

An Evaluation of the Efficiency of Asset Forfeiture in Nigerian Criminal Justice Administration

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Abstract

Criminal asset forfeiture is a tool adopted in many jurisdictions as a deterrence and retribution from criminal justice delivery perspective. This study seeks to answer how asset forfeiture if adopted as is the case in many jurisdictions, serve as an appropriate criminal penalty against the commission of crime. More importantly, does it prevent further commission of crime? In evaluating its efficiency, this article relies on statutes, cases of asset forfeiture and focuses on contemporary substantive legal provisions. The study finds that asset forfeiture does not serve as adequate deterrence against crime as the total number of forfeitures carried out and the amounts recovered remain at modest level compared to the rising corruption profile in Nigeria. The author observes that the challenge in Nigerian asset recovery is not with the legal provisions but with apolitical influence and the vendetta flavour which has clouded the measures in Nigeria. The work recommends among others further deterrence of imprisonment for those caught as society's disapproval for such acts.

Keywords: criminal, criminal justice delivery, asset, forfeiture

1. Introduction/Background to the study

The use of asset forfeiture as a means of crime control has ancient roots¹ dating as far back as the English common law.² It is a concept deeply rooted in western jurisprudence and was developed primarily in admiralty law to prevent ship owners from continuing in the smuggling of cargoes;

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¹ Alice W. Dery. 2012. Overview of Asset Forfeiture. Business Law Today pp. 1-5

² Stefan D. Cassella. 2009. An overview of asset forfeiture in the United States in Civil forfeiture of criminal property.

such that, where a government forfeited a ship, the ship owner was prevented from continuing his illegal activities³. Between the 70s and 80s⁴, its use expanded from the narrow usage to government's weapon of war against drug trafficking⁵ and white-collar crimes⁶ and against organized crimes. The broad use of asset forfeiture for recovery of looted funds and proceeds of corruption and white-collar crimes is of much importance to the citizenry in Nigeria due to the notoriety the country is associated with.⁷ Therefore, this work focuses more on government-led forfeiture programs in mostly money laundering and corruption cases in Nigeria.

According to a survey carried out between the years 2000 to 2013⁸, corruption was more prevalent among the government authorities or officials with incriminating trail of activities, such as the misappropriation of public funds, the mismanagement of public companies, and irregularities in the privatization process are manifestations of official recklessness and corruption in high places.⁹

The main objective of this study is to review legal and contemporary debates on asset forfeiture in Nigeria in order to underscore its relevance

³ Legal measures for targeting the proceeds of crime. Simon M. Young. (ed)

⁴ Organized crime in South Africa has made it one of the 'most dangerous countries of the world'. The country's Prevention of Organized Crime Act 121 of 1998 (POCA) 1998 (hereinafter referred to as the 'POCA' or the 'Prevention of Organised Crime Act') applies to so-called 'proceeds of unlawful activities'. Scholars such as Douglas has traced origin of use of forfeiture to Bible times in Exodus 21:28 where in rem forfeiture was stated.

⁵ For instance, US, 21 USC? 881 Comprehensive Drug Abuse Prevention and Control Act authorizing the government to seize and forfeit drugs, drug manufacturing and storage equipment, and conveyances used to transport drug. This Act was intended to forestall the spread of drugs in a way criminal penalty could not-by striking at its economic roots

⁶ Douglas Kim. 1997. Asset forfeiture. Giving up constitutional rights. Campbell Law Review, 19(2), 527-578.

⁷ Sam Roberts. New York Times. Diepreye Alamiyewigha, Nigerian notorious for corruption, dies at 62. https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwievpa6-7pAhXE8eAKHZ2XA1MQFjABegQIAhAB&url=https%3A%2F%2Fwww.nytimes.com%2F2015%2F10%2F15%2Fworld%2Fdiepreye-alamiyeseigha-nigerian-ex-governor-dies-at-62.html&usg=AOvVaw1-MIeMGQIINVD0tM_wMj9y

⁸ Oluwaseun Bamidele, Azeez O. Olaniyan and Bonnie Ayodele. 2015. Seized by Sleaze: The Siege of Corruption and a Search for Workable Options in Nigeria. International Social Science Review, Vol. 90, No. 1), pp. 1-26

⁹ O.E. Bassey and E.I. Ute, "Corruption and National Development in Nigeria: The Way Forward" Sophia: An African Journal of Philosophy 1, no. 2 (2007).

within criminal justice administration while related objectives are to: (i) identify the legal framework of asset forfeiture in Nigeria and, (ii) to review its efficacies. In the following pages, we detail the use of asset forfeiture laws and their efficacy in reduction of corruption rates. So far, existing literature on forfeiture has focused mainly on one, (albeit equally important) issues of in rem asset forfeiture.¹⁰ This paper adds another dimension to the scholarship on asset forfeiture by looking at punitive purpose of forfeiture as a punishment viz-a-viz criminal justice administration and attempts to contribute to the debate on the evidential basis for anti-money laundering by examining the regime in Nigeria. The aim is to ensure that criminals do not enjoy the proceeds of their crime, remodel Nigerian anti-corruption laws thereby making corruption less attractive.

2. Methodology/Approach:

In order to achieve the objectives above, this work adopts a library-based doctrinal legal approach. It draws on official records, policy pronouncements and a considerable volume of related literature. The study makes use of journals, textbooks and internet sources as secondary sources. The primary sources of laws include case laws, statutes, relevant international anti-corruption conventions.

