COMBATING CORRUPTION WHILE RESPECTING HUMAN RIGHTS: A CRITICAL STUDY OF THE NON-CONVICTION BASED ASSETS RECOVERY MECHANISM IN KENYA AND SOUTH AFRICA

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DOCTOR OF PHILOSOPHY

IN

LAW

Faculty of Law, Rhodes University

By

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DECLARATION

I, KEN OTIENO OBURA, declare that the work presented in this thesis is original. It has never been submitted by me for a degree at another University or institution. Where other people's works have been used, references have been provided, and in some cases, quotations made. It is in this respect that I declare this work as originally mine. It is hereby presented in fulfilment of the requirements for the award of the Degree: Doctor of Philosophy (PhD) in Law.

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DEDICATION

To those who believe in good governance

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(European Convention).

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Organization for Economic Cooperation and Development

Organization for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, done at Paris, 17 December 1997 OECD/DAFFE/IME/BR(97)16/FINAL; 37 I.L.M.

Organisation of American States

Inter-American Convention Against Corruption done at Caracas, 29 March 1996, 35 I.L.M. 724.

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LIST OF ABBREVIATIONS

ACECA	Anti-Corruption and Economic Crimes Act
ACPU	Anti-Corruption Police Unit
AfCHPR	African Charter on Human and Peoples' Rights
AFU	Assets Forfeiture Unit
ANC	African National Congress
AU	African Union
COE	Council of Europe
DPCI	Directorate of Priority Crime Investigation
DPP	Director of Public Prosecution
DSO	Directorate of Special Operations
DSPS	Directive Principles of State Policy
EA	East Africa
EACC	Ethics and Anti-Corruption Commission
ECHR	European Court of Human Rights
EU	European Union
FATF	Financial Action Task Force
ICCMA	International Cooperation in Criminal Matters Act
ICCPR	International Covenant on Civil and Political Right
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICHRP	International Council on Human Rights Policy
KACA	Kenya Anti-Corruption Authority
KACC	Kenya Anti-Corruption Commission
NDPP	National Director of Public Prosecution
NPA	National Prosecuting Authority
OAS	Organisation of America States
OECD	Organisation for Economic Cooperation and Development
PCCAA	Prevention and Combating of Corrupt Activities Act
POCA	Prevention of Organised Crimes Act
SA	South Africa
SAPS	South African Police Unit
UDHR	Universal Declaration of Human Rights
UK	United Kingdom

UN	United Nations (Organisation)
UNCAC	United Nations Convention Against Corruption
UNDP	United Nations Development Programme
UNODC	United Nations Office on Drugs and Crime
UNCTOC	United Nations Convention against Transnational Organized Crime
US	United States of America

ABSTRACT

The thesis contributes to the search for sound anti-corruption laws and practices that are effective and fair. It argues for the respect for human rights in the crafting and implementation of anti-corruption laws as a requisite for successful control of corruption. The basis for this argument is threefold: First, human rights provide a framework for checking against abuse of state's police power, an abuse which if allowed to take root, would make the fight against corruption lose its legitimacy in the eye of the people. Second, human rights ensure that the interest of individuals is catered for in the crafting of anti-corruption laws and practices thereby denying perpetrators of corruption legal excuses that can be exploited to delay or frustrate corruption cases in the courts of law. Third, human rights provide a useful framework for balancing competing interests in the area of corruption control – it enables society to craft measures that fulfils the public interest in the eradication of corruption while concomitantly assuring the competing public interest in the protection of individual members' liberties – a condition that is necessary if the support of the holders of these competing interests is to be enlisted and fostered in the fight against corruption.

The thesis focuses on the study of the non-conviction based assets recovery mechanism, a mechanism that allows the state to apply a procedure lacking in criminal law safeguards to address criminal behaviour. The mechanism is thus beset with avenues for abuse, which if unchecked could have debilitating effects not only to individual liberties but also to the long term legitimacy of the fight against corruption. In this regard, the thesis examines how the human rights framework has been used in Kenya and South Africa to check on the potential dangers of the non-conviction based mechanism and to provide for a proportional balance between the imperative of corruption control and the guarantee against arbitrary deprivation of property. The aim is to unravel the benefits of respecting human rights in the fight against corruption in general and in the non-conviction based assets recovery in particular. Kenya and South Africa are chosen for study because they provide two models of non-conviction based mechanisms with different levels of safeguards, for comparative consideration.

CHAPTER ONE

GENERAL INTRODUCTION

> "This country's planted thick with laws from coast to coast - man's laws, not God's - and if you cut them down - and you're just the man to do it - d'you really think you could stand upright in the winds that would blow then? *Yes, I'd give the Devil benefit of law, for my own safety's sake*."[1]

1.1. Description and context of research

The fight against corruption has become an integral part of the international community's development agenda.[2] Although there was initial disagreement among commentators on the undesirability of corruption, with some strongly arguing in favour of corruption,[3] it is today generally recognized that corruption is bad and that it needs to be contained if humanity is to move forward. One of the main driving forces behind this trend is the growing evidence of the detrimental effects of corruption.[4] The World Bank, for instance, estimates that more

[1] The words of Thomas More a character in R Bolt *A Man of All Seasons: A Play in Two Acts* (1960) 66 (emphasis added).

[2] This has seen the crafting of a number of anti-corruption conventions including United Nations Convention against Corruption G.A. Res. 58/4 (Oct. 31, 2003) (UNCAC); African Union Convention on Preventing and Combating Corruption done at Maputo, 11 July 2003, 43 I.L.M. 1(AU Convention); Council of Europe Civil Law Convention on Corruption done at Strasbourg, 4 November 1999, (entered into force 1 November 2003), E.T.S. 174 (COE Civil Convention); Council of Europe Criminal Law Convention on Corruption done at Strasbourg, 27 January 1999, (entered into force 1 July 2002), E.T.S. 173 (COE Criminal Convention); Organization for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, done at Paris, 17 December 1997 (entered into force 15 February 1999), OECD/DAFFE/IME/BR(97)16/FINAL; 37 I.L.M. 1 (OECD Convention; Inter-American Convention Against Corruption done at Caracas, 29 March 1996, 35 I.L.M. 724 (entered into force 6 March 1997) (OAS Convention).

[3] Several authors were of the view that some corruption might actually be good to society. Pointing to East Asia, which continued to register economic growth despite increased cases of corruption, some argued that corruption facilitated economic growth and investment. See G Myrdal *Asian Drama: An Inquiry into the Poverty of Nations* Vol II (1968) 951-955. Others associated corruption with the process of modernisation citing the experience of Western societies - which had manifested peak levels of corruption as they experienced socio-political development - to support their argument that every modernising state was susceptible to corruption. Some more considered corruption to be redistributive as it allowed those of more modest means in the public sector to subsidize their salaries from the bribes of the wealthy individuals and corporations in the private sector. See P Perry *Political Corruption and Political Geography* (1997) 38. Still others contended that corruption was just but a harmless way of showing gratitude for deeds done, a practice that had existed in many societies since time immemorial. See J Kimand & JB Kim "Cultural Differences in the Crusade Against International Bribery: Rice-Cake Expenses in Korea and the Foreign Corrupt Practices Act," (1997) 6 *Pacific Rim Law & Policy Journal* 549 at 561. Some even encouraged the perpetuation of corruption scandals arguing that such scandals were necessary for the standardization of societal norms. See M Gluckman *Custom and Conflict in Africa* (1955) 135. Yet others maintained that corruption was good for the integration of nations as it provided the means for ruling elites to persuade or co-opt fractious political, ethnic, or religious groups. See S Huntingdon *Political Order in Changing Societies* (1968) 59.

[4] Other factors include: (1) the 1997/98 financial collapse that brought the former economic power houses of the East Asia and former Soviet bloc, touted as models of corruption at its best, to their knees; (2) End of cold war; (3) Globalisation; (4) Donor fatigue; (5) Growth of democracy; (6) Market liberalisation; and (7) internationalisation of anti-corruption norms. For further discussion, see generally M Naim "The Corruption Eruption" (1995) 2(2) *Brown Journal of World Affairs* 245.

than 1 trillion US dollars is lost to bribery (just one component of corruption) each year.[5] Similarly, the African Union estimates that Africa loses an estimated 148 billion US dollars annually to corrupt practices, a figure that represents 25% of the continent's gross domestic product.[6] This loss weakens the ability of States to deliver services to their citizens, thereby causing abject poverty and stunted development.[7]

To counter these deleterious effects of corruption, governments and non-government organisations have worked at the international, regional and local level to draft laws providing for, among other strategies,[8] the recovery of corruptly acquired wealth.[9] The use of the recovery strategy is seen as a remedy to the negative effects of corruption as it allows stolen wealth to be retrieved from corrupt individuals and restored to the use of the wider society.[10] It is estimated, for example, that every 100 million US dollars lost, if recovered, could fund treatment for over 600,000 people with HIV/AIDS for a full year, or buy drugs for the treatment of malaria for between 50 and 100 million people, or provide 250,000 water connections for poor households, or afford full immunisations for 4 million children.[11] In addition to its remedial role, asset recovery is also seen as a preventive strategy as it removes profit out of corruption, thereby discouraging those who may wish to engage in corruption from doing so and denying the already corrupt individuals the ability to finance

[5] World Bank Institute *Worldwide governance indicators: 1996–2006* (2007). See also P Eigen "Removing a Roadblock to Development" (2008) 3(2) *Innovations* 19 at 19–33.

[6] See the following sites: http://news.bbc.co.uk/1/hi/world/africa/2265387.stm and http://www.transparency.org. (Accessed 30/2/2011). Also cited in World Bank and UNODC "Fact Sheet on Stolen Asset Recovery" http://www.unodc.org/pdf/Star_FactSheet.pdf. (Accessed 30/2/2011). See also the Transparency International estimates that corruption in Africa siphons off 20 to 30 percent of funding from basic service provision. "Africa: Corruption Hampers MDGs - Transparency International" http://allafrica.com/stories/201010271133.html (Accessed 30/6/2012).

[7] For example, in a test of 27 Sub-Saharan countries from 1984 to 2006, Bissessar found that governments in the region face daunting development goals because Africa has a very large percentage of highly corrupt countries. N Bissessar "Does Corruption Persist In Sub-Saharan Africa?" (2009) 15 *International Advances in Economic Research* 336.

[8] Other strategies include public education, criminalisation of corruption, and corruption prevention. For a review of anti-corruption laws in African countries, see Economic Commission for Africa "Assessing the Efficiency and Impact of National Anti-Corruption Institutions in Africa" (2010)

[9] The major international and regional anti-corruption instruments call on member states to adopt this strategy in their fight against corruption: See, for example, UNCAC, chapter V; AU Convention, article 16; OAS Convention, article 15.

[10] See "Travaux Preparatoires of the Negogiations for the Elaboration of the United Nations Convention against Corruption"
http://www.unodc.org/documents/treaties/UNCAC/Publications/Travaux/UNCAC_Travaux_Preparatoires_-_English.pdf (accessed 10/3/2011) (This intention is apparent from the initial title of the chapter on Asset Recovery in UNCAC. It read "Preventing and combating the transfer of funds of illicit origin derived from acts of corruption, including the laundering of funds, and returning such funds").

[11] See World Bank and UNODC "Fact Sheet on Stolen Asset Recovery" http://www.unodc.org/pdf/Star_FactSheet.pdf. (Accessed 30/2/2011). See also World Bank and UNODC "Asset Recovery – A Breakthrough by the UN Convention against Corruption" http://www.gtz.de/de/dokumente/en-gtz-asset-recovery-2007.pdf (accessed 30/2/2011).

any future corrupt activity.[12]

However, in spite of its usefulness in the fight against corruption, the recovery of corruptly acquired wealth has not been an easy task in many jurisdictions.[13] One challenge faced by governments is the difficulty in proving the connection between the property to be recovered and a specific offence of corruption.[14] This requirement to establish a link is a pre-condition for lawful confiscation of criminally acquired assets in many jurisdictions.[15] A criminal conviction usually has to be won by the prosecution before it can seek an order for the confiscation of the property derived from that offence. Even if a conviction is obtained, the prosecution still needs to prove the link between the criminal offence for which the defendant had been convicted and the property to be confiscated before the court can sanction the confiscation of the property.

The secret nature of corruption and the lack of individual victims that would report an act of corruption make it difficult to prove this link.[16] The fact that perpetrators invariably ensure that they are far removed from the overt criminal activity does not make the task any easier.[17] Particular difficulties occur when a case involves prominent politicians and wealthy businesspersons who fund and support corruption but seldom carry out the physical elements of the crime.[18] Even more troublesome are instances when the suspect flees from the jurisdiction, or dies, or when assets are held through offshore trusts or companies or

[12] See generally M Pieth (ed) *Recovering Stolen Assets* (2008) (Discussing the meaning, practice, impact and challenges of asset recovery).

[13] For an exposition, see TS Greenberg *et al Stolen Asset Recovery: A Good Practices Guide for Non-Conviction Based Asset Forfeiture* (2009) 109-191 (Discussing the forfeiture regimes in representative countries from both the common law tradition and the civil law tradition).

[14] See S Young (ed) *Civil Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime* (2009) (illustrating how because of the difficulty in using criminal forfeiture systems to disrupt criminal organizations, state countries such as Australia, Canada, China, Ireland, South Africa, the United Kingdom and the United States are turning to civil forfeiture systems).

[15] See TS Greenberg *et al Stolen Asset Recovery: A Good Practices Guide for Non-Conviction Based Asset Forfeiture* (2009) 109-191 (discussing the forfeiture regimes in representative countries from both the common law tradition and the civil law tradition).

[16] I Carr "Fighting Corruption through the United Nations Convention on Corruption 2003: A Global Solution to a Global Problem? 11(1) *International Trade Law Review* (2005) 24 at 26 (pointing out that "corruption is a hidden crime and investigation can prove a costly exercise").

[17] See P Henning "Public Corruption: A Comparative Analysis of International Corruption Conventions and United States Law" (2001) 18 *Arizona Journal of International & Comparative Law* 793 at 825 (analysing the offence of influence peddling and concluding that the chance of proving this type of corruption is lower "because the influence-peddler is removed from the actual decision"). See also S Al-Jurf "Good Governance and Transparency: Their Impact on Development" (1999) 9 *Transnational Law & Contemporary Problems* 193 at 202 (noting the secretive nature of corruption: "Participants in corruption do everything within their power to keep their transactions secret").

[18] For an illustrative study, see J Maton and T Daniel "Recovering the Proceeds of Corruption by Public Officials: A Case-Study" (2009) 10(3) *Era Forum* 453 (discussing international efforts to recover the assets of a former Nigerian State Governor).

associates not amenable to prosecution or to recovery orders.[19]

To overcome this onerous challenge, governments are increasingly resorting to the non-conviction based assets recovery mechanism as an alternative means to the conviction based assets recovery mechanism.[20] While the recovery models have varied among the jurisdictions that have adopted them, non-conviction based assets recovery mechanisms generally provide for the recovery of illicit wealth without the need for a conviction or criminal charge against the owner.[21] Its purpose is, therefore, to make the work of the state easy by rendering the onus and standard of proof for criminal guilt inapplicable to recovery proceedings.[22] The state is only required to meet, in most cases, the civil standard of proof (balance of probability or preponderance of evidence) in proving that the property is suspect.[23] The onus of proving that the asset is not connected to an offence often rests on the defendant.

The ease in proving an assets recovery case under the non-conviction based mechanism makes it an attractive tool in the quest to recover corruptly acquired wealth.[24] However, the reversal of onus of proof, the lowering of standard of proof and the waiver of the requirement for conviction, makes non-conviction based assets recovery mechanism inherently intrusive on the rights of persons with interest in the impugned property.[25] One

[19] See CM Welu "The International Compliance Clamp-Down" (2007/2008) 74 *Euro Law* 51 at 52 (Pointing out that anti-corruption cases tend to be highly political and affect the diplomatic sensitivities of the nations involved); J Carver "The Hunt for Looted State Assets: The Case of Benazir Bhutto" in R Hodess *et al* (eds) *The Global Corruption Report* (2004) 102 (for a case study on the difficulties of trans boundary recovery).

[20] For an illustration of these laws see TS Greenberg *et al Stolen Asset Recovery: A Good Practices Guide for Non-Conviction Based Asset Forfeiture* (2009) 109-191.

[21] See A Kennedy "Designing a Civil Forfeiture System: An Issues List for Policymakers and Legislators" (2006) 13 *Journal of Financial Crime* 132 (examining the provisions of legislations from a number of countries and setting out the common issues which have arisen and the range of options which have been attempted as potential solutions).

[22] See S Casella "The Case for Civil Forfeiture: Why *in rem* Proceedings are an Essential Tool for Recovering the Proceeds of Crime." (2008) 11 *Journal of Money Laundering Control* 8 (concluding that criminal forfeiture statutes, which authorize forfeiture after a defendant has been convicted are not enough, by themselves, for successful recovery of criminal proceeds, and that civil forfeiture provisions must be included for the recovery efforts to succeed).

[23] In some civil law jurisdictions, such as Switzerland and Thailand, the standard of proof for forfeiture is beyond reasonable doubt or intimately convince. See *A-Company v Federal Office of Justice* ATF 132II 178 (Switzerland).

[24] See A Freiberg and RG Fox "Fighting Crime with Forfeiture: Lessons from History" (2000) 6 *Australia Journal of Legal History* 1 at 3 (pointing out that the urge to punish lies deep in human beings and that "to the modern mind, the ancient laws of forfeiture, and the punishment of inanimate objects or animals, appear strange and possibly brutal, but in moments of crisis, anger or pain, these almost atavistic responses are evoked").

[25] These rights include the rights to silence, privacy, property, dignity, fair trial, and presumption of innocence. For an illustration on potential infringement of these rights, see B Clarke "Confiscation of Unexplained Wealth: Western Australia's Response to Organised Crime Gangs" (2002) 15 *South African Journal of Criminal Justice* 61.

consequence of using the mechanism is that a person may end up losing legitimately acquired property simply because he or she lacks the evidence to show that it was lawfully acquired.[26] Another consequence is that an innocent property owner may end up being branded a criminal without being given an opportunity, usually available in conviction based recoveries, to have his or her guilt proven beyond reasonable doubt.[27] Furthermore, since it targets the property itself without being concerned about the criminal involvement of its current holder, the non-conviction based mechanism can result in innocent third parties, who acquired interest in the targeted property for value without notice of its illegal origin, losing their innocent investment without compensation.

1.2. Research questions

Where the rights of property owners are protected by constitutional guarantees, the intrusive effects of non-conviction based assets recovery mechanism on individual rights raises a number of poignant questions:

1. What is the constitutional basis of non-conviction based assets recovery mechanism in light of its potential to infringe individuals' rights?
2. Should the societal interest in recovery of corruptly acquired assets through non-conviction based mechanisms override the society's interest in securing the rights of property owners?
3. If not, how then should courts proceed to balance the two interests in the area of non-conviction based assets recovery?
4. If the purpose of assets recovery should override the goal of protecting individual rights, what safeguards, if any, should non-conviction based assets recovery laws have in order to check on its arbitrary or disproportionate effect on property owners?
5. What lessons can be learned from Kenya's and South Africa's treatment of the non-conviction based assets recovery mechanism in their legislations and courts?

These five questions constitute the main points of analysis of this thesis.

[26] For a discussion of the likely injustices, see PC Roberts & LM Stratton *The Tyranny of Good Intentions: How Prosecutors and Law Enforcement are Trampling the Constitution in the Name of Justice* (2008).
[27] This is because, though formally not concerned with the guilt of the property owner, non-conviction based assets recovery carries the insinuation that the property owner either participated in, obtained profits from, or somehow abetted others in the commission of a crime.

1.3. Theoretical framework

The questions derive from contemporary human rights discourse, which requires that intrusive state actions, such as non-conviction based assets recovery, for them to be valid, must be constitutionally justifiable, in the sense of serving an overriding public purpose. However, in the process of such justification, the unfair effect of the action is also usually taken into consideration. In other words, the justification of an intrusive state action situates the whole action within a context where judicial review of the rationality and proportionality of the action also becomes unavoidable. The purpose of such scrutiny is to determine whether the means adopted is rationally connected to the purpose served and whether the effect of the means is proportional to the purpose served. In other words, an intrusive means, such as the non-conviction based assets recovery mechanism, for it to pass constitutional muster, must not only serve an overriding public purpose (legitimacy requirement) but must also be rationally connected to the purpose that it seeks to achieve (rationality requirement) and must have in place safeguards to ensure that it is no more restrictive on the rights of individuals than is necessary to achieve the legitimate objective (proportionality requirement).[28] It is within this human rights framework that the non-conviction based mechanism is examined.

1.4. Aim and scope of study

This thesis attempts to address the highlighted research questions through a case study of the non-conviction based assets recovery regimes in Kenya and South Africa. The thesis purposes to study how the two jurisdictions have tried to ensure that their respective versions of non-conviction based mechanisms do not unduly infringe on the rights of property owners. The analysis of the non-conviction based mechanism is to be carried out with respect to its relation to the right to fair trial and the right to property. The choice of the two rights is informed by the fact that they are directly involved in the non-conviction based mechanism and therefore present guaranteed framework for analysing the constitutionality or unconstitutionality of non-conviction based assets recoveries.[29] Also given that the effects on

[28] See generally AS Sweet & J Mathews "Proportionality Balancing and Global Constitutionalism" (2008) 47 *Columbia Journal of Transnational Law* 73.

[29] It is true that other substantive rights such as the right to privacy, peaceful family life, housing, and children rights are sometimes also affected by deprivation of property and could therefore be used to check on the state abuse of the non-conviction based assets recovery mechanism. However, given that the effects on these rights are secondary (they arise only as an indirect consequence of confiscation of property) and that they only occur in certain circumstances (for example, effect on right to housing would arise only where the targeted property is

other rights such as right to housing or peaceful family life arise only as an indirect consequence of confiscation of property, the effect of the non-conviction based assets recovery mechanism on these rights becomes part and parcel of the consideration taken into account when determining the constitutionality of the mechanism under the right to property's proportionality analysis, and therefore considering them separately would amount to unnecessary duplication.

In the same vein, while recognising that non-conviction based assets recovery mechanism can be used to recover proceeds from all criminal activities,[30] the study only considers the recovery of proceeds from corruption. As has been held by a number of courts, the nature of the crime outlawed is one of the factors to be considered in determining the constitutionality and proportionality of a restrictive means.[31] Thus, considering all authorised non-conviction based recoveries in the limited space of this thesis would clutter the analysis.

It is also worth noting that in the study of assets recovery a distinction is usually made between recoveries which relates to the proceeds of the crime from those that relate to the instrumentality and the subject of crime.[32] This thesis is concerned with the study of the non-conviction based assets recovery mechanism only as it relates to the recovery of proceeds of crime. It is further noteworthy that assets recovery has four connected stages (investigation, freezing or seizing, confiscating and returning proceeds of corruption to its rightful owners).[33] While acknowledging all these stages in the recovery of corruptly acquired assets, this thesis, however, concentrates more on the stage that finally takes away the property from the owner, the confiscation stage.

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a residential house while that on family or children right would occur only where the owner of targeted property has family and children respectively or where the property belongs to a family or child), the usefulness of these rights in checking the abuse of the mechanism is fairly limited. On the other hand, because property is the primary target of the non-conviction based assets recovery mechanism, it is unlikely that the tension between the protection of private property and the public interest in the recovery of corruptly acquired assets, which is represented in the right to property, can be avoided. Similarly, since the reason behind the use of the non-conviction based mechanism is to address crime (of which corruption is one), the issue of the applicability of the criminal law fair trial guarantees in the non-conviction based procedure cannot be sidestepped.

[30] For example, the South African Constitutional Court has held in *Mohunran v National Director of Public Prosecutions* 2007 (2) SACR 145 (CC) para 30 that the application of the recovery mechanism under the South Africa's Prevention of Organized Crimes Act of 1998 "is not in fact limited to so-called 'organized crime offences'" but also cover other crimes that are acquisitive in nature.

[31] See, for example, the South African case of *Prophet v National Director of Public Prosecutions* 2007 (6) SA 169 (CC) para 58 (pointing out that a determination of the constitutionality of a forfeiture provision should bear in mind "the nature of the offence"); *Honourable Friday Anderson Jumbe & Others v AG*, (CC Nos 1 and 2 of 2005) in the Constitutional Court of Malawi Unreported.

[32] For a discussion of the different types of assets recovery, see s 3.6 below.

[33] For a discussion of the different types of assets recovery, see s 3.5 below.

1.5. Hypothesis

The study is guided by the general assumption that human rights offer a desired balance between the society's need to recover stolen public property and the corresponding need to protect individuals' against the unfair effects of the non-conviction based assets recovery process. The particular assumptions include: first, that corruption is a vice that needs to be eradicated; second, that the non-conviction based assets recovery mechanism is a necessary means in the eradication of corruption; third, that the non-conviction based assets recovery mechanism if unregulated can have unfair and disproportionate effects on property owners; fourth, that the right to fair trial and right to property are applicable in the non-conviction based assets recovery process and do provide property owners with protection against unfair and disproportionate non-conviction based assets recoveries.

1.6. Justification of study

Through this study, the thesis hopes to contribute to the search for sound anti-corruption laws and practices that are fair and compatible with human rights. Because of the importance of human rights and their wide recognition and acceptance, it is imperative that the fight against corruption, for it to gain legitimacy, should be conceptualized in such a way as to respect human rights. As one commentator aptly puts it:

> "Disregard of human rights in combating corruption is not only morally wrong, but it is also strategically mistaken, since it undermines the foundations of the anti-corruption policy in itself. If we defeat corruption, it must be without giving up our ideals and values. If we give them up, corruption would have defeated us."[34]

But even more compelling for this study is the increasing evidence of cases of corruption being thrown out by courts in a number of jurisdictions on technicalities and not on merit because of unfair laws or because of investigators or prosecutors failing to observe the fundamental rights of suspects.[35] If perpetrators of corruption are to face justice, then anti-corruption laws should be framed and their enforcement conducted in such a way that no legal loopholes that can be exploited by the suspects in the courts of law are left unaddressed. Through a review of court cases, this thesis hopes to unravel what courts

[34] N Kututwa, "How to Combat Corruption While Respecting Human Rights" (2007) http://www.ichrp.org/files/papers/135/131_-_Noel_Kututwa_-_2007.pdf (accessed 05/10/2009) (Quoting Saba).

[35] See for example, *Hon. Friday Anderson Jumbe & Others v AG*, (Constitutional Cases Nos 1 and 2 of 2005) in the High Court of Malawi Unreported; *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; *Gachiengo & Another v Republic* (2000) 1 EA 52 (CAK).

consider as the best anti-corruption practices in the area of non-conviction based asset recovery.

In this regard, the choice of Kenya and South Africa as the fulcrums of study is not without justification. Both countries are parties to the major international human rights and anti-corruption instruments.[36] In addition, both countries have a constitutionally entrenched Bill of Rights and are beholden to the legal principle of supremacy of the constitution.[37] However, unlike Kenya, one legacy of South Africa's apartheid past has been that the South African legislature is barred by the post-apartheid Constitution (in the absence of constitutional amendment) from pursuing more sweeping non-conviction based assets recovery laws.[38] Kenya's legislature is not so precluded[39] and has provided for far-reaching powers to its anti-corruption agency in its version of the non-conviction based assets recovery regime.[40] The two jurisdictions thus provide two models of non-conviction based assets recovery mechanisms with different levels of safeguards for comparative consideration.[41]

The two countries also represent what seems to be a "regional dimension" to the perception of the level of corruption in Africa. The level of corruption control is rated much lower in

[36] These instruments include Universal Declaration of Human Rights (UDHR); African Charter on Human and Peoples Rights(ACHPR); UNCAC; AU Converntion; International Covenant on Civil and Political Rights, adopted 16/12/1966; G.A. Res 2200 (XXI), UN. Doc A/6316 (1966) 999 UNTS 171 (ICCPR); and International Covenant on Economic, Social and Cultural Rights, adopted 16/12/1966; G.A. Res 2200 (XXI), UN. Doc A/6316 (1966) 993 UNTS 3 (ICESCR).

[37] See Constitution of the Republic of Kenya 2010, s 2(4) and Constitution of the Republic of South Africa 1996, s 2. On the principle of supremacy of the constitution, see generally J Limbach "The Concept of the Supremacy of the Constitution" (2001) 64(1) *The Modern Law Review* 1 (pointing out that the principle of supremacy of the constitution confers constitutions the highest authority in a legal system and any action or law that is inconsistent with the constitution is considered null and void).

[38] See *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC) para 25 (Where the South African constitutional Court stressed "that the need for the protection of security of tenure of South Africans must be viewed in the light of the injustices of forced removals from land and evictions from homes perpetrated in the past").

[39] Unlike South Africa, whose apartheid era was characterized by injustices of forced removals from land and evictions from homes, Kenya's immediate past is characterized by injustices of powerful individuals grabbing public and communal land and converting the same to private use. In this regard the Constitution of the Republic of Kenya 2010 has expressly provided in its right to property clause that the right to property "do not extend to any property that has been found to have been *unlawfully acquired*". Constitution of the Republic of Kenya 2010, s 40(6) (emphasis added). For an exposition of land grabbing history in Kenya, see Government of Kenya *Report on Illegal and Irregular Allocation of Public Land* (2004).

[40] See Ant-Corruption and Economic Crimes Act of 2003 (ACECA) s 55 (providing for the seizure and forfeiture of "unexplained assets" - discussed in detail in chapter 3).

[41] The courts in the two countries have had an opportunity to adjudicate the tension between non-conviction based assets recovery mechanism and the right to property and fair trial in a number of cases. See, for example, *Kenya Anti-corruption Commission V Stanley Mombo Amuti* [2011] eKLR; *Christopher Ndarathi Murungaru V Kenya Anti-Corruption Commission & Attorney- General* (2006) KLR; *Prophet v National Director of Prosecution* 2007 (6) SA 169 (CC).

West and East Africa than in Southern Africa.[42] Specifically as regards Kenya and South Africa, the Economic Commission for Africa Governance Reports, for example, shows South Africa having scores of over 60% while Kenya remains below the 50% mark.[43] The Transparency International Corruption Perceptions Index for African Countries also indicates that South Africa has consistently scored higher than Kenya.[44] No clear reasons for the trend have been found, but it is evident that the countries with better scores in corruption control are generally more affluent than their low scoring counterparts. According to the Economic Commission for Africa another reason could be because these countries with better scores have better and stronger institutions of governance generally.[45] It would be interesting to know whether and how the level of corruption has affected the crafting and interpretation of the non-conviction based assets recovery laws in the two countries.

1.7. Literature review

A review of the available literature reveals that the relationship between human rights and the fight against corruption has generally not been treated as an integral part of the mainstream research on corruption, which tend to regard human rights and corruption as separate disciplines.[46] Most existing work on corruption have concentrated on areas such as the definition, causes and effects of corruption, mechanisms and policies to contain it, anti-corruption institutions, and forms of international cooperation in the fight against corruption.[47] Among the few authors who have tried to link the two disciplines, most have concentrated on discussing the effect of corruption on human rights.[48] Some have analysed

[42] For the trend, see The Transparency International Global Corruption Barometers (2005-2010) at http://www.transparency.org/policy_research/surveys_indices/gcb (accessed 6 October 2011); *Economic Commission for Africa: African Governance Report I* (2005); *Economic Commission for Africa: African Governance Report II* (2009) .

[43] See, for example, Economic Commission for Africa: African Governance Report 2005 at 149, 265 (noting that in the corruption control index, Namibia, Botswana, South Africa, Mauritius and Lesotho, have scores of well over 50 (with Botswana and South Africa having scores over 60 and Namibia having a score over 70) while countries in East and West Africa have scored less).

[44] The reports can be accessed at Transparency International, www.transparency.org (accessed on 10/3/2011). The 2008 report for example notes that South Africa scored 4.9 while Kenya only scored 2.1.

[45] See Economic Commission for Africa "Assessing the Efficiency and Impact of National Anti-Corruption Institutions in Africa" (2010) at 23

[46] For a review of the various literature, see World Bank "Literature Survey on Corruption" available at http://www1.worldbank.org/publicsector/anticorrupt/ACLitSurvey.pdf (accessed 12/10/2010).

[47] See World Bank "Literature Survey on Corruption" available at http://www1.worldbank.org/publicsector/anticorrupt/ACLitSurvey.pdf (accessed 12/10/2010).

[48] See International Council on Human Rights Policy (ICHRP) "Corruption and Human Rights: Making the Connection" available at http://www.ichrp.org/en/projects (accessed 10/1/2011) (assessing the impact of corruption on human rights); T Landman & CJW Schudel "Corruption and human rights: Empirical Relationships and Policy Advice" (2007) *ICHRP Working Paper* http://www.ichrp.org/en/projects/1312 (accessed 20/2/2011) (Looking at the empirical relationship between corruption and human rights in different

how human rights could be used to defeat the fight against corruption.[49] While others have studied how the rights-based approach can be used to make the fight against corruption responsive to the needs of the victims of corruption.[50]

In the reviewed literature, however, there was limited attention given to the actual human rights conflicts that have arisen in the course of fighting corruption or to the analysis of how the emerging jurisprudence from the courts, which are the main arbiters on these conflicts, is

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countries using extant quantitative measures and concluding that more corrupt countries have worse records of human rights protection); JB Terracio "Hard Law Connection between Corruption and Human Rights" *ICHRP Working Paper* http://www.ichrp.org/en/projects/1312 (accessed 20/2/2011) (in his attempt to clarify the links between corruption and human rights, has drawn up three categories: (i) corruption as protecting human rights, (ii) corruption as leading to human rights violation and (iii) corruption itself as a violation of human rights). P Matsheza, "fighting corruption while safeguarding human rights" a paper presented at the United Nations Conference on Anti-Corruption Measures, Good Governance and Human Rights Warsaw, Republic of Poland, 8-9 November 2006 http://www2.ohchr.org/english/issues/development/governance/docs/Matsheza.pdf (accessed 20/2/2011) (highlighting some of the human rights issues that may arise during the implementation of the United Nations Convention against Corruption (UNCAC); N Kututwa "How to Combat Corruption While Respecting Human Rights" (2007) *ICHRP Working Paper* http://www.ichrp.org/en/projects/1312 (accessed 20/2/2011) (analysing the effects of criminalizing corruption on human rights); C Gruenberg & P Biscay "A comparative assessment of the compliance with human rights standards of anti-corruption legislations" (2007) *ICHRP Working Paper* http://www.ichrp.org/en/projects/1312 (accessed 20/2/2011) (carrying out a comparative assessment on the compliance of anti-corruption legislation with human rights principles).

[49] James Gathii, for example, has looked at how influential persons in Kenya have used the Bill of Rights in the Constitution to derail their investigation and prosecution. He observes that "while corruption negatively affects human rights protection, human rights can help corruption to flourish". This in his view is because human rights and procedural rights, such as due process--the right not to have undue delay in court proceedings, and the right to a fair trial--can be used by corrupt government officials "to circumvent and avoid punishment and accountability for the role they played in acquiring personal gain for themselves at the expense of the people they should be serving". J Gathii "Defining the Relationship Between Corruption and Human Rights" (2009) *University of Pennsylvania Journal of International Law* 125 at 126. Kollapen and Makubetse Sekhonyane, on their part, have looked at how the era of constitutionalism and human rights since the end of Apartheid regime has affected the criminal justice system in South Africa. N Kollapen and M Sekhonyane Combating Crime and Respecting Human Rights: An illusive Balance or the Search for a Durable Solution" (2002) International Council on Human Rights available at Policy http://www.ichrp.org/en/projects/1312 (accessed 20/2/2011).

[50] In this group is Kumar, who argues that the human rights approach requires that responses to corruption are couched in the language of rights to ensure the empowerment of the victims of corruption. He stresses that all efforts to address corruption need to be connected to the basic objective of empowering the people by making them increasingly aware of and participative in governance. R Kumar "Human Rights Approaches of Corruption Control Mechanisms: Enhancing the Hong Kong Experience of Corruption Prevention Strategies" (2004) 5 *San Diego International Law Journal* 323. Thomas Snider and Won Kidane on their part, having carried out a comparative analysis of rights-based approaches in international anti-corruption instruments, conclude that even though the African Union Convention on Preventing and Combating Corruption is the only instrument of its kind that takes a human rights approach, such an approach should be encouraged and developed further in all anti-corruption implementation and enforcement stages. T Snider and W Kidane "Combating Corruption through International Law in Africa: A Comparative Analysis" (2007) 40 *Cornell International Law Journal* 691. Balakrishnan Rajagopal, on his part, has explored the dialectic of the relationship between corruption discourse, legitimacy, and human rights discourse. He argues that the campaign to contain corruption and the movement for the promotion and protection of human rights are inextricably linked and interdependent. As such, he proposes that for there to be legitimacy, the elimination of corruption should be based on the concrete problems and deprivation of the victims of corruption in their particular local situation. B Rajagopal "Corruption, Legitimacy and Human Rights: The Dialectic of the Relationship" (1999) 14 *Connecticut Journal of International Law* 495. See also ICHRP "Corruption and Human Rights: Integrating Human Rights in Anti-Corruption Agendas" available at http://www.ichrp.org/en/projects (accessed on 10/10/2009) (assessing the effectiveness of a human rights based approach in the fight against corruption).

helping in the development of sound anti-corruption practices that do not infringe on the human rights of those involved.[51] This lacuna is also observable in the majority of studies carried out in the area of non-conviction based assets recovery.[52] However, in the study of the non-conviction based assets recovery procedures, a few authors have highlighted some of the human rights risks posed by the use of the non-conviction based procedure in the recovery of proceeds of crime and cited cases to illustrate how the law enforcement agencies are misusing the mechanism to the detriment of innocent property owners.[53] Some of these authors have also attempted to offer solutions on how to make the non-conviction based assets recovery effective and fair.

One such work is Simon Young's *Civil Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime*.[54] In this book different authors provide a detailed analysis of the legal and practical dimensions of the non-conviction based assets recovery laws in diverse jurisdictions including Australia, Canada, China, Ireland, South Africa, the United Kingdom and the United States. Young's work however concentrates more on the use of the non-conviction based assets recovery mechanism in the fight against organized crime and international money laundering with little emphasis on corruption. The book also gives little attention to the effect of the non-conviction based mechanism on the right to property as most of the discussion revolves around the applicability of the criminal justice fair trial guarantees in the non-conviction based recovery process.

Another useful work is Greenberg *et al*'s *Stolen Asset Recovery: A Good Practices Guide for Non-Conviction Based Asset Forfeiture*[55] which identifies key legal, operational and practical concepts that are critical for designing and building an effective non-conviction based assets recovery system. However, just like Young's *Civil Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime,* the guidelines in

[51] Cf N Kofele-Kale "Presumed Guilty: Balancing Competing Rights and Interests in Combating Economic Crimes" (2006) 40 *International Lawyer* 909 (sketching an outline of an analytical system for resolving the unavoidable conflicts between competing human rights: the individual right to be presumed innocent versus the collective right to a corruption-free society).

[52] For these studies, see World Bank "Literature Survey on Corruption" available at http://www1.worldbank.org/publicsector/anticorrupt/ACLitSurvey.pdf (accessed 12/10/2012).

[53] Miller and Selva, for example, have documented cases of "asset hunting" by law enforcement officers in the US in search of revenue regardless of the confiscation's enforcement value. See JM Miller & LH Selva "Drug Enforcement's Double-Edged Sword: An Assessment of Asset Forfeiture Programs" (1994) 11(2) *Justice Quarterly* 313. See also PC Roberts and LM Stratton *The Tyranny of Good Intentions: How Prosecutors and Law Enforcement are Trampling the Constitution in the Name of Justice* (2008).

[54] S Young (ed) *Civil Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime* (2009).

[55] TS Greenberg, LM Samuel, W Grant and L Gray *Stolen Asset Recovery: A Good Practices Guide for Non-Conviction Based Asset Forfeiture* (2009).

Greenberg's work relate to the non-conviction based recovery of proceeds of all crimes without specific reference to corruption.

Mark Pieth's *Recovering Stolen Assets*[56] is also another book that discusses challenges involved in assets recovery, the assets recovery systems in different legal systems and countries, success stories in asset recovery, and mutual legal assistance under the United Nations Convention Against Corruption (UNCAC). The contributors in the book hold that an effective framework to recover assets corruptly acquired by corrupt leaders is a prerequisite for fruitful development efforts. Pieth's book is useful in that it gives specific attention to the issues around corruption related recovery. However, the topics covered in the book are thin on issues related to the human rights challenges posed by assets recovery generally and non-conviction based assets recovery mechanism specifically.

In addition to the books, there are also a number of published articles that have tried to address the human rights challenges posed by the application of the non-conviction based assets recovery. A useful article that discusses the relationship between non-convictions based mechanism and the right to property is that of Van der Walt's *"Civil Forfeiture of Instrumentalities and Proceeds of Crime and the Constitutional Property Clause"*.[57] The article examines, through a case study of United States, Germany, United Kingdom, Ireland, Namibia, Australia, the European Union, and South Africa, the question whether the non-conviction based confiscation of property in which innocent third parties have invested interest should be treated as expropriation for purposes of compensation of the affected individuals. The article is useful in providing information on how the unreasonable or excessive burden that non-conviction assets recovery imposes on innocent property owners is treated in different jurisdictions. With regard to South Africa, however, the article does not analyse the jurisprudence of the courts on this important issue nor does it discuss how the proportionality analysis has been used by the courts to ensure that the excessive effects of the non-conviction based mechanism are contained.[58]

[56] M Pieth (ed) *Recovering Stolen Assets* (2008).
[57] AJ Van der Walt "Civil forfeiture of instrumentalities and proceeds of crime and the constitutional property clause" (2000) 16 *South African Journal on Human Rights* 1.
[58] See also JA Crane "Property, Proportionality and Instruments of Crime (2011) 29 *National Journal of Constitutional Law* 159 at 175 (discussing the issue of proportionality in the non-conviction based regime but with respect to instrumentality confiscation not proceeds of crime).

Carol Steiker,[59] Mary Cheh,[60] and Kenneth Mann,[61] among other authors,[62] have also engaged in a useful discussion in their respective articles on the placement, within the criminal or civil law divide, of procedures such as the non-conviction based assets recovery mechanism, which though branded civil by the legislature are used to address criminal prohibitions. Steiker concludes that such procedures should be subjected to the criminal law procedural guarantees because they result in moral blaming, which in her view is an attribute of criminal law.[63] Cheh, on the other hand, is of the view that such procedures should not be subjected to criminal fair trial guarantees because of their civil labelling, which in her view is an indication that they belong in the civil law divide.[64] Mann on his part contends that such procedures do not belong to either criminal or civil law divide but rather fit in a special category of procedures referred to as "middleground" procedure which require hybrid guarantees borrowing from both the criminal and civil law.[65] Though not specific on the non-conviction based assets recovery mechanisms, these arguments are helpful in guiding the discussion on the applicability of the criminal law fair trial guarantees to the non-conviction based assets recovery procedures.

There thus remain areas of controversy on the subject of non-conviction based assets recovery which touch on serious legal issues, such as the applicability of the right to fair trial and right to property to the non-conviction based assets recovery mechanism, and how the effect of the mechanism on individual property owners can be contained to ensure that it is not arbitrary or disproportionate. This thesis seeks to add to the body of knowledge by considering these legal issues from Kenyan and South African perspectives. Specifically, the thesis seeks to unravel how the human rights' framework, which is usually used by courts in resolving the public interest-individual rights conflict,[66] can be used to ensure that the non-

[59] CS Steiker "Foreword, Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide" (1997) 85 *Georgetown Law Journal* 775.
[60] MM Cheh "Constitutional Limits on Using Civil Remedies To Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction" (1991) 42 *Hastings Law Journal* 1325.
[61] K Mann "Punitive Civil Sanctions: The Middleground between Criminal and Civil Law" (1992) 101(8) *The Yale Law Journal* 1795.
[62] See also SR Klein "Redrawing the criminal-civil boundary" (1999) 2 *Buffallo Criminal Law Review* 679; JM Clark, "Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis" (1976) 60 *Minnesota Law Review* 379.
[63] CS Steiker "Foreword, Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide" (1997) 85 *Georgetown Law Journal* 775.
[64] MM Cheh "Constitutional Limits on Using Civil Remedies To Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction" (1991) 42 *Hastings Law Journal* 1325.
[65] K Mann"Punitive Civil Sanctions: The Middleground between Criminal and Civil Law" (1992) 101(8) *The Yale Law Journal* 1795.
[66] For a discussion of the proportionality principle, see chapter 6 below. See also See AS Sweet & J Mathews "Proportionality Balancing and Global Constitutionalism" (2008) 47 *Columbia Journal of Transnational Law* 73.

conviction based assets recovery mechanism is no more restrictive on the rights of property owners than is necessary to achieve the legitimate objectives of assets recovery. Evaluation of Kenya's and South Africa's jurisprudence on these issues remains scanty in the reviewed literature.

1.8. Methodology

The study adopts the doctrinal research methodology to discover the legal principles that answer the set out research questions.[67] In this regard, the study locates (through desk-based research) and critically reviews the relevant primary sources including policies, statutes, constitutions, standards, codes, conventions, declarations, charters, resolutions, case law and decisions on corruption, non-conviction based assets recovery and human rights. In addition to the primary sources, the study makes use of the secondary sources including books, journal articles, internet materials and reports which have investigated, analysed and explained the identified applicable rule or rules of law. The purpose is to expose the understanding and elaboration of these principles by different commentators and authors. Having established the relevant rule or rules of law applicable to the identified research questions, the study then examines how these rules have been applied by Kenyan and South African courts in specific cases. The purpose is to determine how the context of each country and case affects the application of these rules.[68] Since all the documentary data to be relied on is in the public domain, no ethical consideration arises.

1.9. Arrangement of chapters

The thesis is divided into seven chapters. Chapter one introduces the study. It provides the general introduction, the context in which the study is set and the basis and structure of the study. Chapter two is dedicated to unmasking the crime of corruption. It critically analyses the meaning and characteristic of corruption in order to determine why the recovery of corruptly acquired assets is considered an indispensable strategy in the fight against corruption. Chapter three looks into the assets recovery strategy in detail. It discusses the

[67] Doctrinal research is concerned with the analysis of legal rules so as to clarify ambiguities within rules and formulate coherent doctrines/principles. For an exposition on doctrinal research, see P Chynoweth "Legal Research" in A Knight and L Ruddock (eds) *Advanced Research Methods in Built Science* (2008) 28-38.

[68] It is now widely accepted that a part of the courts function is to make decisions according to "policy considerations" of the government of the day. It is therefore important to understand the nature of policy considerations influencing judicial decisions. For an empirical work on policy matters and how it influences decisions by the judiciary, see J Bell *Policy Arguments in Judicial Decisions* (1983).

meaning, foundational basis, and types of assets recovery and the legislative framework for recovery of corruptly acquired assets in Kenya and South Africa. The aim is to prepare the ground for the discussion in the fourth, fifth and sixth chapters on how the non-conviction based type of assets recovery fits within the requirements of a constitutionally entrenched human rights framework and how the right to fair trial and right to property have impacted on the framing of the non-conviction based assets recovery mechanism in Kenya and South Africa. In this regard, chapter four examines the tension between the non-conviction based assets recovery mechanism and the right to fair trial and how it has been resolved while chapter five discusses its constitutionality in relation to the requirements of the right to property. Chapter six analyses the impact, if any, of the two human rights frameworks on the treatment accorded to the non-conviction based assets recovery mechanism in Kenya and South Africa. Chapter seven concludes by identifying lessons from the study and offering recommendations based on the study.

CHAPTER TWO

MEANING AND NATURE OF CORRUPTION

"When the state is in healthy condition, all things prosper; when it is corrupt, all things go to ruin."[69]

2.1. Introduction

This chapter begins the study by dissecting the concept of corruption. The aim is to identify the meaning and characteristic of corruption and by extension to reveal the place of the assets recovery strategy in its eradication. In this regard, it is noteworthy that though corruption is not a new phenomenon,[70] disagreement still abounds on its meaning.[71] This disagreement has ranged from the criteria to be used in determining corrupt conduct to the actual content of corruption. The criteria debate has pitted those who see law as the best criterion for determining standards of behaviour against those who view morality as the better criterion. But even among those who are for morality there is an internal schism separating those who favour universal morals from those who favour relative morals.[72] On the other hand, the debate on the content of corruption has seen a division emerging not only on whether the definition should cover both the public and private related corruption but also on whether the list of corrupt acts should be closed to specific acts or should be left open ended.[73]

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[69] A saying by Democritus quoted in N Kofele-Kale "The Right to a Corruption-Free Society as an Individual and Collective Human Right: Elevating Official Corruption to a Crime under International Law" (2000) 34 *International Law Journal* 149 at 149.

[70] See, for example, JT Noonan *Bribes* (1984) 13-14 (tracing the concept of bribery to the Middle East and finding out that in Mesopotamia and Egypt: "from the fifteenth century B.C. on, there has been a concept that could be rendered in English as 'bribe', of a gift that perverts judgment"). See also P Bardhan "Corruption and Development: A Review of Issues" (1997) XXXV *Journal of Economic Literature* 1320 at 1320 (pointing out that "While corruption has always been with us, it has had variegated incidence in different times at different places with varying degrees of damaging consequences").

[71] This disagreement has been noted by Johnston in M Johnston "Fighting systemic corruption: Social foundations for institutional Reform" In M Robinson (ed) *Corruption and Development* (1998) 85 at 89 (pointing out that there remains considerable confusion over what exactly ''corruption'' means).

[72] See, for example, EC Banfield *The Moral Basis of a Backward Society* (1958); JPO de Sardan "A moral economy of corruption in Africa?" (1999) 37(1) *The Journal of Modern African Studies* 25 at 25 (pointing out that the concept is often stigmatized as amoral or moral). Peter Euben makes us understand that it can also mean degenerative change. He writes that corruption connotes moral decay, infection, and ultimately a loss of integrity and identity: "A people degenerates when it sinks to a lower standard of behaviour than the generations which preceded it". JP Euben "Corruption" in T Ball *et al* (eds) *Political innovation and conceptual change* (1989) 220 at 221-222. For a similar view, see also J Harrington *The Commonwealth of Oceana and A System of Politics* (1992) 60-61.

[73] The World Bank, for example, defines corruption as "the abuse of public office for private gain." World Bank *Helping Countries Control Corruption: The Role of the World Bank* (1997) 8. The African Development Bank, on the other hand, sees corruption as encompassing not only abuse of public office but also of private office and defines it as "the abuse of public or private office for personal gain." See African Development Bank

This disagreement on the criteria and content of corruption can be attributed to the complex and multifaceted nature of corruption which makes it take on various forms and functions in different contexts.[74] As Marquette pointedly laments, ''no matter how many times it is prodded, poked at or pulled apart, more questions than answers seem to arise from the literature''.[75] Because of this difficulty in identifying the true nature of corruption some commentators, like Ulrich Von Alemann, have advised against a search for a universally true and correct definition arguing that such a definition is unattainable and can only act as a guiding star.[76] Others, like Oskar Kurer, have contended that this disagreement on the definition of corruption is healthy as "far from hampering the research effort, the lack of a unified definition has positively stimulated it".[77]

It is the position of this thesis, however, that the disagreement on the definition of corruption if unresolved would result in a confusing state of affairs where varied definitions of corruption exist side by side in uneasy competition. Such a confusing state of affairs if allowed to persist could discourage or slow down the global effort to eradicate corruption as there would be no agreement on which corruption to fight. To avoid such a result, it is imperative, therefore, that the different perspectives on corruption are examined and their commonalities exposed with a view to reconciling their differences. This chapter specifically seeks to do that. It discusses the various theoretical perspectives on and dimensions of corruption with a view to differentiating with clarity and delimiting the terrain of operation of corruption as is generally understood, if not globally, at least, within the context of this thesis. The clarification is by extension aimed at determining why the recovery of corruptly acquired assets is considered an indispensable strategy in the fight against corruption.

The starting point for such an endeavour would be to state the problem, well encapsulated by James C Scott as: "Corruption, we would all agree, involves a deviation from certain

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"Anticorruption Policy: Harmonized Definition of Corrupt and Fraudulent Practices" available at http://www.adb.org/Documents/Policies/Anticorruption/definitions-update.pdf (accessed 4/2/2010). Transparency International eschews this public-private dichotomy and simply defines it as the abuse of entrusted power for personal gain. T International *Global Corruption Report* (2003).

[74] On the complexity of corruption, see generally MK Khan "A Typology of Corrupt Transactions in Developing Countries" (1996) 27(2) *Institute of Development Studies Bulletin* 12; J Gardiner "Defining Corruption, Coping with Corruption in a Borderless World" in M Punch *et al* (eds) *Proceedings of the Fifth International Anti-Corruption Conference* (1993) 26.

[75] H Marquette "Corruption Eruption: Development and the International Community" (1999) 20(6) *Third World Quarterly* 1215 at 1215.

[76] See U Von Alemann "The Unknown Depths of Political Theory: The Case for A Multidimensional Concept of Corruption" (2004) 42 *Crime, Law & Social Change* 25 at 26 ("Maybe such a definition is like the Holy Grail, i.e. something unattainable that can only be a kind of guiding star").

[77] O Kurer "Corruption: An Alternative Approach to Its Definition and Measurement" (2005) 53 *Political Studies* 222 at 227.

standards of behaviour. The first question which arises is, what criterion shall we use to establish those standards?"[78] The second question would be, which standards of behaviour should these be? In this context, the thesis views corruption as an illegal (not merely immoral) act; that arises from the abuse of public (not private) entrusted authority; and which benefit private (not public) interest. These various dimensions and perspectives of corruption are clarified, differentiated and justified in detail in the following sections.

2.2. Corruption as an illegal not (merely) immoral act

The debate on the relationship between law and morality is not new. It forms a central part of legal philosophy and has for a long time pitted the "positivists" against the "naturalists" with the "historicists" coming late in the day to join in the fray.[79] The positivists, on the one hand, view law as being independent from morality and insist on law as the criterion for the standard of behaviour. The naturalists, on the other hand, view law and morality as being intertwined and insist on a universal morality as the criterion for the standard of behaviour. The historicists, on their part, while agreeing with the naturalists on the connection between law and morality, insists that morality as a criterion must take into account the historical and cultural specificity of each society. But what do these criteria mean in practice and which criterion or criteria should one adopt when defining corruption?

2.2.1. The legal criterion

The legal criterion of standard of behaviour is usually attributed to the positive law school of thought. The positivists contend that the ultimate source of law is the will of the lawmaker as expressed in operational law and not some abstract morality as espoused by the naturalists. They argue that one must first establish what law is before it can legitimately be asked what the law ought to be or how it came to be what it is.[80] In other words, to the positivists the problem of norm setting is determined with reference to the legal rules provided by statutes

[78] JC Scott, *Comparative political corruption* (1972) 3.

[79] The positivists are the proponents of the positive law school of thought. The naturalists support the natural law school of thought. The historicists espouse the historical law theory.

[80] See J Austin *The Province of Jurisprudence Determined* (1995) 157 explaining this legal positivism thus:

> "The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry. A law, which actually exists, is a law, though we happen to dislike it, or though it vary from the text, by which we regulate our approbation and disapprobation."

and court decisions. Thus, to positivists, the standard of behaviour is what is formally enunciated as such by the lawmakers.[81]

To a legal positivist, therefore, corruption would be connected to any behaviour that violates some formal standard or rule of behaviour set down by a political system for its officials and citizens. This positivist perspective to corruption can be equated to what some commentators have called the legal approach to corruption.[82] This definition says, if an act is prohibited by formal laws, it is corrupt; if it is not prohibited, it is not corrupt even if it is injurious or unethical. For example, behaviour was judged by James Bryce to be either permissible or corrupt depending on the criteria established by legislators and judges:

> "Corruption may be taken to include those modes of employing money to attain private ends by political means which are *criminal* or at least *illegal*, because they induce persons charged with a public duty to transgress that duty and misuse the functions assigned to them (emphasis added)."[83]

One advantage of using law as the criterion for corruption is that the resultant definition of corruption is clear and can easily be operationalized as government officials and ordinary citizens can be expected to access and understand the requirements and prohibitions spelled out in statutes.[84] A second advantage is that even if the legal definition is not perfect or if new corrupt issues arise in the future, the lawmaker can easily amend the laws to deal with these problems.

The legal criterion, however, suffers from a number of shortcomings. One flaw is that it assumes that all that is legal is not corrupt and that all that is illegal is corrupt. However, this is not necessarily true. As Jackson *et-al* aptly points out:

> "Worse still, using law as the standard of corruption supports the assertion that everything that is not legal is permitted. The legal foundation of political corruption is simultaneously too narrow and too

[81] Some positivists have adopted an extreme conceptualism whereby a legal norm is only considered legal if a sovereign lawmaker is identified. For analysis of this school, of which Kelsen's theory is an example (H Kelsen *General Theory of Law and State* (1945)), see E Bodenheimer *Jurisprudence: The Philosophy and Method of Law* (1974) 91-109. At the other extreme end of the positive theory are the adherents of the Critical Legal Studies movement who view legal rules as rationalizations of officials' behaviour, the source of which is found in economic, political, and other non-legal factors. For an exposition of this school, see JA Standen "Note, Critical Legal Studies as an Anti-Positivist Phenomenon" (1986) 72 *Virginia Law Review* 983.

