclusion in international legal instruments.⁴⁷ Be that as it may, this thesis submits that an international legal framework that is geared towards the ultimate reduction of economic crimes ought to make civil forfeiture mandatory, to make sure that in all situations, there is rectification of injustice in Nozick's terms.

3.3.2 Establishment of asset forfeiture as a form of punishment

All the international legal instruments mentioned above provide for asset forfeiture as a tool for combating of crimes. The Vienna Convention captures forfeiture

44 UNCAC Technical Guide (2009: 208).

45 UNCAC Technical Guide (2009: 208).

46 Godinho (2009: 323).

47 Godinho (2009: 324).

(termed confiscation in the Convention) as a form of punishment or sanction.⁴⁸ By capturing forfeiture as a mode of punishment, the Convention recognises it as such. Furthermore, the Palermo Convention captures forfeiture as one of the measures envisaged to facilitate the prevention and combating of transnational organised crime.⁴⁹ It defines confiscation as the permanent deprivation of property by order of a court or other competent authority.⁵⁰ The UNCAC and the AU Convention also bear a similar definition for forfeiture.⁵¹ As discussed in Chapter Two, the deprivation of property constitutes punishment.

The SADC Protocol makes the punitive element of forfeiture clear in its definition. It defines forfeiture as any penalty or measure resulting in a final deprivation of property, *i.e.* proceeds or instrumentalities, ordered by a court of law following proceedings in relation to a criminal offence or offences connected with or related to corruption.⁵²

This thesis submits that the international legal framework recognises asset forfeiture as a form of punishment. This finding is consistent with the conclusion made in Chapter Two of this thesis, that asset forfeiture, be it criminal or civil, constitutes punishment. Hence, it demands due process safeguards that apply to criminal proceedings. The discussion will assess how far the international legal framework gone to require the recognition of due process guarantees by states when they are implementing both civil and criminal forfeiture laws.

48 Article 3 (4)(a) of the Vienna Convention.

49 Article 12 of the Palermo Convention.

50 Article 2(g) of the Palermo Convention.

51 Article 2(g) of UNCAC and Article 1 of the AU Convention.

52 Article 1 of the SADC Protocol.

3.3.3 In pursuit of a mixed theory of punishment

It begs to question how the international legal framework justifies asset forfeiture. The social contract discussed in Chapter Two dictates that punishment must be pursued in order to achieve deterrence and victim compensation, while applying retributive principles. Being a form of punishment, asset forfeiture must be forward-looking, aiming at financial incapacitation, deterrence and reparation objectives, while applying retributive principles. There is, therefore, need to assess what approach the international legal instruments on asset forfeiture has advanced.

3.3.3.1 Deterrence

The utilitarian theory, the root of deterrence, states that the object of the law is to prevent, so far as possible, the commission of crimes.⁵³ Thus, the international legal framework must reflect a crime-prevention theme. The Vienna Convention's Preamble indicates the determination of States Parties to deprive persons engaged in drug trade of the proceeds of their criminal activities, and to eliminate their main incentive for engaging in such activities.⁵⁴

Two words are crucial in this part of the preamble, and these are "deprive" and "eliminating their incentive". "Deprive" denotes the wish to incapacitate criminals, by taking away that which they gain from crime, which they may re-invest in further criminal activities. "Eliminating their incentive" signifies specific deterrence, by discouraging criminals from committing further crimes because states are keen to deprive them of their criminal gains. This can also serve as general deterrence to

53 Bentham (1781: 140).

54 Preamble to the Vienna Convention Para 5.

the public, because it sends the message that due to the implementation of forfeiture laws, there is no economic incentive for engaging in economic crimes. In this regard, the Vienna Convention has approached forfeiture through the lens of deterrence.

Going further, the Palermo Convention's statement of purpose states clearly that the Convention aims to promote cooperation to prevent and combat transnational organised crime more effectively.⁵⁵ This shows that the aim is not just to punish organised crime for retribution's sake, but ultimately, to prevent and fight crime.

In addition, the FATF justified the necessity of adopting asset forfeiture in its *Best Practices Paper on Confiscation*. The FATF's approach carries with it a predominantly deterrent message which is packed in these sentences:

“Confiscation prevents criminal property from being laundered or reinvested either to facilitate other forms of crime or to conceal illicit proceeds. In itself, this can significantly stifle organised criminal operations, break them or frustrate the movement of proceeds realised from crime. Reducing the rewards of crime, affects the balance of risk and reward, and the prospect of losing profits may deter some from crime. It may also allow the victim of the crime to be partially or fully compensated, even when the proceeds are moved around the world.”⁵⁶

The above text shows that by advocating for forfeiture, the FATF aims at preventing the laundering or reinvestment of illicit property. When such property is left in the hands of criminals, they may conceal its illicit nature, or they may use it to facilitate the commission of other crimes. The FATF also anticipates that that the forfeiture of proceeds of crime would deter those who hope to gain from crime, from living a criminal lifestyle.

55 Article 1 of Palermo Convention.

56 FAFT Best Practices Paper (2010: 3).

Furthermore, the SADC Protocol carries a deterrent approach to the combating of corruption. Its States Parties took note of the link between corruption and other criminal activities and reaffirmed the need to eliminate corruption through effective preventative and deterrent measures.⁵⁷ One of such measures is asset forfeiture.

Going further, the AU Convention seeks to promote and strengthen the development in Africa by putting in place mechanisms to prevent, detect, punish and eradicate corruption and related offences in the public and private sectors.⁵⁸

The AU Convention has eradication of corruption as its overarching aim, as this has a bearing on development. This resonates with the crime reduction aim of punishment, since the efforts do not stop at punishing for the sake of punishment, but are aimed at the ultimate eradication of corruption.

UNCAC's deterrent approach is reflected in its Preamble, where States Parties declared that they are "determined to prevent, detect, and deter in a more effective manner international transfers of illicitly acquired asset."⁵⁹

The international legal framework, therefore, offers a solid foundation for building asset forfeiture systems that are adequate to deter the commission of economic crimes and the laundering of criminal proceeds.

3.3.3.2 Compensation

Apart from achieving deterrence, forfeiture must aim at compensating victims of crimes also. The FATF aims to achieve reparative objectives, when it says:

57 Preamble for the SADC Protocol.
58 Article 2 (1) of the AU Convention.
59 Preamble of the UNCAC.

“Confiscation ... may also allow the victim of the crime to be partially or fully compensated, even when the proceeds are moved around the world.”⁶⁰

Furthermore, UNCAC obligates its States Parties to return confiscated property to compensate victims of crime.⁶¹ Moreover, UNCAC requires its States Parties to permit their courts to order the payment of compensation to another State Party that has been harmed by corruption offences.⁶² Citizens of corrupted governments are the principal victims of corruption, hence, priority must be given to their compensation when it is time to determine the disposal of forfeited property. However, citizens do not have to receive compensation individually, in cases such as embezzlement of public funds. Instead, the victim state receives compensation on behalf of the general populace, because the government is considered as the legitimate representative of the citizen victims.⁶³

In addition, the Palermo Convention’s Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children requires States Parties to ensure that victims of trafficking are given the opportunity to seek compensation.⁶⁴

Thus, the international legal framework provides a framework for the compensation of victims. Nevertheless, it is imperative to find out if indeed the obligations on asset forfeiture that the international legal instruments establish, are effective enough to achieve deterrent and reparative objectives.

60 FAFT Best Practices Paper (2010: 3).

61 Article 57(3)(c) of UNCAC.

62 Article 53(b) of UNCAC.

63 Stephenson (2014).

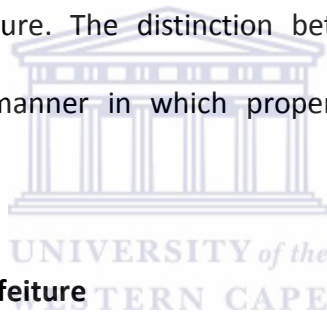
64 Article 6(6) of the Trafficking Protocol.

3.4 Forfeitable property

An effective asset forfeiture regime that is deterrent and reparative in aims, but guided by the retributive principle of proportionate punishment, demands the forfeiture of all criminal gains and instruments of crime. There is, therefore, need for the international framework to set standards and obligations that cast the net of forfeitable property as wide as possible, to make sure that criminals do not hold on to any of their illicit gains.

3.4.1. Proceeds of crime: value-based and object-based models

The forfeiture of proceeds of crimes falls into two categories, *i.e.* object-based and value-based forfeiture. The distinction between the two models of forfeiture lies in the manner in which property rights are affected, as discussed below.



3.4.1.1 Object-based forfeiture

Object-based forfeiture targets property which can be traced directly to a crime. It constitutes a transfer of direct proceeds of crime from an offender to the state.⁶⁵ All of the legal instruments provide for the forfeiture of criminal proceeds.⁶⁶ Proceeds of crime comprise both direct (primary) and indirect (secondary) proceeds. Direct proceeds constitute property that has been generated immediately by an offence.⁶⁷ This includes money which a person

65 UNCAC Legislative Guidance (2006: 93).

66 Article 5 (1) (a) of the Vienna Convention; Article 12(1)(a) of the Palermo Convention; Article 31(1)(a) of UNCAC; Article 16 (1)(b) of the AU Convention; Article 8 (1) (a) of the SADC Protocol; and FATF Recommendation 4.

67 Stessens (2000: 48).

receives as bribery, money earned through the sale of drugs or a car that one has stolen.

Indirect or secondary proceeds constitute income or benefits that derive from the direct proceeds of crime. The Vienna Convention, the Palermo Convention and the UNCAC provide for secondary proceeds of crime.⁶⁸ Such proceeds include bank interests⁶⁹ or any appreciation in the value of the proceeds of crime that is generated from the investment of the proceeds.⁷⁰

But why must the state take away benefits that do not derive directly from the criminal activity but from a criminal's investor skills? Is this not the labour that John Locke alluded to when he contended that a person can acquire property legitimately through their labour?⁷¹ The answer is no. Locke's account justifies the forfeiture of benefits that derive from proceeds of crime. The reason is that they derive from property whose root is criminality, instead of labour.

Additionally, the state must confiscate such benefits because the acquisition of the proceeds from which they derive, constitutes an injustice, according to Robert Nozick's justice in acquisition principle.⁷² Nozick's principle of rectification of injustice calls on states to take action that will correct the

68 Article 5 (6)(c) of the Vienna Convention; Article 12(5) of Palermo Convention and Article 31(6) of the Palermo Convention.

69 UNCAC Technical Guide (2009: 96).

70 Stessens (2000: 49).

71 Locke (1990: 130) V.27.

72 Nozick (1974: 150).

injustice, and such action must include the forfeiture of any benefit that originates from an injustice in acquisition.⁷³ Forfeiture rectifies this injustice.

If the state confiscates only the direct proceeds and leaves any surplus that a criminal makes through the investment of the proceeds, criminal behaviour would still be profitable. The forfeiture of only direct proceeds would not be deterrent enough because the benefits or income from proceeds would remain an incentive for engaging in economic crimes. Furthermore, the proportionality principle would demand that a criminal should forfeit everything he has gained from the commission of a crime. This includes both the proceeds and the benefits from the proceeds.

3.4.1.2 Value-based Forfeiture

Value-based forfeiture concerns the deprivation of property of a value which corresponds to criminal proceeds.⁷⁴ This requires an assessment and quantification of criminal benefits.⁷⁵ It constitutes an order for the offender to pay a certain amount of money, usually equivalent to the value of the undue advantage or benefit from an offence.⁷⁶ If the offender fails to pay, the state can confiscate any of his property, regardless of whether it was acquired legally or not.⁷⁷

In a bid to ensure that offenders do not benefit from crime at all, the Palermo Convention, FATF, UNCAC, AU Convention and the SADC Protocol obligate

73 Nozick (1974: 152).

74 UNCAC Legislative Guidance (2006: 93).

75 OECD/The World Bank (2012: 18).

76 Zagaris (1991: 500). UNCAC Legislative Guidance (2006: 93).

77 Zagaris (1991: 500).

their States Parties to confiscate property whose value corresponds to the value of criminal gains,⁷⁸ known as property of corresponding value. This reflects a global aspiration to ensure that even when the direct proceeds of crime have dissipated, the state should still be able to disgorge the value of criminal gains by targeting any property of the offender that is available. One might ask if taking an offender's legitimate property to recover the value of criminal gains is fair and justifiable. The answer is yes.

If the state stops at targeting direct or traceable proceeds of crime, criminals would just have to stash criminal proceeds out of the reach of law enforcers, and remain with legally acquired property. Criminals could still be enjoying these proceeds elsewhere, and criminal enterprise would remain a profitable lifestyle. In order to diminish the incentive for engaging in criminal lifestyles, the state must be empowered to target any property that belongs to the offender. With respect to the proportionality principle, the state must target only property whose value corresponds with the value of criminal gains.

The Vienna Convention, Palermo Convention as well as UNCAC provide for the forfeiture of proceeds that have been transformed or converted into other property.⁷⁹ The forfeiture of such property is necessary because often times, criminals get rid of primary proceeds of crime in order to obscure their illicit origin.⁸⁰ They dispose of it, convert or transform it into another form of

78 See Article 12(1) of the Palermo Convention; Article 31(1)(a) of UNCAC; Article 16 (1)(b) of the AU Convention and Article 8 (1) (a) of the SADC Protocol.

79 Article 5(6) of the Vienna Convention; Article 12(3) of the Palermo Convention; and Article 31(4) of UNCAC.

80 Stessens (2000: 48).

property.⁸¹ Deterrence will not be achieved if the state halts its forfeiture plans just because it cannot trace the direct proceeds of crime. The reason is that criminals will just make sure they transform the property and then continue enjoying the proceeds of crime in another form. Thus, every legal system that is keen on reducing economic crime must expand its scope of proceeds of crime to include proceeds that have been transformed or converted into other property.

Furthermore, it may happen that an offender could mix his criminal gains with property which he acquired legally,⁸² referred to as intermingled property. This happens often at the placement stage of money laundering. Owing to this mingling of property, it may become difficult to separate the illicit property from the legitimate property. What must the state do in such situations? Must it give up the forfeiture plans because it cannot separate illicit property from the licit? The Vienna Convention, the Palermo Convention and the UNCAC, state that any property that has been mixed with criminal proceeds must be forfeited.⁸³

In accordance with retribution's proportionality principle, the intermingled property should be liable to forfeiture only up to the assessed value of the intermingled proceeds.⁸⁴ Forfeiting property whose value is beyond the value of criminal gains and benefits would be harsh, unfair and arbitrary.

81 Greenberg *et al* (2009: 39).

82 Greenberg *et al* (2009: 42).

83 Article 12 (1) (a) of the Palermo Convention, Art 5(6) of Vienna Convention and Article 31(5) of UNCAC.

84 Art 5(6) of Vienna Convention; Article 12(4) of the Palermo Convention; Article 31 of UNCAC.

3.4.1.3 Value-based forfeiture vs object-based forfeiture

Pursuing a purely object-based forfeiture model may lead to unjust consequences if property that is supposed to be liable to forfeiture has dissipated; has been spent or consumed by the time a forfeiture order is made.⁸⁵ Further, object-based forfeiture model would be challenging in cases where an offender conceals proceeds of crime in a corporate vehicle.⁸⁶ This would demand having laws in place that allow for the piercing of the corporate veil to facilitate investigations. This is why states must make companies and other corporate entities liable to money laundering if they are being used to hide criminal proceeds.

Given the challenges that the object-based forfeiture model poses in the recovery of criminal proceeds, value-based forfeiture seems to offer a better route to justice. The value-based forfeiture's convenience lies in the fact that it does not concern the transfer of direct proceeds to the state, but requires an offender to pay to the state an amount that is equivalent to his criminal proceeds.⁸⁷ An offender may thus be ordered to pay an amount equivalent to the criminal proceeds or to forfeit any of his property. Ultimately, it is not necessary to link the available property to an offence.⁸⁸ It is forfeitable, as long as it belongs to the offender and it can assist in realising the value of the actual proceeds of crime.⁸⁹ The prosecution has to simply prove the link between an offender's benefit to specific offence.⁹⁰ Thus, it is easier

85 UNCAC Legislative Guidance (2006: 94).

86 UNCAC Legislative Guidance (2006: 94).

87 UNCAC Legislative Guidance (2006: 94).

88 OECD/The World Bank (2012: 18).

89 UNCAC Legislative Guidance (2006: 94).

90 OECE/The World Bank (2012: 18).

to obtain a forfeiture judgment in a value-based system as opposed to an object-based system.⁹¹

3.4.2 Instrumentalities of crime

Quite apart from the confiscation of the proceeds of crime, the international legal instruments provide for the forfeiture of instrumentalities of crime. This refers to property used, as well as property that is intended to be used in the commission of a crime. The aim is to remove the means to commit future crimes.⁹² The theory behind the confiscation of instrumentalities of crime is that the objects have been misused in a way harmful way to society, and therefore the state must stop this from happening again.⁹³ This kind of forfeiture is punitive in nature, as it leads to the deprivation of misused property. The forfeiture links the property to the harmful results it produced.⁹⁴

Furthermore, after the confiscation of certain instrumentalities of crime, the objects are usually destroyed. This shows that the theory underlying the forfeiture of such objects is of a preventive nature. Such objects are considered vulnerable to misuse and this raises a specific interest in destroying them.⁹⁵ However, the forfeiture of contraband such as drugs is said to have wider protective benefits and is not a punitive matter; thus, such objects are not forfeited to punish the defendant but to protect the society.⁹⁶

91 OECD/The World Bank (2012: 18).

92 Zagaris (1991: 482).

93 UNCAC Technical Guide (2009: 93).

94 UNCAC Technical Guide (2009: 93).

95 UNCAC Technical Guide (2009: 93).

96 UNCAC Legislative Guide (2009: 93).

3.4.2.1 Property used in the commission of crime

The Vienna Convention, Palermo Convention, UNCAC, the FATF and the SADC Protocol provide for the confiscation of instrumentalities used in the commission crimes.⁹⁷ Even though the AU Convention's definition of confiscation includes the permanent deprivation of instrumentalities, the Convention does not make any reference to instrumentalities when it comes to the actual forfeiture obligations under Article 16. All in all, the international legal framework is adequate to meet the crime reduction objective by removing things that facilitate the commission of crime.

3.4.2.2 Property intended or destined for use in the commission of a crime

The Vienna Convention and the FATF Recommendations provide also for the forfeiture of property intended for use in the commission of crime.⁹⁸ Why is the focus on property intended to be used, in addition to property that is really used in the commission of an offence? The most plausible reason is that the state seeks to discourage the use of property in the commission of crimes in the future. Thus, the forfeiture is ordered not just for punishment's sake but in the spirit of crime prevention, hence enforcing the deterrent aim of punishment.

The Palermo Convention⁹⁹ and UNCAC make reference to such instrumentalities as objects destined for use in the commission of a crime.¹⁰⁰ There was a debate during the negotiations of the Palermo Convention on whether the phrase should be "property destined for use" or "property intended to be used" in the commission of

97 Article 5(1)(b) of the Vienna Convention; Article 12 (1)(b) of the Palermo Convention; Article 31 (1)(b) of UNCAC. FATF Recommendation 4 and Article 8 (1) (a) of the SADC Protocol.

98 Article 5 of the Vienna Convention. Recommendation 4 of FATF Recommendations.

99 Article 12 (1)(b) of the Palermo Convention.

100 Article 31(1)(b) of UNCAC.

a crime. At the fifth session of the *Ad Hoc* Committee, several delegates expressed some hesitation with regard to the phrase “or intended for use”, while several other delegates supported the retention of this phrase, just as it appeared in the Vienna Convention.¹⁰¹

The phrase, “intended for use”, is meant to signify an intention that is tantamount to an attempt to commit a crime.¹⁰² The basis for the forfeiture of such property lies in an offender’s intention to use the property to commit a crime. In criminal law, intent is a general prerequisite for punishment, and in particular, punishment of attempted crimes.¹⁰³ Is the state justified to punish a person for manifesting an intention to use property in the commission of a crime? Yes, it is justified, in the same way that the state justifies punishment of an attempted theft, for example. The argument is that “If a particular form of conduct is legitimately criminalized, then the attempt to engage in that form of conduct is also legitimately criminalized.”¹⁰⁴

The state punishes attempted offences because people who attempt to commit offences increase the probability of a result which the law seeks to prevent.¹⁰⁵ A person intends that a prohibited harm or wrong must occur.¹⁰⁶ It must be true, therefore, that those who attempt to cause a harmful or wrongful result increase

101 *Travaux Préparatoires* for the Palermo Convention (2006: 111). The support to retain the phrase as it appeared in the Vienna Convention, attests to the influence which the Vienna Convention had on the negotiation and drafting of the Palermo Convention.

102 *Travaux Préparatoires* for the Palermo Convention (2006: 111).

103 Shavell (1990: 449).

104 Yaffe (2011: 21).

105 Husak (2012: 5).

106 Cahill (2012: 754).

the probability of its occurrence.¹⁰⁷ However, the issue does not stop at intent alone, but at the resolve of the offender to carry out the intended offence.¹⁰⁸ The resolve may be in the form of substantial steps towards the completion of a crime, which corroborate a criminal purpose.¹⁰⁹ In the same way, it is not enough to prove a person's intent to use vehicle X in the trafficking of drugs, for example. The state must prove also that the person carried out some activity to show a commitment to perform the intended act and to use the vehicle for such purposes.

Further, according to John Locke's reasoning, a state of war arises when one man uses or declares his intention to use force against another man.¹¹⁰ In a bid to maintain order, the society has the power to restrain attempts by any person to break the law of nature. This thesis submits that such restraint, therefore, may include the forfeiture of instruments which an offender intends to use in breaking the law. This justifies the punishment of attempted crimes, as well as the forfeiture of property intended to be used in the commission of a crime. The punishment of attempted offences augments deterrence of proscribed behaviour.¹¹¹ It does so "by increasing the probability of imposing sanctions".¹¹² It should be noted, however, that deterrence is augmented if there is high likelihood of being apprehended and punished for committing an attempt.¹¹³ The increase of such likelihood depends on the vigilance of law enforcement authorities in making sure they investigate and apprehend as many offenders as possible.

107 Husak (2012: 5).

108 Cahill (2012: 755). See also Alexander (1997: 1168).

109 Alexander (1997: 1169).

110 Locke (1990: 126) IV.19.

111 Shavell (1990: 446).

112 Shavell (1990: 446).

113 Shavell (1990: 447).

3.5 Pre-forfeiture actions

There is a lot of work that must be done before arriving at the forfeiture stage. This work includes the identification and preservation of forfeitable property.

3.5.1 Identification, tracing and evaluation of forfeitable property

The starting point for forfeiture proceedings is the identification, tracing and evaluation of forfeitable property. This is why the international legal instruments urge countries to put in place measures that will assist law enforcement authorities to identify, trace and evaluate property that is liable to forfeiture.¹¹⁴

The argument is that there would be no forfeiture if there were no forfeitable property available. Similarly, a legal system cannot achieve deterrence, reduction of economic crimes and compensation of victims if its law enforcement authorities fail to identify and trace criminal proceeds. Furthermore, the question of proportionate forfeitures would not arise if the state and the courts fail to ascertain the value of criminal proceeds, in order to know how much to order in pursuit of a value-based confiscation. Failure to ascertain the value of forfeitable property may lead to the injustice of under-punishing an offender by forfeiting only the little that has been traced. This failure may lead also to the injustice of under-compensating victims, since the amount of compensation will depend on the traced property.

114 Article 31(2) of UNCAC; Article 5(2) of the Vienna Convention; Article 12(2) of the Palermo Convention; Article 8(1)(b) of the SADC Protocol; Article 16(1)(a) of the AU Convention and FATF Recommendation 3.

3.5.2 Provisional measures: freezing and seizure of forfeitable property

The ability to seize and freeze forfeitable assets is very fundamental to the overall asset forfeiture exercise.¹¹⁵ Freezing and seizure serve to preserve forfeitable property until the conclusion of forfeiture proceedings. This is why the international legal instruments obligate their States Parties to implement measures for the freezing and seizure of suspect assets.¹¹⁶ These measures are preliminary in nature, and they aim to bar the disposal and dissipation of property that is liable to forfeiture.¹¹⁷

However, since property is seized or frozen before the final determination of forfeiture proceedings, property owners ought to be given an opportunity to challenge provisional orders.¹¹⁸ There ought to be provision also for their basic subsistence from the seized or frozen property.¹¹⁹ This is one way of ensuring that property owners are not rendered destitute before the court determines the criminality of their property.

3.6 International co-operation

Given that criminals move their illicit gains across borders, the international community has made sure that criminals should not find a safe haven for their illicit property. Others have attributed the movement of proceeds of crime across borders to globalisation. The argument is that globalisation has generally

115 Pieth (2008: 11).

116 Article 31(2) of UNCAC; Article 5(2) of the Vienna Convention; Article 12(2) of the Palermo Convention; Article 8(1)(b) of the SADC Protocol, Article 16(1)(a) of the AU Convention and FATF Recommendation 3.

117 Nikolov (2011: 24).

118 Pieth (2008: 11).

119 Pieth (2008: 11).

contributed to money movement because the liberalised global financial system has taken on characteristics that are as conducive to money laundering, as to any other form of money movement.¹²⁰

Furthermore, the globalisation of trade, technology, transportation, communications, information, and financial systems provides new opportunities for criminal enterprises to operate across national borders.¹²¹ The free trade system has made it easy to embed illicit products in the vast amounts of imports and exports that now characterise international trade.¹²² Thus, both clean and dirty money can be moved easily across the globe in the liberalised economy. In this manner, proceeds of crime are often moved across several jurisdictions, making it difficult for law enforcement to follow the money trail.¹²³

Following the money across multiple jurisdictions is a daunting task for law enforcement authorities. Even if criminal money is identified, obtaining it from foreign countries is a formidable task.¹²⁴ This challenge, therefore, demands international co-operation by the international community in order to stop the cross-border movement of illicit money. The same is needed for the forfeiture and repatriation of illicit property to the victim country. For this reason, as will be discussed in the subsequent paragraphs, the international legal instruments obligate States Parties to cooperate with one another on asset forfeiture, asset sharing, legal assistance, and compensation of victims.¹²⁵ The Vienna Convention,

120 Aldridge (2009: 93).

121 Williams (2003: 109).

122 Williams (2003: 109).

123 Williams (2003: 110).

124 Williams (2003: 110).

125 See for example Article 5(4) of the Vienna Convention, Article 54 of UNCAC..

for examples, obligates also the States Parties to conclude bilateral and multilateral treaties, agreements, or arrangements to enhance smooth co-operation.¹²⁶

3.6.1 Co-operation in asset forfeiture

Due to the cross-border movement of illicit property, the international legal framework obligates states to give each other assistance in the confiscation of illicit property that is in their territory.¹²⁷

The emergence of the conventions helped to alleviate the way the divergence of legal systems affected co-operation in asset forfeiture issues. The specific inclusion of civil forfeiture in UNCAC, for example, was an effort to address the problem encountered in the past, where states could provide legal assistance and co-operation in criminal matters only, but not in civil cases.¹²⁸ Requests from countries that have civil forfeiture, such as the USA, could face co-operation problems from countries whose legal systems do not recognise civil forfeiture because they would lack the legal basis to make or enforce civil forfeiture orders.¹²⁹ This explains why civil forfeiture was included under the provision on international co-operation in UNCAC.¹³⁰

If all States Parties to UNCAC have civil forfeiture provisions in their laws as anticipated by the Convention, co-operation on forfeiture would not be limited to criminal forfeiture orders alone. However, as stated earlier, the shortcoming of UNCAC in this regard is that it does not make the adoption of civil forfeiture

126 Article 5(4)(g) of the Vienna Convention.

127 Article 5(4) of the Vienna Convention.

128 Greenberg *et al* (2009: 19) referring to Legislative Guide for UNCAC (2006) Para 522.

129 Zagaris (1991: 449).

130 Article 54 of UNCAC.

mandatory for its signatories.¹³¹ The casual approach of UNCAC in this respect is costly, bearing in mind the possible obstacles the exclusion of civil forfeiture in any country's legal system may have on international co-operation, as explained earlier. UNCAC failed to seize the opportunity to deal with divergences of legal traditions that hamper cooperation, by not making the adoption of civil forfeiture mandatory.

3.6.2 Investigative co-operation

Due process requirements such as service of *ex parte* orders on defendants usually make investigative information available to the public.¹³² This alerts defendants that forfeiture proceedings have been instituted, and causes them to move forfeitable assets to other countries.¹³³ This necessitates that the investigating state should rely on the assistance of other countries to locate the moved assets.¹³⁴ Thus, requested states ought to render a requesting state some investigative assistance in the identification, tracing, freezing, or seizing of forfeitable property. For this reason, the FATF encourages international co-operative investigations among competent and relevant authorities.¹³⁵ Furthermore, the conventions such as the Vienna Convention, obligate their States Parties to authorise their courts or other competent authorities to order the seizure and production of bank, financial, or commercial records.¹³⁶ When requested, each State Party is precluded from declining to render any assistance on account of bank secrecy laws.

131 Article 54(1)(c) of UNCAC.

132 Zagaris (1991: 489).

133 Zagaris (1991: 489).

134 Zagaris (1991: 489).

135 FATF Recommendation 38. Also FATF Best Practices Paper (2012: 3).

136 Article 5(3) of the Vienna Convention.

3.6.3 Co-operation in the return of forfeited property

The vulnerability of the international financial systems is an avenue through which corrupt officials, for example, seek to insulate themselves and their assets from detection and recovery.¹³⁷ The UNCAC recognises the importance of international co-operation in the return of assets to victim states.¹³⁸ UNCAC emphasises further in its Preamble that States Parties are “determined to prevent, detect, and deter in a more effective manner international transfers of illicitly acquired assets and to strengthen international co-operation in asset recovery”. This statement reflects an understanding that the abuse of international financial systems and jurisdictional boundaries between states is a particular danger to the combating of crimes whose proceeds are usually transferred and invested in foreign countries.¹³⁹ Victim states will therefore rely on the cooperation of foreign jurisdiction in the return of forfeited property.



3.6.4 State as a claimant or plaintiff in forfeiture proceedings

Another novelty seen in UNCAC is its provision that a state may participate as a private litigant in the courts of another state in order to recover proceeds of corruption. It may do so in its capacity as a plaintiff in its own action, as a claimant in a forfeiture proceeding, or as a victim for purposes of court-ordered restitution.¹⁴⁰ These are referred to as measures for direct recovery of property.¹⁴¹

These remedies and mechanisms comprise the second core principle of UNCAC, whose emphasis is on self-help. Under the self-help principle, UNCAC seeks to

137 Claman (2008: 334).

138 Article 51 of UNCAC.

139 Claman (2008: 334).

140 Article 53 of UNCAC.

141 See the heading of Article 53 of UNCAC.

empower States Parties to take action on their own to protect themselves from high-level official corruption and recover the proceeds of crime.¹⁴² This becomes useful and convenient in cases where mutual legal assistance would be hampered by the complexity of a case; or due to divergences in the legal traditions for different countries, which would result into denial, delays or complications in the traditional mutual legal assistance.¹⁴³

The self-help asset recovery is done in the three ways. First, in order to allow a state to be involved as a plaintiff, each State Party is obliged to permit another state to establish title to, or ownership of property acquired through the commission of an offence established in the Convention.¹⁴⁴

Secondly, in order to make it possible for another state to make a claim as a victim, each State Party is obliged to permit its courts to order those who have committed offences established in the Convention to either pay damages or compensation to another State that has been harmed by such offences.¹⁴⁵

Lastly, when having to decide upon the forfeiture of stolen property, each State Party is obliged to permit its courts or competent authorities, to recognise another State Party's claim as a legitimate owner of property acquired through the commission of an offence established in the Convention.¹⁴⁶ This provision resonates with Nozick's rectification of injustice principle. The legitimate owner must get back their property. It has an upper claim in the confiscated property than any other

142 Claman (2008: 338).

143 Claman (2008: 338).

144 Article 53(a) of UNCAC.

145 Article 53(b) of UNCAC.

146 Article 53(c) of UNCAC.

state. It would be unfair and unjust if the confiscating country ignores the interests of the legitimate owner.

In essence, Article 53 is calling upon States to open up their courts and systems to allow foreign governments to come and act as private litigants, a thing that could not always happen in the past before UNCAC came into force. This Article is therefore unique among property-related provisions in criminal law conventions because it provides civil remedies and other mechanisms for asset recovery that are outside the traditional mutual legal assistance and forfeiture.¹⁴⁷ However, Claman is sceptical about the practicality of this provision. He argues that it may fail if states sense that pursuing their claims and litigating them in foreign tribunals would open their governments to potential civil discovery, or may constitute a waiver of sovereign immunity.¹⁴⁸



3.7 Management and disposal of confiscated assets

An effective and just asset forfeiture system requires not only the enactment of the necessary law, or the making of forfeiture and provisional orders. It requires also the setting up of organisational infrastructure to handle practical issues that arise when handling seized, frozen and forfeited property.¹⁴⁹ These practical issues include the custody, safe storage, management and disposition of forfeited property. Asset management ensures the preservation of the value of forfeitable assets.¹⁵⁰ The realisation of the deterrent and reparative aims of assets forfeiture is dependent on the preservation and proper management of property until its

147 Claman (2008: 341).

148 Claman (2008: 341).

149 Greenberg *et al* (2009: 85).

150 G8 Best Practices for the Administration of Seized Assets (2005: 1).

disposal. Victims can only be compensated if there is property to give them by the time their compensation is determined. The state must make the aims of asset forfeiture paramount, and consequently, seize and manage forfeitable assets, in all cases.¹⁵¹

Apart from UNCAC and the AU Convention, none of the other conventions provide expressly for the administration of seized and frozen assets. UNCAC is the first Convention to obligate States Parties to adopt, in accordance with their domestic law, legislative and other measures that may be necessary to regulate the administration by competent authorities of frozen, seized or confiscated property.¹⁵² This is a novel obligation, which recognises that if property is not managed well after it is seized or frozen, that would affect the value of property that is liable to forfeiture.

After UNCAC, the AU Convention also included a provision on the administration of frozen or seized instrumentalities and proceeds of corruption, pending a final judgment.¹⁵³ However, unlike UNCAC, the obligation in the AU Convention does not apply to confiscated assets. This is a weakness, because it ignores the need for further management of assets pending their final disposition, after the making of a confiscation order.

3.7.1 Disposal of assets confiscated domestically

So what must the state do with confiscated assets? The Vienna Convention obligates States Parties to dispose of confiscated assets according to its domestic

151 G8 Best Practices for the Administration of Seized Assets (2005: 1).

152 Article 31(3) of UNCAC.

153 Article 16(1)(a) of the AU Convention.

law and administrative procedures.¹⁵⁴ The Palermo Convention¹⁵⁵ and the SADC Protocol bear similar provisions.¹⁵⁶ When exercising their discretion on how to dispose of confiscated property, states must remember the tenets of the social contract. They ought to determine the disposition of confiscated assets for the public good.

The FATF encourages states to consider establishing an asset forfeiture fund in which all or part of confiscated assets will be deposited for law enforcement, health, education, or other appropriate purposes.¹⁵⁷ It goes further to recommend that even in the absence of an asset forfeiture fund; states should endeavour to use confiscated assets transparently to fund projects that further the public good.¹⁵⁸

Another aspect worthy examining is the issue of sharing confiscated funds with law enforcement agencies. Countries such as the USA share confiscated property with law enforcement agencies as an incentive for them to pursue asset forfeiture vigilantly.¹⁵⁹ However, this practice has been criticised for adding another rationale for asset forfeiture, *i.e.* money-making mechanism for law enforcement agencies.¹⁶⁰ It may compromise the legitimacy of asset forfeiture to a certain extent, as one could question whether law enforcers are pursuing the proceeds of crime in pursuit of deterrence or reparation of victims, or for their own private interests.

154 Article 5)(5)(a) of the Vienna Convention.

155 Article 14 (1) of the Palermo Convention.

156 Article 8 (6) of the SADC Protocol.

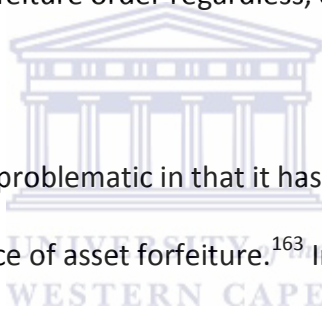
157 See best Practices on Confiscation (2012: 7). See also Interpretive Notes to the Forty Recommendations on Recommendation 38 (2012: 6).

158 See Best Practices on Confiscation (2012: 7). See also Interpretive Notes to the Forty Recommendations on Recommendation 38 (2012: 6).

159 Van der Berg (2015: 891).

160 Stessens (2000: 56-58). See also Zalman (1996: 207).

The best way is for the confiscated assets go to the general public fund, which ensures the people that individual law enforcement departments would no longer use asset forfeiture as a way of supplementing their budgets.¹⁶¹ Can asset sharing with the law enforcement be justified with John Locke's framework? Does it not make law enforcers judges in their own cases? Zalman suggests that we must ask first if such asset sharing is for the public good. If the answer is no, he adds, then it becomes an arbitrary invasion of citizens' rights.¹⁶² Perhaps, one could argue, that there is no need to worry about sharing forfeited assets with law enforcement agencies because in any case, the punitive goals of asset forfeiture are achieved upon the making of a forfeiture order regardless, of how the assets are used in the end.



Notably, asset sharing is problematic in that it has the potential of clouding the public good of the practice of asset forfeiture.¹⁶³ In addition, does the natural law principle that no one should be a judge in their own case provide a basis for the constitutional challenge of asset sharing? Zalman answers that there is no constitutional objection to asset sharing.¹⁶⁴ Nevertheless, it flouts a natural law principle which prohibits one from being both a party and a judge in one case.

The allocation of government departments' budgets is decided by parliament, hence, asset sharing that bypasses this process is wrong, as it gives the police power beyond what it has. On this understanding, a principled legislature ought to

161 Zalman (1996: 207).
162 Zalman (1996: 218).
163 Zalman (1996: 219).
164 Zalman (1996: 221).

reject asset sharing with law enforcement authorities.¹⁶⁵ The parliamentary budget process and the lack of direct incentive to forfeit would help to limit asset forfeiture's aims at crime reduction and reparation, and would avoid objections from John Locke's point of view.¹⁶⁶

Be that as it may, asset-sharing seems to have its own advantage to the success of international cooperation. In the reality of law enforcement authorities being bribed by offenders not to touch their illicit property, giving the authorities an incentive through asset sharing may help in achieving smooth cooperation.¹⁶⁷

3.7.2 Disposal and return of property confiscated in a foreign country

The exportation of criminal assets has serious or even devastating consequences for the state of origin.¹⁶⁸ As a result, the confiscation and return of criminal assets has become a pressing concern for many states.¹⁶⁹ This, then, calls for an effective and deterrent global response that would address the issue of asset return to victimized states or other parties.¹⁷⁰

What does the international legal framework say about the return of confiscated assets to victim states? The Vienna Convention does not provide specifically for the return of confiscated assets to victim states. Instead, it states that countries may consider entering into *ad hoc* agreements on contributing confiscated assets to intergovernmental bodies that specialise in the fight against drug offences, or

165 Zalman (1996: 221).

166 Zalman (1996: 221).

167 Zagaris (1991: 506).

168 UNCAC Legislative Guide (2006: 229). The effects include; It undermines foreign aid, drains currency reserves, reduces the tax base, increases poverty levels, harms competition and undercuts free trade.

169 UNCAC Legislative Guide (2006: 229).

170 UNCAC Legislative Guide (2006: 229).

sharing them with other states.¹⁷¹ Perhaps the Convention does not make the return of confiscated proceeds of drug-trade mandatory because the victim state cannot claim legitimate ownership of such proceeds, as it would in cases such as embezzlement of public funds. However, its victim status ought to be recognised, taking into account the negative effects of drugs on its people. Thus, the return of the proceeds of drug-dealing to the victim state ought to be prioritised over the suggestion to contribute confiscated proceeds to inter-governmental organisations.

Furthermore, the Palermo Convention stipulates that a requested state must give priority to returning the confiscated property or proceeds of crime to the requesting state, so that it can pay compensation to victims or return them to their legitimate owners.¹⁷² However, the requested State can do this only to the extent permitted by its domestic law, and if it is so requested. This means that if there is no request for the return of the proceeds or property, by the State that sent the confiscation request, then the requested party can keep them or dispose of them domestically, as it deems fit.

Given that the Palermo Convention prioritises the return of confiscated proceeds so as to compensate victims, this priority is weakened by the fact that the Convention does not make the return of confiscated proceeds mandatory. There ought to be a pro-active return of confiscated assets on the part of the confiscating state, without an option of holding on to them just because there is no request for their return. Failure to repatriate proceeds of crime to victims, defeats the compensatory purpose of the confiscation in the first place. The restoration of property to victims

171 Article 5(5)(b) of the Vienna Convention.

172 Article 14 (2) of the Palermo Convention.

must be prioritised when it comes to the disposal of forfeited property.¹⁷³

Nevertheless, one could argue that victim states ought to be vigilant in making requests for the return of confiscated property, for the sake of doing justice to victims of crime through compensation. Any government that is keen on compensation of victims of crime among its people should be pro-active in making requests for the repatriation of criminal proceeds.

In addition, the Palermo Convention states that if the requested state does not return confiscated property to a victim state, it may contribute them to a Special Fund, which is a designated UN account.¹⁷⁴ The requested state may also make a contribution from the confiscated assets to intergovernmental bodies specialised in the fight against organised crime.¹⁷⁵ The arguments made earlier in relation to a similar provision under the Vienna Convention, apply here also. There may be no state to claim legitimate ownership in proceeds of certain crimes unlike embezzlement, and it may be difficult to assess its victim status. Going further, the AU Convention obliges States Parties to adopt legislative measures as may be necessary to enable repatriation of proceeds of corruption.¹⁷⁶ This is commendable.

Notably, UNCAC makes a distinction when it comes to the return of forfeited property that relates to embezzlement and the laundering of embezzled public funds on one hand, and the return of proceeds of any other offence covered by the Convention. It obligates the requested state to return confiscated proceeds of

173 Cassella (2009: 31).

174 Article 30(2)(c) of the Palermo Convention.

175 Article 14(3)(a) of the Palermo Convention.

176 Article 16(1)(c) of the AU Convention.

embezzlement to the requesting state.¹⁷⁷ In this, UNCAC recognises that embezzlement proceeds must be returned to the rightful owner, which is the victim state.¹⁷⁸ The forfeiture and return of embezzlement proceeds would “contribute greatly to the reparation of harm and reconstruction efforts in victim States”.¹⁷⁹ It will also contribute to the prevention of grand corruption by conveying the message that dishonest public officials can no longer hide their illegal gains anywhere across the globe because the arms of the law will catch their criminal assets anywhere.¹⁸⁰

In addition, UNCAC states that in all other cases, priority consideration should be given to returning confiscated property to the requesting state for purposes of returning such property to its prior legitimate owners or compensating the victims of crime.¹⁸¹ However, a requested state can return the property to a requesting State on two conditions. First, the requesting state must establish reasonably its prior ownership of the confiscated property.¹⁸² Second, confiscated property can be returned if the requested state recognises the damage the crime has occasioned to the requesting state. In this regard, UNCAC recognises that a state may suffer damage, and that such damage must be recognised by the requested state if its laws permit.¹⁸³

177 Article 57 (3) (a) of UNCAC. This must be the case if forfeiture was executed in accordance with Article 55, and on the basis of a final judgment made in the requesting state. However, this requirement is not cast in stone because it can be waived.