3 Forfeiture

Asset forfeiture has become one of the more innovative tools to combat economic and financial crimes as it addresses the ownership of property suspected to be fruits of illegally acquired property. As a result of this, it is not uncommon to see governments utilize asset forfeiture as a form of deterrence against criminal tendencies; the more reason why forfeiture as

¹⁰ Fatima Waziri – Azi. The Scope of “in Rem” Forfeiture under Nigerian Law: Issues Arising. *World Journal of Social Science* 7:1:2020 Where she discusses in detail the legal framework of in rem forfeiture under Nigerian laws, the gaps as well as management of seized or forfeited assets pending final forfeiture order. Abdullahi Y. Shehu Key Legal Issues and Challenges in the Recovery of the Proceeds of Crime: Lessons from Nigeria. *International Law Research; Vol. 3, No. 1; 2014* discusses the key legal issues and challenges in the recovery of the proceeds of illicit enrichment and recommend steps to address those challenges. Okubule Bukola Opedayo’s Masters research thesis titled civil recovery of corruptly-acquired assets: a legal roadmap for Nigeria examined the legal framework for the recovery of corruptly-acquired assets, with particular emphasis on the Nigerian situation.

a punishment is not limited only to corruption cases¹¹, but extends to drug war¹² although this form of punishment is more prevalent in Nigeria in high profile corruption cases.

Black Law Dictionary¹³ defines forfeiture as "[a] comprehensive term which means a divestiture of specific property without compensation; it imposes a loss by taking away some pre-existing valid right without compensation". Loosely defined, it refers to the seizure and eventual forfeiture of property obtained because of criminal activity. The typical forfeiture action begins with a police seizure, which then is often followed by a legal action, filed by a prosecutor, against the property in question. The title, rights and benefit in forfeited assets is thereafter transferred to the government.

3.1 Types of Asset Forfeiture

While asset forfeiture procedure varies from jurisdictions, the types of forfeiture are substantially the same in both civil and common law jurisdictions¹⁴. Asset forfeiture is generally classified into criminal and civil actions. Criminal asset forfeiture occurs when property used in the commission of a crime, or property gained illegally through crime, is forfeited to a government upon criminal conviction of the owner.¹⁵ Criminal asset forfeiture known as forfeiture upon conviction¹⁶ are usually *in personam*, i.e against the person, and it requires judicial due process of

¹¹ There is the US Comprehensive Drug Abuse Prevention and Control Act 38 Pub L No 91-513, 84 Stat 1242 (1970), codified at 21 USC?? 80 which authorizes the government to seize and forfeit drugs, drug manufacturing and storage equipment, and conveyances used to transport drugs; South Africa's Prevention of Organized Crime Act 121 of 1998(hereinafter referred to as the 'POCA' or the 'Prevention of Organised Crime Act') modelled after the US and the UK's Criminal Justice Act

¹² The 1988 United Nations Convention against the Illicit Traffic of Narcotic Drugs and Psychotropic Substances prescribing confiscation of crime proceeds. Article 5 of the Convention sets out confiscation measures but related to drug offences only. Article 7 provides for mutual legal assistance, while articles 8 and 10 make provisions for transfer of proceedings in criminal matters, as well as international cooperation. These provisions, though pertinent to the recovery of the proceeds of crime, are not sufficient for the recovery of the proceeds of illicit enrichment. Likewise, the United Nations Convention against Transnational Organized Crime (TOC - the Palermo Convention), which covers "organized crime activities", including corruption, obstruction of justice and money laundering also advocate confiscation.

¹³ Black's Law Dictionary (6th edition) p. 650.

¹⁴ Such as the UK, USA, South Africa, etc

¹⁵ Brian D. Kelly, Maureen Kole. 2016. The Effects of Asset Forfeiture on Policing: A Panel Approach. *Economic Inquiry*. 54:01:1

¹⁶ Section 44 (2) 1999 Constitution

criminal justice systems. An order of forfeiture may be made without conviction¹⁷ (forfeiture without conviction)¹⁸ Non-conviction-based forfeiture has received support of the United Nations General Assembly (UNGA)¹⁹ resolution 58/4 by its Articles 1, 3 and 31 which conjunctively empowers a state to ensure confiscation and/or asset forfeiture of proceeds of crime. Another requirement of criminal forfeiture is that the court must determine that the property in question was in fact the proceeds of the offence²⁰ This procedure is similar to the position in South Africa where the Prevention of Organized Crime Act (POCA) in its Chapter 5 sets out three stages in the criminal process – the restraint stage²¹, the confiscation stage and the realization stage.

Civil asset forfeiture on the other hand, is an action *in rem*, i.e the action is against the property, rather than against the individual; wherein the court is invited to inquire into the origin of a property to prove that its title lies in the proceeds of an illegal activity. An action *in rem* frames the property in question as the offender, irrespective of the role of the owner of the property. As the Supreme court stated in *Harmony v. United States*²² that, ‘The vessel which commits the aggression is treated as the offender, as the guilty instrument or thing to which the forfeiture attaches, without any reference whatsoever to the character or conduct of the owner’. *In rem* action is not limited to actions against property alone but has been extended to circumstances where the property is in the hands of a lessee²³ Like the criminal forfeiture, the rationale for a civil asset forfeiture is that the gains from an illegal activity should be disgorged; and that civil asset forfeiture is a means of suppressing the conditions leading to the commission of a crime.

¹⁷ See the case of *Ogungbeje v. FRN* (2018) LPELR-45317 CA where the Appellate court held that section 17 (6) of the Advanced Fee fraud and other Related Offences Act 2006 empowers the court to make an order of forfeiture which shall not be based on conviction.

¹⁸ *Ibid.*

¹⁹ To which Nigeria is a party

²⁰ Rule 32.2 (b)

²¹ By section 26 of the South African Prevention of Organised Crime Act 121 of 1998 (hereafter referred to as POCA or the Prevention of Organised Crime Act), the restraint stage of criminal forfeiture proceedings involves the granting of a restraint order, which prohibits any person affected by the order from dealing in any manner with the property to which it applies.