[82] Scott calls this approach, the legal approach. See JC Scott, *Comparative political corruption* (1972) 3-5. See also AJ Heidenheimer *Political Corruption: Readings in Comparative Analysis* (1970 3-5 (calling this definition "Public office centred" definition). A definition cited by commentators today is that of Nye in JS Nye "Corruption and Political Development: A Cost-Benefit Analysis" (1967) LXI (2) *American Political Science Review* 417 at 419. According to Nye, corruption is an act which:

> "[D]eviates from the *formal* duties of a public role because of private regarding (personal, close family, private clique) pecuniary or status gains; or violates rules against the exercise of certain types of private role - regarding influence (emphasis added)."

[83] J Bryce *Modern Democracies* (1921) 477- 478.

[84] This is not always the case though as statutory drafting often lends itself to varied interpretations. Still the fact that it is written in statutory books makes it accessible for verification.

> broad, excluding too much (the unethical but legal) and including too much (the illegal but not unethical)."[85]

The second defect is that the definition depends on the idea that legal frameworks are somewhat neutral, objective and non-political and that, therefore, what the lawmaker wills in the law should be taken as the true representation of the good of society. Research, however, shows that laws regulating political and bureaucratic conduct are not neutral and often depend on the prevailing assumptions and beliefs about the nature of politics and the character of public office.[86] In some cases these laws are actually a product of a trade-off among the politically powerful who can determine and declare a conduct to be improper or proper for reasons not necessarily in tandem with the interest of the general public.[87] James Scott captures this concern thus:

> "Our conception of corruption does not cover political systems that are, in Aristotelian terms, 'corrupt' in that they systematically serve the interests of special groups or sectors. A given regime may be biased or repressive; it may consistently favour the interests, say, of the aristocracy, big business, a single ethnic group, or a single region while it represses other demands …."[88]

A further shortcoming of the legal approach is that when the impugned conduct allegedly transgresses a legal norm or standard, such as customary law, which is not tied to a specific statute or court ruling, this definition of corruption becomes less useful in differentiating acceptable and unacceptable behaviour in society.[89]

2.2.2. The objective moral criterion

To overcome some of the shortcomings of the positivist approach, a second way of identifying the required standard of behavior would be to resort to natural law. Natural law theory holds the view that man-made law, as well as individual choices, can and should be

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[85] M Jackson *et al* "Sovereign Eyes: Legislators' Perception of Corruption" (1994) 32(1) *Journal of Commonwealth and Comparative Politics* 54 at 55-56.

[86] See, for example, L Beck "Senegal's Enlarged Presidential Majority: Deepening Democracy or Detour?" in R Joseph (ed) *State, Conflict, and Democracy in Africa* (1999) 197 (Discussing the public perception on the reported case of LONASE scandal involving the skimming off of large sums of money from the Senegalese lottery and how the perceptions are influenced by the nature of politics at play).

[87] For an exposition on the politics of law making, see, for example, D Kairys (ed) *The politics of law: A progressive critique* (1998).

[88] JC Scott, *Comparative Political Corruption* (1972) 5. See also O Kurer "Corruption: an alternative approach to its definition and measurement" (2005) 53(1) *Political studies* 222 at 222 (pointing out that the definition "fails to cover cases where legislation itself is corrupt (for example, 'legislative corruption' such as the indiscriminate enrichment of legislators), and it is inapplicable in pre-modern settings").

[89] As noted by J Gardiner, "Defining Corruption" in AJ Heidenheimer & M Johnston (eds) *Political Corruption: Concepts and Contexts* 3 ed (2002) 25:

> "A belief that anything the legislature decides is good requires condemnation as corruption of any actions which nullify the legislature's intent. Acceptance of the possibility that the legislature can create a bad policy however creates the possibility that some corruption may be necessary or even good."

determined using objective moral standards.[90] As HLA Hart explains, the classical theory of natural law is the view "that there are certain principles of human conduct, awaiting discovery by human reason, with which man-made law must conform if it is to be valid".[91] In other words, to the naturalist, in order to determine what the standard of behaviour is, the inquiry must not stop at examining what the rules that have been accepted says but must go further and refer to the objective standards of morality.[92] It is only the rules that conform to this objective standard of morality that deserves to be accepted as law (standard of behaviour).

To a naturalist, therefore, corruption would be viewed as an act that goes against human nature, against human morality. This definition says: if an act is harmful to the general human good (morality), it is corrupt even if it is legal; if it is beneficial to the public good, it is not corrupt even if it violates the law. For example, Thomas Aquinas, one of the proponents of natural-law theory, argued that "law is primarily an ordination for the general good, commands to do particular deeds are laws only when ordered to that general good."[93] In his view, while actions "are certainly individual […] those individual actions have a relationship to the general good ...."[94] Thus, individual actions that go against this general good should be condemned and punished.[95] As Larry A Dimatteo concludes in his review of the history of natural law theory:

> "As a member of such a community, one's actions, contractual or otherwise, must never be detrimental to that community. Taking advantage of another community member would be considered such a detriment. On strict theological grounds, this detriment would be considered a sin against God. Therefore, Aristotelian and Thomistic virtue held that the obtainment of wealth was not a good in

[90] For a discussion on natural law theory, see, for example, R Dworkin "The Model of Rules" (1967) 35 *University of Chicago Law Review* 14.
[91] HLA Hart *The Concept of Law* (2012) 182.
[92] See P Soper "Some Natural Confusions about Natural Law" (1992) 90 (8) *Michigan Law Review* 2393 at 2398 (noting that a natural law theory is "a theory of law that insists that one determine what law is, not just by a factual inquiry into the conventions that have been accepted, but also by reference to minimum standards of morality").
[93] See T Aquinas *Selected Philosophical Writings* (1993) 413 ("Actions are certainly individual, but those individual actions have a relationship to the general good").
[94] T Aquinas *Selected Philosophical Writings* (1993) 413.
[95] This position is supported by Lon Fuller in his book *The Morality of Law* (1969) 5-6. To Fuller, there are two sorts of morality: the morality of aspiration and the morality of duty. The morality of aspiration:

> "[I]s the morality of the Good Life, of excellence, of the fullest realization of human powers . . . [A] man might fail to realize his fullest capabilities. . . . But in such a case he was condemned for failure, not for being recreant to duty; for shortcoming, not for wrongdoing."

The morality of duty, on the other hand,

> "[L]ays down the basic rules without which an ordered society directed toward certain specific goals must fall short of its mark …. It does not condemn men for failing *to* embrace opportunities for the fullest realisation of their powers. Instead, *it condemns them for failing to respect the basic requirements of social living* (emphasis added)."

> itself. It was a means to self- sufficiency which was a precursor of happiness. However, one could only obtain happiness through wealth if it was obtained honourably."[96]

Proponents of this school emphasise the classical view of public good in which officials are unselfish and treat everyone equally and with fairness.[97] Thus, an act that is selfish, unequal in treatment and/or is unfair in process and result can be said to be corrupt.[98] These principles of natural law are usually fronted as universal, neutral and unbounded by time.[99]

However, to be sure, the naturalists are not unanimously agreed on how morality or public good is to be determined. To those of the Judeo-Christian legal tradition, such as St. Augustine and St. Aquinas, the arbiter of this moral law was to be the ecclesiastical authority.[100] To some, like Fuller and Finnis, the decision is to be made by a skilful practitioner, or skilful practitioners basing their analysis on the facts of each instance of law-making.[101] To others, like John Locke, natural law is the "decree of the divine will" rather than a mere "dictate of reason" and can, therefore, only be revealed to a select few by God.[102] However, the dominant position within the natural law tradition appears to be that moral truths are to be derived from truths about human nature as viewed by the whole society (failing which, by the majority in the society).[103] The basis of this position is that since natural law is discoverable from the universe through human reason, and since all human beings are endowed with reason, it should only follow that these laws of nature are universal and discoverable to all human beings in whatever station of life they maybe.[104] Thus, according to the dominant view, what is moral, or what is good, is what the people say

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[96] LA Dimatteo "The History of Natural Law Theory: Transforming Embedded Influences into a Fuller Understanding of Modern Contract Law" (1999) 60 *The University of Pittsburgh Law Review.* 839 at 848.
[97] For a discussion, see J Rawls *A Theory of Justice* (1971) particularly 11-18, 114-117.
[98] See R Dworkin *Taking Rights Seriously* (1977) (giving examples to illustrate how natural law principles aim at the fairness of the outcome).
[99] See, for example, LL Wenreb *Natural Law and Justice* (1987) 1-2 (discussing the connections between nature, law, and morality in classical natural law theory).
[100] See JH Berman, "The Religious Foundations of Western Law" (1975) 24 *Catholic University Law Review* 490 at 498 (pointing out that "[t]here was also a claim of moral superiority by the ecclesiastical authority, coupled with demands for changes in the secular law to conform to moral standards set by the clergy."). See also WW Bassett "Canon Law and the Common Law" (1978) 29 *Hastings Law Journal* 1383 at 1407 (pointing out that "[b]y the middle of the fourteenth century the principles and the theories of the canonists virtually permeated society").
[101] See, for example, J Finnis *Natural Law and Natural Rights* (1980) 33-36 (responding to the "is/ought" challenge).
[102] See J Locke *Essays on the Law of Nature* (1958) 474-475 (defining divine law as law that "which God has set to the actions of men, and whether promulgated to them by the light of nature, or the voice of revelation").
[103] See RP George *In Defence of Natural Law* (1999) (summarizing the dispute). See also J Locke *Two Treatise of Government* (1967) Second Treatise, section 98 (arguing, though in a political context, that unanimous consent is "next impossible ever to be had" and that the only alternative is majoritarianism).
[104] See, for example, YR Simon *The Tradition of Natural Law: A Philosopher's Reflection* (1965) 41-66; LL Wenreb *Natural Law and Justice* (1987) 1-2 (discussing the connections between nature, law, and morality in classical natural law theory).

it is, and since it is based on human nature, what is moral in New York, should be moral in Paris, Beijing, Sydney or Lagos.[105] Jean-Jacques Rousseau pointed out this universality of morality when he said:

> "Thus there is, at the bottom of *all souls*, an innate principle of justice and of moral *truth* (which is) *prior* to *all national prejudices*, to *all maxims of education*. This principle is the involuntary rule by which, despite *our own maxims*, we judge our actions, and those of others, as good or bad; and it is to this principle that I give the name conscience (emphasis added)."[106]

This natural-law school view of corruption as a breach of the general human good (as determined by public opinion) can be equated to what some authors have called "public interest" or "public opinion" criterion for corrupt conduct.[107] The "public interest" school views corruption as a violation of public interest.[108] The "public opinion" school, on the other hand, tries to define corruption according to how people in a nation view it. According to this school, an act is said to be corrupt when the weight of public opinion perceives it so.[109] Thus, a natural-law theory perspective, in a way, combines these two perspectives in its approach to the conception of corruption.

One advantage of the natural-law perspective is that, because it is based on universal moral principles, it can be used as an acceptable framework for a cross-cultural study or analysis of corruption.[110] The second advantage is that since it represents the general understanding of corruption by the citizens in a country, it can provide a basis for effective anti-corruption strategy. This is because, it is easier to enlist and foster the public support in the fight against corruption when citizen values correspond to the statutory definition of corruption. Citizens are also more likely to police themselves when faced with compromising situations since the conception of corruption would be in line with their own internal beliefs. At the global level,

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[105] But see Oliver Wendell Holmes in "Natural Law" (1919) 32 *Harvard Law Review* 40 (arguing that one's reason is often tampered by one's earlier environment and experience, which is not uniform).

[106] JJ Rousseau "Lettres Morales" in JJ Rousseau *Ouvres Completes de Jean-Jacques Rousseau* vol 4 (1969) 1111.

[107] JC Scott, *Comparative Political Corruption* (1972) 3.

[108] A classic example of a public interest definition available in literature is that of Carl Friedrich, quoted in AJ Heidenheimer *et a*l (eds) *Political Corruption: A Handbook* (1989) 10; and in M Philip "Defining Political Corruption" (1997) XLV *Political Studies* 436 at 440:

> "The pattern of corruption can be said to exist whenever a power holder who is charged with doing certain things i.e., who is a responsible functionary or officeholder, is by monetary or other rewards not legally provided for, induced to take actions which favour whoever provides the rewards and thereby *does damage to the public and its interest* (emphasis added)."

[109] For a discussion, see M Jackson *et al* "Sovereign Eyes: Legislators' Perception of Corruption" (1994) 32(1) *Journal of Commonwealth and Comparative Politics* 54 at 54-67.

[110] But see Mari-Liis Liiv *The Causes of Administrative Corruption: Hypothesis for Central and Eastern Europe* (2004) 9 (arguing that "[t]he weakness of the moralistic approach derives from negative connotations – wrong judgments and cultural relativism that may accompany international comparisons").

such a universalistic approach to corruption provides a ready standardized and acceptable frame for engendering a global action against corruption.

Still, the natural-law theory approach is not without limitations. One major limitation is that a concept as broad as "morality" or "public good" upon which behaviour is to based, while it might be innate in human nature, is not an easy concept to identify.[111] It is inevitably broad and ambiguous, and will rarely give one answer that everyone accepts.[112] A second challenge is that it is usually difficult to demarcate the boundary between the opinion of public and that of the political elite.[113] What is taken to be public opinion in many societies is oftentimes the opinion of the elites.[114] It is also not a given that all citizens in a country have the capacity to reason and identify governing ethical norms.[115] And even if they all do, one's reason, as noted by Oliver W. Holmes, is often tampered by one's earlier environment and experience, which is often not uniform.[116] Furthermore, research carried out on public opinions show that attitudes and beliefs are not static and can and do change with time.[117] This possibility of fluctuation in opinion with time raises doubt about the immutability and universality of morality as espoused by the naturalists.

2.2.3. The subjective moral criterion

To overcome the challenge occasioned by the possibility of fluctuation in opinion about the required standard of behaviour, one way would be to view corrupt conduct from a relativist perspective. The relative moral criterion is usually attributed to the historical law school of

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[111] See, for example, S Anderson "Corruption in Sweden: Exploring Danger Zones and Change" (2004) available at http://www.diva-portal.org/smash/get/diva2:142008/FULLTEXT01.pdf (accessed 20/10/2012) 28 (claim that according to the public interest-centred definitions, illegal actions can be justified if they promote the common interest).

[112] See, for example, R Williams *Political Corruption in Africa* (1987) 11 (pointing out the difficulty and arguing that corruption, like "obscenity is more readily condemned than defined or explained").

[113] See AJ Heidenheimer *Political Corruption: Readings in Comparative Analysis* (1970) (In his view the corruptness of political acts is determined by the interaction between the judgment of a particular act by the public and by political elites or public officials. He points to the existence of a scale or dimension of corruption that can be used to classify political behaviours according to their degree of corruptness from "black" to "gray" to "white").

[114] See, for example, M Johnston *Political Corruption and Public Policy in America* (1982) 7 (pointing out that there are, after all, many publics and they rarely agree on anything of importance).

[115] See, for example, J Locke "The reasonableness of Christianity" in J Locke *The Works of John Locke* vol 7 (1824) 140 at 142 (arguing that "human reason unassisted" can "fail men in its great and proper business of morality").

[116] See OW Holmes "Natural rights" (1919) 32 *Harvard Law Review* 40 at 41, concluding that:

> "The jurists who believe in natural law seem to me to be in that naive state of mind that accepts what has been familiar and accepted by them and their neighbours as something that must be accepted by all men everywhere."

[117] See H Erskine "Polls: corruption in government" (1973) 37(4) *The Public Opinion Quarterly* 1.

thought. The historical law theory sprung up as a response to the inability of the natural law theory to accept the relativity of morals and as an attempt to recognise customary law that had been left out by the positivists.[118] The theory advocates for a relativist approach to the conception of law arguing that the ultimate source of law is the character, the culture, and the historical traditions of a society.[119] It holds that law is determined by the "custom" and "popular belief" of a specific people and not by "the arbitrary will of the legislature".[120] Unlike the positive school, the historical law school concentrates more on the rules of customary law than the rules of statutory law and, unlike the natural school, it is more concerned with those specific moral principles that correspond to the social life, the beliefs and the values of a given people or a given community rather than with universal moral principles. Thus to the historicists, the criterion for determining the standard of behaviour is the popular belief and custom of the society in which the law is to apply.[121]

Understood in this sense, therefore, from the historical law perspective, corruption would be viewed as a concept in comparative, historical research. This definition says: if an act is harmful to the good of a specific society, it is corrupt even if it is legal in the eye of another group of people; if it is beneficial to a people of a particular society, it is not corrupt even if it violates the good of another society or another generation within the same society.[122] In other words, from a historicist's perspective, corruption should be viewed as a relative

[118] The historical school of thought, just like its characteristic, was founded in response to a historical event – the 1814 drafting of a code of laws for the states that made up the German confederation (before Germany was established as a unified state). It is usually traced back to the writings of the German jurist, Friedrich Karl von Savigny who opposed the idea of such a cross-cutting code of laws, which did not take into account the historical peculiarities of the individual states making up the German confederation. In his seminal essay entitled, *On the Calling of Our Time for Legislation and Jurisprudence*, Savigny, set out a theory of what law is, how it is related to the character and traditions of the society of which it is a part, and how it develops over time. He held that a good law should be a product of the history and experience of the people it is to regulate, and that in adapting law to new circumstances the legislator or judge should take cognizance of this history and experience. In this view, Savigny was rejecting the predominant idea in the Western thought at the time which viewed legislation as the main source of law, and the legislator's primary task as guaranteeing the "rights of man" or the "greatest good of the greatest number," or both, without taking due regard to a society's historical experiences. See FV Savigny *Of the Vocation of Our Age for Legislation and Jurisprudence* (1831). See also A Bickel *The Morality of Consent* (1975).

[119] For an exposition and critique of the historical school of jurisprudence, see J Stone *The Province and Function of Law: Law as Logic, Justice, and Social Control: A Study in Jurisprudence* (1950) 419-48.

[120] Law, wrote Savigny, "is developed first by custom and by popular belief, then by juristic activity--everywhere, therefore, by internal, silently operating powers, not by the arbitrary will of a legislator". See FV Savigny *Of the Vocation of our Age for Legislation and Jurisprudence* (1831) 30.

[121] HJ Bermant "Toward an Integrative Jurisprudence: Politics, Morality, History" (1998) 76(4) *California Law Review* 779 at 788-794. See also OW Holmes *The Common Law* (1963) 1 (pointing out that "the life of the law has not been logic: it has been experience").

[122] An example of definition that fits this bill is that proposed by A Sajo "From Corruption to Extortion: Conceptualization of Post-Communist Corruption" (2003) 40 *Crime, Law and Social Change* 171 at 176 ("While a concept of corruption may serve goals of intellectual clarity and categorisation, "real corruption" is a *social construct* that results from official definitions … and anti-corruption practices").

concept and not as a universal one. In this regard, Michael Johnston has aptly pointed out that:

> "We never will devise a definition of corruption as a category of behaviour that will travel well to all such places or times – or even, realistically, to most of them. Moreover, such approaches will often tell us little about the development or significance of corruption in real societies. I propose that in such instances we study, not a category of behaviour, but rather the issue or idea of corruption, and the social and political processes through which it acquires its meaning and significance. I regard corruption as a 'politically contested concept', and suggest that comparative analysis can fruitfully focus upon what I call role-defining conflicts."[123]

This need for a relativist approach to conceptualisation of corruption springs from a number of considerations: First, is the recognition that the social, political and economic structures of countries differ. For example, some of the tasks that are performed by government officials in countries with socialist systems are performed by private individuals in the private sector of the capitalist societies, and in these two situations different standards apply.[124] Second, is the understanding that the attitude of a people to corruption is often influenced by their historical experience.[125] For instance, in former colonies where the European legal system was superimposed on the traditional system, the prevalent attitude is that practices that were customary in the traditional set up only became corrupt when colonial values were introduced.[126] Third, there is difference in opinion about what the scope of corruption should be. There are countries that believe that corruption should be limited to bribery, while others believe that the concept should be broadened to cover other acts such as embezzlement, fraud, favouritism, election dishonesty and bid rigging.[127] And even among those who accept that corruption should cover bribery, there are some who believe that customarily recognized acts such as "gift giving" or "grease payments" should be left out of the definition.[128]

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[123] M Johnston *Comparing Corruption: Conflicts, Standards and Development* a paper presented at the XVI World Congress of the International Political Science Association, Berlin, 1994 available at http://www.nobribes.org/Documents/ipsaconf.doc (accessed 20/12/2012).

[124] James Scott, for example, notes that a nation where almost everyone is a government employee can't easily be compared with one where most people work for private corporations. JC Scott *Comparative Political Corruption* (1972) 5.

[125] Ronald Wraith and Edgar Simpkins, for instance, point out that "an act is presumably only corrupt if society condemns it as such, and if the doer is afflicted with a sense of guilt when he does it: *neither of these apply to a great deal of African nepotism* (emphasis added)." R Wraith & E Simpkins *Corruption in Developing Countries* (1963) 35.

[126] As a senior official of a Pacific nation said at the Third International Anti-Corruption Conference in Hong Kong, "we did not have corruption in my nation until the British legal system was brought in: The British introduced us to the concept of corruption! See Independent Comission Against Corruption Hong Kong *Third International Anti-Corruption Conference, 1987, Hong Kong -- Conference Report* (1987).

[127] Compare the definition of corruption in the South Africa's POCA & Kenya's ACECA discussed in detail in section 2.3.1 below.

[128] See, for example, the US Foreign Corrupt Practices Act of 1977 s 78dd-1(b), 78dd-2(b) (exempting the payment of grease money from the ambit of foreign bribery).

Yet, despite its apparent usefulness in identifying the type of activities understood as immoral in a particular polity, the use of local norms and judgments as a basis for discussing moral concepts such as corruption poses a number of related problems. First, by endorsing conceptual relativism, the theory creates an obstacle to any attempt at cross-cultural analysis of moral concepts. Second, by limiting the discussion of moral concepts to time-bound sensitivities of individual polities, it impinges upon a search for a universal and immutable sense of morality and by extension corruption. Third, the idea of relative national ideals and community values, if unchecked, can be hijacked by crafty individuals to justify political arbitrariness or moral depravity. For example, in the context of Africa it is said that the use of public position to assist members of one's family or next of kin is a valid expression of the extended family system that has existed in many African communities. Or that bribery is a harmless way of showing gratitude for deeds done, a practice that had existed in many African societies since time immemorial.[129] However, as the Economic Commission for Africa rightly points out, these explanations are mere justifications of what are evidently corrupt conducts.[130]

2.2.4. Why legal criterion is preferred

The three criteria discussed leave us with a set of contradictory descriptions of standard of behavior and by extension the phenomenon of corruption, all of which, as highlighted, have major disadvantages. The options that remain is either to accept a state of affairs with multiple definitions or to try to pick up the strengths of each approach and cobble up a hybrid definition. The first option will leave us with different approaches in uneasy competition. For instance, historical law approaches which rely on ascertaining locally what is perceived to be good or moral will have the disadvantage of being relativistic, different in time and from society to society. Natural-law approaches that define concepts according to universal moral principles will meet the criticism of being culturally insensitive and of imposing a particular moral understanding of behaviour on the world.[131] On the other hand,

[129] For a discussion of the African perspective, see, for example, JPO de Sardan "A Moral Economy of Corruption in Africa?" (1999) 37(1) *The Journal of Modern African Studies* 25; C Akani (ed) *Corruption in Nigeria: The Niger Delta Experience*, (2002); A Nwankwo "*Political Economy of Corruption in Nigeria"* in C Akani (ed) *Corruption in Nigeria: The Niger Delta Experience,* (2002) 9; E Ekekwe *Class and State in Nigeria* (1986); T Falola and J Ihonvbere (eds) *Nigeria and the International Capitalist System* (1988);.

[130] Economic Commission for Africa "Assessing the Efficiency and Impact of National Anti-Corruption Institutions in Africa" (2010) ("One problem with cultural explanations for corruption is that they easily become justifications")

[131] For example, when examining why, according to British standards, colonial Burma was so "corrupt" JS Furnivall concluded that in many cases the Burmese were simply following their customary norms of correct

in an increasingly globalizing world, it is only a well-defined objective criterion of behaviour that can permit international comparisons and engender globalized action against harmful behaviour such as corruption.

Given these irreconcilable differences, the alternative approach would be to integrate the three classical schools of thought into a common functional focus.[132] This approach is not new and has been advocated by the integrative law theorists. The integrative law theory, which is usually traced to Jerome Hall,[133] is based on the understanding that each of the competing schools of law has identified some useful dimension of law, which would be lost if only one of the schools is used as a source of reference.[134] It thus advocates for the mutual reinforcement of the three schools of jurisprudence while recognising their separate individual importance.[135] It provides that for this mutual reinforcement to be made possible, a broader definition in law than that which is usually adopted by each of the schools and which captures the particular virtues of each school must be given.[136] A definition of corruption based on this approach would thus have to embrace the virtues of all the three legal schools of thought for it to meet the criterion of the integrationists. Such a definition would most probably capture the aspect of formal duties and norms from the positivist

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conduct. JS Furnivall *Colonial Policy and Practice: A Comparative Study of Burma and Netherlands India* (1948).

[132] But see O Kurer "Corruption: An Alternative Approach to Its Definition and Measurement" (2005) 53 *Political Studies* 222 at 227 (pointing out that "far from hampering the research effort, the lack of a unified definition has positively stimulated it").

[133] The theory was first espoused by Hall in his 1947 article "Integrative Jurisprudence" in P Sayre *Interpretations of modern legal philosophies: essays in honour of Roscoe Pound* (1947) 313. He called this legal philosophy that combines the three classical schools (legal positivism, natural-law theory, and the historical school) integrative jurisprudence.

[134] J Hall *Foundations of jurisprudence* (1973) chap 6; J Hall *Studies in jurisprudence and criminal theory* (1958) 37-47; J Hall, "From Legal Theory to Integrative Jurisprudence" (1964) 33 *University of Cincinnati Law Review* 153. See also E Bodenheimer "Seventy-Five Years of Evolution in Legal Philosophy" (1978) 23 *American Journal of Jurisprudence* 181 at 204-05 (Writing of "The Need for an Integrative Jurisprudence" citing Jerome Hall).

[135] See HJ Bermant "Toward an Integrative Jurisprudence: Politics, Morality, History" (1998) 76(4) *California Law Review* 779 at 801 explaining that:

> "The issue is not the primacy of one or another of these three aspects of the legal enterprise but rather their integration. In situations where they appear to conflict with each other, the right solution can only be reached by prudentially weighing the particular virtues of each. What are trumps depends on what is bid; and sometimes the bid is no trump. Indeed, all that needs to be subtracted from each of the three major schools of jurisprudence, in order to integrate them, is its assertion of its own supremacy. All that needs to be added is a recognition of their mutual interdependence."

[136] See J Hall, "Integrative Jurisprudence" in PL Sayre (ed) *Interpretations of modern legal philosophies: essays in honour of Roscoe Pound* (1947) 313 (combining positivism and natural-law theory with a sociological jurisprudence and defining law as a type of social action, a process in which rules and values and facts coalesce and are actualized).

perspective and the violation of public good as viewed by both the naturalists and historicists.[137]

This thesis agrees with the integrationists that each of the three substantive legal schools of thoughts has isolated some important perspective of law that would be lost if one aligns itself exclusively with any one of the schools. It, however, contends that if lawmakers are truly representative of the people, then their conception of corruption as enacted in statutes would most probably also be in tandem with the predominant opinion of members of the society in which they spring from.[138] As jurist Dicey correctly pointed out, a representative legislature, to ensure its own political survival, would not ordinarily legislate against the wishes of the people or against "the sentiment prevailing among the distinct majority of the citizens of a given country".[139] In other words, one can safely argue that a positivist approach to corruption does not really contradict a historicist or a naturalist understanding of corruption. Indeed, legal definitions in most, if not all countries, also usually contribute to the public good and breaking them is condemned by the public.[140] Thus an act declared illegal by the formal laws would most probably also be immoral in the sense of being injurious to public good/morality as understood by both the naturalists and historicists.

On the other hand, not all immoral acts usually find themselves into the formal laws. There are many conducts, which, though considered immoral by popular belief or opinion, fails to meet the threshold of illegality and are therefore excluded from the province of law.[141] This

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[137] See HJ Bermant "Toward an Integrative Jurisprudence: Politics, Morality, History" (1998) 76(4) *California Law Review* 779 at 787 explaining that:

> "Law is more than morality or politics and more than morality and politics combined. Law is also history. What is morally right in one set of historical circumstances may be morally wrong in another; likewise, what is politically required in one set of historical circumstances may be politically objectionable in another. History-the experienced life of the community-may bring morality and politics together, permitting and even compelling an accommodation between the two."

[138] See K Adrian "Democracy and Despotism: Bipolarism Renewed? (The Comparative Survey of Freedom: 1996" (1996) 1 *Freedom Review* 27 (noting that growing democratisation has meant the emergence of vibrant civil society and free press with the power to hold leaders accountable).

[139] AV Dicey *Lecture on the relation between law and public opinion in England during the Nineteenth Century* (1905) 55 quoted in PP Craig "Dicey: Unitary, Self-Correcting Democracy and Public Law" (1990) 106 *Law Quarterly Review* 105 at 111.

[140] See, for example, M Jackson "The political consequences of corruption: a reassessment" (1986) 18(4) *Comparative politics* 459 at 460 arguing that:

> "A more stable and precise standard is the law or formal regulations. Laws change, but, unless we seek a single ultimate standard, this is an advantage, not a problem: contrasts or changes in laws allow us to compare the political processes and value conflicts involved in setting rules of behaviour."

[141] This point was ably demonstrated by Lord Devlin and Jurist Hart in their debate on the Wolfenden Committee's report on homosexuality and prostitution (JPK Lovibond "The Report of the Departmental Committee on Homosexual Offences and Prostitution" (1957) 2 (5045) *British Medical Journal* 639). See generally P Devlin *The Enforcement of Morals* (1959) (providing the guideline for the relationship of law and morality as: (1) Privacy should be respected; (2) Law should only intervene when society won't tolerate certain

could be because they are private and harmless to the common good or because their potential harm to the common good is considered to be at a tolerable level not warranting the intervention of the law.[142] It is the view of this thesis, that these latter acts of immorality that do not meet the threshold of illegality should not be included in the definition of corruption. The reason for this limitation as aptly explained by Thomas Hobbes is that:

> "The desires and other passions of men are in themselves no sin. No more are the actions that proceed from those passions, *till they know a law that forbids them; which till laws be made they cannot know; nor can any law be made, till they (society) have agreed upon the person (sovereign) that shall make it* (emphasis added)."[143]

Thus, to the extent that an immoral act is made corrupt by formal law, it should be recognized in a corruption definition. But to the extent that it is not so illegalized, it should be excluded from the ambit of a corruption definition. It is in this light that the thesis' argument for the limitation of the concept of corruption to illegal and not *merely* immoral act is to be understood.

2.3. The illegality is in the abuse of public entrusted office/authority for private benefit

Having identified illegality as the standard for identifying corrupt conduct, the second question that arises is: which illegal acts are corrupt or put another way, which corrupt acts ought to be illegal. To answer the first form of the question would require one to take a positivist's review of the law to find out what the legal definition of corruption actually is. On the other hand, to answer the second form of the question would require one to engage in a naturalist's (Universalist) or a historicist's (relativist) inquiry into the popular moral opinion or belief of what a legal definition of corruption ought to be. However, if one is to take the position, as this thesis does, that the lawmaker's will as expressed in the formal laws is usually not in conflict with the prevailing moral position in the society, then an inquiry into the legal definition provided in the formal laws would in most cases be enough to

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behaviour; (3) Law should be a minimum standard not a maximum standard); HLA Hart *Law, Liberty and Morality* (1963) (While disagreeing with Devlin on the standard for determining morality (he argues that the standard should be "best" not "popular" opinion), however, similarly holds that law should not apply in all aspects of social life). See also G Dworkin "Lord Devlin and the Enforcement of Morals" (1966) 75(6) *The Yale Law Journal* 986 (introducing the concept of liberty into the debate and arguing that if a behaviour is a basic liberty (such as sex) this should not be illegalized unless they cause harm to the public).

[142] See the guidelines provided by Devlin in P Devlin *The Enforcement of Morals* (1959) See also T Aquinas *Summa Theologica* (Fathers of the English Dominican Province translation 1947) Q 96 Art 2 Obj 3 holding that:

> "human laws do not forbid all vices, from which the virtuous abstain, but only the more grievous vices, from which it is possible for the majority to abstain; and chiefly those that are to the hurt of others, without the prohibition of which human society could not be maintained."

[143] W Molesworth (ed) *The English Works of Thomas Hobbes of Malmesbury* (1839-45) 114.

answer both the "is" and the "ought" in the two forms of the question. Indeed as the Kenyan Constitutional Court aptly noted in the case of *Republic v The Kenya National Commission On Human Rights Ex-parte William Ruto,*[144] legislatures and courts "do not operate in a (social) vacuum" nor do they "close their eyes and ears to what is happening in the society"; instead they "always try to give life to the aspirations of the societies in which they live in".[145]

Thus one can safely argue that definitional provisions in the formal law are also representative of the prevailing moral position of the time. However, this assumption must also take into account the fact that there are political systems which are corrupt in that they serve the interests of special groups or sectors and not that of the public.[146] As a caution, therefore, in addition to reviewing formal laws it is also important to review the prevailing popular opinion as expressed in research findings to confirm whether the definition as "is" complies with the definition as "ought" to be.

An examination of the different conventions and legislations reveal that there is no adequate one-line definition of corruption. Many of the laws recognize corruption's multi-faceted nature and, therefore, instead of adopting an omnibus definition, separate and define its different forms. These forms of corruption include bribery; breach of trust; embezzlement; misappropriation of public funds; failure to follow procurement and financial procedures; illicit enrichment; trading in influence; favouritism; and dishonesty in use of public property. The emerging thread from the various definitions, however, is that they involve some form of misuse of authority or resources entrusted by the public for private gain. For example, the South African Prevention and Combating of Corrupt Activities Act of 2004 (PCCAA), while singling out the bribery form of corruption, nevertheless defines it as occurring when one party gives to or receives from another party anything of value with the purpose of influencing them to abuse their power.[147] The Act applies to both the private and public sector corruption and specifically criminalises corruption relating to tenders, contracts, agents, public officers and a number of other matters.[148] Likewise, the Anti-Corruption and Economic Crimes Act of 2003 of Kenya (ACECA), defines corruption as any of several

[144] *Republic v The Kenya National Commission On Human Rights Ex-parte William Ruto* [2012] eKLR.
[145] *Republic v The Kenya National Commission on Human Rights Ex-parte William Ruto* [2012] eKLR 10.
[146] See I Currie & J de Waal *The Bill of Rights Handbook* 5ed (2005) 3 (giving the example of the racial South African Parliament, which under the 1909 Union Constitution "could write and rewrite the law, alter the basic structure of the state and invade human rights without constraints").
[147] PCCAA, s 3.
[148] Prevention and Combating of Corrupt Activities Act, chapter 2, part 2 to part 6.

defined offences including the fraudulent/unlawful acquisition, mortgage, charge or disposal of public property; failure to pay taxes, fees, levies and charges; fraudulent payments out of public revenue; breach of financial or procurement procedures and engaging in unplanned public projects.[149] Similarly, the United States Foreign Corrupt Practices Act of 1977 (FCPA), from which the international legal understanding of corruption is usually traced,[150] though focusing on the corrupt practice of foreign bribery, defines it as the paying, offering to pay, or promising to pay foreign government officials to influence any official act, induce officials to act or fail to act in violation of their lawful duty, or induce officials to use their influence with government to obtain business.[151]

This understanding of corruption as abuse of public entrusted authority or resources for private benefit mirrors its conception in international and regional conventions. For example, the United Nations Convention Against Corruption (UNCAC), which is the global instrument against corruption, conceptualizes corruption broadly as including bribery, embezzlement, misappropriation or other diversion of property by a public official, trading in influence, abuse of functions, illicit enrichment, concealment of illicit wealth and obstruction of justice.[152] The definition holds to account both public and private sector actors and applies in both domestic and foreign context.[153] In this regard, it criminalizes the bribery of not just foreign public officials, but also of national public officials and officials of public international organizations.[154]

This comprehensive conception of corruption in UNCAC was a culmination of the corruption debate within the UN which started way back in 1975 when the United States, Iran, and Libya each introduced and later withdrew-proposals for a General Assembly resolution on corruption.[155] The General Assembly eventually adopted a resolution on the

[149] ACECA, s 39-47.
[150] Professor Peter Schroth, for example, notes that "any discussion of international measures against corruption and bribery must begin with the United States." PW Schroth "National and International Constitutional Law Aspects of African Treaties and Laws Against Corruption" (2003) 13 *Transnational Law & Contemporary Problems* 83 at 87..
[151] FCPA, s 78dd-l(a), 78dd-2(a) & 78dd-3(a).
[152] UNCAC, chap III.
[153] UNCAC, arts 21 and 22.
[154] UNCAC, arts 15 and 16.
[155] The Iranian proposal called for governments to take strict measures against corruption, asked the Secretary General to conduct a study on ways to fight corruption (including establishing a code of conduct), and called upon governmental and non-governmental organizations to assist in these efforts. The Libyan proposal condemned what it called the immoral activities of multinational corporations that threatened the safety and security of people and states. Libya called for sanctions, including international boycotts, against bribing corporations. The U.S. proposal called for the General Assembly's condemnation of both the offering and

basis of a draft introduced by a group of developing and Central European countries.[156] This resolution, General Assembly Resolution 3514, was adopted on December 15, 1975.[157] It condemned all supply side corrupt practices in international business transactions.[158] It also requested the Economic and Social Council (ECOSOC) to direct the Commission on Transnational Corporations to include the foreign illicit payments issue in its work program.[159] However, the effort to develop an illicit payments agreement was caught in the West-East and North-South struggles of the 1970s and 1980s.[160] It was not until the late 1980s when the changes in the world economy, including the trend towards globalization, brought renewed awareness of international criminal activity. The United Nations addressed this issue by encouraging international efforts against global organized crime. Corruption was reintroduced to the United Nations agenda as an item under study within ECOSOC's work against organized crime.[161]

In June 1996, following the progress made at the OECD and the OAS, the United States, along with Argentina and Venezuela, submitted a draft resolution for a United Nations Declaration on Corruption and Bribery in Transnational Commercial Activities.[162] After several drafts and attempts at negotiation, the declaration was adopted without vote by the General Assembly on December 16, 1996.[163] It was the first comprehensive global

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solicitation of bribes and called for international cooperation to address the problem. See *United Nations Year Book* (1975) 486, 487.

[156] Algeria, Argentina, Benin, Bolivia, Colombia, Costa Rica, Cuba, Democratic Yemen, Ecuador, Egypt, Gabon, Guyana, Iran, Iraq, Libya, Madagascar, Nigeria, Pakistan, Peru, Romania, Somalia, Syria, Togo, Tanzania, Upper Volta, Venezuela, and Yugoslavia. *United Nations Year Book* (1975) 487.

[157] G.A. Res. 3514, U.N. GAOR, 2d Comm., 30th Sess., U.N. Doc. A/10467 (1975).

[158] G.A. Res. 3514, para 1.

[159] G.A. Res. 3514, para 6

[160] See JM Vogelson "Corrupt Practices in the Conduct of International Business: Section Recommendations and Reports, American Bar Association Section of International Law and Practice Reports to the House of Delegates" (1996) 30 *International Law* 193 at 195.

[161] On July 14, 1989, the Economic and Social Council stated in resolution 1989/70 on International Co-Operation In Combating Organized Crime its concern that:

> organized crime has increased in many parts of the world and has become more transnational in character, leading, in particular, to the spread of such negative phenomena as violence, terrorism, *corruption,* illegal trade in narcotic drugs and, in general, undermining the development process, impairing the quality of life and threatening human rights and fundamental freedoms....

E.S.C. Res. 1989/70, U.N. ESCOR, 1st Sess., 50th mtg. at 1, U.N. Doc. E1RES/198970, E11989A1NF7 (1989) (emphasis added).

[162] See Argentina, United States of America and Venezuela: Draft Resolution: Corruption in Transnational Commercial Activities, E.S.C., 1st Sess., Agenda Item 6(i), U.N. Doc. E/1996/L.26 (1996). The proposal was also based on General Assembly resolution 50/106, which recommended that the ECOSOC reconsider the draft international agreement on illicit payments that had been abandoned years previously. See G.A. Res. 50/106, U.N. GAOR 50th Sess., Agenda Item 95(h), U.N. Doc. A/RES/50/106 (1996).

[163] See G.A. Res. 51/191, U.N. GAOR, 51st Sess., Agenda Item 12, Annex, U.N. Doc. A/RES/51/191 (1996). To urge the member states to implement the Declaration, the General Assembly adopted in December 1997 the Resolution on International Cooperation Against Corruption and Bribery in International Commercial Transactions. See G.A. Res. 52/87, U.N. GAOR 52d Sess., 70th mtg., Agenda Item 103, U.N. Doc.

declaration that the fight against corruption and bribery is essential to "an improved international business environment," and "form[s] a critical part of promoting transparent and accountable governance, economic and social development and environmental protection in all countries."[164] It identified corruption as encompassing not only "active" and "passive" bribery,[165] but also "illicit enrichment by government officials without demonstrable cause".[166]

The Declaration being a non-binding document did not, however, satisfy the call of those who wanted an internationally binding instrument to address global organized crime.[167] In 2000 the United Nation adopted the first legally binding instrument to address the scourge of corruption.[168] This instrument, the United Nations Convention Against Transnational Organized Crime (UNCTOC), was intended to address the activities of 'organized criminal groups'.[169] It, however, recognizes that corruption is often an instrument or consequence of organized crime and includes several provisions to address it.[170] It, for example, requires States parties to adopt laws and other necessary measures to criminalize active and passive bribery connected to the exercise of public duties.[171] It also calls on State parties to take measures to ensure effective action by its authorities in the prevention, detection and punishment of "the corruption of public officials, including providing such authorities with adequate independence to deter the exertion of inappropriate influence on their actions".[172] Still UNCTOC was not a purely anti-corruption instrument. In December 2000, the General Assembly recognized that an effective international legal instrument against corruption, independent of the UNCTOC, was desirable and hence the creation of the UNCAC Ad hoc committee, which successfully negotiated the UNCAC.[173]

A/RES/52/87 (1997). This call was reiterated in December 1998. *See* G.A. Res. *53/176,* U.N. GAOR 53d Sess., 91st mtg., Agenda Item 92, U.N. Doc. A/RES/53/176 (1998).

[164] UN Declaration, preamble.

[165] Paragraph 3 of the Declaration states that bribery may include "the offer, promise or giving of any payment, gift or other advantage, directly or indirectly, by any private or public corporation, including a transnational corporation, or individual from a State to any public official or elected representative of another country" or the soliciting, demanding, accepting, or receiving consideration by the public official "as undue consideration for performing or refraining from the performance of that official's or representative's duties in connection with an international commercial transaction".

[166] UN Declaration, para 7

[167] LE Nagle "The Challenges of Fighting Global Organized Crime in Latin America" 26 *Fordham International Law Journal* (2003) 1649 at 1665

[168] United Nations Convention Against Transnational Organized Crime (UNCTOC), done at Palermo, 12–15 December 2000, (entered into force 19 September 2003) 40 I.L.M. 353; G.A. Res. 55/25, U.N. GAOR, 55th Sess., Annex, Agenda Item 105, U.N. Doc A/RES/55/25 (2000)

[169] Global Programme Against Corruption, 91–92.

[170] UNCTOC, preamble

[171] UNCTOC, art 8

[172] UNCTOC, art 9(2)

[173] G.A. Res. 55/61, U.N. GAOR, 55th Sess., Agenda Item 105, at 1, U.N. Doc. A/RES/55/61 (2001).

At the regional level, The African Union Convention on Preventing and Combating Corruption (AU Convention), which was adopted in Mozambique in 2003 reflects the African conception of corruption.[174] It was a culmination of a drawn-out call on African leaders to follow the example of the other regional bodies and adopt its own regional convention. This call began as early as 1994, during the East and Central African Seminar on Corruption, Human Rights and Democracy, held in Uganda, when African leaders were called upon to adhere to the recent OECD recommendation and to follow the example set by the American nations.[175] In 1998, at the Thirty-Fourth Ordinary Session held in Ouagadougou, Burkina Faso, the Assembly of Heads of State and Governments of the OAU acknowledged that corruption posed a significant problem to the continent and gave the Secretary General the task of convening a commission of experts to study means of combating it.[176] This expression of determination was followed in February 1999 by the adoption of a framework comprising twenty-five anti-corruption principles.[177] These principles, subscribed to by eleven countries, focused on containing corrupt practices relating to international business transactions and promoting external development assistance to Africa.[178]

The Convention's adoption was, however, accelerated with the change in priority within the African Union, which was established in 2000 as a successor to the Organization of African Unity (OAU).[179] Whereas the OAU focused on removing the vestiges of colonization and apartheid, the African Union aims to expedite the process of economic and political integration in the continent.[180] The Convention's objectives reflect the African Union's focus on economic and political development. It aims to promote mechanisms to fight corruption in the public and private sectors, to facilitate cooperation among states parties, and to coordinate the policies and legislation relevant to corruption.[181] To realise its objectives, the

[174] African Union Convention on Preventing and Combating Corruption (African Union Convention), done at Maputo, 11 July 2003, 43 I.L.M. 1. See African Union, "List of Countries which have Signed, Ratified/Acceded to the African Union Convention on Preventing and Combating Corruption" (2007) http://www.africaunion.org/root/au/Documents/Treaties/List/African%20Convention%20on%2OCombating%2OCorruption.pdf (accessed 20/10/2011).
[175] P Tamesis, *Different Perspectives of International Development Organisations in the Fight Against Corruption, in Corruption and Integrity Improvement Initiatives in Developing* Countries (1998) 129, 131.
[176] Assembly of Heads of State & Government "Declarations and Decisions Adopted by the Thirty-Fourth Ordinary Session of the Assembly of Heads of State and Government" (1998), available at www.africa-union.org/root/au/Documents/Decisions/hog/8HoGAssembly1998.pdf;
[177] See ABM Marong "Toward a Normative Consensus Against Corruption: Legal Efforts of the Principles to Combat Corruption in Africa" (2002) 30 *Deny Journal of International Law and Policy* 99 at 99-100.
[178] Ibid
[179] African Union, 'About AU', http://www.africa-union.org/home/Welcome.htm (accessed 2/11/2011).
[180] African Union, 'About AU', http://www.africa-union.org/home/Welcome.htm (accessed 2/11/2011).
[181] AU Convention, art 2

Convention conceptualises corruption broadly to cover active and passive bribery; influence peddling; illicit enrichment; diversion of public property for private use; concealment of proceeds derived from corrupt acts; and conspiracy to commit corruption.[182]

This conception of corruption as abuse of public entrusted authority or resources for private gain is also reflected in the Inter-American Convention against Corruption. The Inter-American Convention, which was pushed by a group of Latin American governments led by Venezuela and strongly supported by the US through the Organisation of American States (OAS),[183] conceptualises corruption as extending beyond the bribery of foreign officials.[184] Apart from provision on transnational bribery, which covers not only bribery where the purpose relates to a contract or business transaction, but also any other case where the bribe relates to "any act or omission in the performance of that official's public function",[185] it also requires states parties to criminalize: solicitation, acceptance, offer, or delivery of improper payments; the illicit use of a position of authority for the official's own benefit; the fraudulent use or concealment of property derived from that position of authority; and participation in any of these acts as accomplice, collaborator or conspirator.[186] States parties are further asked to consider criminalising a series of further offences on improper use of confidential information or government property by an official, seeking a decision from a public authority for illicit gain, and improper diversion of state property, monies or securities.[187] This broad conception of corruption was informed by the composition of the OAS, which includes both developed and developing countries, and, therefore, the need to fight both foreign bribery and domestic corruption.[188]

The same conception of corruption as abuse of public entrusted authority or resources is also evident in both the Criminal and Civil Conventions on Corruption of the Council of Europe and the and the European Union's Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States. The Criminal Law

[182] AU Convention, Art 4. This broad conception of corruption can also be attributed to the global trend at the time of adoption of the Convention. The international community was beginning to appreciate that corruption was more than bribery.
[183] For a discussion, see DA Gantz "globalizing Sanctions Against Foreign Bribery: The Emergence of a New International Legal Consensus" 18 *NW. Journal of International Law & Businees* (1998) 457 at 477.
[184] S Rose-Ackerman "Corruption and the Global Corporation: Ethical obligations and workable strategies" in Michael Likoksky (ed) *Transnational Legal Processes* (2002) 148at 150.
[185] OAS Convention, art VIII.
[186] OAS Convention, art VI, VII.
[187] OAS Convention, art XI.
[188] S Rose-Ackerman "Corruption and the Global Corporation: Ethical obligations and workable strategies" in Michael Likoksky (ed) *Transnational Legal Processes* (2002) 150.

Convention on Corruption (COE Criminal Convention) was adopted in 1999 and entered into force in 2002 as a binding legal instrument and is open for ratification by non-European countries that participated in its drafting.[189] It contains provisions criminalizing a list of specific forms of corruption, the majority of which are limited to active and passive bribery.[190] Trading in influence and laundering the proceeds of crime are also covered, but extortion, embezzlement, insider trading and nepotism are not.[191] Apart from domestic corruption, the Convention also deals with a range of transnational cases such as bribery of foreign public officials and members of foreign public assemblies.[192]

The Civil Law Convention on Corruption (COE Civil Convention), on the other hand, was adopted in 1999 and entered into force in 2003.[193] It currently has 21 ratifications and non-European countries may join.[194] It represents the first attempt to define common international rules for civil litigation in corruption cases.[195] However, the Convention's conceptualisation of corruption is narrower than the COE Criminal Convention because it only applies to bribery. It defines corruption as "requesting, offering, giving or accepting directly or indirectly a bribe or any other undue advantage or the prospect thereof, which distorts the proper performance of any duty or behaviour required of the recipient of the bribe, the undue advantage or the prospect thereof".[196] This definition applies both to the domestic and international business context.[197]

The European Union Convention on the Fight against Corruption Involving Officials of the European Communities or Officials of Member States (EU Convention), on its part, was adopted in 1997[198] as a consequence of EU's effort to address financial malfeasance within the European Community.[199] However, despite its long title, the EU Convention's

[189] Council of Europe Criminal Law Convention on Corruption (COE Criminal Convention), done at Strasbourg, 27 January 1999, (entered into force 1 July 2002), E.T.S. 173.
[190] Criminalization requirements are in articles 2–14 of COE Criminal Convention
[191] COE Criminal Convention, arts 12 & 13.
[192] COE Criminal Convention, arts 5, 6, 9 & 11.
[193] Council of Europe Civil Law Convention on Corruption (COE Civil Convention), done at Strasbourg, 4 November 1999, (entered into force 1 November 2003), E.T.S. 174.
[194] COE, 'Treaty Office', http://conventions.coe.int/Treaty/EN/CadreListeTraites.htm (visited 1 October 2004).
[195] COE "Explanatory Note on Civil Convention against Corruption" http://conventions.coe.int/Treaty/en/Reports/Html/174.htm
[196] COE Civil Convention, art 2.
[197] COE "Explanatory Note on Civil Convention against Corruption" para 33
[198] Convention on the Fight Against Corruption involving Officials of the European Communities or Officials of Member States (EU Corruption Convention), done at Brussels, 26 May 1997, 37 I.L.M. 12; OJ 1997 C 195
[199] For a discussion, see S White *Protection of the financial interests of the European Communities: the fight against fraud and corruption* (1998) 7.

conception of corruption is narrow as it only applies to "active" and "passive" bribery.[200] It does not deal with embezzlement, fraud, money laundering or other corruption-related offences.[201] It also only applies to conduct on the part of officials of the European Community and its Member States.[202]

Indeed, while there is a difference in emphasis on the forms of corruption,[203] the common thread in the different legal definitions is that corruption involves the abuse of authority, office or resources entrusted by the public for private benefit. This illegal thread of corruption as abuse of public entrusted authority for private benefit is also evident in the writing of many scholars and in the opinion of practitioners in the field of corruption. For example, in his research among elites in emerging economies Daniel Kaufman found empirical support for relying on this definition as a workable definition for corruption.[204] Similarly, in her literature review for the Asian Foundation, Amanda Morgan found many recent academic studies and international organizations opting for this definition in their analysis of corruption.[205] The World Bank too has carried a review of anti-corruption literature and found a preponderant conception of corruption as abuse of public entrusted authority for private gain.[206]

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[200] It defines active corruption as "the deliberate action of whosoever promises or gives, directly or through an intermediary, an advantage of any kind whatsoever to an official for himself or for a third party for him to act or refrain from acting in accordance with his duty or in the exercise of his functions in breach of his official duties" (EU Convention, art 3). Passive corruption is defined along the same lines to mean "the deliberate action of an official, who, directly or through an intermediary, requests or receives advantages of any kind whatsoever, for himself or for a third party, or accepts a promise of such an advantage, to act or refrain from acting in accordance with his duty or in the exercise of his functions in breach of his official duties" (EU Convention, art 2).

[201] See UNODC "Global Programme Against Corruption; UN Anti-Corruption ToolKit" (2004) http://www.unodc.org/documents/corruption/publications_toolkit_sep04.pdf at 102.

[202] EU Convention, art 1

[203] For example, UNCAC provides for a comprehensive definition of corruption covering different forms such as bribery, embezzlement, influence peddling, fraud, illicit enrichment and diversion of public property (See UNCAC chapter III) while the EU Corruption Convention emphasizes only the bribery form of corruption (See EU Corruption Convention, art 2). Similarly, while the Kenyan Anti-Corruption legislation has embraced the comprehensive conception of corruption (ACECA, s 2, 39-47), the South African Anti-Corruption Legislation only covers bribery. PCCAA, s 3.

[204] D Kaufmann *Perceptions about Corruption among Elites in Emerging Economies* (1997).

[205] See AL Morgan *Corruption: Causes, Consequences, and Policy Implications: A Literature Review* (1998) 9-10.

[206] World Bank *Helping Countries Combat Corruption: The Role of the World Bank* (1997). The World Bank, for example, defines corruption as "the abuse of public office for private gain." World Bank *Helping Countries Control Corruption: The Role of the World Bank* (1997) 8. The African Development Bank, on the other hand, sees corruption as encompassing not only abuse of public office but also of private office and defines it as "the abuse of public or private office for personal gain." See African Development Bank "Anticorruption Policy: Harmonized Definition of Corrupt and Fraudulent Practices" available at http://www.adb.org/Documents/Policies/Anticorruption/definitions-update.pdf (accessed 4/2/2010). Transparency International eschews this public-private dichotomy and simply defines it as "the abuse of entrusted power for personal gain". Transparency International *Global Corruption Report* (2003). See also See S Rose-Ackerman "The Political Economy of Corruption" in KA Elliot (ed) *Corruption and the Global*

It is the view of this thesis that this understanding of corruption as the abuse of authority, office or resources entrusted by the public for private benefit is broad and open ended enough to cover the limitless manifestations of corruption such as bribery, embezzlement, favouritism, bid rigging and fraud. The definition is also tenably integrative of the legal and moral criterion of behaviour as it embraces the aspect of formal duties and norms from the positivist perspective through the concept of public trust; and the aspect of the violation of the public good as viewed by both the naturalists and historicists through the concept of abuse of public entrusted authority. In addition, the definition embraces the essential conflict between public good and private interest in corruption as viewed by both the naturalists and historicists through the economic concept of private gain.[207] In this way, corruption becomes a multidimensional concept that has legal, social, political, economic and ethical connotations.[208] The definition can, thus, be said to capture the multifaceted nature of corruption and is advocated by the thesis for corruption analysis purposes.[209]

2.3.1. Meaning of public entrusted authority

The conception of corruption as abuse of public entrusted authority for private benefit, though predominant, is, however, not universally supported. A major criticism that is usually levelled against a conception of corruption as the abuse of public authority, office or resources for private gain is that it leaves out private corruption, particularly corruption in the private sector. The argument goes that by restricting corruption to abuse of "public office" or "public authority" or "public resources" the definition ignores corruption that takes place in the private sector.[210]

Such criticism can, however, only be valid if by "public" is meant "government" so that the definition turns into abuse of "government office" or "government authority" or "government resources". Otherwise, if by "public office", "public authority" or "public resources" is meant an office, authority or resources entrusted by the public then the

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Economy (1997) 31 at 31 (pointing out that corruption also occurs where public officials have a direct responsibility for the provision of a public service or application of specific regulations to the private sector).