178 Claman (2008: 345).

179 UNCAC Legislative Guide (2006: 266) Para 674.

180 UNCAC Legislative Guide (2006: 266) Para 674.

181 Article 57(c) of UNCAC.

182 Article 57 (3) (b) of UNCAC.

183 Claman (2008: 345).

In reference to the totality of its Article 57, UNCAC has brought a new approach to the return of confiscated property. It is a break-away from the tradition reflected in the Vienna and Palermo Conventions, where the requested state has the ultimate control and discretion over forfeited property, regardless of whether the forfeiture judgment was issued by its own authorities or by a foreign tribunal.¹⁸⁴

However, returning confiscated assets becomes tricky in cases where the assets must be returned to a state that is controlled by corrupt public officials.¹⁸⁵ In such cases, there is likelihood that upon their return, the assets will be misused or stolen by corrupt government officials.¹⁸⁶ Can such a return be said to be in the interests of the people? No, it is not. So what must confiscated assets be used for in such cases? Others have suggested that before the return of assets in such situations, states should enter into agreements that the assets should be used to settle state debts with international institutions, or to use them for specific expenditure that addresses the plight of poor and vulnerable people.¹⁸⁷ Nevertheless, this attracts considerable criticism such as “the legitimacy of the debts being reimbursed, good governance imposed from afar or the financing of development programs with criminal money”.¹⁸⁸

3.7.3 Asset sharing

The international legal framework introduced an asset-sharing scheme, where the requested state shares the confiscated assets with the requesting state. In this regard, the UNCAC, Vienna and Palermo Conventions encourage the

184 Claman (2008: 345).

185 Schmid (2008: 236).

186 Smith (2010: 34).

187 Schmid (2008: 236).

188 Schmid (2008: 236).

sharing of confiscated assets on a case by case basis.¹⁸⁹ Similarly, the SADC Protocol provides for asset sharing. It states that once a state has confiscated property or proceeds, it may transfer all or part of that property to another State Party that helped with the underlying investigation or proceeding.¹⁹⁰ Similarly, the FATF recommends that states should consider taking measures that will enable them to share the recovered assets.¹⁹¹

Sharing assets with a country which helped with investigation is a reasonable thing to do. It would encourage investigative cooperation, because the assisting states will have the incentive that their investigative expenses will be reimbursed.

3.7.4 Deduction of expenses from forfeited property

Apart from asset sharing, UNCAC recognises further the expenses that a requested state would incur ordinarily when executing a confiscation order of foreign assets placed in its jurisdiction. The Convention permits the requested state to deduct from the confiscated assets, the value of expenses it incurred during the process.¹⁹²

This refers to expenses that are incurred during investigation, prosecution or any judicial proceedings that lead to the confiscation of assets.

In as much as the recognition of expenses is commendable, it raises questions regarding the competing interests that arise at the asset disposal stage. These are the interests of the requested state to recover its expenses on the one hand, and interests of the requesting state to recover the illicit property in whole, on the

189 Article 5(5)(b)(ii) of the Vienna Convention; Article 14(3)(b) of the Palermo Convention and Article 57(5) of UNCAC. UNCAC stipulates that States Parties may enter into asset disposal agreements on case by case basis. This may include asset sharing agreements.

190 Article 8 (6) of the SADC Protocol.

191 Interpretive notes to the Forty Recommendations, on Recommendation 38 at 6.

192 Article 57(4) of UNCAC.

other hand. In relation to the need to compensate victims of crime, it becomes questionable whether the deduction of expenses from the forfeited property would not have a negative impact on the reparative purpose of asset forfeiture, since the deduction would affect the value of the property, thereby affecting the amount that victims receive in compensation.

The same argument can be raised in cases where the requesting state itself is a victim of embezzlement. UNCAC obligates its states parties to return property recovered on account of embezzlement, because the victim state is the legitimate owner of embezzled funds. This is a mandatory obligation. However, when it comes to the provisions on the return of forfeited property, UNCAC does not make an exception that requested states must not deduct expenses from property that constitutes the proceeds of embezzlement. This waters down the reparative spirit expressed in UNCAC's provision on the mandatory return of proceeds of embezzlement.

3.7.5 A proposed asset management framework

Even though the conventions suggest a general framework for asset management, they do not provide a detailed outline on how states must implement the asset management obligation. The development of a detailed framework is left to the discretion of each state, according to their legal systems. Nevertheless, the FATF, the G8 countries and the World Bank have proposed models for an asset management framework which complements the aims of asset recovery. Such a framework ought to have the characteristics outlined below.

3.7.5.1 Establishing an asset management authority

The FATF proposes that states should develop a framework for managing or overseeing the management of frozen, seized and confiscated property.¹⁹³ The purpose for such a framework is to preserve “the economic value of assets in an efficient, transparent, and flexible manner”.¹⁹⁴ The starting point for setting up such a framework is the enactment of the relevant law and regulations.¹⁹⁵ There should be measures in place to care for and preserve as far as practicable assets such as vehicles, livestock, or real estate which may require ongoing maintenance, control, and management.¹⁹⁶ The framework should, therefore, include legal authority to preserve and manage such property.¹⁹⁷

In addition, states must appoint designated authorities responsible for managing or overseeing the management of assets.¹⁹⁸ The appointed authorities should have the capacity to provide immediate support and advice to law enforcement authorities, and subsequently handle all practical issues in relation to freezing and seizure of property.¹⁹⁹ Ideally, they should have sufficient skills and expertise to manage any type of property.²⁰⁰

193 FATF Best Practices Paper on Confiscation (2012: 10).

194 Brun (2011: 91).

195 Brun (2011: 91).

196 Brun (2011: 91).

197 FATF Best Practices Paper on Confiscation (2012: 10).

198 Brun (2011: 91).

199 FATF Best Practices Paper on Confiscation (2012: 10).

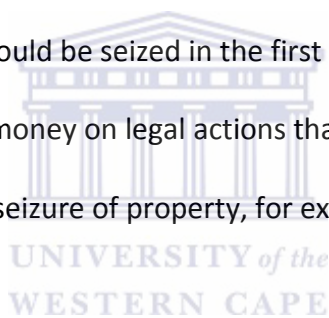
200 Brun (2011: 92). FATF Best Practices Paper on Confiscation (2012: 10).

3.7.5.2 Resources

The asset management process attracts significant costs that arise through actions such as tracing, restraining, and management of assets.²⁰¹ Thus, states must put aside sufficient resources in place to cover all aspects of asset management.²⁰²

3.7.5.3 Planning

Law enforcement authorities must not freeze or seize property without a clear purpose for doing so. They must plan for such actions.²⁰³ Planning helps relevant authorities to identify specific actions they need to take in order to secure the custody of targeted property.²⁰⁴ The planning would also assist in determining whether the property should be seized in the first instance.²⁰⁵ This would help the state to avoid spending money on legal actions that may emanate from unnecessary freezing or seizure of property, for example.



3.7.5.4 Legal powers

There should be statutory authority to permit a court to order a sale of seized and frozen property, with the consent of the owner, in cases where the property is perishable or rapidly depreciating.²⁰⁶ The authority must be able to sell property that is too burdensome to manage.²⁰⁷ However, the power to put such property up

201 Brun (2011: 102).

202 Brun (2011: 92. See also FATF Best Practices Paper on Confiscation (2012: 9).

203 FATF Best Practices Paper on Confiscation (2012: 9).

204 Greenberg *et al* (2009: 86).

205 G8 Best Practices for the Administration of Seized Property (2005: 2).

206 Brun (2011: 91).

207 G8 Best Practices for the Administration of Seized Property (2005: 3).

for sale must be accompanied with the possibility to compensate property owners should the court refuse to make a forfeiture order.²⁰⁸

Further, asset managers must be permitted to destroy property that is not suitable for public sale.²⁰⁹ They must also be allowed to run businesses that are subject to confiscation, and this should include the power to hire and fire employees for the business.²¹⁰

3.7.5.5 Transparency

Transparency is an important aspect of the asset management framework.²¹¹ In order to enhance transparency, accountability and the effectiveness of the asset management system, the relevant authorities must keep appropriate records (an inventory) of frozen, seized and confiscated property.²¹² The inventory should contain information such as the whereabouts, value, condition and status of litigation.²¹³ Further, the inventory must contain records of the ultimate disposition of property.²¹⁴ In the case of a sale, the records must indicate the value of the money that has been realised.

The assessment of seized or frozen property is important in making sure that its value is preserved until the forfeiture proceedings are completed.²¹⁵ This can guard

208 Nikolov (2011: 24).

209 FATF Best Practices Paper on Confiscation (2012: 10). This includes property that is likely to be used as an instrumentality for further criminal activity; constitutes contraband or that is a threat to public safety.

210 Brun (2011: 92).

211 Brun (2011: 99-108).

212 Brun (2011: 94). FATF Best Practices Paper on Confiscation (2012: 10).

213 Greenberg *et al* (2009: 87).

214 Greenberg *et al* (2009: 87).

215 Greenberg *et al* (2009: 87).

against subsequent claims that assets were damaged in the hands of the asset management authority.²¹⁶

Ultimately, there must be an authority responsible for the inspection of the inventory, and the results of the inspection must be made public.²¹⁷

3.7.5.6 Management of foreign assets

In order to enhance international co-operation in cases where assets are frozen or seized in a foreign country, asset managers in both countries ought to cooperate so as to maintain the value of the targeted property.²¹⁸ The authority in the requested state ought to be empowered to enforce foreign court orders, such as restraint or confiscation orders. One challenge with such co-operation is that the requested state may not have the legal basis for the restraint or seizure of certain assets. This may mean that the asset management object would collapse. Further, the requested state might not have the resources for asset management.²¹⁹ This may be resolved by entering into *ad hoc* agreements with the requesting state.

3.7.5.7 Disposal of property

Countries must also develop clear procedures for the disposal of confiscated property.²²⁰ In order to secure the preservation of property interests of the people, states ought to take responsibility for any damages that need to be paid, following legal action by an individual in respect of loss or damage to property.²²¹

216 Brun (2011: 94).

217 G8 Best Practices Paper on the Administration of Seized Property (2005: 2).

218 Brun (2011: 94).

219 Brun (2011: 99).

220 FATF Best Practices Paper on Confiscation (2012: 10).

221 FATF Best Practices Paper on Confiscation (2012: 10).

3.7.5.8 Convenience of civil forfeiture in asset management

Given the possibility that certain property is perishable and therefore demands immediate disposal and that asset management is costly, this thesis submits that the state can circumvent these challenges through the use of civil forfeiture. The argument is that since civil forfeiture is not based on a conviction, the state would not have to manage property until the conclusion of a criminal trial. In contrast with criminal forfeiture, therefore, civil forfeiture “allows for the management of seized property after dispossessing the owner, including the possibility for the property to be sold by the government before final judgement is passed”.²²²

3.8 Third party rights

In addition, the international legal framework on asset forfeiture recognises the need to achieve the purposes of forfeiture without trampling upon the rights of innocent people. This is evident in the Palermo Convention, for example, where it stipulates that the provisions on asset forfeiture shall not be construed to prejudice the rights of *bona fide* third parties.²²³ The same principle was emphasised in the Vienna Convention,²²⁴ the FATF Recommendations,²²⁵ and UNCAC.²²⁶

3.8.1 Third party rights in proceeds of crime

Asset forfeiture results often in the interference with economic rights of the people. Therefore, States Parties to the different conventions are urged to ensure

222 Nikolov (2011: 24).

223 Article 12(8) of Palermo Convention.

224 Article 5(8) of the Vienna Convention.

225 FATF Recommendation 4.

226 Article 31(9) of UNCAC.

that their asset forfeiture systems should respect the rights of *bona fide* parties who have interests in the property that is liable to forfeiture.²²⁷

Object-based confiscation, for instance, targets illicit property regardless of who has it in their possession. By the time a forfeiture order is made, the property might be in possession of an innocent third party or a *bona fide* owner.²²⁸ This then calls for the protection of third party rights, to make sure that the innocent do not lose their property rights.

Furthermore, the fact that value-based forfeiture is made only against an offender who must pay the value of the evaluated proceeds of crime either from his funds or through the sale of his assets means that the forfeiture order cannot apply to property which has been acquired by *bona fide* third parties. But what happens if an offender transfers his property to a third party deliberately as a way of concealing it from law enforcement, to the extent that there is no more property in his name to satisfy a forfeiture order?

Robert Nozick's justice in transfer principle provides guidance on how the law must approach such transfers. According to Nozick, a transfer of proceeds of crime would be unjust because its acquisition was unjust, *i.e.* through criminality.²²⁹ Thus, property rights cannot pass to a third party, if the person making the transfer has no title in the property in the first place, because he earned the property through criminal acts and not a legitimate source or activity. But what if the third party is a *bona fide* purchaser? Is it not unjust to

227 UNCAC Legislative Guide (2006: 140) Para 424.

228 UNCAC Legislative Guidance (2006: 94).

229 Younkins April 27, 2002 / No 102.

rectify the injustice in acquisition or transfer, when the rectification will lead to the injustice of depriving an innocent third party who had no knowledge of the criminal nature of the property? Yes, it is unjust.²³⁰ The key word here is '*bona fide*'. The third party must be *bona fide*.

In order to avoid occasioning more injustice through asset forfeiture, the international legal framework offers protection for the interests of innocent third parties who had no knowledge of the illicit nature of property, at the time of its transfer or acquisition.²³¹ Requiring proof of a third party's knowledge of the illicit nature of property serves to balance the interests of the third parties to retain the property, with interests of the public to disgorge illicit proceeds.

On one hand, the requirement makes sure that innocent third parties are not deprived of their property. This is an enforcement of the retributive principle which ensures that punishment must be imposed on offenders only and not innocent people. On the other hand, the requirement serves to ensure that third parties do not co-operate with criminals so as to keep criminal proceeds out of reach of the law on asset forfeiture. The public's notion of justice would not be offended if such a third party is punished through asset forfeiture for receiving illicit property knowingly.²³²

Additionally, third parties may be liable for money laundering if the state proves that at the time of its transfer, they knew or had reason to suspect

230 Zagaris (1991: 502).

231 Article 31(9) of the UNCAC, Article 12(8) of Palermo Convention, Article 5(8) of Vienna Convention, FATF Recommendation 4.

232 Zagaris (1991: 502).

that the property in question was tainted. That way, the transferred property may still be liable to forfeiture as laundered property.²³³ Further, the state must have laws that permit it to void the transfer or sale contract between the offender and the third party, if it proves that the third party knew that it was tainted at the time of the transfer.²³⁴

All in all, it would be ideal for a country to adopt both value-based and object-based models, and to use them as situations demand, as long as property of the innocent is spared.

3.8.2 Third party rights in instrumentalities of crime

It may so happen that an offender uses another person's property as an instrumentality in a crime. This is why the international legal framework obligates states to ensure that the interests of such third parties are safeguarded during asset forfeiture proceedings.²³⁵

One must remember, nonetheless, that in criminal forfeiture, the state can only target property which belongs to an offender.²³⁶ This is because criminal proceedings are limited to the interests of a defendant, and do not concern the interests of people who are not party to the proceedings. In civil forfeiture, however, the proceedings are made against anyone's property, as long as the state can prove that it was used or intended to be used as an instrumentality of crime.

233 UNCAC Legislative Guidance (2006: 94). FATF Recommendation 4.

234 Cassella (1996: 5).

235 Article 31(9) of the UNCAC, Article 12(8) of Palermo Convention, Article 5(8) of Vienna Convention and FATF Recommendation 4.

236 Cassella (1996: 4).

This gives civil forfeiture a wider scope, and renders it advantageous over criminal forfeiture, as far as the scope of forfeitable property is concerned.

But then again, in a bid to avoid forfeiture, offenders may transfer instrumentalities to third parties soon after committing a crime. Such property may be forfeitable, if the state proves that the transfer was a sham and that the offender is still the true owner.²³⁷ In addition, the state must be able to void the transfer contract between the offender and the third party, if it proves that the third party knew that it was tainted at the time of the transfer.²³⁸ Further, they may use other people's property deliberately, knowing that the property will not be liable to forfeiture because it does not belong to them. Again, the innocence of the third party is crucial. The protection of third party interests must not apply to those who had knowledge of the property's criminal use.

In case of co-owned property which has been used as an instrumentality, the state can confiscate the property but allow the co-owner party to claim their interest.²³⁹

This will ensure that the innocent co-owner is not deprived of their property arbitrarily. However, the innocent co-owners must establish their innocence first before their interests are spared from forfeiture.

3.8.3 Third party rights in international co-operation

In addition, the international legal instruments recognise the need to protect the interests of third parties when enforcing asset forfeiture orders across borders.

They state that the facilitation of smooth international co-operation in asset

237 Cassella (1996: 5).

238 Cassella (1996: 5).

239 Cassella (1996: 5).

forfeiture must not be construed to prejudice the rights of *bona fide* third parties.²⁴⁰

In addition, UNCAC emphasises that States Parties must put in place legislative and other measures that will facilitate the return of forfeited property to a requesting state, while taking into account rights of *bona fide* third parties.²⁴¹

These legal instruments, do not, however, specify to what extent third parties should be provided with effective legal remedies in order to preserve their rights, and this is a task left for each country to determine.

3.8.4 Third party rights in asset management

Countries must have measures to address the individual's and third party rights throughout the asset management process.²⁴² The law should allow third parties with interests in seized or frozen property to carry on with the exercise of their rights pending confiscation. This may include allowing a third party to continue conducting a business, or allowing a tenant to continue occupying a house that is subject to provisional orders.²⁴³

3.9 Conclusion

The international legal framework provides an adequate basis for a just and fair asset forfeiture framework. It is human rights-centric, as it implores states to uphold the rights of innocent people throughout the asset forfeiture process, so as to avoid the arbitrary deprivation of their property rights.

240 Article 13 (8) of the Palermo Convention.

241 Article 57 (2) of UNCAC.

242 FATF Best Practices Paper on Confiscation (2012: 10).

243 G8 Best Practices Paper (2005: 4).

The international framework recognises the importance of international co-operation in asset recovery. It also emphasises the need to return confiscated assets as compensation to individual victims and victim states, and it acknowledges the need to adopt measures that are sufficient to deter criminals from engaging in economic crimes. To this extent, the framework advances the mixed theory of punishment, whose aim of punishment is twofold: deterrence and reparation of victims. The protection of innocent people's rights constitutes the role of retribution in the achievement of a just asset forfeiture framework. The wide scope of forfeitable property as well as the management of forfeitable property is relevant for the determination of proportionate forfeiture orders.

However, the international legal framework is weak, for it does not obligate every country to adopt civil forfeiture. This oversight excludes the recovery of illicit property that is in the names of people who cannot be prosecuted. This thesis argues that the international community cannot fight economic crimes successfully without civil forfeiture, given the advantages and convenience it offers.

Another pitfall in the international legal framework is that it does not devote much attention to the administration of seized, frozen and confiscated property. The objectives of asset recovery, such as compensation of victims, would not be achieved if the condition or value of restrained property is compromised due to mismanagement. Further, the mismanagement of restrained or confiscated assets has the effect of raising public doubt whether asset forfeiture laws are indeed being implemented in the interests of the public.

CHAPTER FOUR

LEGAL AND INSTITUTIONAL FRAMEWORKS ON MONEY LAUNDERING AND ASSET FORFEITURE IN MALAWI

4.1 Introduction

A good anti-money laundering system demands a good and robust asset confiscation regime.¹ This is because asset confiscation ensures that illicit property, which is often laundered, is taken away from criminals. The international legal framework for asset forfeiture and money laundering discussed in the previous chapter, forms the basis on which Malawi should build its anti-money laundering and asset forfeiture regime. Malawi is a State Party to the international legal instruments discussed in Chapter Three.² These are:

- a. The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988 Vienna Convention),³
- b. The United Nations Convention against Transnational Organised Crime (Palermo Convention),⁴
- c. The United Nations Convention against Corruption (UNCAC),⁵

1 FATF Best Practices Paper on Confiscation (Recommendation 4 and 38) and On-going Work for Asset Recovery (2012).

2 Malawi being a dualist system, these international legal instruments become binding law only upon being domesticated through an enabling Act of Parliament. See Section 211(1) of the Constitution of the Republic of Malawi.

3 Adopted on 20 December 1988 in Vienna. Entered into force on 11 November 1990. Ratified on 12 October 1995.

4 Adopted on 15 November 2000. Entered into force on 29 September 2003. Ratified by Malawi on 17 March 2005.

5 Adopted on 31 October 2003. Entered into force on 14 December 2005. Ratified by Malawi

- d. The Financial Action Task Force (FATF) Recommendations,⁶
- e. The African Union Convention on Preventing and Combating Corruption (AU Convention);⁷ and
- f. The Southern African Development Community Protocol against Corruption (SADC Protocol).⁸

These instruments obligate their States Parties to criminalise money laundering as well as all economic crimes that constitute predicate offences for money laundering. They also obligate States Parties to ensure the establishment of specialised institutions and systems for the combating of crime and for the recovery of illicit property. The success of Malawi's anti-money laundering efforts requires the establishment of money laundering as an offence. It requires also a proper system for the recovery of laundered and other illicit property property, among other efforts.

This chapter discusses the legal and institutional frameworks for asset forfeiture and the combating of money laundering in Malawi. It will examine the what extent to which they meet the standards set by the international legal framework. Further, the discussion will assess if the current legal framework sticks to the boundaries of the social contract, so as to avoid occasioning injustice on the people of Malawi. This thesis continues to emphasise that asset forfeiture must aim at

on 4 December 2007.

6 Revised version published in February, 2012.

7 Adopted on 11 July 2003. Entered into force on 5 August 2006. Ratified by Malawi on 26 November, 2007.

8 Adopted on 14 August, 2001. Entered into force on 6 July, 2005. Ratified by Malawi on 27 September, 2002.

achieving deterrence and victim compensation, while applying retributive constraints in order to avoid disproportionate forfeitures, or the forfeiture of innocent people's property. It should be noted, from the onset, that the laws of Malawi use the concepts of forfeiture and confiscation interchangeably.

4.2 Anti-money laundering legal framework

Does Malawi really need a vibrant anti-money laundering framework or is it supposed to have one just because it is a State Party to conventions that make the criminalisation of money laundering mandatory? The answer is yes, Malawi needs this framework because money laundering is a big problem it must deal with. A recent Typologies Study conducted by the Malawi Financial Intelligence Unit revealed that, currently, there is significant laundering of proceeds of four major predicate offences. These are fraud, corruption, tax evasion and trade-based money laundering.⁹ Trade-based money laundering involves manipulation of the stated price, quantity, quality, or type of goods shipped, in order to distort the value of the shipment.¹⁰ This enables importers and exporters to move large amounts of money internationally without a transaction record.¹¹

Generally, the government of Malawi loses public funds due to these offences. The Typologies Study revealed that fraud and corrupt acts such as embezzlement and bribery of public officials, occasion the government huge losses of public funds

9 Money Laundering Typologies in Malawi (2011: 3). Trade-based money laundering is an Alternative remittance system that allows illegal organizations the opportunity to earn, move and store proceeds disguised as legitimate trade. Value can be moved through this process by false-invoicing, over- invoicing and under-invoicing commodities that are imported or exported around the world.

10 Liao (2011: 81).

11 Liao (2011: 81).

through schemes such as the awarding of undeserving tenders and payment of money for fictitious transactions.¹² Recently, there has been a revelation of massive fraud and corruption by junior government officials so far, followed by revelations of inexplicable millions of Malawi Kwachas (tens of thousands of US Dollars) beyond their monthly earnings being found in the suspects' houses and cars.¹³ Another arrest of a junior public official concerns the approval of an award of \$3m to a ghost firm.¹⁴ So far, donors such as the Norwegian government have frozen monetary aid in terms of budgetary support to Malawi following suspicion of embezzlement of about 4 million dollars of aid funds.¹⁵

Further, the government loses revenue through tax evasion, because the Malawi Revenue Authority, a body tasked with the collection of revenue, fails to collect enough revenue due to under-invoicing on imports by traders, or under-declared profits for some corporate bodies.¹⁶ In addition, the government of Malawi suffers from the adverse effects of capital flight that is occasioned by trade-based money laundering, through schemes such as payments for fictitious and over-inflated invoices on imports.¹⁷ These are just a few of the many examples of how the government loses money. In view of these losses and risks posed by the mentioned criminal activities, it is necessary for Malawi to put in place a strong anti-money laundering framework.

12 Malawi Typologies Report (2011: 7).

13 See Nyasa times (14 October 2013). One such case is *The Republic v Sithole* Criminal Case No 908 of 2013, where the convict, a junior public officer, was found with huge sums of money hidden in his wife's car. He was charged and convicted of theft and money laundering.

14 See News 24 (10 October 2013).

15 Daily Times (15 October 2013). See an announcement by the Norwegian Ministry of Foreign Affairs on 11 October, 2013.

16 Malawi Typologies Report (2011: 8).

17 Malawi Typologies Report (2011: 8).

4.2.1 Criminalisation of money laundering

The criminalisation of money laundering is a mandatory obligation under the international legal instruments. The Vienna Convention obliges States Parties to criminalise the laundering of proceeds of drug related offences.¹⁸ The Palermo Convention obliges States Parties to criminalise the laundering of proceeds of all serious crimes.¹⁹ The all-crimes approach is also adopted by the FATF and UNCAC.²⁰ Finally, the AU Convention and SADC Protocol obligate State Parties to criminalise the laundering of proceeds of corruption.²¹

In accordance with the mandatory obligations imposed by the international framework, Malawi has criminalised money laundering under Section 35 of the Money Laundering, Proceeds of Serious Crime and Terrorist Financing Act (hereafter referred to as the Money Laundering Act).²² Section 35 covers all forms of money laundering comprehensively. They include the conversion or transfer of property while knowing or having reason to believe that it constitutes proceeds of crime, with the aim of concealing or disguising the illicit origin of that property.²³

Furthermore, the Act criminalises the concealment or disguising of the true nature, origin, location, disposition, movement or ownership of property, while knowing or having reason to believe that the property is the proceeds of crime.²⁴ The Act also

18 Article 3 of the Vienna Convention.

19 Article 6 of the Palermo Convention.

20 Article 23 of UNCAC.

21 Article 6 of the AU Convention.

22 Chapter 8:07 of the Laws of Malawi. Came into force on 15th August, 2006.

23 Section 35 (1)(a) of the Money Laundering Act. Cf Article 3 (b)(i) of the Vienna Convention; Article 6(1)(a)(i) of the Palermo Convention; Article 23(a)(i) of UNCAC; and Article 6(a) of the AU Convention.

24 Section 35 (1)(b) of the Money Laundering Act. Cf Article 3 (b)(ii) of the Vienna Convention;

makes criminal the acquisition, possession or use of property, knowing or having reason to believe that it is derived, directly or indirectly, from proceeds of crime.²⁵ Finally, the Act establishes as offences the participation, conspiracy, attempt, aiding, abetting and facilitation in the commission of any of the acts referred to above.²⁶ On the basis of this Act, Malawi has criminalised money laundering adequately, and meets the international standards in this regard.

4.2.1.1 Penal Code: Duplication of the criminalisation of money laundering

Even though the AML Act has criminalised money laundering, the same offence has been established under Section 331A of the Malawian Penal Code also.²⁷ There is duplication, therefore, because at the moment, there are two pieces of legislation that establish the same offence. The Penal Code provision stems from an amendment that was drafted and proposed in the year 2000, before the AML Act was enacted in 2006.²⁸ The Commission responsible for the review of the Penal Code considered that at that time, it was important and timely to criminalise money laundering; and that a general offence in this regard should be codified in the Penal Code.²⁹ However, the Penal Code amendment came into force only in 2011, five years after the coming into force of the AML Act. By the time the Penal Code amendments came into force, the proposed money laundering provision was maintained, even though it was not necessary since the offence had already been

Article 6(1)(a)(ii) of the Palermo Convention; Article 23(a)(ii) of UNCAC and Article 6(b) of the AU Convention.

25 Section 35 (1)(c) of the Money Laundering Act. Cf Article 3 (c)(i) of the Vienna Convention; Article 6(1)(b)(i) of the Palermo Convention; Article 23(b)(i) of UNCAC and Article 6(c) of the AU Convention.

26 Section 35 (d) of the Money Laundering Act. Cf Article 3 (c)(iv) of the Vienna Convention; Article 6(1)(b)(ii) of the Palermo Convention and Article 23(b)(ii) of UNCAC.

27 Chapter 7.02 of the Laws of Malawi. Came into force on 1 April, 1930.

28 Report on the Review of the Penal Code (2000: 71).

29 Report on the Review of the Penal Code (2000: 71).

criminalised under AML Act. Be that as it may, the state charges suspects under the AML Act.³⁰

4.2.2 Scope of predicate offences for money laundering

The offence of money laundering exists on the basis of underlying offences, referred to as predicate offences, from which tainted property derives. In order to combat profit crimes and the laundering of tainted property, Malawi ought to classify as many offences as possible, as predicate offences. In this respect, the FATF urges countries to apply the offence of money laundering to all serious offences in order to include the widest range of predicate offences.³¹ The Palermo Convention, too, has a similar obligation for its States Parties,³² and it defines a serious offence as any offence punishable by not less than four years' imprisonment.³³ The Vienna Convention requires that money laundering should apply to all drug-related offences established by the Convention. UNCAC also obliges its States Parties to apply money laundering to the widest range of predicate offences, and to include, at a minimum, a comprehensive range of criminal offences established by the Convention.³⁴

In the case of Malawi, the AML Act defines serious crime as an offence against a provision of any written law in Malawi, for which the maximum penalty is not less than 12 months' imprisonment.³⁵ Serious crime refers also to an offence against a

30 See *R v Maxwell Namata & Luke Kasamba* High Court of Malawi, Criminal Case No 45 of 2013. The two were charged and convicted of laundering the proceeds of theft of public funds, under Section 35(1) of the AML Act.

31 FATF Recommendation 3.

32 Article 6(2)(a) of the Palermo Convention.

33 Article 2(b) of the Palermo Convention.

34 Article 23(2)(a)&(b) of UNCAC.

35 Section 2 of the AML Act.

provision of a foreign state in relation to acts or omissions which, had they occurred in Malawi, would have constituted an offence whose maximum sentence is not less than 12 months' imprisonment.³⁶ In view of these provisions, every offence with a maximum sentence of not less than 12 months' imprisonment is a predicate offence for money laundering.

The 12 months imprisonment threshold is wide enough to capture all income-generating offences. The offences which the Typologies Study established as offences that are rampant in Malawi, *i.e.* fraud, corruption, tax evasion and trade-based money laundering, also fall under the category of serious offences because their maximum penalty is more than 12 months imprisonment. All corruption-related offences under the Corrupt Practices Act (CPA),³⁷ such as active and passive bribery,³⁸ trading in influence,³⁹ and misuse of public office,⁴⁰ attract a maximum sentence of 12 years' imprisonment.⁴¹ All tax-related offences under the Customs and Excise Act⁴² fall also into the category of serious offences in Malawi, because the least maximum sentence under the Act is two years imprisonment.⁴³ The law is, therefore, wide enough to cover the laundering of the proceeds of all significant predicate offences.

In order to combat crimes that generate illicit assets and subsequently give rise to money laundering, the legal framework in Malawi calls for the forfeiture of both

36 Section 2 of the AML Act.

37 Chapter 7:04 of the Laws of Malawi. Came into force on 15 February 1996.

38 Section 24(1)&(2) of the CPA.

39 Section 25(1)&(2) of the CPA.

40 Section 25B(1) of the CPA.

41 Section 34 of the CPA.

42 Chapter 42:01 of the Laws of Malawi.

43 Section 143 of the Customs and Excise Act.

proceeds and instrumentalities of crime, and in some instances, the confiscation of contraband. Contraband refers to any property that is illegal to produce, possess, import or export.⁴⁴ However, this discussion focuses on proceeds and instrumentalities of crime.

4.3 Legal framework for the forfeiture of proceeds of crime

The international legal framework on asset recovery obliges countries to adopt measures for the forfeiture of proceeds of crime. Following these standards, Malawi has put in place a legal framework for asset forfeiture in the Penal Code, the AML Act, CPA, the Dangerous Drugs Act (DDA)⁴⁵ and the Customs and Excise Act.⁴⁶ The DDA is a law aimed at controlling the importation, exportation, production, possession, sale, distribution, and use of dangerous drugs and for matters incidental to such activities. The Customs and Excise Act regulates *inter alia*, the administration, management and control of customs and excise, the imposition and collection of customs and excise. It establishes offences such as smuggling,⁴⁷ tax evasion through false declaration of value of exports and imports⁴⁸ and falsification of invoices on imports.⁴⁹

As stated earlier, the laws of Malawi refer to confiscation and forfeiture interchangeably. The Penal Code, CPA and DDA use the word forfeiture, while the AML Act refers to confiscation. But the Penal Code, CPA and DDA do not define

44 See Online Black's Law Dictionary.
45 Chapter 35:02 of the Laws of Malawi.
46 Chapter 42:01 of the Laws of Malawi.
47 Section 134(a) of the Customs and Excise Act.
48 Section 134(b) of the Customs and Excise Act.
49 Section 135(e) of the Customs and Excise Act.

forfeiture. However, the AML Act defines it as the permanent deprivation of property by order of a court or other competent authority.⁵⁰

4.3.1 Proceeds of which crimes?

Asset forfeiture does not operate in a vacuum. The proceeds of crime are forfeited on the basis that they derive from the commission of an offence. Thus, the fight against money laundering is predicated on the state's ability to confiscate as many criminal proceeds as possible. This is because proceeds of crime are the main incentive for criminals' engagement in profit crime, and criminals launder the proceeds so as to keep them out of reach of the law. Just as money laundering must apply to the widest range of offences, the law must also provide for the forfeiture of the proceeds of the widest range of offences, in order to enhance deterrence.



Under the Penal Code, forfeiture applies to few specific offences, and not to each and every serious crime which constitutes a predicate offence for money laundering. It applies forfeiture to official corruption;⁵¹ extortion by public officers;⁵² public officers receiving property to show favour;⁵³ compounding felonies;⁵⁴ compounding penal actions;⁵⁵ money laundering;⁵⁶ and corrupt practices.⁵⁷ As far as the Penal Code is concerned, it has a limited range of predicate offences since it leaves out other income-generating offences contained in the

50 Section 2 of the AML Act.

51 Section 90 of the Penal Code.

52 Section 91 of the Penal Code.

53 Section 92 of the Penal Code.

54 Section 110 of the Penal Code.

55 Section 111 of the Penal Code.

56 Section 331A of the Penal Code.

57 Section 396 of the Penal Code.

Penal Code, such as general theft, theft by public servant, fraud or robbery.

Therefore, the list-based approach taken by the Penal Code is not helpful in the implementation of a successful anti-money laundering regime because it leaves out the forfeiture of proceeds of profit crimes.

The Penal Code's inadequacy regarding offences whose proceeds must be subject to forfeiture is cured by the AML Act which takes a threshold approach, allowing the forfeiture of the proceeds of all serious crimes.⁵⁸ This means that the application of forfeiture under the AML Act is much wider than that of the Penal Code. This ensures that the state can get hold of all criminal proceeds through forfeiture, leaving nothing for the criminal to enjoy or launder. This, in turn, assists in enhancing deterrence.

With regard to the CPA, forfeiture applies to all offences established under the Act.⁵⁹ This ensures that all advantages gained from corruption are subject to forfeiture. In relation to tax-related offences, the Customs and Excise Act provides for forfeiture of property that is connected to any of the offences established under the Act.⁶⁰ This, arguably, may apply to proceeds of tax-related offences. In view of the above, the laws in Malawi apply forfeiture to proceeds of a wide range of offences.

4.3.2 Forfeiture of proceeds of crime: object-based model

As established in Chapter Three, the best approach to asset forfeiture is to put in place both object-based and value-based forfeiture. Object-based allows the state

58 Section 42 of the AML Act.

59 Section 37 of the CPA.

60 Section 45 of the Customs and Excise Act.

to confiscate objects that can be traced directly to a crime.⁶¹ Forfeiture, under this model, is limited to tainted proceeds.⁶² The laws of Malawi cover the forfeiture of direct proceeds of crime adequately through the Penal Code, AML Act,⁶³ and the CPA.

The Penal Code empowers courts to order the forfeiture of any property which has been passed to a person in connection with the commission of an offence.⁶⁴ The Report on the Review of the Penal Code⁶⁵ says the provision relates to the forfeiture of the proceeds of crime.⁶⁶ Further, the AML Act states that upon conviction of a serious crime, a competent authority may apply to a court for a confiscation order against tainted property.⁶⁷ According to the Act, tainted property includes proceeds of crime,⁶⁸ and it defines proceeds of crime as any property derived or realised directly or indirectly from a serious crime.⁶⁹ Under the CPA, forfeiture applies to any money, wealth, property, asset that is ascertained by the court to have been acquired through the commission of an offence.⁷⁰ This scope covers direct proceeds of crime.

In addition, the law calls for the forfeiture of benefits or income that derive from criminal proceeds. Under the AML Act, these include income, capital or other

61 UNCAC Legislative Guidance (2006: 93).

62 OECD/The World Bank (2012: 110).

63 Section 48 (1)(a) of the AML Act.

64 Section 30 of the Penal Code.

65 Report of the Law Commission on Criminal Justice Reform on the Review of the Penal Code (Cap.7:01) (2000) (Hereafter, Report on the review of the Penal Code).

66 Report on the Review of the Penal Code (2000:24. The Report simply proposed one Amendment to Section 30, which is the inclusion of money laundering to the list of offences to which forfeiture should apply.

67 Section 48 (1)(a) of the AML Act.

68 Section 2 of the AML Act.

69 Section 2 of the AML Act.

70 Section 37(a) of the CPA.

economic gains derived or realised from property that is derived or realised from a serious crime.⁷¹ Under the CPA, forfeiture applies to income, capital or other economic gains derived or realised from such pecuniary resources or property at any time since the commission of the crime.⁷²

The DDA does not provide for proceeds of crime as there is no mention of property derived from the production, sale, distribution, use, export or importation of prohibited drugs and plants. Be that as it may, section 42 of the AML Act would be the basis for the confiscation of proceeds of drug dealing since it applies to proceeds of any serious crime, which include drug dealing offences under the DDA. The Customs and Excise Act provides for the confiscation of goods in respect of which an offence has been committed under the Act.⁷³ It is not clear whether this refers to proceeds or instrumentalities of crime. All in all, Malawi has a comprehensive framework for object-based forfeiture of proceeds of crime.

4.3.3 Forfeiture of proceeds of crime: value-based model

In order to disgorge as many criminal proceeds as possible, courts must be empowered to order the forfeiture of other property, or the payment of money to the corresponding value of proceeds of crime, through a value-based approach. The value-based model allows the state to get the value of illicit property from an offender.⁷⁴ It allows for the forfeiture of the value of the offender's benefit from

71 Section 2 of the AML Act.

72 Section 3 of the CPA.

73 Section 145(1) of the Customs and Excise Act.

74 UNCAC Legislative Guidance (2006: 93).

crime, without proving any connection between the property and the crime.⁷⁵ The state just has to prove that an offender gained some benefit from an offence.⁷⁶

In Malawi, the law allows also for the forfeiture of the value of proceeds of crime by requiring the forfeiture of property of corresponding value to criminal proceeds, through the Penal Code, the CPA and the AML Act.⁷⁷ In addition, the law provides for the forfeiture of property into which any direct proceeds of crime were converted, transformed or intermingled.⁷⁸

Further, in pursuit of recovering the value of criminal proceeds, a court can make a pecuniary order. A pecuniary order is a financial penalty against a convict, in respect of benefits that derive from the commission of the offence of which he or she has been convicted.⁷⁹ A pecuniary penalty entails that a person must pay to the Government an amount equal to the value of his or her benefit from the offence.⁸⁰ This happens in cases where there is no tangible property against which to make a confiscation order.

4.3.4 Establishing ownership proceeds of crime

Since value-based forfeiture is limited to assets owned by an offender,⁸¹ in order to enhance deterrence and compensation of victims, the prosecution needs to target as many criminal proceeds as possible, by establishing to whom they belong.