²² *Harmony v. United States* 43 U.S. (2 How.) at pp. 233–34

²³ *Dobbins’s Distillery v. United States*. 96 U.S. 395 (1878)

3.2 Rationalizing Forfeiture

The justification of asset forfeiture can be divided into two – the economic model and the deterrent model. The economic model of asset recovery posits that, the offender, in addition to facing criminal charges, disgorges the ill-gotten wealth to the state. Bowles et.al, for instance, argue that forfeiture plays a complementary role in that ‘the gap between the maximum punishment the law will allow and fines sufficient to represent a credible deterrent’.²⁴ The deterrence model focuses on the effect such a forfeiture has on the offender. - when those assets are owned by someone other than the offender²⁵ and suggests forfeiture in addition to imprisonment and/or fine.

There is a legal justification for the use of asset forfeiture, as is found in *R v Waterfield*²⁶ where Lawton J justified its use thus:

‘the first thing the law should do is to ensure that those who break it should not make any money out of their wrong doing.... this court is fully of the opinion that if those who take part in this kind of trade.... know that upon conviction they are likely to be stripped of every penny of profit they make and a good deal more, then the desire to enter it will be diminished.’

Asset forfeiture entails the transfer of rights, title and interests in the proceeds of crime through the state. Forfeiture perceives the loss of some rights to property as a penalty for the crime committed as seen in the Nigerian case of *Mohammed Abacha v. Federal Republic of Nigeria*²⁷, where the court held that the final forfeiture order is to divest the convict of the title to, or any interest in the property and to transfer the same to the government.

²⁴ Bowles, Faure, and Garoupa. 2000. Economic Analysis of the Removal of Illegal Gains. *International Review of Law and Economics* 20(4):537-549

²⁵ Thomas J. Miceli. Derek Johnson. 2016. *Contemporary Economic Policy* Volume 34 :1 119–126

²⁶ *R v Waterfield*, 17 Feb 1975 Unreported in Ubaka Victor Onyemekukwe, 2018 Non-conviction based forfeiture: testing the constitutionality of section 17 of the Advanced Fee Fraud Act against human rights scrutinies. *Patience Jonathan v. FRN in perspective* October 1 2018 available at <https://ssrn.com/abstract=3326074> or <http://dx.doi.org/10.2139/ssrn.3326074> accessed 25 May 2021

²⁷ (2014) 6 NWLR (Pt.1402) 43

The converse of a loss as penalty is the conferment on another; on the one hand, forfeiture divests the property or proceeds of crime while it vests same on the state, allowing the government to keep the seized cash and property²⁸, destroy the property, or sell it and keep the proceeds to fund a number of activities²⁹, defund organized crime, prevent new crimes from being committed and weaken criminal cartels. The proceeds can be used for law enforcement expenses, such as investigative activities, equipment, restitution payments to crime victims, drug education programs, prosecutorial costs, or other governmental activity.³⁰

4 Forfeiture in Nigeria.

Like other jurisdictions³¹, Nigeria has adopted asset forfeiture as a tool for combating the changing pattern of criminality. Prior to this move, successive administrations in Nigeria have evolved various measures, policies, and programs to combat the menace of corruption. For instance, Jaji Declaration/confiscation of assets illegally acquired by Nigerians of the 1970s, Shagari's Ethical Revolution to fight corruption through the

²⁸ EFCC hands over forfeited property to National Directorate of Employment. January 1, 2020. The EFCC secured the final forfeiture of the property to the Federal Government on February 15, 2018, at the conclusion of forfeiture processes in a Federal High Court, Abuja, presided over by Justice Ijeoma Ojukwu.

²⁹ <https://www.ncsl.org/research/civil-and-criminal-justice/evolving-civil-asset-forfeiture-laws.aspx>. A good instance is the proceeds of corruption arising in Nigeria during the five years of Abacha's administration totaling \$321million in assets. In a negotiated agreement which commenced in 2018, the US government agreed to release the funds to Nigeria, which according to the FGN would be used to develop road infrastructure, boost supply chain connections and economic growth. <https://www.reuters.com/article/us-usa-nigeria/u-s-jersey-sign-300-million-abacha-loot-repatriation-deal-with-nigeria-idUSKBN1ZY1W0> assessed 1st April 2021. Nigeria and Switzerland agreed in 2004 that the USD 505.5 million should go into pro-poor projects, under the watchful eye of a third-party entity. Through the World Bank, the Swiss government provided a grant of about USD 280,000 to co-finance the Public Expenditure Management and Financial Accountability Review (PEMFAR). PEMFAR was initiated as a means of executing reforms in budget spending, with regard to the Nigeria's national economic empowerment development strategy (NEEDS) priorities in education, health, and basic infrastructure (power, roads, and water). Out of a total sum of USD 505 million repatriated from Switzerland, and according to the agreement reached on priority pro-poor sectors, the allocations were to power (USD 168.5 million), works (USD 144.5 million), health (USD 84.1 million), education (USD 60.1 million), and water resources (USD 48.2 million) (See (Okonjo-Iweala and Osafo-Kwaako (2008) The Role of Civil Society Organizations in Supporting Fiscal Transparency in African Countries Some Lessons from Nigeria, Center for the Study of the Economies of Africa, CSEA Policy Brief PB/08/001, available at http://cseaafrica.org/publications/CSEAPolicyBrief%20PB_08001.pdf. last assessed 13 May 2021

³⁰ This position is similar to the one adopted in the US on the use of forfeited assets

³¹ Ibid

introduction of code of conduct for public servants of 1981, and the War Against Indiscipline (WAI) by the Buhari/Idiagbon administration in 1984. The ethical and social mobilization crusade by the Babangida regime in 1986 as well as WAI and Corruption (WAI-C) by Abacha's administration in 1994. The Obasanjo-Atiku administration made the reduction of corruption one of the wars after the return to democratic governance – the administration set up institutional and legislative anti-graft agencies which paid off a little with Transparent International ranking Nigeria 32nd position out of 147 countries surveyed in the world from its erstwhile 2nd position out of 147 countries in 2003³².