[207] Private gain here is viewed broadly as including gain to family members, close friends or close associates. The gain also need not be monetary in nature. It could include expensive gifts like jewellery to wife, training in exclusive sites and promotions.

[208] Brinkerhoff, for example, sees corruption as "subsuming a wide variety of illegal, illicit, irregular, and/or unprincipled activities and behaviours". DW Brinkerhoff "Assessing political will for anti-corruption efforts: an analytic framework" (2000) 20(3) *Public administration and development* 239 at 241.

[209] On the complexity of corruption, see generally MK Khan "A Typology of Corrupt Transactions in Developing Countries" (1996) 27(2) *Institute of Development Studies Bulletin* 12.

[210] S Rose-Ackerman, *Corruption and Government: Causes, Consequences, and Reform* (1999) 187–88.

criticism loses its sting. This is because most, if not all, of the offices, authority or resources in the private sector are also entrusted by the public or a section of the public and, therefore, their abuse falls within this broad definition of corruption.[211]

What the definition does not cover, and rightly so, is the abuse of private authority, which private individuals entrust to themselves, such as the case where a sole proprietor misuses the funds of his business for personal benefit. In this case, while there is abuse leading to loss of fund, there would be no wrongdoing warranting legal sanction because the capital was the sole proprietor's to begin with. The case would be different if the person, for private benefit, abuses the authority or resources formally entrusted to him or her by another person, a group of people, a partnership, a company or an association. In all these latter cases the public, or more accurately, a section of the public, is involved and going by the functional definition of corruption the person would have abused authority or resources entrusted by the public for private benefit. The public here must, therefore, be construed broadly to include the whole public or a section of it.

This broad understanding of the "public office/authority/resources" is necessary for three related reasons. Firstly, in many countries the private sector is increasingly overgrowing the government sector in size.[212] Secondly, the line between the government and private sectors is being blurred by privatization of government functions, outsourcing, and public listing of private companies in the share market.[213] Third, the huge economic muscle of multinational corporations and the consequent impact they are having on the lives of members of the public means that they cannot be excluded from an international anticorruption strategy.[214]

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[211] The private sector is made up of sole proprietorships, partnerships, companies, or associations whose shareholders are members of the public. Therefore people working in these private institutions are acting under entrusted authority by a section of the public. Any abuse of such authority would, tenably, fall within the definition of corruption.

[212] See, for example, D MacGregor "Jobs in the Public and Private Sectors: Presenting data (updated to June 2000) on jobs in the public and private sectors" (2001) Economic Trends, Working Paper No. 571 available at 1 available at http://www.statistics.gov.uk/cci/article.asp?id□88 (accessed 1/11 2011) (pointing out that in the UK, 82 per cent of all workforce jobs were in the private sector in 2000); Y Yao "The Size of China's Private Sector" (1999) *China Update* 1 at 2 (pointing out to an increasing influence of the private sector in China – for example the private sector accounted for 34.3 per cent of national industrial output by 1997, compared to 2 per cent in 1985).

[213] Privatization, apart from transferring public-oriented services to the private sector, also creates opportunities for corruption during the process of transfer and after. See P Heywood "Political Corruption: Problems and Perspectives" (1997) 45 *Political Studies* 417 at 429 (arguing that due to economic liberalisation and new political management reforms, the borderline between private and public spheres have blurred). See also Transparency International Press Release, 'TI calls for the UN Anti-Corruption Convention to Deter Bribery of Corporate Officials and Criminalize Private Sector Corruption', 11 March 2003, available at http://www.transparency.org/pressreleases_archive/2003/2003.03.11.un_convention.html (accessed 1/1/2012)

[214] On the economic muscle of multinational corporations, see UNCTAD *World Investment Report 2002* (2002) 90 available at http://r0.unctad.org/wir/pdfs/fullWIR02/pp85-114.pdf (accessed 30/10/2011).

Another unrelated but equally important reason is that with the increasing devolution of government functions to local levels, government offices are increasingly affecting only a section of the public. This latter reality further justifies the need to broaden the definition of public office so as to capture offices formed by or affecting only a section of the public. Thus, viewed from this broad perspective, an office or authority that has been created by the public or a section of it, be it in the public or private sector, would fall within the definition of public office/authority and if a person entrusted with that office/authority *abuses* its functions for private benefit such abuse would amount to corruption.

2.3.2. The nature of abuse

The kinds of abuse that would amount to corruption, as seen from the discussed legal instruments,[215] are varied and, therefore, difficult to circumscribe, nor, it is submitted, should they be. One common denominator of these forms of abuse, however, is that they involve the use of the public entrusted authority for the purpose for which it was not intended. This common denominator derives from the ordinary dictionary meaning of abuse, which is, misuse or use for the unintended purpose.[216] Thus abuse of public entrusted authority would entail the use of authority for the purpose for which it was not intended. This abuse can take many forms including demanding bribes before offering an otherwise free public service; embezzlement; diverting public resources for personal use; nepotism or cronyism in recruitment to public offices; acting for one's own benefit in carrying out official functions; fraudulent dealings; or taking advantage of information that one only has access to as a public official. The World Bank, for example, has taken "abuse of public office for private gain" as its minimal working definition and dissected it by identifying specific abuses:

> "Public office is abused for private gain when an official accepts, solicits, or extorts a bribe. It is also abused when private agents actively offer bribes to circumvent public policies and processes for competitive advantage and profit. Public office can also be abused for personal benefit even if no bribery occurs, through patronage and nepotism, the theft of state assets, or the diversion of state revenues."[217]

The abuse is, however, not limited to those initiated by the holder of the public office/authority but also include those initiated by private individuals. So that it also amounts to corruption if private individuals offer bribes to influence decisions of officials entrusted with public authority/office in their favour so as to, for example, pay lower taxes, win a

[215] Section 2.3. above.
[216] See Oxford Dictionaries available at http://oxforddictionaries.com/definition/english/abuse (accessed on 3/9/2011) defining abuse as "use (something) to bad effect or for a bad purpose; misuse".
[217] World Bank *Helping Countries Combat Corruption: The Role of the World Bank* (1997) 8-9.

contract, get employed or promoted, get something done quickly, or avoid a fine or penalty. As the World Bank rightly notes, public office "is also abused when private agents actively offer bribes to circumvent public policies and processes for competitive advantage and profit".[218]

2.3.3. The intention of abuse is to benefit private not public interest

It is usually not easy to identify the reasons that motivate people to act in a certain way especially given the conflation and complexity of individual dispositions. Indeed countering corruption would be very easy if the motivations were easily identifiable and uncontroversial. "Then it would be enough to carry out structural diagnosis, detect inadequate relations and banish corruption."[219] But such a task is not easy as one has to take into account a great diversity in human motivation and modes of action and move beyond approaches that embrace a "single behavioural logic".[220] Furthermore, one has to contend with the "situational imperatives" and the "social processes" that shape a person's inclination.[221] Still, despite this seemingly insurmountable challenge, the search for behavioural motivations has remained a perennial endeavour preoccupying the thoughts of scholars for many years.[222]

Within the context of corruption, it is generally recognized that corruption is not a crime of passion, or an accidental happenstance, but a crime of calculated gain.[223] This calculation involves a conscious or sub-conscious weighing of the expected benefits of engaging in corruption and the expected costs in the form of the consequences of being detected.[224] Corruption is predicted to occur if the gain from corruption outweighs the cost of being caught. As Van Klaveren aptly noted:

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[218] World Bank *Helping Countries Combat Corruption: The Role of the World Bank* (1997) 8.
[219] R Espejo *et al* "Auditing as the Dissolution of Corruption" (2001) 14(2) *Systemic Practice and Action Research* 139 at 144.
[220] JP Olsen "Citizens, Public Administration and the Search for Theoretical Foundations" (2004) 37(2) *Political Science & Politics* 69 at 75.
[221] JQ Wilson *Bureaucracy: What Government Agencies Do and Why They Do It* (1989) 34.
[222] See for example, PE Crewson "Public Service Motivation: Building Empirical Evidence of Incidence and Effect" (1997) 7 *Journal of Public Administration Research and Theory* 499; DD Wittmer "Serving the People or Serving for Pay: Reward Preferences among Government, Hybrid Sector, and Business Managers" (1991) 14 *Public Productivity and Management Review* 369.
[223] See R Klitgaard *et al Corrupt Cities: A Practical Guide to Cure and Prevention* (2000) The World Bank Institute and Institute for Contemporary Studies, Washington at 28 (noting that "Corruption is a crime of calculation, not passion").
[224] R Klitgaard *Tropical Gangsters* (1990) 90 ("it is reasonable to posit that an official undertakes a corrupt action when in his judgments, it's likely benefits outweigh its likely costs"). Compare with the tax evasion model where the same calculations take place. See M Allingham and A Sandmo "Income Tax Evasion: A Theoretical Analysis" (1972) 1 *Journal of Public Economics* 323.

> "A corrupt civil servant regards his public office as a business, the income of which he will seek to maximise. The office then becomes a "maximising unit". The size of his income depends upon the market situation and his talents for funding the point of maximal gain on the public's demand curve."[225]

A person, thus, engages in the abuse of public entrusted authority because of the personal gain that he calculates to reap from it.[226] Because of this reason private gain is generally considered an integral part in the conception of corruption. But should all abuses of public entrusted authority for private gain be regarded as corruption? The answer to this question requires one to appreciate the factors that motivate individuals to resort to corruption as a means of achieving private gain.

Studies reveal that, while the motivational factors for human behaviour are many,[227] those that drive the calculation in corruption can, however, be distilled into two: the internal factor of greed and the external factor of need.[228] Legal philosophers have similarly identified these two as the main drivers of corrupt conduct. On his account of human psychology, Thomas Hobbes, for example, points out that man's action is motivated by self-preservation. In chapter two of *The Citizen* he urges that the whole breach of the laws of nature "consists in the false reasoning or rather folly of those who see not those duties they are necessarily to

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[225] See J Van Klaveren "The Concept of Corruption" in AJ Heidenheimer *Political corruption: Readings in comparative analysis* (1978) 26, 38-40, quoted in AJ Heidenheimer *et al Political Corruption: A Handbook* (1989) 9. See also M Qizilbash "Corruption and Human Development: A Conceptual Discussion" (2001) 29(3) *Oxford Development Studies* 265 at 267-268 (noting that the civil servant is "an income-maximizing monopolist, who uses his monopoly position to exploit the public"). Viewed from a principal-agent perspective, the agent or civil servant is said to be corrupt when he sacrifices the interest of the principal or public to his or her own pecuniary advantage. R Klitgaard *Controlling Corruption* (1988) 24:

> "This approach defines corruption in terms of the divergence between the principal's or public's interests and those of the agent or civil servant: corruption occurs when an agent betrays the principal's interest in pursuit of her (sic) own."[225]

[226] See further GS Becker "Crime and Punishment: An Economic Approach" (1968) 76 *Journal of Political Economy* 169.

[227] For example, when asked to rank what is most important to them, 60% of public employees surveyed by Houston chose "meaningful work," 18% chose "chances for promotion," 12% chose "job security," and 11% put "high income" at the top of their list. DJ Houston "Public service motivation: Amulti-variate test (2000) 10 *Journal of Public Administration Research and Theory* 713.

[228] For the causes of corruption in Africa, see Economic Commission for Africa "Assessing the Efficiency and Impact of National Anti-Corruption Institutions in Africa" (2010) 30-32 (concluding that "In the end, the most sensible explanations are selfish and without redemption, the desire of the individual to better himself financially or politically at the expense of the commonwealth"). See also V Tanzi *Corruption around the world - causes, consequences, scope, and cures* (1998) (concluding that "One can speculate that there may be corruption due to greed and corruption due to need"). Holmes also cites human weakness as another human motivation for corruption. He gives the example of those who, because of human weakness, find it difficult to reject offers from a person of a "generous" nature or those who accepts gifts because they know they have been particularly helpful to someone (that is they feel that a reward is not inappropriate), or those who genuinely do not want to offend or embarrass a grateful supplicant. Fear is also mentioned as a motivation for corruption. It is argued that in a hierarchical situation, for example, a subordinate may fear the consequences of not acting in a similar way to his/her corrupt superior. See L Holmes *The End of Communist Power: Anti-Corruption Campaign and Legitimation Crisis* (1993) 170. However, all these examples given by Holmes point to human weakness and fear as more of a justification for engaging in corruption than a motivation for the same. In any case these external factors that "force" people to be weak can safely fall under the need factor.

perform towards others in order to *their own conservation* (emphasis added)". [229] John Locke, on his part, is more nuanced, arguing that man has the capacity for reason and good judgment and that he is always motivated to do what is right.[230] At the same time, he acknowledges man's perennial temptations to take advantage of others and to develop "disproportionate desires" for worldly goods and power, to the neglect of virtue.[231] Jean-Jacques Rousseau's own view is that humans are motivated by both self-preservation and by natural concern for others, dispositions that can manifest themselves in a variety of ways.[232]

Indeed greed, which John Locke calls "disproportionate desires", has been recognized as a predominant factor in the motivation for corruption.[233] This is because it makes people selfish and insatiably hungry for status and comfort which their lawful income cannot match.[234] Because of greed people become blind to the misery their corruption causes others and justifies it simply because they gain from it.[235] It makes people trade their personal integrity and virtues in exchange for the trappings of wealth. In the case of public officials greed comes in to motivate them to abuse their authority, embezzle or misappropriate entrusted public funds, or demand bribes from members of the public so as to finance their "disproportionate desires" for lavish lifestyles and worldly power.[236] For the private citizen,

[229] T Hobbes *De Cive (The Citizen)* (1949) 32n. See also L Stephen *Hobbes* (1904) 208-209 (concluding that Hobbes' real theory is that "Men act for their own preservation as stones fall by gravitation"); JW Gough *The Social Contract: A Critical Study of Its Development* 2 ed (1957) 111 (Pointing out that the reasons why men obey the sovereign is for self preservation: "Their ruling motive is desire for protection – for the preservation of their lives"). But see M Oakeshott *Leviathan* (1957) Lviii - Lxi (pointing out that while selfishness is common in Hobbes, Hobbes is making a more fundamental point not exclusively related to self-preservation).

[230] J Locke *Second treatise of government* (1980) 9.

[231] J Locke *Second treatise of government* (1980) chap 4.

[232] For Rousseau "the human race would have perished long ago if its preservation had depended only on the reasoning of its members." In his view, our disposition to do what is good for oneself without harming others is a "natural sentiment," and "it is in this natural sentiment, rather than in subtle arguments, that we must seek the cause of the repugnance every man would feel in doing evil, even independently of the maxims of education". JJ Rousseau *The Social Contract* (1786) 108.

[233] See, for example, R Wraith and E Simpkins *Corruption in Developing Countries* (1963) 40 (Pointing out that love for ostentation is a major contributor of corruption in African Societies); J Thornton "Confiscating Criminal Assets: the New Deterrent" (1990) 2 *Current Issues Criminal Justice* 72 (concluding that "the motivation for such crime is greed and the aim is profit"); TM Ocran *Law in Aid of Development: Issues in Legal Theory, Institution Building, and Economic Development in Africa* (1978) 119, fn 10 (listing greed as a cause of corruption in West Africa); D Treisman "The causes of corruption: a cross-national study" (2000) 76 *Journal of Public Economics* 399 at 399–457; E Colombatto "Why Is Corruption Tolerated?" (2003) 16(4) *Review of Austrian Economics* 363 at 363-79.

[234] See JS Nye "Corruption and political development: A cost-benefit analysis" (1967) *American Political Science Review* 61 at 416 (identifying corruption as behaviour that "deviates from the formal duties of a public role (elective or appointive) because of private-regarding (personal, close family, private clique) *wealth or status gains*" (emphasis added)).

[235] See SH Alatas *The sociology of corruption: the nature, function, causes, and prevention of corruption* (1980) 77 (quoting the 14th century writing of Abdul Rahman Ibn Khaldun that "the root cause of corruption" was "the passion for luxurious living with the ruling group. It was to meet the expenditure on luxury that the ruling group resorted to corrupt dealing").

[236] See RC Tilman "Emergence of Black-Market Bureaucracy: Administration, Development, and Corruption in the New States" in MU Ekpo (ed) *Bureaucratic Corruption in Sub-Saharan Africa: Toward a Search for*

greed leads them to offer bribes so as to avoid or jump to the front of a bureaucratic queue, or avoid lawful obligation or penalty, or get a benefit that he or she is otherwise not entitled to.[237] And since greed feeds on itself, the more benefit these people gain, the greedier they become for more. As Hobbes aptly noted:

> "So that in the first place, I put for a general inclination of all mankind, a perpetual and restless desire of power after power that ceaseth only in death. And the cause of this, is not always that a man hopes for a more intensive delight, than he has already attained to; or that he cannot be content with a moderate power; *but because he cannot assure the power and means to live well, which he hath present, without the acquisition of more*."[238]

While greed "pushes" an individual to selfishly seek beyond their basic requirement, the need-factor, what Hobbes and Rousseau call self-preservation, forces an individual to satisfy basic requirements for survival. It is caused mainly by the systemic deficiencies in a society's institutions, laws, economics, culture and politics.[239] For example, where institutions have ceased, or takes long, to function, citizens may be "forced" to resort to bribes because it is the fastest way, or actually the only way, by which they can access the service that they are otherwise freely entitled to.[240] Similarly, where a country's politics is unregulated or is unstable, politicians may find that they have to resort to bribery and cheating to get elected or to maintain their political positions.[241] The same logic applies where the economy cannot afford workers basic needs, or where poverty is pervasive to the point that people cannot make ends meet. In those instances, individuals may be tempted to resort to corrupt ways of earning money or accessing resources in order to cushion themselves or their families from the debilitating effects of a non-functioning economy.[242] Likewise, where one's culture requires, for example, dependence and loyalty to one's group,

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Causes and Consequences (1979) 352 (quoting Brahman Prime Minister of Chandragupta list of "at least forty ways" of embezzling money from government).

[237] See, for example, SH Alatas *The sociology of corruption: the nature, function, causes, and prevention of corruption* (1980) 9 (giving examples of bribery in ancient China).

[238] W Molesworth *The English Works of Thomas Hobbes of Malmesbury* (1839-45) 85 ((emphasis added)). See also Plato *Republic* (2000) VI, 1 ("For our lusts are set over our thoughts like cruel mistresses, ordering and compelling us to do outlandish things").

[239] For a discussion see C Van Rijckeghem & B Weder "Corruption and the Rate of Temptation: Do Low Wages in the Civil Service Cause Corruption?" (1997) International Monetary Fund Working Paper Working Paper No. 97/73 available at papers.ssrn.com/sol3/papers.cfm?abstract_id=882353 (accessed 20/11/2011).

[240] See MU Ekpo "Gift-giving and Bureaucratic Corruption in Nigeria" in Ekpo (Ed) *Bureaucratic Corruption in Sub-Saharan Africa: Toward a Search for Causes and Consequence*s (1979).

[241] The concept of "status strain" introduced by Lipset and Raab can explain how people behave when they fear losing their status. This fear of status decline is caused when those who are socially well-established feel threatened. In politically unstable countries, the anxiety and fear from the "status strain" will put pressure on the people to do anything possible in order to protect their social status and property including engaging in corrupt conduct. SM Lipset & E Raab *The politics of unreason: the right-wing extremism in America* (1970).

[242] See C Van Rijckeghem & B Weder "Corruption and the Rate of Temptation: Do Low Wages in the Civil Service Cause Corruption?" (1997) International Monetary Fund Working Paper Working Paper No. 97/73 available at papers.ssrn.com/sol3/papers.cfm?abstract_id=882353 (accessed 20/11/2011).

individuals may be "forced" to misuse their position in favour of the group so as to secure their sense of belonging.[243]

Some might argue that because need based corruption is externally driven it should be considered a lesser corruption than greed based corruption. However, it is the position of the thesis that this argument should not be allowed to hold sway. This is because there is enough evidence showing that there are many people who would be in similar dire situations caused by external need but still remain honest, hardworking, impartial and trustworthy.[244] Indeed these deficiencies in societal structures that force people to resort to underhand tactics are not aimed at specific individuals but affect the public in common. Those who react to them by taking unlawful advantage of the opportunities granted by their public positions for private benefit should not therefore escape culpability on the basis of need.[245] When the social conditions are dire men must learn to live honestly within those conditions as they seek ways to improve or rectify the situation for all. Otherwise, necessity can become a pretence under which "every enormity is attempted to be justified".[246] As Rousseau correctly pointed out in *Emile:*

> "So it is the fewness of his needs, the narrow limits within which he can compare himself with others that makes a man really good; *what makes him really bad is a multiplicity of needs and dependence on the opinions of others* (emphasis added)."[247]

Thus, both greed and need based corruption are equally culpable. They both elevate private interest over public good. This elevation of private interest over public interest is what makes corruption condemnable in many societies and accounts for why private gain is

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[243] As Carvajal aptly notes, close relationships have corruption-engendering effects as "networks need friends in influential positions in order to manoeuvre payoffs, to attain suitable regulations accordance with one's interests, and to buy protection". R Carvajal "Large Scale Corruption: Definition, Causes, and Cures (1999) 12(4) *Systemic Practice and Action Research* 335 at 343. According to L Holmes *The End of Communist Power: Anti-Corruption Campaign and Legitimation Crisis* (1993) 165:

> "The power of both peer pressure and peer-comparison can be great, for instance in the words of one artist "when the best of people take bribes, isn't it the fool who doesn't?" In other words if individuals see others around them benefiting from corruption, they may well choose to indulge too."

[244] See, for example, C Van Rijckeghem & B Weder "Corruption and the Rate of Temptation: Do Low Wages in the Civil Service Cause Corruption?" (1997) International Monetary Fund Working Paper Working Paper No. 97/73 available at papers.ssrn.com/sol3/papers.cfm?abstract_id=882353 (accessed 20/11/2011) (according to their empirical study based on public sector wage data of 31 developing countries, the raising of the level of salary would not lead to lower corruption in the short run, though an active wage policy is still necessary in the fight against corruption). See also K Abbink "Fair Salaries and Moral Cost of Corruption" (2000) University of Bonn Economic Discussion Papers No 1 (concluding that high relative salaries do not lead to less corruption); Compare with RK Goel & MA Nelson "Corruption and Government Size: A disaggregated Analysis (1998) 97 *Public Choice* 107.

[245] See JJ Rousseau "Lettres Morales" in H Gouhier *Ouvres Completes de Jean Jacques Rousseau* vol 4 (1969) 1106 (noting that "the whole morality of human life is the intention of man").

[246] See W Paley *The principles of moral and political philosophy* (1786) 121 ("but necessity is pretended; the name under which every enormity is attempted to be justified").

[247] Rousseau, *Emile: Or, On Education* (1762) 209.

considered an essential element in the definition of corruption.[248] It must, therefore, be shown to exist for an abuse of public entrusted authority to amount to corruption. Mere abuse of public entrusted authority would not do. This is because there are circumstances where an abuse of public entrusted authority would be justified for serving the common good and not private interest. For example, in cases of an emergency a public official may be forced to divert funds or public property from its intended purpose in order to save public lives. In these kinds of cases, the element of private gain would be lacking to make the act corrupt.

Still, one has to be careful before setting a fast and rigid rule that all acts that seem to serve the common good are non-corrupt. This is because private interest comes in various shades and shapes and is not limited to monetary gain or to the individual interest of the public official but extends to other non-monetary benefits and to benefits accruing to the family, friends and close associates of the suspected official.[249] Indeed the benefit to the public could well be incidental to the main objective of benefitting private interests. For example, a holder of public office may opt for single sourcing in procuring public goods and services instead of the more rigorous process of open tendering ostensibly to save the public money while the real reason is to rig the process in favour of a specific supplier who is his or her close associate or friend. Each case should, therefore, be determined on its own facts. The point that needs to be stressed, though, is that the intention to benefit private interest is an essential element in the conception of corruption.

2.4. Why private gain at the expense of public good is at the core of corruption definition: a social contract theory explanation

As understood in the above description, corruption, in a sense, is the elevation of self-interest over public good. It is rooted in the selfish idea that the goal of holding public entrusted office or authority is to channel as much of the public cake as possible to one's self, family, tribe or friends, with little regard to the need of the trustees (the public). This essence of corruption goes to the very root of why corruption is condemned in many societies.[250] It breaches the very premise of the social contract, which requires persons entrusted with

[248] See V Tanzi *Corruption around the world - causes, consequences, scope, and cures* (1998).
[249] Private gain here is viewed broadly as including gain to family members, close friends or close associates. The gain also need not be monetary in nature. It could include expensive gifts like jewellery to wife, training in exclusive sites and promotions.
[250] See V Tanzi *Corruption around the world - causes, consequences, scope, and cures* (1998).

public authority, resources, or office to utilize the authority, resources, or office for the benefit of the public and not to convert public goods, services, benefits and advantages to private hands, without lawful or moral justification.[251] As one commentator has aptly observed:

> "Under any theory of government, the wealth of a nation is traditionally placed under the guardianship of its elected and appointed officials. Implicit in the acceptance of a public appointment is a commitment by the political leadership to hold and manage the nation's wealth and resources in trust for the people. In their role as a trustee, the public servant is subject to the constraints imposed by the fiduciary relationship he enjoys with the public he serves. A fiduciary is under a duty to refrain from administering the trust in a manner that advances his personal interests at the expense of the beneficiaries and to use reasonable care and skill to preserve the trust property. Officials who engage in illicit enrichment (a form of corruption) violate this public trust."[252]

The idea of the social contract has been used since the 17th century to explain the legitimacy of human authorities and still remain a popular doctrine today.[253] It is usually traced back to the classical writings of Thomas Hobbes,[254] John Locke[255] and Jean-Jacques Rousseau,[256] though Sophists[257] and earlier philosophers like Plato[258] and Aristotle[259] had also touched on it.[260] The theory views human authorities as established by convention with their subjects for specific tasks and that their legitimacy depends upon fulfilment of these tasks.[261] The theory begins by unravelling the condition of man in the hypothetical "State of Nature", that is, the natural state of man before creation of civil society. In this state, life is described as

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[251] See, for example, E Burke "Reflections on the Revolution in France" in E Burke *The work of the right honorable Edmund Burke* (1871) 359 (pointing out that "society is, indeed, a contract"). But see JS Mill *On liberty* (1975) 70 ("[s]ociety is not founded on a contract, and.., no good purpose is answered by inventing a contract in order to deduce social obligations from it").

[252] N Kofele-Kale "Presumed Guilty: Balancing Competing Rights and Interests in Combating Economic Crimes" (2006) 40 *International Lawyer* 909 at 942.

[253] See, for example, P Riley *Will and Political Legitimacy: a critical exposition of social contract theory in Hobbes, Lock, Rousseau, Kant and Hegel* (1982) 1 (pointing out that "political legitimacy, political authority and political obligations are derived from the consent of those who create a government and who operate it").

[254] T Hobbes *Leviathan* (1994).

[255] J Locke *Second treatise of government* (1980).

[256] JJ Rousseau *The social contract and the first and second discourses* (2002).

[257] Sophists were travelling teachers in ancient Greece who specialized in the use of philosophy to teach virtues and excellence to their students who were mainly made up of the nobility. On details of Sophist thoughts, see J de Romilly *The Great Sophists in Periclean Athens* (1992) (Pointing out that Sophists in fifth-century (B.C.) Athens had inferred from the difference in lifestyle and custom among the communities living in the Mediterranean world that social arrangements were not products of nature, but of convention or contract).

[258] For example, in earlier Platonic dialogue, *Crito*, Socrates adopts a social contract argument to tell Crito why he must remain in prison and accept the death penalty. He argues that because the Laws of Athens has served him during his life out of prison, he is consequently obligated to obey the Laws. See Plato *Five Dialogues* (1981).

[259] See Aristotle *On generation and corruption* (2004).

[260] For a historical account of social contract theory see DG Ritchie "Contribution to the History of the Social Contract Theory" in DG Ritchie (ed) *Darwin and Hegel: and Other Philosophical Essays* (1893) 196.

[261] While there is controversy on how voluntarism and contract theory arose, what is certain is that ideas of the "good" state espoused by the early Christian leaning theorists eventually gave way to ideas of the "legitimate" state, which was taken to rest on will of the people. Today, social contract theory is understood to hold that social arrangements are products of agreements not of nature. For a discussion of the origin of legitimate state and social contract theory, see, for example, A Black "The juristic origins of social contract theory" (1993) 14(1) *History of Political Thought* 57.

"solitary, poor, nasty, short and brutish"[262] as men are forced to compete for limited resources in an environment full of distrust and lacking in an externally enforceable rule of competition.[263] Life is uncertain and insecure in this environment because survival is dependent on the strength and fitness of each individual and the goodwill of the adversary.[264] Yet this individual strength is not a guarantee for survival as even the strongest man can be killed "in their sleep" or by a combined force of the weaker members.[265] Nor can the goodwill of the adversary be relied on as it is always subject to the self-interest of its holder.[266]

It is this unpredictability of life in the State of Nature that motivates natural men to make deals with one another and create a sovereign with powers to oversee the peaceful enjoyment of their individual rights.[267] To ensure their escape from the unpredictable State of Nature, social contract theories hold that rational individuals will agree to let go of their unregulated freedom in the State of Nature in exchange for the predictability and security of a civil society governed by enforceable common law.[268] As Michael Keeley aptly notes:

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[262] T Hobbes *Leviathan* (1994) 100.

[263] Even though, as John Locke points out, nature has provided enough for everybody and despite the fact that natural man is controlled in his actions by natural morality discoverable to human reason, given that this morality is not externally enforced, the self-interest of man can and do often take over thereby creating a state of anxiety in the State of Nature. For a fuller reading of Locke's argument, see T Pogge (2ed) *World Poverty and Human Rights* (2008) chap 4. See also T Hobbes *Leviathan* (1994) (characterizing the natural condition of humankind as a mutually unprofitable state of war of every person against every other person).

[264] J Locke *Second treatise of government* (1980) para 5 of the second treatise describes this goodwill thus:

> "The like natural inducement hath brought men to know that it is no less their duty, to love others than themselves; for seeing those things which are equal, must needs all have one measure; if I cannot but wish to receive good, even as much at every man's hands, as any man can wish unto his own soul, how should I look to have any part of my desire herein satisfied, unless myself be careful to satisfy the like desire, which is undoubtedly in other men, being of one and the same nature."

[265] C Friend "Social contract theory" *Internet Encyclopaedia of Philosophy* available at http://www.iep.utm.edu/soc-cont/ (accessed 12/1/2012).

[266] But see J Locke *Second treatise of government* (1980) para 6 (arguing that while the State of Nature is pre-political, it is not pre-moral and that, therefore, men in this state are bound by the Law of Nature not to harm others with regards to their "life, health, liberty, or possessions"). However, even Locke concedes that the State of Nature becomes insecure once one man declares war on another, by stealing from him, or by trying to make him his slave. J Locke *Second treatise of government* (1980) chaps II & III.

[267] But see generally P Riley *Will and Political Legitimacy: a critical exposition of social contract theory in Hobbes, Lock, Rousseau, Kant and Hegel* (1982) (arguing that the bedrock of social contract is voluntary consent and not on any other basis such as necessity, custom, convenience, theocracy, divine right, the natural superiority of one's betters, or psychological compulsion).

[268] Two of the rights forfeited upon entering society are the right to do whatever is required for self-preservation and the right to punish violators of crimes committed in the state of nature. See T Hobbes *Leviathan* (1994) 158-59; see also E Burke "Reflections on the Revolution in France" in E Burke *The work of the right honourable Edmund Burke* (1871) 309 (a fundamental rule of civilized society is "that no man should be judge in his own cause"). But see Montesquieu's story of the Troglodytes to the import that savage men make no compacts or agreements and do not attach importance to promises. CLB de Montesquieu "The Parable of the Troglodytes" in CLB de Montesquieu *Persian Letters* (1721).

> "But, since some persons may not always act with good will, and since even those who do may be biased toward their own cause in judging violations of the moral law, people may derive additional benefit by agreeing to positive laws and responsible judges to enforce them."[269]

The social contract is made up of two parts: first, natural men "collectively and reciprocally" agree to waive the rights they had against one another in the State of Nature;[270] and second, they agree to endow some one person or assembly of persons with the authority and power to ensure that the waiver in the first contract is not breached (is enforced).[271] In other words, the social contract requires that natural men must not only agree to live in community with each other under shared laws, but also to create an authority (sovereign) to enforce the social contract and the laws that constitute it.[272] In this way society becomes possible because, whereas in the State of Nature there was no authority to control the actions of individuals, now there is a conventionally created civil sovereign that can overawe men to cooperate.[273]

To ensure that the sovereign is able to function, the individuals voluntarily surrender to the sovereign person or assembly of persons the authority necessary to enforce the first contract.[274] These include the power to make laws, judge and mete out punishment for breaches of the contract.[275] The individuals also agree to give the sovereign control over communal resources to protect and use in the execution of its functions.[276] In addition, the individuals agree to abide by the decisions of the sovereign and where necessary to assist in effecting the same.[277] On its part, the sovereign must ensure that it protects and secures the

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[269] M Keeley "Continuing the social contract tradition" (1995) 5(2) *Business Ethics Quarterly* 241 at 243.
[270] Hobbes defines contract as "[t]he mutual transferring of Right". T Hobbes *Leviathan* (1994) 68.
[271] See T Hobbes *Leviathan* (1994) 89 ("[b]efore the names of just and unjust can have place there must be some coercive power to compel men equally to the performance of their covenants"). For criticism of Hobbes, see C Pateman *The problem of political obligation: A critical analysis of liberal theory* (1979) 53 (arguing that for Hobbes the "bonds of civil life rest on the sword, not on the individual's social capacities").
[272] For Locke, there must be no question about asserting the "right to punish" those who violate moral standards of conduct—principally property rights—but this right is given to a "commonwealth" rather than to a "Leviathan." J Locke *Second treatise of government* (1980) 65-66.
[273] See T Hobbes *Leviathan* (1994) 82 (noting that the motive for a contract, a mutual transference of rights to a sovereign, is "the security of man's person, in his life and in the means of so preserving his life as not to be weary of it").
[274] Hobbes formulates the covenant by which the sovereign is instituted in these words: "I Authorise 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 Authorise all his Actions in like manner." T Hobbes *Leviathan* (1994) 87.
[275] According to Locke, men gain three things in the civil society which they lacked in the State of Nature: laws, judges to adjudicate laws, and the executive power necessary to enforce these laws. J Locke *Second treatise of government* (1980) para 97.
[276] For Locke, protection of property, including their property in their own bodies, is the primary motivation of the social contract. J Locke *Second treatise of government* (1980), para 124.
[277] Although Hobbes insists that "all men equally, are by Nature Free', yet he treats authorization as limiting that freedom. T Hobbes *Leviathan* (1994) 111. He distinguishes two ways in which such a limitation might arise, either "from the expresse words, I Authorise all his Actions" by which the subject places himself under the sovereign, or "from the Intention of him [the subject] that submitteth himself to his [the sovereign's] Power, (which Intention is to be understood by the End for which he so submitteth . . .)". And this end, Hobbes goes on

individual members of the society and their common interest in an impartial and just manner and that the resources entrusted in its care is used for the common good.[278]

The social contract does not, however, divest the individuals of all their rights nor does it give the sovereign power to control all aspects of the individual life. There remains with the individuals a residual right that allows them to pursue their natural self-interests - interests that do not breach the common interest – without the interference of the sovereign.[279] For example, with regard to property, Locke argued that the system of natural liberty leaves the fruits of nature to man in common, but the fruits of labour to the individual worker:

> "[T]hough the Earth, and all inferior Creatures be common to all Men, yet every Man has a Property in his own Person. This no Body has any Right to but himself. . . . Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his Labour with, and joyned to it something that is his own, and thereby makes it his Property."[280]

In this way, Man comes "to have a property in several parts of which God gave to Mankind in common, and that without any express Compact of all the Commoners".[281] Thus, under the social contract, only those private acts that affect other individuals' or the communal well-being are to be subjected to common law and to the sovereign's supervision.[282] Otherwise, the individual retains the freedom to pursue his or her individual interests unfettered by the sovereign will. As Rousseau aptly pointed out:

> "It is apparent from this that the sovereign power, albeit entirely sacred, and entirely inviolable, does not and cannot exceed the limits of the general conventions, *and that every man can fully dispose of the part of his goods and freedom that has been left to him by these conventions* (emphasis mine)."[283]

This traditional notion of social contract was meant to explain the creation of civil societies and the legitimacy of government authority.[284] However, since Immanuel Kant used the term

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to say, is "the Peace of the Subjects within themselves, and their Defence against a common Enemy." T Hobbes *Leviathan* (1994) 111.

[278] As Rousseau urges, it is only on the "basis of this common interest that society must be governed". JJ Rousseau *The social contract and the first and second discourses* (2002) 25. According to Hobbes, the motive for a contract is "the security of man's person, in his life and in the means of so preserving his life as not to be weary of it". T Hobbes *Leviathan* (1994) chap 14 at 82. See also J Locke *Second treatise of government* (1980) para 97.

[279] For a discussion of the place of individual right in civil society, see, for example, AS Brett *Liberty, Right and Nature: Individual Rights in Later Scholastic Thought* (2003).

[280] J Locke *Second treatise of government* (1980) 328.

[281] J Locke *Second treatise of government* (1980) 327-328.

[282] But see J Tully *A discourse on property: John Locke and his Adversaries* (1980). He attributes to Locke the remarkable conclusion that property in political society is a creation of that society and that when man enters into the political society, "[a]ll the possessions a man has in the state of nature…become the possessions of the community" so that "the distribution of property is now conventional". Thus according to Tully's interpretation of Locke, a man in civil society has no other property entitlements than those which are given to him by the communal laws. J Tully *A discourse on property: John Locke and his Adversaries* (1980) 98, 164 & 165.

[283] JJ Rousseau *The Social Contract* (1786) 63.

[284] See generally P Riley *Will and Political Legitimacy: a critical exposition of social contract theory in Hobbes, Lock, Rousseau, Kant and Hegel* (1982).

as an Idea for social formation,[285] the theory has also been used to explain the formation of social entities at both macro and micro state levels.[286] Understood in this sense, therefore, whenever two or more people or groups of people come together and voluntarily agree among themselves to share the burdens of life and the side-benefit that emerges from the collective synergy the basis of a social contract is formed.[287] When this grouping anoints, appoints or elects a representative person or an assembly of persons to look after their collective interest, such a person or persons is expected to act impartially and in the common interest of the group.[288]

However, when the representative(s) breaches this public trust for their own private benefit or when individual members of the society bribe the representative(s) in order to get preferential treatment then the social system becomes corrupted.[289] As Rousseau aptly noted "if you would have the general will (common interest) accomplished, bring all particular wills (private interests) into conformity with it"; in other words, "as virtue is nothing more than the conformity of the particular wills with the general will, establish the reign of virtue".[290] The corollary is that where the pursuit of common interest is replaced by the glory of selfish interest, the reign of virtue loses to that of corruption.[291] Indeed, the orthodox understanding of corruption since Aristotle's writing in *On generation and corruption*,[292] the one put forth in particular by Machiavelli in his *Il Principe*,[293] is that of corruption as a decline or decay of the capacity of the citizens and officials of a state (and it may now be added, of any other social formation) to subordinate the pursuit of private interests to the

[285] For a full translation of Kant's entire work, see I Kant *The Conflict of the Faculties* (1979). Kant talks of the Idea of the Social Contract, that "the act through which a people constitutes itself a state, or to speak more properly the *Idea of such an act*, in terms of which alone its legitimacy can be conceived, is the original contract by which all the people surrender their outward freedom in order to resume it at once as *members of a common entity*… (emphasis added)). I Kant *The Conflict of the Faculties* (1979) 186.

[286] For this approach, see, for example, T Donaldson & TW Dunfee, "Integrative Social Contracts Theory: A Communitarian Conception of Economic Ethics" (1995) 11(61) *Economics and Philosophy* 85. See also M Rosenfeld "Contract and Justice: The Relation between Classical Contract Law and Social Contract Theory" (1985) 70 *Iowa Law Review* 769 863 (pointing to "the *twofold nature of the Social Contract as Contract of Association and Contract of Government*" (emphasis added)).

[287] See generally IR MacNeil *The new social contract: An inquiry into modern contractual relations* (1980).

[288] Locke, for example, argues that the justification of the authority of the government is the protection of the people's property and well-being, so that when such protection is no longer present the men reserve the right to resist the authority of that government. J Locke *Second treatise of government* (1980).

[289] R Braibanti "Reflection on Bureaucratic corruption" (1962) 40(4) *Public administration* 357 at 365 (pointing out that bureaucratic norms are meant to ensure, after all, precisely this – that "decisions be made without regard to personal interest and group pressure").

[290] JJ Rousseau "Economie politique" in JJ Rousseau *The Social Contract and Discourses* (1950) 302-310.

[291] See, for example, DH Lowenstein "Political Bribery and the Intermediate Theory of Politics" (1985) 32 *UCLA Law Review* 784 at 786, 833 (pointing out that a related conception of corruption arises from political philosophy and trusteeship theory: the idea that public officials must privilege the public interest rather than either political considerations or private gain).

[292] Aristotle *On generation and corruption* (2004).

[293] N Machiavelli *The Prince (Italian: Il Principe)* (1532).

demands of the common good.[294] It is in this sense, that the explanation of corruption as an abuse of public entrusted authority for private benefit is (or ought to be) understood, if not globally, at least, within the context of this thesis.

2.5. Conclusion

This chapter has attempted to demarcate the contours of corruption as understood globally and more specifically in this thesis. It concludes that while the legal criterion for determining standard of behaviour has certain limitations it is a better criterion than the moral criterion for determining acts that amount to corruption. The reason for this is three-fold. First, moral criterion is usually too wide and ambiguous on concepts as they depend on public opinions which are never uniform or static. Second, popular opinions on concepts are usually just that: opinions and would not ordinary have any force on the behaviour of people until they are backed by the law. Third, legal standards of behaviour are often also a reflection of the prevailing morals in the society as the lawmakers who enact them do spring from the same society. Thus, while the moral debate on the standard of behaviour is important in determining the kind of standards that should guide the behaviour in any society, only those morals or conducts that have been distilled into law, it is contended, should determine the standard of corruption.

The chapter also concludes that the standard of corrupt behaviour should not be overly circumscribed given the multifaceted nature of corruption. Indeed there are many identified acts of corruption, which if a rigid definition of corruption is adopted would most probably be left out. In this connection, the thesis believes that the best definition that captures the various manifestations of corruption is that of abuse of public entrusted authority for private gain. This definition is not novel and seems to be the popular standard accepted in the various laws and scholarly writings. The public nature of the definition derives from the fact that the purpose of law as evincible from the contractual basis of society is not to restrict the freedoms of individual members of the society but to create an atmosphere where everybody can realise their full potential by regulating only those conducts that affect the common good

[294] For a discussion on Aristotle's views, see J Barnes *The Complete Works of Aristotle: Volume One* (1984). In a passage in *Politics,* Aristotle, for example, says:

> "There are three kinds of constitution, or an equal number of deviations, or, as it were, corruptions of these three kinds …. The deviation or corruption of kingship is tyranny. Both kingship and tyranny are forms of government by a single person, but the tyrant studies his own advantage … the king looks to that of his subjects."

Quoted in AJ Heidenheimer *et al* Political *Corruption: A Handbook* (1989) 3.

of the society. Those individual acts that have no bearing on this common good are accordingly excluded from the ambit of the law. Thus, the public related definition of corruption is more in tandem with the social contract regime than one that tries to also capture private corruption, which does not affect the common good.

More importantly, the chapter concludes that one essential element in the definition of corruption is its elevation of private interest over public interest. This allure of private gain is recognized as the main motivation for engaging in corruption. Thus, one strategy of containing corruption would be to remove the private gain from the equation. This strategy of removing corruptly acquired gains apart from ensuring that corruption loses its allure by making it profitless also guarantees that communal property illegally diverted to individual use is recovered for the use of the community. It is this strategy, commonly referred to as assets recovery, which is the concern of this thesis and is discussed in detail in the next chapter.

CHAPTER THREE

RECOVERING "PRIVATE GAIN" FROM CORRUPTION: THE ASSETS RECOVERY LEGAL REGIME IN KENYA AND SOUTH AFRICA

> "There can be no prevention, confidence in the rule of law and criminal justice processes, proper and efficient governance, official integrity or a widespread sense of justice, and faith that corrupt practices never pay, unless the fruits of the crime are taken away from the perpetrators and returned to the rightful parties."[295]

3.1. Introduction

The previous chapter examined the crime of corruption. It concluded that, although disagreement still abounds on the criteria to be used in determining corrupt conduct and on the ambit of corruption definition, there is an almost universal agreement among commentators and legal instruments that corruption is an acquisitive crime motivated in individuals by the allure for private gain.[296] This general characteristic of corruption has influenced the type of anti-corruption strategies proposed to contain the vice. These anti-corruption strategies can be classified into two broad categories: preventive and curative.[297]

The preventive strategy aims at introducing measures that would ensure that corruption does not take place. The strategy proceeds from the premise that corruption is a function of inclination and opportunity and that it occurs whenever an individual inclined to corruption meets a corruption opportunity presented by loopholes in the institutional systems.[298] As such the preventive strategy proposes measures, such as systems audit, that are aimed at

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[295] "The Legislative Guide to the 2003 UN Convention against Corruption" available at www.unodc.org/pdf/corruption/CoC_LegislativeGuide.pdf (accessed 20/4/2012).

[296] Indeed even among the commentators who view corruption as a non-behavioural problem, there is an acceptance that corruption is committed, in the final analysis, by individuals and not by such abstract entities as states, institutions or politics. See, for example, DJ Gould "Administrative Corruption: Incidence, Causes, and Remedial Strategies" in A Farazmand *Handbook of Comparative and Development Public Administration* (1991) 467 at 468 (while arguing for a systemic approach to corruption also concedes that it is committed by individuals).

[297] For a discussion of the various anti-corruption strategies, see the UNODC *The Global Programme Against Corruption: Anti-Corruption Tool Kit* (2004) available at http://www.unodc.org/documents/afghanistan/Anti-corruption/corruption_un_anti_corruption_toolkit_sep04.pdf (accessed 2/10/2011).

[298] As confessed by the former director of KACC (now Ethics and Anti-Corruption Commission) Justice Aaron Ringera "the bulk of the matters the Commission investigates and deal with amounts to no more than an investigation of the opportunities taken by persons with no integrity that might have been passed on by people with integrity". See A Ringera "Corruption and Integrity" a presentation during the British Council Leadership Forum in Kenya on 25 August 2007 at 17 available at http://www.eacc.go.ke/archives/speeches/British-Council.pdf (accessed 20/10/2010).

sealing institutional loopholes[299] and those, such as public education, that are aimed at disinclining people from corruption.[300] The curative strategy, which is also commonly referred to as the law enforcement strategy, on the other hand, proceeds from the premise that there are people who cannot be disinclined by public education or who cannot resist taking advantage of weaknesses and loopholes in the systems however much they are tightened and that the only way to deal with these people is to confront them with the full wrath of the law.[301] The strategy, therefore, aims at punishing these offenders and ensuring that they do not benefit from the fruit of their crime. It proposes measures, such as imprisonment, that are aimed at isolating the offenders from the rest of the society and those, such as assets recovery, which are aimed at recovering the stolen public property and reverting it back to public use.

The two categories of strategies, though serving different ends, are, however, not mutually exclusive.[302] They are in most cases mutually reinforcing. For example, the law enforcement measure of imprisonment apart from punishing the offender can also serve a preventive role by deterring offenders and potential offenders from engaging in corruption.[303] Similarly, some of the preventive measures could also be considered curative. For example, the sealing of corruption loopholes in a system could well be as a response to a past abuse of the system. This thesis, while recognizing the mutual inclusivity of the two strategies and the need for them to be applied concomitantly, is, however, only concerned with the law enforcement strategy, and especially as it relates to the recovery of the benefit derived from corruption.

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[299] The World Bank is typical of this approach. See World Bank *World Development Report (*1997) 103 ("Any policy that creates an artificial gap between demand and supply creates a profitable opportunity for opportunistic middlemen"). See also M Khan "The New Political Economy of Corruption" in B Fine *et al* (eds) *Development Policy in the Twenty-First Century: Beyond the Post-Washington Consensus* (2001) London: Rutledge 112 at 112–135.

[300] Other measures include strengthening ethical codes and individual responsibility, centralizing investigation and surveillance, and tightening sanctions on corruptive behaviour. For a discussion, see TM Holbrook & KJ Meier "Politics, Bureaucracy, and Political Corruption: A Comparative State Analysis" In HG Frederickson (ed) *Ethics and Public Administration* ((1993) 28 at 28-51. See also JST Quah "Comparing Anti-Corruption Measures in Asian Countries: Lessons to be Learnt" (1999) 11(2) *Asian Review of Public Administration* 71.

[301] Hobbes, for example, points out that while appeals to high ideals, such as integrity, are certainly desirable sentiments, the "bonds of words" are "too weak to bridle men's ambition, avarice, anger, and other passions", and so what is needed is either "a fear of the consequence of breaking their word, or a glory, or pride in appearing not to break it". But since this latter requirement of "glory or pride" is a generosity too rare to find or to depend on "especially in the pursuers of wealth, command, or sensual pleasure; which are the greatest part of mankind", to Hobbes, therefore, "the passion to be reckoned upon, is fear (of punishment)". See T Hobbes *Leviathan* (1994) chap 14, 31.

[302] For example, UNCAC recognizes both the preventive and law enforcement measures in the fight against corruption. UNCAC, chapter II, III, IV, V & VI. For an examination of UNCAC see generally P Webb "United Nations Convention against Corruption: global achievement or missed opportunity" (2005) 8(1) *Journal of International Economic Law* 191.

[303] For the deterrence role of punishment, see, for example, J Bentham "Principles of penal law" in J Bowring *The Works of Jeremy Bentham* (1962) 367 at 396 (pointing out that one of the aims of punishment is to deter future crimes).

The assets recovery objective of law enforcement derives from an understanding that the traditional response of prosecution, followed by punishment is seldom of itself an adequate response to acquisitive crimes such as corruption.[304] Since the general motivation for such crimes is accumulation of wealth, to reduce them, it is generally understood that the motivation must also be removed.[305] Assets recovery strategy by taking away ill-gotten wealth from offenders and restoring it to its original owners is seen as fulfilling this purpose. This chapter examines in detail the meaning and types of assets recovery, the foundational basis for using assets recovery to fight acquisitive crimes such as corruption, and the legal framework for the recovery of corruptly acquired assets in Kenya and South Africa. The aim is to prepare the ground for a critical analysis in subsequent chapters of how the two countries have used the human rights framework to ensure that the public interest in the recovery of corruptly acquired assets is proportionally balanced with the public interest in the protection of rights of property owners in their respective assets recovery laws.

3.2. Background to the assets recovery strategy

The recovery of proceeds of crime is a recent strategy in the war against crime. It first emerged in the 1980s, commonly referred to as the "age of proceeds of crime", as a response to the menace of drug trafficking.[306] Prior to the 1980s the prevalent approach of the criminal law in many countries around the world was to allow criminals get away with the fruits of their crimes.[307] While *instruments* or *subjects* of crime could be recovered, the traditional criminal justice system did not provide for the recovery of the proceeds of crime.[308] In those instances where an offence resulted in loss of any kind, the task was left to the victims of the

[304] See generally RG Fox and A Freiberg "Profits of Crime and Their Recovery" (1984) 3 *Cambridge Studies in Criminology* 6.

[305] See QC Costigan "Organized Fraud and a Free Society" (1984) 17 *Australian and New Zealand Journal of Criminology* 7 at 12 noting that:

> "The possession of the power that flows with great wealth is to some people an important matter in itself, but this is secondary to the prime aim of accumulating money. Two conclusions flow from this fact. The first is that the most successful method of identifying and ultimately convicting major organized criminals is to follow the money trail. The second is that once you have identified and convicted them you take away their money; that is, the money which is the product of their criminal activities."

[306] MM Gallant *Money Laundering and the Proceeds of Crime: Economic Crime and Civil Remedies* (2005) 1.

[307] G Stessens *Money laundering: A New International Law Enforcement Model* (2000) 3.

[308] G Stessens *Money laundering: A New International Law Enforcement Model* (2000) 4-5 (pointing out that the majority of criminal justice systems were familiar with the more traditional forms of recovery – of the instrument or subject of crime). In this regard, the English common law instruments of deodand and attainder, which is sometimes touted as the progenitors of the modern recovery laws, were mainly aimed at recovering the subjects and instruments of crime not proceeds of the same. For a discussion of these instruments, see A Freiberg and RG Fox "Fighting Crime with Forfeiture: Lessons from History" (2000) 6 *Australia Journal of Legal History* 1.

crime to institute a civil case for compensation.[309] But where the offence did not have any identifiable victim, the proceeds of crime would remain untouched.[310]

It was this gap that became glaringly clear to the community of nations in its failing effort to eradicate drug trade, which had taken a transnational dimension.[311] The immense revenue from drug trafficking was making it possible for drug lords to insulate themselves from detection and arrest as they were now able to pay for the services of intermediaries and, thereby, distance themselves from the actual acts of trafficking and delivering of drugs.[312] The enormous profit was also enabling drug lords to infiltrate and compromise law enforcement agencies and political and judicial institutions.[313] In addition, the vast proceeds was providing the drug trafficker with the financial muscle to expand their illegal trade to other illegal areas such as human trafficking, terrorism and racketeering, thereby making them more connected and dangerous.[314] Once acquired, the "dirty" proceeds were being introduced into the legitimate sphere so as to disguise their illegal origin, making it even more difficult to connect the criminals with the proceeds.[315] In effect, the proceeds of crime became the very means by which the lifeblood of organized crime could be generated and maintained.[316]

However, given the absence of identifiable victims in drug trade it became difficult to recover the proceeds of the criminals for purposes of compensation. The only legal instrument which could ensure that offenders were deprived of their illegal profits was the recovery of the proceeds of crime. This was the instrument that the international community

[309] G Stessens *Money laundering: A New International Law Enforcement Model* (2000) 4.
[310] See MM Gallant *Money Laundering and the Proceeds of Crime: Economic Crime and Civil Remedies* (2005) 13 (noting that criminal liability in pre-1980s international and most domestic laws did not attach to the act of concealing criminal revenues).
[311] With the beginning of globalisation in the 1980s, the mobility of capital, commodities, people and services acted in favour of organized crimes such as drug trade which tended to ignore national boundaries.
[312] Revenues generated from illegal drug trafficking were estimated to be over one hundred billion dollars per year in the United States, and up to five hundred billion worldwide. J Carr & C Morton, "How to Recognize a Money Launderer" (1989) 8 *International Financial Law Review* 10 (Five hundred billion is an estimate from Interpol).
[313] B Vettori *Tough on Criminal Wealth: Exploring the Practice of Proceeds from Crime Confiscation in the EU* (2006) xi.
[314] For a discussion, see M Kleiman "Drug Enforcement and Organized Crime" in H Alexander and G Caiden (eds) *The Politics and Economics of Organized Crime* (1985) Washington: Lexington Books 67-87.
[315] See N Ryder, 'The Financial Services Authority and Money Laundering: A game of Cat and Mouse' (2008) 67(3) *Cambridge Law Journal* 636.
[316] A Smellie "Prosecutorial Challenges in Freezing and Forfeiting Proceeds of Transnational Crime and the use of International Asset Sharing to Promote International Cooperation" (2004) 8(2) *Journal of Money Laundering Control* 104 at 104-105 (discussing the Al Capone case and concluding that "moral of the Al Capone case is that the only way to put "Mr Bigs" out of business is to confiscate their proceeds of crime").

(beginning with the USA) turned to when it launched its so-called "War on drugs."[317] The strategy is aimed at taking away the profits of crime.[318] It is based on the understanding that the commission of acquisitive crimes is motivated in large part by the allure of monetary gain and that this gain if not taken away would not only make these crimes seem profitable but would also provide the capital necessary to commit further offences.[319] This understanding informs the philosophy behind the strategy.[320] First is the notion that because monetary gain is the motive, eliminating the criminal proceeds would act as a powerful deterrent. Second is the idea that taking away ill-gotten income would prevent the criminals from being able to penetrate and compromise the legal system and the legitimate economy. Third is the view that, when connected to criminal organizations, removing the proceeds would reduce their operative capital for future or diversified criminal activities.