However, doing so demands the ability to identify property and ascertain if an

75 Greenberg *et al* (2009: 13).

76 OECD/The World Bank (2012: 18).

77 Section 30 of the Penal Code; Section 38 of the CPA and S2 of the AML Act.

78 AML Act, CPA Act, Penal Code; and Section 149(4) of the CP&EC.

79 Section 48(1)(2) of the AML Act.

80 Section 61(1) of the AML Act.

81 OECD/The World Bank (2012: 18).

offender is in possession or control of forfeitable property. The AML Act allows relevant authorities to obtain, through court orders, any documents that are relevant for identifying, locating and quantifying property which belongs to, is in possession of, or is in control of an offender.⁸²

The ascertainment of the beneficial owner is necessary because property has four incidents; namely nominal title, control benefit and management, which can be owned separately or jointly.⁸³ Thus, while title to property may be in the name of one person, its control or benefit may be attributed to another, who in this case may be an offender who merely transfers title to a third party while he enjoys its benefit and control. In addition, the authorities can obtain orders that are relevant for identifying or locating documents that show the transfer of the property.⁸⁴ Further, the court can order a financial institution to produce information about any transaction conducted for or on behalf of an offender during any specified period.⁸⁵

4.3.5 Lifting the corporate veil

In order to track and confiscate as many criminal proceeds as possible, relevant authorities ought to be aware of the different modes through which criminals disguise their ownership of property. One such mode is the creation of corporate entities and using them as vehicles for laundering proceeds of crime.⁸⁶ The title documents may show that the property belongs to the corporate vehicle, making it

82 Section 42(a)(i) of the AML Act.

83 Kamchedzera (1992: 188-190).

84 Section 42(a)(ii) of the AML Act.

85 Section 42(2) of the AML Act.

86 FATF (2006: 1).

impossible to order its forfeiture because legally, it does not belong to the offender. There is, therefore, need to determine who the beneficial owner of such business arrangements is, in order to maximise the recovery of illicit property. A beneficial owner, according to the AML Act, is a person who ultimately owns or controls an asset or a business; a person on whose behalf a transaction is conducted; or a person who exercises effective control over a legal person or arrangement.⁸⁷ In this vein, the AML Act empowers courts to treat as criminal proceeds, any property that is under an offender's effective control.⁸⁸ This is regardless of whether the offender has any legal or equitable interest in the property; or any right, power or privilege in connection with the property.⁸⁹

In determining beneficial ownership of forfeitable property, courts should have regard to an offender's shareholding in, debentures over or directorship in any company that has an interest, whether direct or indirect, in the property.⁹⁰ In order to make a thorough assessment, the court may order the investigation and inspection of the books of a named company⁹¹ and of any trust that has any relationship to the property. Courts may also assess any relationship between the persons that have an interest in the property, companies or trusts.⁹²

Once a court determines that an offender is in effective control of property, it may order that the property be made available to satisfy a pecuniary order.⁹³ Thus, the court may make a pecuniary penalty order or a restraining order against the

87 Section 2 of the AML Act.
88 Section 66(1) of the AML Act.
89 Section 66(1)(a)&(b) of the AML Act.
90 Section 66(2) of the AML Act.
91 Section 66(2)(a) of the AML Act.
92 Section 66(2)(b) of the AML Act.
93 Section 66(4) of the AML Act.

property, as if the property belongs to the person against whom the orders were made.⁹⁴

Having established that criminals use corporate entities to hide criminal proceeds, there is further need to deter this practice. One way to curb this practice, as the AML Act stipulates, is to hold the entities liable for money laundering, and for participating in the concealment or disguise of illicit property.⁹⁵ The AML Act establishes that corporations may be liable for money laundering, and their punishment may be a fine and loss of a business licence.⁹⁶ In addition, the corporation must suffer forfeiture of its assets, which represent criminal proceeds or gains.⁹⁷ Forfeiture of the assets of such a corporate is essential, in the spirit of deterrence through forfeiture, because it ensures the removal or mitigation of the economic incentive for committing crimes. If the courts stop at imposing a fine and revoking a business licence only, it would be the same as imposing an imprisonment sentence for a natural person, but leaving them with the proceeds of crime. Crime would pay, in such circumstances.

4.3.6 Failure to honour a forfeiture or pecuniary order

One might wonder as to what should happen if an offender fails to satisfy a confiscation or pecuniary order. Should the state give up and endorse in their records that a forfeiture order was made but there was no property to pursue? No. Justice would demand otherwise. The AML Act recognises that property that should be subject to a forfeiture order may not always be available, either because it is

94 Section 66(3) of the AML Act.

95 Section 35(1) (b) of the AML Act.

96 Section 35(1)(b) of the AML Act.

97 Madinger (2012: 126).

outside the country, has been substantially diminished in value, or has been commingled with other property, such that it is difficult to separate.⁹⁸ In such cases, the court may order the person to pay an amount equivalent to the value of the property.⁹⁹ The amount payable in lieu of a confiscation order must be treated as a fine. If a person fails to pay the ordered amount of money, the court may impose a sentence of imprisonment in default of payment of the fine.¹⁰⁰ Similarly, if a person fails to pay an amount under a pecuniary order, the court may impose a term of imprisonment instead.¹⁰¹

Importantly, the AML Act states that the term of imprisonment must run consecutively with another form of punishment imposed on the person.¹⁰² This answers the question raised in Chapter Two, that even though asset forfeiture is punitive, a forfeiture order made in addition to an imprisonment sentence does not constitute double jeopardy. Thus, it may be imposed in addition to another form of punishment. Making the period of imprisonment to run consecutively to another form of punishment, stresses the point that an offender must serve the punishments separately, the way one would do by losing illicit property through a forfeiture order in addition to serving a period of imprisonment term for theft or drug trafficking, for example.

4.4 Legal Framework for the forfeiture of instrumentalities of crime

The law in Malawi provides for the forfeiture of instrumentalities of crime. The Penal Code provides for the forfeiture of instrumentalities of crimes such as house

98 Section 58 of the AML Act.
99 Section 58 of the AML Act.
100 Section 59 of the AML Act.
101 Section 67 of the AML Act.
102 Section 59 (b) of the AML Act.

housebreaking and burglary and similar offences.¹⁰³ The AML Act provides for the forfeiture of property intended for use in, or used in or in connection with the commission of a serious crime.¹⁰⁴

The Penal Code provides for the forfeiture of any dangerous or offensive weapon or instruments used in the commission of burglary, house breaking and similar offences.¹⁰⁵ In addition, the Penal Code provides for the forfeiture of property such as aircraft, vessel or vehicle used to facilitate the commission of theft, burglary, housebreaking, offences allied to stealing, as well receiving stolen property or property that was obtained unlawfully.¹⁰⁶ Further, the Criminal Prosecure and Evidence Code (CP&EC) stipulates that courts can order the forfeiture of instrumentalities of the same offences.¹⁰⁷

Further, the DDA empowers courts to order the confiscation of dangerous drugs, pipe, receptacle, appliance, or plant that was produced, possessed, used, sold, kept, distributed or cultivated in contravention of the Act.¹⁰⁸ A reading of this provision shows that the confiscation relates to both instrumentalities and contraband. In this case, instrumentalities would be a pipe, receptacle or any appliance used in the consumption through smoking or use of the prohibited drugs or plants. Prohibited drugs and plants would be confiscated as contraband, because they are tainted for being prohibited items whose use, distribution, export and import constitutes a

103 Section 315 of the Penal Code.

104 Section 2 of the AML Act. There is no actual reference to instrumentalities of crime, but tainted property or property connected with the commission of an offence refers to both proceeds and instrumentalities of crime.

105 Section 315 of the Penal Code.

106 Section 317 of the Penal Code.

107 Section 149(1) of the CP&EC.

108 Section 17(6) of the DDA.

violation of the law. In this regard, it is clear that the DDA allows for the confiscation of contraband, as well as instrumentalities of crime,

Finally, there is the Customs and Excise Act.¹⁰⁹ This Act provides for the confiscation of goods in respect of which an offence has been committed under the Act.¹¹⁰ It further provides for confiscation of conveyances (referring to aircrafts, vessels and vehicles) used without authority for the transportation of goods that are liable to forfeiture.¹¹¹ In addition, the Act provides for the confiscation of all packages, utensils and things of that nature in which all goods subject to confiscation are contained.¹¹² The Act, therefore, covers instrumentalities.

In view of the laws discussed above, Malawi meets the international standard of applying confiscation to instrumentalities of crime. The inadequacies of the other pieces of legislation are covered by the AML Act, which applies to a broader spectrum of instrumentalities of crime, by referring to instrumentalities of all serious crimes. The AML Act is also comprehensive as it provides for the forfeiture of instrumentalities intended for use in the commission of crimes, as required by the international legal framework.

As discussed in Chapters Two and Three, in order to avoid punishing innocent people through asset forfeiture, forfeiture orders must be made only against the property of people who are at criminal fault, and not the innocent. This is what the retributive aspect of punishment within the social contract demands. In Malawi, under the Penal Code, the court is permitted to order the forfeiture of a vessel,

109 Chapter 42:01 of the Laws of Malawi.

110 Section 145(1) of the Customs and Excise Act.

111 Section 145(2) of the Customs and Excise Act.

112 Section 145(2)(b) of the Customs and Excise Act.

aircraft or vehicle only if it finds that the owner or any of his agents or servants consented to, or were aware of the use or employment of the property to the commission of a crime.¹¹³ This is to make sure that the property of innocent people is spared from forfeiture, thus avoiding arbitrary forfeiture orders.

4.5 Conviction-based vs non-conviction based forfeiture

As discussed in Chapter Two, a comprehensive asset forfeiture regime must recognise two types of forfeiture. It must recognise conviction-based forfeiture, which is based on the conviction of an offender,¹¹⁴ and non-conviction-based forfeiture which does not depend on the conviction of an offender.¹¹⁵

4.5.1 Conviction-based forfeiture

Malawi has made provision for conviction-based forfeiture under the Penal Code which states that when any person is convicted of specified offences, courts may order confiscation in addition to or in lieu of any penalty which may be imposed.¹¹⁶

Forfeiture in this case falls under penalties, but courts are not obliged to make such an order because the provision does not make the ordering of forfeiture

mandatory. The CPA also provides for conviction-based forfeiture as an additional penalty, but unlike the Penal Code, courts are obligated to make such an order.¹¹⁷

In addition, the AML Act provides for conviction-based forfeiture, based on the conviction of a serious crime.¹¹⁸

113 Section 317 (2) of the Penal Code.

114 Greenberg *et al* (2009: 13).

115 Greenberg *et al* (2009: 13).

116 Section 30 of the Penal Code.

117 Section 37 of the CPA.

118 Section 48(1) of the AML Act.

The AML Act sets time limits for the commencement of conviction-based forfeiture proceedings. It states that the relevant authorities can apply for forfeiture 12 months after conviction.¹¹⁹ Once a forfeiture order has been made, the state can only apply for another forfeiture order in respect of the offence for which the person was convicted, with the leave of the court.¹²⁰ The court is permitted to grant such leave if it is satisfied that the property or benefit which is sought after in the subsequent forfeiture application was identified after the previous application was determined; or that the necessary evidence became available after the determination of the previous application; or that it is in the interest of justice to hear the new application.¹²¹ The state can avoid the inconvenience of having to apply for subsequent forfeiture orders if it does a thorough job in identifying, tracing and seizure of forfeitable property at the earliest stages of investigations.

All in all, because confiscation under the AML Act applies to all serious crimes established under any law in Malawi, this thesis argues that Malawi has adequately put in place a legal basis for conviction-based forfeiture. But where does Malawi stand with regard to non-conviction-based forfeiture?

4.5.2 Non-conviction based forfeiture

While all of the international legal instruments make the adoption of conviction-based forfeiture mandatory, UNCAC and the FATF Recommendations urge countries to consider adopting non-conviction based forfeiture also. As aforesaid, non-conviction based forfeiture helps the state to recover proceeds or

119 Section 48(1) of the AML Act.

120 Section 48(3) of the AML Act.

121 Section 48(3) of the AML Act.

instrumentalities of crime without having to obtain the conviction of an offender first.¹²² However, it should be noted that the adoption of a non-conviction-based forfeiture pursuant to UNCAC and FATF standards is not mandatory, since countries are merely urged to consider adopting the same.¹²³ Each country therefore, needs to make an assessment of whether it can do without it or not.

One may then wonder if Malawi really needs non-conviction based forfeiture. This question can be answered best upon considering the reasons and benefits of having in place a non-conviction-based forfeiture legal framework. The benefits are that it can be used to confiscate property where an offender cannot be prosecuted because he or she is dead, sick, has fled or absconded, is immune from prosecution or cannot be prosecuted for political reasons.¹²⁴ The adoption of non-conviction-based forfeiture can help Malawi considerably in its efforts to combat money laundering. This is because the state would not have to prosecute individuals first, obtain a conviction and then apply for the forfeiture of their tainted property.

Notably, the AML Act provides for some sort of non-conviction based forfeiture, which it refers to as *in rem* proceedings under section 52. However, unlike the ideal *in rem* proceedings that should apply to all scenarios where it is not possible to bring a suspect to court for prosecution, the provision in the AML Act is to a certain degree inadequate. The inadequacy lies in the fact that under this provision, *in rem* proceedings apply only in cases where a person has been charged with a serious

122 Daniel *Et al* (2008: 243).

123 FATF Recommendation 4 and Article 54(1)(C) of the UNCAC.

124 Greenberg *et al* (2009: 1).

crime and a warrant for arrest for the person has been issued in relation to that charge, but the person has died or absconded.¹²⁵

For the sake of clarity, the Act provides that “charging a person” refers to a procedure described in Malawi or elsewhere, by which criminal proceedings may be commenced.¹²⁶ In Malawi, criminal proceedings are commenced by way of lodging a complaint with a magistrate; or by bringing before a magistrate a person who has been arrested without warrant; or by a public prosecutor or a police officer signing and presenting a formal charge to a magistrate.¹²⁷ The implication of section 52 of the AML Act is that *in rem* proceedings arise only in cases where a suspect has died or absconded. This, therefore, leaves out the possibility of the state applying for confiscation in cases where a suspect is alive and is within the jurisdiction but cannot stand trial due to sickness, or where the evidence is enough to prove tainted property, but it is not strong enough to secure the conviction of an offender.

Furthermore, the provision states that the state may apply for forfeiture where two pre-conditions have been satisfied, *i.e.* a suspect has been charged within the meaning provided above, and a warrant of arrest has been issued in relation to the charge. This is not clear how the provision will apply to cases where a suspect has died before they are charged, because ordinarily, the state cannot institute criminal proceedings or obtain a warrant of arrest against the dead. Thus, as the law is, no civil forfeiture proceedings can be commenced in relation to property of someone

125 Section 52(1)(a)&(b) of the AML Act.

126 Section 3 of AML Act.

127 Section 81(1) of the Criminal Procedure and Evidence Code and Chapter 8:02 of the Laws of Malawi.

who dies before the state began or concluded its investigations, because it cannot obtain a warrant of arrest or commence criminal proceedings.

In view of this limitation, this thesis argues that there is need to amend this provision in order to accommodate a wider application of *in rem* confiscation. This amendment should be done, if Malawi is serious about disgorging tainted property and curbing money laundering by criminals who are alive and are within the jurisdiction, but cannot be prosecuted for some reason.

In addition, the CPA provides for what seems to be administrative forfeiture, otherwise known as uncontested forfeiture. Administrative forfeitures are processed by law enforcement agencies, not courts, as it is the case with civil and criminal forfeitures.¹²⁸ Courts are not involved because no one steps in to challenge the forfeiture.¹²⁹ The CPA states that recovered, seized or frozen property shall vest in the state in any of the following situations: (i) the owner has fled the country in a bid to evade investigation or prosecution; (ii) the owner cannot be identified or ascertained; (iii) the owner has absconded; and (iv) the owner admits their involvement in any offence under the CPA and has agreed to return the property to the state.¹³⁰ The ACB Director should issue a notice, published in a Gazette, newspaper, served on the concerned person or left at the property

128 Dery (2012: 2).

129 Dery (2012: 2).

130 Regulation 3 of the Corrupt Practices (Disposal of Recovered, Seized or Frozen Property) Regulations.

owner's last known address. The property vests in the state if no one brings a claim within three months.¹³¹

Unlike the non-conviction based forfeiture provided under the AML Act as discussed above, this forfeiture under the CPA is not complicated because it does not require the arrest or the charging of the property owner first. This is commendable, since it takes care of cases where the state has in its possession illicit property but it cannot commence a criminal trial for the eventual criminal forfeiture proceedings. However, the CPA being an Act of limited application, the AML Act should have had a similar provision because it applies to a broader spectrum of offences.

However, this kind of forfeiture can be distinguished from the American model, which only applies to property whose value is not more than \$500,000.¹³² Further, it does not apply to real property, regardless of its value.¹³³ This is because houses cannot be seized administratively.¹³⁴ The Malawian administrative forfeiture does not have any restrictions on the type and value of property which be subject to forfeiture. Further, the CPA does not guide on what should happen in case someone comes forth with a claim. In the USA, , if someone contests the forfeiture, the state commences either criminal forfeiture after a successful prosecution, or civil forfeiture.

131 Regulation 3(2)(a)&(b) of the Corrupt Practices (Disposal of Recovered, Seized or Frozen Property) Regulations.

132 Worral (2008: 3).

133 Worral (2008: 3).

134 Dery (2012: 2).

In the Malawian context, since the law does not provide for civil forfeiture, it seems that the state's only option would be to try the person first, and proceed with forfeiture proceedings if the person was convicted. If there the state fails to secure a conviction, the absence of the law on civil forfeiture means that the ACB would be forced to give the property back to the claimant. Owing to this implication, the importance of having civil forfeiture regime cannot be over-emphasised. The success of administrative forfeiture regime depends significantly on the presence of both criminal and civil forfeiture as options, when the administrative forfeiture has been contested. Thus, this thesis argues that the state must include both administrative forfeiture and civil forfeiture in its laws.

4.5.3 Notice of a forfeiture application: avoiding arbitrary orders

In order for the state to avoid issuing arbitrary asset forfeiture orders, property owners ought to be given notice of an intended forfeiture. Thus, the AML Act requires a competent authority to give a written notice of not less than 14 days, of an application for a conviction-based forfeiture, to any person who may have an interest in the targeted property.¹³⁵ In addition, the court may on its own motion direct the relevant authority to publish a notice of the forfeiture application in the Gazette or newspaper, to any person who in the opinion of the court, might have an interest in the property.¹³⁶

The state bears a similar obligation in relation to an application for a pecuniary penalty in respect of benefits derived from an offence.¹³⁷ These notices are a

135 Section 49(1) of the AML Act.

136 Section 49(1)(c) of the AML Act.

137 Section 49(2) of the AML Act.

commendable way of ensuring that the people understand the basis of state action, which is to avoid arbitrary deprivation of the people's property. The social contract disapproves of arbitrary state actions, hence, this is one way of making the state explain and justify its actions to the people.

4.5.4 Salient factors to consider when making a forfeiture order

The imposition of punishment, such as asset forfeiture, must not result in avoidable injustice. Thus, the court must take into consideration factors that may prevent occasioning injustice. In this light, the AML Act suggests that when determining whether a forfeiture order should be made, courts must consider the interests of third parties in the forfeitable property; the gravity of the serious crime concerned; any hardship that may reasonably be caused to any person by the operation of the order; and the use that is ordinarily made of the property, or the use to which the property was intended to be put.¹³⁸

4.5.4.1 Proceeds of crime

It is prudent for the courts to consider the interests of third parties in forfeitable property, before ordering its forfeiture. Further, the consideration of the gravity of the serious crime concerned is relevant because forfeiture in Malawi applies to property related to serious crimes. However, once it is established that the offence is a serious crime, the consideration of the gravity of the offence should end there. The court should not bother determining whether it should make a forfeiture order at all. The focus should be on disgorging every gain or benefit that emanates from

138 Section 53(4) of the AML Act.

the commission of a serious crime, without thinking about the gravity of the offence, be it a simple theft or a complex fraud.

The injustice in proceeds of crime lies in their illicit acquisition through the commission of a serious crime, regardless of its gravity, and a forfeiture order serves to rectify the injustice. Thus, courts must not worry about the gravity of a serious crime. The court must not have an option or ordering forfeiture in one case of serious crime, and not another, when in both cases there is evidence that there is an illicit gain involved. Courts must order the forfeiture of any illicit property, as long as it derives from a serious crime.

In addition, it begs to question why the AML Act suggests that the court must consider the possible hardships of a forfeiture order on other people. The principle of proportionality would demand that courts should order the forfeiture of all criminal proceeds, without thinking about any hardship that may be caused on other people, such as an offender's family members, whose subsistence relies on the same criminal proceeds.

As Nozick contends in his rectification of justice principle, any injustice in acquisition or injustice in transfer must be rectified. However, Nozick's principle has limited application, and would occasion some injustice if the state applies it strictly in all cases and ends up confiscating property of *bona fide* purchasers. Thus, this thesis submits that the court must consider only interests of *bona fide* purchasers who pay some sufficient consideration for the property, and had no knowledge of the property's illicit nature. The state should forgo pursuing what the purchaser bought. Instead, it should pursue other property of an offender, which can be the

property he bought using the money paid by the *bona fide* purchaser, or any of his property, to the corresponding value of the criminal proceeds. If not, the court can order a pecuniary order or the imposition of a prison sentence in default.

Therefore, courts must order forfeiture of criminal proceeds regardless of who else might have interests in them, such as an offender's family members or anyone who merely receives criminal proceeds as a gift.

4.5.4.2 Instrumentalities of crime

All of the factors suggested by the AML Act, however, should apply to the confiscation of instrumentalities of crime. Third party interests must be taken into account because of the possibility that a criminal can use another person's property to commit an offence, without the owner's knowledge. Further, the gravity of the serious crime involved is a relevant factor to consider because the offence may not be so grave to warrant the forfeiture of instrumentalities. For instance, it would be disproportionate to order the forfeiture of a car as an instrumentality of crime just because it was used to transport of 100 grams of marijuana. Such a forfeiture order would violate the principle of proportionality, as suggested by Locke, Bentham and retributive proponents, that punishment should fit the crime.

In addition, the court must consider any hardship that may reasonably be expected to be caused to any person by a forfeiture order. For instance, the court must consider if ordering the forfeiture of a house may render an offender's family homeless and destitute, just because the offender was using one room of the house to produce and package marijuana. Finally, it makes sense for the court to consider what the property was used for or what it was intended to be used for, when

determining whether to order its forfeiture as an instrumentality of crime. For instance, it would not be fair to forfeit a school block which benefits a whole village, just because a criminal gang uses it at night for packaging or receiving illicit drugs. The court must consider what immediate socio-economic impact the order would have in such a case when it is executed.

4.6 Provisional orders

The ability to confiscate illicit property depends heavily on the state's ability to trace, seize and preserve forfeitable property until the conclusion of forfeiture proceedings.¹³⁹ Even though Malawi's law on asset forfeiture is adequate, it is imperative to assess the extent to which it provides for provisional orders such as seizure and freezing orders.



4.6.1 Search and seizure orders

The AML Act provides for search and seizure of tainted property. The Act mandates any competent authority to conduct a search under warrant and eventually to seize any property that the authority believes, on reasonable grounds, to be tainted property.¹⁴⁰

In addition, the Corrupt Practices Act (CPA) authorises the Anti-Corruption Bureau's Director or Deputy Director or a senior police officer, to seize or freeze any document or other records or evidence or any asset, account, money or other pecuniary resource, wealth, property, or business or other interest.¹⁴¹ Furthermore,

139 Pieth (2008: 11).

140 Section 69(1) and Section 70 of the AML Act.

141 Section 23A of the CPA.

the CP&EC empowers the police to stop, search and detain any aircraft, vehicle and vessel if they have reason to suspect that it is carrying stolen goods, or anything that has been obtained unlawfully.¹⁴² Further, the police can also stop, search and detain any vehicle, aircraft or vessel if there is reason to suspect that it is an instrumentality of offences such as robbery, extortion, burglary, house breaking, or receiving stolen property.¹⁴³ In addition, the police can search any person whom they reasonably suspect of having in his or her possession or conveying any property that is stolen or obtained unlawfully.¹⁴⁴ Consequently, the police can seize any property they can find through the seizure.¹⁴⁵

The provisions discussed above indicate that there is adequate legal basis for the state to get hold of tainted property and to keep it until the determination of forfeiture proceedings. The ability to obtain custody of such property has a bearing on deterrence and compensation of victims, which depends heavily on how much property has managed to subject to forfeiture.

4.6.2 Restraining orders

The law in Malawi recognises the need to restrain the use or disposal of property that may be subject to forfeiture, and thus permits courts to issue restraining orders. Under the AML Act, competent authorities are allowed to apply to court for a restraining order against any realisable property held by a defendant or any other person other than the defendant.¹⁴⁶ Such orders may be obtained in respect to

142 Section 25(1)(a) of the CP&EC.

143 Section 25(1)(b) of the CP&EC.

144 Section 25(1)(c) of the CP&EC.

145 Section 25(1)(c) of the CP&EC.

146 Section 79(1) of the AML Act.

cases where the defendant has been convicted, or has been charged but not yet convicted of a serious crime.¹⁴⁷

In cases where a defendant has not yet been convicted, a competent authority that seeks a restraining order ought to state grounds in an affidavit its grounds for believing that (a) the defendant committed an offence;¹⁴⁸ (b) the property is tainted property in relation to the offence in question;¹⁴⁹ (c) the defendant derived a benefit, directly or indirectly, for the commission of the offence;¹⁵⁰ and finally, (d) that a forfeiture order or a pecuniary penalty order may be or is likely to be made in respect to the property.¹⁵¹

In case of property that is owned by a person other than the defendant, a competent authority ought to state grounds for the belief that the property is tainted property and that it is subject to the effective control of the defendant.¹⁵²

This means a restraint order can be obtained in respect of property that belongs to a defendant, as well as property belonging to another person, as long as the two conditions are satisfied. This ensures that the law targets as much property as possible. It is also one way of defeating property-concealing tactics by offenders, who may transfer property to other people in a bid to avoid restraining orders being attached to their criminal proceeds.

Further, the CPA provides for restraint orders, specifically referred to as restriction notices. These notices restrain any person from dealing or disposing of any property

147 Section 79(2) (a)&(b) of the AML Act.

148 Section 79(2)(b) of the AML Act.

149 Section 79(2)(e) of the AML Act.

150 Section 79(2)(f) of the AML Act.

151 Section 79(2)(h) of the AML Act.

152 Section 79(2)(g) of the AML Act.

without the consent of the Director of the Anti-Corruption Bureau (ACB).¹⁵³ The notices apply to property that is subject to, or is somehow implicated in the investigation or prosecution of any offence under the Act. Apart from property, a person may also be restricted from entering into any contract, transaction, agreement or other arrangement. Unlike a restraining order under the AML Act, which is ordered by a court, a restriction notice under the CPA is made by the Director of the ACB.¹⁵⁴

The law sets time limits for the operation of a restraining order. The AML Act sets the limit at six months from the date on which it is made, or any period as may be set by the court.¹⁵⁵ The state may apply for the extension of the period, and the court may grant the extension if it is satisfied that a confiscation order may be made against the property, or a pecuniary order may be made against the person.¹⁵⁶ Such limits are a good way of recognising the property owner's right to use their property which may be infringed by the perpetual existence of a restraining order.

In order to ensure compliance, the CPA and AML Act provide for the punishment of those who contravene any directive in a restraining order or restriction notice.¹⁵⁷

This is an effective way of ensuring that no one affects the availability or condition of property until the determination of forfeiture proceedings.

153 Section 23 of the CPA.

154 Section 23(1) of the CPA.

155 Section 86(b) of the AML Act.

156 Section 88(1)&(2) of the AML Act.

157 Section 23(4) of the CPA and Section 85(a) of the AML Act.

4.7 Asset management

The success of Malawi's asset forfeiture regime rests on the ability of its competent authorities to manage both forfeitable and forfeited assets.

4.7.1 Management of seized and restrained assets

Upon seizure of property, the CP&EC stipulates that the property must be brought before a court, where it may be detained until the conclusion of the case or the investigation. This means that the court itself will be the manager or administrator for the property. The property is to be maintained until the conclusion of a trial, or until the determination of an appeal, in case an appeal has been lodged.¹⁵⁸ In cases where there are no court proceedings instituted, either trial or an appeal, the court must restore the seized property to the person from whom it was taken.¹⁵⁹ The possibility of returning seized property to the owner necessitates that the property should be managed well so as to preserve its value and condition.¹⁶⁰

The AML Act, however, rests the administration or management of seized assets on the competent authority that executes a seizure order, to ensure its care and preservation.¹⁶¹ The same applies to the Anti-Corruption Bureau, under the CPA.¹⁶²

Pursuant to an application for a restraining order, the AML Act stipulates that a court may appoint a person to take custody of the restrained property, as well as require him or her to deal and manage such property as the court may direct.¹⁶³ In

158 Section 116(2) of the CP&EC.

159 Section 116(3) of the CP&EC.

160 Section 116(1) of the CP&EC.

161 Section 72(1) of the AML Act.

162 Section 3 of the Corrupt Practices (Disposal of Recovered, Seized or Frozen Property) Regulations (Issued under Section 54 of the CPA).

163 Section 82(2)(b)(i) of the AML Act.

addition, the court may require any person having possession of the property to give possession of the property to the appointed person for him or her to take custody and control of that property.¹⁶⁴

4.7.2. Planning

The law in Malawi recognises that sometimes, relevant authorities abuse due process by applying for needless restraint orders. Thus, the AML Act gives people whose property is affected by such restraining orders, the right to seek payment of damages, in cases where it is alleged that the action of the relevant authorities involved an abuse of process.¹⁶⁵ In addition, the CP&EC provides that no one shall be entitled to damages or compensation for any loss or damage suffered due to the search, detention and seizure of their property, except where the police acted without reasonable cause.¹⁶⁶ Thus, the state must avoid wasting public funds through payment for damages in matters where legal suits could be avoided.

The answer to avoiding such situations lies in planning. The FATF suggests that state authorities must plan properly before they apply for any provisional orders.¹⁶⁷

Planning helps relevant authorities to identify specific actions they need to take in order to secure the custody or preservation of relevant property.¹⁶⁸ Further, planning would assist to determine whether the property needs to be seized or frozen in the first place.¹⁶⁹ Thus, actions must not be spontaneous or frivolous. This

164 Section 80(2)(b)(ii) of the AML Act.

165 Section 47 of the AML Act.

166 Section 25 (2) of the CP&EC.

167 FATF Best Practices Paper on Confiscation (2012: 9).

168 Greenberg *et al* (2009: 86).

169 G8 Best Practices for the Administration of Seized Property (2005: 2).

will help the state to avoid legal suits that might arise if the state abuses the process by applying for provisional orders, needlessly.

4.7.3 Management of confiscated property

Once the court makes a forfeiture order, there is need to preserve the nature and value of property until its disposal. This ensures that meaningful assets are realised and given to the right people either as restitution, compensation or are allocated to meaningful public projects. This is one grey area where the law does not state who should administer confiscated property. Should it be with the courts or with the prosecution? Or should it go back to investigative agencies? The law in Malawi ought to regulate how relevant authorities should handle such property until its final disposal.



4.7.4 Sale of perishable property

The asset management framework discussed in Chapter Three, recommends that a country should permit the sale of perishable property, before it loses its value.¹⁷⁰ In Malawi, the CPA's Regulations on the Disposal of Recovered, Seized or frozen Property provide for the sale of fast decaying property that has been recovered, seized or frozen.¹⁷¹ This requires ACB officials to act proactively, to discern the delicate nature of the property and to push for its sale. This provision is laudable, for the reason that it ensures that the value of the property is maintained until the end of a prosecution, forfeiture proceedings or disposal stage. Should there be

170 Brun (2011: 91).

171 Section 4(1) of the Corrupt Practices (Disposal of Recovered, Seized or Frozen Property) Regulations (Issued under Section 54 of the CPA).

victims to be compensated the provision ensures that there is money available for their compensation.

Notably, the Regulations state that the sale should be done only with leave of the court. Thus, the court must sanction the sale. This is one way of counter-checking if the decision to put the property on sale is indeed in the interests of justice. Further, the Regulations provide that anyone who has a claim in the property is allowed to pursue their claim in the proceeds of the sale instead.¹⁷² This provision ensures that the state's action through the sale does not infringe on interested parties' rights to seek legal recourse against state actions that affect their interests. This is, therefore, a commendable provision.

Unfortunately, the other pieces of legislation do not have a similar provision. This is a significant oversight, especially on the part of the AML Act, particularly because it has a wider application to all serious crimes than the CPA. Hence, much as the provision for the sale of perishable property is a commendable initiative, the inadequacy posed by the AML Act is regrettable.

4.7.5 Disposal of confiscated property

Once a confiscation order is made, the next thing to determine is where the confiscated property should go. Generally, property law abhors a void in title, and forfeiture ensures that there is no *lacuna* in the ownership of property, by passing title to the state.¹⁷³ This principle applies in Malawi also.

172 Section Section 4(2) of the Corrupt Practices (Disposal of Recovered, Seized or Frozen Property) Regulations (Issued under Section 54 of the CPA).

173 Simser (2009: 13).

All property that is confiscated under the CPA and the Customs and Excise Act, vests in the state.¹⁷⁴ Similarly, all property confiscated under the AML Act vests absolutely in the state.¹⁷⁵ The CPA suggests that the confiscated money, or proceeds from the sale of confiscated property must be given to the state, through the Consolidated Fund, which is the main bank account for the Malawi Government.¹⁷⁶ The other laws do not mention specifically whether vesting in the state means depositing proceeds of the sale of confiscated property into the Consolidated Fund as well. The CP&EC is not clear about the disposal of property. It says merely that the court may make orders regarding disposal of property, either by forfeiture or return of property to its owner.¹⁷⁷

All in all, this is how the law in Malawi has determined the disposal of confiscated property, in pursuit of the standards set by the international conventions, that individual states should dispose confiscated property according to their domestic laws and procedures. However, nothing is said about what the property should be used for, once it vests in the state. The AML Act merely suggests that the confiscated property may be disposed of and its proceeds be applied or dealt with in accordance with the directions of the Attorney General.¹⁷⁸ Since the social contract dictates that the state should conduct its business in the interests of the people, it is imperative that confiscated property should be used for the benefit the

174 Section 3 of the Corrupt Practices (Disposal of Recovered, Seized or Frozen Property) Regulations (Issued under Section 54 of the CPA) and Section 148 of the Customs and Excise Act.

175 Section 54 of the AML Act. The AML Act under Section 54(3)(a) of the AML Act however, stresses that In case an appeal has been lodged, confiscated property shall not be disposed of until the determination of the appeal.

176 Section 5 of the Corrupt Practices (Disposal of Recovered, Seized or Frozen Property) Regulations (Issued under Section 54 of the CPA).

177 Section 149 of the CP&EC.

178 Section 54(3)(b) of the AML Act.

people. The FATF suggests the establishment of an asset forfeiture fund in which all or part of confiscated assets will be deposited for law enforcement, health, education, or other appropriate purposes.¹⁷⁹ In the absence of an asset forfeiture fund, the FATF encourages states to endeavour to use confiscated assets transparently to fund projects that further the public good.¹⁸⁰

4.7.5.1 Compensation of victims of crime

Given that one aim of punishment within the social contract is victim reparation, the Malawi government must ensure that victims of crime are compensated as much as possible. The Penal Code states that the court may order any person convicted of an offence to make compensation to any person who has suffered loss of property by such offence.¹⁸¹ The compensation may be either in addition to or in substitution for any other punishment.

The other laws do not mention anything about victim compensation, but instead, they talk about restitution as discussed below. Suffice to say that the guiding principle on compensation is that a victim must not be over-compensated or under-compensated.¹⁸²

4.7.5.2 Restitution

In the advancement of the reparative aim of asset forfeiture, the CPA requires courts to order a convict to pay to the rightful owner an amount or value of any

179 See best Practices on Confiscation (2012: 7). See also Interpretive Notes to the Forty Recommendations on Recommendation 38 (2012: 6).

180 See FATF Best Practices on Confiscation (2012: 7). See also Interpretive Notes to the Forty Recommendations on Recommendation 38 (2012: 6).

181 Section 32 of the Penal Code.

182 Zelden (1994: 248).

advantage he obtained or received.¹⁸³ However, in the event that the rightful owner cannot be traced, or is himself implicated in the giving of the advantage, the court shall order that the advantage should be forfeited to the government.¹⁸⁴ This thesis argues that this is an extension of the principle that no one should benefit from the commission of a crime. No money or assets should be returned to a person who became a victim in the process of taking part in the commission of a crime. The operation of the law should not be in favour of offenders, nor should it result in the rewarding of offenders.

In addition, the CP&EC provides that in cases where a person is convicted of property-related offences, the court should order the restoration of property to legitimate owners. These offences include theft and theft-related offences such as stealing, taking, obtaining, extorting, converting, or disposing of, or in knowingly receiving any property.¹⁸⁵ Thus, the courts have the power to award, from time to time, writs of restitution in a summary manner.¹⁸⁶ However, the CP&EC stresses that in cases where an offender obtained property by fraud or other wrongful means that do not amount to stealing, the property in such goods shall not vest in the original owner by reason only of the conviction of the offender.¹⁸⁷

In cases like these, prosecutors and courts ought to remember, at all times, to consider the interests of victims. Court cases should not end at imposing imprisonment sentences, but at making sure that victims are given back what was stolen from them. The definition of justice in such cases must be comprehensive,

183 Section 37(b) of the CPA.

184 Section 37(b) of the CPA.

185 Section 148 (1) of the CP&EC.

186 Section 148(2) of the CP&EC.

187 Section 148(3) of the CP&EC.

that is, it must constitute punishing an offender and undoing the harm they occasioned on victims.

This restitution principle is quite significant since it can guide courts and prosecutors on how to dispose of stolen property. It must be given back to legitimate owners. It should be noted, however, that in order for legitimate owners to receive their lost property in its full value, the relevant authorities have the task of tracing, preserving and managing the property until the disposal stage.

Restitution cannot be possible if that which must be given back to its legitimate owner has dissipated or lost its value, as that would be tantamount to failure of justice.



4.7.6 Transparency

Since the social contract demands a government that is accountable to its people in all its actions, there is need for transparent administration of restrained or seized property, as recommended by the international legal framework on asset forfeiture. In Malawi, the AML Act obliges competent authorities that seize property suspected to be tainted property, to report to the FIU on a monthly basis on the status of all seized property.¹⁸⁸ Such competent authorities include all relevant law enforcement agencies that have the mandate to search and seize suspicious property. These monthly reports could enhance transparency in the management of seized property, with the FIU acting on a supervisory role. It should be noted, however, that the other laws do not contain a similar provision on the monthly return of reports of seized property. Nevertheless, since the AML Act

188 Section 72(2) of the AML Act.

applies to all serious crimes whose investigation falls under the mandate of different law enforcement agencies, one can argue that this transparency provision under the AML Act effectively covers all law enforcement authorities.

4.8 Third party interests

Malawi's asset forfeiture regime can be deemed to be just and fair if the relevant laws are centred on the retributive principle which prohibits punishment of the innocent. The law on asset forfeiture must punish law breakers only, by targeting property of those who have broken the law. Usually, punishment of the innocent in asset forfeiture proceedings arises when the seized or confiscated property belongs to third parties who had nothing to do with any offence which tainted the property. To avoid the injustice of depriving innocent people of their property through forfeiture, the law in Malawi protects the interests of innocent third parties and *bona fide* purchasers in forfeitable property.

4.8.1 Third party interests in seized property

The AML Act allows any person who claims an interest in seized property to apply to court to have the property returned to him or her.¹⁸⁹ The court will order the return of such seized property only if it is satisfied that the applicant is entitled to the possession of the property, and that the property is not tainted.¹⁹⁰ However, as discussed in Chapter Three, third party claims ought to be approached with caution, knowing the possibility that offenders may hide tainted property by transferring it to third parties. Thus, the AML Act requires that before returning seized property to

189 Section 73(1) of the AML Act.

190 Section 73(2)(a)&(b) of the AML Act.

a third party, the court must be satisfied that the person, whose conviction, charging or proposed charging formed basis for the seizure of the property, has no interest in the property.¹⁹¹ This law is aimed at stopping criminals from benefiting from sham contracts or agreements, where they transfer property to a third person as a way of distancing themselves and avoiding the forfeiture of their property.

4.8.2 Third party interests in restrained property

In relation to an application for restraining orders, the law has given the courts the discretion to require that a notice should be given to any person who, in the court's opinion, might have an interest in the property.¹⁹² The AML Act, however, recognises that property owners may conceal or manipulate the targeted property once they become aware of an intended restraint through the service of a notice of the state's intention to restrain property. As a result, the Act provides that notice should not be given to third parties if the court is of the opinion that giving such a notice before making the order would result in the disappearance, dissipation or reduction in value of the property.¹⁹³

In cases where a restraining order has already been made, a third party who has an interest in the property may apply to court for the review of the order.¹⁹⁴ The court can either vary or revoke the restraining order, or it can subject the order to certain conditions as the court may deem fit.¹⁹⁵ Before making its decision regarding the application for review, the court may require that notice be given to any person

191 Section 73(2) of the AML Act.

192 Section 82 of the AML Act.

193 Section 82 of the AML Act.

194 Section 87(1) of the AML Act.

195 Section 87(4) of the AML Act.

who in the court's opinion may have an interest in the same property.¹⁹⁶ Similarly, the CPA allows people who are aggrieved by a directive in a restriction notice (referring to a restraining order) to apply to court for the reversal or variation of the order.¹⁹⁷ Consequently, the court can confirm, reverse or vary any directive in the restriction notice. Further, the court can consent to the disposal or dealing of any property, subject to any terms and conditions it may set.

However, the law envisages that property owners may collude with third parties to frustrate the ends of justice by selling or transferring targeted property to third parties. Thus, the AML ACT stipulates that any person who contravenes a restraining order by disposing of the restrained property is guilty of an offence and is liable to punishment upon conviction.¹⁹⁸ Criminalising the contravention of a restraining order is, therefore, the best way of ensuring that targeted property is available for an eventual forfeiture order. Due to the possibility of a collusion between a property owner and a third party to contravene a restraining order, the law allows for the setting aside of any disposition deal between the two. The disposition can be set aside if there is proof that the buyer or recipient did not pay sufficient consideration for it, or had knowledge of the existence of the restraining order and the controversy around the property.¹⁹⁹ Thus the law protects *bona fide* third parties only.

196 Section 87(3) of the AML Act.

197 Section 23(5) of the CPA.

198 Section 85(1) of the AML Act.

199 Section 85(2) of the AML Act.

4.8.3 Third party interests in property liable to forfeiture

Under the AML Act, third party interests are protected before and after the making of a confiscation order. Thus, where a person claims an interest in property before a forfeiture order is made, the court will make an order declaring the nature, extent and value of that person's interest in the property.²⁰⁰ Examples of such property would be a house or vehicle co-owned by spouses, and only one of them has committed an offence and used the property as an instrumentality of crime. Before determining the extent and nature of a third party's interest in the property, the court must be satisfied first, on the balance of probabilities, that the person was not in any way involved in the commission of the offence in question.²⁰¹ The Penal Code also bars claims from people who knew or consented to have their property used in the commission of a crime.²⁰²

Further, where the person acquired the interest during or after the commission of the offence, the court must be satisfied that he or she acquired the interest for sufficient consideration and without knowing that the property was not, at the time of its acquisition, property that was tainted property.²⁰³ This provision is commendable as it makes sure that only those who buy tainted property without knowing about its tainted nature are spared. It could have been a mistake to simply spare those who purchase property by paying sufficient consideration, since some can pay sufficient consideration while they are fully aware that the property they are purchasing is tainted.

200 Section 56(2) of the AML Act.

201 Section 56(2)(a) of the AML Act.

202 Section 317(2) of the Penal Code.

203 Section 56(2)(b)(i)&(ii) of the AML Act.

4.8.4 Third party interests in forfeited property

Under the AML Act, once a forfeiture order has been made, third parties are allowed to claim their interests in the forfeited property within twelve months from the date the order was made.²⁰⁴ A person is barred from making make such a claim, however, if he had knowledge of the state’s application for forfeiture before the order was made, or if they ever appeared at the hearing of a forfeiture application.²⁰⁵

4.8.5 Third party interests in property subject to restitution

Before ordering restitution, if evidence shows that an offender stole property and sold it to another person, and that money from the sale was found on him during his arrest, the court may, on the application of a purchaser, order that the purchaser be given back what he or she paid for the purchase.²⁰⁶ The court should order the return of the money only if evidence shows that at the time of the purchase, the purchaser had no knowledge that it was stolen.²⁰⁷ The amount of the returned money, however, should not exceed the amount of the proceeds of the sale. This provision ensures that there is no injustice occasioned on innocent purchasers, by helping them recover what they spent on the purchase of stolen property.