The legal actions that the state adopts in pursuing asset recovery are diverse. These may include domestic criminal prosecution and conviction-based confiscation. In this respect, criminal forfeiture is preceded by a conviction, followed by the forfeiture of the property used in the crime or obtained in the proceeds from the crime.³³ The instance of Deziani Madueke, former Petroleum Minister is apt. In that case, the US

³² The Buhari-Osinbajo led administration in its first tenure declared a war against crime. Incidentally, Buhari-Idiagbon military administration [erstwhile militaries] in 1983 declared war against corruption in all its ramifications. Corruption, unfortunately, has continued unabated. According to the former Economic and Financial Crime Commission (EFCC) Chairman, Nuhu Ribadu, what had been looted from Nigeria by the leaders is "six times the total value of resources committed to rebuilding Western Europe after the Second World War" The corruption indexes in Nigeria are not limited to political kleptocracy but extends to the banking sector where, within the last decade, more than six CEOs of banks have been convicted of one bank fraud or the other. In 2010, Cecilia Ibru of the defunct Oceanic bank was convicted and sentenced to six months' imprisonment and confiscation of properties; the former CEO of defunct Fin Bank, Okey Nwosu, Nnamdi Okonkwo formerly of Fidelity Bank etc. In 2017, the Buhari-Osinbajo led administration unveiled National Action Plan (NAP) with a commitment to asset recovery – through strengthening asset recovery legislation and a renewed focus on developing internationally endorsed guides for transparent management of recovered assets.³² The government's strategy constitutes one of the government's example of re-enacting its zero tolerance for corruption which has been the nation's alter ego for more than four decades. This is evident for instance, in the move by the administration to recover the Abacha loot estimated to about \$3-5billion. So far, about \$2.2bn has been recovered through various legal means.

³³ Section 26(1) of the EFCC Act The seizure is related to arrest or search in the case of assets liable to forfeiture upon the process issued by the court after a request has been made by the agency to the court in harmony with the stipulated rules. Section 29 of the Act provides the procedure for the procurement of an interim order of forfeiture concerning the possessions or property of any individual detained for a crime under the Act or any assets confiscated by the agency under the Act.

Department of Justice identified the proceeds of crime namely, a \$50million condominium located in Manhattan, and an \$80million yacht.³⁴

5. Legal Regime for Asset Forfeiture in Nigeria

This section outlines the current legal regime governing the forfeiture of criminally tainted property in the system. The international community and regional institutions have developed various tools for recovering the proceeds of crime. United Nations Convention against Transnational Organized Crime (TOC - the Palermo Convention) Article 12, paragraph 7 of the TOC provides that ‘States Parties may consider the possibility of requiring that an offender demonstrate the lawful origin of alleged proceeds of crime or other property liable to confiscation’ to the extent consistent with domestic law and the nature of the proceedings. The United Nations Convention Against Corruption (UNCAC) is the groundbreaking Convention on asset recovery. Article 31 defines forfeiture and explains that property rights are extinguished at the point of conviction while Article 14 provides that States Parties should adopt comprehensive domestic regulatory and supervisory measures towards eliminating money laundering; Article 21 of the UNCAC encourages States Parties to put in place measures that would criminalize illicit enrichment, which is defined as “a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income³⁵”.

The African Union Convention on Preventing and Combating Corruption and Related Offences (AU Convention)³⁶ aims at combating corruption and addressing its devastating impact on the political, economic, social and cultural stability of African states³⁷ In Article 1, “proceeds of corruption” is defined as “assets of any kind, corporeal or incorporeal, movable or immovable, tangible or intangible and any document or legal instrument evidencing title to or interests in such assets acquired as a

³⁴ Similarly, the EFCC had on July 5, 2019 secured an interim forfeiture of 2,149 pieces of jewelry and a customized gold iPhone belonging to Mrs Alison-Madueke jewelry and the customized gold iPhone are all valued at \$40million. The Economic and Financial Crimes Commission, EFCC, filed for an order of forfeiture of two properties properties situated at 17 & 17A, McDonald Road, Ikoyi, Eti-Osa, Lagos belonging to the former President of the Senate Bukola Saraki

³⁵ See also Articles 43-46 of UNCAC.

³⁶ The AU Convention was adopted on 11 July 2003 and it entered into force on August 5, 2006. U4 Anti-Corruption Resource Centre (2007: 1) and Nigeria ratified in 2006

³⁷ See the Preamble to the AU Convention.

result of an act of corruption”. Article 16 of the Convention empowers States Parties to enact laws that would enable the identification, freezing or seizure, confiscation and repatriation of the proceeds and instrumentalities of corruption. Furthermore, States Parties are required to adopt measures to empower its courts and other competent authorities to order seizure or confiscation of banking, commercial or financial documents for use in recovery proceedings. Bank secrecy cannot be used as a defence by uncooperative banks.³⁸

Under the ECOWAS Protocol (as a sub-regional convention under the aegis of the ECOWAS), States have the obligations of establishing preventive measures against corruption, criminalization of acts of corruption, international co-operation and follow-up mechanisms. The ECOWAS Protocol makes provision for the seizure and confiscation of assets in Articles 13 and 15. In Article 13, States Parties are required to adopt appropriate measures to facilitate the identification, tracing and seizure of items for eventual forfeiture. Likewise, Article 15 makes provision for mutual legal assistance and law enforcement co-operation.

The 1999 Constitution of the Federal Republic of Nigeria (as amended)³⁹ in section 44 recognizes criminal forfeiture in rem. It also contains provisions directed at eliminating corruption by the Auditor-General of the federation⁴⁰ and The Code of Conduct for public officers⁴¹. Section 11 of the Code of Conduct obliges a public officer to submit a written declaration of all assets to the Code of Conduct Bureau upon assumption of office or at the end of every four years or term of office. Any asset acquired after declaration which is not fairly proportional to income is deemed to have been acquired in breach of the Code, unless the contrary is proved. Section 15 establishes the Code of Conduct Tribunal to deal with complaints of corruption against public servants for breaches of the provisions of the Code.