The attractiveness of the strategy in the fight against drug trade made it to be internationalized in the 1988 United Nations Convention against the Illicit Traffic of Narcotic Drugs and Psychotropic Substances (hereinafter the Vienna Convention).[321] The Vienna Convention was soon followed by the negotiation of the 1990 Council of Europe Convention on Laundering, Search Seizure and Confiscation of the Proceeds from Crime.[322] These conventions symbolised and embodied a global desire to separate criminals from their ill-gotten gains. Indeed, even though different national and regional factors are important to understanding the emergence of the assets recovery strategy, the single most important factor that influenced the emergence of the strategy was the fact that most of the acquisitive crimes such as drug trade were transboundary thereby necessitating international, unitary measures through international organisations and international law.[323]

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[317] The strategy first surfaced in the United States of America (USA), where efforts to tackle drug trafficking were failing mainly because of the enormous profits generated from the drug business. The "success" of the strategy in fighting drug trade in USA made it to quickly spread to the rest of the world where it ignited a new era in the fight against organized crime. For a sceptical view on the success of US's war on drugs, see D Baum *Smoke and mirrors: the war on drugs and the politics of failure* (1996) (examining the US war on drugs and declaring it a failure). For a general discussion of assets recovery in the war against drugs, see MB Stahl "Asset forfeiture, Burdens of proof and the war on drugs" (1993) 83 *Journal of Criminal Law & Criminology* 274.

[318] G Stessens (3ed) *Money Laundering: A New International Law Enforcement Model* (2000) 12.

[319] B Vettori *Tough on Criminal Wealth: Exploring the Practice of Proceeds from Crime Confiscation in the EU* (2006) 2.

[320] For a discussion see M Kleiman "Drug enforcement and organized crime" in H Alexander & G Caiden (eds) *The Politics and Economics of Organized Crime* (1985) 67-87. I Tremblay "The proceeds of crime: one year's experience" (1989) 13 *Criminal Law Journal* 24.

[321] United Nations Convention against the Illicit Traffic of Narcotic Drugs and Psychotropic Substances, Vienna, 20 December 1988, *ILM* (1989), 493.

[322] Council of Europe Convention on Laundering, Search Seizure and Confiscation of the Proceeds from Crime Strasbourg, 8 November 1990, *ETS* No. 141.

[323] As one commentator has aptly noted, "[g]lobal regimes, harmonized through international law allow countermeasures to replicate the global character of the conduct they seek to suppress." MM Gallant *Money*

Urged by the international initiatives, those countries that had not yet embraced the new strategy soon adopted it in their municipal laws. For example, South Africa in 1992 enacted the Drug and Drug Trafficking Act in which recovery of proceeds was recognized as a strategy in the fight against drug-related crimes.[324] Likewise Kenya enacted the Narcotic Drugs and Psychotropic Substances (Control) Act of 1994 in which a whole chapter was dedicated to the confiscation of proceeds of drug-related crimes.[325] Commenting on this change of attitude in the criminal justice system, the then UN Secretary-General noted: "The connection between organized crime and illicit drug trafficking has changed both the panorama of organized crime and the way criminal justice seems to react to this phenomenon".[326]

The paradigm rapidly expanded from the fight against drugs to other areas. Within the Organization for Economic Cooperation and Development (OECD), for example, the paradigm was first expanded to cover "serious crimes" as defined by individual members. This followed the 1996 review of the 40 Recommendations against Money Laundering by the Financial Action Task Force (hereinafter FATF) and its recommendation to Members to expand the definition of predicate offences from drug trafficking to "serious crimes". The paradigm was later extended to "the widest range of predicate offences" following a second revision of the 40 Recommendations by FATF in 2003.[327]

In the United Nations context, the paradigm was extended to the area of transnational organized crime by the adoption of the United Nations Convention against Transnational Organized Crime (UNCTOC).[328] UNCTOC defined transnational organized crime as including belonging to an organized group, corruption, obstruction of justice, money laundering and specific protocols on trafficking in persons, arms, organs and migrants.[329] The adoption of the United Nations Convention Against Corruption (UNCAC) in December

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Laundering and the Proceeds of Crime: Economic Crime and Civil Remedies (2005) 7. See also B Vettori *Tough on Criminal Wealth: Exploring the Practice of Proceeds from Crime Confiscation in the EU* (2006) 7-8.

[324] Drug and Drug Trafficking Act 140 of 1992.

[325] The Narcotic Drugs and Psychotropic Substances (Control) Act of 1994 (as amended in 2010) chap IV.

[326] Secretary-General of the UN "Note: Strengthening Existing International Cooperation in Crime Prevention and Criminal Justice, including Technical Co-operation in Developing Countries, with Special Emphasis on Combating Organised Crime. Addendum: Money Laundering and Associated Issues: the Need for International Cooperation" (Vienna: UN, 1992), E/CN.15/1992/4/Add.5 at 3.

[327] FATF *40 Recommendations* (2003), recommendation 1 available at http://www.fatf-gafi.org/media/fatf/documents/FATF%20Standards%20-%2040%20Recommendations%20rc.pdf (accessed 20/10/2012).

[328] United Nations Convention against Transnational Organized Crime entered into force in 29 September 2003, art 38.

[329] UNCTOC, in line with the FATF Recommendations of 2003, requires State Parties to apply money laundering offences to "the widest range of predicate offences".

2003 reaffirmed the validity of the assets recovery strategy and its full extension to the anti-corruption arena.[330] Although the negotiations relating to the provisions of asset recovery proved very difficult,[331] UNCAC expressly stated that asset recovery is "a fundamental principle" in the fight against corruption[332] and dedicated a whole chapter to matters pertaining to asset recovery.[333]

The regional bodies also adopted anti-corruption instruments under which the assets recovery mechanism was embraced as a useful mechanism of tackling corruption. The African Union, for example, adopted the African Union Convention on Preventing and Combating of Corruption of 2003 (AU Convention), in which State Parties were called upon to adopt legislative and other measures to, among others, empower their competent authorities to trace, identify, administer, freeze or seize the 'instrumentalities and proceeds of corruption" pending a final judgment; and to confiscate and repatriate proceeds of corruption.[334] Under Article 19(3) state parties were encouraged to adopt legislative and other measures to ensure that public officials do not enjoy the ill-gotten wealth hidden in their jurisdiction and to freeze and facilitate the repatriation of such wealth.[335] Similar assets recovery provisions were also provided for in the Inter-American Convention against Corruption (OAS Convention)[336] and the Council of Europe Criminal Law Convention on Corruption (COE Criminal Convention).[337]

This broadening of the reach of assets recovery at the international and regional levels to cover other acquisitive crimes such as corruption was replicated at the national level with

[330] UNCAC defines "Proceeds of Crime" as "Any property derived from or obtained, directly or indirectly, through the commission of an offence". UNCAC, art 2 (e).
[331] See generally P Webb "United Nations Convention against Corruption: global achievement or missed opportunity" (2005) 8(1) *Journal of International Economic Law* 191 at 192 (discussing the negotiating history of the UNCAC).
[332] UNCAC, art 51 ("The return of assets pursuant to this chapter is a fundamental principle of this Convention, and State Parties shall afford one another the widest measure of cooperation and assistance").
[333] UNCAC, chap V
[334] AU Convention, art 16.
[335] AU Convention, art 19(3).
[336] The Inter-American Convention against Corruption (OAS Convention) deals with asset recovery "as a means of enforcing the criminalization provisions with different level of emphasis". It requires state parties to provide each other "the broadest measure of assistance" in the tracing, freezing, seizure, and forfeiture of proceeds of criminal conduct. Where a state party receives a confiscation order from another state it "shall" dispose of the proceeds of crime in accordance with its domestic laws. The proceeds can, however, be transferred in part or in whole to a "State Party that assisted in the underlying investigation or proceedings." See OAS Convention, art XV.
[337] COE Criminal Convention, unlike the COE Civil Convention, provides for the tracing, identification, freezing or seizure, and confiscation of proceeds of corruption. It calls on state parties to adopt legislative and other measures to ensure that instrumentalities and proceeds of corruption or "property the value of which corresponds to such proceeds" are recovered. See COE Criminal Convention, arts 19(3) & 23.

many countries also changing their laws to include assets recovery as a strategy in the fight against corruption and other organized crimes.[338] South Africa, for example, repealed its 1992 Drug and Drug Trafficking Act and replaced it with the Proceeds of Crime Act of 1996, which extended the powers of the courts to other forms of organized criminal activity, namely, money laundering.[339] This 1996 Act was later repealed by the Prevention of Organized Crimes Act of 1998 (POCA), which broadened the ambit of the Act to cover all organized crimes. The enactment of the Prevention and Combating of Corrupt Activities Act of 2004, which provided for a "comprehensive" definition of corruption in South Africa brought corruption crime within the ambit of the assets recovery regime under POCA.[340] Similarly in Kenya the confiscation of proceeds of crime was extended to the fight against corruption by the enactment of the ACECA.[341] The enactment of the Proceeds of Crime and Anti-Money Laundering Act of 2009 and the Prevention of Organized Crime Act of 2010 further expanded the reach of assets recovery to other predicate crimes such as money laundering and racketeering.[342]

3.3. Explaining the term "Assets Recovery"

Clearly, the recovery of proceeds of crime has become an inevitable tool in the fight against acquisitive crimes such as corruption. However, in spite of its popularity in the fight against crime, a review of the literature and various legal instruments shows that the terminology related to the process of retrieving proceeds from crime is not fully settled. Some legal documents call the object of retrieval "proceeds of crime",[343] others use the term "unexplained wealth"[344] and still others prefer to use "illegal properties".[345] Scholars have

[338] See, for example, the South African case of *NDPP v Cole and others*[2004] 3 All SA 745 (W) para 14 (noting that "broadening of confiscation as a means for the prevention and punishment of crime (in South Africa) accorded with similar developments at international level"). See also Kenyan case of *Christopher Ndarathi Murungaru v KACC* (2006) eKLR 47 (for a similar observation).
[339] Proceeds of Crime Act 76 of 1996.
[340] Though the Act does not specifically provide for an assets recovery regime, in *S v Shaik and Others* (CCT 86/07) [2008] ZACC 7 the Constitutional Court held that corruption crime as defined under the the Prevention and Combating of Corrupt Activities Act of 2004 amounted to organised crime which formed part of the crimes covered under the assets recovery regime in the (POCA).
[341] ACECA, Part VI (deals with assets recovery).
[342] See Proceeds of Crime and Anti-Money Laundering Act 9 of 2009 of Kenya and Prevention of Organized Crime Act 6 of 2010 of Kenya.
[343] See, for example, Proceeds of Crime Act 2002 of United Kingdom.
[344] See, for example, Kenya's ACECA (discussed below). For an illustration of a similar provision in Australia, see B Clarke "Confiscation of 'unexplained wealth': Western Australia response to organized gangs" (2002) 15 *South African Journal of Criminal Justice* 61.
[345] For illustration see, for example, HG Nilsson "The Council of Europe Laundering Convention: A recent example of a developing international criminal law" (1991) *Criminal Law Forum* 419.

similarly adopted different terms including "illegal profits",[346] "ill-gotten gains",[347] and "criminal assets".[348] In the area of corruption, however, there is an increasing preference for the use of the terms "asset" or "assets" to describe the object of recovery and "asset recovery" or "assets recovery" to describe the process of retrieving the proceeds of corruption.[349] The 2003 UN Convention against Corruption, which was the first international legal instrument to specifically cover the whole process of identifying, tracing, freezing or seizing, confiscating and returning proceeds of corruption to its rightful owners, calls this comprehensive process "assets recovery".[350] Subsequent legal texts have built on this and extended the term to recovering proceeds from other types of crime.[351] This thesis uses the term "assets recovery" and refers to its definition in the UN Convention against Corruption simply as the whole process of recovering corruptly acquired assets and returning it to their rightful owners.[352]

3.4. Stages in assets recovery

Assets recovery has four connected stages. The first stage is the institution of investigation for purposes of identifying and tracking the criminally acquired assets; the second stage is the preliminary legal action of freezing or seizing the identified assets for the purpose of securing them from being wasted, lost or improperly disposed of; the third stage is the confiscation or forfeiture of the identified criminally acquired assets by order of a court or competent authority; and the fourth stage is the returning of proceeds of crime to its rightful owners. Some definitions of assets recovery include a further stage of "assets management" which is the process of keeping, storing or managing the assets before they are forfeited and/or returned to their rightful owners. This thesis, however, concentrates more on the third step, that is, the confiscation process.

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[346] See, for example, RG Fox and A Freiberg "Profits of Crime and Their Recovery" (1984) 3 *Cambridge Studies in Criminology* 6.
[347] See L Katz *Ill-Gotten Gains: Evasion, Blackmail, Fraud, and Kindred Puzzles of the Law* (1996).
[348] See, for example, RE Bell "Civil forfeiture of criminal assets" (1999) 63 *Journal of Criminal Law* 371.
[349] See, for example, D Scher "Asset recovery" (2005) 14(4) *African security review* 17; S Jeffrey "Asset recovery and kleptocracy" (2010) 17(3) *Journal of Financial Crime* 321.
[350] *Legislative guide for the implementation of the United Nations Convention against Corruption* available at www.unodc.org/pdf/corruption/CoC_LegislativeGuide.pdf (accessed 20/4/2012) at 3-5.
[351] See, for example, *Convention on Laundering, Search, Seizure and Confiscation of Proceeds of Crime and on the Financing of Terrorism* (2005 Warsaw Convention).
[352] See also *Communication from the Commission to the European Parliament and the Council. The EU Internal Security Strategy in Action: Five steps towards a more secure Europe*. Objective 1, Action 3 at 6.

3.5. Confiscation stage of assets recovery

The literature and legal documents on confiscation, just like that on assets recovery, are full of different definitions, classifications and models of the phenomenon.[353] However, the term, which is usually used interchangeably with forfeiture,[354] is generally understood to mean the permanent deprivation of funds or other assets used in or gotten from an unlawful act by order of a competent authority or a court.[355] "It is a state action whereby the state seizes and claims property rights in private property without compensation to the owner".[356] It takes place through a court or administrative process that divests an individual or entity of the ownership of property and transfers it to the State. Its effect is that the state gains ownership of the property and the person or entity that held an interest in the property before confiscation loses all rights to the confiscated property.[357]

3.6. Types of confiscation

In studying the concept of confiscation a distinction is usually made between modern type of confiscation which relates to fruits of the crime from older and more traditional terms that relate to the instrumentality and the subject of crime.[358] A further distinction is made between the object and value models depending on the target of confiscation. A distinction can also be made between conviction based and non-conviction based confiscation depending on whether the confiscation is as a consequence of criminal proceedings or civil proceedings.[359]

These types of confiscation are defined according to the relation between the property at stake and the acts for which confiscation is being pronounced. The traditional type relates to

[353] See for example different definitions of confiscation in Article 1(f) of the 1988 UN Vienna Convention (deprivation) and in Article 1(d) of the UN Money Laundering Convention (penalty).
[354] See A Freiberg & RG Fox "Fighting crime with forfeiture: lessons from history" (2000) 6 *Australian Journal of Legal History* 1 at 4 (pointing out that "Confiscation is a more modem term often used, in contradistinction to forfeiture, to denote deprivation of an offender of assets being the benefits, proceeds or profits of crime").
[355] In the United States, for example, the concept of forfeiture was originally defined as "the divestiture without compensation of property used in a manner contrary to the laws of the sovereign". *US vs. Eight Rhodesian Stone Statues* (1978). More recently, the concept has been expanded to include "the divestiture of property acquired in an illegal manner". See Asset Forfeiture Office (AFO) *Asset Forfeiture Manual: Law and Practice* (1994).
[356] RE Edwards "Forfeitures – civil or criminal?" (1970) 43 *Temple Law Quarterly* 191 at 191.
[357] See FATF *Best practices: confiscation (recommendation 3 to 38)* (2010) 3.
[358] See, for example, G Stessens *Money Laundering: A New International Law Enforcement Model* (2000) 29.
[359] SD Cassella "The Case for civil forfeiture: Why in Rem proceedings are an essential tool for recovering the proceeds of crime." (2008) 11 *Journal of Money Laundering Control* 1 at 1-2. See also B Vettori *Tough on Criminal Wealth: Exploring the Practice of Proceeds from Crime Confiscation in the EU* (2006) 8-10.

the instrumentalities or the subject of crime while the modern type of confiscation relates to fruits of the crime. Instrumentalities confiscation refers to confiscation of the property, equipment, or other items used in or destined for use in the commission of an offence (for example, land used for cultivation of drug crops; gun or knife used to rob; or premises used for holding victims of human trafficking).[360] Subject confiscation concerns the property that is the subject of the criminal behaviour (for example, contrabands; falsified identification card; fraudulent credit card; or counterfeit bills). The modern confiscation, the one discussed in this thesis, relates to the proceeds of crime or the advantage gained directly or indirectly through the commission of a crime.[361] The proceeds may be physical objects, such as a house bought for a public official by a briber as a result of a contract awarded by the bribed official, or intangible objects, such as shares in a company.

A second distinction can also be made between two models of confiscation, that is, object confiscation and value confiscation. The former is directed at objects directly linked to the predicate offence (for example smuggled jewels). In this type of confiscation, what matters is the direct relation between the object and the predicate offence. Once the relationship is confirmed the object becomes amenable to confiscation notwithstanding any possible property rights established in relation to the property. As such object confiscation "blindly" targets the object without giving regard to the guilt or otherwise of the actual holder of the property at the time. It is useful where the illegally acquired property is easily identifiable and where the property has a sentimental value. The second model, value confiscation, is directed at the sum of money equivalent to the value of the proceeds of crime and not at the object itself.[362] Where it is not possible to determine the sum of money equal to the the value of the defendant's criminal proceeds, the amount can usually be assessed.[363] One advantage of this approach is that it is flexible and does not require the prosecution to trace the direct proceeds of crime. It is especially useful in instances where the proceeds have been hidden, laundered, sold, or converted into other forms of property. In these instances, the confiscation can be enforced on the offender's property which has been legally obtained and has no connection with the offence itself. As such value confiscation represents a much more

[360] For examples of confiscation of instrumentalities of crime, see, for example, *NDPP v RO Cook Properties (Pty) LTD; NDPP v 37 Gillespie Street Durban (Pty) Ltd and another; NDPP v Seevnarayan* 2004(2) SACR 208(SCA), paras 31 & 33.
[361] See G Douthwaite "Profits and their recovery" (1970) 15 *Villanova Law Review* 346; G Stessens *Money Laundering: A New International Law Enforcement Model* (2000) 30.
[362] G Stessens *Money Laundering: A New International Law Enforcement Model* (2000) 32-33.
[363] G Stessens *Money Laundering: A New International Law Enforcement Model* (2000) 36.

attractive approach and has been introduced in many jurisdictions as an addition or even as an alternative to object confiscation.[364]

The third way of understanding the concept of confiscation is to distinguish between conviction based confiscation and non-conviction based confiscation. In conviction based confiscation, a conviction for a predicate (profit generating) crime is required to trigger the confiscation of assets. This type of confiscation is also usually called criminal confiscation, confiscation of criminal proceedings, or *in personam* confiscation. It is conducted against the offenders in criminal proceedings and in most cases constitutes part of the criminal charge. It affects only the defendant's interest in the property, not the property itself. It is imposed as part of the sentence in a criminal case and requires that the person whose property is targeted be found guilty beyond reasonable doubt, or to similar standard, for a profit generating crime before an order for confiscation of the person's property can flow.[365] It is mostly value based, though in some cases it can also be object-based.[366] Once an order of confiscation is granted, the defendant forfeits his interest in the assets as his ownership of the assets becomes irrelevant.

By contrast, in non-conviction based confiscation, a conviction for a predicate (profit generating) crime is not required for the confiscation of assets to take place. This type of confiscation is usually called civil confiscation, confiscation of civil proceedings, or *in rem* confiscation.[367] It is directed at the property itself or the proceeds of crime and operates under the fiction that "guilt" attaches to the property itself. In this way it is mainly object-based, that is, it relates to the actual property that was illegally acquired and not to substitutes. While in conviction based confiscation, the defendant forfeits his interest in the asset, non-conviction based confiscation operates to forfeit the asset itself. It can be filed before, during or after criminal conviction or even where there is no criminal charge against the individual. The prosecutor need only prove that the property is tainted by the commission

[364] B Vettori *Tough on Criminal Wealth: Exploring the Practice of Proceeds from Crime Confiscation in the EU* (2006) 8.

[365] In common law countries, the guilt of the defendant is usually proved beyond a reasonable doubt, while in civil law countries the court need to be intimately convinced of the defendant's guilt. See World Bank/UNODC *Stolen Asset Recovery: Towards a Global Architecture for Asset Recovery* (2009) Available at <http://www.siteresources.worldbank.org/EXTSARI/Resources/5570284-1257172052492/GlobalArchitecturefinalwithCover.pdf?resourceurlname=GlobalArchitectureFinalwithCover.pdf> [accessed on 1 May 2011] at 15.

[366] The South African POCA, for example, provide for value based confiscation in its conviction based mechanism. POCA, chap 5. Kenya's ACECA on the other hand provides for both value and object based confiscation. ACECA, s 54.

[367] See RE Bell 'Civil Forfeiture of Criminal Assets' (1999) 63 *Journal of Criminal Law* 371 at 377.

of an offence to the civil standard (balance of probabilities) before confiscation is triggered. The onus of proving that the property is not related to the alleged crime lies with the owner of the property.[368] This thesis is particularly concerned with this latter category of confiscation and its use in the recovery of proceeds (as opposed to instrumentalities and subjects) of crime. The remaining part of this chapter examines how the assets recovery strategy has been localised in the Kenyan and South African context.

3.7. Assets recovery legal regime in Kenya

The fight against corruption in Kenya is anchored in the Constitution. Section 79 of the 2010 Constitution provides for the creation of the Ethics and Anti-Corruption Commission (EACC) and entrusts it with the responsibility of fighting corruption and promoting integrity and good governance in public service.[369] In addition to the Constitution, there are also two enabling Acts of Parliament: the EACC Act of 2011 and the ACECA. The former Act provides for the institutional framework while the latter Act provides for the operational framework for the fight against corruption.

3.7.1. The institutional framework

The EACC is the institution entrusted with the responsibility of fighting corruption in Kenya. It was formally established on 5 September 2011 following the enactment of the enabling legislation, the EACC Act.[370] By dint of section 33 of the EACC Act, the EACC replaced the Kenya Anti-Corruption Commission (KACC), which was hitherto the body fighting corruption. The Section provides that any function, transaction or investigation carried out by KACC before the commencement of the EACC Act is deemed to have been carried out under the Act. The EACC is, however, just but the latest attempt at institutionalising the fight against corruption in Kenya.

A brief history of the institutional framework shows that since the first anti-corruption legislation (the Prevention of Corruption Act) was enacted in 1956 there have been no less than five anti-corruption agencies established to spearhead the fight against corruption in

[368] See TS Greenberg *et al Stolen asset recovery: a good practices guide for non-conviction based asset forfeiture* (2009) 14-15.
[369] Constitution of the Republic of Kenya 2010 s 79.
[370] The EACC Act was signed into law on 29 August 2011 but came in force on 5 September 2011.

Kenya.[371] Under the 1956 Prevention of Corruption Act, the task of fighting corruption was carried out as part of the normal crime control function of the Kenya police. This later changed due to increasing incidences of corruption. An effort was therefore made to establish specialized anti-corruption agencies to fight the vice. The first anti-corruption agency, the Anti-Corruption Police Squad, was administratively established in November 1993, under the provision of the Corruption (Amendment) Act of 1991 "to undertake necessary measures to eradicate corruption in private and public sector". A police officer was appointed as its director and the staff seconded from the police office. However, following allegation of widespread bribe taking by its officers, the police squad was disbanded on 22 June 1995 after working for only two years and its officers absorbed back into the police force.[372]

The dissolution of the Anti-Corruption Police Squad was followed by a two year lapse in the institutionalised fight against corruption. This changed on 1 December 1997 when, at the insistence of the Bretton Wood Institutions (World Bank and International Monetary Fund), a second amendment was introduced to the Prevention of Corruption Act to provide for an Anti-Corruption Authority (KACA) independent from the police force.[373] However, like its predecessor the recruitment of the Director and staff of KACA was made entirely from the police force.[374] Again, like its predecessor, the KACA did not last for long and was disbanded after 7 months in operation following a finding by a judicial tribunal formed to investigate allegations that the Director of the Authority had acted outside his powers. The case against the Director was that he had instituted corruption proceedings against four top treasury and tax department officials and eleven other people over an alleged tax fraud of approximately $3 million from wheat and sugar imports without consulting the Attorney General as was required by section 11(3) of the Prevention of Corruption Act. The judicial tribunal found that this action was *ultra vires* and recommended for the dismissal of the Director, a recommendation which the then President effected immediately.[375]

[371] For further reading on the history of the Anti-corruption agencies in Kenya, see generally K Kibwana *et al The Anatomy of Corruption in Kenya: Legal, Political and Socio-economic Perspectives* (1996); Parliamentary Anti-Corruption Select Committee *Report of the Parliamentary Anti-Corruption Select Committee* (2000); JP Mutonyi "Fighting Corruption: Is Kenya on the Right Track?" (2002) 3(1) *Police Practice and Research: An International Journal* 21.

[372] See the Ethics and Anti-Corruption Commission, *The Anti-Corruption and Economic Crimes Act 2003 Explained: A Manual for Public Officers and Members of the Public* (2012) 1.

[373] See Prevention of Corruption Act of 1956 (repealed).

[374] The Director, Mr Harun Mwau, at the time of his appointment was a retired police officer.

[375] JP Mutonyi "Fighting Corruption: Is Kenya on the Right Track?" (2002) 3(1) *Police Practice and Research: An International Journal* 21.

More than one year later, in November 1999, the KACA was reconstituted with the appointment of a Director from the Judiciary and recruitment of high skilled staff by the Public Service Commission from across the professional divide. The Authority retained the power to investigate and prosecute corruption cases.[376] However, like its predecessor, the reconstituted Authority did not last for long. On 22 December 2000 the Constitutional Court delivered a ruling in the case of *Gachiengo & Another v Republic*[377] declaring the Authority unconstitutional.[378] According to the Court, the establishment of the Authority conflicted with section 26 of the Constitution which provided that only the Attorney General and the police could respectively prosecute and investigate criminal offences. The Court therefore found that the continued operation of KACA with its independent power to investigate and prosecute undermined the powers conferred on both the Attorney General and the Commissioner of Police by the Constitution. Consequently the authority was disbanded.

After this debacle, and following continued pressure from development partners, the government initiated new efforts to resuscitate the fight against corruption. By an Executive Order of 15 August 2001, an Anti-Corruption Police Unit (ACPU) was created to replace KACA and to be responsible to the Director of the Criminal Investigation Department of the Kenya Police for the efficient and effective performance of the Unit. The function of the Anti-Corruption Police Unit was stated as: "To investigate all corruption and corruption-related offences either at their own initiative and/or as directed by the Attorney-General and/or the Commissioner of the Police".[379]

The ACPU took over all matters that were up to then being investigated by the KACA and continued to perform this function until 2 May 2003 when the KACC was established by section 6 of the new ACECA. The ACECA repealed the 1956 Prevention of Corruption Act and established the KACC as the premier anti-corruption body. The KACC was given the task of investigating corrupt practices; educating members of the public on the dangers of corruption and enlisting their support in the fight against corruption; sealing corruption loopholes in the systems, procedures and policies of public bodies; and recovering corruptly acquired assets.[380] In carrying out its mandate the KACC was made accountable only to

[376] Prevention of Corruption Act of 1956 (repealed), s 11B.
[377] *Gachiengo & Another v Republic* (2000) 1 EA 52 (CAK).
[378] *Gachiengo & Another v Republic* (2000) 1 EA 52 (CAK) 70-74.
[379] Executive Order of 15 August 2001, cited in *Julius Meme v Republic & Another* (2004) 1 KLR.
[380] ACECA, s 7.

parliament.[381] However, and apparently in line with the decision in *Gachiengo & Another v Republic*, the Commission was denied the power to prosecute the cases it had investigated.[382] This power was entrusted to the Attorney General. The Commission was required to recommend cases for prosecution to the Attorney General after finalising its investigations.[383] The Attorney General had the discretion to accept the recommendation or not and was accountable only to parliament on the exercise of that discretion.[384]

In spite of the reduced power of the KACC, in the case of *Julius Meme v Republic & Another,*[385] the constitutionality of the investigatory power of the KACC was put to test. The Applicant in that case contended that, the judgment in *Gachiengo & Another v Republic* had held not only that the power to prosecute criminal cases resided exclusively with the Attorney General but that also the power to investigate criminal cases resided exclusively with the Kenya Police. According to the Applicant, the KACC could not, therefore, investigate corruption cases without approval from the Commissioner of Police and that by purporting to exercise such independent investigatory powers the KACC was going against the Constitution. However, this time round the Constitutional Court constituted by different judges did not go along with that argument holding instead that contrary to the decision in *Gachiengo* the prosecutorial and investigatory powers under the Constitution did not lie exclusively with the Attorney General and Kenya Police respectively. In the Court's own words:

> Mr Bowry for the applicant did not, however, attempt to persuade the Court that the Constitution requires the Attorney-General to personally or by his office, conduct all litigation in the country, or that the Commissioner of Police had a monopoly on all criminal investigations, and neither did he very well explain the operation of investigations and prosecutions that are provided for in a different manner in many statutes in force. Therefore, we have been unable to consider ourselves bound by the Gachiengo case.[386]

The chequered history of anti-corruption agencies in Kenya must have influenced the decision to enshrine the fight against corruption in the Constitution. In any case, when the Constitution was promulgated in 2010, a new body, the EACC was specifically included in the Constitution as a constitutional commission having the status and powers of Chapter Fifteen commissions of the Constitution.[387] According to the Constitution, Chapter Fifteen Commissions are independent institutions subject only to the Constitution and the rule of

[381] ACECA, s 10.
[382] For *Gachiengo & Another v Republic* 1 EA 52 (CAK).
[383] ACECA, s 35.
[384] ACECA, s 37.
[385] *Julius Meme v Republic and Another* (2004) 1 KLR.
[386] *Julius Meme v Republic and Another* (2004) 1 KLR paras 661-662.
[387] Constitution of the Republic of Kenya 2010, s 79.

Law.[388] The EACC formally replaced KACC on 5 September 2011 following the enactment of the EACC Act in line with the requirements for change as stipulated in the new Constitutional dispensation.

The EACC is composed of three commissioners, a secretary and staff.[389] The Commissioners undergo a rigorous recruitment process involving a selection panel, the president and parliament.[390] Once appointed, the commissioners serve a non-renewable term of six years and are expected to work on a full-time basis.[391] The secretary of the Commission, on the other hand, is recruited by the Commissioners through a "competitive and transparent" process and serves as the chief executive officer of the EACC for a non-renewable term of six years.[392] The staff of the EACC also known as the secretariat consists of officers competitively recruited by the EACC and public officers seconded to the Commission by the Public Service Commission upon request.[393]

The EACC Act lists the functions of the EACC as including investigating corrupt cases; creating public awareness on issues of corruption and anti-corruption; undertaking preventive measures against unethical and corrupt practices; and assets recovery.[394] The Courts have ruled that these core anti-corruption functions cannot be delegated to other bodies. For example, in the case of *Midland Finance & Securities Globetel Inc v Attorney General & Another*[395] where the KACC purported to support the decision of the Ministry of Finance to contract a private entity (PriceHouseWaterCoopers) to investigate alleged corrupt practices of two companies with which it was conducting business, the Court held that:

> … but the view of the Court is that the Commission cannot delegate its core business to the Ministry of Finance who in turn contract it out to a private entity. It is a violation of the Commissions (sic) independence and mandate.[396]

[388] Constitution of the Republic of Kenya 2010, s 249(2).
[389] Ethics and Anti-Corruption Commission Act of 2011, s 4, 16 and 18.
[390] Commissioners are interviewed by a selection panel made up of representatives from government, independent commissions, media, the Association of Professional Societies of East Africa, and joint forum of religious organisation. Once interviewed a list of shortlisted candidates (3 for the chairperson position and 4 for the two members positions) are then forwarded to the president for appointment. The appointed names must be approved by parliament. Ethics and Anti-Corruption Commission Act of 2011, s 6.
[391] Ethics and Anti-Corruption Commission Act of 2011, s 7.
[392] Ethics and Anti-Corruption Commission Act of 2011, s 16.
[393] Ethics and Anti-Corruption Commission Act of 201, s 18.
[394] Ethics and Anti-Corruption Commission Act of 2011, s 11.
[395] *Midland Finance & Securities Globetel Inc v Attorney General & Another* Misc Civil Application No. 359 of 2007.
[396] *Midland Finance & Securities Globetel Inc v Attorney General & Another* Misc Civil Application No. 359 of 2007 34.

The import of this decision is that, in Kenya, the core responsibility of fighting corruption as enumerated in both the EACC Act and ACECA lies solely with the EACC and that while the EACC may seek the cooperation of other bodies in the carrying out of its functions,[397] it cannot delegate its anti-corruption mandate to these other bodies. Indeed as the court noted in the case of *African Centre for International Youth Exchange v The EACC,*[398] the EACC is "the premiere body charged with fighting the cancer of corruption (in Kenya)".[399]

However, just like was the case with the KACC, the EACC does not have prosecutorial powers. That power lies with the Director of Public Prosecution. The prosecutorial power was removed from the Attorney General in the new constitutional dispensation because of the conflict that used to arise in the past from the Attorney General's exercise of his twin functions of chief legal advisor to the government[400] and of chief public prosecutor.[401] This conflict played itself out, for example, in the case of *Republic vs. Judicial Commission of Inquiry into the Goldenberg Affair & 2 others Ex-parte George Saitoti*[402] where the Court was forced to dismiss a corruption case against the Applicant on the ground that the Applicant, who at the material time was the minister of finance, had acted on the basis of a legal advice from the Attorney General's office. According to the Court, by formally advising the Applicant that his action was legally sound, the Attorney General had "by conduct denied himself the right to prosecute the Applicant in future in connection with the same issue".[403] The 2010 Constitution addressed this conflict by separating the two functions, with the Attorney General retaining the advisory role and the new office of Director of Public Prosecution being assigned the prosecutorial function.[404] Thus, the body

[397] ACECA, s 13 allows the Commission to cooperate with other bodies in the carrying out of its function.
[398] *African Centre for International Youth Exchange (ACIYE) & 2 Others vs. The Ethics and Anti-Corruption Commission & Another* [2012] eKLR.
[399] *African Centre for International Youth Exchange (ACIYE) & 2 Others vs. The Ethics and Anti-Corruption Commission & Another* [2012] eKLR 2.
[400] This role was set out in s 26(2) of the 1963 Constitution (repealed in 2010) as: "The Attorney General shall be the principal legal adviser to the Government of Kenya".
[401] This second role was provided for under s 26(3) of the Constitution of Republic of Kenya 1963, which was repealed in 2010 when the new Constitution of Republic of Kenya 2010 was enacted.
[402] *Republic vs. Judicial Commission of Inquiry into the Goldenberg Affair & 2 others Ex-parte George Saitoti* [2006] eKLR.
[403] *Republic vs. Judicial Commission of Inquiry into the Goldenberg Affair & 2 others Ex-parte George Saitoti* [2006] eKLR 64.
[404] The Constitution of the Republic of Kenya 2010. s 156 & 157 respectively. The new office of the Director of Public Prosecution was described in *Kenya Youth Parliament & 2 Others v Attorney General & Another* [2012] eKLR para 1 as follows:

> "Our 2010 Constitution in Article 157 created the office of the Director of Public Prosecutions, (DPP) which hitherto existed in the office of the Attorney General under a different name. That current office of Director of Public Prosecutions is an independent one, not requiring the consent of any person or authority for the commencement of criminal proceedings and in the exercise of the functions of that office the holder shall not be under the direction or control of any person or authority."

that the EACC forwards its investigated file for prosecution is not, as was the case with the KACC, the Attorney General but rather the Director of Public Prosecution.[405] The EACC, however, retains the power to file civil suits for the recovery of corruptly acquired assets.

3.7.2. The operational framework under ACECA

According to section 36 of the EACC Act, save for the amendments made with regard to the institutional framework, the ACECA of 2003 under which the KACC (the predecessor to the EACC) operated remains fully in force. This means that the operational framework provided for under ACECA is still binding on the EACC. Under Section 7 of the ACECA, the EACC retains the function of: investigation, education, prevention and assets recovery.[406] These functions are replicated in the EACC Act.[407] In addition, section 11 of the EACC Act also empowers the EACC to develop a code of ethics and best anti-corruption practices for use in the public service.[408] All these functions have been held by the Court of Appeal in the case of *KACC v First Mercantile Securities Corporation*[409] to be equally important to the fight against corruption.[410] However, this thesis is limited to discussing the assets recovery function of the EACC.

3.7.2.1. The general asset recovery provisions

The assets recovery function is provided for under section 7(1)(h) of ACECA. The section empowers the EACC:

> "[T]o investigate the extent of liability for the loss of or damage to any public property and –
> (i) to institute civil proceedings against any person for the recovery of such property or for compensation; and
> (ii) to recover such property or enforce an order for compensation even if the property is outside Kenya or the assets that could be used to satisfy the order are outside Kenya."[411]

This provision is augmented by part 6 of the ACECA, which is headed: "COMPENSATION AND RECOVERY OF IMPROPER BENEFITS". Under this part, the modalities for the execution of the assets recovery function are exposed. The part is made up of six sections

[405] Ethics and Anti-Corruption Commission Act of 2011, s 11(d).
[406] ACECA, s 7.
[407] Ethics and Anti-Corruption Commission Act of 2011 at s 11.
[408] Ethics and Anti-Corruption Commission Act of 2011 at s 11.
[409] *KACC v First Mercantile Securities Corporation* [2010] eKLR.
[410] *KACC v First Mercantile Securities Corporation* [2010] eKLR 17-18 (disagreeing with the High Court's judgment that assets recovery was a more important function than investigation).
[411] ACECA, s 7(1)(h).

(Sections 51 to 56).[412] The first three sections (Sections 51 to 53) provides for preliminary issues such as who is liable for compensation and who can sue for the compensation. Under section 51, a person who does anything that constitutes corruption or economic crime is liable to anyone who suffers a loss as a result for an amount that would fully compensate the loss suffered.[413] This amount according to section 53(1) is subject to an interest at the prescribed rate.[414] The liability for compensation is, however, exempted by section 53(5) in instances where the victim also participated in the corrupt act or in a related corrupt act.[415] Under section 52 in cases where the corruption offence results into improper benefits, the beneficiary of these benefits is made liable for the value of the benefit to the persons beneficially entitled to the benefits.[416] The compensation or value of benefit can be recovered by the victim but where the victim is a public body, the amount can be recovered either by the public body or by the EACC on its behalf. These first three sections in part 6 having dispensed with the general issues, the last three sections (sections 54 to 56) then provide for the procedure to be followed in recovering the compensation or the improper benefits. These sections are discussed in detail below

3.7.2.2. Conviction based assets recovery provision

Section 54, titled "Compensation orders on conviction" is the equivalent of a conviction based assets recovery. It provides that a court that convicts a person of any corruption or economic crime may at the time of conviction or on subsequent application order a person to compensate his/her victims if any or to give back to the rightful owner any property corruptly acquired or an amount equivalent to the value of that property.[417] The section further provides that in the case of corruptly acquired property, where the owner cannot be determined or if there is no rightful owner, the property or equivalent amount is to be forfeited to the Government.[418] In making an order under the section, the Court has discretion to determine how to quantify the amount of compensation.[419] The confiscation order is considered a civil judgment enforceable as though it were a civil debt.[420]

[412] ACECA, s 51-56.
[413] ACECA, s 51.
[414] ACECA, s 53(1).
[415] ACECA, s 53(5).
[416] ACECA, s 52.
[417] ACECA, s 54(1)(a) & (b).
[418] ACECA, s 54(2).
[419] ACECA, s 54(3).
[420] ACECA, s 54(4).

3.7.2.3. Non-conviction based assets recovery provision

Section 55, titled "Forfeiture of unexplained assets" is the equivalent of a non-conviction based recovery. It provides that the EACC may commence civil proceedings to recover "unexplained assets" from public officers. Unexplained assets are defined as assets of a person:

> (a) acquired at or around the time the person was *allegedly* guilty of corruption or economic crime; and (b) whose value is disproportionate to his known sources of income at or around that time and for which there is no satisfactory explanation.[421]

These assets need not be wholly in the public officer's name. They are deemed to include assets held by another person in trust for or on behalf of the person whose assets are in question. They also include assets of another person which were acquired from the person whose assets are in question either as a gift or as a loan without adequate consideration.[422]

Under the section, there is no pre-condition that the public officer should be first found guilty of corruption or economic crime before the EACC can bring recovery proceeding. The only preconditions are that: (1) investigations must reveal that the public officer has assets whose value is disproportionate to his/her known sources of income; (2) a "reasonable opportunity" must be given to the said officer to explain the source of the disproportion between his wealth and his known source of income;[423] and (3) the explanation given must be inadequate and unsatisfactory to the EACC.[424]

Once these conditions are met the EACC can then bring civil recovery proceedings for the recovery of the unexplained assets. During the proceedings the EACC is expected to adduce evidence to prove that the assets are unexplained. The public officer or other interested party also has a chance to challenge any evidence adduced by the EACC. If after the EACC has adduced the evidence the court is satisfied on a balance of probability that the person has unexplained assets, it may require the person by testimony or other evidence it deems sufficient to satisfy the Court that the assets were acquired otherwise than by corrupt means. If after such explanation the court is not satisfied with the explanation of the person, it may then order the person to pay to the government an amount equal to the value of the

[421] ACECA, s 2 (emphasis added).
[422] ACECA, s 55(7).
[423] The courts have held that what amounts to "reasonable opportunity' would depend on the circumstances of each case. See *Kenya Anti–Corruption Commission v Stanley Mombo Amuti* [2008] eKLR 5.
[424] ACECA, s 55(2) (a) & (b).

unexplained asset. This whole procedure was summarized by the Court in the case of *KACC v LZ Engineering Construction Limited & 5 others*[425] as follows:

> (1) there must be an investigation and the Respondent must satisfy itself that the person under investigation has unexplained assets after affording such person a reasonable opportunity to explain the disproportion. (2) if the Respondent is not satisfied with the explanation so given, it may commence proceedings in this court in which the person whose assets are in question shall be afforded the opportunity to challenge the evidence adduced by the Respondent. (3) if on that evidence the court is satisfied that the person concerned does have unexplained assets, the court may require such person to adduce evidence to satisfy the court that the assets were not acquired as a result of corruption conduct; and (4) if the court is not satisfied, it may require the person concerned to pay to the Government an amount equal to the value of the unexplained assets.[426]

This non-conviction based procedure for the recovery of unexplained assets takes the "value" model of confiscation in that it requires the Court to assess the value of the unexplained assets and order for an equivalent amount to be confiscated.[427] The reason for this approach is that it is usually difficult to determine which among the assets of the defendant was actually acquired *exclusively* through corruption. Still, there are instances where it is actually possible to say with certainty that a certain physical property owned by the defendant is public property acquired through corruption. For example, where a public officer grabs or corruptly alienates a public utility it is possible to determine that the utility does not lawfully belong to the defendant. However, because the section does not provide for "object" confiscation,[428] in the instances where the illegal source of the property is clearly known, the courts hands would be tied as they cannot order for the return of the property but only for the payment of an amount equivalent to the value of the property.

To avoid sanitising corrupt acquisition of public property through value confiscation, the Courts have held that section 55 does not bar the EACC from instituting a civil recovery proceeding under section 7(1)(h) which as we have seen is the functional provision on assets recovery and provides for the "object" recovery of corruptly acquired property.[429] As noted by the Court in *KACC v Ambrose Rachier*[430] the EACC can institute civil proceedings either under section 7(1)(h) or 55 for the civil recovery of stolen property.[431] This means that where it is clear that the targeted asset was corruptly acquired the EACC can move to court using civil procedure under section 7(1)(h) to recover the actual asset. This was the case, for

[425] *KACC v LZ Engineering Construction Limited & 5 others* [2004] eKLR.
[426] *KACC v LZ Engineering Construction Limited & 5 others* [2004] eKLR 7 & 12 (agreeing with the summation of section 55 by counsel for applicant).
[427] ACECA, s 55(6). For the types of confiscation see section 3.6 above.
[428] For the meaning of object confiscation, see section 3.6 above.
[429] See section 3.7.2.1 above.
[430] *KACC v Ambrose Rachier* [2010] eKLR.
[431] *KACC v Ambrose Rachier* [2010] eKLR para 25.

example, in *KACC v Davy Kiprotich Koech*[432] where the then KACC made an application under section 7(1)(h) to recover money that was allegedly embezzled by the Defendant from a government parastatal, the Kenya Medical Research Institute.

The courts' holding that section 7(1)(h) can be used to institute civil recovery proceedings also addresses the limitation that section 55 seems to put on targeted parties. Section 55 provides that "The Commission may commence proceedings under this section against a person who is or was a *public officer* …." Though the High Court in *KACC v Pattni & others*[433] did hold that section 55 applies to all persons and is not restricted to public officers;[434] the specific mention of "public officer" in section 55 seems to militate against such a finding as it expressly limit the recovery of unexplained assets to public officers.[435] In any case, section 7(1)(h) does provide the EACC with an additional, if not an alternative, avenue to recover corruptly acquired assets from private persons as it does not prescribe the "public officer" limitation found in section 55.[436]

3.7.2.4. Preservation order's provision

Section 56 titled "Order preserving suspect property" allows the EACC to make an *ex parte* application to the High Court for orders prohibiting the transfer, disposal or other dealing with a property shown to have been acquired through corrupt means.[437] The order can be made against the person who was "involved in the corrupt conduct" or against a person "who subsequently acquired the property".[438] Such an order shall have effect for six months but may be extended on the application of the Commission.[439] A person served with the order may apply to court within 15 days of receiving the order for the court to discharge or vary

[432] *KACC v Davy Kiprotich Koech* [2011] eKLR.
[433] *KACC v Pattni & others* (2003) KLR.
[434] *KACC v Pattni & others* (2003) KLR 650. According to Judge RawaL:

> "If the intention of the Parliament was that section 55 only applies to the public officer, it could have specifically stated so. But it has not. The use of the words "The Commission may commence proceedings….." in my humble opinion mean that it includes also the public officer but does not exclude other persons."

[435] Contrary to Judge Rawal's assertion (see ibid) Section 55 specifically mentions "public officer". A full quotation of the section makes this clear. The section provides that "The Commission may commence proceedings under this section against a person who is or was a *public officer* …." (Emphasis added). The specific mention of public officer militates against a finding that other persons are included. This is in line with the well-known interpretative maxim: *"specific inclusion of one implies the exclusion of the other"*. For a discussion of the maxim, see *Colquhoun v Brooks* (1888) 21 QB 52 at 65 & *Administrator, Transvaal and Others v Zenzile and Others* 1991 (1) SA 21 (A) 37H.
[436] ACECA, s 7(1)(h).
[437] ACECA, s 56(1).
[438] ACECA, s 56(2).
[439] ACECA, s 56(3).

the order and the court may after hearing both parties discharge or vary the order or dismiss the application.[440] The court can, however, only discharge or vary the order if it is satisfied on a balance of probability that the property with respect to which the order was made was not acquired through corruption.[441] Failure to obey the conservatory order can result into a fine not exceeding two million shillings or to imprisonment for a term not exceeding ten years or to both.[442]

The language of the section appears to suggest that the conservatory order can only be issued after it is established that the owner is guilty of a corrupt conduct. It talks of the order being made against a person "who was involved in the corrupt conduct" and the order applying to a property "acquired as a result of corrupt conduct". These words suggest that the EACC must first prove that the person was involved in a corrupt conduct or that there was a corrupt conduct from which the property was acquired. Proof of these criminal elements would ordinarily take place in a criminal trial with its attendant procedural guarantees. The Court of Appeal has, however, interpreted this section to mean that the person need not have been found guilty of the corrupt conduct and that the standard of proof applicable is that of civil proceedings since the application is civil rather than criminal in nature. As the Court of Appeal noted in *Dakane Abdullahi Ali v KACC*:[443]

> We are aware that there are criminal proceedings pending against the applicant. It cannot be said that the preservation order was given to preserve the subject property pending the conclusion of those criminal proceedings. The wording of Section 56 does not permit such a robust interpretation. Preservation orders are normally given in civil proceedings, and the application the Commission filed was of a civil rather than criminal nature. A preservation order *is in the nature of an injunction* to stop dealings in property, which is the subject matter of civil proceedings.[444]

At the *ex parte* stage when the EACC is seeking a preservation order, it only needs to show a *prima facie* case with a probability of success. As the High Court noted in *KACC v David Some Barno*[445] the court "must first and foremost consider whether the plaintiff has shown a prima–facie case with a probability of success".[446] The Black's Law Dictionary defines a *prima facie* case as "a party's production of enough evidence to allow the fact trier to infer the fact at issue and rule in the party's favour".[447] It further defines *prima facie* evidence as "evidence that will establish a fact or sustain a judgment unless contradictory evidence is

[440] ACECA, s 56(4).
[441] ACECA, s 56(5).
[442] ACECA, s 56(6).
[443] *Dakane Abdullahi Ali v KACC & 2 Others* [2008] eKLR.
[444] *Dakane Abdullahi Ali v KACC & 2 Others* [2008] eKLR 4.
[445] *KACC v David Some Barno & 3 Others* (2009) eKLR.
[446] *KACC v David Some Barno & 3 Others* (2009) eKLR para 15.
[447] BA Garner *Black's Law Dictionary* (2004) West Group 1228.

produced".[448] As noted in *KACC vs. Paul Moses Ngetha,*[449] the KACC (now EACC) need only to place "sufficient evidence" before the court to support the grant of the preservation order.[450]

The section is, however, not clear at what stage the *ex parte* application for preservation order should be made. The section merely states that "on an ex parte application by the Commission" the court may grant the conservatory orders. Can the EACC make an *ex parte* application at the investigation stage without first filling a civil recovery suit or must it first file a suit for the recovery of the property before asking for conservatory orders? In addressing this issue the Court of Appeal has held that the *ex parte* application under section 56 can only be made within a main suit, in other words, the EACC must first file a civil recovery suit before making an *ex parte* application for conservatory order. The courts have also stressed that a criminal trial cannot be a substitute to a civil recovery suit. As the Court of Appeal explained in the *Dakane Abdullahi Ali* case:

> A preservation order is in the nature of an injunction to stop dealings in property, which is the subject matter of civil proceedings. So if there is no clear provision regarding the next step in the proceedings, the order might remain in force indefinitely through repeated extensions. The Commission has not demonstrated that it intends to file recovery proceedings. The criminal proceedings are not such proceedings, otherwise Parliament would not have enacted Section 7(1)(h)(i) to provide for the commencement of recovery civil proceedings.[451]

However, in addition to the preservation order provision under section 56, the EACC can also approach the courts at the investigation stage for orders of seizure and detention of the seized property. This power derives from section 23 of the ACECA, which provides that in carrying out its investigatory powers the EACC shall have the powers, privileges and immunities of a police officer.[452] Among the powers that a police officer enjoys in Kenya include the power of search, seizure, and detention of seized property. These powers are found in section 118 and 121 of the Criminal Procedure Code. Under section 118, a police officer can approach a court, a magistrate or a justice of the peace during the course of an investigation for a warrant to search any place, building, person, ship, aircraft, vehicle, box or receptacle suspected of containing an item of investigation. Such a court, a magistrate or a justice, has authority to issue a written warrant (search warrant) authorizing the police officer or any other person named in the search warrant, to conduct a search, and if the search yields

[448] BA Garner *Black's Law Dictionary* (2004) West Group 598.
[449] *KACC v Paul Moses Ngetha & 102 Others* (2006) eKLR.
[450] What amounts to "sufficient evidence" would depend on the circumstances of each case. *KACC v Paul Moses Ngetha & 102 Others* (2006) eKLR para 9.
[451] *Dakane Abdullahi Ali v KACC & 2 Others* [2008] eKLR 4.
[452] ACECA, s 23(3).

fruits, to seize the thing found. The seized property must, however, be brought before a court having jurisdiction to be dealt with in accordance with the law. Under section 121, once the seized property is brought before a court, the court may order that it be detained until the conclusion of the investigation or until the conclusion of a case brought against the accused owner.

The difference between the conservatory order under section 56 and the search, seizure and detention order flowing from section 23 is that the former can only be issued after a suit has been filed for the recovery of the suspect property. The latter, however, does not require such a suit to have been filed and can be issued at the investigation stage. Also the purpose of the preservation order under section 56 is to preserve the property so that it may ultimately be available for recovery or for compensation of person(s) who have suffered loss as a result of the corrupt conduct. In contrast, the purpose of seizure and detention of properties flowing from section 23 is mainly to preserve the property as exhibit in a criminal trial.[453] However, where the detained property is intended for compensation or recovery, then the EACC is obliged to apply to the High Court for the preservation thereof.[454]

3.7.3. Assets recovery provision in other legislations

The first anti-corruption legislation in Kenya, the Prevention of Corruption Act of 1956 did not have an assets recovery provision. The Act only provided for three functions: the investigation and prosecution of suspects, prevention of corruption, and the education of members of the public in order to enlist their support in the fight against corruption.[455] This changed, as we have seen, with the enactment of the ACECA in 2003 under which assets recovery strategy was given equal prominence. The inclusion of the assets recovery provision in the ACECA was precipitated by the changes at the international plane where the recovery of proceeds of corruption was increasingly being accepted as an inevitable tool in the successful fight against corruption. As noted by the Constitutional Court in the case of *Christopher Ndarathi Murungaru v KACC*:[456]

[453] See *ABC Metallurgiacs Limited v Republic* [2009] eKLR para 10 holding that:

> "The overriding principle as captured under … section 118 of Criminal Procedure Code is to ensure that no party compromises or interferes or destroys evidence that would be necessary for the interest of public good and for the general principle of detection, investigation and conclusion of criminal offences."

[454] For a judicial explanation of the difference between the two, see *Beryl Akinyi Muganda v Ethics and Anti-Corruption Commission* (2012) eKLR paras 50-59.

[455] Prevention of Corruption Act of 1956, s 11(3).

[456] *Christopher Ndarathi Murungaru v KACC* (2006) eKLR.

> Borrowing from various multi-lateral instruments on corruption and economic crimes, the Kenya Anti-corruption and Economic Crimes Act had to adopt new and novel modes of investigation and detection of complex webs of local and international corruption.[457]

However, in addition to ACECA, there are other legislations that have provisions on the recovery of proceeds of crime. These legislations include the Narcotic Drugs and Psychotropic Substances (Control) Act of 1994 (Narcotic Drugs Act);[458] the Proceeds of Crime and Anti-Money Laundering Act of 2009 (Anti-Money Laundering Act);[459] and the Prevention of Organized Crime Act of 2010.[460]

The Narcotic Drugs Act came into force on 26th August 1994 and is aimed at fighting drug related crimes.[461] Part IV of the Act provides for the forfeiture of the property of a person convicted of drug related offense and details the procedure to be followed by law enforcement officers in seeking a forfeiture order. However, there is no provision for non-conviction based confiscation and the Act is only restricted to the confiscation of the proceeds of drug related crime.[462] The Proceeds of Crime Act, on the other hand, was enacted in 2009 and aims to fight the new offence of money laundering, which it defines.[463] The Act provides for both the conviction based and the non-conviction based assets recoveries.[464] It creates an Asset Recovery Agency and empowers it with the responsibility of recovering proceeds from money laundering.[465] The Prevention of Organized Crimes Act, on its part, came into force on 23 September 2010 and aims to fight organized criminal activities, which it defines broadly to mean an offence committed by a structured group of three or more people.[466] Under part IV it provides for the procedure for the tracing, seizure and confiscation of property of organized groups. The Act entrusts the responsibility of enforcing the recovery provisions with the Attorney General.

It is to be noted, however, that these three legislations, while illustrating the diversified use of assets recovery strategy in the fight against crime in Kenya, are not helpful in the recovery of proceeds of corruption. The EACC cannot rely on these provisions when applying for the recovery of corruptly acquired assets. As noted by the Court of Appeal in *KACC v First*

[457] *Christopher Ndarathi Murungaru v KACC* (2006) eKLR 47.
[458] Narcotic Drugs and Psychotropic Substances (Control) Act of 1994 (as revised in 2012).
[459] Proceeds of Crime and Anti-Money Laundering Act 9 of 2009.
[460] Prevention of Organized Crime Act 6 of 2010.
[461] Narcotic Drugs and Psychotropic Substances (Control) Act of 1994 (as revised in 2012) at short title.
[462] Narcotic Drugs and Psychotropic Substances (Control) Act of 1994 (as revised in 2012), s 36 & 41.
[463] Proceeds of Crime and Anti-Money Laundering Act 9 of 2009, short title.
[464] Proceeds of Crime and Anti-Money Laundering Act 9 of 2009, part VI.
[465] Proceeds of Crime and Anti-Money Laundering Act 9 of 2009, part VII & VIII.
[466] POCA, s 2 read with s 3.