204 Section 56(3) of the AML Act.

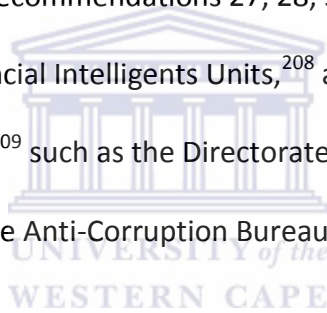
205 Section 56(4)(a)&(b) of the AML Act.

206 Section 148(4) of the CP&EC.

207 Section 148 (4) of the CP&EC.

4.9 Institutional framework for money laundering and asset forfeiture

The law would be of no effect if it is not coupled with enforcement. On top of setting up laws relating to money laundering and asset forfeiture, Malawi has designated relevant authorities to assist in the enforcement of these laws. These authorities collectively comprise Malawi's institutional framework for the investigation and prosecution of offences, and for the recovery of illicit property. This is in line with the requirements set by the international anti-money laundering and asset recovery framework. Specifically, the FATF requires countries to put in place a strong law enforcement, prosecution and other competent authorities pursuant to the FATF's Recommendations 27, 28, 30 and 32. In Malawi such institutions include Financial Intelligents Units,²⁰⁸ as well as law enforcement and investigative authorities²⁰⁹ such as the Directorate of Public Prosecutions, the Malawi Police Service, the Anti-Corruption Bureau and the Malawi Revenue Authority.



4.9.1 Prosecutorial and investigative authorities

The supreme authority to prosecute crimes vests in the Director of Public Prosecutions (DPP). The DPP is responsible for the prosecution of all crimes against the laws of Malawi, pursuant to section 99 of the Constitution of the Republic of Malawi (The Constitution)²¹⁰ and section 76 of the Criminal Procedure and Evidence Code (CP&EC).²¹¹ These provisions imply that the DPP is responsible for the

208 FATF Recommendation 29.

209 FATF Recommendation 30.

210 Came into force on 18 May, 1994.

211 Chapter 8:01 of the Laws of Malawi.

prosecution of all criminal cases in Malawi, including money laundering and all predicate offences that form the basis for the forfeiture of tainted property.

The DPP can delegate his or her prosecutorial duties to any person working in the public service acting as the DPP's subordinate, or other legally qualified persons on instructions from the DPP.²¹² The persons in the public service include lawyers and paralegals working in the DPP's office, or officers working in specialised law enforcement institutions such as the Anti-Corruption Bureau and the Malawi Revenue Authority. Furthermore, persons in public service include prosecutors in the Malawi Police Service.²¹³ The DPP appoints prosecutors or delegates prosecutorial power in writing, either generally or on a case by case basis.²¹⁴ When the DPP appoints public officials or legal officers as prosecutors generally, it means that the appointees may, from the time of their appointment, prosecute any case at any time without specifically seeking consent from the DPP in each case they handle. However, when the DPP specifically appoints a prosecutor, it means the appointee has to seek consent to prosecute on a case by case basis.

The second law enforcement authority under discussion is the Malawi Police Service (MPS), established under section 3 of the Police Act.²¹⁵ It is headed by an Inspector General who is subject to the general directions of a Minister of Internal Affairs.²¹⁶ The MPS is responsible for the prevention, investigation and detection of crime, as well as the apprehension and prosecution of offenders, among other

212 Section 100 (1)(a)&(b) of the Constitution. See also Section 79 of the CP&EC.

213 Section 100(2)(b) of the Constitution.

214 Section 73 of the CP&EC.

215 Act No 10 of 2010.

216 Section 7 of the Police Act.

functions.²¹⁷ This means the MPS can investigate any crime against the laws of Malawi. Further, the MPS can prosecute offenders who violate the laws of Malawi, except for very serious cases which are prosecuted by officers of the DPP's office.

Even though the MPS is tasked generally with the prosecution of offenders, police prosecutors conduct prosecutions based on the general consent of the DPP, as stated earlier. It should be noted, however, that Malawi has not established a specific law enforcement agency for the investigation of money laundering. Given its general investigative powers, the MPS has the primary responsibility of investigating money laundering, fraud and other financial crimes such as theft by public officials, through its Fraud and Fiscal Unit.²¹⁸

Additionally, there is the Anti-Corruption Bureau (ACB). This is a specialised government department established under section 4 of the Corrupt Practices Act.²¹⁹ It is headed by a Director, whose appointment and removal from office is done by the State President, subject to the confirmation of Parliamentary Appointments Committee.²²⁰ The ACB is charged with the prevention, investigation and prosecution of corruption offences.²²¹ Even though it is tasked with corruption offences, the ACB can investigate any offence under any written law of Malawi that is disclosed in the course of investigating any corruption offence under section 10(e) of the CPA. The implication of this provision is that the ACB can also prosecute money laundering if its commission is disclosed during a bribery investigation. In agreeing with this implication, ACB authorities indicated that they intended to use

217 Section 4(1) of the Police Act.

218 Mutual Evaluation Report for Malawi (2008) Para 235 & 240.

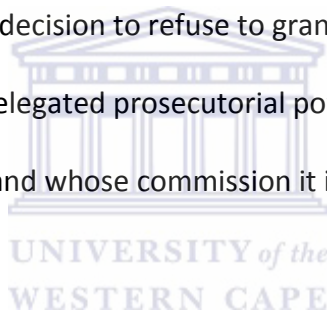
219 Chapter 7:04 of the Laws of Malawi.

220 Section 5(1) and section 6 (2) of the CPA.

221 Section 10 (a),(d)&(f) of the CPA Act.

the AML Act to broaden their investigations in corruption cases by including the laundering of the proceeds of corruption.²²²

Notably, prosecutors employed at the ACB are required to obtain consent from the DPP before they can institute prosecution proceedings for offences under the CPA, or any offence under any written law that is disclosed during a corruption investigation.²²³ Unlike the general consent given to police prosecutors, the ACB must seek consent from the DPP on a case by case basis. The DPP can either grant or refuse to grant such consent, but he or she must furnish the ACB Director with reasons for any such refusal.²²⁴ In addition, the DPP is mandated to inform the Legal Affairs Committee of his decision to refuse to grant prosecutorial consent.²²⁵ Thus, the ACB only exercises delegated prosecutorial powers over offences it is specially assigned to investigate, and whose commission it is specifically mandated to prevent.²²⁶



Lastly, some prosecutorial and investigative authority vests in the Malawi Revenue Authority (MRA), established under section 3 of the Malawi Revenue Authority Act (MRA Act).²²⁷ This is a government agency responsible for the assessment, collection and receipt of specified revenue in Malawi.²²⁸ It is headed by a Commissioner General whose appointment and removal from office is done by a

222 Mutual Evaluation of Malawi (2008) Para 242. The ACB authorities made this indication during an interview with a team of evaluators during and anti-money laundering and combating terrorist financing evaluation, conducted in March 2008.

223 Section 42(1) of the CPA Act.

224 Section 42(2)(a) of the CPA Act.

225 Section 42(2)(b) of the CPA Act.

226 Section 10(1)(a)&(b) of the CPA Act.

227 Chapter 39:07 of the MRA Act.

228 Section 4(1) of the MRA Act.

Board of Directors, subject to the approval of the Minister of Finance.²²⁹ Among other functions, the MRA is tasked with the administration and enforcement of certain laws such as the Customs and Excise Act, Taxation Act and the Value Added Tax Act.²³⁰ It is also mandated to counteract fraud and other forms of fiscal evasion.²³¹ The investigation of tax fraud, tax evasion and other tax-related offences is done by MRA's Tax Investigation Division (TID).

In view of these foregoing, Malawi has put in place a comprehensive institutional framework to help with the prosecution and investigation of all crimes established under its laws. These institutions are tasked with the enforcement of the anti-money laundering and asset forfeiture legal framework discussed earlier. However, establishing an institution is one thing, but ensuring the smooth operation of the institution is another. Therefore, this thesis will proceed to assess the independence of these institutions, especially since the appointment of the heads of most of these institutions is done by a political figure, the State President.

4.9.2 Financial Intelligence Unit

Apart from the law enforcement institutions discussed above, Malawi has also put in place the Financial Intelligence Unit (FIU), an institution that is crucial in the overall fight against money laundering. The FIU was established under Section 11 of the AML Act, and it became operational in July 2007. It is an autonomous central national agency, responsible for receiving, requesting, analysing and disseminating reports to competent authorities, in order to counter money laundering and

229 Section 17(1)&(5) of the MRA Act.

230 Section 4(2)(a) of the MRA Act.

231 Section 4(2)(d) of the MRA Act.

financing of terrorism.²³² The FIU receives, analyses and assesses reports of suspicious transactions issued by financial institutions.²³³ If, upon the analysis and assessment of such reports, the FIU determines that there is an element of money laundering or financing of terrorism in the case at hand, it is mandated to send a report in that regard to an appropriate law enforcement or supervisory authority.²³⁴ In view of the nature of these functions, Malawi's FIU is administrative in nature, since it neither investigates nor prosecutes money laundering or any related cases.²³⁵

The FIU is supposed to be headed by a Director who is appointed by the President of the Republic of Malawi.²³⁶ The appointment, however, is subject to the approval of the Public Affairs Committee (PAC).²³⁷ The Director may be removed from office by the President on grounds of misconduct, incapacity or incompetence, but the removal is subject to the approval of the PAC.²³⁸ Unlike the independence issue raised in relation to the appointment and removal of the DPP, the independence of the Director of the FIU cannot be questioned in the same regard because the President is not left with the autonomous power to hire and fire. It should be noted, however, that since its establishment in 2007, the FIU has had only its first Director who was appointed in 2013. The first Director appointed by President Bingu wa Mutharika was not confirmed by the PAC.²³⁹ The rejection was on the

232 Section 11(1) of the AML Act.

233 Section 11(2)(a) of the AML Act.

234 Section 11(2)(b) of the AML Act. The authorities include the Fiscal and Fraud Unit of the Malawi Police, the ACB, MRA and Immigration Department.

235 Section 11(2)(i) of the AML Act.

236 Section 13(1) of the AML Act.

237 Section 13(1) of the AML Act.

238 Section 15(1) of the AML Act.

239 Mutual Evaluation Report for Malawi (2008) Para 186.

ground that the appointee was not fit for the job, but the PAC did not give valid reasons in this respect.²⁴⁰ Until 2013, the FIU has been headed by an acting Director, who assumed all the powers of the Director.

The FIU is perceived as the main driver behind the implementation of the anti-money laundering regime in Malawi.²⁴¹ Its central role can be appreciated from its multi-dimensional functions, which cut across the different participants in the anti-money laundering field, such as financial institutions and law enforcement. An example of the relevance of the FIU in the anti-money laundering discourse is its involvement in the investigation of the recent embezzlement cases discussed earlier. In this respect, the FIU is not investigating *per se* since it is not mandated to do so. Rather, the FIU is working in collaboration with the Reserve Bank in the analysis of various bank accounts in order to find out how the Government paid out huge sums of money to various companies that have been implicated in the embezzlement.²⁴²

4.9.3 Operational independence of prosecuting authorities

Based on the supreme prosecutorial powers which the DPP holds, the prosecution of money laundering and serious crimes and the subsequent confiscation of tainted property largely depends on the DPP's smooth and unhindered exercise of his powers. One important aspect in this regard is the DPP's independence to exercise his powers, which can be affected by his appointment into and removal from office.

240 Millennium Challenge Corporation (2008).

241 Mutual Evaluation Report for Malawi (2008) Para 160.

242 Matonga (2013).

The DPP is appointed by the President, subject to confirmation by the Public Appointments Committee (PAC), a committee which comprises members of parliament.²⁴³ Furthermore, the President has the power to remove the DPP from office, on grounds of incompetence; questionable impartiality in the exercise of his or her duties; incapacitation; or attainment of the prescribed retirement age.²⁴⁴

Unlike the appointing powers, the President's power to remove the DPP is not subject to the approval of PAC. This raises serious concerns about the DPP's independence, as he may be subjected to political pressure or influence in fear of the President's absolute power to remove him. One may argue, perhaps, that there is no need to be concerned because the Constitution stipulates grounds on which the President can remove the DPP from office, as stated earlier. However, the mere listing of grounds for dismissal in the Constitution is no guarantee of the tenure of the DPP, nor does it guarantee non-interference with the DPP's independence.

A practical example is the dismissal of a former DPP, Mr Ishamel Wadi, by the former President of Malawi, Professor Bingu wa Mutharika on 10 August 2006. Mr Wadi was dismissed before the expiry of his term of office.²⁴⁵ Even though the Constitution obliges the President to fire a DPP only on the stated grounds, the dismissal was not justified on any of these grounds.²⁴⁶ The dismissal followed the DPP's decision to discontinue the prosecution of a case against the preceding President of Malawi, Dr Bakili Muluzi, who was facing corruption charges and the case was being handled by the ACB. The DPP made the decision to discontinue the

243 Section 101 of the Constitution.

244 Section 102(2) of the Constitution.

245 Tenthani (2006).

246 Kanyongolo (2006: 90).

case on the eve of Muluzi's trial. The basis for his decision was that since the State President had fired the then ACB Director, the ACB had no power to prosecute the matter because only an ACB Director could prosecute such cases, according to the law.²⁴⁷

However, Mutharika contended that Wadi's decision to drop the charges had done the country more harm than he realised and further argued:

"This withdrawal has destroyed my credibility as president against corruption but also the credibility of this country globally."²⁴⁸

Clearly, the personal reference made by the president in this statement had nothing to do with the grounds laid down in the Constitution. This speaks volumes about the genuineness of the dismissal.

The independence of the ACB is debatable also, because of the requirement that the ACB Director must obtain from the DPP consent to prosecute cases it is mandated to investigate. Ideally, the ACB is supposed to be an independent government department, exercising its functions and powers independent of any direction or interference by any other person or authority.²⁴⁹ However, as already noted above, the ACB can prosecute only with the direction of another authority, the DPP. One may argue that there is no problem with this because the DPP is mandated to give reasons for the refusal of consent, hence his refusal is not arbitrary.

247 Pantesco (2006).

248 Tenthani (2006).

249 Section 4(3) of the CPA Act.

However, this thesis argues that there is still a challenge stemming from the fact that even though the DPP ought to give reasons for refusal of consent to both the ACB Director and the Legal Affairs Committee, this is of no consequence since it all ends with the DPP's furnishing reasons for such refusal. The law as it stands today, provides no basis for the Legal Affairs Committee to question the DPP's decision; or for the ACB Director to appeal against or seek a review of such a decision. The Constitution provides that the DPP shall be accountable to the Legal Affairs Committee for the exercise of his powers,²⁵⁰ but it is not known how the Committee deals with consent refusals. There have been situations whereby the ACB has investigated cases and recommended them for prosecution, but few are prosecuted because the DPP refused to grant the necessary consent.²⁵¹

Another safeguard against complications brought about by consent-seeking by the ACB, is the provision that the ACB Director is entitled to commence prosecution as if he or she had been given consent, if the DPP does not respond to an application for consent to prosecute within thirty days.²⁵² Much as this provision gives the ACB Director authority to prosecute if the DPP does not respond to an application within 30 days, it is submitted that this is not enough in addressing the ACB's independence. The argument is that this provision only addresses delays of the DPP to give consent but it does not address the ACB's independence as long as the DPP responds to consent applications within thirty days. Given this situation, the ACB's independence remains shaky, as long as the prosecution of the cases it investigates depends on the consent of another authority, the DPP, whose decisions the ACB

250 Section 100(2)(a) of the Constitution.

251 Kamanga (2007: 154).

252 Section 42(3) of the CPA.

cannot question, and whose independence from political interference by the Executive branch of government is questionable also.

All in all, despite the operational independence issues affecting the law enforcement institutions, the institutional framework is adequate for the combating of money laundering and the recovery of illicit property. What remains is evidence that the state, through these institutions, is geared towards crime prevention through the combating of money laundering and the recover of criminal proceeds.

4.10 Conclusion

Generally, Malawi meets the minimum international standards on the combating of money laundering and forfeiture of illicit property. Malawi has put in place the basic structure for a comprehensive legal and institutional framework for the combating of money laundering and confiscation of tainted property. The legal framework is centred on achieving a forfeiture regime that is fair and just, by excluding interests of innocent people from forfeiture, and also by providing for proportionate forfeiture orders. The wide range of forfeitable property ensures the maximisation of deterrence, as well as victim-compensation.

However, the absence of a comprehensive civil forfeiture scheme is a significant oversight which needs immediate attention. It will be difficult to enhance deterrence or to compensate victims adequately, if the state fails to recover criminal proceeds through civil forfeiture. This oversight must be addressed as soon as possible.

In addition, Malawi needs to address the questions of the operational independence of its law enforcement authorities. The executive branch of the government ought to stick to the tenets of the social contract, by refraining from unduly influencing the operations of the law enforcement authorities. These authorities must be allowed to execute their powers and duties in the best interests of the people, not in the best interests of a few top government officials.



CHAPTER FIVE

THE CONSTITUTIONALITY OF PROVISIONAL ORDERS

5.1 Introduction

The implementation of laws relating to asset forfeiture in Malawi has been shaped by the legacy of the 1966 Forfeiture Act,¹ which failed the constitutionality test at the advent of democracy. This chapter will analyse the implementation of the current laws relating to provisional orders in Malawi, as discussed in the previous chapter, while highlighting the influence that the repealed Forfeiture Act has had and continues to have, on the implementation of these laws. The discussion will confront the courts' approach to the law on asset forfeiture, as well as the evolution of the jurisprudence on this subject. The discussion will highlight ultimately the human rights issues that arise in the asset forfeiture discourse, particularly in relation to provisional orders, and analyse how courts in Malawi approach and interpret them.

5.2 The constitutionality question

As stated in Chapter Two, the republican constitution comprises a legal framework of a social contract among members of a society.² The state's adherence to the limits set by the constitution becomes the benchmark for assessing the goodness of any law or state policy for the people. In addition, the legitimacy of government policy and authority derives from the people, through the constitution.³ Thus, the

1 Act No 1 of 1966.

2 Norrie (1991: 226).

3 Okoth-Ogendo (1991: 7).

topic on the constitutionality of state laws, policies and actions keeps resurfacing in modern day, even in issues of crime prevention measures, such as asset forfeiture and provisional orders. In Malawi, the Constitution is the supreme law of the land. Hence, state laws, policies and actions are constantly tested against the tenets of the Malawi Constitution.

The constitutionality test on asset forfeiture began with the repealed Forfeiture Act which was challenged at the advent of democracy in Malawi in the early 1990s. The Act was criticised mainly for its gross violation of the fundamental human rights of the people it targeted, due to its lack of due process safeguards during and after the ordering of forfeiture. Ironically, the constitution which existed before Malawi's democracy, the 1966 Constitution, guaranteed the recognition of the sanctity of the personal liberties that were enshrined in the United Nations Universal Declaration of Human Rights (UDHR).⁴ These include the right to own property and the right against the arbitrary deprivation of property.⁵

The Malawi Supreme Court of Appeal confirmed, in the case of *Tom Chakufwa Chihana v The Republic*,⁶ that the UDHR was part of the laws of Malawi, and that the Court must be the protector of the fundamental human rights contained in the Declaration. However, those liberties and rights were subject to limits under the Malawian Constitution. The Constitution stated that rights could be limited only by a law that was reasonably required, in the interests of defence, public safety, public

4 Section 2(1)(iii) of the 1966 Constitution. UDHR was proclaimed by the United Nations General Assembly in Paris on 10 December 1948.

5 Article 17(1) & (2) of the UDHR.

6 MSCA Criminal Appeal Number 9 of 1992.

order, or the national economy.⁷ Public safety, public order and national economy also constituted grounds for ordering forfeiture under the Forfeiture Act. This begs the question: How could anyone question the constitutionality of the Forfeiture Act when the grounds for ordering forfeiture fell squarely within the constitutional limitation of rights and liberties?

There are two schools of thought regarding this question. The first school argues that the Forfeiture Act was constitutional in so far as it justified forfeiture on the grounds that justified the limitation of rights, as set out in Section 2(2) of the Constitution, *i.e.* that a person acted in a manner that was prejudicial to the safety or the economy of the state, or was subversive to the authority of the lawfully established government. The considerations of public safety and the economy of the nation as justification for forfeiture, therefore, according to this school of thought, put the Act in harmony with the text on constitutional limitations. This was the understanding of the High Court judges, Tambala and Msosa (as they were then), in *Aboobaker & Another v Attorney General*⁸ and *Chaponda v Attorney General*,⁹ respectively.

These judges determined the constitutionality of the Act by looking at how it fits within the constitutional limitations. They said that the Forfeiture Act was not unconstitutional in as far as the circumstances under which property could be forfeited, were compatible with the *proviso* to Section 2(2) of the Constitution. This approach can be attributed to legal positivism, which concerns itself with what the

7 Section 2(2) of the 1966 Constitution.

8 [1995] 1 MLR 1 (HC).

9 [1997] 1 MLR 273 (HC).

law is, not what it ought to be. To a positivist, a law is valid because it was created or promulgated through the right processes or by the right authority, and not because it is just or reasonable.¹⁰ A piece of legislation, therefore, could be a valid law simply because it came into being by way of an acceptable process, regardless of whether its implementation yields unreasonableness and injustice.

Contrariwise, the second school of thought determined the constitutionality of the Forfeiture Act on the basis of how its implementation contravened fundamental human rights, and yielded unreasonableness and injustice. This approach was propounded by some Judges of the High Court (as they were then), such as Justice Mwaungulu and Justice Kunitsonyo. Unlike the first school of thought, these judges considered the manner in which the Forfeiture Act was enforced, as well as the injustice it occasioned those against whom it was enforced. The judges did not focus on how consistent its text was with the Constitution. Justice Mwaungulu in *American Stores Limited v Attorney General*¹¹ found that the Act was unconstitutional for unreasonably compromising human rights. In the same vein, Justice Kunitsonyo in *Mohamed Sidik Aboobaker v Attorney General*¹² held that the Forfeiture Act's violation of the rules of natural justice rendered it unconstitutional.

Nonetheless, it should be noted that Justice Msosa in the *Chaponda* case, upon giving a positivist evaluation of the Forfeiture Act, proceeded to determine the constitutionality of the Act using the second school of thought. Thus, she held that

10 Simons (2009: 147).

11 Civil Cause No 173 of 1994 (Unreported).

12 Civil Cause No 964 of 1994 (Unreported). See also *Waka v Attorney General* Civil Case No 1855 of 1993, (Unreported); *Gombera v Attorney General* Civil Case No 1558 of 1993 (unreported); *Banda v Attorney General* Civil Case No 1727 of 1993 (unreported) and *Khansia v Attorney General* Civil Case No 33 of 1994 (Unreported).

ultimately, the Act was unconstitutional because its forfeiture procedures contravened fundamental human rights.

In view of the two schools of thought, then, one may wonder as to what makes a particular law a good law, and what should be the basis for determining the validity of a law. Is it the compatibility of its text with constitutional provisions, or should one consider the effect that such a law has on its subjects? When assessing the validity of a law, legal positivism does not consider questions of human rights, fairness or justice. The theory focuses mainly on the ways in which such a law was created. Following positivist thinking, the Forfeiture Act would be a valid law regardless of the injustice it created, and that is why Justices Tambala and Msosa arrived at their conclusion that it was valid. Such an approach is blind to the gross injustices this law created for the people whose property had been forfeited arbitrarily, pursuant to the Act, as will be discussed later in the chapter.

Taking a positivist approach presupposes that a government would pass a good law in the first place and hence there would be no need to worry about its fairness.

Contrary to this assumption, Justice Mwaungulu, in *American Stores Limited v Attorney General*,¹³ said:

“Constitutional governments, upholding the rule of law, democratic values and fundamental rights can pass laws that undermine fundamental human rights. What matters is existence of legal arrangements, as both Constitutions provide, for challenging the validity of such laws.”¹⁴

Mwaungulu’s statement expresses the fear that governments, albeit constitutional and professing to uphold human rights, may resort to passing laws that undermine

13 Civil Cause No 173 of 1994 (Unreported).

14 Civil Cause No 173 of 1994 (Unreported).

human rights and the ends of justice. Thus, applying the law as it is, regardless of its unreasonable and unjust consequences, would occasion great injustice for the people it is supposed to serve. Even Locke in his account of the social contract states that people give parliament the power to make laws that are just and in their interests only.¹⁵ The legislature must not act against the trust of the people, by refraining from making laws that limit the rights of the people arbitrarily.¹⁶ This underscores the point that a law is not valid merely because it has been passed by parliament. It is valid because it is just.

Furthermore, Justice Mwaungulu commented that even though the Forfeiture Act was intended for the protection of the economy, it flouted basic human rights, and was not reasonably necessary for the protection of the economy. Consistency with the constitutional limitation clause is not only a function of the similarity of the text, but mainly, of the justice of results. This thesis, therefore, agrees with the approach taken by the second school of thought. Courts ought to determine the validity of a law by assessing the injustice it creates, and not by merely looking at how its text aligns with the text in the Constitution.

5.3 Limitation of human rights under the 1994 Constitution

The current Constitution allows for the limitation of certain human rights also. It states as follows:

“No restrictions or limitations may be placed on the exercise of any rights and freedoms provided for in this Constitution other than those prescribed

15 Locke (1990: 189) XI.142.

16 Locke (1990: 228) XIX.221.

by law, which are reasonable, recognized by international human rights standards and necessary in an open and democratic society.”¹⁷

In cases where the restriction or limitation of rights is permissible, the laws prescribing such restrictions or limitations should not negate the essential content of the right or freedom in question.¹⁸

Similarly, in the Canadian case of *R v Oakes*¹⁹ the Court in this case said that the limitation of the rights enshrined in the Canadian Charter had to be directed to the achievement of an objective of sufficient importance and there had to be proportionality between the limitation and such an objective. Proportionality according to the court in this case necessitated that first, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on rational considerations.

The Supreme Court of Malawi, in *The Attorney General v Hon. Friday Jumbe & Another*,²⁰ deliberated on the meaning of the word “necessary” contained in the Constitution of Malawi’s limitation clause. It held that:

“*necessary* would be that which is beyond mere convenience and should lend itself to that which is indispensable in order to achieve certain results.”²¹

In relation to provisional orders, therefore, the issuing and continued enforcement of such orders should not be a function of mere convenience, as bemoaned by the Supreme Court. It should be indispensable to achieving the objectives of the asset forfeiture laws. This should be the standard when determining whether a particular

17 Section 44(1) of the Constitution.

18 Section 44(2) of the Constitution.

19 1987 LRC (Const.) 447 500.

20 MSCA Constitutional Appeal No 29 of 2005 (Unreported).

21 MSCA Constitutional Appeal No 29 of 2005 (Unreported) 5. (My emphasis on ‘necessary’).

order constitutes an unjustifiable limitation the right to property. As stated in Chapter Four, the state must plan before seeking any provisional orders, so as to determine if it is really necessary to get such orders.²²

5.4 Human rights contentions in relation to provisional orders

Often times, asset forfeiture comes into conflict with human rights. Locke stated that the chief end of a civil government is the protection of the right to property, which comprises the right to liberty, life and estates.²³ Thus, the need to respect fundamental rights is a standard requirement for sound policy making, and a structural issue of any given legal system. The implementation of the existing asset forfeiture laws in Malawi, particularly concerning provisional orders, continues to trigger human rights debates.



5.4.1 Right to property

The 1966 Forfeiture Act was declared unconstitutional for its violation of the right to property, among other rights. The 1966 Constitution also provided that no person should be deprived of his property without payment of fair compensation, unless public interest required or justified such deprivation.²⁴ As mentioned earlier, the UDHR guarantees the right to property and the right against arbitrary deprivation of property. This international legal instrument forms part of the laws of Malawi, and offers an extra basis for the recognition of the right to property in Malawi.

22 FATF Best Practices Paper on Confiscation (2012: 9). See also Greenberg *et al* (2009: 86).

23 Locke (1990: 180) IX.124.

24 Section 2(1)(iv) of the 1966 Constitution.

It should be noted, however, that the 1966 Constitution guaranteed only the right against deprivation of property by expropriation, and not necessarily deprivation by forfeiture, because it talks about payment of compensation to those whose property has been expropriated, which does not happen in asset forfeiture. The Constitution did not provide for the right to property generally, as provided by the UDHR. Nevertheless, according to the *Tom Chakufwa Chihana v The Republic*²⁵ case, the UDHR was law in Malawi, and therefore, the Malawi Government was under an obligation to protect all rights and liberties under the UDHR, including the right to property.

As mentioned above, the 1966 Constitution stated that the limitation of rights could be permissible only if the law which brings about such a limitation was necessary in the interests of defence, public safety, public order or the national economy. Thus, it begs to question if the limitation of the right to property under the Forfeiture Act is justifiable. The Act allowed the Minister to make a forfeiture order without giving reasons or grounds for ordering the forfeiture. This ministerial freedom constituted an arbitrary deprivation of property, since no one could appreciate the basis for the orders. In the *Chaponda* case, Justice Msosa found that the Act violated the right against arbitrary deprivation of property. She commented that the Government should be able to justify its actions, failing which it would be difficult for one to justify the ordering of forfeiture by the Minister.²⁶

Given the history of the repealed Forfeiture Act and how it violated the right to property, the current forfeiture laws often attract criticism for their potential to do

25 MSCA Criminal Appeal No 9 of 1992 (Unreported).

26 Civil Cause No 616 of 1994 (Unreported).

the same. Provisional orders affect property rights because they result in the temporary deprivation of property that is or is suspected to be connected to criminal activity, as the case may be.

The good news is that the current Constitution protects the right to property. It provides specifically that every person has the right to acquire property as well as the right against arbitrary deprivation of property.²⁷ It should be noted, though, that the Constitution merely protects the right to acquire property and not the express right to own property, as provided for under the UNDHR.²⁸ This protection is wanting, because forfeiture interferes with ownership and possession of property and not only its acquisition. The law limits the right to property right from the implementation of provisional orders up to the confiscation stage.

However, Section 28(2) of the Constitution mitigates the inadequacy created by the right to acquire property, by providing against arbitrary deprivation of property.

This provision, therefore, establishes a minimum protection of the right to peaceful possession, use and enjoyment of property.²⁹ One can argue, however, that possession, use and enjoyment may not always presuppose ownership. Be that as it may, the protection against arbitrary deprivation of property guards implicitly against any unjustified interference with the ownership of property.

The Supreme Court of Malawi in *Attorney General v. The Malawi Congress Party & Others* held that “to act arbitrarily” means “to act without any reasonable

27 Section 28 of the Constitution.

28 Compare Section 28 (1) of the Constitution and Article 17(1) of the UNDHR.

29 Chirwa (2011: 288).

cause".³⁰ Thus, ideally, provisional orders must not be obtained or executed arbitrarily, lest they interfere unjustifiably with a person's right to acquire and own property. However, this thesis contends that the right to property does not extend to the proceeds of crime, because an offender has no right to keep them.³¹ They must be confiscated, in line with the rationale that crime should not pay.

The High Court, in the case of *Atupele Properties Limited v Director of Anti-Corruption Bureau*³² stated that inherent in the right to property, is the right to dispose of property by way of sale or otherwise.³³ Provisional measures, therefore, should not be obtained or executed in a manner which interferes with one's right to sell or dispose of property unjustifiably.

5.4.1.1 Right to property vs provisional orders

The interference with the enjoyment of the right to property begins at the investigation stage, when the state obtains provisional orders such as seizure and freezing orders against suspect property. As stated earlier, these orders help to avoid the dissipation of property pending the conclusion of investigations, prosecution and subsequent forfeiture proceedings. Once provisional orders are made, the property owner has limited or restricted use of or access to his property, thus, limiting his full realisation of the right to property. In relation to the right to dispose of property, the existence of a provisional order implies that the property owner is enjoined from disposing of such property as he would wish.³⁴ The

30 MSCA Civil Appeal No 22 of 1996.

31 Godinho (2008: 331).

32 Miscellaneous Civil Cause No 286 of 2005 (Unreported).

33 Miscellaneous Civil Cause No 286 of 2005 (Unreported) 30.

34 *Atupele Properties Limited v Director of Anti-Corruption Bureau*. See Chirwa (2011: 288).

discussion will proceed to assess if such a limitation or restriction is justifiable under the current Constitution.

5.4.1.2 Limitation of the right to property

The current Constitution permits the limitation of the right to property.³⁵ However, the limitation should be prescribed by law, reasonable, recognised by international human rights standards and necessary in an open and democratic society.³⁶ The restriction or limitation should not negate the essential and explicit elements of the right to property,³⁷ which are the right to acquire property, as well as the right against arbitrary deprivation of property.³⁸

*Greselder Jeffrey v Anti-Corruption Bureau*³⁹ is the case in point. In this case, the ACB obtained a seizure order and a freezing order against money belonging to the appellants. This occurred pursuant to Section 32(5) of the Corrupt Practices Act (CPA) of 1995, (now Session 23 of the current CPA of 2004). This provision authorises the ACB to seize or freeze any document or other records or evidence, or any property including the property which is alleged to constitute bribery.

The appellants applied to the High Court for the variation of the seizure and freezing orders, but the court denied the application. Consequently, they lodged an appeal in the Supreme Court of Malawi. Among other issues, the appellants argued that Section 32(5) of the CPA, especially as regards the manner in which it may be interpreted and applied in a particular case, is capable of violating the right against

35 Section 44 of the Constitution.

36 Section 44(2) of the Constitution.

37 Section 44(3) of the Constitution.

38 Chirwa (2011: 288).

39 MSCA Civil Appeal No 12 of 2002 (Unreported).

arbitrary deprivation of property that is guaranteed under Section 28 of the Constitution.⁴⁰ They submitted that the application of section 32(5) of the CPA violated the right to property.

In opposition to the appeal, the respondent (ACB) argued that the right to property is subject to limitation under Section 44(2) of the Constitution. The appellants conceded that the right to property is indeed subject to limitation and that Section 32(5) of the CPA restricts this right, but they were concerned that the manner in which this section may be interpreted and applied, could violate the right.⁴¹ The respondent then submitted, and the court agreed, that Section 32(5) of the CPA contains the best safeguards against abuse because every time a seizure order is required, it must be obtained from a court of law.⁴² This underscores the expectation that courts are there to safeguard the rights of property as much as possible when an application for a provisional order is before them; hence, there is no cause for concern.

It is argued also that the limitation of the right to property should not impose unreasonable restriction on the freedom of property owners to dispose of their property.⁴³ *Atupele Properties Limited v Director of Anti-Corruption Bureau*⁴⁴ is the case in point. In this case, the ACB had issued a restriction notice, restraining the Land Registrar of the Minister of Lands from authorising the sale of Keza Building which was owned by Atupele Properties Limited, or otherwise dealing with any other matter relating to the building, without the consent of the Director of the

40 MSCA Criminal Appeal No 12 of 2002 (Unreported) 10.

41 MSCA Criminal Appeal No 12 of 2002 (Unreported) 11.

42 MSCA Criminal Appeal No 12 of 2002 (Unreported) 11.

43 Chirwa (2011: 288).

44 Miscellaneous Civil Cause Number 286 of 2005 (Unreported).

ACB. The intervention was to pave the way for the conclusion of corruption investigations against Dr Bakili Muluzi, who was at that time the chairman of the appellant, Atupele Properties Limited. This notice was issued pursuant to Section 23(5) of the Corrupt Practices Act and its granting was triggered by the intention of Atupele Properties Limited to sell the Keza building while investigations against its chairman, Dr Bakili Muluzi, were still in progress.

Atupele Properties Limited filed an application in the High Court for the reversal or variation of the directives contained in the restriction notice. The High Court vacated the restriction notice mainly on the basis of the delay on the part of the ACB to conclude investigations and commence criminal proceedings against Dr Bakili Muluzi. The court stated that such a delay violated some rights and constitutional values, and that the restriction notice in this particular case violated the right to property.



The court also held that the applicant made the decision to dispose of Keza Building long before the restriction notice was issued, that the decision to sell was based exclusively on commercial considerations, and that the respondent frustrated the applicant by issuing the restriction notice. Therefore, in view of the delay in concluding investigations which necessitated the extension of the period for restraining the sale of Keza Building, the court held that the continued operation of the restriction notice could not be justified.⁴⁵

It is clear at this point that delays in concluding investigations and prosecutions, which then result in the extension of provisional orders, constitute an unjustified

45 *Atupele Properties Limited v Director of ACB* (Unreported) 31.

limitation of the right to property, rendering these measures unconstitutional. This thesis agrees with this reasoning by emphasising that provisional orders are not unconstitutional *per se*, but their unconstitutionality arises when their operation prolongs because of inordinate delays in concluding investigations or commencing criminal trials. When the state takes too long to conclude an investigation or a prosecution, the continued operation of provisional orders becomes a mere convenience to the state, which convenience was disapproved by the court in the case of *The Attorney General v Hon. Friday Jumbe & Another*.⁴⁶

In the case of *Anti-Corruption Bureau v Amos Chinkhadze & Joe Kantema*,⁴⁷ Justice Tambala condemned delays in concluding investigations also. He said:

“Delay in commencing criminal proceedings or pursuing such proceedings after they are commenced, amounts to conduct on the part of the Bureau which is oppressive, unfair and unjust. Issuing restriction orders and obtaining seizure and freezing orders, and sitting back thereafter, may produce results worse and more oppressive than the notorious forfeiture orders of the old times.”⁴⁸

The notorious forfeiture orders of the old times mentioned here are those emanating from the repealed Forfeiture Act. The court made reference to the repealed Forfeiture Act in order to emphasise the undesirability of implementing forfeiture laws in a manner that yields the same unfairness and injustice as did the Forfeiture Act.

Inordinate delays ought to be minimised in a bid to mitigate the unjustified existence of provisional orders. The AML Act has set six months as the maximum life of a restraining order, though the period may be extended subject to the court’s

46 MSCA Constitutional Appeal No 29 of 2005.

47 MSCA Criminal Appeal No 1 of 2003.

48 MSCA Criminal Appeal No 1 of 2003 (Unreported) 5.

discretion.⁴⁹ This is a laudable approach, as it limits the state's powers of restricting property rights beyond justified and reasonable periods. The Supreme Court, too, has resorted to limiting the time within which the state should conclude its investigations or prosecution, or risk having the existing provisional orders vacated. In the case of *Anti-Corruption Bureau v Amos Chinkhadze & Joe Kantema*,⁵⁰ Justice Tambala directed the ACB to make sure that the appeal it had commenced was heard within 30 days, failing which the respondents would have the liberty to apply that the restriction notice against their money be set aside.⁵¹

The approach taken by the courts in the cases discussed above shows clearly that courts are there to enforce the trust relationship which exists between the government and its people, within the social contract.⁵² They are aware of their task to make sure that the state pursues its crime prevention policies without occasioning any injustice on the people through the violation of their right to property. If courts continue to take this approach, cases where people suffer injustice through provisional orders would be few and far between.

5.4.2 Right to be heard

Natural justice recognises the importance of giving people an opportunity to be heard before making a decision that would affect them. Decisions that are made without giving the affected people an opportunity to be heard would be arbitrary, contrary to the tenets of the social contract which disapproves of arbitrary government actions.

49 Section 86 of the AML Act.

50 MSCA Criminal Appeal No 1 of 2003 (Unreported).

51 MSCA Criminal Appeal No 1 of 2003 (Unreported) 5.

52 Henkin (1987: 266).

The repealed Forfeiture Act was criticised also for its violation of the right to be heard which was guaranteed by the UDHR.⁵³ The UDHR states that everyone is entitled to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations. Given that forfeiture affects one's right to property, there was need to give every person likely to be affected by a forfeiture order, an opportunity to be heard before his right to property was limited or forfeited.

The manner in which forfeiture orders were made pursuant to the Forfeiture Act, denied property owners an opportunity to be heard. For instance, the government confiscated property belonging to a company called American Stores Limited, without giving reasons for the action and without giving the company an opportunity to answer any allegations on which the government based forfeiture decision. Consequently, at the advent of democracy in Malawi, the company instituted recovery proceedings against the government, in the case of *American Stores Limited v The Attorney General*.⁵⁴ Commenting on the right to be heard, High Court Judge Mwaungulu (as he was then) said:

“the Forfeiture Act denied the victims of the Act the right to be heard on government action that was, to all fair minded people, coercive and oppressive.”

The plaintiff in *Mohamed Sidik Aboobaker v Attorney General*⁵⁵ also faced forfeiture without being given an opportunity to be heard. Justice Kunitsonyo condemned the Forfeiture Act for denying people whose property was subject to forfeiture, the right to be heard. He argued that the Act contravened the UDHR, by allowing the

53 Article 10 of the UDHR.

54 Civil Cause No 713 of 1994 (Unreported).

55 Civil Cause No 964 of 1994 (Unreported).

state to deprive people of their property, using a procedure which allowed the Minister to issue a forfeiture order without giving reasons. Similarly, the High Court in the *Chaponda* case held that the Act was unconstitutional for its violation of the right to be heard.

These three cases point to the court's unanimous stand regarding the right to be heard. The importance of safeguarding this right when the state seeks to obtain provisional orders is vital, since it guards against arbitrary actions by the government and its agents. Further, safeguarding this right gives people an opportunity to defend their interests in the targeted property, before the making of a provisional order. Therefore, denying people the opportunity to defend their property rights during provisional order proceedings is as good as depriving them their right to property arbitrarily.

Stressing the significance of the right to be heard, the court, in the case of *Mbewe v Registered Trustees of Blantyre Adventist Hospital*, said that:

“the right to be heard carries with it a right of the accused person to know the case which is made against him. The accused must, thus, know what evidence has been given and what statements have been made affecting him. He must then be given a fair opportunity to correct or contradict them. The judge, or whoever has to adjudicate, must not hear or receive representations from one side behind the back of the other.”⁵⁶

Arguments pertaining to this right have arisen also in the recent cases in Malawi. In the case of *Greselder Jeffrey v Anti-Corruption Bureau*,⁵⁷ the appellants claimed that the High Court dealt with the application for a seizure order as if it were a criminal matter instead of hearing it as a civil matter. They argued further that due to this

56 [1997]1 MLR 403 (Unreported) 415.