³⁸ Article 17

³⁹ See sections 88 and 128 of the 1999 Constitution

⁴⁰ See section 125 of the Constitution.

⁴¹ Part 1 paragraphs 1-13 of the fifth schedule to the Constitution. The provisions of the Code of Conduct for public officers as they appear in the Constitution are also contained in the Code of Conduct Bureau and Tribunal Act Cap. 15 Laws of the Federation of Nigeria 2004

The Criminal and the Penal Codes are the two main codes dealing with crimes⁴². Anti-corruption provisions are contained in sections 98, 404 and 494 of the Criminal Code⁴³. The Codes criminalize bribery by public officers. However, neither the Criminal nor the Penal Code prescribes forfeiture of assets as punishment for corruption⁴⁴. The Corrupt Practices and Other Related Offences Act of 2004 (otherwise known as the Anti-Corruption Act) was first enacted in 2000. The Act established the Independent Corrupt Practices and other Related Offences Commission (ICPC)⁴⁵. An important feature of the Corrupt Practices Act is that forfeiture is an automatic consequence upon conviction. The Act criminalizes accepting gratification⁴⁶ offering a bribe to a public officer⁴⁷, fraudulent acquisition of assets⁴⁸, falsification of records,⁴⁹ bribery relating to the award of contracts⁵⁰, and attempt or conspiracy to commit any of the above offences⁵¹. Section 47 relates to criminal forfeiture of corruptly-acquired assets. Under this section, the court may make an order for the forfeiture of assets where, in the course of prosecution, the offence is proved against the accused or the court is satisfied that neither the accused nor a purchaser in good faith for valuable consideration has title to the property.

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

⁴² The Criminal Code applies to the states in Southern Nigeria while the Penal Code applies to states in the North. See Ojukwu

⁴³ Sections 115-122 of the Penal Code contains similar provisions.

⁴⁴ The punishment recognised under both codes for acts of corruption is imprisonment.

⁴⁵ Section 3(2) of the Anti-Corruption Act provides that the Commission shall be a body corporate with perpetual succession and with power to sue and be sued in its own name

⁴⁶ Section 8 Anti-Corruption Act

⁴⁷ Section 9 Anti-Corruption Act

⁴⁸ Section 13 Anti-Corruption Act

⁴⁹ Sections 15 and 16 of the Anti-Corruption Act.

⁵⁰ Section 22 Anti-Corruption Act

⁵¹ See section 26

forfeiture applications. The application for an order of forfeiture must be brought within 12 months of the date of seizure, otherwise the property will be released to the person from whom it was seized.

There is a similar provision under section 333 of the Administration of Criminal Justice Act (ACJA) of 2015 which confers on the court the power to

- (a) *order the seizure of any instrument, material or thing which there is reason to believe is provided or prepared, or being prepared, with a view to the commission of an offence triable by the court; and*
- (b) *direct the instrument, material or thing to be forfeited, confiscated, held or otherwise dealt with in the same manner as property under section 336 of this Act.*

Also, section 337 (1) which empowers the court to make an order in respect of the disposal of the property or its delivery to the person entitled to its possession or such other orders as it may deem fit in the circumstances.

Section 337 (2) of the ACJA further states that ‘*Where the person entitled to the possession of property referred to in subsection (1) of this section is unknown, the court may detain it and shall issue a public notice specifying the articles of which the property consists and requiring any person who may have a claim to it, to appear before the court and establish his claim within six months from the date of the notice.*’⁵²

These provisions reasonably empower the court to order the forfeiture of any property reasonably believed to be the proceeds of crime.

The Proceeds of Crime Bill which was first read in December 2020 and has passed its second reading at the Senate also seeks to ensure the management of the funds and property confiscated from criminals, improve the ability of the law enforcement agencies to seize, freeze, and confiscate stolen assets in Nigeria while observing all related constitutional and human rights laws. The Bill is critical in sustaining the

⁵² Section 337 (2) ACJA

fight against corruption, money laundering and illicit movement of stolen funds the banking system and across the Nigerian borders. It is hoped that, once passed into law, this bill will address the lack of transparency and accountability associated with the management of recovered funds from anti-corruption agencies in the country.

The Economic and Financial Crimes Commission (Establishment) Act of 2004⁵³ is the enabling Act which establishes the Economic and Financial Crimes Commission (EFCC) as the designated financial intelligence unit (FIU) in Nigeria. By this Act, the Agency is vested with power to co-ordinate various institutions involved in the fight against money laundering and in the repression of all financial crimes⁵⁴. The Act criminalizes terrorist financing,⁵⁵ retention of proceeds of criminal conduct⁵⁶, and acquisition and conversion of property which are the proceeds of crimes under the Act.⁵⁷ The Act also vests the Commission with power to enforce the provisions of all laws dealing with economic and financial crimes, laws which include the Money Laundering Act of 2004, the Advance Fee Fraud and other Related Offences Act of 1995, the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Act of 1994 (as amended), the Banks and other Financial Institutions Act of 1991 (as amended), the Miscellaneous Offences Act of 2004, as well as the Criminal and Penal Codes.⁵⁸ Thus, the EFCC does not deal only with acts of corruption in the public sector. In recent times, it has spread its tentacles to the private sector, as revealed in the arrest, investigation and prosecution of ex-bank directors on charges of money laundering and corruption.⁵⁹ The latest conviction secured by the EFCC is the Ex Bank PHB MD, Atuche who was jailed for 25years for defrauding the bank to the tune of N25.7bn.⁶⁰

⁵³ repealed the Economic and Financial Crimes Commission (Establishment) Act of 2002

⁵⁴ The FATF is an inter-governmental body set up by a G-7 summit held in Paris in 1989, with the co-operation of the European Commission, to develop and promote policies to combat money laundering and terrorist financing. See Privacy International (2005).