Mercantile Securities Corporation, "The Appellant (KACC – the precursor to EACC) is a statutory body under Kenyan Law and *it can only do that which its creating statute empowers it to do*".[467] In other words, unless the creating statutes (EACC Act and ACECA) specifically empower the EACC to avail itself of the assets recovery provisions in the three legislations, it cannot use them to recover corruptly acquired assets. As it is, the creating statutes of the EACC have not mentioned any of the three legislations in their provisions.[468] In any case, both the Narcotic Drugs Act and the Anti-Money Laundering Act have a restricted scope applying only to drug related offences and money laundering offences respectively. In addition, the Anti-Money Laundering Act has an inbuilt institution assigned with the responsibility of enforcing its assets recovery provisions. The Prevention of Organized Crimes Act also, though defining organized crime broadly to probably encompass instances of corruption committed by organized group, has an inbuilt body, the Attorney General, which is exclusively entrusted with the recovery of assets under its provisions. In other words, even where the corruption offence is committed by an organized group, the EACC is excluded from using the assets recovery procedure under the Prevention of Organized Crime Act because the Act has provided for its own institutional framework. Thus, the only relevant laws for the recovery of corruptly acquired assets in Kenya are the ACECA and EACC Act.

3.8. Assets recovery legal regime in South Africa

South Africa differs from Kenya in that it has no specialized anti-corruption agency.[469] Under its current anti-corruption legislation, the PCCAA, no mention is made of a specialized institutional framework.[470] The Act also does not provide for an assets recovery mechanism. The Act merely defines the offence of corruption and provides for the investigative measures and penalty for the commission thereof.[471] This approach can be

[467] *KACC v First Mercantile Securities Corporation* [2010] eKLR 21 (emphasis added). See also *Nicholas Muriuki Kangangi v Attorney General* [2011] eKLR para 13 ("As a creature of statute, it must comply with the provisions of its creator. If it fails to do so, it is acting ultra vires and any such action is null and void").

[468] But see ACECA, s 11(4) assigning the Commission all the powers it requires to efficiently carry out its function as may be provided in the EACC Act, the Constitution or "any other written law". However, it is submitted that these other laws must specifically assign responsibility to the EACC. Example of such laws include the Public Officer Ethics Act no 4 of 2003, which at section 30 gives the EACC the right to access wealth declaration forms in the course of its investigation.

[469] The question on whether international law requires South Africa to have a specialised anti-corruption agency was the point of discussion in *Glenister v President of the Republic of South Africa and Others* (CCT 48/10) [2011] ZACC 6 where the Constitutional Court concluded that, while desirable, there was no such international obligation.

[470] Prevention and Combating of Corrupt Activities Act no 12 of 2004 (PCCAA).

[471] PCCAA, short title.

explained by the fact that under the South African legal framework corruption is viewed as intimately linked with other organized crimes. As noted by the Constitutional Court in *S v Shaik Shabir*[472]:

> Moreover, corruption is often closely associated with organised crime. The preamble to the Prevention and Combating of Corrupt Activities Act also recognises that "there are links between corrupt activities and other forms of crime, in particular organised crime and economic crime, including money-laundering …." The United Nations Convention Against Corruption points to the close relationship between corruption and organised crime in identical terms …. In the light of the above, it is clear that corruption is a serious crime which is potentially harmful to our most important constitutional values. Moreover, it is clear that both our Parliament and the international community recognise the close links between corruption and organised crime. In the circumstances, it seems to me that corruption is one of the offences closely related to the purposes of the Act (the Prevention of Organized Crimes Act).[473]

Because of this linkage, the responsibility of investigating and prosecuting corruption offences and that of recovering corruptly acquired assets are placed on the same bodies that deal with the investigation, prosecution, and recovery of proceeds of organized crime.[474] These bodies are respectively: the South African Police Service (SAPS), specifically the Directorate of Priority Crime Investigation (DPCI); the National Prosecuting Authority (NPA); and the Asset Forfeiture Unit (AFU).[475] The DPCI is a special directorate within the South African Police Service (SAPS) entrusted with the responsibility of combating and investigating national priority offences including corruption.[476] The NPA is the constitutional body responsible for instituting and conducting all criminal proceedings on behalf of the Republic of South Africa.[477] The AFU is a unit within the NPA entrusted with the implementation of chapters 5 (conviction based confiscation of proceeds of unlawful activities) and chapter 6 (non-conviction based confiscation of property) of the POCA.[478]

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[472] *S v Shaik and Others* (CCT 86/07) [2008] ZACC 7.

[473] *S v Shaik and Others* (CCT 86/07) [2008] ZACC 7 paras 73–74 (footnotes omitted).

[474] For a discussion see generally the case of *Glenister v President of the Republic of South Africa and Others* (CCT 48/10) [2011] ZACC 6 (in which the majority Justices in the Constitutional Court called for the establishment of a specialized independent anti-corruption agency in South Africa).

[475] However, in addition to these bodies, there are also other Constitutional and oversight bodies such as the Office of the Auditor General, Office of the Public Protector, Public Service Commission, and Independent Complaints Directorate; and other important stakeholders such as Department of Public Service and Administration, National Intelligence Agency, South African Revenue Services, and National Anti-Corruption Forum; whose role also contribute to the fight against corruption in South Africa. However, for the purpose of assets recovery, the DPCI, the NPA and AFU play a leading role and are therefore discussed in detail in this thesis.

[476] The DPCI is the successor to Directorate of Special Operations (DSO), which was located within the National Prosecuting Authority (NPA). It was established on 27 January 2009 when the President signed into law the National Prosecuting Authority Amendment Act 56 of 2008 (NPAA Act) and the South African Police Service Amendment Act 57 of 2008 (SAPSA Act). It is situated within the South African Police Service.

[477] The NPA is the only institution with the power to institute criminal proceedings on behalf of the state (Section 179(1) Constitution and Section 20(1)(a) NPA Act), and must carry out any necessary functions incidental to instituting criminal proceedings (Section 179(2) Constitution and Section 20(1)(b) NPA Act).

[478] The AFU was established in May 1999 within the Office of the NDPP. Its mandate is to ensure that POCA is used efficiently and that assets recovery procedures under POCA are used to maximum effect. See http://www.npa.gov.za/ReadContent387.aspx (accessed 8/3/2013).

Since the Prevention and Combating of Corrupt Activities Act of 2004 does not have an asset recovery provision, the Constitutional Court has held in *S v Shaik Shabir* that recovery provisions under the POCA are applicable to the recovery of corruptly acquired assets.[479] This section is limited to examining the institutional and legislative framework for the recovery of corruptly acquired assets in South Africa.[480]

3.8.1. The institutional framework

In South Africa, the recovery of proceeds of organized crimes including corruption is regulated by the POCA. The body entrusted with enforcing the recovery provisions in the POCA is the AFU. AFU is a special unit within the NPA. The NPA is the body entrusted with the responsibility of ensuring the administration of justice by way of prosecution.[481] The NPA consist of: a National Director of Public Prosecutions (NDPP), who is the head of the prosecuting authority and is appointed by the President;[482] Directors of Public Prosecutions (DPPs); and prosecutors.[483] The AFU is situated within the NDPP's office. It was created in 1999 to ensure the efficient and effective use of the recovery procedure under chapter five and six of POCA.[484] It does not, however, have investigative or arresting powers though it can provide financial investigative capacity to the relevant body in the criminal justice system.[485]

The investigation of crime is entrusted to the SAPS. Section 205(3) of the Constitution provides that the objects of the SAPS include preventing, combating, and investigating crime.[486] The Department of Police (formerly the Department of Safety and Security) oversees the operation of SAPS.[487] The SAPS Act 68 of 1995 governs the way in which the SAPS operates. In terms of this Act, the SAPS investigates crimes including corruption and bribery. This Act was, however, amended in 2008 to introduce a special unit within the

[479] *S v Shaik and Others* (CCT 86/07) [2008] ZACC 7 paras 73–75, 81.
[480] See fn 420 above for other bodies that are involved in the general fight against corruption in South Africa.
[481] See Constitution of the Republic of South Africa 1996, s 129; National Prosecuting Authority Act No. 32 of 1998, s 2.
[482] Constitution of the Republic of South Africa 1996, s 179(1)(a); National Prosecuting Authority Act No. 32 of 1998, s 2(a).
[483] National Prosecuting Authority Act No. 32 of 1998, s 2(b).
[484] See NPA's webpage. http://www.npa.gov.za/ReadContent387.aspx (accessed 8/3/2013).
[485] See M Montesh *A Critical Analysis of Crime Investigative System Within the South African Criminal Justice System: a Comparative Study* (2007) 224 (concluding that the POCA does not give powers of arrest, detain and use of firearms to the AFU, and no other legal provision gives such powers to the AFU).
[486] Constitution of the Republic of South Africa 1996, s 205(3).
[487] Constitution of the Republic of South Africa 1996, s 205(3).

SAPS, the DPCI. The amendment entrusted the DPCI with the responsibility of investigating priority crime, including corruption.

The DPCI (popularly known as the "Hawk") is a successor to the Directorate of Special Operation (DSO) (popularly known as the "Scorpions").[488] The DSO was established in 2001 and situated within the NPA to fight the increasing menace of organized crime and to overcome the ineffectiveness of the national and regional divisions of SAPS in fighting these crimes.[489] The placement of the DSO within the NPA outside the SAPS was influenced by a perception among the public and politicians that the police could not handle complex forms of organized crime as they were themselves involved in serious levels of crime.[490] This placement, however, later became a "sore point" and in its 52nd national conference held in December 2007 the African National Congress (ANC) adopted a resolution calling for a single police service and the dissolution of the DSO.[491] The official reason given for the dissolution of the DSO was that there was need to reorganize the country's crime-fighting capabilities.[492] However, it has been suggested by some commentators that the real motive for the DSO's abolition was fear over its independence and fearless record of combating corruption in high places.[493] In any case, on 27 January 2009 the President effected the dissolution by signing into law the NPA Amendment Act[494] and the SAPS Amendment Act.[495] The NPA Amendment Act dissolved the DSO while the SAPS Amendment Act created the new DPCI and transferred the powers, investigations, assets, budget and liabilities of the DSO to the DPCI.

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[488] See *Khampepe Commission of Inquiry Report* (2006) 6 available at http://www.info.gov.za/view/DownloadFileAction?id=80441 (accessed on 20/1/2013).

[489] The Scorpions officially came into legal existence in January 2001, when the amendments to the National Prosecuting Authority Act were adopted. See National Prosecuting Authority Amendment Act 61 of 2000.

[490] See A du Plessis *et al* "Report on the South African Prosecuting Authority" in Open Society Institute Sofia *Promoting Prosecutorial Accountability, Effectiveness and Independence: Comparative Research* (2008) 343 at 347 (pointing out that when President Mbeki announced the creation of the DSO, he admitted that one of its tasks would be the investigation of corruption matters within the police).

[491] See *The so-called Polokwane Resolution*, adopted in December 2007, available at http://www.anc.org.za/show.php?id=2536 (accessed 2/3/2012).

[492] *The so-called Polokwane Resolution* adopted in December 2007, available at http://www.anc.org.za/show.php?id=2536 (accessed 2/3/2012).

[493] See, for example, D Steward "The Constitutional Court's Judgment in Respect of the Dissolution of the Scorpions (The Directorate of Special Operations)" available at http://www.fwdeklerk.org/cgi-bin/giga.cgi?cmd=cause_dir_news_item&news_id=100405&cause_id=2137 (accessed 3/5/2013) (citing DSO success in unearthing the role of MPs in the Travelgate scandal; success in investigating Commissioner of SAPS' involvement in corruption; and its leading and independent role in unearthing the armament scandal where the then Deputy President Jacob Zuma was adversely mentioned).

[494] National Prosecuting Authority Amendment Act 56 of 2008.

[495] South African Police Service Amendment Act 57 of 2008.

The SAPS Amendment Act places the DPCI within the SAPS and entrusts it with the responsibility of preventing, combating and investigating national priority offences including corruption.[496] In carrying out this function, the DPCI is required to employ a multi-disciplinary and integrated approach through the cooperation of all relevant stakeholders[497] and to ensure that it has the requisite independence to perform its function.[498] It is also to have Parliamentary oversight in the carrying out of its function. Furthermore, a Ministerial Committee has been formed to provide policy guidelines and oversee the function and operation of the DPCI.[499]

The dissolution of the DSO and its replacement by the DPCI did not, however, go unchallenged. It was the subject of review by the Constitutional Court in the case of *Glenister v President of the Republic of South Africa*.[500] In that case the applicant contended, among other things, that the removal of the DPCI from the NPA and its placement within the SAPS and under the oversight of the Ministerial Committee was contrary to the State's constitutional duty to provide for an independent anti-corruption institution. The Court in a majority judgment (5 against 4) found that the Constitution did actually impose on the South African government an obligation to establish and maintain an independent organization to combat corruption and organized crime. The Court further found that while the placement of the DPCI within the SAPS was within the competency of the executive, making it subject to the oversight of the Ministerial Committee denied the DPCI the necessary independence as there was "a plain risk of executive and political influence on investigations and on the entity's functioning".[501] The oversight of the Ministerial Committee also created "the possibility of hands-on management, hands-on supervision, and hands-on interference".[502]

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[496] South African Police Service Amendment Act 57 of 2008 at s 17B(a). As noted by the Constitutional Court in the *Glenister v President of the Republic of South Africa and Others [*2011] ZACC 6 para 233*:*

> "We point out in this regard that the DPCI is not, in itself, a dedicated anti-corruption entity. It is in express terms a directorate for the investigation of "priority offences". What those crimes might be depends on the opinion of the head of the Directorate as to national priority offences – and this is in turn subject to the Ministerial Committee's policy guidelines. The very anti-corruption nature of the Directorate therefore depends on a political say-so, which must be given, in the exercise of a discretion, outside the confines of the legislation itself. This cannot be conducive to independence or to efficacy".

[497] South African Police Service Amendment Act 57 of 2008, s 17B(b)(i) and 17F(1).

[498] South African Police Service Amendment Act 57 of 2008, s 17B(b)(ii).

[499] The function of the Committee include to (i) determine police guidelines in respect to the functioning of the DPCI; (ii) policy guidelines for the selection of national priority offences; (iii) policy guidelines for the referral to the Directorate by the National Commissioner of any offence or category of offences for investigation by the DPCI; and (iv) procedures to co-ordinate the activities of the Directorate and other relevant Government departments or institutions. South African Police Service Amendment Act 57 of 2008, s 17I (1), (2) & (3).

[500] *Glenister v President of the Republic of South Africa and Others* (CCT 48/10) [2011] ZACC 6.

[501] *Glenister v President of the Republic of South Africa and Others* (CCT 48/10) [2011] ZACC 6, para 299.

[502] *Glenister v President of the Republic of South Africa and Others* (CCT 48/10) [2011] ZACC 6, para 235.

Following the majority judgment a new Bill was tabled in parliament in 2012 and signed into law in September the same year to address the risk of undue influence and to strengthen the structural and functional independence of the DPCI.[503] The Act aims to ensure that the DPCI (i) has operational and structural independence; (ii) provides security of tenure and remuneration to its employees, and (iii) is given accountability and oversight by the Ministerial Committee.[504] The Act also amended Section 34(1) of the PCCAA, which required that reporting should be made to any police officer. In terms of the latest amendment, all such offences must now be reported to a member of the DPCI.[505]

As it is the DPCI is entrusted with the investigatory function into corruption offences and the AFU with the recovery of corruptly acquired assets. Both of these bodies are required to work in concert in the implementation of their functions. The DPCI forwards its investigation files to the NPA for prosecution and where there is need for assets recovery, the AFU takes over.[506]

3.8.2. The operational framework

South Africa has a comprehensive legal framework to deal with the recovery of proceeds of corruption. The main legislations are: the POCA and the PCCAA. The PCCAA is the main anti-corruption legislation. It is a successor to the Corruption Act of 1992.[507] However, just like its predecessor, the PCCAA only provides for the investigation and prosecution of corruption offences. It does not provide for the recovery of the proceeds of corruption. Where investigations reveal that there are corruptly acquired assets, the task is left to the AFU to invoke the provisions of the POCA for the recovery of the same.

The POCA is the latest legislation to vest broad powers in the South African judiciary to make restraint and confiscation orders in respect of organized criminal activities. These powers were first introduced in the Drug and Drug Trafficking Act of 1992. They were, however, limited to drug and drug related offences. The 1992 Act was repealed by the Proceeds of Crime Act of 1996, which extended the powers of the courts to other forms of

[503] See South African Police Service Amendment Act 10 of 2012.
[504] South African Police Service Amendment Act 10 of 2012, short title.
[505] South African Police Service Amendment Act 10 of 2012, schedule.
[506] For further reading, see PG Pereira *et al South Africa Anti-Corruption Architecture* (2012) available at http://www.baselgovernance.org/fileadmin/docs/publications/commissioned_studies/South_Africa_Anti-Corruption_Architecture.pdf (accessed on 9/3/2013).
[507] Corruption Act of 1992 Act 94 of 1992.

organised crime, namely money laundering. This 1996 Act was later repealed by the current POCA in 1998. The enactment of POCA, as noted by the Constitutional Court in *NDDP v Mohamed NO*,[508] was the culmination of "a protracted process of law reform which […] sought to give effect to South Africa's international obligation to ensure that criminals do not benefit from their crimes".[509]

The POCA creates a number of offences including racketeering under Chapter 2, money laundering under Chapter 3 and criminal gang activities under Chapter 4. However, the courts have held that the ambit of POCA is not limited to these three offences. For example, in *Mohunran v NDPP*[510] the appellants who were convicted of illegal gambling had argued that illegal gambling was not an organized crime within the ambit of POCA and that therefore their gambling machines and premises were not subject to forfeiture under POCA.[511] In dismissing this argument, the Constitutional Court quoted with approval the *Director of Public Prosecutions v Van Staden*,[512] where the Supreme Court of Appeal had held that the provisions of POCA "are designed to reach far beyond organised crime and apply also to cases of individual wrongdoing".[513] In the Constitutional Court's own words, "the wording of POCA as a whole makes it clear that its ambit is *not* in fact limited to so-called "organised crime offences".[514]

Furthermore, following the judgment of the Cape High Court in *NDPP v Carolus*,[515] in which it was held that Chapter 6 of POCA[516] (as it was then) was not retrospective in effect,[517] the Act was amended by the Prevention of Organised Crime Second Amendment Act 38 of 1999,[518] to make its recovery mechanisms "applicable in respect of instrumentalities of offences and proceeds of unlawful activities where such offences or

[508] *NDPP v Mohamed NO* [2002] ZACC 9; 2002 (4) SA 843 (CC).
[509] *NDPP v Mohamed NO* [2002] ZACC 9; 2002 (4) SA 843 (CC) para 16.
[510] *Mohunran v NDPP* 2007 (2) SACR 145 (CC).
[511] According to the Applicant the offences for which forfeiture is potentially competent are limited to those "created" by POCA, that is, racketeering under Chapter 2, money laundering under Chapter 3 and criminal gang activities under Chapter 4. *Mohunran v NDPP* 2007 (2) SACR 145 (CC), para 15.
[512] *Director of Public Prosecutions v Van Staden and Others* 2007 (1) SACR 338 (SCA).
[513] *Director of Public Prosecutions v Van Staden and Others* 2007 (1) SACR 338 (SCA) paras 1 and 10.
[514] *Mohunran v NDPP* 2007 (2) SACR 145 (CC) para 30 (emphasis in the original).
[515] *NDPP v Carolus and Others* 1999 (2) SACR 27 (C). This judgment was upheld by the Supreme Court of Appeal in *NDPP v Carolus and Others* 2000 (1) SA 1127 (SCA); [2000] 1 All SA 302 (SCA).
[516] Chapter 6 deals with the non-conviction based recovery mechanism and include the provisions governing preservation of property orders and confiscation orders.
[517] That is, it could not be invoked to deal with unlawful activities committed before the coming into operation of POCA on 21 January 1999.
[518] Prevention of Organised Crime Second Amendment Act 38 of 1999.

unlawful activities occurred before the commencement of the Act".[519] The import of this amendment is that these provisions do operate retrospectively and apply to a wider range of offences including those that precede POCA.[520] Specifically, with regard to corruption, the Constitutional Court has held in the case of *S v Shaik Shabir* that the recovery provisions under the Prevention of Organized Crime Act (POCA) are applicable to the recovery of corruptly acquired assets.[521] This section examines in detail the assets recovery scheme under POCA.

One of the purposes of POCA is to make sure that "no person should benefit from the fruits of unlawful activities...."[522] As noted by the Supreme Court of Appeal in *ABSA Bank Ltd v Fraser*[523]

> [o]ne 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.[524]

To realise this objective, the POCA uses two mechanisms. The mechanisms are set out in Chapters 5 and 6. Chapter 5, in sections 12 to 36, provides for the confiscation of the benefits derived from the commission of an offence but its confiscation mechanism can only be invoked once a defendant has been convicted. Chapter 6, on the other hand, in sections 37 to 62, provides for confiscation of the proceeds of and properties used in the commission of crime without the need for the conviction of the defendant. In other words, Chapter 5 provides for the conviction based assets recovery mechanism while chapter 6 provides for the non-conviction based assets recovery mechanism. As explained by the Constitutional Court in *NDPP v Mohamed NO*:[525]

> Chapter 5 provides for the forfeiture of the benefits derived from crime but its confiscation machinery may only be invoked when the "defendant" is convicted of an offence. Chapter 6 provides for forfeiture of the proceeds of and instrumentalities used in crime, but is not conviction-based; it may be invoked even when there is no prosecution.[526]

3.8.2.1. The conviction based assets recovery provision – Chapter 5 of POCA

Chapter 5 of the POCA is made up of four parts: part one describes how the chapter is to be applied; part two provides for confiscation orders; part three provides for the restraint orders;

[519] See POCA, pmbl.
[520] *Mohunran v NDPP* 2007 (2) SACR 145 (CC), para 24.
[521] *S v Shaik and Others* (CCT 86/07) [2008] ZACC 7, paras 73–75, 81.
[522] POCA, pmbl para 10.
[523] *ABSA Bank Ltd v Fraser and another* 2006(2) SACR 158(SCA).
[524] *ABSA Bank Ltd v Fraser and another* 2006(2) SACR 158(SCA), para 24.
[525] *NDPP v Mohamed NO* 2002 (4) SA 843 (CC).
[526] *NDPP v Mohamed NO* 2002 (4) SA 843 (CC) para 16.

and part four provides for the modalities of realising the property subject to confiscation order.

3.8.2.1.1. Applicable procedure

Part one of Chapter 5 provides for interpretation of the various terms used in Chapter 5. It also makes it clear that proceedings for a confiscation or restraint order under Chapter 5 are civil, not criminal.[527] As such civil law rules of evidence are made applicable and questions of fact are to be decided on a balance of probabilities.[528] The part also requires a change from the reference to an accused which is found elsewhere to reference to a defendant further signalling the applicability of civil procedure. As noted by the Supreme Court of Appeal in *NDPP v Mcasa*[529] reference to a "defendant" "appears to flow from the deliberate insistence by the Act that proceedings for a confiscation or restraint order are civil and not criminal".[530]

3.8.2.1.2. Confiscation order provision

Under part two of Chapter 5 of POCA, a court may, after convicting a person of an offence, and upon application by the Prosecution, inquire into any benefit that the person may have derived from: (1) that offence; (2) any other offence of which the accused may have been convicted at the same trial; and (3) any criminal activity to which the court finds to be sufficiently related to those offences.[531] If the Court finds that the convicted person has so benefited, the court may issue, in addition to any punishment which it may impose in respect to the offence, a confiscation order instructing the person to pay the State an amount it considers appropriate.[532] This confiscation order, as noted by the Constitutional Court in *Falk and Another v NDPP*[533] is a civil (not criminal) judgment.[534] The type of confiscation is also that of "value" not "object" confiscation.[535] As stated by the Constitutional Court in *S v*

[527] POCA, s 13.
[528] POCA, s 13(2) & (5).
[529] *NDPP v Mcasa* 2000 (1) SACR 263 (Tk).
[530] *NDPP v Mcasa* 2000 (1) SACR 263 (Tk), para 10.
[531] POCA, s 18(1).
[532]. POCA, s 18(1).
[533] *Falk and Another v NDPP* (CCT 95/10) [2011] ZACC 26.
[534] *Falk and Another v NDPP* (CCT 95/10) [2011] ZACC 26, para 11 (noting that "A confiscation order under Chapter 5 is a civil judgment for the payment of an amount of money based on the value of the benefit that the defendant derived from the crime").
[535] For the difference between the two, see section 3.7.2 above.

Shaik and Others[536] "the order that a court may make in terms of chapter 5 is not for the confiscation of a specific object, but an order for the payment of an amount of money to the state".[537]

A person is said to have benefited from unlawful activity if the person, before or after the commencement of the POCA, received or retained any proceeds of unlawful activities. "Proceeds of unlawful activities" are broadly defined to mean any property or any service, advantage, benefit or reward which was derived, received or retained, directly or indirectly, in connection with or as a result of any unlawful activity carried out by any person. The reason for this broad definition of "proceeds of crime" is, as noted by the Supreme Court in *Shaik v S,*[538] to counter the sophisticated criminals who would seek to avoid the confiscation of proceeds of crime by using a network of complex "camouflage".[539]

To determine whether the convicted person has benefited from the offence or offences of which he or she has been convicted, or from related criminal activity, the court must assess the evidence relating to proceeds of unlawful activities as follows. First, if it is found that a defendant did not, at the material time, have legitimate sources of income sufficient to justify the interests in any property that he or she holds, the court shall accept this as *prima facie* evidence that such interests form part of such benefit. Secondly, if, pursuant to a restraint order, the court ordered a defendant to disclose information and he or she had without sufficient cause failed to disclose such facts, or had, after being so ordered, knowingly furnished false information, the court shall accept this as *prima facie* evidence that any property to which the information relates, forms part of the defendant's benefit or is held by defendant as an advantage, payment, service or reward in connection with the offences or related criminal activities.[540]

However, the confiscated amount cannot be more than the value of the proceeds of the crime or related criminal activities or, if the value which might be realized at the time of making the order is lower than the value of the proceeds of crime, should not exceed the lower value. Also, unlike the Proceeds of Crime Act of 1996 where equivalent provisions contained reverse onus presumptions which put legal onus on the defendant to persuade the court on a

[536] *S v Shaik and Others* (CCT 86/07) [2008] ZACC 7.
[537] *S v Shaik and Others* (CCT 86/07) [2008] ZACC 7, para 24.
[538] *Shaik and Others v S* [2006] ZASCA 106.
[539] *Shaik and Others v S* [2006] ZASCA 106, para 24.
[540] POCA, s 22(2)(a).

balance of probabilities, of the incorrectness of the fact presumed,[541] the presumptions under POCA merely give prosecution evidence the status of *prima facie* proof.[542] The burden of proof still lies with the prosecution. In discharging this burden, the prosecutor may make use of statement in writing under oath, provided a copy of the statement is shown to the defendant at least 14 days before the date that they are served in court. The defendant has the right to controvert the evidence contained in these written statements by showing the grounds on which he or she objects. If the defendant cannot dispute the evidence, then any allegation contained in the statement will be considered as conclusive proof by the courts.

3.8.2.1.3. Restraint order

Section 26 allows the prosecution to make an *ex parte* application to the High Court for a restraint order on a person's property. The purpose of the restraint order as explained in the case of *NDPP v Mcasa*[543] is to preserve the property "so that any confiscation order (under Part 2 of Chapter 5) which may be granted can be effective".[544] Another purpose as noted by the High Court in *NDPP v Moronyane and Others*[545] is to safeguard the property "from dissipation so as to yield the greatest possible amount in the event of a confiscation order being issued later".[546]

The High Court can, however, only make the order when: (a) a criminal case has been instituted against the defendant; (b) either a confiscation order has been made against that defendant or it appears to the court that there are reasonable grounds for believing that a confiscation order would be made against the defendant; and (c) the proceedings against the defendant has not been concluded. In case no criminal case has been instituted, the High Court may only make the order when: (a) the court is satisfied that the person is to be charged with an offence; and (b) it appears to the court that there are reasonable grounds for believing that a confiscation order would be made against the defendant.[547] Thus, the

[541] Instead of the words "shall accept these facts as *prima facie* evidence…" the words "it shall be presumed in the absence of evidence to the contrary…" were used in the Proceeds of Crimes Act of 1996.
[542] This was influenced by a number of judgments by the Courts in which the reverse onus burden was declared unconstitutional. For example in *S v Bhulwana; S v Gwadiso* 1996 (1) SA 388 (CC), the Constitutional Court declared unconstitutional section 21(1)(a)(I) of the Drugs and Drug Trafficking Act 140 of 1992, which provided that a person in possession of an amount of dagga exceeding 115 grams would be considered a dealer unless he could prove otherwise.
[543] *NDPP v Mcasa* 2000 (1) SACR 263 (Tk).
[544] *NDPP v Mcasa* 2000 (1) SACR 263 (Tk), para 8.
[545] *NDPP v Moronyane and Others* [2005] ZANCHC 91.
[546] *NDPP v Moronyane and Others* [2005] ZANCHC 91, para 12.
[547] POCA, s 25.

restraint order under Chapter 5 can be made either after an accused has been convicted or before. In interpreting this provision, the Courts have added that in cases where the criminal proceedings are pending a court issuing a restraint order must also satisfy itself that there is reasonable ground that a criminal proceeding against the defendant would lead to the conviction of the defendant. As explained by the Supreme Court of Appeal in *NDPP v Mcasa:*

> A reading of sections 18(1), 25(1) and 26(1) and (2) leads to the following conclusion: in a case like the present (i.e. where the respondents are still facing charges), there may be a restraint order only if reasonable grounds exist for the grant of a confiscation order which, in turn, may only be granted if there has been a conviction. Put differently, it is our view that a restraint order is competent only if reasonable grounds exist for a court to believe that the defendant concerned may be convicted of an offence.[548]

In order to make the assessment on whether the conditions for the order have been met, the Supreme Court of Appeal has noted in *NDPP v Basson*[549] that the court "must be apprised of at least the nature and tenor of the available evidence, and cannot rely merely upon the [prosecution's] opinion".[550] However, this does not mean that the court is called upon to decide upon the veracity of the evidence. As the Supreme Court of Appeal noted in *NDPP v Rautenbach and Another:*[551]

> It (the court) need ask only whether there is evidence that might reasonably support a conviction and a consequent confiscation order (even if all that evidence has not been placed before it) and whether that evidence might reasonably be believed. Clearly that will not be so where the evidence that is sought to be relied upon is manifestly false or unreliable and to that extent it requires evaluation, but it could not have been intended that a court in such proceedings is required to determine whether the evidence is probably true.[552]

The Courts have also said that it is not required of the National Prosecutor to show that the assets which are subject to the restraint order had been derived from illegitimate sources in order to obtain a restraint order. As noted by the Supreme Court of Appeal in *NDPP v Rautenbach* "the fact that some assets were acquired before the offences were committed, and were not themselves acquired from the proceeds of unlawful activity" is "immaterial when determining whether a confiscation order might be granted."[553] The reason for this is "because the idea (behind Chapter 5) is to reverse whatever benefit was derived from criminal activity to which no legal entitlement can appropriately be claimed".[554] In other words, the aim of the restraint order is to ensure that there is enough property to satisfy any confiscation order that might be made by a Court in the criminal case against the defendant.

[548] *NDPP v Mcasa* 2000 (1) SACR 263 (Tk), para 42.
[549] *NDPP v Basson* 2002 (1) SA 419 (SCA).
[550] *NDPP v Basson* 2002 (1) SA 419 (SCA), para 19.
[551] *NDPP v Rautenbach and Another* [2004] ZASCA 102.
[552] *NDPP v Rautenbach and Another* [2004] ZASCA 102, para 27.
[553] *NDPP v Rautenbach and Another* [2004] ZASCA 102, para 52.
[554] *NDPP v Mcasa* 2000 (1) SACR 263 (Tk), 268 g-h.

It is also noteworthy that at the *ex parte* stage the court may only issue provisional restraint orders, which have immediate effect but simultaneously grant a "*rule nisi"*[555] calling upon all interested parties to present a case for why the order should not be made final.[556] The nature of these *ex parte* orders, as noted in *MV Snow Delta: Serva Ship Ltd v Discount Tonnage Ltd*[557] is that they are provisional in that they are "conditional upon confirmation by the same Court (albeit not the same Judge) in the same proceedings after having heard the other side".[558] When the interim restraint order comes for confirmation, the court is required to provide for reasonable living and legal expenses to the person whose property is subject to the restraint order if it is satisfied that he or she has disclosed under oath all his or her interests in property subject to a restraint order and that the person cannot meet the expenses concerned out of his or her unrestrained property.[559] In addition, where the High Court has made a restraint order under s 25(1)(*b*) (where it is satisfied that a person is to be charged with an offence and that there are reasonable grounds for believing that a confiscation order may be made) the court is required to rescind the order if the person is not charged within a reasonable period.[560]

The effect of a restraint order, interim or final, on a person's property is that the person cannot deal with the property in any way. Pursuant to the amendment introduced to section 26(8) by Prevention of Organised Crime Second Amendment Act 38 of 1999, the Court is now obligated when making a restraint order to simultaneously authorise seizure of all movable property "concerned" by a police official.[561] Section 27(1) also gives police officers the power to seize any realizable property if they have reasonable grounds to believe that such property will be so disposed of or removed.[562] The Supreme Court of Appeal in *NDPP v Mcasa* has held, with regard to section 27(1), that it is a stand-alone section and "does not flow from the authorisation of a police official by the court to seize property in terms of

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[555] On *rule nisi* in the South African context, see, for example, Erasmus *Superior Court Practice* (2002) 17 B1-52-3:

> "The term '*rule nisi*' is derived from English law and practice, and the rule may be defined as an order by a court issued at the instance of the applicant and calling upon another party to show cause before the court on a particular day why the relief applied for should not be granted. Our common law knew the temporary interdict and, as Van Zyl points out, a 'curious mixture of our practice with the practice of England' took place and the practice arose of asking the court for a rule returnable on a certain day, but in the meantime to operate as a temporary interdict."

[556] POCA, s 26(3).
[557] *MV Snow Delta: Serva Ship Ltd v Discount Tonnage Ltd* 2000 (4) 746 (SCA).
[558] *MV Snow Delta: Serva Ship Ltd v Discount Tonnage Ltd* 2000 (4) 746 (SCA), para 6.
[559] POCA, s 26(6).
[560] POCA, s 25(2).
[561] POCA, s 26(8). Prior to the amendment the Court had discretion to make ancillary orders it considered appropriate for the proper, fair and effective execution of the order, including an order authorising the seizure of the property concerned by a police official".
[562] POCA, s 27(1).

section 26(8)".[563] The two subsections, however, provide that property seized in terms of each shall be dealt with in accordance with the directions of the court which made the relevant restraint order.[564]

A court which has made a restraint order may on application by a person affected by that order vary or rescind a restraint order or an order which authorizes the seizure of the property concerned or may make any other ancillary order provided it is satisfied that the operation of the order would: (1) deprive the applicant the means to provide for living expenses or cause undue hardship to the applicant; and (2) the hardship the applicant will suffer outweighs the risk that the property concerned may be destroyed, lost, damaged, concealed or transferred.[565]

3.8.2.1.4. Realization of property

If there is a final confiscation order against a defendant and the trial has come to an end, a court may appoint a *curator bonis* to realize (or take over) any realizable property. A realizable property is defined as any property held by the defendant concerned and any property held by a person to whom that defendant has directly or indirectly made any affected gift.[566] Affected gift is defined as a gift made by the defendant concerned not more than seven years before the fixed date or made at any time if it was a gift that was connected to any offence.[567] However, where a declaration of forfeiture is in force against the property, that property shall not be realisable.[568] Once a *curator bonis* is appointed, the defendant is expected to hand over the property in question to the *curator bonis*. Any person who has an interest in the property and is likely to be directly affected by the confiscation order, or has suffered loss because of the criminal activities of the defendant, have the opportunity to present their case to the court. Also, if such a person has brought or intends to bring legal proceedings against the defendant, the court may decide to stop the realization of the property until that case is over.

[563] *NDPP v Mcasa* 2000 (1) SACR 263 (Tk), para 76.
[564] POCA, s 26(8) & s 27(1).
[565] POCA, s 26(10).
[566] POCA, s 14.
[567] POCA, s 12.
[568] POCA, s 14(2).

3.8.2.2. The non-conviction based assets recovery provision – Chapter 6 of POCA

Chapter 6, section 37 to 62, starts by declaring that all proceedings for the purposes of the chapter are civil proceedings and not criminal proceedings.[569] It provides for confiscation where it is established on a balance of probabilities that property has been used to commit an offence or is the proceeds of unlawful activities, even when no criminal proceedings are pending. In this respect, chapter 6 stands in contradistinction to chapter 5 in that under chapter 6 the focus is not on the wrongdoing but on the property that has been used to commit an offence or that constitutes the proceeds of unlawful conduct. The import as noted by the Constitutional Court in *NDPP v Mohamed NO,* is that under chapter 6 "[t]he guilt or wrongdoing of the owners or possessors of property is, therefore, not primarily relevant to the proceedings".[570]

Chapter 6 also differs with Chapter 5 in that while Chapter 5 applies only to the recovery of proceeds of crime, Chapter 6 applies both to the recovery of the instrumentalities of crime and of the proceeds of crime. Section 38(2) under chapter 6, for example, provides that the High Court shall make a preservation of property order if there are reasonable grounds to believe that the property concerned is either (a) an instrumentality of crime (has been used to commit an offence) or (b) is the proceeds of unlawful activity.[571] Similarly section 50(1) provides that the High Court shall make a confiscation order if its proved on a balance of probability that the property concerned is either (a) an instrumentality of crime (has been used to commit an offence) or (b) is the proceeds of unlawful activity.[572] The thesis while noting the breadth of chapter 6 is, however, limited to discussing chapter 6 in so far as it relates to the recovery of proceeds of crime.

3.8.2.2.1. Stage one: preservation of property order

The non-conviction based assets recovery under chapter 6 starts when the National Director makes an *ex parte* application in terms of section 38 for a preservation order. Section 38(2) of the POCA provides that the High Court shall make such an order "if there are reasonable grounds to believe" that the property concerned is the proceeds of unlawful activities. While

[569] POCA, s 37.
[570] *NDPP v Mohamed NO* 2003 (1) SACR 561 para 17.
[571] POCA, s 38(2).
[572] POCA, s 50(1).

making the order, the court may make other ancillary orders that it considers fit for the fair and effective execution of the order such as authorising the seizure of the property by police officials (this ancillary order is mandatory),[573] or appointing a *curator bonis* to take care of the property,[574] or in the case of immovable property ordering the registrar of title to endorse the preservation in the register.[575] The nature of the preservation of property order at the *ex parte stage*, though not expressly stated in Chapter 6 of POCA as is stated with regard to the *ex parte* restraint order in Chapter 5,[576] has been held by the Constitutional Court in *NDPP v Mohamed NO* to be provisional and may be varied or rescinded in terms of section 44 and 47.[577]

Section 44 and 47 provides opportunities to affected parties to have preservation orders set aside or varied. Under section 44, a High Court may make provision for reasonable living and legal expenses for persons whose property is subject to the preservation order. However before making such provision, the High Court must be satisfied that the relevant person cannot meet the living or legal expenses out of his or her property not subject to a preservation order and that the person has disclosed on oath all her property. Under section 47(3) a person who is affected by a preservation order made in respect of immovable property may apply for the order to be rescinded and the High Court shall rescind the order "if it deems it necessary in the interests of justice" to do so. In respect of movable property, Section 47(1) provides that a High Court may, on the application of an affected party, vary or rescind the preservation order "if it is satisfied" that the order will deprive the applicant of "reasonable living expenses and cause undue hardship for the applicant"; and that "the hardship … outweighs the risk that the property concerned may be destroyed, lost, damaged, concealed or transferred".

3.8.2.2.2. Stage two: confiscation order

If after the challenges by the aggrieved parties the preservation order is still in force (has not been rescinded), then the second stage sets in. The second stage begins when the National

[573] POCA, s 38(3).
[574] POCA, s 42.
[575] POCA, s 43.
[576] It is worth noting that the preservation of property order under chapter 6 is a newcomer to the South African statutory confiscation of property regime. This is because civil recovery was not a confiscating mechanism in either the Drugs and Drug Trafficking Act of 1992 or in the Proceeds of Crime Act of 1996. Section 16 of the 1996 Act, the immediate precursor to the POCA, made provision for restraint orders in the criminal context only and did not have a preservation of property order in the civil context.
[577] *NDPP v Mohamed NO* 2003 (1) SACR 561, para 47.

Director makes an application for an order forfeiting to the state all or any of the property that is subject to the preservation of property order.[578] This application must be made within 90 days of the grant of the preservation of property order; otherwise the preservation of property order will lapse.[579] At this second stage, two related inquiries take place. At the first inquiry, the Court has to find on a balance of probability that the property sought to be confiscated is proceeds of unlawful activities.[580] During this first inquiry, the burden of proving that the property is proceeds of unlawful activities resides with the National Prosecutor. If the Court finds on a balance of probabilities that the property concerned is proceeds of unlawful activity it may order for the confiscation of the property.[581] This order can be made in the absence of a person whose interest in the property may be affected by the confiscation order and is not affected by the outcome of any criminal proceedings or investigation with respect to which the property concerned is connected.[582] However, before making the final order, the Court is required to make a second inquiry to determine whether there are interests of innocent owners that would be affected by the confiscation order.[583]

At the second inquiry the burden of proving that the interest in the property is innocent lies with an aggrieved party.[584] To avoid the order, an owner can claim that he or she obtained the property legally and for value, and that he or she did not know or had no reasonable grounds to suspect that the property constituted the proceeds of crime.[585] Where the court finds on a balance of property that the aggrieved party acquired interest in the property for value, which is not significantly less than the true value of the interest, and without notice of the illegal source of the property, then the court is required to exclude these interests from the operation of the forfeiture order.[586]

It is to be noted that at the first inquiry, the owner's guilt or wrongdoing, knowledge or lack of it, is not the focus. The question at that stage, as noted by the Supreme Court of Appeal in *NDPP v R O Cook Properties (Pty) Ltd*,[587] is "whether a functional relation between property and crime has been established,"[588] that is, whether the property in question was

[578] POCA, s 48.
[579] POCA, s 40.
[580] POCA, s 48(4).
[581] POCA, s 50(1).
[582] POCA, s 50(4).
[583] For a discussion, see *NDPP v April and Another* [2007] 4 All SA 1183 (C), para 35-37
[584] POCA, s 48(4).
[585] See *NDPP v Mohamed NO* 2003 (1) SACR 56, para 18.
[586] POCA, s 52(1) & (2).
[587] *NDPP v R O Cook Properties (Pty) Ltd* [2004] ZASCA 36.
[588] *NDPP v R O Cook Properties (Pty) Ltd* [2004] ZASCA 36, para 21.

"derived, received or retained" "in connection with or as a result of" unlawful activities.[589] It is only at the second inquiry when (after finding that the property is proceeds of crime) that the court considers whether "certain interests should be excluded from forfeiture, does the owner's state of mind come into play".[590] At this second inquiry the aggrieved owner as noted above is availed what the Constitutional Court has christened the "innocent owner defence" where he can show that the property was obtained legally and for value and that he or she had no knowledge of the illegal origin of the property.[591]

3.9. Comparison between Kenya's and South Africa's assets recovery regimes

Both the non-conviction based assets recovery in Kenya and South Africa share the same general characteristics of non-conviction based recoveries in that they do not require to be preceded by a conviction for the confiscation to take place and that the procedure employed is civil not criminal. However, there are also a number of differences in the procedures adopted in the respective laws. First, while in Kenya the application for preservation of property order can only be made within a civil recovery suit, under the South Africa's POCA the application for preservation of property order is in fact the beginning of the assets recovery procedure. Second, unlike Kenya's ACECA, which provides the preservation of property order with a longer life of six months or even more (where EACC applies for extension of time), the preservation of property order under South Africa's POCA has a life span of only 90 days. Third, while the POCA specifically requires the Court to provide for the living and legal expenses of a defendant in its preservation of property order where the need for such is proven, the ACECA has no equivalent explicit provisions on legal and living expenses. Fourth, unlike that of Kenya's ACECA which allows for both object and value confiscation in its non-conviction based mechanism, the confiscation type under chapter 6 of the POCA is purely "object" based, that is, it only targets the object linked to the predicate offence and does not envisage a situation where the court can order the forfeiture of an amount equivalent to the "value" of the targeted property.

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[589] This requirement derives from the definition of "proceeds of unlawful activities" under POCA at s 1, which is:

> "any property or any service, advantage, benefit or reward which was derived, received or retained, directly or indirectly, in the Republic or elsewhere, at any time before or after the commencement of this Act, in connection with or as a result of any unlawful activity carried on by any person, and includes any property representing property so derived."

[590] *NDPP v R O Cook Properties (Pty) Ltd* [2004] ZASCA 36, para 21.

[591] *NDPP v Mohamed NO* 2003 (1) SACR 561, para 18.

With regard to the conviction based assets recovery mechanism, though in both jurisdictions it is preceded by a conviction of the owner of the targeted property, ACECA allows for both object and value confiscations while POCA only allows for value confiscation.[592] Also while the applicable procedure under POCA is expressly civil not criminal, under ACECA the civil procedure is expressly applicable only when the state brings the recovery proceedings after the criminal case has been finalised otherwise the recovery process is treated as part of the sentencing criminal process that follows the conviction of an accused person.

3.10. Common law roots of assets recovery and their relevance in Kenya and South Africa

Both Kenya and South Africa allow for the use of common law in their legal regimes. However, while Kenya relies exclusively on the English common law,[593] South Africa uses a mixture of Roman-Dutch and English common law with predominance reliance on the former.[594] Under Section 173 of the South African Constitution the courts are enjoined to apply and "*develop the common law*, taking into account the interests of justice".[595] Similarly, under Section 3(1)(c) of the Kenyan Judicature Act,[596] the English common law is made applicable to Kenya.[597] However, in both jurisdictions, common law is only applicable where there is no legislative provision on the same issue or where the legislative provision is inadequate to address the end of justice. As noted by the Constitutional Court of South Africa in *NDPP v Phillips & Another*[598]

> Whatever the true meaning and ambit of section 173, I do not think that an Act of Parliament can simply be ignored and reliance placed directly on a provision in the Constitution, *nor is it permissible to side-step an Act of Parliament by resorting to the common law*.[599]

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[592] As the South African Constitutional Court confirmed in *S v Shaik and Others [2008]* ZACC 7, para 24, the order that a court may make in terms of chapter 5 (conviction based mechanism) "is not for the confiscation of a specific object, but an order for the payment of an amount of money to the state". Compare with section 54 of Kenya's ACECA.

[593] The Judicature Act, Chapter 8 Laws of Kenya, s 3(1)(c).

[594] For a discussion, see, for example, LM Van der Walt et al (2ed) *Introduction to South African Law: Fresh Perspectives* (2011) chap 6. See also *S v Zuma & Another* 1995 (2) SA 642 (CC) where the Constitutional Court relied on the English Common Law principle that places the onus of proving voluntariness of confession on the prosecution. *S v Zuma & Another* 1995 (2) SA 642 (CC) para 29-33.

[595] The Constitution of the Republic of South Africa 1996, s 173.

[596] The Judicature Act of 1967, Chapter 8 of the Laws of Kenya.

[597] The Judicature Act of 1967, Chapter 8 of the Laws of Kenya, s 3(1)(c). The section provides that:

> "3. (1) The jurisdiction of the High Court, the Court of Appeal and of all subordinate courts shall be exercised in conformity with …. *(c)* subject thereto and so far as those written laws do not extend or apply, the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August, 1897, and the procedure and practice observed in courts of justice in England at that date."

[598] *NDPP v Phillips & Another* [2005] ZACC 15.

[599] *NDPP v Phillips & Another* [2005] ZACC 15, para 51 (emphasis added).

Similarly in Kenya, the Judicature Act limits the application of common law to only those cases where "written laws do not extend or apply".[600] As noted in *Joel Mutemi Kivangu v Saiko Lekeresie & Another*[601] "The Judicature Act, *(Cap. 8, Laws of Kenya)*, imports the common law of England, to be applied in Kenya, *subject always to the Constitution, and our written laws*".[602] Thus, since both Kenya and South Africa have legislative provisions on assets recovery, common law can only be resorted to where there is a lacuna in the written law.[603] It is also noteworthy that a common law principle, for it to apply in both Kenya and South Africa, must still be considered a useful principle in its jurisdiction of origin. Where the common law principle has been repealed in its country of origin or is no longer in use, the Courts in Kenya and South Africa have been reluctant to continue using that principle in their local cases.[604] It is in light of the above legal terrain that common law antecedents to the modern assets recovery laws should be reviewed.

Modern confiscation laws are usually traced to a number of related sources.[605] The first is deodand, a form of confiscation at common law whereby any object causing the death of or damage to a person or animal was forfeited.[606] The second is attainder, a form of confiscation at common law whereby the estate of a criminal was forfeited upon conviction for capital felony such as treason.[607] The third source is specific statutes under English

[600] The Judicature Act of 1967, Chapter 8 of the Laws of Kenya, s 3(1)(c).
[601] *Joel Mutemi Kivangu v Saiko Lekeresie & Another* [2012] eKLR.
[602] *Joel Mutemi Kivangu v Saiko Lekeresie & Another* [2012] eKLR.
[603] For example, as noted by the South African Constitutional Court "ordinarily the power in section 173 (of the Constitution) to protect and regulate relates to the process of court and arises when *there is a legislative lacuna in the process.*" *NDPP v Phillips & Another* [2005] ZACC 15, para 48 (emphasis added).
[604] See the Kenyan Case of *Wilson Thirimba Mwangi v Director of Public Prosecution* [2012] eKLR *(*discussing the writ coram nobis, which was abolished in England by the Common Law Procedure Act 1854). See also the South African case of *Green v Fitzgerald* 1914 AD 88 (Where the Court discarded the offence of adultery under common law on the ground that it could not find a single judgment reported after 1826 showing the prosecution of offenders for adultery).
[605] For the history of modern confiscation laws, see, for example, AR Mitchell *et al Confiscation* (1992); A Freiberg & RG Fox "Fighting crime with forfeiture: lessons from history" (2000) 6 *Australia Journal of Legal History* 1.
[606] One theory holds that the purpose of forfeiting the object was to prevent the blood feud of early justice by replacing the slayer's kin with the instrument of death as the object of vengeance. See JR Maxeiner, "Bane of American Forfeiture Law: Banished at Last?" (1977) 62 *Cornell Law Review* 768 at 771. See also OW Holmes *The common law* (1923) 11 (noting that "[the hatred for anything giving us pain, which wreaks itself on the manifest cause.., leads even civilized man to kick a door when it pinches his finger"). However, the fact that the deodand was imposed even if the death-causing implement belonged to the victim and even if no other human agency was involved in the death seems to dispel that theory. See M Dalton *Country Justice* (1973) 226 (pointing out that it did not matter that the object did not belong to the person who caused the death, or even if it belonged to the dead person him or herself). Another explanation offered by Finkelstein is that the surrender of the object causing damage or death was "not as true restitution for the damage done, but as a ransom by the owner of the wrongdoing chattel in order to forestall any further action by the injured party". JJ Finkelstein "The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty" (1973) 46(2*) Temple Law Quarterly* 169 at 181.
[607] See generally OW Holmes *The Common Law* (1963); RG Fox and A Freiberg *Sentencing: State and Federal Law in Victoria* (1999) chap 6.

admiralty law which permitted confiscation of property used to commit crimes, especially in areas such as shipping, customs, and revenue. Deodand was directed solely against property and hence was an *in rem* proceeding.[608] Attainder, on the other hand, required criminal conviction of the felon as an essential prerequisite to the confiscation of the property and hence was an *in personam* proceeding.[609] The admiralty laws were designed to raise and protect revenue for the crown and relied more on the *in rem* proceedings of direct seizure of goods and vessels by statute than on the criminal prosecution and conviction of smugglers, though the *in personam* proceeding was also used.[610]

The non-conviction based confiscation is the modern descendant of the common law deodand and *in rem* actions under Admiralty laws, while the conviction based confiscation is the modern descendant of common law attainder and *in personam* actions under Admiralty laws.[611] The common-law confiscation regimes of deodand and attainder were abolished in 1846 and 1870 respectively by the UK parliament.[612] It was only the admiralty laws that survived and took hold in the colonies, and serves as the foundation for modem confiscation law.[613] The *in rem* and *in personam* features of deodand and attainder respectively were, however, later incarnated in the 1980s when, as already seen,[614] law makers enthusiastically embraced the use of statutory confiscation to attack the capital base of organised crime.

The institution of deodand was abolished because it was considered unreasonable and absurd.[615] It was unreasonable for punishing things that could not reasonably be held liable for deaths and for stigmatizing respectable owners of property for acts that they were not responsible for.[616] It was absurd that properties of victims could also be confiscated and that

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[608] See Edwards "Forfeitures: Civil or Criminal?" (1970) 43 *Temple Law Quarterly* 191;
[609] See RG Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (1999) chap 6.
[610] For example, The Navigation Acts of 1660, which required the shipping of commodities in English vessels, were a major component of English policy to promote dominance at sea.
[611] See generally A Freiberg & RG Fox "Fighting crime with forfeiture: lessons from history" (2000) 6 *Australian Journal of Legal History* 1.
[612] The deodand was abolished by Compensating Families of Persons Killed by Accidents Act of 1846 (UK) while attainder by Forfeiture Act of 1870 (UK).
[613] GE Woodbine & SE Thome (eds) *Bracton on the Laws and Customs of England* (1968-77) 284-286 & 362.
[614] See section 3.2. above on background
[615] At the time of the deodand's abolition, Lord Campbell remarked that it was a "wonder that a law so extremely absurd and inconvenient should have remained in force…." United Kingdom *Parliamentary debates* (1845) at 1027. See also United Kingdom, *Parliamentary Debates*, House of Lords, 7 May 1846, 174 (Lord Denman, Deodands Abolition Bill). The preamble to the Act stated baldly: "Whereas the law respecting the forfeiture of chattels which have moved to or caused the death of man, and respecting deodands, is unreasonable and inconvenient …."
[616] See H Smith "From Deodand to Dependency" (1967) 11 *American Journal of Legal History* 389 at 394 (analysing the operation of deodand and concluding that in early nineteenth century coroner's juries tended to minimise the value of objects, either out of sympathy with the owner of the object or perhaps because they objected to respectable citizens being treated and stigmatized in a manner similar to felons).

while personal injury attracted compensation for the victims, death did not (the deodand was never regarded as a means of compensating the victim on the ground that it was not possible to put a value on human life).[617] With regard to Attainder, because it targeted the whole estate of the offender, it was seen as a form of double punishment, punishing both the offender and his family. The offenders' families were left destitute and were in most cases forced into crime in order to make ends meet. It was further criticised for not compensating innocent victims as the property was forfeited to the crown. It was also seen as disadvantaging the creditors as it left them with no estate to sue. [618]

Given the abolition of the common law institutions of deodand and attainder by the UK Parliament and the strong reasons given for their discontinuance, it is safe to conclude that the two common law tools are equally inapplicable in Kenya and South Africa.[619] But even if they were still to be applicable, it is to be noted that the modern assets recovery regime targeting the proceeds of crime is fundamentally different from the defunct deodand and attainder. For example, while deodand targeted property on the basis that the property was guilty of crime, the equivalent modern non-conviction based assets recovery is justified on the basis of pragmatic considerations such as the difficulty in apprehending or prosecuting organised criminals.[620] Moreover, deodand, though also an action *in rem* just like the modern day non-conviction based assets recovery, was mainly concerned with the confiscation of the subject of crime and not proceeds of crime as is the case with modern non-conviction based

[617] F Pollock & F Maitland, *The History of English Law Before the Time of Edward 1* (1923) 474 (Asserting that although in the earliest times, the thing would have gone to the kinsmen of the slain to purchase the peace or to enable the dead man's kinfolk to wreak vengeance upon it, it was never received as compensation). But see H Smith "From Deodand to Dependency" (1967) 11 *American Journal of Legal History* 389 (Pointing out that although there was no legal obligation to give the deodand or its proceeds to relatives of deceased, they were strong candidates for receiving any bounty and there was no impediment to them being recipients).

[618] See United Kingdom, *Parliamentary Debates, House of Commons*, 30 March 1870 at 936. See also A Freiberg & RG Fox "Fighting crime with forfeiture: lessons from history" (2000) 6 *Australian Journal of Legal History* 1 at 42-43.