57 MSCA Civil Appeal No 12 of 2012 (Unreported).

mistake by the High Court, they and certain third parties, who were affected by the seizure and freezing orders, were denied an opportunity to be heard before the orders were made.⁵⁸ The court held that, contrary to the appellants' contention, the application for a seizure order was civil in nature, even though it relates to a criminal investigation. Regarding the significance of the right to be heard, the court said:

“The usual rule of natural justice is that where a decision will impose a penalty or will adversely affect another person's right or freedom, the affected person must be given an opportunity to be heard before the decision is reached. It is immaterial whether the decision arises out of a criminal or civil matter.”⁵⁹

This was the court's acknowledgment of the necessity of the right to be heard, both in criminal and civil matters. In emphasis, the court said that there is no rule of procedure which requires that when a matter is of a criminal nature, then the right to be heard, before a penalty is imposed, is forfeited.⁶⁰ The recognition of this right becomes tricky, however, in *ex parte* applications for provisional orders, owing to the fact that such orders are obtained in order to prevent the dissipation of property, in anticipation of an eventual forfeiture order.⁶¹ Thus, it may not be feasible to give property owners an opportunity to be heard before the orders are made, owing to the urgency of the need to obtain the orders in a bid to prevent the dissipation or disposition of the property.

The manner in which the state obtains provisional orders from courts has the potential of infringing on the property owner's right to be heard. The court in

58 MSCA Civil Appeal No 12 of 2012 (Unreported) 3.

59 *Gresselder Jeffrey v Anti-Corruption Bureau* MSCA Civil Appeal No 12 of 2002 (Unreported) 4.

60 *Greselder Jeffrey v Anti-Corruption Bureau* MSCA Civil Appeal No 12 of 2002 (Unreported) 4.

61 Brun (2011: 76).

*Greselder Jeffrey v Anti-Corruption Bureau*⁶² acknowledged that in the first place, *ex parte* applications are made speedily so as to ensure that the suspect is not given an opportunity to remove, conceal or otherwise dissipate the assets before the chance for an *inter partes* hearing arises.⁶³ The Court further said that often times, *ex parte* orders are obtained while investigations are in progress, and even before the investigators have obtained full knowledge of the assets that belong to a suspect.

However, the interests of the people affected by an *ex parte* order are not ignored completely. Even though they are not heard during the *ex parte* application, their opportunity to be heard arises when they file an *inter partes* application to set aside or vary the order that was obtained *ex parte*.⁶⁴ The court, in the same *Greselder Jeffrey v Anti-Corruption Bureau*⁶⁵ case, stated that during such *inter partes* applications, both parties are heard and the opportunity to be heard for people that are affected by an *ex parte* order arises at this stage.⁶⁶ The court held that the appellants in this case had been heard sufficiently when they presented a variety of arguments in support of their application to have the seizure and freezing orders set aside.⁶⁷ The court added that, given that the appellants applied for the setting aside of the *ex parte* order two days after it was made, their opportunity to be heard had been interfered with only briefly.⁶⁸

62 MSCA Civil Appeal No 12 of 2012 (Unreported).

63 MSCA Civil Appeal No 12 of 2002 (Unreported) 5.

64 Section 73 of the AML Act.

65 MSCA Civil Appeal No 12 of 2012 (Unreported).

66 MSCA Civil Appeal No 12 of 2002 (Unreported) 5.

67 MSCA Civil Appeal No 12 of 2002 (Unreported) 5.

68 MSCA Civil Appeal No 12 of 2002 (Unreported) 5.

Some commentators have made similar arguments, to the effect that the deprivation of property occasioned by *ex parte* orders is only a temporary inconvenience that falls within the bounds of due process, and that this inconvenience can be remedied by subsequent *inter partes* proceedings where both parties are heard.⁶⁹ These arguments are compelling, given that this is but a temporary limitation of the right to be heard, which is justified by the need to preserve the property which may be subject to forfeiture later. Thus, the time factor is of the essence in relation to the limitation of this right, as was established in the discussion on the limitation of the right to property. The longer the limitation lasts, the more unjust and arbitrary it becomes. The preservation of property which may be subject to forfeiture is of paramount importance in the implementation of anti-money laundering and asset forfeiture laws. The preservation is in the interests of justice, but only if provisional orders do not exist perpetually due to delays on the part of the state.

It is commendable to notice that courts are vigilant in ensuring that the state does not limit the property rights of the people through provisional orders by denying them the right to be heard. In the case of *Republic v Caroline Savala*,⁷⁰ the state had obtained one search and seizure warrant pursuant to the Criminal Procedure and Evidence Code⁷¹ and another one under the AML Act. However, the state did not serve the order obtained under the AML Act on the applicant, but chose to rely on it when the applicant applied to court for the return of the vehicle. The court condemned the state for its failure to serve the second *ex parte* seizure order on

69 Ross (2000: 267).

70 Criminal Case No 28 of 2013 (Unreported).

71 Chapter 8:01 of the Laws of Malawi.

the applicant. The court said that such failure denied the appellant an opportunity to apply for the variation or discharge of the order in an *inter partes* hearing, which is a point where affected people are accorded the chance to exercise one's right to be heard after *ex parte* proceedings.

The state argued that the order was valid, as long as it was granted properly by a magistrate, and that it was obtained according to the law. The court dismissed this argument, saying that whether the order was obtained properly or not was not the issue, because even a properly obtained order can be set aside, if rules of procedure were violated.⁷² The court's approach in this respect is commendable, because it emphasises the point that courts should look beyond the legality of the process and basis for obtaining a provisional order. Instead, they should look also at the conduct of the state in relation to the issuing and execution of the order, and examine the fairness of such conduct on people who have interests in the property.

5.4.3 Right to an effective remedy by a competent tribunal

The UNDHR provides for the right to an effective remedy by competent national tribunals when there is a violation of fundamental human rights.⁷³ This implies that a person whose rights have been violated should be able to seek recourse in a court or national tribunal. The Forfeiture Act was criticised for its violation of this right.

This violation stemmed from section 7 of the Act, which read as follows:

“No suit, prosecution or other legal proceedings shall lie or be instituted, against any person or against the Government in respect of anything done or purported to be done under this Act.”⁷⁴

72 Criminal Case No 28 of 2013 (Unreported) 4.

73 Article 8 of the UDHR.

74 Section 7 of the Forfeiture Act.

In essence, section 7 implied that the Minister's forfeiture order was final and could not be challenged at any forum. This was quite drastic given that the Minister was not obliged to furnish reasons for the forfeiture, leaving the subject of the order to speculate on the reasons that might have led to the making of the order. This is why the people who had been affected by the Forfeiture Act challenged it only at the advent of democracy in Malawi, when the democratic dispensation gave them a platform to seek redress for any injustice suffered due to government actions.

In this respect, Justice Kunitsonyo, in the *Mohammed Sidik* case, criticised the Forfeiture Act because it denied its targets the opportunity to challenge forfeiture orders.⁷⁵ The same conclusion was reached in the *American Stores Limited* case, as well as the *Chaponda* case. All these cases point to the undesirability of having a law which, in its application, limits the rights of people without giving them an opportunity to challenge it. The situation was even made worse by the fact that the affected people were denied an opportunity to be heard before the making of the order.

Under the current democratic dispensation, the Constitution states that those whose rights and freedoms are violated by acts such as provisional orders, have a right to seek a legal remedy before the courts.⁷⁶ In addition, the legal framework on asset forfeiture gives those who have been affected by provisional orders, an opportunity to seek before the courts of law, the reversal or variation of the orders.⁷⁷

75 Civil Case No 964 of 1994 (HC) (Unreported).

76 Section 41(3) of the Constitution.

77 Section 87(1) of the AML Act; Section 23(5) of the CPA and Section 73(1) of the AML Act.

5.4.4 Right to engage in economic activity

The right to engage in economic activity is guaranteed under Section 29 the Malawi Constitution, which also includes the right to work and to pursue a livelihood.⁷⁸

Economic activity is a broad concept which covers work, business ventures and enterprises, among others.⁷⁹ The state has a duty not to interfere with people's economic activities and the means by which they undertake those activities.⁸⁰

The right to economic activity becomes an issue when the right to use or deal with one's property for business purposes, for example, is limited through provisional orders. Oftentimes, property owners argue that seizure and freezing orders infringe on their right to engage in economic activity, especially when the property in question is crucial to their business enterprises. For instance, in the case of *Greselder Jeffrey v Anti-Corruption Bureau*,⁸¹ the appellants argued that the seizure and freezing of their assets violated their right to economic activity because the orders affected their transportation business. The transportation business had nothing to do with the construction business which was at the centre of the fraud investigation against the appellants.⁸²

It should be noted that the AML Act guards against the destitution of people whose property is subject to restraining orders. Hence, it empowers courts to make a restraining order with a condition that part of the property should be made available to help a person to meet his reasonable living expenses, including

78 Section 29 of the Constitution.

79 Chirwa (2011: 304).

80 Chirwa (2011: 305).

81 MSCA Civil Appeal No 12 of 2012 (Unreported).

82 MSCA Civil Appeal No 12 of 2002 (Unreported).

expenses of his dependants, as well as his business.⁸³ This is one way of making sure that the pursuit of justice through provisional orders should not yield injustice on the part of those who are affected by the orders.

In the same case of *Greselder Jeffrey v Anti-Corruption Bureau*,⁸⁴ the appellants submitted that the provisional orders that were obtained by the ACB were limiting their means for meeting their general living expenses. In response to these arguments, the Supreme Court held that the CPA's omission to allow for the release of funds out of the seized and frozen assets to meet general living expenses of a person against whom a seizure and freezing order has been made, infringes on the basic rights of that person.⁸⁵ In this regard, the court stated that it would be acceptable for one to apply for the variation of a seizure and freezing order so as to enable him to meet his general living expenses. In this case, again, the issue of delays arose. The court noted particularly that criminal proceedings arising out of the CPA take an unduly long time before they are concluded. In disapproval, the court asked and stated as follows:

“Should a person be driven into utter destitution and remain in that state for a long time before his fate is known? We believe that that would be unacceptable under the current human rights norms. The court would, therefore, be entitled to order the release of funds from the seized and frozen assets sufficient to meet the reasonable general expenses of the person against whom a seizure and freezing order has been made.”⁸⁶

In view of this observation, the court suggested that the release of such funds should occur at the time the seizure and freezing order is made or, preferably, following an application for the variation of such an order. The court's reference to

83 Section 80(3)(a) of the AML Act.

84 MSCA Civil Appeal No 12 of 2012 (Unreported).

85 MSCA Civil Appeal No 12 of 2012 (Unreported) 21.

86 MSCA Civil Appeal No 12 of 2002 (Unreported) 21.

the delays occasioned by the state suggests that the court was not against the temporary limitation of the right to economic activity or livelihood *per se*. The main problem is the state's inordinate delays to conclude an investigation, while there exists a restraining order against property which constitutes the primary source of income for its owner. This cannot be justified, because it yields injustice on property owners.

5.4.5 Presumption of innocence

The right to be presumed innocent is a fair trial right and it is guaranteed by the Constitution.⁸⁷ This right collides with provisional orders because they are enforced against or in relation to property which is merely suspected to be connected to a criminal offence. This means that a property owner, who in most cases is the suspect under investigation, has his use or enjoyment of his property limited through provisional orders, way before his culpability or the tainted nature of his property is determined by a court of law.

Justice Manyungwa, in the case of *Atupele Properties Limited v Director of the Anti-Corruption Bureau*,⁸⁸ also raised a pertinent argument in relation to the consequences and effects of provisional orders on a property owner. He said:

“We must always bear in mind the possibility of an acquittal and thereby vindicating the applicant, or in the worst scenario, the criminal investigations may not always yield into criminal prosecutions. What then? Has the respondent undertaken to pay any damages? In fact, it is in evidence that interest is accruing daily on the property. Should the applicant be made to suffer these when in law he is presumed innocent?”⁸⁹

87 See Section 42(2)(f)(iii) of the Constitution.

88 Miscellaneous Civil Application No 286 of 2005 (Unreported).

89 Miscellaneous Civil Application No 286 of 2005 (Unreported) 31.

Eventually, Justice Manyungwa found that the effects of the restriction notice in this case offended the right to be presumed innocent, especially since the respondent had taken too long to conclude investigations or to prefer charges against Dr Bakili Muluzi, the chairman of the applicant company.

The questions raised by the judge in this case are indeed crucial to the conflict between the state's interests to preserve property through provisional orders and the interests of property owners. The applicant company had interest accruing daily on the loans it took for the construction of the Keza Building, and the inordinate delay by the ACB would result invariably in further accumulation of interest due by the applicant to its debtors. Indeed, as Justice Manyungwa had asked, would the ACB pay damages in the event that Dr Bakili Muluzi was acquitted on the contemplated charges?



The CPA Act, which the ACB used to charge Dr Bakili Muluzi, does not make provision for an undertaking by the ACB to pay damages in the event that a suspect, whose property was subject to provisional orders is acquitted. Nonetheless, the AML Act which was enacted after the CPA, finally has brought a solution to the concerns raised by Justice Manyungwa in this respect. It provides that before making a restraining order, the court may require the government to undertake that it would make payments for damages or costs, in relation to the making and execution of the order.⁹⁰ This requirement would motivate law enforcement authorities to act speedily and treat restrained property with utmost care, so as to minimise damages the state might have to pay, in the event of an acquittal or an

90 Section 81(2) of the AML Act.

order that the property be returned to owner. This provision also serves as a guarantee for the restoration of the original value of property to a property owner, who, at the time of the making of the restraining order, is presumed innocent.

5.4.6 Right to legal representation

Applications for provisional orders involve significant court processes, which necessitate legal representation for those who may be affected by such applications. The Constitution protects the right to legal representation.

Specifically, section 42(1)(c) the Constitution guarantees the right of a person to consult a legal practitioner of their choice, or one who is provided by the state. A person is entitled to choose any legal practitioner, if they are going to shoulder the legal expenses. However, one's choice of a legal practitioner is limited when legal representation is provided by the state.⁹¹ It should be noted that this limitation relates only to the choice of a legal practitioner, in the sense that one's choice is limited to legal practitioners employed in the public service, at the Legal Aid Department of the Ministry of Justice.

Courts have stressed the significance of this right. In *Nkhata v State*⁹² High Court Judge Tambala (as he was then) stated that, in the present age, there is no justification for any law which has the effect of depriving a person, who desires legal representation, the right to such representation. How does this right become an issue in the application for provisional orders? The case in point is that of *Atupele Properties Limited vs The Director of Anti-corruption Bureau*.⁹³ Among other

91 Section 44(5) of the Constitution.

92 [1993] 16(1) MLR 391 (HC) 393.

93 Miscellaneous Civil Application No.286 of 2005 (Unreported).

grounds, the applicant argued that the restriction notice which was issued by the ACB, restraining the sale of the Keza office complex, limited the generation of income which was expected to derive from the sale of the complex. As a result, the applicant could not raise money to meet the legal expenses of the court case due to the restraint against the sale of the Keza complex.

This case foregrounds the complex situation that arises when the property that is subject to a seizure or restraining order, is the very same property that serves as a source of income from which the suspect meets his expenses, including legal expenses. Does it mean that the state would have to provide a legal practitioner at its expense? Or should part of the property be given back to the person in order for him to raise money for such expenses?

In the case of *Greselder Jeffrey v Anti-Corruption Bureau*, the Supreme Court observed that Section 32(5) of the CPA (now Section 23 of the CPA), does not allow for the release of funds from seized and frozen assets to meet the legal expenses of the person against whom a seizure and freezing order has been made. This, according to the court, is a serious omission which can affect negatively the basic rights of a person before he is tried and convicted of a crime. Consequently, the court said that:

“We would find it unacceptable that such person should fail to obtain legal representation because all his assets have been seized and frozen before trial. The court would, therefore, be entitled in a proper case to order release of sufficient funds from the seized and frozen assets to meet his legal expenses.”⁹⁴

94 Miscellaneous Civil Appeal No 12 of 2002 (Unreported).

The court suggested that the appropriate time to make an order for the release of such funds would be when the seizure and freezing order is made or varied. The AML Act reflects the court's suggestion, as it provides that when making a restraining order, the court may make provision for meeting out of the property in question, reasonable legal expenses related to defending criminal charges or any proceedings relating to restraining orders.⁹⁵ This provision, however, is subject to the court's discretion as the circumstances of each case may dictate. It is commendable that the law actually makes room for such a possibility, in a bid to ensure that the interests of the state in obtaining restraining orders do not prejudice unnecessarily one's right to legal representation.

However, this may affect the amount of property that may be available for forfeiture, eventually. If a suspect is allowed to use part of their property to meet legal expenses, and in the end the court finds that the property is in fact illicit in nature, this thesis finds that this could amount to a situation where the law permits a suspect to benefit from crime. The same applies to allowing a person to use part of restrained property to meet their living expenses. This is one of the areas of the law on asset forfeiture, where a criminal would, in retrospect, be allowed to benefit from criminal proceeds. But due to the need to presume every property owner innocent until the court's determination of their criminal behaviour or criminal nature of their property, such situations must be permitted, because they are what the interests of justice would demand.

95 Section 80(3)(b) of the AML Act.

5.4.7 Third party rights

Every robust forfeiture regime must contain mechanisms for determining how forfeiture will affect third party interests.⁹⁶ Provisional orders affect not only the interests of the people connected to the commission of an offence. They can affect also the property interests of innocent or *bona fide* third parties, who have nothing to do with the commission of the offence in question.

In the Malawian context, the law provides for the protection of third party interests before or after provisional orders are made. However, the protection is available only to people who are not connected in any way to the commission of the crime to which the property relates.

In relation to seizure orders, a third party may apply for the return of property, upon satisfying the court that he or she is entitled to possession of the property; that the property is not tainted property; and that the person who is connected to the commission of the criminal offence that formed basis for the seizure order, has no interest in the property.⁹⁷ In relation to restraining orders, the court needs to be satisfied that the applicant is the rightful owner of the property, is innocent of any complicity in the commission of a serious crime, and that the property no longer will be required for the purposes of any investigation or as evidence in any proceedings.⁹⁸

These provisions of the AML Act have clarified circumstances where and when a third party can register and claim his or her interests in property that is subject to

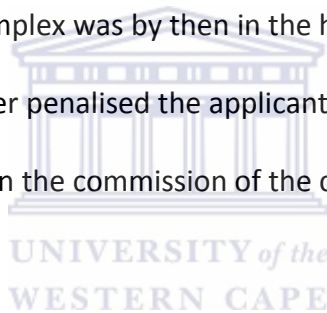
96 Davis (2003: 185).

97 Section 73 of the AML Act.

98 Section 87(5) of the AML Act.

provisional measures. Courts have tackled third party rights and interests also. In *Mohamed Munif Abdallah Al Nadhi v Anti-Corruption Bureau*,⁹⁹ the applicant applied that the Keza office complex, which he had bought from Atupele Properties Limited, be struck out of a seizure order which the ACB had obtained. The ACB had obtained the seizure of Keza complex as property that was believed to belong to a corruption suspect, Dr Bakili Muluzi.

The Supreme Court varied the seizure order and struck the Keza property out of the list of the seized property. The court said it would be absurd, unreasonable and unfair to allow the seizure of the complex and the freezing of the income therefrom, when the complex was by then in the hands of the applicant. It further said that the seizure order penalised the applicant, a *bona fide* purchaser, who was not in any way involved in the commission of the crimes of which Dr Bakili Muluzi was accused.¹⁰⁰



Third party claims, however, are prone to abuse. However, the conditions that one must satisfy before the court orders the return or release of property, serve as a guard against the abuse of third party claims, which some may use to frustrate the ends of justice, in a bid to get away with tainted property. In the case of *Greselder Jeffrey v Anti-Corruption Bureau*,¹⁰¹ the appellants argued that the seizure and freezing orders obtained by the ACB had affected the rights of third parties who had not been given an opportunity to be heard.¹⁰² They claimed that some of the

99 MSCA Civil Appeal No 7 of 2010 (Unreported).
100 MSCA Civil Appeal No 7 of 2010 (Unreported).
101 MSCA Civil Appeal No 12 of 2012 (Unreported).
102 Miscellaneous Civil Appeal No 12 of 2002 (Unreported) 6.

seized property belonged to third parties. In response to this argument, the court noted that the appellants had failed to disclose the identity of those third parties.

The evidence brought by the ACB, by contrast, pointed to the fact that the respondents were in the habit of acquiring various properties using different names. However, title documents showed that the property that had been acquired thus, in fact belonged to the first appellant. Consequently, the court dismissed the third party claim, arguing that due to the evidence that the appellant acquired and held property using different names, it would be difficult for the court to believe that she did so in good faith.¹⁰³

This case exposes the risk that is posed by third party claims. If there are no proper checks, there is a high risk that suspects or those served with provisional orders may falsify title to property, claiming that it belongs to third parties, as can be appreciated from this case. Thus, courts and the state ought to be awake to such risks and approach third party claims with caution. If these claims go unchecked, they may frustrate the interests that a forfeiture regime seeks to serve which is the deterrence of economic crimes through the disgorgement of illicit property.

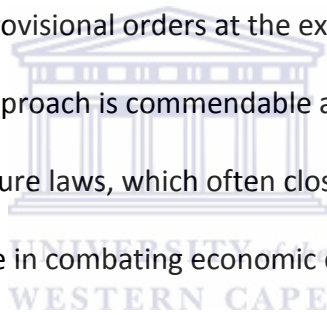
5.5 Conclusion

The international legal framework on asset forfeiture continues to be the standard-setter for the development of Malawian jurisprudence and laws on the subject. Be that as it may, Malawi's jurisprudence relating to asset forfeiture has been shaped and influenced greatly by the legacy of the repealed Forfeiture Act. An analysis of

103 MSCA Appeal No 12 of 2012 (Unreported) 16.

the case law pertaining to the constitutionality of the Forfeiture Act bears testament to the fact that the state has the potential of bringing injustice on its own people, if state authorities do not stick to the limits of the social contract. Bearing in mind the potential injustices which the state can perpetrate against its own citizenry through provisional orders, courts in Malawi desist from interpreting the current asset forfeiture laws in a manner that will cause Malawians to relive the oppressive experience of the Forfeiture Act era.

The analysis of the case law relating to provisional orders has highlighted the courts' stance in ensuring that the state does not pursue crime prevention by obtaining or enforcing provisional orders at the expense of the basic rights of property owners. This approach is commendable as it helps to avoid a positivist approach to asset forfeiture laws, which often closes its eyes to what is just and fair. Interests of the state in combating economic crimes and preserving property for eventual forfeiture orders must be balanced against interests of property owners. Only then can the state obtain provisional orders that are valid constitutionally, and exude justice.



CHAPTER SIX

IMPLEMENTING ASSET FORFEITURE IN MALAWI: EMERGING LEGAL ISSUES

6.1 Introduction

The previous chapter has exposed how unwilling Malawian courts are to allow the state to implement the law on provisional orders in a manner that is oppressive and arbitrary, as was the case with the implementation of the Forfeiture Act of 1966.

This chapter aims at deliberating on what would constitute a civil asset forfeiture regime that is just and acceptable within the current constitutional dispensation in Malawi and within John Locke's idea of the social contract. The discussion dwells on the legal and philosophical principles that should guide the courts when making forfeiture orders. This will be achieved by drawing lessons from the English and South African jurisprudence on asset forfeiture, and by looking also at how their courts have analysed certain pertinent issues on the subject. The South African legal arrangements resemble those of other jurisdictions in Europe, such as the UK, in that both countries have civil forfeiture and criminal forfeiture.

6.2 Asset forfeiture in South Africa

The South African constitution, just like the Malawi Constitution, aims at creating a fair and just society, in which crime does not pay.¹ South Africa, aims at the realisation of such a society thorough means of controlling and preventing criminal behaviour, such as asset forfeiture.

1 Basdeo (2013: 322).

Asset forfeiture was first introduced in South Africa in 1992, in the Drug and Drug Trafficking Act.² This Act provided for conviction-based forfeiture of proceeds and instrumentalities of drug trafficking. However, Chapter 5 of the Act which provided for proceeds of drug trafficking was repealed by section 37 of the Proceeds of Crime Act³. This Act provided for conviction-based forfeiture of benefits derived from any offence. The Drug and Drug Trafficking Act, nevertheless, only retained provisions on the forfeiture of drug contraband and instrumentalities of drug trafficking.

The current asset forfeiture regime is provided for extensively in the Prevention of Organised Crime Act 121 of 1998 (hereinafter referred to as the POCA). Chapter 5 of POCA provides for conviction-based forfeiture of proceeds of unlawful activity. Chapter 6 of POCA provides for the civil forfeiture of both proceeds and instrumentalities of an offence, and this makes POCA the first South African law to provide for civil forfeiture.

Emphasising on the deterrent aim of POCA, the Supreme Court of Appeal has held that

“One should not lose sight of the fact that the purpose of the Act [POCA] is to divest criminals of the proceeds of their criminal activity and to prevent them from deriving benefit from such proceeds.”⁴

The South African approach is to achieve deterrence through the removal of incentives for the commission of crime. Hence, it is argued that the success of POCA is not measured by the number of people that have been prosecuted and convicted, but by the number of people who have been deprived of unlawfully

2 No 140 of 1992.

3 No 76 of 1996.

4 *ABSA Bank Ltd v Fraser and another* 2006(2) SACR 158(SCA) Para 24.

obtained property.⁵ In the same manner, the measure of Malawi's fight against economic crimes and money laundering should be measured by the number of people who have been deprived of illicit gains, because that is what the movement against money laundering is about.

Since civil forfeiture was only introduced by POCA, South African courts were faced with a daunting task of giving form to the new law, despite its novel and complex nature.⁶ The courts in Malawi are facing a similar task at the moment, as they are in the process of giving form to the 2006 AML Act, the jurisprudence of which is yet to be developed. Notably, the development of the South African asset forfeiture jurisprudence has been shaped by the need to balance the public interest served by asset forfeiture with the private interests directly affected by it.⁷ Given the constitutional concerns which civil forfeiture gives rise to, especially with regard to the civil forfeiture of instrumentalities of crime, South African courts have been most active in developing jurisprudence on this aspect of asset forfeiture, by trying to make it justifiable constitutionally.⁸ Similar issues are bound to arise in the Malawian context, as can be appreciated already from the discussion on constitutional debates that have arisen with regard to the implementation of provisional measures in Chapter Five.

5 Mujuzi (2010: 3).

6 Keightley (2009: 95)

7 Keightley (2009 : 96).

8 Keightley (2009: 97).

6.2.1 Criminal asset forfeiture

The South African criminal asset forfeiture scheme is modelled on United States of America's Racketeer Influenced Corrupt Organisations Act (RICO)⁹ and the United Kingdom's Proceeds of Crime Act (POCA)^{10, 11}. As it is the case with other countries, in South Africa too, criminal asset forfeiture is aimed at restoring the *ex ante* legal situation by depriving the offender of what is not legally his.¹²

As it is the case in Malawi, there are three stages for criminal asset forfeiture in South Africa, namely; the restraint stage, confiscation stage and the realisation stage.¹³

The law on asset forfeiture in Malawi does not specify the nature of criminal forfeiture proceedings. In South Africa, POCA indicates that proceedings for conviction-based forfeiture are civil not criminal in nature.¹⁴ Further, POCA stipulates that rules of evidence that are applicable to restraining orders and forfeiture orders are those that apply to civil proceedings.¹⁵

6.2.2 Civil asset forfeiture

As established in Chapter Four of this thesis, Malawi does not have a legal framework for civil recovery of illicit property. There is, therefore, need to amend the law to include civil asset forfeiture. This thesis suggests the adoption of a model

9 Came into force on 15 October 1970.

10 Came into force on 24 July 2002.

11 Basdeo (2013: 304). See also Constitutional Court's comments in *National Director of Public Prosecutions v Prophet 2003] 8 BCLR 906 (C) 914E-H*; Pretorius *et al* (1998: 385-386), Willis J In *National Director of Public Prosecutions v Cole and others* [2004] 3 All SA 745 (W) 752C-D. See also *Redpath 2014*.

12 Basdeo (2014: 1061).

13 Parts 3,2 and 4 of Chapter 5 of POCA, respectively.

14 Section 13(1) of POCA.

15 Section 13 (2) of POCA.

that is similar to that of the United Kingdom and South Africa. The United Kingdom (UK) uses civil forfeiture to recover criminal proceeds in the following situations:

- (a) Where a criminal investigation has been carried out but there is insufficient evidence to pursue criminal charges
- (b) Where a decision not to commence criminal proceedings has been made due to public interest criteria
- (c) Where confiscation proceedings have failed due to procedural faults
- (d) Where the defendant cannot be prosecuted because he is dead or abroad, and there is no prospect of securing his extradition, or that the person has been convicted of an offence abroad but has recoverable property in the UK.

The UK civil recovery model is relevant for Malawi, because it allows for the forfeiture of not only proceeds of crime, but also of cash which is discovered by law enforcement authorities during searches, which cash is suspected to have been unlawfully obtained, or being intended to be used in the commission of an offence.¹⁶ If Malawi adopts this cash forfeiture model, it can be useful for Malawi to use in cases where the police find suspiciously huge sums of money on suspects, as was the case during the 2013 cashgate investigations.¹⁷ One such case is *The Republic v Sithole*¹⁸ where the Malawi Police investigators found in Mr Sithole's house and cars, huge sums of money, that is; K11240000, US\$31850 and

16 Section 240(1) of POCA.

17 Huge sums of money was found hidden under beds and other places in the houses of civil servants suspected to have stolen public funds. See Tenthani (2014).

18 Criminal Case No 908 of 2013.

ZAR122,200.00, suspected to be stolen or unlawfully obtained. He was prosecuted for money laundering, illegal possession of foreign currency and being found in possession of property suspected to be stolen and money laundering.¹⁹

In South Africa, civil forfeiture is considered a useful crime prevention weapon because it enhances the power of the state to combat organised criminal activity, by making it easier for law enforcement authorities to take profit out of crime without being required to obtain the conviction of an offender.²⁰ Civil asset forfeiture proceedings are civil in nature and the only applicable rules of evidence are those that apply to civil proceedings.²¹ The forfeiture process takes two stages, the preservation stage and the forfeiture stage. The preservation stage involves the granting of a preservation order by a court,²² while the forfeiture stage is marked by the granting of a final order by which property is forfeit to the state.²³

A constitutional challenge arises due to the framing of restraining orders in relation to conviction-based and non-conviction-based forfeiture under POCA. Section 26 of POCA allows the state to make an *ex parte* application for a restraining order. The court makes a provisional restraining order, and simultaneously grants a *rule nisi* calling upon the defendant to appear before court and show cause why the restraining order should not be made final. However, section 38 of POCA, which relates to a preventive order pending civil forfeiture proceedings, allows a court to make a final preservation order, upon an *ex parte* application by the state. The

19 Contrary to Regulation 25 of the Exchange Control Regulations; Section 329 of the Penal Code and Section 35(1)(b) of the AML Act respectively.

20 Gupta (2002: 160).

21 Section 37(1)&(2) of POCA.

22 Section 38(1) of POCA.

23 Section 50 of POCA.

court does not make a provisional restraining order, to allow interested parties to show cause why a final restraining order should not be made. This has given rise to a constitutional challenge, pertaining to the right of access to justice.²⁴ Therefore, Malawi should take note of this oversight and make sure that the court makes a provisional restraining order, allowing interested parties to come forward and contest the making of a final restraining order.

If none of the people who indicated their interest in the restrained property comes for the hearing of the forfeiture application, the state can apply for a default forfeiture order.²⁵ Before the court grants the default order, it requires the state to show sufficient proof that all the interested parties had knowledge of the notices of the forfeiture hearing. Upon hearing the state, the court has the discretion to make the forfeiture order as prayed for by the state, make a forfeiture order as the court deems fit or refuse to make a forfeiture order.²⁶ Requiring the state to give proof of service of notice of hearing on interested parties is one sure way of making sure that indeed they had notice but they opted not to appear.

In the case of property belonging to a dead person, any notice in relation to the making of a preservation order or a forfeiture order should be directed at the executor of the person's estate.²⁷ This is as far as the state and the courts can go in ensuring that all interested parties are given a chance to contest the making of a forfeiture order. Malawi should also make sure of this, so as to avoid the injustice caused by the repealed Forfeiture Act which did not allow interested parties a

24 Section 34 of the Constitution.

25 Section 53 of POCA.

26 Section 53(a)(b)&(c) of POCA.

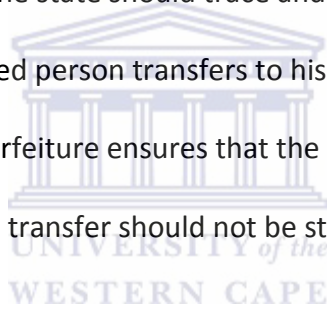
27 Section 59(1) of POCA.

chance to contest the making of a forfeiture order, and neither was notice of the forfeiture given before the making of the order.

In South Africa, Under POCA, provisional orders or civil forfeiture the orders can be made against property that the person held immediately before his or her death.²⁸

These orders may be made in respect of property which forms part of a deceased estate; and on evidence adduced concerning the activities of the deceased.²⁹

Disgorging illicit proceeds from a deceased estate enforces Robert Nozick's justice in transfer principle which ensures that no one should transfer illegally acquired property to any person. Nozick's justice in rectification principle ensures that through civil forfeiture, the state should trace and remove all unjustly acquired property which a deceased person transfers to his heirs through the rules of inheritance. Thus, civil forfeiture ensures that the rectification of injustice in acquisition or injustice in transfer should not be stopped by death.



6.3 Instrumentality test

Mere facilitation of a crime does not make property an instrumentality of crime.

The debate about what constitutes an instrumentality of crime keeps surfacing in cases where the state applies for the forfeiture of property as an instrumentality of crime.

In Malawi, the debate arose in the case of *The Republic v Sithole*.³⁰ In this case, the state applied the forfeiture of a car that had been used to keep money suspected to be stolen or obtained unlawfully. The defendant, through his lawyer, argued that

28 Section 59(2) of POCA.

29 Section 59(3)(a)&(b) of POCA.

30 Criminal Case No 908 of 2013.

the court should consider the ordinary use of the car and ask whether putting money in the car was wrong in the first place. He submitted that cars and houses are normal places where money may be put.³¹ The court made a finding that the car was used in the commission of the offence of money laundering because it was used to facilitate the hiding of money which was stolen or unlawfully obtained.³² The court opined that hiding suspect money in a car did not constitute ordinary use of the car, as claimed by the defendant. The court's analysis did not go beyond the finding that the car was indeed used in the commission of money laundering. The following discussion will show that this analysis was not enough.

To resolve the instrumentality question, South African courts have adopted what is called an instrumentality test, in order to determine whether property against which the state seeks its forfeiture is indeed an instrumentality of crime. Suffice to say that the POCA simply stipulates that the court shall order the forfeiture of property if it is satisfied, on a balance of probabilities, that the property in question is an instrumentality of crime.³³ It does not offer further guidance on the determination of an instrumentality.

To start with, it is submitted that forfeiture should be ordered in cases where ordinary criminal law would not be sufficient to deal with the criminal. In this vein, the *National Director of Public Prosecutions v Van Staden*³⁴ the court said that POCA exists to supplement criminal remedies in appropriate cases and not merely as a more convenient substitute, and it should be used only in cases where 'detection

31 *The Republic v Sithole* Criminal Case No 908 of 2013 at 2.

32 *The Republic v Sithole* Criminal Case No 908 of 2013 at 4.

33 Section 50(1)(a) of POCA.

34 *National Director of Public Prosecutions v Van Staden and others* 2007(1) SACR 338(SCA) Para 7.

and successful prosecution’ pose ‘particular difficulties.’³⁵ The forfeiture must be necessary, and the court must be convinced that the instrumentality was critical to the commission of the offence. Further, in the case of *National Director of Public Prosecutions v Magdalena Elizabeth Parker*³⁶ suggested that it is necessary, when determining whether property is an instrumentality of crime, to look at the broader picture of instrumentality. The court ought to determine whether the property in question was a meaningful and substantial instrumentality in the commission of an offence.³⁷

Similar arguments were raised by the Supreme Court in *National Director of Public Prosecutions v RO Cook Properties (Pty) Ltd and Others*.³⁸ The court said:

“words ‘concerned in the commission of an offence’ must...be interpreted so that the link between the crime committed and the property is reasonably direct and that the employment of the property must be functional to the commission of the crime...The property must play a reasonably direct role in the commission of the offence. In a real or substantial sense the property must facilitate or make possible the commission of the offence.”³⁹

Thus, forfeiture should not lead to the forfeiture of property whose role in or utility to a crime is entirely incidental to its commission.⁴⁰ If is merely incidental to the commission of a crime, it would be unfair and unjust, and this thesis rejects such forfeitures for they violate the tenets of justice within the social contract. An

35 *National Director of Public Prosecutions v Van Staden and others* 2007(1) SACR 338(SCA) Para 7. In this case, the National Director of Public Prosecution had sought to make a forfeiture order against a car that was being driven whilst the driver was under the influence of alcohol.

36 SCA Case number 624/04.

37 *National Director of Public Prosecutions v Magdalena Elizabeth Parker* SCA Case No 624/04 17.

38 2004 (2) SACR 208 (SCA).

39 2004 (2) SACR 208 (SCA) Para 31.

40 *National Director of Public Prosecutions v RO Cook Properties (Pty) Ltd and Others* 2004 (2) SACR 208(SCA) Para 12.

example of such incidental cases arose in the case of *National Director of Public Prosecutions v RO Cook Properties (Pty) Ltd and Others*⁴¹ the SCA had to determine, *inter alia*, where the court had to determine whether a hotel where drug deals frequently occurred was an instrumentality of an offence. In its interpretation of what constitutes an instrumentality of crime, the court said:

“First, the purport of the statute itself suggests some restriction. The purpose of Chapter 6’s forfeiture provisions is signalled in the part of the Act’s Preamble that states that “no person should benefit from the fruits of unlawful activities, nor is any person entitled to use property for the commission of an offence”. The “use” of property “for” the commission of crime denotes a relationship of direct functionality between what is used and what is achieved.”⁴²

In its finding, the court held that the hotel did not constitute an instrumentality of crime, since the NDPP had failed to establish the required closer connection.

Consequently, the forfeiture application was dismissed. In another similar case,

National Director of Public Prosecutions v Braun and Another,⁴³ the court held that

the fact that sexual offences involving minors were committed twice on residential property did not in itself make the property an instrumentality of an offence. The

court reasoned further that “the fact that not the whole property was used for the commission of the offences, is significant and a consideration which militates

against forfeiture.”⁴⁴

41 2004 (2) SACR 208 (SCA).

42 2004 (2) SACR 208 (SCA) Para 14.

43 [2009] ZAWCHC 33 Para 52 and 62.

44 *National Director of Public Prosecutions v Braun and Another* [2009] ZAWCHC 33 Para 61.

However, in *National Director of Public Prosecutions v Prophet*, the High Court, in finding a house to be forfeitable as an instrumentality, said that:

“It was a place to store the chemicals, room on the property were being used to process, refrigerate and ‘synthesise’ these chemicals, into what on a balance of probabilities was methamphetamine. The property cannot be divorced from these acts, as it was an integral part, an instrumentality.”⁴⁵

On an appeal in the same case, the Supreme Court having found that property was adapted and equipped to manufacture drugs from chemical substances unlawfully, stated as follows:

“Its use was deliberate and planned and important to the success of the illegal activities, which could not be conducted openly. So far as the spatial use of the house is concerned, almost the entire house was used either to store chemicals and equipment necessary for the manufacturing process or to manufacture scheduled substances and drugs particularly methamphetamine.”⁴⁶

To arrive at this determination, the Supreme Court had regard to the following factors:

- i. whether the use of the property in the offence was deliberate and planned or merely incidental and fortuitous
- ii. whether the property was important to the success of the illegal activity
- iii. the period for which the property was illegally used and the spatial extent of its use
- iv. whether its illegal use was an isolated event or had been repeated
- v. whether the purpose of acquiring, maintaining or using the property was to carry out the offence

45 *National Director of Public Prosecutions v Prophet* 2003 (6) SA 154 (C); 2003 (8) BCLR 906 (C) Para 27.

46 *Prophet v National Director of Public Prosecutions* 2006 (1) SA 38 (SCA) Para 29.

Going back to Malawi's Sithole case, the instrumentality test would imply a survey on whether the money laundering offence could have been committed anyway, if it were not for that specific car. First, the use of the car was deliberate and planned, for the reason that a person does not incidentally or spontaneously stash huge sums of money into a car. The car was important to the hiding of the money, which was the essential element for the offence of money laundering. The car played a direct role in the laundering of the stolen money. Nevertheless, the hiding of this money could have happened anywhere, either in the defendant's car (since this one belonged to his wife), or in his house. Thus, even though the car played an important role, the commission of the offence was not merely dependent on it.

Further, there was no evidence to indicate whether hiding of money in this car was an isolated or repeated case. It may happen that the all the money was put in the car at once and this was the first time to hide money in the car. It was not proven also, whether the car was bought specifically for purposes of hiding illicit money. Applying the principle elucidated in the South African cases discussed above, the application for forfeiture of the car could not have passed the instrumentality test, and this thesis submits that the car in this case was not an instrumentality.

6.4 Proportionality analysis

After determining that property is an instrumentality of crime, courts in South Africa embark on a proportionality analysis. It is not enough to establish that a specific object or property is an instrumentality of crime. The proportionality analysis allows the state to justify forfeiture measures without compromising the

legitimacy of a forfeiture regime.⁴⁷ In addition, the analysis ensures that the state, in the pursuit of its asset recovery mission, does not confiscate the property of its people without sufficient justification.⁴⁸

The mixed theory of punishment which guides this thesis, disapproves of disproportional punishments. Thus, the courts should embark on a proportionality analysis, to find out if the forfeiture of the property could occasion a miscarriage of justice by being tantamount to unnecessarily harsh punishment. The analysis seeks to examine whether there exists a reasonable relationship between the means employed and the aim sought to be realised.⁴⁹ In all cases, forfeiture must not result into excessive punishment, as that would be against public interests and the limits of state power to punish offenders in proportion to their crimes. The need for a proportionality inquiry indicates that, “although the property may be found to have been an instrumentality of an offence and there are no third party interests involved, the court may decline to order it forfeit to the state on the sole ground that such an order would violate the principle of proportionality”.⁵⁰

6.4.1 Proportionality of instrumentalities forfeiture

In advancement of the mixed theory of punished as proposed by John Locke, the South African framework for the forfeiture of instrumentalities of crime ensures that deterrence is achieved but only through forfeiture orders that are proportional to the offence. To this end, the court in *Mohunram and another v National Director*

47 Krane (2011: 171).

48 Krane (2011: 170).

49 Pretorius (1998: 418).

50 Mujuzi (2010: 5).

of *Public Prosecutions and another*⁵¹ held that before making a forfeiture order, the court must consider whether three main requirements have been met: (1) whether the property in question was an instrumentality of an offence; (2) whether any interest (that is, a third party interest) should be excluded from the forfeiture order; and (3) whether the forfeiture sought would be disproportionate.⁵²

Furthermore, Moseseke CJ in *Mohunram and Another v National Director of Public Prosecutions and another*⁵³ said:

“Proportionality is not a statutory requirement but an equitable requirement that has been developed by the courts to curb excesses of civil forfeiture. Put otherwise, the requirement of proportionality is a constitutional imperative. It is imposed not by the relevant statute [POCA] but by constitutional disdain for arbitrary dispossession of property and unwarranted or excessive punishment.”⁵⁴

In *National Director of Public Prosecutions v RO Cook Properties (Pty) Ltd*⁵⁵ the Court underscored the significance of the proportionality test by stating that in post-conviction forfeitures, the touchstone of the constitutional enquiry is the principle of proportionality. Thus, the amount or value of forfeited property must be compared to the gravity of the offence. If the amount is disproportional to the gravity of the offence, it is unconstitutional.