⁵⁵ Section 15 of the EFCC Act

⁵⁶ Section 17

⁵⁷ Section 18

⁵⁸ Section 7 (2)

⁵⁹ <https://thenationonlineeng.net> accessed July 7 2021 at 2.14pm

⁶⁰ <https://www.efccnigeria.org> accessed July 6 2021 at 2.07pm

Section 20 of the EFCC Act provides that forfeiture may be ordered in addition to any other sentence or penalty imposed, whose aim is to serve, not only as punishment, but also as deterrent for future acts. Section 22 provides for forfeiture of foreign assets held by convicted persons which are the proceeds of crimes. The Act also provides for forfeiture of assets which are the gross receipts obtained by commission of a crime under the Act, as well as forfeiture of instrumentalities of crime such as means of conveyance, records, negotiable instruments and real property process.⁶¹

Under the Money Laundering (Prohibition) Act 2011⁶², corporate bodies fall within the ambit of the statute when it provides that a corporate body may be wound up and its assets forfeited to the government. It is noteworthy that sections 14-17 of the Act have extensive provisions for curbing financial crimes. For instance, under section 6 of the Act, financial institutions have the obligations of verifying customer's details and identity. Where there are cases of suspicious transactions, the financial institution is required to submit written report to appropriate authorities⁶³. The Act also provides for extensive collaboration with regulatory bodies as the Central Bank of Nigeria, Nigeria Customs Service, Nigeria Security and Exchange Commission, National Drug Law Enforcement Agency, Economic and Financial Crimes Commission, Corporate Affairs Commission and the Federal High Court. The penalties imposed for the various offences under the Act include fines, imprisonment, and holding up and withdrawal of licenses of corporate bodies.⁶⁴ It is no defence that the offence was committed in a different country or place.⁶⁵ It is in this regard that the Money Laundering (Prohibition) Act of 2011 provides a tighter noose. Section 18 provides for forfeiture of assets of banks and financial institutions convicted of an offence under the Act.

The Federal High Court has the discretion to wind up such a bank or financial institution and forfeit all its assets to the federal government. Forfeiture in this respect affects all assets, legally or illegally acquired.

⁶¹ Sections 24 and 35 EFCC Act

⁶² The Act repeals the Money Laundering (Prohibition) Act of 2004

⁶³ See section 14-17 of the Money Laundering

⁶⁴ Sections 14-17 of the Money Laundering (Prohibition) Act 2004.

⁶⁵ Section 14(2) of the Money Laundering (Prohibition) Act 2004.

Lastly is the Federal Intelligence Unit (FIU) Nigeria which is the Agency responsible for the receipt of disclosures from reporting organizations. The unit is an autonomous unit within the Central Bank of Nigeria.

6. The Dialectics of Asset Forfeiture Action in Nigeria

It is important to ask whether forfeiture laws offer any benefits in terms of law enforcement. This question is necessary in the light of the adversarial system of justice in Nigeria and in tandem with the aim of the criminal justice administration in Nigeria. Under the Nigerian Constitution, there are constitutional safeguards under the Nigerian legal system and these rights are not lost even in forfeiture cases. This section details the preservation, through case law, of the rights of persons in a criminal forfeiture case in Nigeria and evaluates the position of the law in preserving the sanctity of the constitutional provisions relating to rights of an accused person. In conviction-based forfeiture, rights of parties are not diminished nor meant to be infringed upon even though it is an asset forfeiture proceeding. As the court noted in the American case of *Fuentes v. Shevin*⁶⁶ 'parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right, they must first be notified.

The right to be notified is as important as the court stated, that "It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.'" In *Fuentes case*⁶⁷, the Court established the rule that all property seizures require notice and an opportunity to be heard except where there exists "extraordinary situations" to justify postponement.

As a learned author noted, there is a wide gulf between official pronouncements and respect for human rights and their actual implementations.⁶⁸ The 'extraordinary circumstances' in which notice may be postponed has been addressed by the Nigerian courts. The language of the apex court suggests that, although the issue of notice is deeply rooted within the Nigerian jurisprudence, it appears that action *in rem* does not require notice before the institution of investigation against a person who

⁶⁶ *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972)

⁶⁷ *Ibid.*

⁶⁸ Nlerum S. Okogbule. *Access to Justice and human rights protection in Nigeria. Problems and Prospects* available in <https://sur.conectas.org/en/access-justice-human-rights-protection-nigeria/> accessed on July 07 2021 at 2.52pm

is [reasonably] suspected to have committed economic and financial crimes. This appears to be the position of the court in *E.N. Wike v FRN*⁶⁹ read in conjunction with sections 6 and 7 of the EFCC Establishment Act which establishes that the requirement of notice can be dispensed with in economic and financial crimes. Under this interpretation therefore, a court may dispense with notice without infringing on the rights of the suspect. In support, the court in *Ogungbeje v EFCC*⁷⁰ held that the purpose of an interim order of forfeiture is to preserve the *res* from being dissipated so that the judgment of the court is not rendered nugatory. The court went further to state that section 17 of the Advanced Fee Fraud Act covers not only situations of preserving the *res*, but also where there is a need for forfeiture, where the properties to be forfeited are reasonably suspected as unclaimed property or proceeds of unlawful activity. This is also in tandem with sections 28 and 29 of the EFCC Act.