[619] But see the South Africa case of *Mineworkers Investment Co (Pty) Ltd v Modibane* 2002 (6) SA 512 (w) (where the *amende honorable* (apology) of Roman-Dutch law, which had been thought to be extinct in South Africa was revived with the aid of the Constitution); and the Kenyan case of *Peter Wambugu Kariuki v Justus Weru Wanguchi* In the High Court of Kenya at Nairobi Civil Case No 513 of 1999 at 9 (where the court held that though an action for breach of promise to marry at common law had been abolished in England it was arguable that relief for breach of promise to marry still formed part of the received common law of England in Kenya). However, given the unfairness wrought by Deodand and Attainder that lead to their abolition, it is doubtful whether the same can be revived especially in light of the new constitutional dispensation in South Africa and Kenya.

[620] See AJ Vander Walt "Civil forfeiture of instrumentalities and proceeds of crime and the constitutional property clause" (2000) 16 *South African Journal on Human Rights* 1 at 8-9 noting that:

> "Civil forfeiture is in fact nowadays more often justified on pragmatic grounds, such as the importance of preventing crime or the difficulty of identifying the owner of the property or the person who should be prosecuted for the crime, and the guilty-property fiction is not generally regarded as a good justification for the legitimacy of civil forfeiture in modern law."

assets recovery regime.[621] Similarly, the common law attainder targeted the interest of a felon in land and chattels, as well as his ability to pass title to his heirs not because these were proceeds of his crime but simply as a form of further punishment to the offender.[622]

The statutory forfeiture under English Admiralty laws, on the other hand, though still operational in UK and most of its former colonies like Kenya,[623] is not a common law source by virtue of the fact that it was coded into statute.[624] In any case, these statutory forfeitures are not helpful in the confiscation of proceeds of corruption as, apart from being restricted to areas such as shipping, customs, and revenue; their purpose was mostly the confiscation of instrumentalities of crime, that is, property used in the commission of crimes such as ships or subjects of crime such as contrabands (not proceeds of crime).[625] The recovery of proceeds of crime is a recent phenomenon traceable to the 1980s.[626] As such, in Kenya and South Africa the "available" domestic legal regime for the recovery of corruptly acquired assets is that found in ACECA and POCA respectively.[627]

However, the common law antecedents do offer lessons on the dangers that the modern assets recovery laws could learn from. For example, just like the traditional deodand was considered unjust for stigmatizing respectable owners of property for acts that they were not responsible for, the modern day non-conviction based mechanism also poses risk to innocent property owners who without notice of the illegality innocently purchase an illegally acquired property for value. During the confiscation proceedings, these persons if not given

[621] Under the law of deodand only the property that was "the immediate occasion of the death", and not more, was to be forfeited. Thus, if a person was killed by a driven cart, the cart and its oxen were deodands, but if the death was caused by the person falling from a wheel of a stationary cart, only the wheel was treated as a deodand as it was regarded as the immediate cause of death. For discussion, see M Hale & S Emlyn *Historia Placitorum Coronae: The History of the Pleas of the Crown* (1847) 419–422; W Blackstone *Commentaries on the Laws of England in Four Books* 7 ed (1775) 296.

[622] See RG Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (1999) chap 6. See also A Freiberg & RG Fox "Fighting crime with forfeiture: lessons from history" (2000) 6 *Australian Journal of Legal History* 1 at 42-43.

[623] See, for example, Kenya's Judicature Act of 1967 at s 3(1)(c).

[624] On meaning of common law, see LM Van der Walt *et al* (2ed) *Introduction to South African Law: Fresh Perspectives* (2011) chap 6 (describing it as unlegislated law – law found in case law).

[625] See AR Mitchell *et al Confiscation* (1992) 2; LW Levy *A License to Steal: the Forfeiture of Property* (1996) 1, 21 & 39; CW Palm "RICO Forfeiture and the Eighth Amendment: When is Everything too Much?" (1991) 53 *University of Pillsburg Law Review* 1 at 7-13; N Kohler "The Confiscation of Criminal Assets in The United States and Switzerland" (1990) 13 *Houston Journal of International Law* 1 at 14-15 (all pointing out that statutory forfeiture permitted confiscation of property used to commit crimes in areas such as shipping, customs, and revenue).

[626] See section 3.2 above.

[627] In South Africa, the POCA is augmented by the International Co-operation in Criminal Matters Act 75 of 1996 (ICCMA), which provides for the enforcement in South Africa of restraint orders that have been issued in the course of criminal proceedings in foreign states. However, since it is an enforcement Act of foreign orders it is of little relevance to the purpose of this thesis. For a discussion of the relationship between POCA and ICCMA, see *Falk and Another v NDPP* (CCT 95/10) [2011] ZACC 26.

an opportunity to vindicate their innocence might end up suffering stigma for the underlying offence for which they are actually innocent of. Similarly, just like Attainder was considered unfair for confiscating the entire estate of the felon, thereby leaving the family destitute and creditors without the estate to sue for their debt, modern assets recovery mechanisms can also wrought untold suffering to these category of persons, if their interest is not catered for. Thus, in framing the modern day assets recovery laws, lessons can be learned from the antecedent common law sources on the best way to make the laws fair.

3.11. Conclusion

This chapter has examined the regime for the recovery of corruptly acquired assets. It concludes that two mechanisms - the conviction based and the non-conviction based mechanisms – are available for use by the state in the recovery of corruptly acquired assets and that both have been adopted by Kenya and South Africa in their assets recovery laws. An analysis of the two mechanisms shows that none of the two can be used as a substitute of the other since they both operate under different dynamics. The conviction based mechanism requires that confiscation of property be preceded by the conviction of the owner of the property and is therefore useful where the prosecution of the offender is attainable. The non-conviction based mechanism, on the other hand, allows for recovery of assets without the need for the conviction and can thus be used where prosecution is unattainable.

Between the two mechanisms, the conviction based mechanism raises little concern of potential infraction on the rights of involved individuals as it is rigged with the traditional criminal law procedural guarantee, which require that the state proves the criminal guilt of the owner beyond reasonable doubt before any consequences can be visited upon him. The same cannot however be said of the non-conviction based mechanism, which allows the state to bypass the criminal process and to use the civil procedure in addressing criminal prohibitions. The criminal fair trial guarantees that it bypasses are usually aimed at protecting individuals against arbitrary use of the immense police power that society places on the state and the attendant unfair consequences that may follow from such abuse. Thus, since assets recovery is an exercise of state's police power against crime, the use of a non-conviction based mechanism that does not require proof of criminal guilt of a property owner and that allows the state to confiscate criminally derived property using a civil process does pose serious threat to the rights of the property owner, especially the right to presumption of innocence and the right to property. The remaining chapters of this thesis examine how

courts have addressed this threat in light of the requirement of the right to fair trial and the right to property. The next chapter begins by looking at the constitutionality of the non-conviction based mechanism in light of its apparent infringement of the right to criminal fair trial.

CHAPTER FOUR

NON-CONVICTION BASED ASSETS RECOVERY WITHIN THE RIGHT TO FAIR TRIAL FRAMEWORK

"Nip the shoots of arbitrary power in the bud, is the only maxim which can ever preserve the liberties of any people."[628]

4.1. Introduction

The discussion in the last two chapters have concluded that assets recovery is indeed an important strategy in the fight against corruption not only because it allows states to remove private gain out of corruption thereby making it unattractive but also because it allows for stolen public property to be reverted back to the use of the public. This chapter focuses on the non-conviction based assets recovery, specifically as regards its constitutionality in light of its apparent conflict with the right to fair trial.

As noted in the preceding chapter, states have the option of resorting to either the conviction based or the non-conviction based mechanism in the recovery of corruptly acquired assets. However, though the two mechanisms serve the same purpose of assets recovery, they are fundamentally different in that while the conviction based assets recovery follows a criminal process in which the criminal law fair trial rights are guaranteed, the non-conviction based mechanism does not follow a criminal process and instead applies a civil law procedure to matters that are essentially criminal in nature. Because the conviction based mechanism is fitted with criminal law procedural guarantees, the potential of it being abused to the detriment of individual property owners is effectively reduced. The same cannot however be said of the non-conviction based mechanism, which allows the state to use a process lacking in criminal law protection to address the crime of corruption. Since the criminal fair trial guarantees are aimed at protecting individuals against arbitrary use of the immense police power that society places on the state, and since assets recovery is an exercise of state's police power against crime, the use of a non-conviction based mechanism that does not require proof of criminal guilt of a property owner and that allows the state to confiscate criminally derived property using a civil process does seem to conflict with the right to fair trial.

[628] J Adams *Novanglus Essays* available at www.thefederalistpapers.org at 26 (accessed on 1/3/2012).

In a framework guided by constitutionally entrenched human rights such as Kenya and South Africa, the use of a non-conviction based civil process to fight crime raises the question as to the constitutionality of the non-conviction based mechanism. Because non-conviction based mechanism is considered a viable option in the recovery of stolen public property, to assure its legitimacy, it is imperative that the issue of its constitutionality in light of its potential infraction of the right to fair trial be determined. This chapter reviews the approach that courts (with specific reference to Kenya and South Africa) have adopted in resolving the constitutionality of the non-conviction based mechanism in light of the requirements of the right to fair trial. But before engaging in the review, it is useful to explain first the human rights framework under which the relationship between the state and individuals generally operate.

4.2. The human rights framework

The idea that the individual as a human being holds subjective rights which can and must be protected from the excesses of the state is not new. In fact, it has become almost commonplace.[629] This idea, which has been engraved in the International Bill of Rights,[630] regional human rights instruments[631] and in many national bills of rights,[632] is the outcome of many events, ideas, and movements over many centuries, and the resultant of many interrelating forces. These movements, debates and events, which have received ample

[629] In its historical context, the concept of human rights has been intimately linked to the problem of oppressive exercise of state authority. Although different societies did have some notion of human rights in their social systems, and although many medieval thinkers had identified the idea of rights in their writings, the very first theoretical design of the idea of human rights as understood today is usually traced to the seventeenth-century constitutional crisis in England resulting from the oppressive rule of the Stuart Kings. This first theoretical design is generally attributed to the political philosophy of the Englishman John Locke (1632 -1704), who, in the ensuing struggle against the Stuart Kings, strongly advocated for a representative parliament as the true custodian of the libertarian aspirations of suppressed people. But see WA Edmundson *An introduction to rights* (2004) (tracing the idea to medieval European thinkers before Locke like William of Ockham, Duns Scotus, Jean Gerson, Hugo Grotius, and Thomas Hobbes).

[630] The International Bill of Rights is composed of the Universal Declaration on Human Rights, adopted 10/12/1948; UN.G.A Res. 217 A (III), UN.GAOR, 3d Sess, UN. Doc. A/810 (1948); International Covenant on Civil and Political Rights, adopted 16/12/1966; G.A. Res 2200 (XXI), UN. Doc A/6316 (1966) 999 UNTS 171 (entered into force, 23/03/1976); and International Covenant on Economic, Social and Cultural Rights, adopted 16/12/1966; G.A. Res 2200 (XXI), UN. Doc A/6316 (1966) 993 UNTS 3 (entered into force 3/01/1976).

[631] See the African Charter on Human and Peoples' Rights (African Charter) O.A.U. Doc.CAB/LEG/67/3/Rev.5 (1982) (entered into force, 21/10/1986); the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention) Signed 4 November 1950 and entered into force 3 September 1953; the American Convention on Human Rights (Inter-American Convention) Adopted 7 January 1970, OAS Official Records, OEA/Ser K/XVI/1.1, doc 65 rev 1, corr 1 (1970).

[632] See, for example, the Constitution of Republic of South Africa, 1996; Constitution or Republic of Kenya, 2010.

scholarly attention and therefore need not detain us here, have shaped the understanding of human rights today.[633]

The modern human rights discourse starts from the premise that in human societies there will always be representatives (governments) appointed or elected to exercise some powers on behalf of the populace;[634] that in the exercise of this power the rulers views and interests will sometimes differ with those of the ruled;[635] that these conflicting views and interests can only be resolved by national laws;[636] but that these laws must conform to certain objective and universally accepted standards.[637] Based on these premises the modern human rights laws display the following salient features: (a) they recognize that human rights are derived from universal moral standards upon which the framing and interpretation of national laws and actions should be based; (b) they provide for universal, unconditional, inalienable, and indivisible human rights to all individuals; (c) they seek to place limits on the exercise of state power and at the same time obligate states to act positively to ensure their fulfilment; and (d) they recognize that human rights do sometimes conflict with other non-right objectives of governance and sets out to strike a workable balance between the two.[638] These salient features of human rights framework are explained in detail below.

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[633] On the history of human rights generally, see, for example, PG Lauren *The evolution of international human rights: visions seen* (2003); WA Edmundson *An introduction to rights* (2004); MR Ishay *The history of human rights: From ancient times to the globalization era* (2008); T Buergentha "The Normative and Institutional Evolution of International Human Rights" (1997) 19(4) *Human Rights Quarterly* 703.

[634] This relationship between the rulers and the ruled derive from the social contract idea that views the modern society as a creation of a contract between the people and their government in which the individual members of the civil society maintain their original natural rights but forfeit to the state their natural competency to protect those rights by taking the law into their own hands. See, for example, P Riley *Will and Political Legitimacy: a critical exposition of social contract theory in Hobbes, Lock, Rousseau, Kant and Hegel* (1982) 1 (pointing out that "political legitimacy, political authority and political obligations are derived from the consent of those who create a government and who operate it").

[635] John Locke, for example, likened the social contract between the subjects and the government to the concept of trusts in English Law in which the government as the trustee was bound to act in the best interest of the beneficiaries of the trust, that is, the subjects. According to him, the sole reason for government authority was to protect the natural rights to life, liberty and property of the subjects. Thus, the failure of a government to execute this obligation would automatically dissolve the trust and leave the subjects free to conclude a new social contract with another government. See generally J Locke, *Two Treatise of Government* (1947).

[636] As Boven persuasively argues, "[t]he primary responsibility of states to realize human rights is vis-à-vis the people who live under the jurisdiction of these states". T Van Boven, "The International System of Human Rights: An Overview" in United Nations *Manual on Human Rights Reporting* (1991) 10.

[637] The enactment of the international human rights standard was a response to the failure of national human rights law to check national tyrants such as Hitler and Stalin who would use national sovereignty and cultural relativity to deny their citizens certain fundamental rights and freedoms. For a discussion of the history of international human rights law, see generally PG Lauren *The evolution of international human rights: visions seen* (2003)*;* M Ganji *International Protection of Human Rights* (1962).

[638] On the features of modern human rights framework, see, for example P Sieghart *The lawful rights of mankind: an introduction to international legal code of human rights* (1985).

4.2.1. The morality and constitutionality of human rights

The modern human rights framework is grounded on the consent of the people (or their political representatives) as enacted in the Bill of Rights, whether at the international or national level.[639] This consent therefore now replaces the previous controversial ground of a Creator that was invoked by the 18th century human rights manifestos and in whose existence a number no longer believes[640] or a Law of Nature cited by early western philosophers and whose content is still difficult to empirically observe.[641] As one author has noted:

> The [modern Bill or Rights] does not depend on any prior theory of "divine", "moral", "natural", or any other kind of rights. Instead, just as scientists and engineers have got together to agree on international standards such as the metre and the gram in order to avoid further disputes about miles, leagues, ells, pounds, ounces, and grains, so the nations have now simply agreed on international legal standards of human rights, thereby creating positive law among themselves.[642]

Still, there is a general agreement among human right philosophers that human rights exist prior to, and are independent of any positive recognition and that the Bills of Rights are just

[639] See GL Neuman "Human Rights and Constitutional Rights: Harmony and Dissonance" (2003) 55(5) *Stanford Law Review* 1863 (discussing the "consensual, suprapositive, and institutional" aspects of human rights).

[640] For example, in the Declaration of Independence issued in 1776 by the colonies that were to become the United States the drafters recognized the role of nature (God) in the conception of human rights: All men", they asserted, "are created equal, [and] are endowed *by their Creator* with certain unalienable rights, that among these are Life, Liberty and the pursuit of Happiness…." See T Jefferson, *Summary View of the Rights of British America* (1774), as cited in JP Foley *The Jefferson Cyclopaedia* (1967) 609. Similarly, the French National Assembly made their 1789 Declaration "in the presence and under the auspices of *the Supreme Being*", invoking that authority for the proposition that "Men are born and remain free and equal in respect of rights." They asserted that these rights were universal, "natural, imprescriptible, and inalienable" and that they included "liberty, property, security, and resistance to oppression". See *Declaration des Droits de I'Homme et du Citoyen* – "Declaration of the Rights of Man and the Citizen" translation by AB Fields of the French text in Jean Morange, *La Declaration des droits de I'homme et du citoyen* (1988) 115-16.

[641] To identify the natural rights of man, John Locke, for example, began by imagining the existence of the human person in a State of Nature, that is, the natural state of man before creation of civil society. Employing this method, Locke devised the natural rights of man to life, liberty and property. See J Locke, *Two Treatise of Government* (1947) 163. Locke's premise of human rights as natural rights of individuals derived from state of nature, which everyone is entitled to enjoy without unwarranted interference by others or arbitrary actions of governments, was to have great influence in the rest of Europe and its colonies. Celebrated Western philosophers such as the French Jean Jacques Rousseau (1712 -78), the English Sir William Blackstone (1723-80), and the German Emmanuel Kant (1724 -1804), took up the idea and produced many variations on the human rights theme. See W Blackstone *Commentaries on the Laws of England in Four Book*s (7 ed) (1775) 1, 123 (describing the "absolute rights of man" as those rights "which are such as appertain and belong to particular men, merely as individuals or single persons"; and again as "such would belong to their persons merely in a state of nature, and which every man is entitled to enjoy, whether out of society or in it"); JJ Rousseau *Contract Social* ou *Principes du droit politique* (1762) (resorting to Locke's State of Nature to justify natural rights to life, liberty and property); I Kant *Grundegung zur Metaphysics der Sitten ("Groundwork for the metaphysics of morals')* (1785) (asserting a universal duty to protect the innere Freiheit (inherent freedom) of man in order that man are never treated as means, but as ends in themselves).

[642] P Sieghart *The lawful rights of mankind: an introduction to international legal code of human rights* (1985) 40.

but legal confirmations of pre-existent moral rights.[643] In this regard, it seems that the word "natural rights" that was coined by John Locke has been replaced by "moral rights" perhaps as a response to the criticism that was levelled against the concept of natural rights by the utilitarians and the positivists.[644] As Feinberg notes, the use of "moral" as opposed to "natural" has the benefit of freeing the human rights discourse from the view that human rights norms are somehow built into human nature or the universe.[645] Nevertheless, viewing human rights as moral rights has the implication that they are not donated by conventions or laws but are only confirmed by them, which was the same implication in describing human rights as natural rights.[646]

But viewing human rights as moral rights also entail that there is a valid moral standard upon which states are to base their definition of human rights. Now, it is possible to have moral, and hence human rights in a context where the moral standards are ideologically and culturally relative, but if human rights are to play their role as objective international standards for political criticism then even such relative morality would have to include some criteria that are accepted worldwide.[647] In this regard, there is a general agreement among human rights scholars that the United Nations human rights standards as encapsulated in the international Bill of Rights serves as the benchmark for human rights worldwide.[648] The Universal Declaration of Human Rights, after all, was not designed to codify those rights

[643] See, for example, J Feinberg *Social Philosophy: Foundations of Philosophy Series* (1973) 84 (saying that human rights "can be applied to all rights that are held to exist prior to, or independently of, any legal or institutional rules". See also M Cranston *What Are Human Rights?* (1973) 5-6 (contrasting moral and positive rights).

[644] Utilitarian philosophers, for example, held that the ultimate standard of living lay in the achievement of "the greatest happiness for the greatest number", and that this provided the only valid test for judging the rightness of individual and government action.[644] Accordingly, they had little time for the idea of "rights" derived from "natural law" which could not be put to this test. In the view of Jeremy Bentham, for example, "natural" rights were imprescriptible, vague, "mischievous", and nonsensical – they were "nonsense upon stilts". See J Bentham, *Supply without Burthen or Escheat Vice Taxation* (1794) Objection V The positivists also challenged the idea of natural rights arguing that since natural rights could not *empirically* be demonstrated to exist in the external world, one could not properly invoke them. According to them, the only rights of which one could properly speak were those that could be enforced in practice. In this regard, they argued that what was a right was what was defined as such in positive law, that is, that which was enumerated in formal law or that which a particular court recognized as deserving of a remedy. However, there are some philosophers like Hart and Rawls who have held to the word "natural". See HLA Hart "Are There Any Natural Rights?" (1955) 64 *Philosophical Review* 175; J Rawls *A Theory of Justice* (1971) 505-506.

[645] J Feinberg *Social Philosophy: Foundations of Philosophy Series* (1973) 85.

[646] See J Locke, *Two Treatise of Government* (1947).

[647] It is worth stressing that the adoption of international human rights standard was as a response to the failure of the national human rights system to address the challenge of national sovereignty and cultural relativity that for a long time was used as a justification by tyrant governments for denying their citizens certain basic human rights. see generally PG Lauren *The evolution of international human rights: visions seen* (2003)*;* M Ganji *International Protection of Human Rights* (1962).

[648] As Richard Bilder has copiously written, "[i]n practice a claim is an international human right if the United Nations General Assembly says it is". J Bilder "Rethinking International Human Rights: Some Basic Questions" *(1969)* 2 *Human Rights* 557 at 559. The International Bill of Rights is made up of UDHR, ICCPR and ICESCR. See T Buergenthal *International human rights in a nutshell* (1995) 28-57.

that everyone already accepted; it was intended as "a common standard of achievement for all peoples and all nations".[649] Indeed most countries, including Kenya and South Africa, have recognized the international human rights standards as the yardstick for the framing and interpretation of their Bill of Rights.[650] Using such international moral standards has the advantage of ensuring that governments do not resort to cultural relativity arguments to justify denying certain human rights to their citizens.[651]

Assigning moral standards as the universally accepted frame of reference for human rights, however, also raises the issue as to the precise content and interpretations of the human right. In case of conflict in interpretation who is to be the determinant of the final position? Is it the ecclesiastical authority, the skilled practitioner, or the general public? To answer this question, it is worth noting that most nations have inscribed their catalogues of rights in the written constitution which stands supreme over everything and everyone else, including the laws made by the legislature.[652] In this respect, in the new secular age, the constitution has taken the place of the divine law or natural law as the test of whether an ordinary law or conduct is just and therefore legitimate. In other words, the legislature now only has the power to make such laws as the constitution allows it to make. Instead of being illegitimate because it is *injusta*, a law or conduct, in most jurisdictions and certainly in Kenya and South Africa, is now illegitimate if it is unconstitutional.[653] And instead of leaving the church, the select few, or the public to decide on the *injusta* of a state action, most constitutions now assign the decision on the unconstitutionality of an action to judicial institutions.[654] As aptly noted by Justice Jackson in *West Virginia State Board of Education v Barnette*[655]:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.[656]

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[649] UDHR, Pmbl.

[650] See Constitution of the Republic of Kenya 2010, s 19(3)(b) (recognising international human rights); Consitution of the Republic of South Africa 1996, s 39(b) (binding South African Courts to consider international law when interpreting the Bill of Rights).

[651] This was the argument used by Hitler to deny German Jews human rights and by Stalin to deny the Russian Kulaks theirs in the pre-World War II period. See PG Lauren *The evolution of international human rights: visions seen* (2003) 135; W Laqueur *Stalin, the Glasnost Revelations* (1990) 123-127.

[652] See C Heyns (ed) *Human Rights Law in Africa* (2004) (for a compilation of African constitutions).

[653] See, for example, Constitution of the Republic of Kenya 2010, s 2(4) and Constitution of the Republic of South Africa 1996, s 2. On the supremacy of the Constitution generally, for example, J Limbach "The concept of the supremacy of the constitution" (2001) 64(1) *The modern law review* 1.

[654] See, for example, Constitution of the Republic of Kenya 2010, s 20.

[655] *West Virginia State Board of Education v Barnette* 319 US 624 (1943).

[656] *West Virginia State Board of Education v Barnette* 319 US 624 (1943) 638. See also the South African Constitutional Court's holding in *S v Makwanyane and Another* [1995] ZACC 3 (CC), paras 87 & 88 (noting that public opinion has no place in the interpretation of Bill of Rights. For a similar position in Kenya, see *Christopher Ndirathu Muringaru v KACC* (2006) eKLR, para 19 (where the Court of Appeal noted that "[t]he

4.2.2. The universality, unconditionality, inalienability and indivisibility of human rights

The human rights framework recognizes that human rights are universal. This emanates from the fact that human rights, unlike other rights,[657] are conceived as rights which one holds by virtue of being a human being.[658] Because they inhere in human beings *qua* human beings, these rights are considered universal.[659] This universality of human rights is reflected in a number of human rights instruments. For example, the first article of the Universal Declaration of Human Rights (UDHR) asserts that "All human beings are born ... equal in dignity and rights".[660] Similarly, the second article of the African Charter on Human and Peoples Rights (African Charter) declares that the human rights in the Charter apply to "[e]very individual … without distinction of any kind".[661] The South African and the Kenyan Constitutions too guarantee the rights in their respective Bills of Rights to all without discrimination.[662]

This universality of human rights implies that human rights are "held equally by all human beings" notwithstanding status, age, location, race, gender or any other distinctive characteristic.[663] It further implies that human rights are not conditioned on circumstances or situations.[664] This unconditionality of human rights is not contradicted by the fact that a right

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only institution charged with to the duty to interpret the provisions of the Constitution and to enforce those provisions is the High Court and where it is permissible, with an appeal to the Court of Appeal").

[657] Donnelly, for example, distinguishes between human rights on the one hand, and legal, contractual, promissory, and constitutional rights that are held by human beings without them being necessarily human rights, on the other. J Donnelly "Human Rights and Human Dignity: An Analytic Critique of Non-Western Conception of Human Rights" (1982) 76 *American Political Science* 303 at 304.

[658] In Hart's categorization, they are general rights, rights that arise from no special or conditional undertaking beyond membership in the human race. To have human rights, one does not have to be anything other than a human being. Neither must one do anything other than be born a human being. See generally H Hart "Are there any natural rights?" (1955) 65 *The Philosophical Review* 175.

[659] See M Cranston *What Are Human Rights?* (1973) 7 ("human rights are not rights which derive from a particular situation; they are rights which belong to a man simply because he is a man"); J Feinberg *Social Philosophy: Foundations of Philosophy Series* (1973) 85 and J Feinberg "Voluntary Euthanasia and the Inalienable Right to Life" (1978) 7 *Philosophy and Public Affairs* 92 at 97 (holding that human rights as rights that people have "unconditionally and unalterably"). See also R Martin & JW Nickel "Recent work on the concept of rights" (1980) 17(3) *American Philosophical Quarterly* 165 at 165-180; HLA Hart "Are There Any Natural Rights?" (1955) 64 *Philosophical Review* 175 at 175-176.

[660] UDHR, art 1.

[661] AfCHPR, art 2.

[662] Constitution of the Republic of Kenya 2010, ss 19 & 27; Constitution of the Republic of South Africa 1996, s 7(1).

[663] J Feinberg *Social Philosophy: Foundations of Philosophy Series* (1973) 85. But see WN Nelson "Special Rights, General Rights, and Social Justice" (1974) 3 *Philosophy and Public Affairs* 410 (arguing that many human rights are actually special rights, and not general ones at all).

[664] See both A Edel "Some reflections on the Concept of Human Rights" in EH Pollack *Human Rights* (1971) 1 at 1-23., and WJ Wainwright "Natural Rights" (1967) 4 *American Philosophical Quarterly* 79 (providing interesting discussions of aspects of the topic of universality).

can set condition in its definition or build explicit exceptions in its scope or regard possibility of being outweighed in a particular case by stronger considerations. Thus, the fact that, for example, the human right to a fair trial can only apply when there is a trial does not mean that it's the trial that donates the right or that only accused persons are entitled to the right.[665] Rather it means that the right arises from being a human being but can only apply and can only be enjoyed when a person is accused and is under a trial. Likewise, the fact that, for example, the right to vote applies only to citizens of a country does not mean that it is the citizenship that donates the right. Rather it means that the right to vote arises from being a human being but can only be exercised in a country to which one is a citizen. A distinction is, therefore, drawn between the conditions for having a right and the conditions in which one can enjoy or actualize a right. In other words, an exception or condition built into the scope of human right, or the possibility of a right being outweighed in a particular case by stronger considerations, does not contradict the universality or unconditionality of the human right claim at issue. To the contrary, the thesis of universality and unconditionality is intended to reflect the fact that the possession of human rights is not contingent on the holder holding a certain social position, or on the right's recognition by the state, or on the holder's race, sex, religion, or belief. As the Kenyan Constitution aptly exemplifies, "[t]he rights and fundamental freedoms in the Bill of Rights … belong to each individual and *are not granted by the State*".[666]

Because they inhere in human beings *qua* human beings, human rights are also considered inalienable. For example, the preamble of the UDHR speaks of the "equal and inalienable rights of all members of the human family".[667] Inalienability is, however, a particularly difficult concept to analyze.[668] But at the minimum what is implied is that it is morally impossible to give up, transfer, or otherwise alienate one's human rights without ceasing to

[665] See the South African case of *NDPP v Phillips* 2001 (2) SACR 542 (W) (holding that the right to fair trial applies only to accused persons). See also the Kenyan case of *Christopher Ndarathi Murungaru v KACC & Another* Misc. Civil Application No. 54 of 2006 (holding that the right to a fair trial begins at the point a person is formally charged with a crime).

[666] Constitution of the Republic of Kenya 2010, s 19(3)(a) (emphasis added). For further discussion, see R Martin & JW Nickel "Recent work on the concept of rights" (1980) 17(3) *American Philosophical Quarterly* 165 at 176 (pointing out that the thesis of unconditionality of human rights is that all human beings have some basic rights "independently of their station in life, independently of which rights are recognized by their governments, and independently of their race, sex, or religion"). See also SI Benn "Human Rights? For Whom and For What?" in E Kamenka & AES Tay *Human Rights* (1978) 59 at 59-60.

[667] UDHR, pmbl 1.

[668] Some authors use the term as a synonym for "unconditional" or "indefeasible". See, for example, K Nielsen "Scepticism and Human Rights" (1968) 52 *Monist* 573 at 573 (using "indefeasible" and "inalienable" interchangeably). See also SM Brown "Inalienable Rights" (1955) 64 *Philosophical Review* 192 at 208-209 (using "unconditional" and "inalienable" interchangeably).

be a human being or without destroying one's humanity.[669] This inalienability of human rights has been criticised as being of little practical importance today.[670] As Rex Martin and James Nickel note, the "greater worry today is about governments taking people's rights away, not about people giving them up voluntarily".[671] Indeed, certain human rights such as the right to participate in government or the right to freedom of movement can actually be forfeited or taken away – temporarily or permanently – from those who, say, commit serious crimes.[672] Because they can be taken away or limited in certain circumstances one may contend that human rights are thus not inalienable.

However, the fact that rights can be taken away by governments does not detract from the fact that human rights are inalienable. Neither does the fact that a right is not absolute mean that they are alienable. In those instances when a right is taken away by government a better explanation would be to say that such rights are overridden by weightier considerations.[673] That a right may be legitimately overridden in no way supports the claim that it may be alienated.[674] Thus, for example, in the case where a person loses the right to participate in government or to free movement because of committing a crime, it makes more sense to say that his rights are overridden by, say, public security considerations than to say that he has alienated the right. The difference between the two notions is that when a right is alienated it is lost but when it is overridden it is left unsatisfied so as to promote a more morally weighty

[669] For further discussion, see generally K Thompson (ed) *The Moral Imperative of Human Rights: A World Survey* (1980); BA Richards "Inalienable Rights, Recent Criticism and Old Doctrine" (1969) 29 *Philosophy and Phenomenological Research* 391 at 393-398 (pointing out that the concept of inalienability as asserted by the 1980 human rights philosophers principally meant "that no man can waive or voluntarily relinquish any of these rights").

[670] See both J Feinberg "Voluntary Euthanasia and the Inalienable Right to Life" (1978) 7 *Philosophy and Public Affairs* 92 at 92-123 and M Schiller "Are there any inalienable rights?" (1969) 79 *Ethics* 309 at 309-315 (restricting "inalienability" to historical reasons).

[671] R Martin & JW Nickel "Recent work on the concept of rights" (1980) 17(3) *American Philosophical Quarterly* 165 at 177.

[672] The Kenyan Constitution lists the following rights as absolute: (a) freedom from torture and cruel, inhuman or degrading treatment or punishment; (b) freedom from slavery or servitude; (c) the right to a fair trial; and (d) the right to an order of *habeas corpus*. See Constitution of the Republic of Kenya 2010, s 25. The South African Constitution, however, doesn't have an absolute right. See Constitution of the Republic of South Africa 1996, s 7(3). For a discussion, see RJ Goldstone "The South African Bill of Rights" (1997) 32 *Texas International Law Journal* 451.

[673] Even if one doubts that there are any in-alienable rights, it is instructive to ask why one might think that certain natural rights are logically and morally impossible to waive, transfer, or void by a renunciation of them.

[674] In this regard an attempt by Brown in SM Brown "Inalienable Rights" (1955) 64 *Philosophical Review* 192 at 208-209 and Frankena in WK Frankena "Natural and Inalienable Rights," (1955) 64(2) *Philosophical Review* 219 at 228-229 to use inalienability and indefeasibility interchangeably have been heavily criticised. For the criticism, see, for example, M Schiller "Are there any inalienable rights?" (1969) 79 *Ethics* 309 at 212-213; AJ Simmons "Inalienable Rights and Locke's Treatises" (1983) 12(3) *Philosophy & Public Affairs* 175 at 180.

end (but in this latter case the right remains in the possession of its original owner, with all its previous benefits).[675]

Another way of looking at the problem would be to distinguish between the inalienability of the "claim" to a right and the inalienability of the "entitlement" to a right. While the former can be "alienated" in certain circumstances, the latter cannot. Thus, for example, in the above case of the right to participate in government or the right to freedom of movement, what is forfeited when one commits a crime is the *claim* to participation or free movement but not the *entitlement* to such participation or free movement. In other words, a person would still be entitled as a human being to participation in government and to free movement but because of the crime he has committed he cannot claim the benefits of these rights until he has served his punishment. Indeed as Marvin Schiller aptly remarks "[b]eing [entitled] does not entail having a morally justifiable claim against anyone".[676]

In addition to being inalienable, human rights are also considered indivisible. This principle of indivisibility has been endorsed by the United Nations (UN) in a number of instruments beginning with 1968 Proclamation of Teheran,[677] to the 1977 Resolution,[678] and culminating in the 1993 Vienna Declaration, where the General Assembly declared that "[a]ll human rights are universal, indivisible and interdependent and interrelated".[679] However, while its recognition as a characteristic of human rights is now well established, the meaning and implication of the indivisibility attribute of human rights continues to be the subject of heated debate among human rights commentators.[680] For lack of space, the thesis will not go

[675] See BA Richards "Inalienable Rights, Recent Criticism and Old Doctrine" (1969) 29 *Philosophy and Phenomenological Research* 391 at 394-399.

[676] See M Schiller "Are there any inalienable rights?" (1969) 79 *Ethics* 309 at 310. See also HJ McCloskey "Rights? Some Conceptual Issues" (1976) 54 *Australasian Journal of Philosophy* 99 at 99 (Noting that rights as entitlements are "intrinsic to their possessors" and are held "independently of other people and... of what else ought to be").

[677] "Since human rights and fundamental freedoms are indivisible, the full realization of civil and political rights without the enjoyment of economic, social and cultural rights is impossible." See Proclamation of Teheran, Final Act of the International Conference on Human Rights, Teheran, 22 April to 13 May 1968, U.N. Doc. A/CONF. 32/41 (1968) at 3.

[678] General Assembly Resolution 32/130 on Alternative Approaches and Ways and Means within the United Nations System for Improving the Effective Enjoyment of Human Rights and Fundamental Freedoms A/RES/32/130 (16 December 1977) at res 1(a).

[679] Vienna Declaration and Programme of Action, U.N. GAOR, World Conf. on Hum. Rts., 48th Sess., 22d plen. mtg., part I, 5, U.N. Doc. A/CONF.157/24 (1993), reprinted in 32 I.L.M. 1661 (1993). Its noteworthy that while the terms "interdependent" and "interconnected" were used during to the drafting of the 1948 Universal Declaration of Human Rights, the word "indivisible" was not. See DJ Whelan *Indivisible Human Rights: A History* (2010) chap 1

[680] For an exposition of the debate, see generally JW Nickel "Rethinking indivisibility: towards a theory of supporting relations between human rights"(2008) 30 *Human Rights Quarterly* 984; S Craig "The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights" (1989) 27 *Osgoode Hall Law Journal* 769; DJ Whelan *Indivisible Human*

into the evolving debate. In a sense, however, the thesis of indivisibility can be explained as holding that all human rights are equally important and interconnected and that because of this equality and interconnectedness states must strive to give all the categories of rights equal attention despite the difference in the type of obligations that each category prescribes.[681] In other words, behind the principle of indivisibility is the idea that human rights (whether civil, cultural, economic, political or social) all have equal status and cannot, therefore, be positioned in a hierarchical order. It further implies that rights support and reinforce each other in the sense that the full realisation of one human right is possible only if all the other human rights are also fully realised. Thus, for example, the right to fair trial by preventing the abuse of the criminal process supports the right to property, which would be undermined if the state were to misuse criminal law to falsely confiscate property of innocent individuals.[682] On the other hand, the right to fair trial would really be meaningless without right to property as without security of property and the wealth that comes from it accused persons might not be able to afford adequate representation necessary for a fair trial. It is this equal and interconnected nature of human rights that reference to human right's indivisibility is generally intended to capture.[683] This sense of indivisibility of human rights has been accepted by the courts in Kenya and South Africa. For example, in the Kenyan case of *Duncan Otieno Waga v Hon. Attorney General*,[684] the court noted that *"*[a]ll rights are interdependent and reinforce each other".[685] Similarly the South African Constitutional Court has held in *Government of South Africa v Grootboom*[686] that "All the rights in [South African] Bill of Rights are inter-related and mutually supporting".[687]

Rights: A History (2010); H Quane "Further Dimension to the Interdependence and Indivisibility of Human Rights?: Recent Developments Concerning the Rights of Indigenous Peoples" (2012) 25 *Harvard Human Rights Journal* 49; EU Pettersmann "On 'Indivisibility' of Human Rights"(2003) 14(2) *European Journal of International Law* 381; L Minkler & S Sweeney "On the Indivisibility and Interdependence of Basic Rights in Developing Countries" (2011) 33(2) *Human Rights Quarterly* 351.

[681] But see JW Nickel "Rethinking indivisibility: towards a theory of supporting relations between human rights"(2008) 30 *Human Rights Quarterly* 984 at 987 (noting that "Indivisibility and interdependence are not the same" and that "[m]any more rights are interdependent than are indivisible" and therefore "Indivisibility is a very strong form of interdependence"). Compare with S Craig "The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights" (1989) 27 *Osgoode Hall Law Journal* 769 (urging that too much attention should not be paid to semantics when we consider the different meanings that the terms "indivisible," "interdependent," and "interrelated" may convey).

[682] See also the Kenyan case of *Rodgers Mwema Nzioka v The Attorney General & 9 Others* (2007) eKLR 11 (noting that "where the right to liberty is violated even the enjoyment of the right to life, freedom of conscience and freedom of expression association and assembly are similarly affected").

[683] For a detailed discussion of the history and the current understanding of the term indivisibility, see generally DJ Whelan *Indivisible Human Rights: A History* (2010).

[684] *Duncan Otieno Waga v Hon. Attorney General* (2012) eKLR.

[685] *Duncan Otieno Waga v Hon. Attorney General* (2012) eKLR, para 57.

[686] *Government of South Africa v Grootboom* 2001 (1) SA 46.

[687] *Government of South Africa v Grootboom* 2001 (1) SA 46, para 23.

4.2.3. The vertical application of human rights

Generally in human rights literature, to say that you have a right is to assert that you have a claim to something of value on another person or body, who in turn have the duty to provide or help to provide that something of value.[688] However, not just everything of value is a right; only those things to which one is entitled are, or may be said to be rights. Thus, in this sense, rights are distinguished from benefits, duties, privileges, or some other related practice.[689]

To analytical jurists, rights are seen as legitimate entitlements that generate correlative duties or obligations. In this relation, the duty-bearer satisfies its duty by guaranteeing or supporting the right-bearer to secure the right involved. Hohfeld, for example, describes this right-duty formula as follows: "X has a right against Y in relation to Z", where X is the right-bearer, Y is the duty-bearer, and Z is the object or end of that right.[690] The foundational details of the right-duty correlatives presented by the Hohfeldian theory has received enough scholarly attention in explaining the nature of human rights, the theoretical details need not detain us here.[691] Hohfeld's formula, however, helps in understanding the dynamics of rights. Thus, specifying the nature of the valuable elements that are considered as entitlements or rights, the beneficiaries of the entitlements, and the agents who have the corresponding duties to bring about the fulfilment of those rights must precede any assertion of a right.[692] At the very least, this is the sense present in the classical human rights documents.[693]

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[688] See R Dworkin "Taking Rights Seriously" in M Freeman (ed) *Lloyd's Introduction to Jurisprudence* 7ed (2001) 1429 at 1429-34.

[689] Donnelly gives the example of what is not a right: A may be obliged to confer a benefit on B out of consideration of charity, without B having a right to that benefit. See J Donnelly "Human Rights and Human Dignity: An Analytic Critique of Non-Western Conception of Human Rights" 76 *American Political Science* (1982) 303 at 304.

[690] This is otherwise referred to as the 'Hohfeldian Analysis of Rights.' See WN Hohfeld "Analysis of Rights" in M Freeman (ed) *Lloyd's Introduction to Jurisprudence* 7ed (2001) 355 at 355-58.

[691] For the legal and conceptual rationalization that have ensued from Hohfeld's analysis of rights, see J Singer "The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld" (1982) *Wisconsin Law Review* 975 at 989-90; J Balkin "The Hohfeldian Approach to Law and Semiotics" (1990) 44 *University of Miami Law Review* (1990) 1119 at 1123.

[692] For further discussion, see A Sen Development *as Freedom* (1999) 227-231 (He categories the duties into two: 'perfect' and 'imperfect.' The former requires that an assertion of a right to a 'valuable something' must identify agent-specific duties and methods of fulfilling the obligation of the duty holders, while the latter, instead of perfectly linking rights to exact duties of identified agents, addresses 'the claims generally to everyone who can help').

[693] See C Heyns (ed) *Human Rights Law in Africa* (2004) for a collection of the primary material dealing with human rights law in Africa, on the United Nations, regional, sub-regional, and domestic levels of all the countries of Africa.

However, while it seems settled that the right-bearers are human beings in their individual or corporate capacity,[694] the question as to who bears the responsibility for the fulfilment of human rights remains contested among scholars. Maurice Cranston, for example, contends that the duty bearers are all individuals: "[T]o say that all men have a right to life is to impose on all men the duty of respecting human life ...."[695] David Raphael takes a similar view in his distinction of two senses of "universal moral rights". "In the stronger sense it means a right of all men against all men; in the weaker sense it means simply a right of all men, but not necessarily against all men."[696] Bernard Mayo, on the other hand, conceives human rights as "a claim on behalf of all men ... to action by a state government".[697] The same view is shared by Carl Wellman who defines human rights "as an ethical right of the individual as human being *vis a vis* the state".[698] Joel Feinberg, on his part, though not asserting this about all human rights, is of the view that the right to life is a "double-barrelled claim" addressed both to the world at large and to governments.[699]

This disagreement at the scholarly level has been replicated in the courts of law. The South African Constitutional Court, for example, has held in *Du Plessis and Others v De Klerk and Another*[700] that the Bill of Rights under the South African 1993 Constitution only applied in the vertical relationship between individuals and the state, that is, they "may be invoked against an organ of government but not by one private litigant against another".[701] A similar position seems to be favoured by the Canadian and German highest courts.[702] On the other hand, the United States Supreme Court has held in the case of *Shelley v. Kraemer*[703] that the Fourteenth Amendment of the US Constitution dealing with the right against discrimination,

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[694] However, it is important to clarify that human rights apply to *Juristic persons* such as companies and universities because they are considered as an association of *natural persons.* For further discussion, see M Wolff "On the nature of legal persons" (1938) 54 *Law Quarterly Review* 494.
[695] M Cranston *What Are Human Rights?* (1973) London at 65.
[696] DD Raphael "Human Rights, Old and New" in DD Raphael *Political Theory and the Rights of Man* (1967) 54 at 66.
[697] B Mayo "What Are Human Rights?" in DD Raphael *Political Theory and the Rights of Man* (1967) 68 at 77 (He, however, asserts that "the reasons for this qualification are historical rather than conceptual").
[698] C Wellman "A New Conception of Human Rights" in E Kamenka & AES Tay *Human Rights* (1978) 48 at 55.
[699] J Feinberg "Voluntary Euthanasia and the Inalienable Right to Life" (1978) 7 *Philosophy and Public Affairs* 92 at 96.
[700] *Du Plessis and Others v De Klerk and Another* [1996] ZACC 10 (CC).
[701] *Du Plessis and Others v De Klerk and Another* [1996] ZACC 10 (CC), para 46 (Citing s 7(1) of the Interim Constitution which stated that "This Chapter (the Bill of Rights) shall bind all legislative and executive organs of state at all levels of government" and section 33(4) which provides that "This Chapter shall not preclude measures designed to prohibit unfair discrimination by bodies and persons other than those *bound* in terms of section 7(1)").
[702] See the Canadian case of *Retail, Wholesale & Department Store Union, Local 580 et al v Dolphin Delivery Ltd*(1987) 33 DLR. (4th) 174 and the German case of *Lhth* both cited by the South African Constitutional Court in the case of *Du Plessis and Others v De Klerk and Another* [1996] ZACC 10 (CC).
[703] *Shelley v. Kraemer* 334 US 1 (1948).

which at first site is directed only against state power,[704] applies, in addition to state action, to horizontal relationship between private individuals.[705] A similar position has been held by the Irish Courts.[706] In the Kenyan case, the new 2010 Constitution is very clear that, though the government has the primary responsibility for the fulfilment of the rights,[707] the Bill of Rights applies both vertically and horizontally. It states that "The Bill of Rights applies to all law and binds *all State organs and all persons*."[708] However, before the new Constitution expressly clarified the position, the Kenyan courts just like their South African counterparts were of the view that the Bill of Rights under the Independence Constitution applied only in the vertical relationship. Thus Justice Wasilwa was merely restating the position when she held in *Alphonse Mwangemi Munga v African Safari Club Limited*[709] that "It is trite law and this court has repeatedly held that fundamental rights are *only* enforceable against the Government which is the guarantor of individual rights and freedoms".[710]

Clearly, with the exception of Cranston and Raphael whose views seem to defy the historical journey of human rights,[711] the general view is that states are addressees, if not the primary addressees, of human rights. This position is supported by international human rights instruments which assign states the primary responsibility for the realisation of human rights.[712] But with regard to individuals, the position is not fully clear as most human rights instruments fail to explicitly mention their role in the realisation of human rights leaving it to interpretation.[713] However, in spite of the approach of the South African Constitutional Court in *Du Plessis and Others* and the argument of Mayo and Wellman, a better approach would be to view individuals as having duties as secondary addressees to promote and respect

[704] The Equal Protection Clause requires each state to provide equal protection under the law to all people within its jurisdiction.
[705] *Shelley v. Kraemer* 334 US 1 (1948) 16. The case involved a restrictive covenant between private occupiers that restricted the sale of land in their neighbourhood to whites only.
[706] See, for example, *CM v TM* [1991] I.L.R.M. 268 (in which the court held that the common law doctrine that a wife's domicile is dependent on that of the husband was in breach of the equality clause). For further discussion of the Irish position, see J Casey *Constitutional Law in Ireland* (1992) 378-379.
[707] Under s 21 on the implementation of the Bill of Rights, the Constitution provides: "It is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights". Constitution of the Republic of Kenya 2010, s 21(1).
[708] Constitution of the Republic of Kenya 2010, s 20(1) (emphasis added).
[709] *Alphonse Mwangemi Munga & 10 others v African Safari Club Limited* (2008) eKLR.
[710] *Alphonse Mwangemi Munga & 10 others v African Safari Club Limited* (2008) eKLR, para 10 (emphasis added).
[711] The history of human right both at the international level and in most national jurisdiction is beset with the struggle against state oppression. For the international human rights story, see, for example Lauren *The evolution of international human rights: visions seen* (2003).
[712] See UDHR, Pmbl 6; ICCPR, art 2; ICESCR, art 2; Inter-American Convention, art 1; AfCHPR, art 1; European Convention, art 1.
[713] But see AfCHPR, arts 27-29 (listing the duties of individuals); UDHR, arts 29 & 30 (assigning some duties to individuals).

human rights in cases where they are in a position to do so. Indeed, unlike the 1993 Interim Constitution that the South African Constitutional Court relied on in *Du Plessis and Others*, the 1996 Constitution now explicitly applies the Bill of Rights to horizontal relationships in certain circumstances.[714] Such an approach is practical considering the fact that due to globalisation there are increasingly emerging powerful non-state actors whose actions may have grave bearing on the enjoyment of human rights.[715] Also there are rights such as the third generation rights (right to environment, development, peace, and self-determination) which can only be realised through the collaborative efforts of all actors including individuals.[716] Leaving the individual out completely as an addressee of human rights is, thus, not practically sound. Nevertheless, for the purpose of this thesis it suffices that human rights apply in the vertical relationship between the state and the subjects.

4.2.4. The trump of human rights over collective demands

The traditional view of human rights is that they are a particularly important class of considerations, taking priority over all other collective demands.[717] As Ronald Dworkin convincingly argued, an essential feature of rights is that they are powerful enough as moral or legal considerations that they will generally triumph in competition with collective goals such as welfare, prosperity or security.[718] To Jack Donnelly this trump of human rights is not restricted to collective goals but also to other "non-human" rights such as legal, contractual and promissory rights.[719] In his words, "if rights in general are trumps, human rights are the honour cards in the suit".[720] Today, however, with the exception of a few rights,[721] the

[714] Constitution of the Republic of South Africa 1996, s 8(2): "A provision of the Bill of Rights *binds a natural or a juristic person* if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right" (emphasis added).
[715] For a discussion, see generally P Alston (ed) *Non-state actors and human rights* (2005).
[716] The distinguishing characteristics of these third generation rights have been expressed by Professor Karel Vasak (the person who first introduced the term in the Western Human Rights discourse) to be the fact that "they can be realized only through the concerted efforts of all the actors on the social scene: the individual, the State, public and private bodies and the international community". K Vasak "Pour une troisième génération des droits de l'homme" in C Swinarski *Studies and essays on international humanitarian law and Red Cross principles* (1984) 837 at 839.
[717] See Feinberg's discussion of absolute rights J Feinberg *Social Philosophy: Foundations of Philosophy Series* (1973) 79-83. His view is criticized by GG James "Feinberg on Absolute Legal Rights" (1976) 11 *Journal of Thought* 16.
[718] See R Dworkin *Taking Rights Seriously* (1978) 291-368 (pointing out that the reasons human rights triumphs over other collective consideration is because they are individuated and because they have a high-priority moral and legal consideration based on consideration of individual dignity or equality of respect).
[719] This distinction between human rights and other rights is however often artificial and unrealistic. In fact, subjective legal rights are strictly speaking also human rights. This is because they are also claims of certain individuals against others. For incisive discussion of the differences, see generally HLA Hart "Bentham on Legal Rights" in AWB Simpson (ed) *Oxford Essays in Jurisprudence, Second Series* (1973) 171 at 171-201.
[720] J Donnelly "Human Rights and Human Dignity: An Analytic Critique of Non-Western Conception of Human Rights" (1982) 76 *American Political Science* 303 at 306.

general position is that human rights are not absolute in the sense that they can never be justifiably overridden in any circumstance.[722] Indeed even Dworkin did concede that the dictates of human rights could yield to those of collective goals even if only in "clear and present emergencies".[723] The reason for this concession to the "defeasibility" of human rights points to the difficulty in predetermining the scope and weight of each human right.[724] As Martin and Nickel have pointed out, "the nature of our world, the limits of our knowledge, the indeterminacy of our aims, and the 'open texture' of our language make such full determination a virtual impossibility".[725]

To overcome this difficulty, most human rights instruments today provide for guidelines on how to resolve conflicts that may arise between rights themselves or between a right and other considerations. For example, both the South African and Kenyan Constitution have included interpretation and limitation clauses in their Bill of Rights.[726] In this way, the modern human rights framework does recognize that conflicts do arise between rights and between a right and other considerations and that when this happen the right or consideration

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[721] Under South African Bill of Rights no right is absolute (Constitution of the Republic of South Africa 1996, s 7(3)). Kenyan Constitution, on the other hand, provides for some absolute rights (Constitution of the Republic of Kenya at s 25). See also J Feinberg *Social Philosophy. Foundations of Philosophy Series* (1973) 79-83 (discussing absolute rights). But see GG James "Feinberg on Absolute Legal Rights" (1976) 11 *Journal of Thought* 16 (criticizing Feinberg's absolute rights).

[722] HLA Hart "The Ascription of Responsibility and Rights" in A Flew *Logic and language* (1951) 145 at 147 - 148 approaches non-absoluteness of rights in this way:

> ". .. Claims ... can usually be challenged or opposed in two ways. First, by a denial of the facts upon which they are based and secondly by something quite different, namely a plea that although all the circumstances on which a claim could succeed are present, yet in the particular case, the claim … should not succeed because other circumstances are present which brings the case under some recognized head of exception, the effect of which is either to defeat the claim … altogether, or to 'reduce' it."

[723] R Dworkin *Taking Rights Seriously* (1978) 92, 191 & 195. Dworkin's trump model has been interpreted to mean that a right are to be protected and promoted to the greatest extent possible before other interests are even taken into consideration. See A McHarg "Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights" (1999) 62(5) *The Modern Law Review* 671 at 673-674.

[724] A number of vocabularies have been used by scholars to signify that rights are not absolute. Hart speaks of rights that are defeasible (HLA Hart "The Ascription of Responsibility and Rights" in A Flew *Logic and language* (1951) 145 at 175); Dworkin speaks of indeterminate rights as abstract (R Dworkin *Taking Rights Seriously* (1978) 93); McCloskey has introduced a whole set of concepts - real rights, conditional rights, etc. (HJ McCloskey "Rights? Some Conceptual Issues" (1976) 54 *Australasian Journal of Philosophy* 99 at 105-111); and Ross first identified the now popular term prima facie rights (WD Ross *The Right and the Good* (1930) 48-56 and 59-62).

[725] R Martin & JW Nickel "Recent work on the concept of rights" (1980) 17(3) *American Philosophical Quarterly* 165 at 176 Paraphrasing HLA Hart *The Concept of Law* (1961) 124.

[726] In the Constitution of the Republic of South Africa 1993 (Interim Constitution), the provision for interpretation clause was section 35 while that for the general limitations clause was to be found in Section 33. These became section 39 and section 36 respectively in the Constitution of Republic of South Africa I996. See also section 24 (limitation clause) and section 20(4) (interpretation clause) of the Constitution of the Republic of Kenya 2010.

with lesser weight *in the circumstance* should give way to the weightier right or consideration.[727]

However, the fact that a right gives way to weightier consideration does not mean that the right ceases to exist.[728] To the contrary, the right continues to exist and remains in the possession of its original owner with all its previous benefits but is only left unsatisfied so as to realise a more imperative objective. In this regard, Martin and Nickel explains that a distinction needs to be made between the condition for possessing a right, which specify who has or can own a right; the scope of the right, which specify what the right applies to; and the weight of the right, which specifies the importance to be attached to the right *vis a vis* other rights or interests. The defeasibility of a right refers to the weight and not to the scope or possession of the right. Thus, when a right, say, the right to access to information, is overridden in a particular case (in order, say, to avoid leakage of confidential information) this does not mean that the right holder ceases to possess the right. Also, instead of seeing the case as an exception built into the scope of the right - which would mean that a person has the right to access to information but that the right does not cover cases where it is likely to result in the leakage of confidential information – the case can be understood as being covered by a specification of the right's weight. In this respect, one would say that a person has the right to access to information and that it applies even where it is likely to lead to the leakage of confidential information but that in these cases it is subordinate to some weightier considerations, such as public security. In this way it is possible to deal with a situation where a right is overridden without saying that in such cases the right has ceased to exist.[729]

Similarly, the fact that certain human rights can be overridden in certain circumstances does not mean that the right can be limited for any reason. Indeed if rights were to be overridden "simply on the basis that the general welfare will be served by the restriction" then there would surely be "little purpose in the constitutional entrenchment of rights".[730] In this regard, while rights can be overridden in certain circumstances, the trump of human rights

[727] Indeed even Dworkin did concede that the dictates of human rights could yield to those of collective goals even if only in "clear and present emergencies". R Dworkin *Taking Rights Seriously* (1978) 92, 191 & 195.
[728] There are those like Herbert Morris who suggest that a right which is overridden by stronger considerations ceases to be a right at all in such a situation. See H Morris "Persons and Punishment" (1968) 52 *Monist* 475 at 499. Compare with HJ McCloskey "Rights? Some Conceptual Issues" (1976) 54 *Australasian Journal of Philosophy* 99 (arguing that the right does not cease to exist pointing to those cases where the overriding of a right gives rise to a duty to compensate the injured party as evidence that the right has not disappeared because if it had the infringement would not have generated or triggered the subsequent duty to provide compensation).
[729] For further discussion, see R Martin & JW Nickel "Recent Work on the Concept of Rights" (1980) 17(3) *American Philosophical Quarterly* 165 at 172-174.
[730] J de Waal *et al* (3ed) *The Bill of Rights Handbook* (2000) 133.

requires that a right must to be protected and promoted to the greatest extent possible before other interests can even be taken into consideration.[731] Thus, restrictions or limitations on human rights will not be justifiable unless there is good reason for believing that the restriction would achieve its intended purpose and unless it can be shown that there is no other way in which that purpose can be achieved without restricting the human right in question.[732] Where non-restriction is impossible, there is a further requirement that the means chosen must be the least restrictive means available otherwise the limiting action would be declared unconstitutional.[733]

4.3. Non-conviction based mechanism and the right to fair trial

It is clear from the foregoing discussion that under a constitutionally entrenched human rights framework as exist in Kenya and South Africa, the relationship between the state and the individual is guided by human rights principles. These principles require, among other things, that any state law or action that negatively affects the interests of individuals should be accompanied by procedural and substantive safeguards aimed at checking against arbitrary and unfair effects on individuals. This requirement is necessitated by the fact that the relationship between the state and the individual is unequal in the sense that the state has more power than its subject(s). Because of this power imbalance, the requirement for procedural and substantive protection is meant to balance the relational scale so as to guarantee fairness and proportionality in the vertical actions of the state. Even in instances where the state action is serving a public purpose that exempts it from the procedural and substantive guarantees, the human rights framework still requires that the means adopted in the action must be proportional by not infringing on the rights of the individual more than necessary to achieve the overriding public purpose.