In the same vein, in *Prophet v National Director of Public Prosecutions*,⁵⁶ the Constitutional Court contended that once a court has determined that the property in question is an instrumentality, the next step is to embark on a proportionality

51 SACR 145(CC).

52 *Mohunram and another v National Director of Public Prosecutions and another* (Law Review Project as amicus curiae) SACR 145(CC) 154.

53 *Mohunram v National Director of Public Prosecutions* 2007 4 SA 222 (CC) 237.

54 *Mohunram v National Director of Public Prosecutions* 2007 4 SA 222 (CC) 237.

55 2002 4 All SA 692 (W) Para 29.

56 [2006] ZACC 17.

enquiry. This involves weighing the severity of the interference with individual rights to property, against the extent to which the property was used for the purposes of the commission of an offence, while bearing in mind the nature of the offence.⁵⁷

In *Mohunram v National Director of Public Prosecutions*⁵⁸ Moseneke DCJ said:

“Courts have correctly held all requests by State prosecutors for civil forfeiture to the standard of proportionality which amounts to no more than that the forfeiture should not constitute arbitrary deprivation of property or the kind of punishment not permitted by section 12(1)(e) of the Constitution.”⁵⁹

Thus, the ultimate purpose of the proportionality enquiry is to avoid arbitrary deprivation of property and to ameliorate the potentially unjust consequences that could follow if the forfeiture is grossly disproportional to the offence.⁶⁰

In Malawi’s Sithole case, the court did not deliberate upon the proportionality of making a forfeiture order against the car that had been used as an instrumentality of money laundering. Even though the court found that the car was an instrumentality, it ought to have considered the proportionality of the forfeiture order. It ought to have weighed the severity of the order against nature of the offence. It ought to have considered also the extent to which the car had been used for the purposes of the commission of the offence of money laundering through

57 [2006] ZACC 17 Para 58. The court suggested that the following factors should be taken into account when assessing the proportionality of a forfeiture order: (a) whether the property is integral to the commission of the offence; (b) whether the forfeiture would prevent the further commission of the crime and the social consequences of the offence; (c) whether the innocent owner defence would be available to the owner; (d) the nature and use of the property; (e) the effect on the respondent of the forfeiture.

58 [2007] ZACC 4; 2007 (4) SA 222 (CC); 2007 (6) BCLR 575 (CC).

59 Para 121.

60 *Hilda Van Der Burg and Another v National Director of Public Prosecutions* 2012 ZACC 12 at 24.

concealment of illicit money.⁶¹ The stolen money was a lot, and the gravity of the offence was big considering that the defendant was a public servant who had stolen public funds. Owing to the gravity of the offence and the effects of theft of public funds on the people of Malawi, the forfeiture of the car could have been justifiable and proportional by all standards, if it was truly an instrumentality of crime. Such forfeiture could not amount to an arbitrary deprivation of the car.

Even though the court did not consider addressing the question of the proportionality of the forfeiture, this thesis suggests that courts should make the proportionality analysis an integral part of the forfeiture proceedings. Such analysis may enable them to refuse to grant a forfeiture order on the basis that the order would be disproportionate. Thus, a proportionality analysis is one way of ensuring that forfeiture of an instrumentality of crime, which in most cases is property that was legally acquired, does not amount to excessive punishments and arbitrary forfeitures, as was the case with the repealed Forfeiture Act.

6.4.2 Proportionality of proceeds forfeiture

In principle, it is less complicated to justify the forfeiture of the proceeds of crime or to require a convict to pay to the state an amount equivalent to what he or she benefited from an offence.⁶² Nevertheless, the forfeiture of proceeds of crime; be it through the criminal or civil avenue, must survive constitutional scrutiny and should not be arbitrary.⁶³ Such arbitrariness may be due to forfeiture orders that are disproportional. Kruger has argued that the proportionality test should not apply to

61 Para 58.

62 Basdeo (2014: 1060).

63 Basdeo (2014: 1060).

the forfeiture of proceeds of crime in the same way that it applies to instrumentalities.⁶⁴ The reason is that ordinarily, forfeiture of proceeds of crime would not be disproportionate because it relates to property which a defendant is not entitled to in the first place.⁶⁵ Another argument is that since forfeiture of proceeds of crime is rationalised on the basis of restitution, there is neither a fine nor punishment, and therefore, the excessive fines or proportionality principles do not apply.⁶⁶ To this end, it is argued that:

“As a rule, forfeitures of criminal proceeds serve the nonpunitive ends of making restitution to the rightful owners and of compelling the surrender of property held without right of ownership. Most forfeiture of proceeds, as a consequence, are not fines at all, let alone excessive fines.”⁶⁷

The non-excessiveness of the forfeiture of proceeds of crime is true, only if what is forfeited is the value of criminal proceeds, and nothing more. The proportionality principle would demand the forfeiture of property which represents criminal proceeds only. It is the forfeiture of any property which is beyond the value of criminal proceeds that would be disproportionate, and therefore, arbitrary. Going by Nozick’s rectification of injustice theory, the injustice of acquiring property through crime should be corrected only to the extent which disgorges the value of property that was acquired unjustly.

Thus, courts must embark on a proportionality analysis, which may in some cases lead to a refusal to order the forfeiture of some of the items claimed by the state.

The court can refuse to grant forfeiture orders if it is not satisfied that the some of the items listed by the state are also part of the criminal proceeds, or if it thinks

64 Kruger (2008: 118).

65 Kruger (2008: 118).

66 Gupta (2002: 167).

67 *Bakajahian* 524 US 349-350.

that the value of all criminal proceeds will be realised without the forfeiture of such items.

The proportionality principle is already embedded in the law of Malawi and South Africa, which stipulate clearly that the state should seek the forfeiture of proceeds of crime.⁶⁸ Thus, in adherence to the proportionality principle, courts must order the forfeiture of proceeds of crime, or any lawfully acquired property only up to the corresponding value of the criminal proceeds.

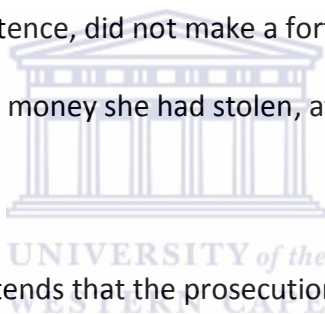
In reference to the case of *The Republic v Sithole*,⁶⁹ apart from seeking the forfeiture of the huge sums of money which the police found in and seized from the defendant's car, the state sought the forfeiture of K750000.00 which the defendant had paid for house rentals, on the basis that it was unlawfully obtained money. Further, the state sought the forfeiture of K1400000.00 which the suspect had used to pay certain boys to buy farm produce for him, on the same basis. However, the state dropped the K750000.00 and K140000.00 from the application, on the basis that the defendant could not be identified easily. This speaks volumes about the ability of investigators to trace property which could have assisted in the realisation of the value of this money. Perhaps, the state should have considered applying for a pecuniary order against the defendant since the forfeiture proceedings were *in personam*. Failure to satisfy the pecuniary order ought to have been treated as failure to satisfy a fine, and that could have necessitated the imposition of an

68 See definition of proceeds of crime under POCA and Malawi's AML Act.

69 Criminal Case No 908 of 2013.

imprisonment term instead, which was to run consecutively to the imprisonment terms he had been slapped with already.⁷⁰

The need for a proportionality analysis in the determination of the value of proceeds of crime that must be targeted applies to the case of *Tressa Namathanga Senzani v Republic*.⁷¹ In this case, Tressa Namathanga Senzani was convicted of the theft of K630000.00 which she had stolen from the public coffers in her capacity as a principal secretary to the Minister of Tourism. She was also convicted of the laundering of the stolen money. She was awarding fake contracts to her company and getting payment for services that were never delivered to the government. The court, in its ruling on sentence, did not make a forfeiture order because the convict had already returned the money she had stolen, at the beginning of the criminal trial.⁷²



However, this thesis contends that the prosecution and the state must not only focus on recovering the actual amount or actual value of the tainted assets. They must seek further the forfeiture of any interest, income or profit a person has made from the illicit assets, because that is what the international legal framework as well as the domestic law requires. Merely stopping at the actual stolen amount limits the reach of Nozick's justice in rectification, since an offender would be left to enjoy the profit, income or interest made from the illicit assets.

Nevertheless, in the present case, the court ordered the forfeiture of all the money that was in the bank account of the company which the convict was using to steal

70 The defendant was sentenced to serve a jail term of 9 years with hard labour.

71 High Court Criminal Case No 63 of 2013.

72 *Tressa Namathanga Senzani v Republic* High Court Criminal Case No 63 of 2013 38.

public funds. The basis for the forfeiture of the rest of the money, the court reasoned, was that the remaining money had been tainted by virtue of it being mixed with the stolen money. This, however, does not address the concern raised above in relation to the forfeiture of interests or profits, because there was no assessment of such interests or profits. It could be that the total value of profits the convict made from the theft of the K63000000.00 was more than the money that was still in her business' account. After all, the profits may not necessarily be placed in the same account. They might have been used to purchase certain property or to finance other businesses.

Thus, this case serves as an example of the possible oversights courts and the prosecution may make in the determination of what constitutes proceeds of crime and what proportionality should mean in relation to criminal proceeds.

A good approach has been evidenced in the case of *The Republic v Maxwell Namata and Luke Kasamba* in which the convicts had restored K24,179,120.79, being stolen and laundered public funds. Unlike the *Tressa Namathanga Senzani v Republic*,⁷³ in this case the court did not stop at the restitution. The court reckoned that restitution of stolen money simply means the return of the principal amount. The spirit of the anti-money laundering regime, however, seeks the forfeiture of any proceeds made by the offenders from the principal amount. The court stressed that allowing offenders to merely restore what they stole but permitting them to keep any proceeds that derive from the stolen money would be as if the government is running "an interest-free loan scheme", where a person is allowed to steal money,

73 High Court Criminal Case No 63 of 2013.

make profit from it and then return what was stolen.⁷⁴ Thus, the court welcomed the state to make an application for the forfeiture of any property the state deems to be proceeds of the stolen money. The court's reasoning in this case reflects what the anti-money laundering regime is all about. Restitution of the direct proceeds of crime is not enough. Courts and the prosecution must always think outside the box by being awake to the possibility that an offender might have made some profit, income or interest out of the direct proceeds of crime. Rectification of the injustice in the acquisition of such profit, income or interest must be pursued vigorously, making sure that crime does not pay the offender in any possible way. This is how courts arrive at making a forfeiture order of proceeds of crime that is proportional to the crime, meaning, proportional to every illicit gain.

6.4.3 Making a forfeiture order in addition to any punishment

Since the focus of asset forfeiture is the recovery of property from a wrongdoer, a confiscation order should be ordered in addition to any punishment the court may impose for any given offence.⁷⁵ In both the *Senzani* and *Sithole* cases discussed above, the courts imposed imprisonment sentences in addition to the forfeiture orders.⁷⁶ This approach would not occasion any failure of justice, as long as the courts apply the proportionality analysis in all cases.

74 *The Republic v Maxwell Namata v Luke Kasamba* Criminal Case No 45 of 2013.

75 Section 18(1) of POCA.

76 Namata was sentenced to 9 months imprisonment for theft and 3 years imprisonment for money laundering, to run concurrently. Sithole was sentenced to 1 year imprisonment for being found in possession of foreign currency, 1 year imprisonment for being found in possession of property suspected to be stolen or unlawfully obtained, and 7 years imprisonment for money laundering, all to run concurrently.

6.4.4 Onus to prove proportionality

The proportionality assessment is a legal one and thus, the onus rests on the state to establish the proportionality of forfeiture that it seeks in each case.⁷⁷ Thus, the state must make sure that the items it includes in the application for a forfeiture order adhere to the proportionality principle by including only items that are necessary to disgorge illicit gain, and nothing more.

6.4.5 Factors to consider when making a forfeiture order of instrumentalities of crime

Forfeiture of instrumentalities of crime constitutes punishment. It is punishment for one's misuse of property, or allowing property to facilitate the commission of crime. In *National Director of Public Prosecutions v RO Cook Properties (Pty) Ltd*⁷⁸ the court reiterated this point by stressing that POCA requires property owners to exercise responsibility for their property and to account for their stewardship of it in relation to its possible criminal utilisation. However, property owners may have different reasons showing that even though they were negligent in handling their property, there are certain factors that militate against the forfeiture of their property.

6.4.5.1 Degree of culpability

In trying to answer the question of proportionality, it is prudent for courts to take into account personal mitigating and aggravating factors before making a forfeiture order. Generally, courts should consider the degree of culpability, and personal circumstances, before they make an order for the forfeiture of instrumentalities. In

77 *Mohunram v National Director of Public Prosecutions* 2007 (2) SACR 145 (CC).

78 2002 4 All SA 692 (W) Para 29.

*National Director of Public Prosecutions and Others v Vermaak*⁷⁹ the Supreme Court of Appeal opined that the more one commits an offence in the course of a broad and protracted enterprise of criminal activity, the more appropriate a forfeiture order would be.⁸⁰

This is a valid factor to consider since it indicates the established plan to use the property in the repeated commission of offences. Repeated offending shows impunity, and such offenders should not be allowed to continue offending. One way of stopping them is by removing the property which offers them the convenience of repeating the commission of offences. It would not be arbitrary nor disproportionate to deprive such people of the property which they use in the commission of offences.

6.4.5.2 Frequent use of property in the commission of a crime

Apart from repeated offending, another related factor for the courts to consider is the repeated use of property in the commission of a crime. In the case of *National Director of Public Prosecutions v Constable*,⁸¹ two immovable properties were forfeited to the state because they were found to be instrumentalities of drug dealing. When assessing the proportionality of the forfeiture of the properties, Davis J stated as follows:

“In my view, when properties are used this consistently for nothing more than drug houses, there is no disproportionality when these particular properties are forfeited, particularly if regard is had to the socio-economic costs of drug-related offences in this country, particularly in this part of South Africa and especially given the pernicious influence which organised

79 [2007] SCA 150.

80 *National Director of Public Prosecutions and Others v Vermaak* [2007] SCA 150 Para 11-3.

81 CPD, Case No 5147/2004 delivered on 2006-02-28 (Unreported).

drug-dealing have had on the social fabric of the society, particularly in disadvantaged communities.”⁸²

The repeated use the property in the commission of a crime that has adverse effects on society justified the forfeiture. The use of the property in this case was not incidental. Even John Locke justifies the forfeiture of anything that is noxious to society.⁸³

Similarly, in the case of *Hilda Van Der Burg and Another v National Director of Public Prosecutions*,⁸⁴ the forfeiture of the appellant’s house was not a top up to other criminal penalties. It was a last resort to stop the appellants’ continued sale of liquor without a licence, which they did not stop selling even after warnings, seizure of liquor, admissions of guilt and preservation orders were executed on the appellants. The continued offending showed that to the appellants, crime pays. This justified the need to put a stop to their unlawful behaviour by taking away the instrument used in its commission.⁸⁵ This, the court said, is not an abuse of POCA or the criminal justice system, and it does not offend the Constitution.⁸⁶

6.4.5.3 Welfare of children

The courts should also go as far as considering domestic circumstances of the property owner before ordering the forfeiture of instrumentalities of crime. In *Hilda Van der Burg and Another v National Director of Public Prosecutions*,⁸⁷ the Constitutional Court upheld a forfeiture order made against the appellant’s house as an instrumentality for selling liquor without a licence, contrary to section

82 *Prophet v National Director of Public Prosecutions* 2006 (1) SA 38 (SCA) Para 27.

83 Locke (1990: 121) II.8.

84 [2012] ZACC 12.

85 *Hilda Van Der Burg v National Director of Public Prosecutions* [2012] ZACC 12 at 25.

86 *Hilda Van Der Burg v NDPP* [2012] ZACC 12 at 25.

87 [2012] ZACC 12.

154(1)(a) of the Liquor Act. The appellants challenged the forfeiture, *inter alia*, on the ground that the order was not proportionate, and it would leave them and their little children homeless.

The Centre for Child Law joined the case as *amicus curiae*, submitting that the Constitution obliges a court to consider the best interests of the applicants' children before a final determination can be made on the forfeiture. Thus the *amicus* requested the Court to appoint a curator *ad litem* to prepare a report concerning the impact the forfeiture would have on the applicants' children. This argument was based on section 28(2) of the Constitution which provides that "[a] child's best interests are of paramount importance in every matter concerning the child." The *amicus* also stressed the importance of the children's rights to family or parental care and to basic shelter, pursuant to section 28(1) of the Constitution.⁸⁸

In its determination, the Constitutional Court stated that even though the proportionality requirement is aimed at balancing the constitutional imperative of law enforcement and combating crime and the seriousness of the offence, against the right not to be deprived arbitrarily of property, the possible homelessness of the applicants and their children was a relevant factor, which may not be overlooked. For the purposes of forfeiture, it makes a difference whether the

88 Section 47(1) of the Children's Act states: "If it appears to any court in the course of proceedings that a child involved in or affected by those proceedings is in need of care and protection as is contemplated in section 150(3) the court must order that the question whether the child is in need of care and protection be referred to a designated social worker for an investigation contemplated in section 155(2)."

property instrumental in crime is for example an uninhabited factory building, or a home.⁸⁹

The court stated further that law enforcement must always be child-sensitive and courts must at all times show due regard for children's rights.⁹⁰ The court asked whether the interests of children should be part of a proportionality enquiry. It is the duty of the court to consider the specific interests of children, and the NDPP, as officers of the court, must assist the court in this exercise even if parents of the children do not raise it.⁹¹ The High Court considered the children's interests when the granting of the forfeiture order. However, the High Court concluded that the forfeiture order would not render the children homeless because their parents had a fruit and vegetable business, which would enable them to find alternative accommodation.⁹² This means that had the court found the likelihood that the children could have been rendered homeless, it could have declined to make the forfeiture order.

In addition, in the case of *Prophet v National Director of Public Prosecutions*,⁹³ the Court considered the fact that though unemployed, the applicant was receiving rentals from immovable property owned by his father, and that the forfeiture would therefore not leave him destitute.⁹⁴ This means that the court could have refrained from making a forfeiture order had it found that the order was going to render him destitute.

89 *Hilda Van Der Burg v National Director of Public Prosecutions* [2012] ZACC 29 Para 58.

90 *Hilda Van Der Burg v National Director of Public Prosecutions* [2012] ZACC 31 para 62.

91 *Hilda Van Der Burg v National Director of Public Prosecutions* [2012] ZACC 34 Para 68.

92 *Hilda Van Der Burg v National Director of Public Prosecutions* [2012] ZACC 39 Para 80.

93 2006 (1) SA 38 (SCA).

94 *Prophet v National Director of Public Prosecutions* 2006 (1) SA 38 (SCA) Paras 38-40.

The consideration of all these and many other personal factors is relevant and important in making sure that the forfeiture orders do not occasion a miscarriage of justice. It is acceptable for courts to accept mitigating factors when making forfeiture orders of instrumentalities of crime, for the same reasons that justify the consideration of mitigating factors in a criminal trial's sentencing stage. Forfeiting an instrumentality of crime merely because it has connection to the commission of crime would render the modern day forfeiture laws draconian, as was the case in the old days when every instrumentality was subject to forfeiture for its mere connection to the commission of crime. The current societies that are built based on constitutional constraints would disapprove and reject any draconian, oppressive and disproportionate forfeiture.

6.4.5.4 Other factors in the determination of sentence in Malawi

In Malawi, too, courts are encouraged to take into account a number of factors before meting out punishment.⁹⁵ Hence, the call to consider the proportionality of the forfeiture orders among other mitigating and aggravating factors will not be an alien principle at all. For instant, in *Ayami v Republic*⁹⁶ the Supreme Court stated that when considering the appropriate sentence to impose in each case, it is imperative to evaluate the extent of the crime, its impact on victims; and the circumstances in which it was committed. Further, on proportionality, the court stated that the question is not whether the sentence is manifestly excessive on its own, but what the court is legally entitled to pass.⁹⁷ The court will be ordered to

95 Section 321(j) of the CP&EC. Factors such as the impact of the offence on victims and gravity of the offence.

96 1990 13 MLR 19 (SCA).

97 *Ayami v Republic* 1990 13 MLR 19 (SCA).

order forfeiture when it is appropriate to do so, depending on circumstances of each case.

In the case of *Tressa Namathanga Senzani v Republic*,⁹⁸ where the convict had stolen K630000.00 from government coffers, the state asked the court to consider the impact of stealing public funds had on the ordinary Malawian,⁹⁹ how the misuse of public funds had caused the government to lose credibility in the eyes of donors who supplement the national budget, as well as her breach of trust occasioning from her high-profile position in public service as a Principle Secretary to the Ministry of Tourism. In agreement, the court recognised the nature of the offences of theft and money laundering, and their impact on the economy and health supplies in the country.¹⁰⁰ Similarly, the court in the case of *The Republic v Maxwell Namata and Luke Kasamba*¹⁰¹ took judicial notice of the effects of the cashgate scandal on the economy of Malawi, among other effects. All this shows the relevance of other factors in the determination of a just and befitting punishment. The same should apply to the determination of a forfeiture order.

However, the courts must exercise caution when they are considering the personal circumstances of an offender or a property owner, as it was the case in *Prophet v National Director of Public Prosecutions*¹⁰² and *Hilda Van der Burg and Another v National Director of Public Prosecutions*.¹⁰³ The courts must only refrain from making a forfeiture order against an instrumentality of crime if the case presents

98 High Court Criminal Case No 63 of 2013.

99 *Tressa Namathanga Senzani v The Republic* Criminal Case No 63 of 2013 (HC) at 21.

100 *Tressa Namathanga Senzani v The Republic* Criminal Case No 63 of 2013 (HC) at 37-38.

101 Criminal Case No 45 of 2013 (HC).

102 2006 (1) SA 38 (SCA).

103 [2012] ZACC 12.

very exceptional circumstances. The Malawi High Court in *Chitsonga v The Republic*¹⁰⁴ reasoned that courts should not take domestic matters into account when sentencing. All offenders have families, and for most, any sentence brings some measure of hardship and deprivation. Therefore, courts should only take into consideration domestic matters only when they are exceptional or unusual. This reasoning is laudable as it balances the interests of the public in punishing an offender for their violation of the social contract, as well as ensuring that under very exceptional circumstances, their innocent family members are not greatly inconvenienced as a result of their relation's criminality. This is in pursuit of the principle of proportionality.

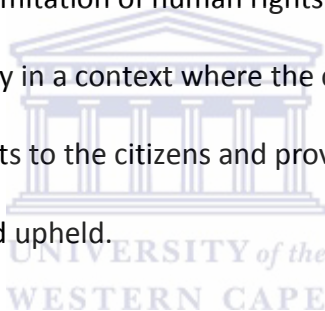
Be that as it may, it has been argued, that proportionality considerations negate the deterrent and denunciatory value of the forfeiture regime.¹⁰⁵ This thesis' response to this assertion is that no, it does not. The reason is that within the mixed theory of punishment applicable to this thesis, deterrence exists within the same framework with the principle of proportionality of punishments. The recognition of the proportionality principle is a deliberate effort to ensure that the state should not oppressive its people through the imposition of excessive punishments all in the name of the pursuit for deterrence. Within John Locke's social contract, proportionality is the constraint for deterrence. Thus, proportionality does not negate deterrence, rather, it complements it in order to achieve at just and fair results.

104 (1995) 1 MLR 86(HC).

105 Krane (2011: 181).

6.5 Constitutional rights vs civil asset forfeiture

The government of South Africa, as it is the case with Malawi, has a duty to protect individual rights, such as the right to property.¹⁰⁶ The state is faced with the duty to implement appropriate law enforcement measures such as asset forfeiture in pursuit of the protection of the rights of society, on the one hand, and the duty to protect individual rights of property rights on the other hand.¹⁰⁷ In determining whether asset forfeiture is justifiable, South African courts are guided by constitutional imperatives.¹⁰⁸ The constitutionality approach is necessary in order to avoid implementing an asset forfeiture regime in a matter which would constitute the arbitrary limitation of human rights. However, the constitutionality approach is desirable only in a context where the constitution in question confers fundamental human rights to the citizens and provides the process by which these rights can be invoked and upheld.



The traditional *in rem* fiction which informs the basis of civil forfeiture today attracts constitutional concerns and it can lead to legal complications because it is constitutionally problematic. The fiction has led to the questioning of legitimacy of civil forfeiture in South Africa.¹⁰⁹ It is, therefore, suggested that “South Africa should down play the *in rem* fiction and focus instead on criminal doctrinal arguments that illuminate POCA’s constitutionality”.¹¹⁰ The argument is that given the oppressive history of apartheid in South Africa, any law enforcement measure

106 Section 7(2) and Section 25 of the South African Constitution.

107 Basdeo (2014: 1058).

108 Basdeo (2014: 1059).

109 Gupta (2002: 164).

110 Badeo (2014: 1062).

such as the civil asset forfeiture, must withstand vigilant constitutional scrutiny lest South Africa's transition entail a shift from one oppressive regime to another.¹¹¹

Civil asset forfeiture orders under chapter 6 of POCA are deemed to be inherently intrusive in that they may carry dire consequences for property owners. Courts are, therefore, enjoined by section 39(2) of the Constitution to interpret legislation such as the POCA in a manner which "promote[s] the spirit, purport and objects of the Bill of Rights", to ensure that its provisions are constitutionally justifiable, particularly in the light of the property clause enshrined in terms of section 25 of the Constitution.¹¹² However, the success and legitimacy of the civil forfeiture regime in South Africa rests on its use as a supplement to criminal remedies to combat organised crime, and not merely as a more convenient substitute.¹¹³

The same suggestions given to South Africa above, should apply to Malawi and all other countries whose torch is the constitution. If Malawi adopts civil forfeiture, its success is most likely going to be confronted with legal challenges which countries such as South Africa face in the implementation of their civil forfeiture laws. It is, therefore, prudent to discuss the debates surrounding these legal challenges, so as to prepare Malawi on what lies ahead and how best to tackle the potential challenges if they arise once it introduces civil forfeiture laws. The challenges are foreseeable because civil forfeiture by its nature, somewhat resembles the forfeiture regime under the repealed Forfeiture Act of 1966, in the sense that in both, the conviction of the property owner is irrelevant. Thus, the introduction of

111 Gupta (2002: 160.)

112 *Prophet v National Director of Public Prosecutions* Case CCT 56/05 Para 46.

113 *National Director of Public Prosecutions v Staden and Others* 2007 (1) SACR 338 (SCA) Para 7.

civil forfeiture is more likely to be confronted by s the questioning of its constitutionality, among other questions.

6.5.1 Arbitrary deprivation of property

The social contract theory, which this thesis argues that it should inform the government's crime prevention strategies such as civil asset forfeiture, emphasises that punishment must not be arbitrary. Thus, the implementation of civil asset forfeiture must not result into the arbitrary deprivation of property, as this is prohibited by the Malawi Constitution.¹¹⁴

In South Africa, section 25(1) of the Constitution for the Republic of South Africa prohibits the arbitrary deprivation of property and further states that no law may permit such deprivation. The first clause of this provision confirms the existence of property rights, but it also recognises that there may be measures that limit this right without resulting into arbitrary deprivation of the right to property.¹¹⁵ The purpose of the constitutional protection is to establish a just and equitable balance between the protection of private property and the promotion of the public interest.¹¹⁶

In *National Director of Public Prosecutions v RO Cook Properties (Pty) Ltd and Others*¹¹⁷ the SCA said:

“A deprivation of property is arbitrary when the statute in question does not provide sufficient reason for the deprivation or is procedurally unfair.”¹¹⁸

114 Section 28 of the Malawi Constitution.

115 Krane (2011: 174).

116 Justice Belinda Van Heerden in *Monhunram and another v National Director of Public Prosecutions*(2007) 2 SACR 145(CC).

117 2004 (2) SACR 208 (SCA); 2004 8 [BCLR] 844 (SCA).

In the case of *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance (FNB)*,¹¹⁹ the Constitutional Court said:

“For the validity of such deprivations, there must be an appropriate relationship between means and ends, between the sacrifice the individual is asked to make and the public purpose this is intended to serve. It is one that is not limited to an enquiry into mere rationality, but is less strict than a full and exacting proportionality elimination.”¹²⁰

In *Deutschmann v Commissioner for the Revenue Service*¹²¹ the court stated that a law that limits property rights is not arbitrary as long as the application for such deprivation of rights is based on reliable information; an order is made discretionary by a judge; and that any concerned party is free, in terms of the statute, to establish his entitlement and claim delivery. Deprivation of property rights through forfeiture in POCA is also based on clear grounds for suspecting the tainted nature of property, and anyone is free to challenge forfeiture orders or to establish entitlement to the property through the innocent owner defence.

Civil forfeiture may also pose potential violation with the right to property. The argument is that since the state only has to prove the tainted nature of the property on a balance of probabilities, it would be unfair to deprive someone of their property on such a weak link.¹²² The forfeiture could be attacked on the basis that there is no rational connection or substantial relationship between the forfeiture and the aims that it seeks to achieve, such as crime prevention,

118 *National Director of Public Prosecutions v RO Cook Properties (Pty) Ltd and Others* 2004 (2) SACR 208 (SCA); 2004 8 [BCLR] 844(SCA) 15.

119 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC).

120 *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance (FNB)* 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC) Para 98.

121 2000 2 SA 106 (E).

122 Pretorius (1998: 406).

deterrence and compensation.¹²³ It may also be criticised on the lack of proportionality between its purpose and the means used.¹²⁴ In the *Austin* case, Justice Scalia stated that:

“The question is not how much the confiscated property is worth, but whether the confiscated property has a close enough relationship to the offence.”¹²⁵

The foregoing arguments are in line with the argument that this thesis advances, that the means justify the end. Going beyond Justice Scalia’s views, this thesis adds that in the spirit of the proportionality analysis and instrumentality test discussed earlier, the question is about the worth of the confiscated property, as well as the property’s close relationship to the offence. The focus should not only be on proving that the property in question is an instrumentality. The focus is also on how much it is and whether its forfeiture would not be arbitrary due to the fact that it is would constitute excessive punishment. Thus, there should be a clear relationship between the forfeiture and the purpose it seeks to achieve, *i.e.* deterrence, and the value of the property.¹²⁶

In Malawi too, the introduction of civil asset forfeiture would demand that the state should disclose reasons for the intended forfeiture; that the making of the forfeiture order is up to the determination of the courts, and that any concerned party is free to challenge the forfeiture orders. This would avoid the repetition of the injustice of the repealed Forfeiture Act, which did not meet any of these

123 Pretorius (1998: 407).

124 Pretorius (1998: 407).

125 *Austin v United States* (1993) 509 US.

126 *Shaik v State* 2007 2 ALL SA 150 (SCA) 158.

requirements because there were no reasons given for the forfeiture, it was made a cabinet Minister and no one had the right to challenge it.

6.5.2 Right to legal representation

Further, under civil forfeiture, oftentimes, all or a significant part of a defendant's property is frozen, making it hard for them to afford the services of a lawyer.¹²⁷

However, since the proceedings are civil in nature but arguably pursuing criminal penal law objectives, one can argue that the state should provide legal representation for defendants of civil forfeiture applications.¹²⁸ But even if the state is to provide a legal counsel, still the argument is that the defendant would be denied the right to be represented by counsel of their choice; the one they could have afforded had their property not be frozen.¹²⁹

However, provision of a court-appointed lawyer is arguably blind to the "function of the independent lawyer as a guardian of our freedom".¹³⁰ Forcing a person to rely on the services of a lawyer other than a lawyer of their choice violates basic fairness, deprives defendants of attorney-client relationships which are characterised by trust; disrupts the equality of legal representation between state and defendants' threatens the foundations of the criminal defence bar and does not further forfeiture's core aim of taking profit out of crime.¹³¹

The dilemma is that since technically, a criminal has no property rights in criminal proceeds, allowing them to use part of the suspected criminal proceeds to seek

127 Gupta (2002: 175).

128 Gupta (2002: 175).

129 Gupta (2002: 157-176).

130 *Caplin & Drysdale v United States*, 491 U.S. 617 (11989) 644.

131 Gupta (2002: 176-177).

legal expenses is problematic because it would amount to allowing them to spend money that does not belong to them.¹³² This argument is problematic also because the legitimacy of the defendant's title to the targeted property is what the court seeks to determine at the end of the forfeiture proceedings.¹³³

Section 45 of POCA makes provision for legal expenses to be met out of property that is subject to a preservation order, pending a forfeiture hearing. It, however, sets a limit for the amount payable towards legal expenses by saying that legal expenses should not be met out of that property to the extent that the amount payable for any legal service concerned exceeds any prescribed maximum allowable cost for that service.

In addition, the High Court has discretion in terms of section 26(6) to make provision in a restraint order for the reasonable living and legal expenses of the defendant. In the case of *Trent Gore Fraser v ABSA Bank Limited (National Director Public Prosecutions as amicus curiae)*,¹³⁴ Mr Fraser was charged with racketeering, money laundering and drug-related offences. The state obtained (in the High Court) a provisional restraint order against his property, placing it in the hands of a curator.

Subsequently, Mr Fraser applied for an order directing the curator to sell the property and use its proceeds for the payment of his legal expenses. This prompted ABSA Bank, a third party with an interest in the same property and who had a four year old default judgment against Mr Fraser, to apply for intervention in the matter.

132 See *Caplin & Drysdale v United States*, 491 US 617 (11989) 625-626.

133 Gupta (2002: 176).

134 [2006] ZACC 24. Decided on: 15 December 2006.

ABSA's interest was to oppose Mr Fraser's application for the sale of the property that had been placed in the hands of a curator, arguing that if Mr Fraser were successful, the Bank would be unable to recover its judgment debt.¹³⁵

The High Court, however, dismissed ABSA's application to intervene, confirmed the provisional restraint order and granted Mr Fraser's application for the sale of the property. The court reasoned that the effect of a restraint order was to protect defendants against the claims of creditors and to provide defendants the right to have first call upon their property in order to meet legal expenses. This reasoning was based upon the High Court's construction of section 33(1) of POCA, thereby concluding that claims of concurrent creditors, such as ABSA, were "obligations" of the applicant that "conflict with the obligation to satisfy a confiscation order" within the meaning of section 33(1).

On appeal by ABSA, the Supreme Court of Appeal dismissed Mr Fraser's application to sell property and granted ABSA's application to intervene. Consequently, ABSA's claim against Mr Fraser was secured. The Court, in interpreting the section 26(6) of POCA, said:

"The legislature could not have intended that a concurrent creditor, who had pursued a claim and obtained a default judgment prior to the issuance of a restraint order, would be prevented from satisfying that judgment simply because the debtor's assets had been restrained."

Consequently, Mr Fraser made an appeal to the Constitutional Court against the decision of the Supreme Court. The question before the court was whether a creditor of a defendant may join the proceedings when the defendant applies to a court to provide in a restraint order for reasonable legal expenses connected to his

135 [2006] ZACC 2 at 5.

criminal trial. He argued that the failure to make provision for his legal expenses would violate his right to a fair trial, in particular, the right to legal representation.

The Constitutional court upheld the Supreme Court's decision to allow ABSA to intervene in the proceedings. However, it held that the Supreme Court was incorrect in holding that ABSA's claim against Fraser was secured against the provision for his reasonable legal expenses. The Court stated:

“A decision to allow a creditor to intervene does not automatically result in an order to ‘ring-fence’ its claim against competing claims and the defendant’s claim for reasonable legal expenses.”¹³⁶

In its analysis, the Constitutional court argued that when considering an application for the provision for reasonable legal expenses, pursuant to section 26(6) of POCA, the High Court must balance up the interests of all who have a claim in the property in question. That is, the accused person's right to legal representation, the interest of the state in preserving the property and the interests of creditors. The court then referred the matter back to the High Court for it to exercise its discretion in terms of section 26(6) of POCA.

In the case of *National Director of Public Prosecutions and Another v Mohamed NO and Others*,¹³⁷ the Constitutional court considered whether section 38 of POCA infringed the right of access to courts. Even though section 38 deals with preservation orders, it is drafted in very similar terms to section 26 in that it allows the NDPP to apply for an order *ex parte*. In *Mohamed*, the court *a quo* struck down section 38 on the basis that the section made no provision for a rule *nisi* calling

136 *Trent Gore Fraser v ABSA Bank Limited (National Director Public Prosecutions as amicus curiae)* [2006] ZACC 2 Para 77.

137 2002 (4) SA 843 (CC); 2003 (5) BCLR 476 (CC).

upon interested parties to show cause why a preservation order should not be made. This Court found that the High Court erred in the order it made in that: (a) it had attempted to remedy, by way of a notional severance formulation, a constitutional invalidity caused by an omission. The Court held that the correct procedure would have been to read-in the rule *nisi* requirement; and (b) section 38 was not specifically challenged in the court *a quo*. Rather, the whole of chapter 6 was challenged. This Court, therefore, found that the High Court erred in attempting to decide the matter on the narrow basis it did rather than deciding the constitutionality.

The court observed that the forthcoming criminal trial was anticipated to be strenuous and long, and emphasised the need for reasonable legal expenses to be provided for as a fair trial requirement. The High Court stated that an order regarding legal expenses does not amount to allowing a convicted person to retain ill-gotten gains. A fair criminal trial is required by the Bill of Rights and is not only advantageous to the accused, but also to the state.

In view of the foregoing, Malawi courts ought to be awake to the possibility of such arguments. The right to legal representation should be upheld, but not in a manner that will lead to the depletion of the value of the preserved property. Since this right is not absolute, the limitation on the choice of counsel by providing people with state or court-appointed lawyers is a good balance between the interests of the state in preserving the value of the targeted property, and the recognition of the right to fair trial through legal representation for the respondent.

However, should a person insist on finding their own lawyer using part of the preserved assets to pay legal fees, once a forfeiture order is made, they should pay an amount which represents a reduction in value which results from the payment for legal expenses. The basis for this argument is that the suspect has no right to spend unlawfully gained property, hence should not be allowed use such property to meet expenses which any other citizen meets from the fruits of their clean labour. This proposal would secure the interests of the property owner in the sense that their right to legal representation is not limited from the time their property has been subjected to forfeiture proceedings. They should not be forced to rely on a state or court-appointed lawyer, if they feel their interests would be better represented by a lawyer of their choice.

However, this proposal would not work in relation to civil forfeiture proceedings, since the proceedings are *in rem* not *in personam*. Thus, the state would have no choice but to allow property owners to use part of the frozen, seized or restrained property for their reasonable living expenses until the determination of the forfeiture application. However, in order to minimise the reduction of the value of the targeted property, the state and the court must ensure speedy proceedings, so as to minimise the period within which the property owner will need to survive from part of the property. This is one way of ensuring that no one benefits from tainted property any further.

6.5.3 Presumption of innocence

There is a presumption that civil forfeiture does not interfere with the presumption of innocence because it does not involve a criminal charge.¹³⁸

In the mid 1990's, before POCA was enacted, in the case of *S v Zuma*, the South African Constitutional Court opined that if a law requires an accused person to establish, on a balance of probabilities either an element of an offence or an excuse, then it contravenes the constitutional right to be presumed innocent.¹³⁹

In addition, the European Court of Human Rights (ECHR) suggested that forfeiture proceedings do not amount to a criminal charge, as the person is not being accused of any crimes, and there is no effect on the person's criminal record.¹⁴⁰ For this reason, it is argued that civil forfeiture does not fall within the ambit of presumption of innocence, which arises only in connection with a criminal charge.¹⁴¹ Further, in *R (Director of the Assets Recovery Agency) v Belton*,¹⁴² the state argued that civil forfeiture proceedings are classified as civil action against any person who holds or controls property, whether or not he is the one who committed the offence. Therefore, the proceedings do not contravene the presumption of innocence rule.¹⁴³

In *Walsh v United Kingdom*,¹⁴⁴ a case based on an action for civil recovery of the applicant's assets, the applicant contended that the proceedings for recovery of his

138 Godinho (2009: 332).

139 1995 2 SA 642 (CC) 656.

140 Godinho (2009: 332).

141 *Phillips v United Kingdom* Application No.41087/98, 5 July 2001 Para 35.

142 (2005) NIQB Ref No COGF5334.

143 Kennedy (2004: 18).

144 [2006] ECHR 1154.

assets were not civil but criminal in nature and were proceedings to which the right to be presumed innocent under the European Convention on Human Rights applied.¹⁴⁵ The European Court of Human Rights had to decide whether the recovery proceedings involved the determination of a criminal charge such as to invoke the provisions of Article 6. The court considered three important criteria, namely, the domestic classification of the matter, the nature of the charge and the penalty to which a person becomes liable.

Firstly, the court found that, according to the UK domestic law, the recovery proceedings were regarded as civil and not criminal. Secondly, the purpose of the proceedings was not punitive or deterrent but to recover assets to which the defendant lawfully was not entitled.¹⁴⁶ The court further confirmed that there was no finding of guilt of specific offences and that though the recovery order made by the lower court involved a huge sum (£70 250), it was not intended to be punitive.

The tricky part about civil forfeiture is that it is an action related to the commission of crimes, but the commission is not proved to the requisite standard of proof beyond reasonable doubt through criminal trial in some cases because there is no sufficient evidence for the state to open a criminal case. In such cases, if evidence was enough, the state could have instituted a prosecution. Thus, it is argued that a civil forfeiture application constitutes an express accusation of the unlawful origin of the property and an implicit accusation of the commission of the crime.¹⁴⁷ The accusation of the commission of crime is made indirectly.¹⁴⁸ By being required to

145 Article 6(2) of the ECHR.

146 The ECHR also made a similar determination in *Butler v United Kingdom* [2002] ECHR IV.

147 Godinho (2009: 333).

148 Godinho (2009: 333).

prove the lawful origin of assets, a person is called to rebut implicitly, the indirect accusation of the commission of crimes. When courts are convinced that indeed the property is proceeds of crime, they are, impliedly, convinced that a crime was committed. Thus, civil forfeiture involves an indirect accusation and an implied criminal charge for the commission of crime.¹⁴⁹

6.5.4 Third party rights

The social contract prohibits punishment of innocent people. Thus, forfeiture orders should not be imposed on property which belongs to innocent people. South Africa is keen on making sure that innocent people do not experience the punitive aspect of asset forfeiture. Thus, POCA contains a significant safeguard of the interests of innocent owners of property which may be subject to forfeiture. It provides that forfeiture does not affect the rights of a person who claims and proves that he had no knowledge of the instrument's use in the commission of an offence.¹⁵⁰ Furthermore, person can save their property from forfeiture if they prove that they could not prevent its use in the commission of a crime, and that they may lawfully possess the instrument which has become subject to forfeiture.