Under the Nigerian Constitution, an accused person is presumed innocent until the contrary is proved. In the case of *Dame Patience Ibifaka Jonathan v. FRN*,⁷¹ the applicant counsel before the appellate court contended that the sections violated the presumption of innocence.⁷² The court stated that section 17 was not inconsistent with the fair hearing principle of section 36 (5) of the CFRN. Rather, section 17 was in furtherance of non-conviction-based forfeiture whose procedure allows for ex-parte motion to be followed by a motion on notice. This decision follows the earlier decision of the court in *Dangabar v. FRN*⁷³ which validates the temporary forfeiture of assets pending the determination of the substantive suit. Owoade JCA in *Dame Patience Jonathan*'s case stated that, "I make bold to say that the consistency of the courts in holding that

⁶⁹ (2009) LPELR 8077

⁷⁰ (2018) LPELR- 45317

⁷¹ (2018) LPELR 43505

⁷² Section 17 of the Advanced Fee Fraud and other Related Offences Act, which was the Act in contention, requires the following matters to be taken into consideration before an in rem forfeiture is granted; an ex parte interim forfeiture order must have been granted; notice must have been given or publication made; the High Court must be reasonably satisfied that property is unclaimed property or proceeds of unlawful activity under the Advanced Fee Fraud and Other Fraud Related Offences Act, the Money Laundering Act of 2004, the Economic and Financial Crimes Commission Act of 2004 or any other law enforceable. At the expiration of 14 days or such other period as the High Court may reasonably stipulate from the date of the notice or making of the publication, an application shall be made by a motion on notice for the final forfeiture of the property concerned to the Federal Government of Nigeria.

⁷³ (2012) LEPLR-19732 (CA)

the process of forfeiting property in the interim is constitutional and rendered the earlier contrary view expressed by the Lagos Division of the Court of Appeal in the case of *FRN v. Nwaigwe*⁷⁴ into a minority dissenting view”

The case of *Woolmington v. DPP*⁷⁵ also restates the presumption of innocence of the accused person until proven guilty *beyond all reasonable doubt*, a position which has received both statutory and judicial affirmation within the Nigerian criminal justice system as upheld in *Martins v. The State*⁷⁶ where the court affirmed that the prosecution is required to establish the guilt of the accused person with reasonable certainty.

In *Dauda v Federal Republic of Nigeria*⁷⁷, the Supreme Court had the opportunity to decide on the issue of burden of proof with respect to unexplained wealth. The appellant in the case appealed, among other grounds, on the basis that the trial judge contended that the onus is on the appellants to establish the lawfulness or legality of each lodgment made into the accounts. The appellant submitted that the trial judge by postulating such position reversed the time-honored rule that “the burden of proof in criminal matters lies on the prosecution.” In resolving the issues raised by the appellant, the Supreme Court stated that: “Proving Money Laundering cases are a herculean task because it requires a prior establishment of the predicate offence before the money laundering aspect can be established. To obviate this problem, a remedy was introduced by statutorily inferring money laundering from not only the conduct of the defendant but his lifestyle which is similar to the Proceeds of Crime Act 2002 of the UK. Even though Section 36(5) of the 1999 Nigerian Constitution provides that every person charged with a criminal offence shall be presumed to be innocent until he is proven guilty, the proviso also allows for shifting the burden of proof on the defendant. It has been⁷⁸ stated, that the sense of fair play dictates a fair state-individual balance by requiring the government in its contest with the individual to

⁷⁴ (2009) 16 NWLR (pt. 1166) p. 169

⁷⁵ [1935] UKHL 1

⁷⁶ [2005] 7 NWLR (Pt. 925) @614

⁷⁷ *Dauda v Federal Republic of Nigeria* (2018) 10 NWLR (Pt.1626) 169

⁷⁸ Amusa K.O. Babatunde O. Non-conviction based criminal forfeiture and right to own property in Nigeria – enhancing the benefits and engaging the problems.

shoulder the entire load. Contrary legal opinion as to the status of the law of procedure in the doctrine of natural justice abound. The authors further stated that the *ex parte* order, an order obtained without hearing the other side is in disregard of the presumption of innocence.⁷⁹

7. Asset Forfeiture as a Tool

In assessing the effectiveness of asset forfeiture as a tool in criminal justice system, Dr Jackie Harvey in her 2005 evaluation of the UK's money laundering policies, suggested that: "...*there is no evidence of a reduction in money laundering activity.*" That said, it is not easy to divorce Harvey's conclusion from her observation that there is great difficulty in measuring the amount of money laundering. *Indeed, for Harvey: "[t]his inability to quantify the volume of money laundering activity and hence the effectiveness of countermeasures has forced reliance on a 'second best input approach' that, instead, is focused on the whole compliance activity.*" In measuring the effectiveness of asset forfeiture regime in Nigeria, this article adapts Harvey and Z/Yen consultants when they asserted that:

"[i]n trying to judge effectiveness it is important to have a clear understanding of what the objectives.... are. One can then determine perceived effectiveness at achieving that specific objective";⁸⁰ and Rahn's logical suggestion that: "it is important to first ask if the claims of the anti-money laundering advocates hold up."⁸¹ This then raises the question, 'What objectives or claims did the government make in relation to these re-balancing measures?'