In the context of the state action of assets recovery, the ordinary expectation is that since corruption is a crime, any mechanism that is adopted to deal with it will take into account

[731] See A McHarg "Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights" (1999) 62(5) *The Modern Law Review* 671 at 673-674 (interpreting Dworkin's trump theory to mean such).
[732] See D Meyerson *Rights limited: Freedom of Expression, Religion and the South African (*1997) 36-43.
[733] This is the approach that courts, at least in Kenya and South Africa, have adopted and is examined in detail in the following section and chapters. A similar approach is evincible in the practice of international and regional human rights bodies. See generally M Poto "The principle of proportionality in comparative perspective" (2007) 8 *German Law Journal* 835; S Greer *The European Convention on Human Rights: Texts and Materials* (2007) (discussing the "balancing" justice dispensed by the European Court on Human Rights); AS Sweet & J Mathews "Proportionality Balancing and Global Constitutionalism" (2008) 47 *Columbia Journal of Transnational Law* 73.

corruption's criminal nature. Because crime usually pits an individual against the society,[734] they are traditionally dealt with under the criminal law with its attendant fair trial guarantees.[735] The criminal law provides for a stringent procedure, which is aimed at protecting the individual against arbitrary use of the immense police power that society places on the enforcer of its interest - the state.[736] This criminal procedure requires, among other things, that the state proves criminal guilt beyond reasonable doubt before any remedy for criminal conduct can be visited upon an individual and that the individual be presumed innocent until the criminal guilt is proven. As one author has rightly noted "[a] conviction marks the point in time when the State is entitled to punish a person in order to enforce the law and, until that point in time, a person is entitled to be considered innocent".[737] These procedural safeguards have been recognized as forming part of the criminal justice right to fair trial and are aimed at checking against arbitrary use of state's police power and the attendant unfair consequences of criminal labelling and unfounded punishment.

However, when it comes to the recovery of corruptly acquired assets, states have given themselves the option of using the non-conviction based mechanism that employ civil law procedure to remedy the corruption crime. This raises the question whether such use of a civil process unduly infringes on the right to criminal fair trial of concerned individuals. In other words, since assets recovery is a state response to corruption crime (wrongs committed by individuals against the society) should not the non-conviction based mechanism be amenable to the fair trial guarantees under the criminal law, or does the labelling of recovery process as "civil" effectively removes it from the reach of these fair trial guarantees? The remaining sections of this chapter attempts to address this question by examining the approach that courts have adopted within the human rights framework in resolving the applicability of the right to criminal fair trial to responses by states against individual's criminal behaviour.

[734] See, for example, W Blackstone *Commentaries on the laws of England* (1775) 2 (dividing wrongs in civil injuries which infringe upon private rights and crimes which breach public duties).
[735] See J Hall "Interrelations of Criminal Law and Torts (pts. 1 & 2)" (1943) 43 *Columbia Law Review* 753 (reviewing fundamental differences between civil and criminal law).
[736] See H Hart "The aims of the criminal Law" (1958) 23 *Law & Contemp. Probs.* 401 at 405 (pointing out that criminal sanctions "take their character as punishment from the condemnation which precedes them and serves as the warrant for their infliction"). See also HG Grasmick "Legal punishment and social stigma: a comparison of two deterrence models" (1977) 58 *Social Science Quarterly* 15
[737] R Kitai, "Presuming Innocence" (2002) 55(2) *Oklahoma Law Review* 257 at 280-81.

4.4. The approach in resolving conflict between intrusive laws and human rights

For purposes of the protection of human rights, courts are entrusted with the function of ascertaining the meaning of a human right's provision in order to establish whether a challenged law or conduct is inconsistent with the requirements of the right in question.[738] In this respect, the interpretation of human rights clauses generally involves two enquiries: first the meaning or scope of the right in question is exposed; then it is determined whether the challenged law or conduct conflicts with the right.[739] The first enquiry is aimed at determining the content of the right, that is, the kind of activities that are protected by the right or the kind of objectives that the right demands to be fulfilled.[740] The second inquiry involves determining, first, what the challenged law or conduct amounts to and thereafter determining whether there is a conflict between the law or conduct and the human right in question.[741] As far as law is concerned, the conflict with the human right may arise from either the legislation's unconstitutional purpose or its unconstitutional effect.[742] In either case, the legislation will violate the human right. However, with regard to the effect, a distinction is usually made between the impermissible effect caused by the legislative provision itself and the one caused by the way the legislation is implemented or enforced. The legislation may only be challenged in the former case, while in the latter case it is the conduct of the implementer of the legislation that is challenged.[743]

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[738] See, for example, Constitution of the Republic of Kenya 2010, s 20; Constitution of the Republic of South Africa at s 39. See also the Kenyan case of *Charles Omanga and Anor v IEBC & 2 Others* Nairobi HCC Petition No. 2 of 2012 noting that:

> "the doctrine of separation of powers and checks and balances which run throughout our Constitution deliberately obligate the High Court to determine 'any question whether any law is inconsistent and in contravention of the Constitution'."

[739] See J de Waal *et al* (3ed) *The Bill of Rights Handbook* (2000) 115-117.

[740] For example, the first generation type of right (civil and political rights) places a negative obligation on the actors it binds while the second generation type of rights (socio-economic and cultural rights) places positive obligation on those it binds. Certain rights places both negative and positive obligations. For further discussion, see H Shue *Basic rights: Substance, Affluence and US Foreign Policy* (1980) (noting that state parties have a general duty to respect, protect, promote, and fulfill human rights and discussing the requirements of each duty).

[741] J de Waal *et al* (3ed) *The Bill of Rights Handbook* (2000) 116.

[742] See, for example, the South African case of *New National Party of South Africa v Government of the Republic of South Africa* 1999 (3) SA 191 (CC) para 18 (where the Constitutional Court held that legislation may either be "facially" inconsistent with the Bill of Rights or that its effect may violate the law).

[743] For illustration, see, for example, the South African case of South African case of *New National Party of South Africa v Government of the Republic of South Africa* 1999 (3) SA 191 (CC) para 37 (the case concerned the provisions of the Electoral Act 73 of 1998 which required proof of identity and citizenship for registration and voting by means of a particular type of identity document. One of the disputed issues was whether the Department of Home Affairs was capable of issuing the required document in time. In order to challenge the statute as opposed to the Department of Home Affairs the Defendant was required to show that it was the machinery or process provided in the Act and not the failure of the Department that made it unreasonably difficult for people to exercise their right to vote).

Where the human right in question is granted subject to limitations, a second stage of inquiries usually follows once it is determined that the challenged law or conduct is in breach of the human right. The aim of the second stage analysis is to determine whether, in spite of violating the human right, the law or conduct is nevertheless justified under the limitation clause.[744] This two-stage approach has been upheld for rights subject to limitation clauses in many jurisdictions, including Kenya and South Africa.[745] It differs from the one stage approach that is applicable for rights without limitation clause. As explained by the South African Constitutional Court in *S v Makwanyane:*[746]

> Our Constitution deals with the limitation of rights through a general limitations clause. As was pointed out by Kentridge AJ in *Zuma*'s case, this calls for a "two-stage" approach, in which a broad rather than a narrow interpretation is given to the fundamental rights enshrined in Chapter Three, and limitations have to be justified through the application of section 33. In this it differs from the Constitution of the United States, which does not contain a limitation clause, as a result of which courts in that country have been obliged to find limits to constitutional rights through a narrow interpretation of the rights themselves. Although the "two-stage" approach may often produce the same result as the "one-stage" approach, this will not always be the case.[747]

Thus, in discussing the applicability of the right to fair trial to the non-conviction based assets recovery procedure, the scope of the right and the nature of assets recovery need to be exposed in order to determine whether the non-conviction based procedure violates the right to fair trial or not.

4.5. The scope of the right to fair trial

The right to fair trial is provided for in a number of international,[748] regional[749] and national instruments[750] and aims to ensure that governments do not abuse their police powers.[751] As

[744] Limitation clauses usually provide that for a restriction on human rights to be justified it should be done through enacted law and that the said law must be "necessary" or "reasonably required" to accomplish certain specified social or public goals and that there is a demonstrated proportionality between the restrictive effects of the means chosen and the objectives that the law seeks to realize. For further discussion, see, for example, HK Prempeh "Marbury in Africa: Judicial Review and the Challenge of Constitutionality in Africa" (2006) 80 *Tulane Law Review* 1239.

[745] See Constitution of the Republic of Kenya 2010, s 24 and Constitution of the Republic of South Africa 1996, s 36 (for limitation clauses).

[746] *S v Makwanyane and Another* [1995] ZACC 3.

[747] *S v Makwanyane and Another* [1995] ZACC 3 para 100 (footnotes omitted). See also the Kenyan case of *Randu Nzai Ruwa & 2 Others v Internal Security Minister & another* [2012] eKLR para 48 & 52 (holding that s 24 of the Constitution (limitation clause) requires the courts in Kenya to carry out a proportionality analysis where a state action infringes the human right(s) of an individual). For further discussion of the human rights interpretation, see H Webb "The Constitutional Court of South Africa: rights interpretation and comparative constitutional law" (1999) 1 *University of Pennsylvania Journal of Constitutional Law* 205 at 220-225 (discussing the One-Stage and the Two-Stage Approaches to Bill of Rights interpretation).

[748] See UDHR. arts 10 & 11; ICCPR, art 14.

[749] Inter-American Convention, art 8; European Convention, art 6; AfCHPR, art 7.

[750] See, for example, Constitution of the Republic of South Africa 1996, s 35(3); Constitution of the Republic of Kenya 2010, s 50.

such its scope is not infinitely elastic and extends only to procedures that lead to criminal punishment.[752] In this regard, the right to fair trial is distinguishable from the right to fair hearing which applies to *all* procedures in which the right or obligation of an individual is under determination.[753] The fair hearing guarantees include: equality before courts and tribunals; fair and public hearing before competent, independent and impartial courts of law; speedy hearings; access to courts; and equality of arms between the parties.[754] But in addition to these fair hearing guarantees, there are certain specific minimum requirements that form the content of the right to fair trial and that apply only to criminal trials. These requirements include: proof by the state of criminal guilt beyond reasonable doubt; right to legal representation for the defendant; presumption of innocence in favour of the defendant; the right against self-incrimination; right against retrospective punishment; right to silence; right against double jeopardy; and the exclusion of illegally obtained evidence.[755] It is the scope of applicability of these additional requirements, which together form the content of the right to fair trial that is the concern of this thesis.

The reason for these additional fair trial guarantees in criminal trials flows directly from the very nature of these trials. Criminal trials, unlike their civil counterparts which is characterised by a contest between similarly positioned adversaries, involve the use of state's

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[751] See, for example, the holding of Supreme Court of Kenya in *Raila Amollo Odinga & 2 Others v Independent Electoral and Boundaries Commission of Kenya and 3 Others* [2013] eKLR, para 297:

> "In criminal law, proof must be "beyond any reasonable doubt", *as the liberties of the subject are at stake* and, failing absolute proof, an accused person must be set at liberty. By contrast, in civil law, which is private matter between two individuals, a wrong only needs to be proved on a balance of probability (emphasis added)."

See also the South African case of *S v Grobler* 1996 (1) SA 507 A 523F where Wessels JA remarked that "the main purpose of criminal proceedings is to establish guilt of an accused person of criminal conduct so that he may be punished according to law for that conduct".

[752] On right to fair trial and criminal punishment, see G Fletcher *Rethinking criminal law* (1978) 409 (citing cases to show that the test for when processes are criminal is the concept of punishment). See also J Hall "Interrelations of Criminal Law and Torts (pts. 1 & 2)" (1943) 43 *Columbia Law Review* 753 (reviewing fundamental differences between civil and criminal law).

[753] Compare s 34 (which provides for the general right to fair public hearing) and s 35(3) (which provides for the right to fair trial) of the Constitution of the Republic of South Africa 1996; s 50(1) (which provides for the right to fair hearing) and s 50(2)-(7) (which provides for the right to fair trial) of the Constitution of the Republic of Kenya 2010.

[754] See Human Rights Committee General Comment 32 U.N. Doc. CCPR/C/GC/32 (2007) para 3 (noting that "Article 14 (on the right to fair hearing and trial) is of a particularly complex nature, combining various guarantees with different scopes of application").

[755] See, for example, ICCPR, art 14(2)-(5); European Convention, arts 6(2) & (3); Inter-American Convention, art 8(2)-(5); AfCHPR. art 7 read together with the African Commission's Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa; Constitution of the Republic of Kenya 2010, s 50(2)-(7); Constitution of the Republic of South Africa 1996, s 35(3). See also K Mann "Punitive civil sanctions: the middleground between criminal and civil Law" (1992) 101 *Yale Law Journal* 1795 at 1813 (providing summary of principal paradigmatic distinctions between civil and criminal law).

extensive police (law enforcement) power over less powerful but offending individuals.[756] The state exercises this authority by inflicting punishment upon those who commit offences against it.[757] The typical punishment is aimed at curtailing the right to liberty, property and even life of the offender.[758] In addition to the pain of these punitive sanctions, the convicted criminal also suffers from the social stigma of being labelled a criminal.[759] Because both the stigma and the pain suffered from the punishment (from loss of liberty, property, or in some cases life) is so great and because there is unequal power balance between the state and the accused,[760] the additional fair trial guarantees are provided in criminal trials as a safeguard against abuse of state authority and as a check against arbitrary punishment and stigma.[761] As aptly noted by the Lawyers Committee for Human Rights:

> "The right to a fair trial is a norm of international human rights law designed to protect individuals from the unlawful and arbitrary curtailment or deprivation of other basic rights and freedoms, the most prominent of which are the right to life and liberty of the person."[762]

The fair trial guarantees can only be invoked by a person who is charged with a criminal offence. In other words, the right to fair trial does not apply at all stages of a trial but only from the point when a person is accused by being formally "charged" with a criminal

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[756] It is actually the absence of state authority in the horizontal relationship that differentiates the vertical relationship in criminal law from the horizontal relationship in civil law. Otherwise, just like in criminal law relationships, there are examples of civil law relationships in which one legal subject has a form of authority over the other, such as a parent-child relationship in family law. The equality in relationship in civil law trials is thus in so far as one subject is not invested with state authority in relation to the other. See MJ Horwitz, *The transformation of American law 1870-1960: The crisis of legal orthodoxy* (1992) 11 (describing the sharp division in late nineteenth-century law between a coercive public sphere and a non-coercive private sphere).

[757] The aim of the punishment is to serve both the retributive and utilitarian ends of punishment, that is, to "payback" the offender for committing the offense and to prevent future commission of the same. For further discussion, see J Baker *et al Hall's criminal law* (1993) 839-54.

[758] The typical punishment include imprisonment, fines and even death. However, this list is not exhaustive. See Mann "Punitive civil sanctions: the middleground between criminal and civil law" (1992) 101(8) *The Yale Law Journal* 1795 at 1809 (discussing contemporary remedies in both civil and criminal law).

[759] See H Hart "The aims of the criminal Law" (1958) 23 *Law & Contemporary Problems* 401 at 405 (pointing out that criminal sanctions "take their character as punishment from the condemnation which precedes them and serves as the warrant for their infliction"). See also HG Grasmick "Legal punishment and social stigma: a comparison of two deterrence models" (1977) 58 *Social Science Quarterly* 15.

[760] There is unequal relationship that exists between the state and the accused in the sense that the state has more power than its subject(s).

[761] The presumption of innocence, for example, aims to protect individuals from social stigma and other punitive consequences that would arise from presumption of guilt by requiring that where a person is charged with a criminal offense the person would be presumed innocent until the state proves his or her guilt beyond reasonable doubt. As the Canadian Constitutional Court rightly noted in *R v Oakes* (1986) 26 DLR (4^{th}) 200 at 212-13, the principle of presumption of innocence until proven guilty forms part of the right to fair trial and, "reflects our belief that individuals are decent and law abiding members of the community until proven otherwise". The double jeopardy principle ensures that an individual cannot be tried and punished twice for the same offence. The other procedural requirments such as the right to silence, right against self incrimination and the exclusion of illegally obtained evidence are also aimed at ensuring that individuals are not harmed by criminal consequences unless the state has enough evidence to prove their criminal culpability.

[762] Lawyers Committee for Human Rights "What is a fair trial?: A basic guide to legal standards and practice" available at http://www.humanrightsfirst.org/wp-content/uploads/pdf/fair_trial.pdf at 7.

offence until the point when the charge is finally determined.[763] Once a person is charged, he "mutates" from being a suspect to an accused person. Thus, the right to fair trial can only be claimed by an accused person.[764] This does not mean that it's the trial that donates the right or that only accused persons are entitled to the right. Rather, as already discussed,[765] it means that the right arises from being a human being but can only apply and can only be enjoyed when a person is accused and is under a trial. It also does not mean that a person is deprived of procedural fairness prior to becoming an accused. Such a person would still be subject to the pre-trial procedural safeguards found in such rights as right to personal liberty and the right to freedom and security of person.[766] However, the right to fair trial only becomes operational once the person is "charged" with a criminal offence.[767]

What amounts to a "charge" will depend on the national law under review and the context in which it is applied.[768] However, as was held by the European Court of Human Rights in the case of *Deweer v. Belgium,*[769] a charge can generally be defined as "the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence".[770] This definition of "charge" by the European Court is somewhat similar to the understanding of the concept in the Kenyan and South African context. For example, in terms of the Criminal Procedure Act of South Africa,[771] charge is defined as including "an

[763] According to the ICCPR, fair trial rights apply once the individual concerned has been "charged" with a criminal offence. ICCPR, art 14(1). See also the European Convention, art 6 (providing that the fair trial provisions in those sections is applicable to an individual subject to a "criminal charge" (or "charged with a criminal offence" in the terminology of Article 6 (2) and (3)). See also the Kenyan case of *Christopher Ndarathi Murungaru v KACC & Another* (2006) eKLR 76 (where the Constitutional Court concluded that the right to fair trial was only available at or during a criminal trial and only to an "accused" person who has "been *charged* in [a] court of law"). For the South African position see *National Director of Public Prosecution v Phillips* 2002 (4) SA 60 (W) paras 40 and 41, where the court held that the right to a fair trial applied to an accused person, who it defined as a person called to answer a charge in proceeding that culminate in a conviction.

[764] See, for example, the Kenyan case of *Christopher Ndarathi Murungaru v KACC & Another* (2006) eKLR 76 (where the Court concluded that the right to fair trial applies only to an "accused" person). See also the South African case of *Nel v Le Roux NO* 1996 (3) SA 562 (CC) para 11 (where the court held that the right to fair trial under section 35(3) applied to an accused person).

[765] See the discussion in section 4.1.2. above.

[766] See *Coetzee v Government of the Republic of South Africa* 1995 (4) SA 631 (CC) para 43.

[767] Thus, for example, a person who has been forced to self-incriminate during investigation can only claim the right against self-incrimination (which is part of the right to fair trial) if he is eventually charged. Such self-incriminating evidence can be obtained at the investigation stage but it cannot be used during trial because of the dictates of the right against self-incrimination. For further discussion, see PJ Schwikkard *Presumption of Innocence* (1999) 65-75.

[768] See, for example, the South African Constitutional Court note in *Sanderson v Attorney General, Eastern Cape* 1998 (2) SA 38 (CC) para 19 to the effect that it is "not useful to attempt a universally valid interpretation of a word so vague and which therefore derives much of its content and meaning from a particular context in which it may be used".

[769] *Deweer v Belgium* (1979-1980) 2 European Human Rights Report 439.

[770] *Deweer v Belgium* (1979-1980) 2 European Human Rights Report 439 para 46.

[771] Criminal Procedure Act of 1977.

indictment and summons".[772] In *Du Preez v Attorney General, Eastern Cape*[773] the South African Court held that "a person is not 'charged' with an offence until he is advised by a competent authority that a decision has been taken to prosecute him".[774] Similarly in Kenya, under the Criminal Procedure Code,[775] a charge is described as a formal "statement of the offence with which the accused is charged".[776]

However, the existence of a charge is not always dependent on an official act. It may in some instances take the form of "other measures which carry the implication of such an allegation and which likewise substantially affect the situation of the suspect".[777] For example, the South African Constitutional Court has noted in *Sanderson v Attorney General, Eastern Cape*[778] that "having been charged" includes appearing in the dock for the formal remand of a criminal case.[779] Similarly, the Kenyan Court has noted in *Koigi Wamwere v Attorney General*[780] that being charged includes being arraigned in a criminal proceeding within the prescribed time.[781] Thus, it can be said that under the two jurisdictions, the right to fair trial comes into play when a person is notified formally or informally of the state's intention to prosecute a criminal case against him or her.[782]

It is to be noted, however, that while it is true that the right to fair trial can only be invoked by a person facing a criminal charge, for the person to claim the right to fair trial he must be an accused in a criminal trial.[783] In other words, the right to fair trial does not extend to civil trials or to other proceedings outside the criminal trial.[784] Thus, for example, a person who

[772] Criminal Procedure Act of 1977, s 1.
[773] *Du Preez v Attorney General, Eastern Cape* 1997 (2) SACR 375 (E).
[774] *Du Preez v Attorney General, Eastern Cape* 1997 (2) SACR 375 (E) 382j.
[775] Criminal Procedure Code Chapter 75 Laws of Kenya.
[776] Criminal Procedure Code Chapter 75 Laws of Kenya, s 89(4).
[777] *Foti v Italy* (1983) 5 European Human Rights Report 313 para 52.
[778] *Sanderson v Attorney General, Eastern Cape* 1998 (2) SA 38 (CC).
[779] *Sanderson v Attorney General, Eastern Cape* 1998 (2) SA 38 (CC) para 19.
[780] *Koigi Wamwere v Attorney General* [2012] eKLR.
[781] *Koigi Wamwere v Attorney General* [2012] eKLR para 34.
[782] Compare with *Foti v Italy* (1983) 5 European Human Rights Report 313 para 52 (Where the European Court of Human Rights made it clear that the existence of a charge is not always dependent of an official act: "it may in some instances take the form of other measures which carry the implication of such an allegation and which likewise substantially affect the situation of the suspect").
[783] See, for example, the Kenyan case of *Dennis Mogambi Mong're v Attorney General & 3 Others* [2011] eKLR para 90 (noting that the right to fair trial only applies to accused person in criminal trial and that a judicial official undergoing a vetting process is not such an accused person).
[784] See, for example, the South African case of *Nel v Le Roux NO* para 11 where the Constitutional Court held that s 25(3) of the interim constitution which is similar to s 35(3) of the 1996 Consitution on the right to fair trial was restricted to criminal proceedings. See also the Kenyan case of *Omega Credit Limited v Mt Kenya Roses Limited & 2 Others* (2006) eKLR where the court held that:

> Section 77 of the Constitution which deals with provisions to secure protection of law to persons charged with a criminal offence cannot have any relevance to an order of court in which a person is

has been accused and wishes to apply for bail would be entitled in the bail proceedings to claim the rights of an arrested and detained person but not the right to fair trial. As aptly explained by the South African Constitutional Court in *S v Dlamini*:[785]

> There is a fundamental difference between the objective of bail proceedings and that of the trial. In a bail application the enquiry is not really concerned with the question of guilt. That is the task of the trial court. The court hearing the bail application is concerned with the question of possible guilt only to the extent that it may bear on where the interests of justice lie in regard ot bail. The focus at the bail stage is to decide whether the interest of justice permit the release of the accused pending trial, and that entails in the main protecting the investigation and prosecution of the case against hindrance.[786]

However, while it might be easy to determine when a criminal trial begins for purposes of the application of the fair trial guarantees, it is not always easy to determine which trial is criminal (as opposed to civil) for purposes of the application of the fair trial guarantees. The traditional view is that criminal law regulates the relationship between citizens and the state while civil law regulates the relationship between private citizens.[787] According to this traditional understanding, the purpose of criminal law is to control offenses against the state by punishing the offending individuals while the purpose of civil law is to address the injury occasioned by one individual or entity to another by compensating the injured party.[788] Thus, according to this traditional view, a trial would be criminal if its aim is to prove the moral culpability or guilt of the suspected wrongdoer for purposes of meting out appropriate punishment;[789] and it would be civil if its aim is to prove private injury for purposes of restoring the injured party to his or her original position or making him or her whole through compensation.[790]

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subject to committal to civil jail as the procedure in the civil court cannot be equated to proceedings in a criminal court or the right of a person charged in such a court.

[785] See *S v Dlamini* 1999 (4) SA 623 (CC).

[786] *S v Dlamini* 1999 (4) SA 623 (CC) para 11. In this regard, the Court found that the imposition of the onus of proof on the applicant for bail was not objectionable as it was not a criminal trial. *S v Dlamini* 1999 (4) SA 623 (CC) para 78. See also *Geuking v President of the Republic of South Africa and Others* 2003 (3) SA 34 (CC) para 47 where the court held that a person facing extradition is not an accused person for the purposes of the protection afforded by s 35(3) of the Constitution. For Kenyan position, see *Mary Wambui Kinyanjui v Republic* (2006) eKLR (discussing the applicable principles on bail application).

[787] See, for example, W Blackstone (7ed) *Commentaries on the Laws of England in Four Books* (1775) 2 (dividing wrongs in civil injuries which infringe upon private rights and crimes which breach public duties).

[788] See K Mann "Punitive civil sanctions: the middleground between criminal and civil law" (1992) 101(8) *The Yale Law Journal* 1795 at 1809 (discussing contemporary remedies in both civil and criminal law and listing them as including "payment of money, disqualification, forfeiture of property, imprisonment, declaration of standards, administrative regulations, orders to comply with standards (injunctions), deprivation of services and financial support, deprivations of rights to conduct transactions, incarceration in non-prison institutions, other restrictions on movement, and stigmatisation").

[789] See G Fletcher *Rethinking criminal law* (1978) 409 (citing cases to show that the test for when processes are criminal is the concept of punishment).

[790] Punitive damages may be available in certain tort actions, but the primary focus of tort remedies is to make the plaintiff whole, while the primary focus of criminal penalties is to punish the defendant.

This traditional boundary between criminal and civil law has, however, not always been clear cut. For example, in many jurisdictions, courts have traditionally had the discretion to award punitive damages, of the nature of fines, in civil tort actions.[791] Similarly, many criminal laws have provided for "strict liability" crimes which impose punishment without the need to prove *mens rea* (a morally culpable state of mind).[792] Imprisonment in criminal law has also had its counterpart in civil law in the form of civil contempt punishable by incarceration.[793] Likewise, payment of money clearly associated with civil law has taken the form of fines in criminal law. These few exceptions have, however, been relatively minor, and have served to reinforce rather than disintegrate the general boundary between the two areas of law.[794] It is only over the last few decades that the criminal-civil boundary has been disintegrated to noticeable levels. This disintegration has come about by the introduction, in many jurisdictions, of provisions that combine elements of both civil and criminal law. These provisions include those that: one, allow private individuals to obtain punitive remedies (fines) in civil cases that they share with the state;[795] two, authorize private individuals to seek civil remedies in criminal cases;[796] and three, permit the state to use civil procedure to punish individuals for acts prohibited by criminal law provisions.[797]

Because of this disintegration in the traditional boundary between civil and criminal law, courts have been required in a number of cases to pronounce on whether a specified proceeding amounts to criminal trial for purposes of the applicability of the right to fair trial. In this respect, the South African courts have maintained the traditional purposive approach variously holding that the right to fair trial will apply only when the object of the

[791] See J Hall "Interrelations of Criminal Law and Torts (pts. 1 & 2)" (1943) 43 *Columbia Law Review* 753.
[792] On strict liability in criminal law, see RA Wasserstrom "Strict liability in criminal law" (1960) 12(4) *Stanford Law Review* 731.
[793] See, for example, the Kenyan case of *Omega Credit Limited v Mt Kenya Roses Limited & 2 Others* (2006) eKLR (noting that contempt of court is a civil remedy).
[794] SR Klein "Redrawing the Criminal-Civil Boundary" (1999) 2(2) *Buffalo criminal law review* 679 at 679-680.
[795] In this instance features from both sides are mixed: civil procedures coupled with punitive sanctions, and individuals who are, in a sense, acting on behalf of the state government. SR Klein "Redrawing the Criminal-Civil Boundary" (1999) 2(2) *Buffalo criminal law review* 679.
[796] These laws have been influenced by the Victims' Rights Movement across the world that advocate for the representation of victims in criminal cases and to utilise the criminal rather than the civil process to be made whole. As a result most criminal laws now provide for the representation of victims in criminal cases and the imposition of restitution against a criminal defendant for the victims of his crime. For a discussion, see GP Fletcher *With Justice for Some: Victim's Rights in Criminal Trials* (1995). For how this works in the International Criminal Court, see, for example, B Michael "Protection and Rights of Victims under International Criminal Law" (2000) 34 *International Law* 7.
[797] These include instances where government agencies use civil law to recover government or private money lost through fraud and, increasingly, where government use the civil law to stop those who violate criminal prohibitions from enjoying their ill-gotten gains. For further discussion, see, for example, IS Klein "Civil *in rem* forfeiture and double jeopardy" (1996) 82 *Iowa Law Review* 183.

proceedings is to determine the guilt or innocence of the accused for purposes of meting out criminal punishment.[798] Kenyan courts, on the other hand, have largely paid deference to the legislative characterisation of the proceedings holding that the right to fair trial will apply only in cases where the criminal procedure is made applicable by the relevant law.[799] At the international level, the Human Rights Committee (HRC), established to monitor compliance with the International Covenant on Civil and Political Rights (ICCPR),[800] has held that the right to fair trial under the ICCPR applies in procedures meant to punish acts declared punishable under domestic law.[801] The Committee has, however, also added that the right may also apply in procedures meant for "sanctions that, *regardless of their qualification in domestic law*, are penal in nature".[802]

This approach of the HRC of looking beyond the legislative characterisation of a sanction in order to determine whether the right to fair trial applies has also been adopted by the European Court of Human Rights. For example, in *Engel and Others v Netherlands,*[803] the Court set out three criteria for determining whether a case amounted to a criminal trial or not: the first criterion is the categorisation made by the national law and authorities; the second is the nature of the offence; and the third is the nature and degree of severity of the penalty that may be imposed in the event of a finding against the person concerned.[804] With regard to the first criterion, the Court has held that while it is important, it will only be conclusive where the case is classified as criminal.[805] Otherwise, the Court will look beyond

[798] See, for example, *S v Dlamini* 1999 (4) SA 623 (CC) para 11 (where the Constitutional Court held that what distinguishes bail proceedings from criminal trial is that in the former "the enquiry is not really concerned with the question of guilt" while in the latter it is); *Ferreira v Levin NO* 1996 (1) SA 984 (CC) para 41 (holding that the right applies only in a "criminal prosecution"); *Nel v Le Roux NO* 1996 (3) SA 562 (CC) para 11 (holding that criminal proceedings "result in the examinee being convicted of any offence"); *Geuking v President of the Republic of South Africa and Others* 2003 (3) SA 34 (CC) para 47 (holding that extradition proceedings are not subject to the right to fair trial because "the enquiry does not result in a conviction or sentence".

[799] See, for example, *Omega Credit Limited v Mt Kenya Roses Limited & 2 Others* (2006) eKLR (holding that the right to fair trial does not apply in contempt proceedings "as the procedure in the civil court cannot be equated to proceedings in a criminal court or the right of a person charged in such a court"). See also *KACC V Stanley Mombo Amuti* [2011] eKLR (where the Court held that the right to fair trial did not apply in a non-conviction based assets recovery under section 55 of the Anti-Corruption Crimes Act because the procedure envisioned in that provision is the civil procedure).

[800] The Committee is empowered to 'receive and consider' communications from individuals who are subject to the jurisdiction of states that have ratified an Optional Protocol and who claim to have suffered a violation of any of the rights protected by ICCPR. See art 1 Optional Protocol to the International Covenant on Civil and Political Rights, GA Res 2200A, UN Doc A/6316 (1966).

[801] See. Human Rights Committee General Comment 32 U.N. Doc. CCPR/C/GC/32 (2007) at para 1 of part III (emphasis added).

[802] *Perterer v. Austria* Communication No. 1015/2001 para. 9.2. See also Human Rights Committee General Comment 32 U.N. Doc. CCPR/C/GC/32 (2007) para 1 of part III.

[803] *Engel and Others v Netherlands* Judgment of 8 June 1976, Series A no. 22.

[804] *Engel and Others v Netherlands* Judgment of 8 June 1976, Series A no. 22 at 34-35 para 82-83.

[805] *Lutz v. Germany*, judgment of 25 August 1987, Series A no. 123 at 23 para 5.

the classification and examine the substantive reality of the procedure in question.[806] With regard to the second and third criteria, the court has noted that they are not necessarily cumulative and that the Court may find that a case is "criminal" by reference either to the nature of the offence or to the penalty available.[807] However, where a separate analysis of each criterion does not make it possible to reach a clear conclusion, then the court will look at the two cumulatively.[808] It suffices for the second criterion that the offence in question is by its nature regarded as "criminal" from the point of view of the Convention[809] while for the third criterion, it suffices that the sanction, by its nature and degree of severity, belongs in general to the "criminal" sphere.[810]

Unlike the European Court, the Inter-American Commission and Court and the African Commission on Human Rights have not come up with a criterion for determining which procedures are criminal for purposes of the applicability of the right to fair trial under their respective regional human rights instruments.[811] However, the American Convention on Human Rights specifically prohibits the punishment of any other person apart from the criminal.[812] This provision taken together with the Court's holding that punishment must be subject to fair trial guarantees,[813] means, it can be argued, that the right to fair trial under the Inter-American System applies only to procedures that lead to the finding of criminal guilt. In other words, since right to fair trial applies to procedures for punishment and since punishment cannot be meted on persons whose criminal guilt have not been adjudged, it

[806] *Bendenoun v. France*, judgment of 24 February 1994, Series A no. 284, 20 para 47.
[807] *Lutz v. Germany*, judgment of 25 August 1987, Series A no. 123, 23.
[808] *Engel and Others v Netherlands* Judgment of 8 June 1976, Series A no. 22 34-35.
[809] In determining whether the offence in question meets this criterion, the court has set out the following factors for considerations: (1) whether the legal rule applies only to a specific group or it has general application (See *Bendenoun v. France*, judgment of 24 February 1994, Series A no. 284, para 47); (2) whether the proceeding is instituted by a public enforcement body (See *Benham v. the United Kingdom*, judgment of 10 June 1996, Reports of Judgments and Decisions 1996 III, para 56); (3) whether the legal rule has a punitive or detterent purpose (See *Öztürk v. Germany*, judgment of 21 February 1984, Series A no. 73, p. 21, para 49); (4) whether the imposition of penalty is dependent on finding of guilt (See *Benham v. the United Kingdom*, judgment of 10 June 1996, Reports of Judgments and Decisions 1996 III, para 56); (5) how comparable procedures are classified in other member states (See *Öztürk v. Germany*, judgment of 21 February 1984, Series A no. 73, p. 21, para 53); and (6) whether the procedure gives rise to a criminal record, though not decisive as it depends on the domestic classification (See *Ravnsborg v. Sweden*, judgment of 23 March 1994, Series A no. 283 B, para 38).
[810] In evaluating this last criterion, the Court will refer to the maximum potential penalty which the relevant law provides for. See *Campbell and Fell v. the United Kingdom*, judgment of 28 June 1984, Series A no. 80, para 72; *Demicoli v. Malta*, judgment of 27 August 1991, Series A no. 210, p. 17, para 34.
[811] See, for example, J Kokott "Fair Trial: the Inter-American System for the Protection of Human Rights" available at http://www.wfrt.org/humanrts/fairtrial/wrft-ko.htm#N_105_ (accessed 20/5/2013) (concluding that there is no case law in the Inter-American System on the applicability of the right to fair trial in civil trials).
[812] Inter-American Convention, art 5 para 3 (reads, "Punishment shall not be extended to any person other than the criminal").
[813] See *Case of the Ituango Massacres*, Judgment of July 1, 2006. Series C No. 148, para. 289; *Case of Baldeón-García*, Judgment of April 6, 2006. Series C No. 147, para. 166; and Case of *the Pueblo Bello Massacre*, Judgment of January 31, 2006. Series C No. 140, para. 171.

follows that the right to fair trial would only apply when the object of the proceedings is to determine the guilt or innocence of the accused for purposes of punishment. Conversely, no punishment can be meted in any procedure that does not deal with proof of the criminal guilt of the offender as it would not meet the fair trial requirements. On the other hand, the African Commission in its Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa[814] has lumped the right to fair trial under the heading "proceedings relating to criminal charges".[815] Meaning, one can argue, that, under the African Charter on Human and Peoples Right, the right to fair trial will apply only in proceedings in which a person has been charged with a criminal offence. Indeed as the Commission noted in the case of *Constitutional Rights Project (in respect of Wahab Akamu, G. Adega and others)/Nigeria*[816] the right to fair trial under the African Charter would not be violated where punishments are decreed "as the culmination of a carefully conducted criminal procedure".[817]

Clearly, from the various jurisprudence discussed, one common thread is that the right to fair trial applies only in criminal trials and only to persons who are answering accusations under such trials. What makes a trial criminal is first its characterisation as such by the municipal legislation. However, because there is danger of legislatures abusing their authority by removing certain procedures from the ambit of criminal law due to its stringent requirements,[818] international human rights bodies have cautioned that one needs to look at a decriminalised procedure in its entirety to determine whether its decriminalisation does not lead to results incompatible with the object and purpose of the right to fair trial. In other words, the mere labelling of a trial as civil by the legislature should not of itself suffice to remove the trial out of reach of the requirements of the right to fair trial. One must still go behind appearances and labels and assess the substance of the trial in question. Where the substance of the trial requires the finding of moral culpability or guilt of a defendant for purposes of meting out of punishment then the right to fair trial should apply. The corollary is that where a trial leads to criminal punishment and its attendant moral blameworthiness

[814] African Commission in its Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa DOC/OS(XXX)247.
[815] African Commission in its Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa DOC/OS(XXX)247 at 13.
[816] *Constitutional Rights Project (in respect of Wahab Akamu, G. Adega and others)/Nigeria* Communication 60/91.
[817] *Constitutional Rights Project (in respect of Wahab Akamu, G. Adega and others)/Nigeria* Communication 60/91 at para 13. See also *Constitutional Rights Project (in respect of Zamani Lakwot and six others)/Nigeria* communication 87/93 para 11.
[818] See HM Hart "The aims of criminal law" (1958) 23 *Law & Contemporary Problemss* 401 at 404 (noting the stringent procedural requirements of criminal law).

(social stigma), then the right to fair trial should apply even if the trial is labelled civil by the legislature and any person tried in such a trial should be entitled to invoke the guarantees of the right to fair trial. The question that remains to be answered is whether the non-conviction based assets recovery is one such trial.

4.6. The nature of non-conviction based assets recovery

Since the right to fair trial only applies in trials that lead to criminal punishment, to determine whether non-conviction based assets recovery is such a trial entails determining whether assets recovery is by nature a criminal punishment. In this regard, given that the characterisation ascribed to non-conviction based assets recovery by most jurisdictions, including Kenya and South Africa, is "civil",[819] the question that arises is whether such characterisation is enough in deciding whether assets recovery is "civil" remedy (not "criminal" punishment) for purposes of the application of the right to fair trial. To answer this question, courts have adopted a number of approaches. This section examines some of these approaches.

However, before examining the approaches, it is noteworthy that in some jurisdictions such as South Africa both the conviction based and non-conviction based assets recovery are labelled "civil" meaning that an application for a confiscation order whether it follows a criminal conviction or not is guided by the civil not criminal procedure.[820] In such cases, the use of civil procedure does raise questions as to the applicability of the right to fair trial in both assets recovery types. However, because the conviction based assets recovery follows the conviction of the defendant, the danger posed to the human rights of the accused is somehow ameliorated compared to that posed to the "innocent" property owner in the case of non-conviction based assets recovery.[821] This is mainly because the defendant in the

[819] For an exposition of the non-conviction based regimes in representive countries from both the common law and civil law tradition, see TS Greenberg *et al Stolen Asset Recovery: A Good Practices Guide for Non-Conviction Based Asset Forfeiture* (2009) 109-191.

[820] See, for example, the South Africa's POCA, chapter V (the chapter relates to conviction based confiscation but the process is labelled "civil). In Kenya the conviction based assets recovery is part of the sentencing criminal process that leads to the conviction of an accused person. However, the state is also allowed to bring a later civil suit for recovery of assets following the conviction of an accused. If the state adopts this latter process then the applicable procedure is civil. See ACECA, s 54 and the discussion in Chapter 3 part 3.7.2.2.

[821] The civil procedure in the conviction based confiscation is different from the non-conviction based one as it follows a criminal conviction - the state first proves the criminal guilt of the defendant, and then uses the civil process to recover the proceeds from that crime. It could arise in those cases where investigations have not revealed the existence of the proceeds at the time the criminal trial is concluded or where the relevant law specifically provide for it in order to allow the state to lead evidence justifying the confiscation and to allow the property owner to rebut that evidence. See, for example, the South Africa's POCA, s 18.

conviction based mechanism would have benefited from some of the criminal law fair trial guarantees such as the requirement that his criminal guilt be proved beyond reasonable doubt while a defendant in the non-conviction based mechanism would not have. This thesis is particularly concerned with the non-conviction based assets recovery. However, the courts' decision on the applicability of the right to fair trial to the civil law procedure in the conviction based mechanism do also have a bearing on the right's applicability in the non-conviction based mechanism and is therefore also examined where necessary.

4.6.1. The Kenyan "literal" approach

In Kenya, the courts have had an opportunity to decide on whether the civil labelling of non-conviction based mechanism is enough in deciding whether the nature of assets recovery is "civil" (not "criminal") for purposes of the application of the right to fair trial. Justice Rawal in the case of *KACC v Stanley Mombo Amuti*[822] answered the question in the affirmative. In that case the court was asked to determine whether section 55 of the ACECA, which provided for the confiscation of "unexplained wealth" of public officials, was "civil" or "criminal" for purposes of the application of the right to fair trial.[823] The defendant had argued that the fact that section 55 put the burden on the defendant to explain the source of his wealth made it violate the tenets of the right to fair trial under section 50 of the Constitution, which requires that the state should bear the burden of proof in all criminal cases. In pursuing this line of argument, the defendant referred to the fact that section 55 was aimed at fighting corruption crime, an objective which made it have a defining trait of a criminal remedy.

The Court, however, found that the recovery of unexplained assets was a civil remedy because the "proceedings under section 55 is a [c]ivil proceedings".[824] In this respect the Court relied solely on legislative intent, ascertained from the legislature's procedural choice in section 55. In the Court's view, the import of this finding was that normal procedural requirement of civil procedure should apply to these proceedings.[825] These requirements, the Court explained, included the burden of proof being allocated to the state and the standard of

[822] *KACC v Stanley Mombo Amuti* Civil suit No. 448 of 2008.
[823] ACECA.
[824] *KACC v Stanley Mombo Amuti* Civil suit No. 448 of 2008 16 (noting that the under section 55 KACC "has to move the court by way of Originating Summons" – a civil law device and concluding that the burden and standard of proof under section 55 should therefore be interpreted accordingly).
[825] *KACC v Stanley Mombo Amuti* Civil suit No. 448 of 2008 19-20 These requirements, the Court explained, included the burden of proof being allocated to the state and the standard of proof placed on both parties being balance of probability.

proof placed on both parties being balance of probability (not "beyond reasonable doubt" as is required by the right to fair trial in a criminal trial).[826] In the end the Court found in favour of the defendant, not because the procedure demanded the applicability of criminal burden of proof on the state, but because the standard of proof that was required of the defendant by section 55 went beyond the normal civil law standard of balance of probability.[827]

The Court did not, however, give its reason for relying on the legislative label as the basis of excluding the application of the criminal fair trial guarantees. Nevertheless, this approach of relying on the legislative label to determine whether a remedy is civil or criminal has received support from some authors. According to Professor Mary Cheh, for example, "legislative label" is the true criterion for determining whether a sanction is civil or criminal.[828] Her rationale for supporting this criterion is that: firstly, it provides a "bright line test" that can easily be applied to resolve the civil-criminal law conundrum;[829] and secondly, it reflects historical outcomes that have seen persons convicted of acts labelled "criminal", however small the punishment, being branded "criminals" while persons that have been found liable for acts labelled "civil", however big the monetary compensation, escaping such a criminal branding.[830] To her, the legislative labelling of an act as "criminal" has always been the true source of a society's moral judgment that such an act is deviant, unacceptable and therefore to be formally and socially condemned.[831] And so in her view, however punitive an act is, if it is not labelled "criminal" in the legislation then it would not fall in criminal law side of criminal-civil law divide.

The decision of Justice Rawal in the *Mombo Amuti* case was, however, appealed against by the KACC (now EACC) to the next court in the hierarchy of Kenyan Courts – the Court of Appeal. In granting an application for the maintenance of the status quo pending the full determination of the appeal, the Court of Appeal noted that the legal challenge to the High

[826] *KACC v Stanley Mombo Amuti* Civil suit No. 448 of 2008 16-18.
[827] *KACC v Stanley Mombo Amuti* Civil suit No. 448 of 2008 19 (finding that the section prescribed a "higher standard of proof than that of balance of probability").
[828] MM Cheh "Constitutional Limits on Using Civil Remedies To Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction" (1991) 42 *Hastings Law Journal* 1325.
[829] In this regard, she rejects the various criteria available for distinguishing criminal and civil law such as sanction, stigma, and punitive intent for not being clear-cut. MM Cheh "Constitutional Limits on Using Civil Remedies To Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction" (1991) 42 *Hastings Law Journal* 1325 at 1350-1358.
[830] MM Cheh "Constitutional Limits on Using Civil Remedies To Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction" (1991) 42 *Hastings Law Journal* 1325 at 1353.
[831] MM Cheh "Constitutional Limits on Using Civil Remedies To Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction" (1991) 42 *Hastings Law Journal* 1325 at 1353.

Court's reasoning was arguable.[832] However, it remains to be seen what the Court of Appeal and ultimately the Supreme Court would say on the merit of the appeal considering that an earlier decision by the same High Court (constituted by different judges) in the case of *Christopher Ndarathi Murungaru v KACC*[833] had also opined, though on an entirely different subject, that the ACECA is a penal statute and like all penal statutes "must be construed strictly".[834]

4.6.2. The South African "purposive" approach

The question as to whether recovery of proceeds of crime is criminal punishment or civil remedy has also been raised in the Courts of South Africa in a number of cases challenging its labelling as "civil" under the POCA.[835] In all these cases, the Courts have upheld its labelling as "civil" arguing that confiscation of proceeds of crime is indeed a civil remedy and not a criminal punishment.[836] In reaching this conclusion the Courts have employed the "purpose" criterion to determine whether a confiscation order constitutes criminal punishment or not. For example, in *NDPP v Phillips*,[837] where the defendants had argued that a confiscation order is a penal sanction and that labelling it a civil remedy in POCA was a deliberate attempt by the legislature to strip defendants of the protection the constitutional fair trial guarantees,[838] the High Court noted that a confiscation of proceeds of corruption order will constitute punishment "only if its purpose is to punish the defendant for his crimes".[839] In the Courts view, confiscation of proceeds of crime did not meet this criterion because its purpose was not to punish anyone but to "merely [give] expression to the principle that no one should be allowed to benefit from his own wrongdoing".[840]

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[832] *Kacc v Stanley Mombo Amuti* Civil Application No Nai 39 of 2011 (UR.25/2011).
[833] *Christopher Ndarathi Murungaru v KACC & Another* Misc. Civil Application No. 54 of 2006.
[834] *Christopher Ndarathi Murungaru v KACC & Another* Misc. Civil Application No. 54 of 2006, 65 (the case was dealing with the applicability of the right to fair trial at the time of investigation of unexplained assets).
[835] See Prevention of Organised Crime Amendment Act 24 of 1999 (POCA).
[836] See *S v Shaik and Others* [2008] ZACC 7; 2008 (5) SA 354 (CC); 2008 (8) BCLR 834 (CC) paras 50-58. See also *Mohunram and Another v NDPP and Another (Law Review Project as Amicus Curiae)* [2007] ZACC 4; 2007 (4) SA 222 (CC); 2007 (6) BCLR 575 (CC) (*Mohunram*); *Fraser v ABSA Bank Ltd (NDPP as Amicus Curiae)* [2006] ZACC 24; 2007 (3) SA 484 (CC); 2007 (3) BCLR 219 (CC) (*Fraser*); *Prophet v NDPP* [2006] ZACC 17; 2007 (6) SA 169 (CC); 2007 (2) BCLR 140 (CC) (*Prophet*); *Phillips and Others v NDPP* [2005] ZACC 15; 2006 (1) SA 505 (CC); 2006 (2) BCLR 274 (CC); and *NDPP and Another v Mohamed NO and Others* [2003] ZACC 4; 2003 (4) SA 1 (CC); 2003 (5) BCLR 476 (CC).
[837] *NDPP v Phillips & Others* 2002 (1) BCLR 41 (W).
[838] *NDPP v Phillips & Others* 2002 (1) BCLR 41 (W) para 39
[839] *NDPP v Phillips & Others* 2002 (1) BCLR 41 (W) para 42.
[840] *NDPP v Phillips & Others* 2002 (1) BCLR 41 (W) para 43.

The Court explained that a confiscation order merely deprived a criminal "of the benefit to which he was not entitled in the first place" and because of this it could not amount to criminal punishment.[841] Moreover since the confiscation of proceeds under the POCA is limited to the value of the proceeds and not more, its purpose, in the Court's opinion, cannot be to punish as the heinousness, severity, or impact of the crime is rendered entirely irrelevant.[842] The Court also pointed out that a confiscation of proceeds order under POCA extends and may be executed against an innocent recipient of a gift derived from the proceeds of crime to the extent of the value of that gift.[843] In the Court's opinion, this would be illogical if the purpose of the confiscation order was to punish as these recipients are not considered guilty of any offence, at least under POCA.[844] The Court further noted that with regard to the conviction based confiscation under chapter 5 of POCA, a confiscation order may only be made against a defendant who has derived a benefit from his crimes and not against those who had not. This distinction in the Court's view would be absurd if the purpose of confiscation was to punish. It only made sense because the purpose of confiscation was merely to take away proceeds of crime and not to punish.[845]

This finding by the High Court in the *NDPP v Phillips* case that confiscation of proceeds of crime is remedial and not punitive has also been endorsed by the Constitutional Court. For example, in *S v Shaik and Others,*[846] the Constitutional Court, while holding that confiscation of proceeds of crime (which in this case was corruption) does not amount to criminal punishment, explained that the purpose of the confiscation of proceeds is "to ensure that no person can benefit from his or her wrongdoing".[847] In the Court's view this purpose was not "primarily" punitive.[848]

However, although not willing to characterize confiscation of proceeds of crime as criminal punishment, the South African Constitutional Court has acknowledged that these

[841] *NDPP v Phillips & Others* 2002 (1) BCLR 41 (W) para 43.
[842] *NDPP v Phillips & Others* 2002 (1) BCLR 41 (W) para 42 (the Court noted in this regard that the confiscation is directed at the benefit and not the crime).
[843] *NDPP v Phillips & Others* 2002 (1) BCLR 41 (W) para 42. The execution agains innocent recepients is possible in terms of s 30(2) read with ss 14(1) and 33(1)(b) of the POCA.
[844] *NDPP v Phillips & Others* 2002 (1) BCLR 41 (W) para 42.
[845] *NDPP v Phillips & Others* 2002 (1) BCLR 41 (W) para 42.
[846] *S v Shaik and Others* 2008 (2) SA 208 (CC).
[847] *S v Shaik and Others* 2008 (2) SA 208 (CC) para 51.
[848] *S v Shaik and Others* 2008 (2) SA 208 (CC) para 57.

confiscations can also have punitive effects.[849] In *Mohunram and Another v NDPP and Another,*[850] a case on the confiscation of instrumentality of crime, the Court noted that both confiscation of instrumentality and proceeds of crime although having remedial objectives, also have a "palpably punitive or penal effects".[851] In reaching this conclusion, the Constitutional Court quoted with approval the Supreme Court of Appeal's judgment in *NDPP v Cook Properties*[852] in which the Court held:

> "We agree that chapter 6 (of POCA dealing with non-conviction based confiscation) has remedial objectives. *But these cannot disguise the fact that forfeiture, once exacted, operates as a punishment*. The United States Supreme Court in a not dissimilar context has observed that the notion of punishment cuts across the division between civil and criminal law. Civil proceedings may advance punitive as well as remedial goals, and sanctions frequently serve more than one purpose. Hence the fact that a civil statute is remedial does not mean that it may not also have a punitive dimension. That certainly applies to chapter 6. The legislature has expressly ordained that proceedings under the chapter are 'civil ... not criminal' (s 37(1)), and its provisions are clearly remedial. *Yet none of this diminishes the fact that the provisions have some penal element*."[853]

The Constitutional Court noted that this penal effect derived from the fact that confiscation of proceeds of crime denied those involved in crime of the profits of their crime thereby serving the deterrence role of punishment.[854] The Court went further to say that recognising this penal effect of confiscation orders was important as it affected the assessment of the proportionality of a forfeiture order.[855] The Court noted that in such an assessment a court had to take into account criminal penalties (including confiscations) already incurred.[856] The Court further said that because of this penal effect, provisions on confiscations "must be restrictively interpreted".[857]

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[849] Even in *S v Shaik and Others* 2008 (2) SA 208 (CC) para 57, the court, though denying that the purpose of deprivation of criminal benefit was to punish, still acknowledged that such deprivation "might at times have a punitive effect".

[850] *Mohunram and Another v NDPP and Another* 2007 (4) SA 222 (CC).

[851] *Mohunram and Another v NDPP and Another* 2007 (4) SA 222 (CC) para 42.

[852] *NDPP v. (1) R O Cook Properties (Pty) Ltd; (2) 37 Gillespie Street Durban (Pty) Ltd; (3) Seevnarayan* 2004 (2) SACR 208 (SCA).

[853] *NDPP v. (1) R O Cook Properties (Pty) Ltd; (2) 37 Gillespie Street Durban (Pty) Ltd; (3) Seevnarayan* 2004 (2) SACR 208 (SCA) para 17 (footnotes omitted and emphasis added).

[854] *Mohunram and Another v NDPP and Another* 2007 (4) SA 222 (CC) para 57 quoting with approval the statement of the Supreme Court of Appeal in *NDPP v. (1) R O Cook Properties (Pty) Ltd; (2) 37 Gillespie Street Durban (Pty) Ltd; (3) Seevnarayan 2004 (2) SACR 208 (SCA)* para 18:

> "The inter-related purposes of chapter 6 therefore seem to us to include: (a) removing incentives for crime; (b) deterring persons from using or allowing their property to be used in crime, (c) eliminating or incapacitating some of the means by which crime may be committed ('neutralising', as counsel put it, property that has been used and may again be used in crime); and, we would add, (d) advancing the ends of justice by depriving those involved in crime of the property concerned. At least (b) and (d) embody a palpably penal aspect; but the statutory objectives transcend the merely penal. We accordingly agree the provisions must be restrictively interpreted, though not for the narrow reasons counsel advanced."