This provision has been tested in the case of *National Director of Public Prosecutions v Magdalena Elizabeth Parker*,¹⁵¹ Mrs Parker was staying in her house, and her son and his family were staying in another side of her house. The son was involved in drug dealing, using the house as a drug selling spot. When the NDPP applied for the preservation of the property in terms of section 38 of POCA, the

149 Godinho (2009: 334).

150 Section 35 of POCA.

151 Case No 624/04 (SCA).

woman did not dispute the drug dealing allegations by the NDPP, but rather claimed that she was an innocent owner.¹⁵² Thus, as a property owner who was not involved in the commission of the offences, she exercised her right to challenge the preservation order, on the basis of her innocence. This is commendable.

In the UK, too, interests of innocent third parties are protected. In the case of *Air Canada v United Kingdom*¹⁵³ the court said that in relation to forfeiture of instrumentalities of crime, and when it belongs to an innocent third party, proper safeguards must be provided with respect to the rights of persons who are not to blame.¹⁵⁴ The court contended further that forfeiture of property will only comply with the protection of the right to property when the owner can be blamed in respect of an offence committed using his property.¹⁵⁵ The court said:

“Confiscation of property as a sanction to some breach of the law...without there being any relationship between the behaviour of the owner or person responsible for the goods and the breach of the law, is definitely incompatible both with the rule of law and with the right guaranteed in Article 1 Protocol No.1.”¹⁵⁶

The court further stressed that a property owner must be allowed to prove that he could not reasonably have known or suspected that his property would serve as an instrumentality, or even with due diligence have prevented its use. Failure to allow a property owner to show his innocence would upset the fair balance between the protection of the right of property and the requirements of general interest.¹⁵⁷

152 *National Director of Public Prosecutions v Magdalena Elizabeth Parker* Case No 624/04 (SCA) 10-11.

153 20 EHRR (1995) 150.

154 20 EHRR (1995) 180- 181.

155 20 EHRR (1995) 183.

156 *Air Canada v United Kingdom* 20 EHRR (1995) 184.

157 *Air Canada v United Kingdom* 20 EHRR (1995) 184.

The protection of the rights of innocent party is also a subset of the proportionality principle. The proportionality principle would demand that interests of the state are balanced with the interests of a property owner. This was confirmed in the *Allgemein Gold-und Silberscheideanstalt v United Kingdom* case,¹⁵⁸ where the European Human Rights Commission stated:

“It cannot be seen as proportionate towards an innocent property owner to confiscate his goods which were smuggled, without notice to him and without giving him any chance to argue his innocence.”¹⁵⁹

Thus, proportionality of a forfeiture order will also have to be measured against the protection of the rights of innocent people, since a forfeiture order which victimises innocent property owners would be arbitrary.

In relation to Malawi, the same principles innocent party principles apply. The law provides comprehensively for the protection of third party and innocent party interests.¹⁶⁰ In the *Sithole* case, the car which was subject to forfeiture as an instrumentality of crime was alleged to belong to the defendant’s wife. As the law requires, she swore and filed an affidavit, claiming ownership of the car and arguing that it should be excluded from forfeiture. During forfeiture proceedings, the defence counsel argued for the exclusion of the car from forfeiture, arguing that the car belonged to the wife and she was not aware that her husband, Mr Sithole, intended to use it in connection to a crime.

In its analysis, the court stated that she had failed to prove on the balance of probabilities, that she was not aware of the car’s criminal usage. Thus, the court imputed knowledge of the car’s usage in the commission of a crime. It cited reasons

158 EHRR (1987) 1.

159 EHRR (1987) 321.

160 Section 56 of the AML Act.

such as the fact that she was operating from the same house with the defendant, and being the owner of the car, she must have been aware of the presence of the money in the car and had all the opportunity to confront her husband about it.¹⁶¹

This thesis submits that the analysis of the court in this case was comprehensive.

The court gave the third party an opportunity to show cause why the car should not be forfeited. On account of what court in the *Allgemein Gold-und Silberscheideanstalt v United Kingdom* case said,¹⁶² this forfeiture was not disproportional on Mrs Sithole's part because knowledge of the car's use in the commission of money laundering was imputed on her, and she was given a chance to prove her innocence. For the same reasons, neither was the forfeiture arbitrary.

In the spirit of crime prevention, forfeiture of property such as the car in the Sithole case is justified on the basis that the owner is believed to have been negligent with her property.¹⁶³ Thus, deterrence justifies the punishment of negligent or complicit property owners for negligently or knowingly letting their property to be used in the commission of crime. Requiring the forfeiture of property used in the commission of a crime "encourages property owners to take care in managing their property and ensures that they will not permit that property to be used for illegal purposes."¹⁶⁴ Thus, allowing people to prove their innocence on a balance of probabilities is one way of ensuring that a forfeiture order does not punish those who are not culpable of negligence in the usage of their property.

161 *Republic v Sithole* Criminal Case No 908 of 2013 4.

162 EHRR (1987) 1.

163 Gupta (2002: 168).

164 *United States v Ursery* 1996 116 S Ct 2135 290.

6.5.5 Double jeopardy concerns

Civil forfeiture attracts criticism for its likelihood to violate the double jeopardy rule.¹⁶⁵ The rule prohibits the prosecution of a person twice for the same offence, and that a conviction shall be a bar to further criminal proceedings.¹⁶⁶ The argument is that civil forfeiture is a criminal trial that is disguised in civil proceedings, and it should bar subsequent criminal prosecution on the basis that a person has been tried already in civil forfeiture proceedings.¹⁶⁷ Similarly, the law should bar civil proceedings that are instituted after a criminal trial, on the same double jeopardy arguments. The criticism and debate stems from the assertion that civil forfeiture is punitive, not remedial. American courts grappled with this issue also. In *Halper v United States*¹⁶⁸ the court reasoned as follows:

“[a] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term...We therefore hold that under the Double Jeopardy Clause, a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial but only as a deterrent or retribution.”¹⁶⁹

In this case, the court found that a fine is remedial and not punitive by nature, but it would become punishment if it created ‘tremendous disparity’ between the fine and the amount of harm the defendant caused.¹⁷⁰ The issue here was the excessiveness of the fine. It would not be punitive if it were not excessive.

165 Leong (2009: 218).

166 Section 42(2)(vi) of the Malawi Constitution; Section 35(30)(m) of the South African Constitution.

167 Basdeo (2013: 325).

168 490 US 447.

169 *Halper v United States* 490 US 447 448-449.

170 *Halper v United States* 490 US 447 452.

Following the *Harper* case, the court in the case of *Austin v United States*¹⁷¹ reasoned that the provision for an innocent owner defence in relation to forfeiture proceedings indicated that culpability was a requirement for forfeiture.

“If forfeiture had been understood not to punish the owner, there would have been no reason to reserve the case of a truly innocent owner. Indeed, it is only on the assumption that forfeiture serves in part to punish, that the Court’s past reservation of that question makes sense.”¹⁷²

Nevertheless, the court contended that the legislative history indicated that the forfeiture provisions were necessary because criminal sanctions were inadequate to achieve deterrence.¹⁷³ In addition, the court held that forfeitures were punishment and were thus subject to the limitations of the excess fines.

Later on, the Supreme Court in the case of *United States v Ursery*¹⁷⁴ went back to its original position in the *Various Items of Personal Property v United States*¹⁷⁵ case, where it held that *in rem* civil forfeiture is remedial, distinct from punitive *in personam* civil penalties such as fines, and that it does not constitute punishment for double jeopardy purposes. The difference lies in the subject of the proceedings. In proceedings such as civil action to recover penalties such as fines, and in criminal prosecutions, it is the wrongdoer in person who is proceeded against and punished, while in civil forfeiture, it is property that is proceeded against and by legal fiction, condemned.¹⁷⁶ Thus, the court confined the double jeopardy rule to *in personam* civil penalties, such as fines. Civil forfeitures are designed primarily to confiscate property used in violation of the law and to disgorge fruits of unlawful conduct.

171 509 US 602, 125 L Ed 488, SCt 2801.

172 *Austin v United States* 509 US 602, 125 L Ed 488, SCt 2801 502.

173 *Austin v United States* 509 US 602, 125 L Ed 488, SCt 2801 504.

174 1996 116 S Ct 2135.

175 282 US 577 (1931).

176 *Various Items of Personal Property v United States* 282 US 577 (1931) 580-581.

Thus, the court held that the opinion it held in the *Harper* case cannot apply to civil forfeiture.

However, in his dissenting judgement, Justice Stevens in the case of *United States v Ursery* opined that civil forfeiture is punitive, and that naming the proceedings as *in rem* or *in personam* should not be the sole determinant of their nature. He reasoned as follows:

“There is simply no rational basis for characterising the seizure of this respondent’s home as anything other than punishment for his crime. The house was neither proceeds nor contraband and its value had no relation to the government’s authority to seize it. Under the controlling statute, an essential predicate for the forfeiture was proof that the respondent had used the property in connection with the commission of a crime. The forfeiture of this property was unquestionably a penalty ‘that had absolutely no correlation to any damages sustained by society or to the cost of enforcing law.’¹⁷⁷”

In addition, Justice Kennedy in the same *United States v Ursery* case reasoned that providing for the forfeiture of real property used to facilitate drug offences, only the culpable stand to lose their property, and interests of innocent owners are protected if they can show that they did not know or consent to the use of their property in the commission of crime. The law on the forfeiture of instrumentalities of crime is not directed at those who commit crimes, but those who are guilty of misuse of their property, he said.¹⁷⁸ The property stands to be hazardous in the hands of such owners who either use or let others to use their property in the commission of crime.

Since the punitive purpose affects culpable property owners, whether they committed an offence or not, the forfeiture is not punishment for a person’s

177 1996 116 S Ct at 2101.

178 1996 116 S Ct at 2150.

criminal wrongdoing. Thus, in the opinion of the court, the forfeiture is not an *in personam* punishment for the offence, which is all the double jeopardy clause prohibits.

So far, this thesis has argued that civil forfeiture of proceeds of crime is punishment. It is punishment even though it serves both remedial and deterrent purposes. The remedial aspect is the recovery of unlawfully obtained property, and it serves to deter criminals from committing profit crimes. The thesis has argued that the forfeiture of instrumentalities is punishment also, as it punishes negligent property owners and seeks to deter them and others from using or letting their property to be used in the commission of crime. The punitive nature of both types of forfeitures lies in the effects of the forfeiture orders, and not in the nominal description of their proceedings.

All this debate begs the question: Do civil forfeiture proceedings constitute a criminal trial? The answer is no, for the reason that not all forms of punishment emanate from a criminal trial. In the case of forfeiture of criminal proceeds, a criminal prosecution that follows civil recovery will not constitute a second trial. The criminal trial is the only trial and it aims at establishing the guilt of the offender, where a conviction goes into the person's criminal record.

The misuse of the property, which the forfeiture of instrumentalities seeks to curb, is not the subject of the criminal trial. The trial concerns the commission of the crime, while the forfeiture concerns the use of property in the commission of the crime. Thus, if civil forfeiture precedes a prosecution, the punishment that will be imposed will not include forfeiture of criminal proceeds again. The court would

have to impose different types of punishment, such as imprisonment for the underlying offence. Similarly, in cases where civil forfeiture precedes a criminal trial, the punishment that is imposed at the end of the trial will not include forfeiture of instrumentalities again, and the conviction will not be based on the misuse of property, but on the commission of the underlying offence.

Therefore, on the basis of the arguments made above, an inquiry into civil forfeiture's punitive nature should be embarked on in order to assess whether a forfeiture order violates the proportionality principle, which is not related to the double jeopardy principle.

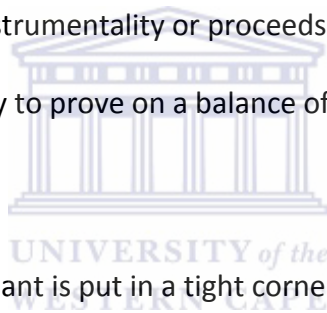
Perhaps, one way around this double jeopardy debate is for states to consider the criminalisation of the misuse of property in unlawful activities. Thus, property owners would have to be prosecuted for using or letting their property to be used in the commission of an offence. The prosecution can be followed by conviction-based proceedings for the forfeiture of the property. If the state deems it convenient and proper, it may just opt to institute civil forfeiture proceedings against the property and forgo the prosecution. If a forfeiture order is granted, the granting of the order should bar the prosecution of the property owner on the charge of misuse of property. However, should the property owner be the one charged with the underlying offence, the civil forfeiture order would not act as a bar for his prosecution in the underlying offence. This is because the forfeiture proceedings only related to the offence of misuse of property.

In order to avoid any miscarriage of justice, the offence should be accompanied by the innocent owner's defence. Property owners ought to prove, on a balance of

probabilities that they did not know about the property's use in the commission of the offence.

6.5.6 Right against self-incrimination

POCA allows for the parallel commencement of both criminal prosecution and civil forfeiture. This has raised arguments relating to the right to against self-incrimination, for the fear that what one says in his defence in one proceeding may be used against him in the other proceeding. Civil forfeiture proceedings have the potential of infringing on the right against self-incrimination. The state simply has to prove on the balance of probability that the property in question is tainted property, either as an instrumentality or proceeds of crime. The property owner is also given an opportunity to prove on a balance of probability that the property is not tainted.



At that stage, the defendant is put in a tight corner where he has the choice to either remain silent and not oppose the forfeiture application, or argue his case and risk divulging criminally incriminating information, which the state may use in criminal prosecution.¹⁷⁹ The complication with the civil proceedings is that there are disclosure requirements under the discovery rules, where the state may make discovery requests which may be significantly self-incriminating.¹⁸⁰ However, the defendant would not face similar discovery requests in criminal prosecution because in a criminal trial, it is only the state which is under an obligation to disclose the evidence it has against a suspect. Thus, a person finds more safeguards in criminal procedure than in civil proceedings. In relation to conviction-based

179 Pretorius (1998: 404-405).

180 Pretorius (1998: 405).

forfeiture, the same does not apply because the proceedings take place after a criminal trial, hence no self-incrimination fears would arise.

6.6 Retroactive application of the law of civil forfeiture

Generally, the law prohibits retroactive punishment or prosecution. The Malawi Constitution prohibits the conviction or punishment of a person for an act which was not an offence at the time of its commission.¹⁸¹ Thus, it is necessary to assess whether the introduction of civil forfeiture as proposed by this thesis will result into the retroactive forfeiture of criminal proceeds that were acquired before the enactment of the civil forfeiture law. If it really results into a retroactive application, it is necessary to examine whether this retroactivity can be justified.

In other jurisdictions, the courts have held that the rule against retroactive punishment cannot apply to civil forfeiture proceedings because forfeiture orders are just “a civil law consequence of the fact that a perpetrator or other beneficiaries had obtained assets from an unlawful act”.¹⁸² The basis for such a position is that the claimant’s conduct was already criminalised and that he never had a vested right to property.¹⁸³

For instance, in *Dassa Foundation v Liechtenstein*¹⁸⁴ the court held that civil forfeiture law was comparable to civil law restitution of unjust enrichment, hence, retroactive application of the law would not constitute retrospective penalty.

Applying this court’s reasoning in Malawi would imply that the state can seek the

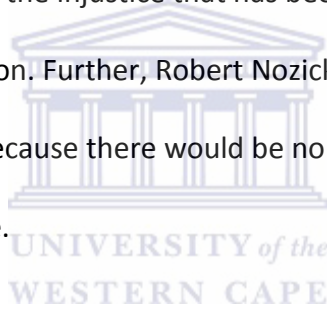
181 Section 42(2)(vi) of the Constitution of Malawi.

182 Greenberg *et al* (2009: 44).

183 *US v Four Tracts of Property on the Waters of Leiper’s Creek* 181 F.3d 104, 1999 WL 357773 at 3-4 (6th Cir. 1999).

184 ECHR Application No 696/05 (10 July 2007).

forfeiture of all illicit proceeds from crimes that were committed before the introduction of civil forfeiture in the Malawian legislation. This could be a powerful tool in ensuring that undeserving people do not continue to enjoy fruits of crime, while hiding behind the rule against retroactive punishment. However, such retroactive forfeiture should only be limited to illicit proceeds which derived from acts that had been criminalised already by the time of the acquisition. This is because the basis of the forfeiture is the acquisition of assets through the commission of a criminal act. If the act was not criminalised, then the forfeiture would lack legal basis, rendering it an arbitrary act by the state. The state could have difficulties to prove the injustice that has been occasioned by the acquisition of the property in question. Further, Robert Nozick's rectification of injustice principle cannot apply because there would be no injustice which needs to be rectified in the first place.



Additionally, being civil proceedings, others have suggested that the state must stipulate the extent to which the civil forfeiture actions should be subject to the statute of limitation.¹⁸⁵ For example, in the UK, civil forfeiture proceedings can be instituted against property that was acquired within 12 years from the day it was unlawfully acquired.¹⁸⁶ However, such limitation is problematic as it may limit the application of Robert Nozick's rectification of injustice principle, by allowing a person to keep criminal proceeds that were acquired beyond the set time limit. Therefore, in the interest of justice within Nozick's theory, the state should not subject civil forfeiture actions to any statutory limitations. Such limits would also

185 Kennedy (2006: 135-136).

186 See Section 316(3) of the POCA (UK).

pose a problem in the recovery of proceeds of offences committed by government leaders who stay in power for long and have had all the opportunity to hide their criminal loot.¹⁸⁷

Ultimately, having a retroactive application of civil forfeiture law could help Malawi in the recovery of illicit property in all cases of the past where the state could not prosecute an individual for one reason or the other. The law can be used to recover illicit proceeds from suspects who were acquitted, absconded or who died but left illicit proceeds to be inherited by their families. However, the rule of the thumb is that such retrospective forfeiture should not be arbitrary. The state must bring before court enough evidence to convince the courts about the illicit nature of the property, and show that its acquisition relates to an act that was criminalised already at that time. The law must further allow people to come and contest the making of a forfeiture order, so as to avoid inconveniencing innocent people, such as *bona fide* purchasers.

6.7 Criminal trial proceedings and civil forfeiture

In order to avoid the abuse of civil forfeiture, there is a suggestion, which this thesis agrees with, that civil forfeiture proceedings should be initiated only where criminal prosecution has failed or is impossible.¹⁸⁸ If there is evidence which allows the commencement of both criminal and civil forfeiture, priority should go to the commencement of criminal proceedings. This is one way of ensuring that the state will not abuse the civil forfeiture measure. It is also one way of allowing offenders

187 Greenberg *et al* (2009: 44).

188 Greenberg *et al* (2009: 62).

to enjoy the full fair trial rights that are obtained in criminal trials.¹⁸⁹ Thus, the state should consider commencing a criminal trial first, and wait until its conclusion before commencing civil forfeiture proceedings, regardless of whether the trial yields a conviction or not. The advantage of doing this is it could circumvent arguments relating to self-incrimination through potentially incriminating information which the property owner may decide to use to argue their case.¹⁹⁰

Alternatively, the state can commence civil recovery proceedings before a criminal trial. This usually attracts criticism in relation to the right against self-incrimination, due to the incriminating information which a property owner may bring in a bid to exclude their property from forfeiture, as well as information which the state may request through discovery rules attendant in civil proceedings.¹⁹¹

It is argued that this approach may work to the advantage of the property owner as well, in case he has to stand subsequent criminal trial because he may use the information laid bare by the state in the civil proceedings, in accordance with discovery rules.¹⁹² However, this is not a problem on the part of the prosecution's case because unlike an accused person, the state has no fair trial rights such as right to remain silent or right against self-incrimination. After all, in criminal trials, the state has the duty to disclose the evidence it has against a suspect, so whether the suspect gets the state's evidence through disclosure arrangements within a criminal trial or through previous civil forfeiture proceedings does not offend any principle of justice.

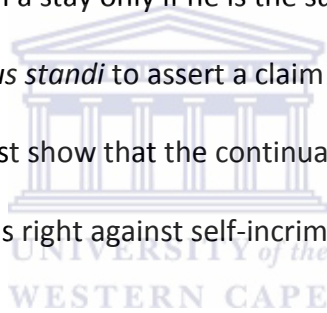
189 Opedayo (2010: 65)

190 Opedayo (2010: 63).

191 Opedayo (2012: 64).

192 Opedayo (2012: 74).

Another approach is for the state to institute parallel civil forfeiture proceedings and criminal trial proceedings. This approach poses self-incrimination fears in the property owner as argued earlier. Hence, he may be forced not to defend his interests in the property in civil forfeiture proceedings for fear of giving implicating evidence which the state may use in the parallel criminal trial.¹⁹³ This was the situation in the case of *Payton v R.*¹⁹⁴ The court ruled that the defendant's fair trial rights should not be violated by any evidence or information given in the civil proceedings, and the state had to make sure of that. In the USA, the law allows for the stay of civil proceedings pending the conclusion of criminal prosecution.¹⁹⁵ A person can apply for such a stay only if he is the subject of a related criminal investigation; he has *locus standi* to assert a claim in the civil forfeiture proceedings; and he must show that the continuation of the forfeiture proceedings would affect adversely his right against self-incrimination in the related criminal investigation.¹⁹⁶



6.8 Conclusion

The fight against economic crimes and money laundering in Malawi must be supplemented by the introduction of civil forfeiture laws. However, due to the potential injustice which civil asset forfeiture poses, the state can circumvent the occasioning of injustice by adhering to its obligations under the constitution. The state and courts must ensure that each and every forfeiture order is made in the interests of justice, by making orders that are not disproportionate or arbitrary,

193 Opedayo (2012: 74).

194 [2006] EWCA Crim. 1226.

195 Kennedy (2006: 151).

196 18 United States Code 981(g)(1) and (2) USA.

without losing sight of their deterrent purpose. The orders must pass the constitutionality test. This is what the social contract demands.



CHAPTER 7

CONCLUSION AND RECOMMENDATIONS

7.1 Conclusion

In the wake of the escalation of economic crimes in Malawi, the fight against money laundering has become more real and more demanding. This is evidenced by the sudden response to prosecute suspects on money laundering charges only from the year 2013, yet the anti-money laundering legislation has been in force since 2006. However, Malawi cannot win the fight against money laundering without the use of asset recovery as a more relevant deterrent tool which targets the very incentive for engaging in criminal behaviour.

Malawi recognised the usefulness of asset forfeiture by including it not only in piecemeal in other pieces of legislation such as the Penal Code and the Corrupt Practices Act, but by including it broadly in the Money Laundering, Proceeds of Serious Crimes and Terrorist Financing Act. Nevertheless, there is a significant oversight in the country's overall asset forfeiture legal framework **because of** the absence of civil forfeiture. By confining the recovery of tainted property to the criminal law sphere, the country runs the risk of making the engagement in economic crimes and money laundering a profitable adventure. This is because the absence of civil forfeiture serves as an assurance that the state is not in a position to prosecute all perpetrators in order to confiscate their illicit property. The lesser the likelihood of prosecution, the lesser the deterrence achieved through the few prosecutions.

The oversight to include civil forfeiture laws can be excused on the basis that the international legal framework does not obligate states to introduce civil forfeiture as a crime prevention measure. The international legal framework merely recommends the adoption of civil forfeiture. However, in view of the benefits which civil forfeiture offers to the overall fight against money laundering, this thesis contends that the oversight by the international legal instrument is significant and it has detrimental implications on the global deterrent stance that they profess.

Nevertheless, states that are serious about fighting economic crimes and money laundering effectively, ought to regard the recommendation to introduce civil forfeiture as if it were a mandatory obligation. Malawi has no excuse for not adopting civil forfeiture. Thus, this thesis proposes the immediate introduction of civil forfeiture in the laws of Malawi. Civil forfeiture will ensure the enhancement of deterrence by applying the recovery of illicit property to all situations where a conviction-based forfeiture would not be attainable. Such situations include where a prosecution is not possible due to illness, death or abscondment of offenders. The state can also use civil forfeiture in cases where a prosecution is not ideal, in the interests of justice.

In addition, the use of civil forfeiture ensures that there is effective rectification of the injustice that lies in the acquisition of property through criminality, as proposed by Robert Nozick in his justice in distribution theory. However, in order to avoid the abuse of civil forfeiture, the state must show cause why it cannot prosecute, because civil forfeiture must exist only to supplement criminal forfeiture, and not to substitute it.

The thesis has advanced its arguments within John Locke's social contract theory which recognises the potential of the state to oppress its people through the implementation of policies such as crime prevention by using oppressive asset forfeiture laws. Thus, the thesis has rejected a model of the social contract as proposed by Thomas Hobbes. Hobbes' theory supports absolutism which serves as a conducive environment for oppressive means of government such as the enactment of oppressive asset forfeiture rules. The government of Malawi already used asset forfeiture laws as an oppressive political tool in the pre-democracy times, and the legacy of that law contributed to parliament's resistance to include civil asset forfeiture in the anti-money laundering legislation. The government breached the model of social contract as propounded by Locke, by going beyond its people-given power, through the enactment and implementation of an oppressive law. In view of this history, this thesis is not blind to the possibility of the resurfacing of such laws or regimes, and that is why it has argued that the proposed civil asset forfeiture law should be one which can pass any constitutionality test. The law must be just, fair and centred on proportionality.

The courts and the prosecution must be awake to the constitutional challenges that confront the implementation of civil forfeiture. These challenges include civil forfeiture's potential to violate fundamental human rights such as the right to property and fair trial rights. The thesis has proposed the reliance on the proportionality test, which dictates that there must be a rational relationship between a forfeiture order and the purpose it seeks to serve. The means must justify the end. Lessons on how to overcome such challenges can be drawn from

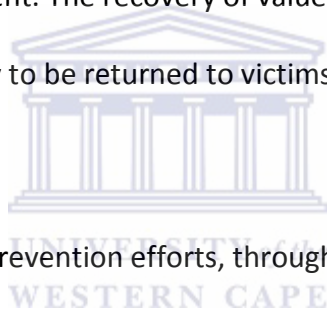
the South African, English and American court cases that have been discussed in Chapter Six.

In order to ensure the fairness of the forfeiture regime, the thesis has proposed that the civil forfeiture regime must be one which is shaped by the mixed theory of punishment. The thesis has deliberately disregarded placing the discussion within the framework of either pure utilitarianism or pure retributivism due to their shortcomings in explaining and shaping an ideal forfeiture regime. The mixed theory advocates for the attainment of utilitarian ends such as deterrence and victim-compensation through the constraints of the retributive theory of punishment, namely, proportionality of punishment and the prohibition of punishment of innocent people. This is the only way the state can ensure that it seeks the forfeiture of property from those who do not deserve to keep and enjoy the property, while sparing the interests of innocent property owners. Using this theory, the state can also ensure that the forfeiture orders will be proportional.

Further, the thesis has demonstrated that the success of the forfeiture regime relies heavily on the state's ability to trace, seize, freeze and restrain targeted property.

When these provisional orders are implemented effectively, they ensure that criminals are not given an opportunity to hide or dissipate the targeted property and keep it out of the reach of the law. Failure by the state to identify and get hold of such property will make economic crimes attractive to the people because there will be little likelihood that the state can locate and seize their criminal proceeds. In essence, the deterrent effect of asset forfeiture rests heavily on the state's ability to make the detection and seizure of illicit property a high probability.

In addition, the success of the asset forfeiture efforts relies on the state's ability to preserve the value and condition of seized, frozen or restrained property, until the disposal stage. Doing so ensures that the courts make meaningful forfeiture orders at the end forfeiture proceedings. Regrettably, there is no coordinated asset management system in Malawi, and this poses a threat to the success of asset forfeiture. The threat lies in situations where a forfeiture application has been denied and the state needs to return the property to the owner. If by the time of the return, the property has decayed or has been damaged, the government could lose money through damages paid for the damage or loss in value of the property caused by mismanagement. The recovery of valueless property also means that there will be no property to be returned to victims, thus, defeating the reparative aim of asset forfeiture.



All in all, in all its crime prevention efforts, through both the existing criminal forfeiture and the future civil forfeiture schemes, the state must remember always that the chief end of its creation and existence is the preservation of its people's rights to property, life and other liberties, granted to them by the law of nature and safeguarded by the constitution. The state's power is also limited by the provisions of the constitution. The implementation of both criminal and civil forfeiture must reflect this understanding.

7.2 Recommendations

In order to ensure the implementation of a comprehensive asset forfeiture regime, apart from proposing the introduction of civil forfeiture law, the thesis proceeds to

make the following specific recommendations which are critical to the smooth implementation of an effective asset forfeiture regime.

7.2.1 Establishment of an asset recovery unit

Due to the complexity of civil asset forfeiture, it is cumbersome for the prosecuting authority to juggle both the criminal trial proceedings and civil forfeiture proceedings. The current trend is for a country to create a specialised unit or agency, which is tasked to concentrate on the recovery of criminal proceeds.¹ The establishment of such a unit in Malawi could enhance efficiency in the discharge of justice because the unit could concentrate on the asset recovery processes while the prosecuting authorities concentrate on the criminal trial.

South Africa has the Asset forfeiture Unit (AFU), which is a specialised agency established in 1999. It falls under the National Prosecuting Authority and it has regional offices in all provinces. The AFU is tasked with the implementation of both criminal and civil asset forfeitures under Chapters Five and Six of POCA.

Further, the UK, through POCA,² established the Asset Recovery Agency (ARA) which became operational in 2003.³ It was a non-ministerial department that was tasked to carry out three operational functions, namely; criminal forfeiture, civil forfeiture and taxation.⁴ It was a central specialised unit for handling high profile and complex forfeiture cases on referral from prosecution and law enforcement authorities.⁵ However, due to huge start-up costs⁵ and its low levels of asset

1 Kempen (2006: 2).

2 Part 1 of POCA.

3 Bacarese (2009: 150).

4 Leong (2009: 203).

5 Leong (2009: 203).

recovery, the ARA was closed and instead, it was merged with the Serious Crime Agency (SOCA) in 2008.⁶ Malawi can learn a lesson from the concerns that led to the closure of the ARA. Malawian authorities need to decide whether the asset forfeiture unit should be established as an independent agency as was the case with the ARA, or to affiliate it to another authority, as the ARA was merged with SOCA, and also as the AFU in South Africa exists within the NPPA.

The proposed unit can also make possible the implementation of the proposal made in Chapter Six, that once a civil forfeiture law is introduced, civil forfeiture proceedings can run parallel to or can precede criminal prosecutions. The presence of the unit, therefore, will ensure that the prosecution authorities focus on the criminal trial while the forfeiture unit focuses on forfeiture processes, concurrently. Allowing the unit to concentrate on the civil forfeiture proceedings may lessen delays in the commencement or conclusion of forfeiture proceedings. This would have the advantage of lessening the time within which the state has to manage seized or restrained property, which in turn has the implication of reducing the asset management costs. Speedy forfeiture proceedings could also lessen litigation costs for both the state and claimants, and also the courts.

7.2.1.1 Operational structure and independence

In the case of Malawi, for the sake of efficiency, the unit ought to be established with the Directorate of Public Prosecutions (DPP), and must have a presence in all the regions of Malawi, namely the northern, central, southern and eastern region. However, establishing the unit within the DPP's office would expose it to the

6 Bacarese (2009: 151).

debate on operational independence and political interference, which have confronted the office of the DPP so far. The success of this unit, therefore, rests on the extent to which the executive branch of the government ensures the independence of the office of the DPP.

7.2.1.2 Co-operation with other relevant authorities

The success of asset forfeiture efforts would depend significantly on the smooth co-operation between the asset forfeiture unit and other law enforcement authorities. The asset forfeiture unit ought to coordinate properly with other key partners in order to enhance its efficiency. In comparison, the South African AFU is mandated to establish excellent relationships with its key partners such as the South African Police Service and the South African Revenue Service. In Malawi, the unit would have to work hand in hand with institutions such as the Malawi Police, the Malawi Revenue Authority and the Anti-Corruption Bureau.

7.2.2 Asset management

The thesis recommends a revamp of the asset management system. This recommendation is made on the basis that currently, there is no coordinated system for the management of seized, frozen and forfeited assets under the laws of Malawi. For instance, under the CP&EC, seized property is to be managed by the court;⁷ while the AML Act and the CPA suggest that the relevant authority that executes a seizure order is solely responsible for the administration of the

7 Section 116(2) of the CP&EC.

property.⁸ The AML Act further provides that the court should appoint a person to manage restrained property.⁹

Regrettably, there are no clear guidelines or regulations for the implementation of critical issues in the management of assets, such as transparency. Transparency is an important aspect of a democratic society because the state and its agents must remain accountable for their actions. Therefore, relevant authorities must be required to keep appropriate records or an inventory of frozen, seized and confiscated property.¹⁰ The inventory must indicate the whereabouts, value, condition and status of litigation.¹¹ The rules must require also the assessment of the value of seized, restrained or frozen property, so as to make sure that the value of the property is preserved until the conclusion of forfeiture proceedings.¹² This can guard against subsequent claims by property owners that their assets were damaged while they were in the hands of the relevant authority that was tasked with their management.¹³

Ultimately, there must be an authority responsible for the inspection of the inventory, and the results of the inspection must be made public.¹⁴ In Malawi, all competent authorities are obliged to submit monthly reports on the status of seized property to the FIU.¹⁵ Thus, the asset management authorities are accountable to the people through the FIU. This makes the FIU an ideal authority

8 Section 72(1) of the AML Act and Section 3 of the Corrupt Practices (Disposal of Recovered, Seized or Frozen Property) Regulations (Issued under Section 54 of the CPA).

9 Section 80(2)(b)(ii) of the AML Act.

10 Brun (2011: 94). See also FATF Best Practices Paper on Confiscation (2012: 10).

11 Greenberg *et al* (2009: 87).

12 Greenberg *et al* (2009: 87).

13 Brun (2011: 94).

14 G8 Best Practices Paper on the Administration of Seized Property (2005: 2).

15 Section 72(2) of the AML Act.

for the inspection of the inventory, but the law is silent on the inspection part and the publication of the results of the inspection. Thus, the law must be amended to include this important aspect. However, it should be noted that the monthly reporting obligation relates only to seized property. It does not apply to restrained property, which this thesis argues also needs similar treatment and attention.

7.2.3 Establishment of an asset forfeiture fund

The law in Malawi stipulates that all forfeited property vests in the state. In order to ensure transparency in the disposal of forfeited property, this thesis proposes the establishment of an asset recovery account, as suggested by the FATF.¹⁶

South Africa established within its National Revenue Fund a separate account known as the Criminal Assets Recovery Account.¹⁷ Into this account goes all money derived from the fulfilment of forfeiture orders are deposited into this account;¹⁸ all property derived from the fulfilment of forfeiture order;¹⁹ and the balance of all money derived from the execution of foreign confiscation orders as defined in the International Co-operation in Criminal Matters Act,²⁰ after payments have been made to requesting States in terms of that Act.²¹

The account can be inspected in order to see how money deposited in it has been used by the relevant authorities. This will enhance accountability. Meanwhile, depositing confiscated money into the government's Consolidated Fund, as

16 See FATF Best Practices on Confiscation (2012: 7). See also Interpretive Notes to the Forty Recommendations on Recommendation 38 (2012: 6).

17 Section 63 of POCA.

18 Section 64(a) of POCA.

19 Section 64(aA) of POCA.

20 Act 75 of 1996.

21 Section 64(b) of POCA.

suggested by the current laws, places the money at the risk of being embezzled by corrupt public officials, since it is mixed with all other government funds for general use in public departments. The risk of the embezzlement of confiscated money which is deposited in the general Consolidated Fund would create a vicious cycle, whereby the state confiscates stolen assets only to place them in the hands of another thief. If the money is deposited in a special fund, it can be easier to monitor its usage.

7.2.4 Negotiated settlements

Apart from asset forfeiture, this thesis proposes that Malawi should consider using negotiated settlements in order to enhance deterrence through the recovery of illicit proceeds. This is in pursuit of negotiated justice. Negotiated settlements are another convenient avenue for depriving offenders of the proceeds of crime is through out of court negotiated settlements.²² Under such settlements, the prosecution and a defendant can enter into an agreement agreeing on particular charges the defendant will plead guilty to.²³ The two parties can confer on the prospective sentence or monetary punishment, but they cannot make an agreement on the sentencing aspect as that is to be determined by the court.²⁴ In some cases, an offender agrees to pay a sum of money or give up his property to the state, to the same value as the proceeds of a crime.²⁵

The different existing forms of settlements are the guilty plea settlements which are used in the USA, Canada and the UK; civil settlements in the UK; the deferred

22 Stessens (2000: 58).

23 Oduor *et al* (2014: 28).

24 Oduor *et al* (2014: 28).

25 Stessens (2000: 58).

and non-prosecution agreements in the USA; and out of court restitution settlements in Nigeria.²⁶ For formality's sake, the settlements must be confirmed by the courts.²⁷ In Malawi, the CP&EC gives the platform for such agreements also, as it allows for plea bargaining in criminal matters. Malawi's model offers an opportunity for guilty plea settlements, such as those of the USA, Canada and UK, as this model is preferred by the common law jurisdictions.²⁸

Under the CP&EC, plea bargaining is defined as “the process whereby the accused and the prosecutor in a criminal case work out a mutually satisfactory disposition of the case subject to court approval”.²⁹ The law permits that a defendant can agree to plead guilty to a lesser offence, or to plead guilty to only one or more counts of a charge.³⁰ The CP&EC does not offer much guidance on how plea bargaining should be done. Instead, it gives power to the Chief Justice to make plea bargaining rules. It should be noted, however, that since the introduction of plea bargaining in the CP&EC in 2010, the Chief Justice has not set the rules yet.

Generally, negotiated settlements are considered a cheaper and faster avenue to asset recovery unlike court processes.³¹ They offer an attractive alternative for prosecutors to avoid lengthy trials and get hold of the criminal loot immediately.³²

This option seems attractive especially in cases where the proceeds are placed in a

26 Oduor *et al* (2014: 17).

27 Oduor *et al* (2014: 17).

28 Oduor *et al* (2014: 17).

29 Section 252A of the CP&EC.

30 Section 252A (2)(a)(b) of the CP&EC.

31 Wako (2014).

32 Stessens (2000: 58).

foreign country and the success of the enforcement of a subsequent forfeiture order after securing a conviction is uncertain.³³

However, some argue that over-reliance on settlements results in the inadequate dealing with the issue of civil forfeiture by avoiding litigation of the salient issues.³⁴

Further, there is concern that significant assets could be legitimised or retained by criminals, by allowing property such as real property which derives from a criminal act to be used by the criminals in order to meet the terms of the negotiated settlement.³⁵ In addition, over-reliance on settlements has the potential of leaving a wrong impression on the public, that the state is not keen to remove a criminal from the society by way of imprisonment, nor is it keen to recover criminal profits.³⁶ Justice must not only be done, but it must be seen to be done. Therefore, negotiated settlements must be approached with caution in Malawi also.

Further, this thesis submits that negotiated settlements ought to be made in the interests of justice, which for purposes of this thesis, means the recovery of the totality of all criminal proceeds and any profit, income or interest accrued thereon. In the case of Malawi, the CP&EC only allows for settlements with regards to the nature of criminal charges and not sentence. This thesis proposes that the state should not reach negotiated agreements with the expectation that it should persuade the court to reduce the amount of forfeitable property, when it is time to present its case on forfeiture. The principles of proportionality must still apply in such arrangements, and proportionality in this sense means the recovery of all that

33 Stessens (2000: 59).

34 Dayman (2009: 246).

35 Dayman (2009: 246).

36 Dayman (2009: 246).

was illegally gained. The state should not enter into an agreement which leaves a criminal with some of the criminal proceeds because the disgorgement of criminal assets is the ultimate aim of the asset forfeiture and anti-money laundering movement.

If anything, an agreement should permit only that an offender should surrender all criminal proceeds, in exchange of an undertaking by the state not to prosecute him, or if a prosecution is pursued, an undertaking to proffer a lesser charge or not to seek the imposition of certain forms of punishment such as an imprisonment sentence, fine or revocation of a business licence. The experience of the UK in this regard, gives a good perspective on how cautious the state must be towards negotiated settlements. In the UK, the Serious Fraud Office has the power to enter into negotiated settlements in cases of serious fraud.³⁷ It has so far entered into settlements with corporate entities that were facing corruption charges, such as *R v Innospec*,³⁸ and *R v BAE Systems Plc.*³⁹

BAE Systems was facing multiple charges on corruption. It agreed in a negotiated settlement with the Serious Fraud Office that it would not plead guilty to corruption, but instead, to plead guilty to one charge of failing to keep reasonably accurate accounting records contrary to section 221 of the Companies Act 1985 in relation to its activities in Tanzania. BAE Systems also indicated it would pay \$30m as reparations to the government of Tanzania, and that any fines the court might impose as sentence in the case, would be deducted from the same amount. The

37 Alge (2013: 1).

38 [2010] Lloyd's Rep FC 462.

39 [2010] EW Misc 16 (CC).

court felt morally bound to keep the fine at a minimum, so as not to eat too much into the value of the reparations that were to be made to the Republic of Tanzania.

This begs the question: did the \$30m sum represent all that BAE Systems had gained from the totality of the alleged corruption activities? There was failure of justice in this case, especially because an offender was left to determine how much of their criminal gains they were willing to part with, in exchange with a plea of guilt. Offenders will not feel the deterrent effect of the law if they are allowed to come to the table to negotiate how much of their proceeds of crimes they must surrender and how much they must keep.

Still in the UK, the ARA was criticised before its closure, for contributing to lengthy forfeiture proceedings because it sought forfeiture of the full value of illicit proceeds, rather than entering into negotiated settlements for the recovery of a proportion of the assets.⁴⁰ This criticism makes sense when one thinks that lengthy forfeiture proceedings have cost implications in relation to litigation and the period within which the state must manage seized, frozen or restrained property pending the conclusion of the case. However, the deterrent purpose of asset recovery must not be compromised by considerations such as delays of forfeiture proceedings in the courts.

Thus, this thesis submits that in as much as negotiated settlements seem to be an attractive approach in the interests of time and costs, they should be encouraged only with regard to the state's waiver to prosecute an offender on given charges, or an agreement on other aspects of punishment. The settlements must not go as far

40 Bacarese (2009: 152).

as allowing an offender to keep some of the illicit assets. There must be maximum rectification of the injustice of acquiring property through crime, in both asset forfeiture proceedings and negotiated settlements. The concern of the anti-money laundering and asset forfeiture regime is not so much about the prosecution and imprisonment of an offender, but in the removal of the incentive for the commission of economic crimes. Hence, the rectification of an unjust acquisition through the forfeiture of the whole value of criminal proceeds, must take priority over the need to prosecute and imprison an offender.