Asset forfeiture has generated a lot of criticisms among scholars as regards its effectiveness to such an extent that opinion concerning the success or otherwise of asset forfeiture is a subject of debate among analysts and scholars, despite international and/or domestic endorsement for it. However, David Fried suggests, the threat of imprisonment, as probably

⁷⁹ See also The Punch Newspaper of December 31, 2007 at page 10

⁸⁰ Z/Yen Anti-money laundering requirements: costs, benefits and perceptions (City Research Series. no. 6. City of London Corporation. London. June 2005) s3.4. 40 http://www.zyen.com/Knowledge/Research/AMLR_FULLL.pdf

⁸¹ R W. Rahn. "Why the war on money laundering is counterproductive" AML Conference Paper. 30 January 2001 <http://www.freedomandprosperity.org/Papers/rahn01-30-01/rahn01-30-01.shtml> accessed 3rd May 2021 at 3.13am

the strongest possible deterrent to white collar and economic crimes. Infact, the relationship of forfeiture and imprisonment as deterrents to white-collar crime may be paradoxical. The successful white-collar criminal is likely to have substantial assets legitimately acquired, particularly because, in our society, the really grand prospects for theft are open only to the already successful, and prison seems to be the most successful deterrent. Blumenson and Nilsen⁸² alleged that asset forfeiture encourages policing for crime, that it tends to target offenses that are both frequently repeated and victimless⁸³

A second question is, how effective is asset forfeiture? Here is the paradox of forfeiture as a deterrent to crime: not only is it a less effective deterrent than the threat of prison against economic criminals whose assets are most available to forfeiture, but it is also probable that the threat of prison is the most effective way to enforce forfeiture.⁸⁴ Forfeiture only requires the criminal to disgorge his ill-gotten gains if caught and convicted, thus restoring him to the status ante. It seems safe to assume that these forfeitures, like any publicized penalty grossly disproportionate to the offense, had a strong if temporary deterrence.

The punitive purpose of forfeiture is accomplished when the defendant is deprived of the proceeds of his crime and claim to the property. The amount of forfeiture should equal the greater of either the provable proceeds of crime, without any requirement or pretence of tracing, or the provable losses suffered. Under the US jurisdiction, the law authorizes the equitable transfer of civilly and criminally forfeited property to cooperating local law enforcement agencies.⁸⁵

⁸² Benson and Rasmussen, 1996. The economic anatomy of the drug war: criminal justice in the Commons.

⁸³ (Bowles, Faure, and Garoupa, 2005. Forfeiture of illegal gains: an economic perspective. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=821679# Oxford Journal of Legal studies Volume 25 no 2 pp 275-295

⁸⁴ The enforcement of forfeitures through the threat of prison may create serious due process difficulties to the extent that the proceeds of forfeiture are intended to be restitution for victims. It is axiomatic that criminal process should not be used to enforce civil liabilities, although criminal process is in fact constantly so used, for example, to collect bad checks and to enforce wage claims. See infra notes 443-46 and accompanying text

⁸⁵ 21 U.S.C. 881(e) (1982 & Supp. III 19. See Attorney General's Guidelines on Seized and Forfeited Property, 50 Fed. Reg. 24,052 (198

8. Recommendation

The growing interest in asset forfeiture in recent years, is based on the fact that it is one of the most effective ways of recovering the proceeds of organised crime. There is no doubt that the asset forfeiture/recovery regime has led to the recovery of assets from those that have come under the provisions and prosecution of the Act. However, the amount of criminal assets removed from the reach of the criminal i.e. restrained – but yet realised – is even greater than this but even more difficult to identify. To this end, the following are recommended as means to enhance the effectiveness of asset forfeiture.

1. The need to have a standing committee in the Ministry of Finance whose function will be to specifically handle proceeds from such crimes. This will ease tracing of such monies when the need arises.
2. Also, as further deterrence, those caught should be imprisoned, to demonstrate society's disapproval for such acts. Deterrence is a double-edged principle. It should, of course, not only deter offenders themselves from committing further crimes, but also, and very importantly, serve to inhibit the rest of the community from indulging in criminal behaviour. The imposition of harsher penalty from a deterrence angle will serve as an ideal punishment.
3. Due to long process and corruption in the judicial system, many have lost confidence in the justice system because, most often than not, by the time the matters are finally dispensed with, most people have even forgotten the facts while some offenders would even have died. The justice system needs to be more pro-active and all stakeholders, the Police, Anti-graft agencies and the courts, should be given all necessary facilities to go after these offenders.

9. Conclusion

There is no doubt that the assets recovery regime has led to the recovery of assets from those the State labels as criminals; On the converse, it is also a truism that corruption crime is increasing by the day; corruption seems to be more pervasive at higher impunity than at the start of the decade. and the corruption problem continues to produce more crimes. An insight to the reason for failure of the Nigerian system can be gleaned from where Georgia and David observed that: *“Offenders who persist in their criminal careers put society at a great risk because they represent the faults*

occurring either in the criminal system or in the intervention programmes, or both.”⁸⁶

In this current state, crime, particularly when persistent, has devastating effects on the Nigerian economy, the communities, the offenders and their families too, which go, in fact, beyond what can actually be measured. By measures, it could be assumed that asset forfeiture does not serve as adequate deterrence against crime and that it has been very effective in Nigeria. As it has been stated, the total number of forfeitures carried out and the amounts recovered remain at modest level compared to the rising corruption profile in Nigeria. As Faraldo⁸⁷ noted, the criminal mechanisms of asset forfeiture, seizure— despite the development over the last few years has not turned out to be very effective when it comes to reducing the number of organized crimes.

The challenge in Nigerian asset recovery is not with the legal provisions but with apolitical influence and the vendetta flavour which has clouded the measures in Nigeria. Without doubt, the adoption of society’s goal, within a utilitarian framework, is to minimize the total social costs of crime, which include the direct costs incurred by victims, the costs of prevention and enforcement.

Also, as further deterrence, those caught should be imprisoned as society disapproval for such acts. Deterrence is a double-edged principle. It not only deters offenders from committing further crimes, but also, and very importantly, it serves to inhibit the rest of the community from indulging in criminal behaviour. The imposition of harsher penalty from a deterrence angle will serve as an ideal punishment.

⁸⁶ Georgia Zara and David P. Farrington. 2016. *Criminal Recidivism. Explanation, Prediction and Prevention*. Routledge at page 44.

⁸⁷ Patricia Faraldo. 2014. *Improving the Recovery of Assets Resulting from Organised Crime*. *European Journal Of Crime, Criminal Law and Criminal Justice* 22 13-32