7.2.5 Public-private partnership

The detection of property liable to prosecution relies significantly on the cooperation between law enforcement authorities and the private sector players such as banks. Law enforcement would have to rely on the will by banks to comply with provisional orders such as production orders for the production of account statements or freezing orders against bank accounts. Financial institutions are also crucial in relation to the triggering of money laundering investigations through their suspicious transaction reporting obligation.⁴¹ In addition, the financial institutions are useful in following of the paper trail or in identifying beneficial owners of certain entities or assets which may be liable to forfeiture. Therefore, the relationship between the public and private actors must be nurtured at all times to ensure smooth cooperation in matters that have a bearing on the success of the anti-money laundering and asset forfeiture efforts in the country.

41 Section 28 of the AML Act requires all financial institutions to report suspicious transactions to the FIU. This requirement stems from the FATF's Recommendation 20.

7.2.6 Funding

This thesis is not blind to the cost implications of the forfeiture processes and the management of assets. Thus, the state ought to make sure that there is enough money in the budgets of all relevant authorities, so as to enable them to carry out their functions in relation to asset recovery and fighting money laundering smoothly. The state must provide enough resources to be able to cover all costs of asset management.⁴² In addition, there must be enough funding to meet the investigative aspect of asset forfeiture, which is critical at the property identification stage. Finally, there must be enough funding to meet litigation costs in forfeiture proceedings.

The case in point is *The Republic v Oswald Fywell Gedion Lutepo*⁴³ in which the defendant was, on 15th June 2015, convicted of conspiracy to defraud the government of Malawi of K4,206,337,562, as well as the laundering of the same. He was convicted on his own plea of guilt. Following the conviction, the prosecution applied for forfeiture order and a pecuniary order against Mr Lutepo. However, the state asked for deferment of sentencing proceedings, to allow for the identification, assessment, valuation and restraint of realisable property which may be attached to the subsequent forfeiture order. In response to the application, the court deferred the sentencing proceedings to 30 July 2015. The court ordered the convict to make a declaration of all property and business arrangements owned by him. Further, it ordered the state to verify the assets the convict is going to declare within ten days after he makes the declaration, and thereafter, serve on the convict

42 Brun (2011: 102).

43 Criminal Case No 2 of 2013 (High Court).

a list of all the property it seeks to attach to the forfeiture order, at least 14 days prior to the sentence hearing. This means that the state has 10 days within which it must conclude this exercise. The success of this exercise depends in significant part, on the availability of the state's resources which include transport, office equipment and all technical resources investigators may require.

7.2.7 Technical capacity of relevant authorities

The proposed asset forfeiture unit, being a specialised agency, must be run by personnel with expertise on the subject of asset forfeiture. As part of its mandate, the unit can offer training to prosecution and investigative authorities on issues of asset forfeiture. This could be more cost-effective, in comparison to sending prosecutors or investigators for basic training on asset forfeiture issues in foreign countries all the time. Foreign training must be reserved for the complex issues of asset forfeiture. For example, the Asset Forfeiture Unit of the USA facilitates training for personnel in the Criminal Division.⁴⁴ The ARA had a similar training mandate also.⁴⁵

The complexity of the exercise the state is required to undertake in case of *The Republic v Oswald Fywell Gedion Lutepo*⁴⁶ demands well-trained personnel such as investigators who can think outside the box in order to verify Mr Lutepo's declared property. Their expertise will also be required in order determine if he is a beneficial owner of certain business arrangements, or if he owns certain property which the convict might omit, either wilfully or otherwise, from the declaration.

44 United States Attorney's Office (2007).

45 Bacarese (2009: 150).

46 Criminal Case No 2 of 2013 (High Court).

This expertise is needed in order to make sure that at the end of the day, the convict is stripped of every ounce of the stolen property or any income, interests and profits which derives from the stolen money. Thus, the capacity of the relevant personnel in this exercise is crucial to the rectification of the injustice in Mr Lutepo's illicit acquisition.

7.2.8 Civil recovery of illicit proceeds as a private claimant

In some cases, criminals may transfer their criminal loot outside Malawi and the recovery of such assets may be hampered by the complexities of mutual legal assistance.⁴⁷ Thus, as proposed by the UNCAC,⁴⁸ Malawi should explore the possibility of seeking civil recovery of proceeds of crime that have been placed in a foreign country, as a private litigant. This will ensure that the deterrent purpose of asset recovery is achieved when criminals place their illicit loot both within and outside Malawi. This avenue has been tested before by the Zambian government in *Attorney General of Zambia v Meer Care and Desai and Others*.⁴⁹ In this case, the Attorney General of Zambia sought in an English court the forfeiture and return of money suspected to have been stolen by the former president of Zambia, Frederick Chiluba, which had been placed in the UK.

In a similar case, the Nigerian government sought in the English courts in the case of *Republic of Nigeria v. Santolina & Ors.*,⁵⁰ the recovery of the proceeds of the sale of property which a Nigerian Governor, Diepreye Alamiyeseigha, had acquired in

47 Oduor *et al* (2014: 12-13); Claman (2008: 338)

48 Article 53 of UNCAC.

49 [2007] EWCH 952 (Ch).

50 [2007] EWHC 3053 (QB)

the UK through his business entity called Santolina Investment Corporation, using stolen public funds.

In the two cases discussed above, the Zambian and Nigerian governments made sure that the placement of their stolen public funds in the UK did not become a barrier to the rectification of the injustice occasioned by the acquisition of property by Mr Chiluba and Mr Alamiyeseigha, through proceeds of embezzlement. Going by this example, the Malawian authorities, too, should not put their tools down once they realise that the targeted property has been hidden abroad. They must seek to rectify the injustice in its acquisition by all means.

All in all, this thesis contends that the key to the combating of money laundering does not lie in the criminal law and criminal proceedings sphere alone. Malawi and all countries that are keen on preventing and combating economic crimes and the laundering of criminal proceeds must seek to find solutions in the civil procedure sphere as well, or otherwise, economic crimes will continue to be profitable and rampant. This, however, must be done only within the confines of the social contract and the mixed theory of punishment, so as to avoid the arbitrary limitation of the people's rights. The state must remember that its chief end is the preservation of its people's rights, and not their infringement. Only then, can civil forfeiture pass the potential constitutionality challenges, and become a powerful deterrent tool.

BIBLIOGRAPHY

Primary sources

International and Regional Instruments

African Union Convention on Preventing and Combating Corruption. Adopted on 11 July 2003 and entered into force on 5 August 2006.

European Convention on Human Rights. Adopted 4 November 1950, entered into force on 3 September 1953.

International Standards on Combating Money Laundering, Financing of Terrorism and Proliferation: Financial Action Task Force Recommendations (2012).

Southern African Development Community Protocol against Corruption. Adopted on 14 August 2001 and entered into force on 6 August 2003.

Universal Declaration of Human Rights. Proclaimed by the United Nations General Assembly in Paris on 10 December 1948.

United Nations Convention against Corruption. Adopted on 31 October 2003 and entered into force on 14 December 2005.

United Nations Convention against Illicit Traffic in Narcotic Drugs and psychotropic Substances. Adopted on 20 December 1988 and entered into force on 11 November 1990.

United Nations Convention against Transnational organised Crime and the protocols Thereto. Adopted on 15 November 2000 and entered into force on 29 September 2003.

Official Reports and Guides

Mutual Evaluation Report for the Republic of Malawi (2008). Available at http://www.esaamlg.org/reports/view_me.php?id=165. Accessed on 9 January 2012.

Law Commission Report on the Review of the Penal Code (2000) Zomba: Government Printer.

Money Laundering Typologies in Malawi (2011). Available at <http://www.fiumalawi.gov.mw/MalawiMLTypologies2011.pdf>. Accessed 12 November 2014.

FATF Best Practices on Confiscation (Recommendations 4 and 38) And A Framework For Ongoing Work On Asset Recovery (2012). Available at <http://www.fatf-gafi.org/media/fatf/documents/reports/Best%20Practices%20on%20Confiscation%20and%20a%20Framework%20for%20Ongoing%20Work%20on%20Asset%20Recovery.pdf>. Accessed on 12 February 2013.

G8 Best Practices for the Administration of Seized Property (2005). Available at http://www.coe.int/t/dghl/monitoring/moneyval/Web_ressources/G8_BPAssetManagement.pdf. Accessed 24 November 2013.

Human Rights Watch (1990) Where Silence Rules: The Suppression of Dissent in Malawi, New York. Available at <http://www.hrw.org/reports/1990/10/01/where-silence-rules-suppression-dissent-malawi>. Accessed on 10 June 2013.

United Nations Office on Drugs and Crime (2009) *Technical Guide to the United Nations Convention against Corruption* New York: United Nations. Available at http://www.unodc.org/documents/corruption/Technical_Guide_UNCAC.pdf. Accessed 12 February 2013.

OECD/The World Bank (2012) *Identification and Quantification of the Proceeds of Bribery: Revised edition*. OECD Publishing. Available at <http://www.oecd.org/daf/anti-bribery/50057547.pdf>. Accessed 03 January 2015.

United Nations Office on Drugs and Crime (2006) *Legislative guide for the implementation of the United Nations Convention against Corruption* New York: United Nations. Available at https://www.unodc.org/pdf/corruption/CoC_LegislativeGuide.pdf. Accessed 12 February 2013.

United Nations Office on Drugs and Crime (2010) *Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention against Corruption* New York: United Nations. Available at https://www.unodc.org/documents/treaties/UNCAC/Publications/Travaux/Travaux_Preparatoires_-_UNCAC_E.pdf. Accessed on 15 August 2012.

United Nations Office on Drugs and Crime (2006) *Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto*. Available at https://www.unodc.org/pdf/ctoccop_2006/04-60074_ebook-e.pdf. Accessed on 15 August 2012.

Malawi Legislation

Constitution of the Republic of Malawi of 1966

Constitution of the Republic of Malawi of 1994

Corrupt Practices Act, Chapter 7:04 of the Laws of Malawi

Criminal Procedure and Evidence Code, Chapter 8:01 of the Laws of Malawi.

Customs and Excise Act Chapter, 42:01 of the Laws of Malawi.

Dangerous Drugs Act, Chapter 35:02 of the Laws of Malawi.

Exchange Control Regulations. Chapter 45:01

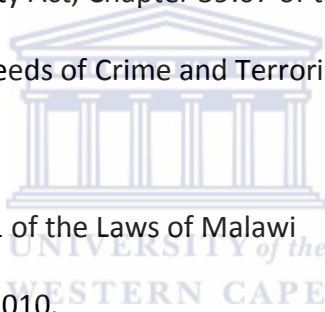
Forfeiture Act 1966 Act No 1 of 1966.

Malawi Revenue Authority Act, Chapter 39:07 of the laws of Malawi.

Money Laundering, Proceeds of Crime and Terrorist Financing Act, Chapter 8:07 of the Laws of Malawi.

Penal Code, Chapter 7:01 of the Laws of Malawi

Police Act, Act No 10 of 2010.



South African Legislation

Children's Act 38 of 2005.

Constitution of the Republic of South Africa Act No 108 of 1996.

Criminal Procedure Code Act No 51 of 1977.

Drug and Drug Trafficking Act No 140 of 1992.

Drug and Drug Trafficking Act No 140 of 1992.

International Co-operation in Criminal Matters Act.

Prevention of Organised Crime Act 121 of 1998.

United Kingdom Legislation

Companies Act of 1985.

Proceeds of Crime Act of 2002.

US and Canadian Case Law

Austin v United States (1993) 509 US.

Bennis v Michigan (1998) 516 U.

Boyd v United States 116 U.S 633-34 (1886).

Caplin & Drysdale v United States, 491 U.S. 617 (11989).

Halper v United States 490 US 447.

Montana Department of Revenue v Kurth Ranch 511 US 796 (1994).

Republic v Oakes 1987 LRC (Const.) 447.

United States ex rel. Marcus v. Hess 317 U.S. 537 (1943).

United States v Bajakajian 524 U.S 321 (1988).

United States v Ursery (1996) 135 L Ed 2D54.

United States v Ward (1980) 448 US 242.

US v Four Tracts of Property on the Waters of Leiper's Creek, (1999) 181F 3d 104,

WL 35777.

US v One 6.5mm Mainlicher-Carcaro military rifle, 250 F.Supp. 410 (N.D Tx.1966)

Various Items of Personal Property v United States 282 US 577 (1931).

English and European Case Law

AG of Zambia v Meer Care & Desai and Others [2007] EWHC 952 (Ch).

Air Canada v United Kingdom 20 EHRR (1995) 150.

Allgemein Gold-und Silberscheideanstalt v United Kingdom EHRR (1987) 1.

Butler v United Kingdom [2002] ECHR IV.

Dassa Foundation v Liechtenstein ECHR Application number 696/05.

Payton v R [2006] EWCA Crim. 1226.

Phillips v United Kingdom Application No.41087/98.

R v BAE Systems Plc [2010] EW Misc 16 (CC).

R (Director of the Assets Recovery Agency) v Belton (2005) NIQB Ref No COGF5334.

R (Mc Cann and Others) v Crown (2001) 1 WLR 358.

R (on the application of Diepreye Solomon Peter Alamiyeseigha) v Crown

Prosecution Service (2005) EWHC 2704 (Admin).

R v Innospec [2010] Lloyd's Rep FC 462.

Republic of Nigeria v. Santolina & Ors. [2007] EWHC 3053 (QB)

R v Waterfield (17 February, 1975, unreported).

Walsh v United Kingdom (2005) NICA 6 43384.

South African Case Law

ABSA Bank Ltd v Fraser and another 2006(2) SACR 158 (SCA).

Deutschmann NO v Commissioner for the South African Revenue Service 2000 (2) SA L06 (E).

First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance (FNB) 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC).

Hilda Van Der Burg and Another v National Director of Public Prosecutions 2012 ZACC 12.

Mohunram and another v National Director of Public Prosecutions and another (Law Review Project as *amicus curiae*) (2007) 2 SACR 145(CC).

Mohunram v National Director of Public Prosecutions 2007 4 SA 222 (CC) 237.

National Director of Public Prosecutions and Another v Mohamed and Others 2002 (4) SA 843 (CC); 2003 (5) BCLR 476 (CC).

National Director of Public Prosecutions v Braun and Another [2009] ZAWCHC 33.

National Director of Public Prosecutions v Cole and others [2004] 3 All SA 745 (W).

National Director of Public Prosecutions v Constable CPD, Case No 5147/2004.

National Director of Public Prosecutions v Magdalena Elizabeth Parker Case Number 624/04 (SCA).

National Director of Public Prosecutions v Prophet 2003 (6) SA 154 (C).

National Director of Public Prosecutions v RO Cook Properties (Pty) Ltd and Others
2004 (2) SACR 208 (SCA).

National Director of Public Prosecutions v RO Cook Properties (Pty) Ltd 2002 4 All SA
692 (W).

National Director of Public Prosecutions v Van Staden and Others 2007 (1) SACR
338.

National Director of Public Prosecutions v Van Staden and others 2007(1) SACR
338(SCA).

National Director of Public v Prosecutions v Prophet [2003] 8 BCLR 906 (C) 914E-H.

NDPP v Magdalena Elizabeth Parker SCA Case number 624/04 17.

National Director of Public Prosecutions v Vermaak [2007] SCA 150.

Prophet v National Director of Public Prosecutions (2007) 6 SA 169 (CC).

Prophet v National Director of Public Prosecutions [2006] ZACC 17.

Prophet v National Director of Public Prosecutions 2006 (1) SA 38 (SCA).

Prophet v National Director of Public Prosecutions 2006 (1) SA 38 (SCA).

Shaik v State 2007 2 ALL SA 150 (SCA).

State v Zuma 1995 2 SA 642 (CC).

Trent Gore Fraser v ABSA Bank Limited (National Director Public Prosecutions as
amicus curiae Case CCT 66/05 (2006).

Malawian Case Law

Aboobaker & Another v Attorney General [1995] 1 Malawi Law Report 1 (HC).

American Stores Limited v Attorney General Civil Cause No 173 of 1994
(Unreported).

Anti-Corruption Bureau v Amos Chinkhadze & Joe Kantema MSCA Criminal Appeal
No 1 of 2003 (Unreported).

Atupele Properties Limited v Director of Anti-Corruption Bureau Miscellaneous Civil
Cause No 286 of 2005 (Unreported).

Ayami v Republic 1990 13 MLR 19 (SCA).

Banda v Attorney General Civil Case No 1727 of 1993 (unreported).

Chaponda v Attorney General [1997] 1 MLR 273 (HC).

Chitsonga v Republic (1995) 1MLR 86 (HC).

Gombera v Attorney General Civil Case No 1558 of 1993 (unreported).

Greselder Jeffrey v Anti-Corruption Bureau MSCA Civil Appeal No 12 of 2002
(Unreported).

Khansia v Attorney General Civil Case No 33 of 1994 (Unreported).

Mbewe v Registered Trustees of Blantyre Adventist Hospital [1997]1 MLR 403
(Unreported).

Mohamed Munif Abdallah Al Nadhi v Anti-Corruption Bureau MSCA Civil Appeal No
7 of 2010 (Unreported).

Nkhata v State [1993] 16(1) Malawi Law Report 391 (HC) 393.

Republic v Caroline Savala Criminal Case No 28 of 2013 (Unreported).

The Attorney General v Hon. Friday Jumbe & Another Malawi Supreme Court of Appeal Constitutional Appeal No 29 of 2005 (Unreported).

The Republic v Maxwell Namata & Luke Kasamba High Court of Malawi Criminal Case No 45 of 2013.

The Republic v Oswald Fywell Gedion Lutepo High Court of Malawi Criminal Case No 2 of 2015.

The Republic v Sithole Criminal Case Number 908 of 2013.

Tom Chakufwa Chihana v The Republic Malawi Supreme Court of Appeal Criminal Appeal Number 9 of 1992.

Tressa Namathanga Senzani v Republic High Court Criminal Case number 63 of 2013.

Waka v Attorney General Civil Case No 1855 of 1993, (unreported).

Secondary Sources

Books

Alldrige P (2003) *Money Laundering Law: Forfeiture, Confiscation, Civil Recovery, Criminal Laundering and Taxation of the Proceeds of Crime* USA: Hart Publishing.

Bagaris M (2003) *Punishment and Sentencing: A Rational Approach* London: Cavendish Publishing Limited.

Baker C (2001) *Revolt of the Ministers: The Malawi Cabinet Crisis, 1964-1965*

London: IB Tauris.

Bentham J (1781) *An Introduction to the Principles of Morals and legislation* (2000)

Kitchener: Batoche Books.

Brun JP, Gray L, Scott C & Stephenson MK (2011) *Asset Recovery Handbook: A*

Guide for Practitioners Washington DC: The World Bank.

Campbell L (2013) *Organised Crime and the LAW: A comparative Analysis* Oxford :

Hart Publishing.

Chirwa DM (2011) *Human Rights under the Malawian Constitution* Cape Town: Juta

Publishing.

Duff RA (1986) *Trials and Punishments* Cambridge: Cambridge University Press.

Duff RA (2003) *Punishment, Communication and Community* New York: Oxford

University Press.

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

Professional Ltd.

Gallant M (2005) *Money Laundering and the Proceeds of Crime: Economic Crime*

and Civil Remedies Cheltenham: Edward Elgar.

Gough JW (1936) *The Social Contract Theory: A Critical Study of its Development*

Oxford: Oxford University Press.

Greenberg TS *et al* (2009) *Stolen Asset Recovery: A Good Practices Guide for Non-Conviction Based Asset Forfeiture* Washington DC: international bank for Reconstruction and Development/World Bank.

Hart HAL (1968) *Punishment and Responsibility: Essays in the Philosophy of Law* Oxford: Clarendon Press.

Hirsch VA (1993) *Censure and Sanctions* Oxford: Clarendon Press.

Hirsch VA (1985) *Past or future crimes: deservedness and dangerousness in the sentencing of criminals* New Brunswick: Rutgers University Press.

Hobbes (1651) *Leviathan* London: Andrew Crook.

Husak D (2010) *The Philosophy of Law* Oxford: Oxford University Press.

Kanyongolo FE (2006) *Malawi Justice Sector and the Rule of Law* The Open Society Initiative for Southern Africa Cambridge.

Kelly L (1992) *A short history of western legal theory* Oxford: Oxford University Press.

Kelsen H (1945) *General Theory of law and the state* (translated by Anders Wedberg) Cambridge: Harvard University Press.

Kershner S (2001) *Desert, Retribution and Torture* Maryland: University Press of America

Kochan DJ (1998) *Reforming property forfeiture laws to protect citizen's fights: why and how to curtail abuses of laws that permit private property seizures Michigan*: Mackinac Center for Public Policy.

Kruger A (2008) *Organised Crime and Proceeds of Crime Law in South Africa* Durban: LexisNexis.

Levy LW (1996) *A licence to steal: the forfeiture of property* North Carolina: University of Carolina Press.

Locke J (1689) *Letters concerning toleration* London: Black Swan.

Locke J (1690) *Second Treatise of Government* (With an Introduction by Carpenter

WS (1990) London: JM Dent & Sons Ltd.

Macpherson CB (1962) *The Political Theory of Possessive Individualism: Hobbes to Locke* Oxford: Clarendon Press.

Madinger J (2012) *Money Laundering: A Guide for Criminal Investigators* (3ed) Boca Raton: CRC Press.

McBride KD 2007 *Punishment and political order* Michigan: University of Michigan Press.

Nozick R (1974) *Anarchy, State and Utopia* Oxford: Blackwell.

Oduor JA, Fernando FMU, Flah A, Gottwald D, Hauch JM, Mathias M, Park JW & Stolpe O (2014) *Left out of the Bargain Settlements in Foreign Bribery Cases and Implications for Asset Recovery* Washington DC: The World Bank.

Phiri KM and Ross KR (1998) (eds.) *Democratisation in Malawi: A Stocktaking*
Blantyre.

Pincoffs EL (1966) *The Rationale of Legal Punishment* New York: Humanities Press.

Pollock J (2010) *Ethical dilemmas and decisions in criminal justice* 6th edition
Belmont: Wadsworth.

Roederer C & Moellendorf D (2004) *Jurisprudence* Cape Town: Juta and Company
LTD.

Samek RA (1974) *The legal point of view* New York: Philosophical library.

Stessens G (2000) *Money Laundering: A new international Law Enforcement Model*
New York: Cambridge University Press.

Stolen Asset Recovery (StAR) Initiative (2007) *Challenges, Opportunities and Action*
Plan. Washington DC: The International Bank for Reconstruction and
Development/World Bank.

Van der Walt JA (2005) *Constitutional Criminal Law* Cape Town: Juta & Company
Ltd.

Wright A (2006) *Organised Crime* Cullompton Devon: Willan Publishing.

Yaffe G (2011) *Attempts* New York: Oxford University Press.

Yikona S, Slot B, Geller M, Hansen B, Kadiri F (2011) *Ill-gotten Money and the*
economy: Experiences from Malawi and Namibia Washington DC, The World Bank.

Young SNM (ed) (2009) *Civil Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime Massachusetts*: Edward Elgar Publishing Limited.

Chapters in Books

Bacarese A (2008) "Asset Recovery in a Common Law System: The United Kingdom" in Pieth M(ed) *Recovering Stolen Assets* Bern: Peter Lang.

Banda J (2001) "Institutional responses to organised Crime in Malawi" in Goredema C (Ed) *Organised Crime in Southern Africa: Assessing Legislation 56 Institute for Security Studies Monograph*.

Cassella SD (2009) "An Overview of Asset Forfeiture in the United States" in Young SNM (ed) *Civil Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime Massachusetts*: Edward Elgar Publishing Limited.

Claman D (2008) "The Promise and Limitations of Asset Recovery under the UNCAC" in Pieth M (ed) *Recovering Stolen Assets* Bern: Peter Lang.

Daniel T & Maton J (2009) "Civil Proceedings to Recover Corruptly Acquired Assets of Public Officials" in Pieth M (ed) *Recovering Stolen Assets* Bern: Peter Lang.

Dayman S (2009) "Is the patient expected to live? UK civil forfeiture in operation" in Young SNM (ed) *Civil Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime Massachusetts*: Edward Elgar Publishing Limited.

Gaumer (2007) "Criminal Forfeiture" in United States Attorney's Bulletin *Asset Forfeiture*.

Gauthier D (1988) "Hobbes's Social Contract" in Rogers GAL and Ryan A (eds) *Perspectives on Thomas Hobbes* New York: Oxford University Press.

Godinho JAF (2009) "Civil Confiscation of Proceeds of Crime: A view from Macau" in Young SNM (ed) *Civil Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime* Massachusetts: Edward Elgar Publishing Limited.

Kamchedzera G (1992) "Land tenure relations, the law and development in Malawi" in Mhone GCZ *Malawi at the Crossroads: The Post-Colonial Political Economy* Harare: SAPES Books.

Keightley R (2009) "Asset Forfeiture in South Africa under the Prevention of Organised Crime Act 121 of 1998" in Young SNM *Civil Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime* Massachusetts: Edward Elgar Publishing Limited.

Leong AVM (2009) "Asset Recovery under the Proceeds of Crime Act 2002: The UK Experience" in Young SNM (ed) *Civil Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime* Massachusetts: Edward Elgar Publishing Limited.

Levi M (2003) "Criminal Asset Stripping" in Edwards and Gill (ed) *Transnational Organised Crime: Perspectives on Global Security* London: Routledge.

Okoth-Ogendo HWO (1991) "Constitutions without constitutionalism: reflections on an African political paradox" in Shivji, IG (ed) *State and constitutionalism an African debate on democracy* Harare: Southern African Political Economic Series (SAPES) Trust.

Pieth M (2008) "Recovering Stolen Assets-A New Issue" in Pieth M (ed) *Recovering Stolen Assets* Bern: Peter Lang.

Reiman JH (1995) "Justice, Civilisation and the death penalty: Answering Van Den Haag" in Simmons *et al Punishment* New Jersey: Princeton University Press.

Simser J (2009) "Perspectives on Civil Forfeiture" in Young SNM (ed) *Civil Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime* Massachusetts: Edward Elgar Publishing Limited.

Schmid JB (2008) "Seizure" in Pieth M (ed) *Recovering Stolen Assets* Bern: Peter Lang.

Williams P (2001) "Crime, Illicit Markets, and Money Laundering" in Simmons PJ and De Jonge Oudrat C (eds) *Managing Global Issue: Lessons Learned* Washington DC: Brookings Institution Press.

Young SNM (2009) "Civil Forfeiture for Hong Kong: Issues and Prospects" in Young SNM (ed) *Civil Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime* Massachusetts: Edward Elgar Publishing Limited.

Articles

Alexander L & Kessler KD (1997) "Mens Rea and Inchoate Crimes" 87(4) *Journal of Criminal Law and Criminology* 1138-1193.

Alge D (2013) "Negotiated Plea Agreements in Cases of Serious and Complex Fraud in England and Wales: A New Conceptualisation of Plea Bargaining?" 19(1) *European Journal of Current Legal Issues* 1-13.

Armstrong KG (1961) "The Retributivist Hits Back" 70(280) *Mind: New Series* 471-490.

Banda S (2009) "Constitutional mimicry and common law reform in a rights-based post-colonial setting: The case of Malawi and South Africa" 53 (1) *Journal of African Law* 142-170.

Basdeo V (2013) "The legal challenges of criminal and civil asset forfeiture in South Africa: A comparative analysis 21(3) *African Journal of International and Comparative Law* 303-326.

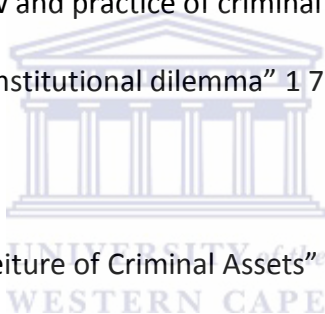
Basdeo V (2014) "The law and practice of criminal asset forfeiture in South African criminal procedure: A constitutional dilemma" 17(3) *Potchefstroom Electronic Law Journal* 1048-1070.

Bell RE (1999) "Civil Forfeiture of Criminal Assets" *The Journal of Criminal Law* 371-384.

Bell RE (2004) "The confiscation, forfeiture and disruption of terrorist finances" 7(2) *Journal of Money Laundering Control* 105-125.

Blazjewski KS (2008) "The FATF and Its Institutional Partners: Improving the Effectiveness and Accountability of Trans governmental Networks" 22 *Temple International and Comparative Law Journal* 1-61.

Bradley GV (2003) Retribution: the central aim of punishment 27(1) *Harvard Journal of Law & Public Policy* 19-32.



Bradley GV "Retribution and Other Secondary Aims of Punishment" (1999) 44
American Journal of Jurisprudence 105-123.

Bronsteen J (2009) Retribution's Role 84(4) *Indiana Law Journal* 1129-1156.

Cabana PF (2010) "General Confiscation Regulation in Spain" 13(2) *Journal of Money Laundering Control* 109-124.

Cahill MT (2012) "Defining Inchoate Crime: An Incomplete Attempt" 9 *Ohio State Journal of Criminal Law* 751-759.

Cassella SD (1996) "Third Party Rights in Criminal Forfeiture Cases" *Criminal Law Bulletin* 32(6) 499-540.

Cassella SD (2004) "Overview of asset forfeiture law in the United States" 17 *South African Journal of Criminal Justice* 347-367.

Chirwa DM (2005) "A Full Loaf is Better than Half: The Constitutional Protection of Economic, Social and Cultural Rights in Malawi" (49) 2 *Journal of African Law* 207–241.

Chirwa DM (2008) "In search of philosophical justifications and suitable models for the horizontal application of human rights" 8 *African Human Rights Law Journal* 294-311.

Dagger R (2011) "Social Contracts, Fair Play, and the Justification of Punishment" *Ohio State Journal of Criminal Law* 341-368.

Davis KE (2003) "The Effects of Forfeiture on Third Parties" (48) *McGill Law Journal* 184-224.

De Koker L & Pretorius JL (1998) Confiscation Orders in terms of the Proceeds of Crime Act: Some Constitutional Perspectives *Journal of South African Law* 467-482.

Fried (1988) "Rationalizing Criminal Forfeiture" (1988) 79(2) *Journal of Criminal Law and Criminology* 328-436.

Friedler E (2013) Protecting the Innocent-the Need to Adapt Federal Asset Forfeiture Laws to Protect the Interests of Third Parties in Digital Assets Seizures 32(1) *Cardozo Arts & Entertainment Law Journal* 283-316.

Goldman G (1979) "The Paradox of Punishment," 9 *Philosophy and Public Affairs* 42-58.

Goredema C (2003) "Money Laundering in East and Southern Africa: An overview of the threat" 69 *Institute of Security Studies Paper* 1-18.

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 Review* 159-183.

Henkin L (1987) "The United States Constitution as Social Compact" 131(3) *Proceedings of the American Philosophical Society* A More Perfect Union: Essays on the Constitution 261-269.

Husak D (2012) "Why punish attempts at all? Yaffe on The Transfer Principle" 6(3) *Criminal Law and Philosophy* 399-410.

Rawls J (1955) "Two Concepts of Rules" 64(1) *The Philosophical Review* 3-32.

Kaye N (2006) "Freezing and Confiscation of Criminal Proceeds" 1 (77) *Revue Internationale De Droit Penal* 323-331.

Kennedy A (2006) "Civil Recovery Proceedings under the Proceeds of Crime Act 2002: The Experiences So Far" 9(3) *Journal of Money Laundering Control* 245-264.

Kennedy A (2006) "Designing a Civil Forfeiture System: An Issues List for Policy makers and Legislators" 13(2) *Journal of Financial Crime* 132-163.

Krane JA (2011) "Property, Proportionality and Instruments of crime" (29) *National Journal of Constitutional Law* 160-187.

Leach AW & Malcolm JG (1993-94) "Criminal Forfeiture: An Appropriate Solution to the Civil Forfeiture Debate" 10(2) *Georgia State University Law Review* 241-295.

Levi M (1997) "Taking the profit out of crime: The UK Experience" 5(3) *European Journal of Crime, Criminal Law and Criminal Justice* 228-239.

Liao J & Acharya A (2011) "Trans-shipment and trade-based money laundering" 14(1) *Journal of Money Laundering Control* 79-92.

Meade J (2000) "The Disguise of Civility-Civil Forfeiture of the Proceeds of Crime and the Presumption of Innocence in Irish Law" 1 (1) *Hibernian Law Journal* 1-22.

Montesh M (2009) "An Analysis of the Role of South African Asset Forfeiture Unit and Special Investigation Unit" 22(2) *Acta Criminologica* 31-40.

Mujuzi JD (2010) "Ten Years of the South African Prevention of Organised Crime Act (1999–2009): What Case Law Tells Us?" *Criminal Justice Initiative Occasional Paper* 6 Open Society Foundation for South Africa 1-13.

Ndzengu NC & Von Bonde JC (2011) "Legal Expenses POCA Clauses: A Loophole to Make Crime Pay?" 24(3) *South African Constitutional Journal of Criminal Justice* 309-332.

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

Olynyk S 2010 "Convenient Fictions: A comparison and critical analysis of Hobbes' and Locke's social contract theories" 1 *The Western Australian Jurist* 132-136.

Penna RL (1993) "Forfeiture of Drug Trafficking Benefits: Need for a Viable International Legal Regime" 14 *Singapore Law Review* 351-381.

Pretorius JL & Strydom HA (1988) "The constitutionality of civil forfeiture" 13(2) *South Africa Public Law* 385-422.

Rainbolt G and Reif AF (1997) "Crime, Property and Justice: The Ethics of Civil Forfeiture" 11(1) *Public Affairs Quarterly* 39-55.

Redpath J (2000) "Forfeiting Rights? Assessing South Africa's Asset Forfeiture Laws" 9(5/6) *African Security Review* 1-6.

Roberts S (1966) "The Malawi Forfeiture Act 1966: A Surfeit of Discretion" 10(2) *Journal of African Law* 131-134.

Shavell S (1990) Deterrence and the punishment of attempts 19(2) part 1 *Journal of legal Studies* 435-466.

Shehu AY (2005) "International Initiatives against Corruption and Money Laundering: An Overview" 12(3) *Journal of Financial Crime* 221-245.

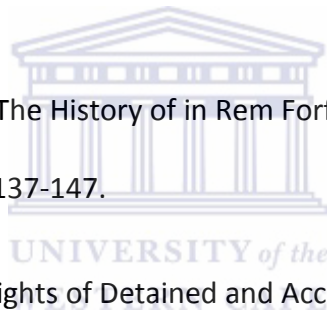
Simser J (2010) "Asset Recovery and Kleptocracy" 17 (3) *Journal of Financial Crime* 321-332.

Tuckness A (2010) Retribution and Restitution in Locke's Theory of Punishment 72(3) *Journal of Politics* 720-732.

Van der Berg M (2015) "Proposing a Transactional Approach to Civil Forfeiture Reform" 163 *University of Pennsylvania Law Review* 867-926.

Van der Walt AJ (2000) "Civil forfeiture of instrumentalities and proceeds of crime and the constitutional property clause" 16 *South African Journal on Human Rights* 1-45.

Van Jaarsveld IL (2006) "The History of in Rem Forfeiture— A Penal Legacy of the Past" (12-2) *Fundamina* 137-147.



Wanda BP (1991) "The Rights of Detained and Accused Persons in Post-Banda Malawi" 40(2) *Journal of African Law* 221-233.

Zagaris B & Kingma E (1991) "Asset forfeiture international and foreign law: an emerging regime" 5 *Emory International Review* 445-513.

Zedner L (1994) "Reparation and Retribution: Are they reconcilable?" 57(2) *The Modern Law Review* 228-250.

Internet Sources

Center for the Study of Democracy (CSD) Policy Brief No.33 of 2012 “Management and Disposal of Confiscated Criminal Assets”

<http://www.docstoc.com/docs/154448175/Management-and-Disposal-of-Confiscated-Criminal-Assets>. Available at 23 May 2013.

Dery AW (2012) “Overview of Asset Forfeiture” *Business Law Today*. Available at <http://apps.americanbar.org/buslaw/blt/content/2012/06/all.pdf>. Accessed on 03 April 2013.

Kempen A (2006) “Taking the Profit Out of Crime: The Asset Forfeiture Unit”.

Available at

<https://www.npa.gov.za/sites/default/files/files/FAQs%20on%20AFU.pdf>. Accessed 13 February 2015. 1-6.



Millennium Challenge Corporation “Malawi Threshold Program Final Malawi MCC TCP (September 23, 2005 – September 30, 2008). Available at <https://assets.mcc.gov/reports/content-report-121510-malawi-threshold-final-implementation-report.pdf>. Accessed 15 November 2014.

Nyamaka DM (2011) “Social Contract Theory of John Locke (1632-1704) in the Contemporary World” Available at

<http://works.bepress.com/cgi/viewcontent.cgi?article=1009&context=dmnyamaka>.

Accessed 14 June 2014.

Stephenson M (2014) "Guest Post: Reaching bribery's victims". Available at <http://globalanticorruptionblog.com/2014/06/12/guest-post-reaching-briberys-victims-part-2/>. Accessed on 15 April 2015.

Theses

Anderson RA (2008) *Civil Asset Forfeiture Analysed through a Constructionist and Conflict Theory Framework* (Unpublished Master thesis, Southern Illinois University Carbondale).

Diwa ZM (2013) *Managing the Proceeds of Crime: A Critical Analysis of the Tanzanian Legal Framework* (Unpublished LL.M thesis, University of the Western Cape).

Muluzi JD (2009) *Life Imprisonment in International Criminal Tribunals and Selected African Jurisdictions—Mauritius, South Africa and Uganda* (Unpublished Ph.D thesis, University of the Western Cape).

Opedayo OB (2010) *Civil Recovery of Corruptly-Acquired Assets: A Legal Roadmap for Nigeria* (Unpublished LL.M thesis: University of the Western Cape).

Phiri PTJ (2013) *Understanding Corruption in Malawi: Sources of Corruption and Constraints on Anti-Corruption Programmes (1994-2004)* (Unpublished Ph.D thesis: University of Wits Watersland).

Soko C (2013) *Evaluation of Zambia's Asset Recovery Laws* (Unpublished LL.M thesis, University of the Western Cape).

Other Sources

Oxford English Dictionary (2006) Soanes C & Hawker S (eds) Oxford: Oxford University Press.

Online Black's Law Dictionary 2nd Edition. Available at

<http://thelawdictionary.org/search2/?cx=partner-pub-4620319056007131%3A7293005414&cof=FORID%3A11&ie=UTF-8&q=contraband&x=0&y=0>. Accessed 22 October 2014.

Conference papers and other papers

Doyle C (2015) "Crime and Forfeiture" Congressional Research Service Prepared for members and committees of congress. Available at

<https://fas.org/sgp/crs/misc/97-139.pdf>. Accessed 20 March 2015.

Kamanga Ivy (2008) "Combating Corruption: Challenges in the Malawi Legal System" Resource Material Series No 76: *The Tenth International Training Course on the Criminal Justice Response to Corruption Participants' Papers* 153-159.

Norrie K, Boardway R & Osberg L (1991) "The Constitution and the Social Contract" *Economic dimensions of constitutional change: the eighth John Deutsch Roundtable on Economic Policy : proceedings of a conference held at Queen's University, 4-6 June 1991* 225-253.

Sanbei A (2012) "European Court on Human Rights Jurisprudence and Civil Recovery of Illicitly Obtained Assets (Confiscation in Rem)" Project on Criminal Assets

Recovery in Serbia CAR SERBIA. Available at

http://www.coe.int/t/dghl/cooperation/economiccrime/corruption/Projects/CAR_S

[erbia/Technical%20papers/CAR%20TP%202%202012%20%20ECHR%20and%20civil%20recovery%20-%20A%20Sambei.pdf](http://www.popcenter.org/Responses/pdfs/asset_forfeiture.pdf). Accessed on 20 March 2015.

Worrall JL (2008) *Asset Forfeiture Problem-Oriented Guides for Police Response*

Guides Series No.7. Available at

http://www.popcenter.org/Responses/pdfs/asset_forfeiture.pdf. Accessed on 12

April 2015.

Internet News Sources

Daily Times “Malawi Names New Finance Minister after 'Cash-Gate' Scandal” 15

October 2013. Available at [http://www.nation.co.ke/news/africa/Malawi-names-](http://www.nation.co.ke/news/africa/Malawi-names-new-finance-minister-after-cash-gate-scandal/-/1066/2033946/-/12hkamc/-/index.html)

[new-finance-minister-after-cash-gate-scandal/-/1066/2033946/-/12hkamc/-](http://www.nation.co.ke/news/africa/Malawi-names-new-finance-minister-after-cash-gate-scandal/-/1066/2033946/-/12hkamc/-/index.html)

[/index.html](http://www.nation.co.ke/news/africa/Malawi-names-new-finance-minister-after-cash-gate-scandal/-/1066/2033946/-/12hkamc/-/index.html). Accessed on 17 June 2014.

Matonga G “Malawi’s Capital Hill plunder...K1.2 billion down the drain” BNL Times 5

October 2013. Available at [http://timesmediamw.com/malawis-capital-hill-plunderk1-2-](http://timesmediamw.com/malawis-capital-hill-plunderk1-2-billion-down-the-drain/)

[billion-down-the-drain/](http://timesmediamw.com/malawis-capital-hill-plunderk1-2-billion-down-the-drain/). Accessed on 20 November 2013.

Tenthani R “Malawi Corruption President Demands Prosecutor Resign”

Mail&Guardian 10 August 2006. Available at [http://mg.co.za/article/2006-08-10-](http://mg.co.za/article/2006-08-10-malawi-corruption-president-demands-prosecutor-resign)

[malawi-corruption-president-demands-prosecutor-resign](http://mg.co.za/article/2006-08-10-malawi-corruption-president-demands-prosecutor-resign). Accessed on 30 March

2013.

Tenthani R “Malawi Jails Civil Servant over Cashgate” *IOL News* (4 November 2014).

Available at [http://www.iol.co.za/news/africa/malawi-jails-civil-servant-over-](http://www.iol.co.za/news/africa/malawi-jails-civil-servant-over-cashgate-1.1775419#.VYC7z82qqko)

[cashgate-1.1775419#.VYC7z82qqko](http://www.iol.co.za/news/africa/malawi-jails-civil-servant-over-cashgate-1.1775419#.VYC7z82qqko). Accessed on 30 December 2014.

Pantesco J “Malawi President Demands Top Prosecutor Resign Over Dropped Corruption Charges” *Jurist* 10 August 2006. Available at <http://jurist.org/paperchase/2006/08/malawi-president-demands-top.php>.

Accessed on 30 March 2013.