[855] *Mohunram and Another v NDPP and Another* 2007 (4) SA 222 (CC) para 42.

[856] *Mohunram and Another v NDPP and Another* 2007 (4) SA 222 (CC) para 42.

[857] *Mohunram and Another v NDPP and Another* 2007 (4) SA 222 (CC) para 42 quoting with approval NDPP v Cook Properties para 18 (in which the SCA stated that because of the penal effect "We accordingly agree the provisions must be restrictively interpreted").

4.6.3. The comparative "substantive" approach

At the international level, the true nature of assets recovery has been the subject of litigation in the European Court of Human Rights. In *Welch v United Kingdom*[858] the labelling of confiscation of proceeds of crime as "civil" under the English Drug Trafficking Act of 1986 was challenged on the ground that it breached Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.[859] The relevant part provides: "Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed".[860] The parties were agreed that the confiscation order had been made retrospectively.[861] The main issue turned on whether the confiscation order amounted to a "penalty" within the meaning of said article.[862]

The Court held that confiscation of proceeds of crime was indeed penal in character. In the Court's view, an assessment of whether a measure amounts to punishment should begin by determining whether the measure in question was imposed following conviction for a "criminal offence". However, in addition, one must also take into account the nature and purpose of the measure in question; its characterisation under national law; the procedures involved in the making and implementation of the measure; and its severity.[863] In applying these factors to the case at hand, the court noted that as regards the connection with a criminal offence, before an order could be made, the accused had to be convicted of a drug-trafficking offence. However, because a statutory presumption concerning the extent to which the applicant has benefitted from the trafficking operated in favour of the state, the confiscation order could also affect proceeds of property which were not directly related to the crime for which a defendant had been convicted. This did not, however, in the Court's opinion alter the fact that the imposition of the order was dependent on there having been a criminal conviction.

With regard to the characterisation of the measure under the national law, the Court while recognising its importance in the determination of the nature of a remedy nevertheless held that it is not a conclusive factor. The Court noted that one "must remain free to go behind appearances and assess for itself whether a particular measure amounts in *substance* to a

[858] *Welch v United Kingdom* (1995) 20 EHRR 247.
[859] European Convention, art 7.
[860] European Convention, art 7(1).
[861] *Welch v United Kingdom* (1995) 20 EHRR 247 para 25.
[862] *Welch v United Kingdom* (1995) 20 EHRR 247 para 25.
[863] *Welch v United Kingdom* (1995) 20 EHRR 247 para 28.

penalty".[864] On the nature and purpose of confiscation of proceeds, the Court noted that confiscating proceeds of crime served a preventive purpose by removing the property that could be used in the commission of future crimes. The Court also recognized that confiscation of proceeds ensured that crime does not pay. The Court held that while these objectives are preventive in nature, they do not exclude a punitive intention from being inferred. According the Court, "indeed the aims of prevention and reparation are consistent with a punitive purpose and may be seen as constituent elements of the very notion of punishment…"[865]

With regard to the severity of the order, the Court held that the severity of an order is not in itself decisive noting that there are many non-penal measures that may have "a substantial impact" on the person concerned.[866] The Court, however, found that in the case before it there were aspects of the Act that kept with the idea of a penalty. These were: the sweeping statutory assumptions that all property passing through the offender's hands over a six-year period was the fruit of drug trafficking unless the defendant can prove otherwise; the fact that the confiscation order was directed to the proceeds involved in drug dealing and not limited to actual enrichment or profit; the discretion of the trial judge, when fixing the amount of the order to take into account the degree of culpability of the accused; and the possibility of imprisonment in cases where the offender defaults in payment.[867] Taking into account all these factors, the court concluded that the confiscation order in the Act provided a strong indication of a regime of punishment.[868] The Court stressed, however, that its conclusion applied only to the retrospective aspect of the relevant legislation and did not have a bearing in any respect to the powers of confiscation to be used by the courts as a weapon against drug trafficking.[869]

4.6.4. Analysis of the different approaches and their conclusion on the nature of assets recovery

The traditional conception of criminal sanctions is that they serve a retributive end, that is, they pay back harm doers for their past crimes and thereby re-establish some kind of societal

[864] *Welch v United Kingdom* (1995) 20 EHRR 247 paras 27 & 34 (emphasis added).
[865] *Welch v United Kingdom* (1995) 20 EHRR 247 262 (emphasis added).
[866] *Welch v United Kingdom* (1995) 20 EHRR 247 para 32.
[867] *Welch v United Kingdom* (1995) 20 EHRR 247 para 33.
[868] *Welch v United Kingdom* (1995) 20 EHRR 247 para 35.
[869] *Welch v United Kingdom* (1995) 20 EHRR 247 para 36.

balance disturbed by the offense.[870] On the other hand, the traditional conception of civil sanctions is that they serve corrective or compensatory end, that is, to restore a pre-existing status quo.[871] However, this distinguishing characteristic has not always been clear cut. For example, while it is true that one of the distinctive features of criminal sanction is to payback the harm done to society by inflicting pain, the same can also be said of some of the civil remedies such as exemplary or punitive damages awarded in tort cases or civil incarcerations ordered in contempt of court proceedings.[872] It is also noteworthy that with the introduction of utilitarianism in the eighteenth and nineteenth centuries, a reconception of both sanctions took place.[873] The utilitarian's idea of the individual as a rational pursuer of maximum happiness required the recognition of the deterrent objective of both the civil and criminal sanctions.[874] Thus, in addition to inflicting pain on the offender equal to the past harm caused, the objective of criminal punishment also became to reduce or prevent future harm.[875] Similarly, in addition to restoring the *status quo ante*, civil sanctions also became forward looking.[876]

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[870] This retributive aim of punishment is usually associated with Immanuel Kant who argued that "punishment can never be administered merely as a means for promoting another good" and should be "pronounced over all criminals proportionate to their internal wickedness". I Kant "The science of right" in R Hutchins *Great books of the Western world: Vol. 42* (1952) 397 at 397. See also See MR Gottfredson and T Hirschi *A General Theory of Crime* (1990).

[871] CR Sunstein "The Limits of Compensatory Justice" in JW Chapman *Compensatory justice: NoMos XXXIII* (1991) 281 at 282 describes the central feature of compensatory justice as follows:

> "The purpose of the remedy, and of the legal system, is to restore the plaintiff to the position that he would have occupied if the unlawful conduct had not occurred. It is not to engage in any kind of social reordering or social management except insofar as these functions are logically entailed by the principle of compensation.".

[872] See MM Cheh "Constitutional Limits on Using Civil Remedies To Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction" (1991) 42 *Hastings Law Journal* 1325 at 1350-1351 (rejecting the punitive criterion for punishment arguing that if it were applicable then the exemplary or punitive damages that are traditionally awarded in civil cases would have long been rejected).

[873] See K Mann "Punitive Civil Sanctions: the Middleground between Criminal and Civil Law" (1992) 101 *The Yale Law Journal* 1795 at 1845 ("Changing perceptions of the nature of law, starting with Beccaria on the Continent and Bentham in England, began to force a revision in the conventional bifurcation between punishment and compensation").

[874] See GS Becker "Crime and Punishment: An Economic Approach" (1968) 76 *Journal of Political Economy* 169 at 209 (describing his project as a "resurrection" of the work of Beccaria and Bentham).

[875] The utilitarian theory starts from the position that punishment is intrinsically bad because it's most direct and immediate effect involves the infliction of pain and unhappiness on the offender. It holds that punishment only becomes justified because of the extrinsic or greater good it produces, which it is felt outweigh the intrinsic bad. This extrinsic good that makes punishment justifiable is held to be the utility (happiness/social harmony) that result from the reduction in crime. Punishment is said to reduce or prevent crime in three ways: deterrence (by discouraging the offender or potential offenders from committing similar crime in future); incapacitation (by removing the opportunity or ability to commit future crimes); and rehabilitation (by reforming the character of the offender so that he or she no longer desires to commit the sort of act for which he or she was punished). Thus, the main thread in the utilitarian theory is that social utility (happiness/harmony) is best served by the prevention of future harm and that the justification for punishment lies in its ability to reduce the chances for the commission of future transgressions. For a discussion, see generally S Wexler "The Moral Confusions in Positivism, Utilitarianism and Liberalism" (1985) 30 *American Journal on Jurisprudence* 121.

[876] See K Mann "Punitive Civil Sanctions: the Middleground between Criminal and Civil Law" (1992) 101 *The Yale Law Journal* 1795 at 1845.

This similarity in objectives – of restoring the *status quo ante* and preventing future harm - between the two sanctions attests to the difficulty in using the "purpose" criterion in differentiating between criminal punishment and civil remedy.[877] Thus, the South African Courts, even though identifying "purpose" as the determining criterion, have also had to resort to the "effect" of the action to acknowledge its punitive nature. This is because the remedial purpose of confiscation (which the *Phillips* case identified as giving "expression to the principle that no one should be allowed to benefit from his own wrongdoing") can, arguably, also be a punitive objective. Indeed one of the retributive objectives of punishment is norm stabilisation or value restoration, which holds that, apart from paying back the offender for the harm his actions has wrought on the victims and society, punishment can also serve another function, namely to restore social consensus about the rules and values that have been violated.[878] In this regard, assets recovery, by not allowing criminals to keep their ill-gotten gains and spend them as they wish, does restore consensus on the value of honest work as it reaffirms to the offender and the vast majority of people who do not commit crime but rather meet their obligations to the community through honest means that crime does not pay.[879] Thus, the same remedial function served by assets recovery also does achieve a punitive objective. As correctly noted by the European Court of Human Rights in *Welch v United Kingdom* "… the aims of prevention and reparation are [also] consistent with a punitive purpose and may be seen as constituent elements of the very notion of punishment…."[880]

[877] Indeed as the European Court of Human Right correctly noted in *Welch v United Kingdom* (1995) 20 EHRR 247 para 32, the severity of an action is not in itself decisive as there are many non-penal measures that also have "a substantial impact" on the person concerned.

[878] The "norm stabilisation" or "value restoration" is part of the retributive objective of punishment. The retributive theory attributes the rationale for punishment to the need for restoration of justice. It identifies two different notions of justice that might motivate people to demand punishment of an offender. In the first notion, an offence is seen as negatively affecting the power balance in the society by lowering the victim's and society's status relative to the offender, and as such punishment is conceived as restoring this balance by requiring a degradation of the offender's status to its original state. In the second notion, an offence is seen as threatening the validity of social values by breaching the agreed upon standard of conduct, and as such punishment is viewed as re-establishing the validity of these values by requiring the reaffirmation of the social consensus. The first notion of justice has been called the just dessert view of retributive theory while the second notion has been christened the norm stabilisation or value restoration view. For a discussion, see generally DA Starkweather "The Retributive Theory of "Just Desserts" and Victim Participation in Plea Bargaining" (1992) 67(2) *Indiana Law Journal* 853; CS Lewis "The humanitarian theory of punishment" in CS Lewis *God in the Dock: Essays on Theology and Ethics* (1970) 287; J Murphy *Retribution, justice and therapy: essays in the philosophy of law* (1979); A Von Hirsch *Doing justice: the choice of punishments* (1976).

[879] See A Bandura *et al* "Mechanisms of moral disengagement in the exercise of moral agency" (1996) 71(2) *Journal of Personality and Social Psychology* 364 at 364-374 (discussing the mechanism of moral disengagement in an offender and how restorative justice helps to bring it back).

[880] *Welch v United Kingdom (*1995) 20 EHRR 247 at 262. Compare with *S v Shaik and Others* [2008] ZACC 7 para 57 ("It may well be that the achievement of this purpose might at times have a punitive effect, but that is not to say that the primary purpose is punitive").

In the same vein, it is difficult to agree with Professor Cheh and Judge Rawal's decision in the Kenyan case of *KACC v Stanley Mombo Amuti* that the ultimate determinant of the nature of an action should be the legislative label. Such an approach, apart from being too deferential to the legislative branch, also underestimates the ability of the public to see through deceptively labelled actions.[881] Indeed, considering that assets recovery refers to the confiscation of proceeds of *crime*, labelling it as "civil" cannot, contrary to Professor Cheh's argument, shield it from the moral condemnation of the community. This is because there will always be an insinuation from asset recovery's connection to a crime that the property owner either participated in, obtained profits from, or somehow abetted others in the commission of the underlying crime.[882]

A better approach, therefore, would be to look at the action in its entirety. As the European Court of Human Rights instructed in *Welch v United Kingdom,* one "must remain free to go behind appearances and assess for itself whether a particular measure amounts in *substance* to a penalty".[883] Such a substantive approach helps one to appreciate not just the label and purpose but also the true characteristics and effects of the action in question.

In this regard, one of the characteristics of assets recovery that immediately comes to mind is its public nature. This public characteristic, which is represented by the fact that the action is enforced by the *state* and not private individuals, is traditionally associated with criminal law punishment.[884] The traditional conception of civil law is that it is essentially of a private (as opposed to public) nature, that is, it is concerned with "private transactions between *private individuals* vindicating their pre-political natural rights".[885] In this private relationship individuals address the injury occasioned to them by other individuals or entities by instituting civil action for corrective or compensatory remedies.[886] On the other hand, the

[881] See HM Hart "The aims of criminal law" (1958) 23 *Law & Contemporary Problems* 401 at 404 (calling such an approach "a betrayal of intellectual bankruptcy").
[882] On stigma, see E Rasmusen "Stigma and self-fulfilling expectations of criminality" (1996) 39(2) *Journal of Law and Economics* 519.
[883] *Welch v United Kingdom (*1995) 20 EHRR 247 paras 27 & 34 (emphasis added). This approach was also alluded to by the South African Supreme Court of Appeal in *NDPP v Mcasa* 2000 (1) SACR 263 (Tk) 269e when it noted in its *obiter dictum* that "it is the substance (and not the labels)" that should determine the true nature of confiscation of proceeds of crime. However, unlike the European Court the South African Courts have resorted to the purpose approach.
[884] See J Hall, "Interrelations of Criminal Law and Torts (pts. 1 & 2)" (1943) 43 *Columbia Law Review* 753 at 974 (pointing out the concepts of "social harm" and "'morally culpable conduct" in the criminal law, as opposed to "individual harm" and objective responsibility in tort).
[885] MJ Horwitz, *The transformation of American law 1870-1960: The crisis of legal orthodoxy* (1992) 11 (describing the sharp division in late nineteenth-century law between a coercive public sphere and a non-coercive private sphere).
[886] The wrong could, for example, be breach of contract or tort.

traditional conception of criminal law emphasizes its essentially public, as opposed to private, nature, that is, it is concerned with regulating the public relationship between the state and the citizens.[887] In this public relationship the state uses its police power to ensure that individuals do not violate the criminal law or are punished for violating it.[888] Indeed, while it is true that the state may sometimes be a party in the area of civil law when, for example, it enters into a contract with a private individual or entity, the fact of the matter is that in these circumstances the state (or its organ) would be acting in its private capacity; it does not act with state authority.[889] The same cannot be said of the confiscation of proceeds of crime where the state is evidently employing its police power to fight crime.[890] This public characteristic of assets recovery clearly identifies it more with criminal law punishment regime than with the civil law remedy regime.

In addition to its public nature, another important characteristic of assets recovery is its connection to a predicate (profit generating) crime. This connection to criminal behaviour is also a defining characteristic of criminal law punishments. As noted by the European Court of Human Rights in *Welch v United Kingdom*, apart from the type of procedure and the nature and purpose of a penalty, the connection to an offence is also an important factor in determining whether a penalty is punitive or remedial.[891] In this regard, it is to be noted that, while the procedure might be labelled "civil", the confiscation is that of proceeds of crime meaning that the confiscation is as a consequence of a crime - it presupposes that a property owner had been involved either directly or indirectly in the crime from which the proceeds springs.[892] Of course, civil remedies can also be a consequence of criminal conducts, such as where a private individual institutes civil proceedings against criminals for compensatory remedies.[893] However, unlike these private cases, the confiscation of proceeds of crime, as already noted, is a consequence of a state's (rarely private) public action, which makes it to be more in tandem with a criminal punishment regime than a civil remedy one.

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[887] See, for example, W Blackstone (7ed) *Commentaries on the Laws of England in Four Books* (1775) 2 (dividing wrongs in civil injuries which infringe upon private rights and crimes which breach public duties).
[888] See GP Fletcher *Rethinking criminal law* (1978) 409 (citing cases to show that the test for when processes are criminal is the concept of punishment).
[889] On the history of this viewpoints, see MJ Horwitz "The History of the Public/Private Distinction" (1982) 130(6) *University of Pennsylvania Law Review* 1423.
[890] See RE Edwards "Forfeitures – civil or criminal?" (1970) 43 *Temple Law Quarterly* 191 at 191 (noting that confiscation "is a state action whereby the state seizes and claims property rights in private property without compensation to the owner").
[891] *Welch v United Kingdom* (1995) 20 EHRR 247 para 28. see also *Phillips v United Kingdom* Application number 4087/98, 10.
[892] See L Jordaan "Confiscation of the proceeds of crime and the fair-trial rights of an accused person" (2000) 15 *South African Journal of Criminal Justice* 41.
[893] See for example, the COE Civil Convention (providing for civil litigation in corruption cases).

Then there is the punitive effect of assets recovery. Indeed, contrary to South Africa's Court's assertion in the *Phillips* case that confiscation of proceeds of crime is remedial because it only takes away that which does not belong to the defendant, the confiscation does in fact take away more than just the fruit of crime.[894] It also takes away the positive social standing of the defendant. This is because, confiscation, though formally a proceeding against the illegal proceeds, usually carry with it a suggestion, derived from its connection to a crime, that the property owner was involved either directly or indirectly in the commission of the crime.[895] This insinuation brings with it moral condemnation in the form of social stigma. And although social stigma could also apply in some cases to civil remedies, the truth of the matter is that *social* moral condemnation is more a consequence of criminal punishment than civil remedy.[896] This is mainly because criminal punishment is associated with "social harm" (harm against the society) while civil remedy is associated with "individual harm" (harm against a particular individual).[897] As a result, civil remedies are often viewed, rightly or wrongly, as a response to private injuries that does not concern the larger society while criminal punishments are seen as a response to a social wrong that concerns the whole society.[898]

Thus, since assets recovery is used by the government (a representative of society) to fight crime (social harm), the owner of the targeted property, in the public eye, is most likely to be

[894] The Constitutional Court seems to base its holding that assets recovery is not a punishment on the ground that it "merely" deprives a criminal of "a benefit to which he was not entitled in the first place". Though not explicitly stated the argument seems to be that because it does not take away anything that belongs to the defendant, it cannot be punitive. See *S v Shaik and Others* [2008] ZACC 7 para 51 quoting with approval the Supreme Court of Appeal's judgment in *NDPP v Rebuzzi* 2002 (1) SACR 128 (SCA) para 19 that "[t]he primary object of a confiscation order is not to enrich the State but rather to deprive the convicted person of ill-gotten gains."

[895] On stigma, see Eric Rasmusen "Stigma and self-fulfilling expectations of criminality" (1996) 39(2) *Journal of Law and Economics* 519.

[896] See CS Steiker "Foreword, Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide" (1997) 85 *Georgetown Law Journal* 775 (contending that moral blaming is an exclusive characteristic of criminal punishment). Compare with MM Cheh "Constitutional Limits on Using Civil Remedies To Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction" (1991) 42 *Hastings Law Journal* 1325 at 1352-1354 (contending that the stigma, which she describes as the "judgment of community condemnation" on a transgressor, is not a useful criterion for distinguishing criminal punishment and civil remedy because the social condemnation can apply in both criminal and civil cases. She cites the negligent discharge of toxic wastes in the environment, which though civil in nature, also attracts equal, if not more, social opprobrium like other ordinary criminal offenses).

[897] See J Hall, "Interrelations of Criminal Law and Torts (pts. 1 & 2)" (1943) 43 *Columbia Law Review* 753 at 974 (pointing out the concepts of "social harm" and "'morally culpable conduct" in the criminal law, as opposed to "individual harm" and objective responsibility in tort).

[898] See SR Klein "Redrawing the Criminal-Civil Boundary" (1999) 2(2) *Buffalo criminal law review* 679 at 679-680. But see HM Hart "The aims of criminal law" (1958) 23 *Law & Contemporary Problems* 401 at 403 (contending that the difficulty with this position is "that society is interested also in the due fulfillment of contracts and the avoidance of traffic accidents and most of the other stuff of civil litigation").

associated with the social harm.[899] This is especially true with regard to corruption, which normally involves theft of public money or property. The effect of such an association is that a defendant, in addition to the deprivation of property, also suffers social stigma, which can be either economic (for example, difficulty in finding a job), political (for example, difficulty in being elected or appointed to public office) or social (for example, difficulty in finding a spouse or maintaining friends). This effect is particularly harsh in instances of non-conviction based confiscations as the state would not have proven the criminal guilt of the property owner nor would the defendant have been given an opportunity to prove his criminal innocence.

In addition to the social stigma, the penal effect of assets recovery also derives from the personal energy, resources and risks that could have been invested by the defendant during and after the acquisition of the proceeds which is lost when the fruit of such effort is taken away. Though, these investments could be dismissed as being illegal, the point to note is that the question of whether an action has punitive effect or not is one that is usually considered from the defendant's perspective.[900] From a defendant's perspective, when the proceeds of crime is confiscated, not only does he lose the fruit of his crime but he also loses the labour that he invested in acquiring, and in some cases in maintaining, that fruit. For example, the South African Constitutional Court has acknowledged in *S v Shaik* that the value of the proceeds to be confiscated under POCA is not the net value of the proceeds but the gross value inclusive of all the attendant expenses incurred by the offender.[901] The English case of *R v Smith (David)* which was discussed by the South African Constitutional Court in *S v*

[899] Indeed, confiscation, though formally a proceeding against offending property carries the insinuation that the property owner either participated in, obtained profits from, or somehow abetted others in the commission of a crime.

[900] *Welch v United Kingdom* (1995) 20 EHRR 247 para 32.

[901] *S v Shaik and Others* [2008] ZACC 7 para 59-62. These expenses include the price or other *quid pro quo* the defendant might have paid or given for the proceeds he received in connection with his crime. In the *Shaik* case, the respondents argued that the definition of proceeds of crime under POCA did not relate to gross proceeds but to the net proceeds of crime. Specifically, the respondents sought to exclude from confiscation the shares and dividend from the shares which they had bought in their company targeted for confiscation on the ground that they had given value to buy the shares. To purchase the shares, they raised a loan which was secured by an escrow agreement. This loan was ultimately fully repaid by the dividends as and when they were declared. In the respondent's contention, the POCA did not permit the confiscation of both the shareholding and the dividends. In their view the definition of "proceeds of crime" in section 1 of POCA applied only to net proceeds of a crime. In disagreeing with this view, the Constitutional Court held that the broad definition of proceeds to include any property, advantage or reward derived, received or retained directly or indirectly in connection with or as a result of any unlawful activity, meant that even the dividends used to pay the could not be subtracted from the final proceeds subject to confiscation as it formed part of the profit derived from the unlawful activity.

Shaik and Others[902] similarly seems to appreciate the defendant's subsequent risks though dismisses, wrongly in the thesis view, its penal value in the assessment of the punitive effect of Assets recovery:

> "It therefore makes no difference if, after [an offender] obtains it, the property is destroyed or damaged in a fire or is seized by customs officers: for confiscation order purposes the relevant value is still the value of the property to the offender when he obtained it. *Subsequent events are to be ignored* (Emphasis added)."[903]

While the Court in *R v Smith (David)* did note that the purpose for ignoring those subsequent events was to ensure "simplicity" in the calculation of the value of proceeds,[904] the fact remains that in the instance where the subsequent events mentioned do occur the value of the proceeds to the defendant would be more than the *actual* value of the property at the time of acquisition. Indeed, as the court in *R v Smith (David)* later acknowledged, ignoring the subsequent cost can in some circumstances "operate in a *penal or even a draconian manner*".[905] In the same vein, the South African Court's reasoning in the *Phillips* case that the heinousness, severity, or impact of the crime is rendered entirely irrelevant in assets recovery proceeding cannot be entirely true since the amount of proceeds of crime would most likely be affected by the heinousness or severity of the crime.[906] In other words, the bigger the acquisitive crime the more is the proceeds likely to be and consequently the bigger is the amount or property that the state is likely to confiscate.

But even assuming that the social stigma and incidental costs do not apply, the argument employed by the South African Court in the *Phillips case* that confiscation of proceeds of crime does not amount to punishment on the ground that it "merely" deprives a criminal of "a benefit to which he was not entitled in the first place", would still not hold as a matter of principle. Such an argument seems to say that because assets recovery does not take away anything that belongs to the defendant, it cannot be punitive. Such an argument, however, fails to appreciate that the purpose of criminal punishment is not to inflict pain on the defendant that is disproportionate to the harm caused. Indeed, the retributive aim of punishment is to ensure that a defendant is served a "just dessert" for the harm he/she has

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[902] *S v Shaik and Others* [2008] ZACC 7 para 55 (though the Court did indicate that it is not bound by the approach employed in the case, the case is useful in illustrating the loss of incidental costs in the assets recovery).
[903] The dictum of Lord Rodger of Earlsferry in *R v Smith (David)* [2002] 1 All ER 366 para 23.
[904] *R v Smith (David)* [2002] 1 All ER 366 para 23 ("Such a scheme has the merit of simplicity").
[905] *R v Smith (David)* [[2002] 1 All ER 366 para 23 (emphasis added).
[906] *NDPP v Phillips* 2001 (2) SACR 542 (W) 584a-b.

caused, that is, a punishment equal in proportion to the wrong committed.[907] The rationality for this proportionality in retribution arises from the fact that punishment is seen as re-establishing some kind of societal balance disturbed by an offense.[908] Such a balance cannot be re-established if the severity of the punishment is disproportionate to the harm caused by the offense.[909] Similarly, the deterrence objective of punishment is to ensure that punishment is just severe enough to cancel the gain from crime.[910] The argument is that without proportionality, people will not be deterred from committing more serious crimes (for example, if rape and murder are both punished by death penalty, a rapist would have little reason for refraining from killing his victim as either way he is destined to death if caught).[911] In other words, a confiscation order that takes away from the defendant more than the actual proceeds would not be in tandem with the objective of punishment as it would be seen as unjust and non-deterrent.[912]

Thus, the fact that confiscation of proceeds of crime targets only that which was illegally acquired or its equivalent does not in any way make it less punitive. To the contrary, from a just dessert perspective, it ensures that criminals do not profit from their crimes and that society and other victims of crime are restored to the position they were in before their

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[907] For a discussion, see generally DA Starkweather "The Retributive Theory of "Just Desserts" and Victim Participation in Plea Bargaining" (1992) 67(2) *Indiana Law Journal* 853; CS Lewis "The humanitarian theory of punishment" in CS Lewis *God in the Dock: Essays on Theology and Ethics* (1970) 287; J Murphy *Retribution, justice and therapy: essays in the philosophy of law* (1979); A Von Hirsch *Doing justice: the choice of punishments* (1976).

[908] As David Starkweather aptly explains in DA Starkweather "The Retributive Theory of "Just Desserts" and Victim Participation in Plea Bargaining" (1992) 67(2) *Indiana Law Journal* 853 at 857:

> "Since crime is defined as the violation or disturbance of the "right" relationships in the community, the goal of the retributive theory of justice is to reconcile these relationships. Reconciliation is accomplished by making an offender "pay" for the disturbance his or her conduct has caused.".

[909] As A Von Hirsch *Doing justice: the choice of punishments* (1976) 66 notes:

> "If one asks how severely a wrongdoer deserves to be punished, a familiar principle comes to mind: *Severity of punishment should be commensurate with the seriousness of the wrong.* Only grave wrongs merit severe penalties; minor misdeeds deserve lenient punishments. Disproportionate penalties are undeserved-severe sanctions for minor wrongs or vice versa (emphasis in original)."

[910] See CR Sunstein "The Limits of Compensatory Justice" in JW Chapman *Compensatory justice: NoMos XXXIII* (1991) 281 at 282 (noting that the purpose of civil remedy "is to restore the plaintiff to the position that he would have occupied if the unlawful conduct had not occurred").

[911] But see CB Beccaria *An essay on crimes and punishment* (1801) 94-98 (pointing out that the more severe the sanction, the greater its deterrent effect). This assumption is however limited by a competing principle of human dignity which opposes increasing severity beyond a certain point, even though a greater deterrent effect may be obtained. For a discussion, see generally M Warr *et al* "Norms, theories of punishment, and publicly preferred penalties for crimes" (1983) 24 *Sociological Quarterly* 75.

[912] But see MM Cheh "Constitutional Limits on Using Civil Remedies To Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction" (1991) 42 *Hastings Law Journal* 1325 at 1355 arguing that:

> "Whatever the final calculation, the punishment must amount to more than recompense or restitution. The theory is that humans, as rational weighers of the risks and benefits of their actions, *will risk being penalized if the worst they face is having to pay market value for their illicit gains* (emphasis added)."

property was illegally taken away from them.[913] It is "just" because it guarantees that nobody (not the state nor the defendant) is unfairly advantaged and that only the *status quo ante* is restored.[914] It is also deterrent because an offender who loses all financial benefits from his criminal activity would more likely be dissuaded by the apparent lack of profit from undertaking similar criminal ventures in future.[915] Thus, even without taking into account the social stigma or the incidental costs incurred by the defendant, the mere deprivation of proceeds of crime is of itself punitive. Indeed as judge Van Heerden rightly observed in the South African case of *Mohunram and Another v NDPP and Another* and the European Court of Human Rights noted in *Welch v United Kingdom,* assets recovery by depriving the defendant of the proceeds of his crime does also serve the objectives of punishment.[916]

In summary, a careful examination of the nature and effects of the assets recovery strategy lead to the conclusion that the confiscation of proceeds of crime, even though having remedial characteristics, is also punitive. The question that remains to be answered is whether this punitive nature, or at least effect, of assets recovery should, therefore, require the applicability of the right to fair trial to its non-conviction based procedures.

4.7. The applicability of the right to fair trial to non-conviction based assets recovery

State practice shows that, in spite of the punitive characteristics of assets recovery, the recovery of proceeds of crime is in fact enforced using the civil law procedure.[917] Indeed, in cases brought to challenge the legal and constitutional basis of using civil procedure to recover proceeds of crime, the courts in a number of jurisdictions have invariably held that

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[913] E Erez "Victim Participation in Sentencing: Rhetoric and Reality" (1990) 18 *Journal of Criminal Justice* 23 (Pointing out that the 'just deserts' model of justice specifically views the concern for victims in the criminal justice process as an integral part of proportionality).

[914] As one putative research has shown:

> "the criminal who convinces his jail mates that 'his' assets are waiting for him when he is released, gains status in the eyes of his fellows; conversely, the one who is publicly stripped of 'his' assets loses status."

M Levi & L Osofsky "Investigating, seizing and confiscating the proceeds of crime" (1995) *Police Research Group Crime Detection and Prevention Series: Paper No 61* 1 at 25.

[915] See MM Gallant *Money Laundering and the Proceeds of Crime: Economic Crime and Civil Remedies* (2005) 3.

[916] *Mohunran v NDPP* 2007 (2) SACR 145 (CC) para 57; *Welch v United Kingdom* (1995) 20 EHRR 247 262.

[917] For an exposition, see TS Greenberg *et al Stolen Asset Recovery: A Good Practices Guide for Non-Conviction Based Asset Forfeiture* (2009) 109-191 (Discussing the forfeiture regimes in representative countries from both the common law tradition and the civil law tradition). See also TR Piety "Comment, Scorched Earth: How the Expansion of Civil Forfeiture Doctrine Has Laid Waste to Due Process" (1991) 45 *University of Miami Law Review* 911 (1991).

these proceedings are constitutional.[918] In reaching this conclusion, the courts have found that the civil assets recovery procedure is either an exception to the fair trial procedural requirements or that it is a justified limitation of the same. The first finding, as we have already seen, implies that the human right to fair trial does not apply to these civil assets recovery procedures at all, while the latter finding implies that the right applies to these procedures but that its application is totally or partially overridden in these cases by some stronger considerations, such as public security.[919]

The South African and the Kenyan Courts in addressing the fair trial challenges brought against their respective non-conviction based assets recovery procedures have concluded that these procedures are not in breach of the right to fair trial. In reaching this conclusion, the Courts have interpreted the scope of the right to fair trial and found its application to be limited to proceedings in which a person is accused of a criminal offence. Based on this finding, the Courts have argued that since the defendant in a non-conviction based assets recovery proceedings is not being accused of any crime, the right to fair trial does not apply. In other words, according to the Courts, the non-conviction based assets recovery procedure falls in the category of procedures that are exempted from adhering to the tenets of the right to fair trial.[920] In this regard, the Courts' analyses have not required an inquiry into whether the procedures are justified limitations of the right to fair trial. Such an inquiry is only triggered if it is found that the challenged procedure is covered by the right to fair trial and has also breached the right's tenets, which is not the case with these procedures according to the South African and Kenyan courts.[921]

[918] Courts have upheld the legality and constitutionality of the civil procedure in many jurisdictions including Colombia (see Constitutional Court, Sentence C-1065-03, Judge Dr. Alfredo Beltrán Sierra (Law 793 of 2002));, South Africa (see *NDPP v. Mohamed No and Ors*, [2003] ZACC 4); Kenya (see *KACC v Stanley Mombo Amuti* Civil suit No. 448 of 2008); Thailand (see *Charles Mescal and Mrs. Tayoy*, Case Nos. 40-41/2546 (October 16, 2003); Ireland (see *Murphy v. GM, PB, PC Ltd*., and GH, O'Higgins J., June 4, 1999 (Supreme Court of Ireland)); United States (see *Calero-Toledo v. Pearson Yacht Leasing Co*., 416 U.S. 663 (1974)); and Canada (see *Attorney General of Ontario v. Chatterjee*, [2007] ONCA 406 (Ontario Court of Appeal)).

[919] See the discussion on the "trump of human rights over collective demand" at section 4.2.4. above.

[920] Other instances where it does not apply include where a sanction is imposed by a domestic disciplinary tribunal (see *Cuppan v Cape Display Supply Chain Services* 1995 (4) SA 175 (D); *Myburgh v Voorsitter van die Schoemanpark Ontspanningsklub Dissiplinere Verhoor* 1995 (9) BCLR 1145 (O)) or where a person is committed to prison for contempt of court (*Nel v Le Roux NO* 1996 (3) SA 562 (CC) para 11; *De Lange v Smuts NO* 1998 (3) SA 785 (CC) paras 37 to 38 and 66 to 67).

[921] See H Webb "The Constitutional Court of South Africa: rights interpretation and comparative constitutional law" (1999) 1 *University of Pennsylvania Journal of Constitutional Law* 205 at 220-225.

4.7.1. South African jurisprudence

The South African jurisprudence is well captured in the already discussed case of *NDPP v Phillips.*[922] In that case, the prosecution sought to confiscate the proceeds of crime from the defendant under Chapter five of the POCA.[923] Chapter five allows the prosecution to apply for a confiscation order for the confiscation of the proceeds of crime from an accused who has been convicted of the crime. Though a conviction based confiscation, the POCA provides that the proceedings on application for a confiscation order are civil proceedings and not criminal proceedings and that the rules of civil proceedings apply.[924] The defendant objected to the application of the prosecution arguing, *inter alia*, that the proceedings leading to a confiscation order are inherently criminal proceedings and incorrectly classified as civil proceedings under POCA. Thus, in his contention, a person against whom a confiscation order is sought is entitled to the right to fair trial set out in s 35(3) of the Constitution. The court rejected this argument holding that the right to fair trial did not apply to these proceedings. The Court based its conclusion on a number of reasons.

The court began by expressing the view that the fact that an application for a confiscation order is preceded by a criminal conviction, could not in itself constitute the proceedings criminal for purposes of the application of the right to fair trial.[925] In the Court's view, the question whether proceedings of this kind are to be characterised as civil or criminal in nature also depended on their purpose and context. In determining the purpose and context of confiscation order under chapter 5 of POCA, the Court then focused, not on the purpose of confiscation of the proceeds of crime as such, but rather on the purpose of the characterisation of the proceedings. It observed that the reason for examining the purpose of the characterisation was to determine whether such proceedings are subject to the right to fair trial under section 35(3) of the Constitution. Since section 35(3) of the Constitution does not speak of "criminal proceedings", but prescribes the rights of every "accused person", the critical question had to be whether a defendant against whom a confiscation order is sought is an "accused person". In the Court's view a person against whom confiscation proceedings have been instituted did not qualify as an "accused person".[926]

[922] *NDPP v Phillips* 2001 (2) SACR 542 (W).
[923] POCA.
[924] POCA, s 13.
[925] *NDPP v Phillips & Others* 2002 (1) BCLR 41 (W) para 40.
[926] *NDPP v Phillips & Others* 2002 (1) BCLR 41 (W) para 41.

This conclusion according to the Court was supported by the text of section 35(3), which on a clear reading showed that none of the specific rights mentioned in the section are applicable to a defendant in confiscation proceedings. First, such a defendant is not called upon to answer a "charge" as required by section 35(3)(a) nor can he or she be presumed innocent in terms of section 35(3)(h) as the proceedings are only instituted after his or her conviction – his guilt or innocence is not in issue in such proceedings.[927] Section 35(3)(i) and (m), on the principle of legality and the rule against double jeopardy, are also inapplicable because only proceedings by which an accused person is tried and convicted for an offence are subject to those sections. An application for a confiscation order, according to the Court, was not that kind of proceeding as the defendant is not under a criminal trial nor does the application culminate in the conviction of the defendant. The Court also found that section 35(3)(n), which guarantees the benefit of the least severe of the prescribed punishments if the punishment has changed between the time that the offence was committed and the time of sentencing, was inapplicable. According to the Court a confiscation order "constitutes punishment only if its purpose is to punish the defendant for his crime", which was not the case as its purpose was not to punish but to deprive the defendant of a benefit to which he was not entitled to in the first place.[928] For these reasons, the Court concluded that the entire guarantees of the right to fair trial under section 35(3) did not apply to the confiscation process.

The *Phillip's* decision, however, related to an application for a civil confiscation of criminal proceeds following the conviction of the defendant under chapter 5. This procedure, though civil in nature, is, however, different from the non-conviction based confiscation procedure contemplated under chapter 6 of POCA. The Constitutional Court has summarised the difference between Chapter 5 and chapter 6 confiscations in *NDPP and Another v Mohamed NO and Others*[929] thus:

> Chapter 5 provides for the forfeiture of the benefits derived from crime but its confiscation machinery may only be invoked when the "defendant" is convicted of an offence. Chapter 6 provides for forfeiture of the proceeds of and instrumentalities used in crime, but is not conviction-based; it may be invoked even when there is no prosecution.[930]

Still, both chapter 5 and chapter 6 confiscations provide that the proceedings on application for a confiscation order are civil proceedings and not criminal proceedings and

[927] *NDPP v Phillips & Others* 2002 (1) BCLR 41 (W) para 41.
[928] *NDPP v Phillips & Others* 2002 (1) BCLR 41 (W) para 41-43.
[929] *NDPP and Another v Mohamed NO and Others* [2002] ZACC 9.
[930] *NDPP and Another v Mohamed NO and Others* [2002] ZACC 9 para 16.

that the rules of civil proceedings apply.[931] The reasoning of the court in *NDPP v Phillip* would therefore still be applicable to the non-conviction based assets recovery procedures under chapter 6 of POCA. In other words, since the defendant in the non-conviction based assets recovery mechanism is not an "accused" in the sense that he or she is not called upon to answer a "charge" as required by section 35(3)(a) of the Constitution, the right to fair trial would not be applicable to these procedures. As held by the Constitutional Court in *Prophet v NDPP*:

> [Non conviction based confiscation] rests on the legal fiction that the property and not the owner has contravened the law. It *does not require a conviction or even a criminal charge against the owner*. This kind of forfeiture is in theory *seen as remedial and not punitive*.[932]

This characterisation of non-conviction based confiscation clearly (following the reasoning in *Phillips)* places it beyond the reach of the right to fair trial. Indeed as stressed by the Constitutional Court in *NDPP v Mohamed NO,* non-conviction based confiscation's primary focus is not on wrongdoers as the guilt or wrongdoing of owners or possessors of property is "not primarily relevant to the proceedings".[933] Meaning that since the procedure is not concerned with the guilt of the owner; the right to fair trial is not applicable as the defendant would not meet the qualification of an accused. As noted by the Constitutional Court in *Nel v Le Roux NO*[934] an accused is a person "facing criminal prosecution".[935]

4.7.2. Kenyan jurisprudence

The jurisprudence of the South African courts is similar to that of Kenya. For example, in the case of *Christopher Ndarathi Murungaru v KACC & Another*[936] the appellant, Christopher Murungaru, was issued with a notice to furnish the respondent, KACC (now the EACC), with certain information relating to the source of his wealth under section 26 of the ACECA. The said section empowers the Commission to require a person reasonably suspected of corruption or economic crime to furnish it with a written statement enumerating his or her property, the time at which they were acquired and the manner in which they were acquired. Failure to furnish the information is considered criminal and is punishable by a fine not exceeding three hundred thousand shillings or to imprisonment for three years or to both. Also under section 55, failure to satisfactorily explain the source of wealth can trigger an

[931] Compare s 13 of chapter 5 and s 37 of chapter 6 of the POCA.
[932] *Prophet v NDPP* 2007 (6) SA 169 (CC) para 58 (emphasis added).
[933] *NDPP and Another v Mohamed NO and Others* [2002] ZACC 9 para 17.
[934] *Nel v Le Roux NO* 1996 (3) SA 562 (CC).
[935] *Nel v Le Roux NO* 1996 (3) SA 562 (CC) para 11.
[936] *Christopher Ndarathi Murungaru V KACC & Attorney- General* (2006) eKLR.

application by the Commission to the Court for a civil confiscation order for the confiscation of the unexplained wealth.

The applicant objected to the notice and applied to the High Court arguing that section 26 was unconstitutional as it implicitly negated the right to fair trial under s 77 of the 1963 Constitution (now repealed and replaced by section 50 of the 2010 Constitution) especially as it related to the presumption of innocence, right to silence, and presumption against self-incrimination. According to the applicant any trial commenced on the basis of investigations pursuant to the said statutory notice would not be fair and would violate the Applicant's fundamental right to a fair trial. The Commission responded to this objection arguing that the right to fair trial only came into play once a person was charged in a court of law and not before. After considering these arguments, the court concluded that the right to fair trial was only available at or during a criminal trial and only to an "accused" person who has "been *charged* in [a] court of law".[937]

This position of *Christopher Ndarathi Murungaru* was confirmed in the case of *KACC v Stanley Mombo Amuti* where the Court, as already discussed,[938] held that the right to fair trial did not apply to the non-conviction based assets recovery proceedings under section 55 of the Anti-Corruption Crimes Act because the "proceedings under section 55 is a [c]ivil proceedings". According to the court because the provided procedure is civil, the normal rules of evidence and standard of proof would apply.

4.7.3. Comparative jurisprudence

The Kenyan and South African Courts in determining whether civil confiscations are subject to the right to fair trial have focused on the legislature intent in the *characterisation* of the proceedings as civil proceedings. In South Africa, the courts have examined the purpose for the creation of the non-conviction based assets recovery mechanism and found that the aim is to remedy crime not punish criminals, a finding that has made them conclude that criminal law procedural guarantees are not meant to apply. For example, in *NDPP v Phillips* the court noted that because the right to fair trial provision in the Constitution did not speak of "criminal proceedings" but prescribed the right of every "accused" person, it had to be determined whether a defendant against whom a confiscation order was sought is an

[937] *Christopher Ndarathi Murungaru V KACC & Attorney- General* (2006) eKLR 76 (emphasis added).
[938] See s 4.6.1 above.

"accused".[939] The court then proceeded to analyse whether in non-conviction based proceeding the defendant could be considered an accused, concluding that the defendant could not because he or she is not called upon to answer to a punitive charge.[940] On the other hand, in Kenya, the courts have resorted to the label given to non-conviction based procedure by the legislature and found that since the non-conviction based mechanism is labelled civil in the law, the intention is that the criminal law procedural guarantees are not to apply. While the South African Court's analysis is more comprehensive, comparing each element of the right to fair trial with the character of the confiscation proceedings, the Kenyan Court's analysis has been less detailed. For example, in the case of *KACC v Stanley Mombo Amuti*, the Court merely paid deference to the legislature's characterisation of the non-conviction based confiscation as civil. The Court found that the right to fair trial did not apply to these proceedings because the "proceedings under section 55 is a [c]ivil proceedings".[941]

Still, relying on legislative intent as the basis of analysing the applicability of the right to fair trial is problematic as it often leads to the confirmation of the legislature's intent to exclude the application of the fair trial guarantees. As judge Madlanga noted in *obiter* in the South African case of *NDPP v Mcasa*[942] "[I]t seems more than likely that the deliberate choice of the above labels (use of "civil" as opposed to "criminal" and use of "defendant" as opposed to "accused") was intended to put Chapter 5 (and by extension chapter 6 of South Africa's POCA) proceedings beyond the reach of s 35 protection of the Bill of Rights".[943] In the court's view, a constitutional analysis of these chapters should go beyond the labels. "…it is the substance (and not the labels) that [should] determine these constitutional issues."[944] Indeed Judge Heher in *NDPP v Phillips* did heed the call of *Mcasa* but instead of analysing the character of the confiscation of the proceeds of crime, concentrated exclusively on analysing the purpose of the *characterisation* of the proceedings as civil proceedings.

In contrast to the Kenyan and South African approach, the European Court of Human Rights has adopted an approach that goes beyond the characterisation of the proceedings and looks at the substance of the confiscation. As it noted in *Welch v United Kingdom,* one

[939] *NDPP v Phillips* 2001 (2) SACR 542 (W) 583a-d.
[940] *NDPP v Phillips* 2001 (2) SACR 542 (W) 583a-d.
[941] *KACC V Stanley Mombo Amuti* [2011] eKLR 16.
[942] *NDPP v Mcasa* 2000 (1) SACR 263 (Tk).
[943] *NDPP v Phillips* 2001 (2) SACR 542 (W) 269d.
[944] *NDPP v Phillips* 2001 (2) SACR 542 (W) 269e.

"must remain free to go behind appearances and assess for itself whether a particular measure amounts in *substance* to a penalty".[945] Using this approach, the Court has concluded, for example in the *Welch v United Kingdom* case that the confiscation of proceeds of crime is in fact a penalty that should be subject to the right to fair trial. In that case, however, the court stressed that its conclusion applied only to the retrospective aspect of the relevant legislation and did not have a bearing in any respect to the powers of confiscation to be used by the courts as a weapon against drug trafficking.

Interestingly, in *Phillips v United Kingdom*[946] where the aspect of the right to fair trial under consideration was the presumption of innocence, the Court while applying the same approach as *Welch* did find that the presumption of innocence though generally applicable to punitive actions was justifiably excluded in the confiscation process under consideration. In that case the issue was whether the conviction based confiscation of proceeds of drug trafficking under the UK's Drug Trafficking Act of 1994 on the basis of factual reverse onus-type presumptions violated the Applicant's right to fair trial specifically the right to be presumed innocent.[947] The European Court of Human Rights found that the case raised a serious question under section 6(2) of the European Convention (on presumption of innocence) and required an examination on the merits. In the case before the European Court, the applicant contended that, rather than simply forming part of the sentence for the crime of which he had been convicted, the proceedings leading to the confiscation order were a judicial process which involved his being "charged with a criminal offence" within the meaning of section 6(2) and as such even at the confiscation stage, the burden of proof lay with the prosecution to prove its case beyond reasonable doubt. The United Kingdom government on the other hand argued that the confiscation proceedings did not amount to the Applicant being charged with any additional offence and so section 6(2) did not apply.

In its decision, the European Court of Human Rights noted that to determine whether

[945] *Welch v United Kingdom* (1995) 20 EHRR 247 paras 27 & 34 (emphasis added).
[946] *Phillips v United Kingdom* Application number 4087/98.
[947] In determining whether and to what extent the defendant has benefitted from drug trafficking, section 4(2) of the Drug Trafficking Act of 1994 requires the court to assume that any property appearing to have been held by the defendant at any time since his conviction or during the period of six years before the date on which the criminal proceedings were commenced, was received as a payment or reward in connection with drug trafficking, and that any expenditure incurred by him during the same period was paid for out of the proceeds of drug trafficking. This assumption can be set aside if shown by the defendant to he incorrect, or if there would be a serious risk of injustice if it were applied (section 4(4) of the Drug Trafficking Act 1994).

section 6(2) applied to the confiscation proceedings it had to take into account three criteria: the classification of the proceedings under national law, their essential nature, and the type and severity of the penalty that the applicant risked incurring.[948] As regards the first of these criteria, the court found that under the United Kingdom's law such confiscation applications did not amount to a new charge. With regard to the second and third criterion (the nature of the proceedings and the type and severity of the penalty at stake), the court noted that the assumption that all property held by the applicant within the preceding six years represented the proceeds of drug trafficking meant that the national court had to assume that the defendant had been engaged in other unlawful drugs-related activity prior to the offence of which he was convicted.[949] The law also placed the burden of proving, on a balance of probabilities, that the targeted property was acquired otherwise than through drug trafficking on the defendant.

The Court, however, held that since the purpose of this procedure was not the conviction or acquittal of the applicant for any other drug-related offence but to enable the national court assess the amount at which the confiscation order should be fixed, it could not be said that the applicant was "charged with a criminal offence". As to whether the presumption of innocence guarantee in section 6(2) should nevertheless protect the applicant from assumptions made during the confiscation proceedings, the Court concluded that the right to be presumed innocent arose only in connection with the particular offence "charged".[950] And since the defendant was not being charged with a new offence but was going through the sentencing process, the right to presumed innocent did not apply. In the court's view, this procedure was analogous to the determination by a court of the amount of a fine or the length of a period of imprisonment to impose upon a properly convicted offender. The court pointed out that this was indeed the conclusion which it reached in *Welch v United Kingdom* when it decided that a confiscation order constituted a "penalty" within the meaning of section 7.

Interestingly, though finding that the right to be presumed innocent did not apply in the conviction based confiscation since the owner of targeted property was already found guilty, the Court still went ahead to determine whether the broader right to a fair hearing under section 6(1) of the Convention had nevertheless been infringed. Considering the

[948] *Phillips v United Kingdom* Application number 4087/98, 9.
[949] Drug Trafficking Act of 1994, s 4.
[950] *Phillips v United Kingdom* Application number 4087/98, 10.

scope of this provision, the court held that the right to presumed innocence, in addition to being specifically mentioned in section 6(2), formed part of the general notion of a fair hearing under section 6(1). In the Court's conclusion, section 6(1) applied at all stages of proceedings, including the stage where a sentence is being fixed. Because it formed part of the right to fair hearing under section 6(1) and because confiscation proceeding is analogous to the sentencing process, the Court found that the presumption of innocence applied to the confiscation proceedings.[951]

However, since this right is not absolute,[952] it had to be examined whether the manner in which the presumption of guilt was applied in the applicant's case did not offend the basic principles of a fair procedure inherent in section 6(1). The court found that there were certain safeguards in the system provided under the Drug Trafficking Act that made it a reasonable limitation of the right to presumption of innocence. In the court's view, the principal safeguard was the fact that the assumption (that property held in the preceding six years was proceeds of crime) could be rebutted by the defendant showing, on a balance of probabilities, acquisition of the property other than through drug trafficking. The judge also had discretion not to apply the assumption if he or she considered that applying it would give rise to a serious risk of injustice. These safeguards in the Court's view made the Act not to unreasonably offend the requirements of presumption of innocence.[953]

These decisions of the European Court in both the *Welch* and *Phillips* cases related to the use of civil procedure in the conviction based type of assets recovery, where the state first proves the criminal guilt of the defendant, and then uses the civil process to recover the proceeds from that crime. However, the approach should be applicable in determining whether the civil procedure in the non-conviction based type of assets recovery is also subject to the right to fair trial. The Court's holding in *Welch* that confiscation of proceeds of crime amounts to a criminal penalty would mean that the right to fair trial should apply to these proceedings as well. Indeed the Court has held in *Dassa Foundation v. Liechtenstein*[954] that a provision that

[951] It is worth noting that Article 6 of the European Convention of Human Rights makes a distinction between those charged with a criminal offence and those whose civil rights and obligations are being determined. The protections in Articles 6(2) and (3) on right to fair trial are only expressed to apply to the former.
[952] *Phillips v United Kingdom* Application number 4087/98, 11 (noting that the right is not absolute)
[953] Other safeguards included: the fact that the assessment was carried out by a court with a judicial procedure including a public hearing; provision was made for advance disclosure of the prosecution case and the opportunity for the applicant to adduce documentary and oral evidence. Moreover, the court was empowered to make a confiscation order of a smaller amount if satisfied, on a balance of probabilities, that only a lesser sum could be realized. *Phillips v United Kingdom* Application number 4087/98, 12.
[954] *Dassa Foundation v. Liechtenstein* European Court of Human Rights, Application no. 696/05 (July 10, 2007).

allows for the confiscation of proceeds of crime on "a *suspicion* that the assets originate from an act liable to punishment (which is a lesser standard than that in non-conviction based confiscations where standard of proof of criminal origin is usually to the civil standard of balance of probability)" could be punitive and thereby make it amenable to the requirements of the right to fair trial, specifically the right against retrospectivity of punishment, which was the issue in the case.[955] Such a finding on the nature of assets recovery would then lead to a determination of whether the civil procedure in the non-conviction based type of assets recovery complies with the requirements of the right. Where it does not and the Bill of Rights provides for limitation of the right, a second stage inquiry to determine whether the procedure is nevertheless justified would then be undertaken.

This substantive approach of examining both the nature of the confiscation and the characterisation of the procedure in determining the applicability of the right to fair trial is also recommended by the Human Rights Committee (HRC).[956] For example in the case of *Perterer v. Austria*[957] the Committee noted that, though the right to fair trial under the ICCPR applies in procedures meant to punish acts declared punishable under domestic law, the right may also apply in procedures meant for "sanctions that, *regardless of their qualification in domestic law*, are penal in nature".[958] Though the case did not concern proceeding for confiscation order, the principle enunciated by the Committee can be used to analyse the applicability of the right to fair trial to these procedures.[959] The advantage of this substantive approach of examining both the substantive character of the confiscation and the characterisation of the procedure by domestic legislatures, as opposed to only examining the purpose of the legislature's *characterisation* of the confiscation, is that it ensures that courts play their rightful role of providing authoritative interpretation to the conflicts between the state and its subject and not merely being deferential to the legislative labels of these proceedings.[960]

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[955] *Dassa Foundation v. Liechtenstein* European Court of Human Rights, Application no. 696/05 (July 10, 2007), 16 (emphasis added). It is to be noted that in the non-conviction based assets recovery, there is no proof of guilt leaving it to suspicion that a crime was committed.

[956] The Committee is empowered to 'receive and consider' communications from individuals who are subject to the jurisdiction of states that have ratified an Optional Protocol and who claim to have suffered a violation of any of the rights protected by ICCPR. See art 1 Optional Protocol to the International Covenant on Civil and Political Rights, GA Res 2200A, UN Doc A/6316 (1966).

[957] *Perterer v. Austria* Communication No. 1015/2001.

[958] *Perterer v. Austria* Communication No. 1015/200,1 para 9.2. See also Human Rights Committee General Comment 32 U.N. Doc. CCPR/C/GC/32 (2007), para 1 of part III.

[959] The case related to the type of proceedings before a disciplinary commission.

[960] See also the views of AJ Vander Walt "Civil forfeiture of instrumentalities and proceeds of crime and the constitutional property clause" (2000) 16 *South African Journal on Human Rights* 1 at 34 (noting that "[t]he

4.8. Conclusion

This chapter has examined the constitutionality of the non-conviction based assets recovery in light of the requirements of the right to fair trial. It concludes that, though assets recovery shares a lot in common with criminal law actions, courts have invariably found that the non-conviction based mechanism does not violate the right to fair trial. In reaching this conclusion the courts have interpreted the scope of the right to fair trial either narrowly to include only those procedures labelled criminal by the legislature or those whose purpose is to convict or acquit a defendant for a criminal offence; or interpreted it broadly to include all procedures which result into criminal punishment but nevertheless found that the non-conviction based assets recovery procedures are justified limitation of the right to fair trial. The advantage of the latter approach is that, unlike the former, it allows for an examination of the procedure in detail at the justification stage to determine whether the procedure adopted in the mechanism is reasonable and proportionate thereby allowing courts to check against unconstitutional effects of the non-conviction based mechanism on property owners.

However, in those jurisdictions, such as South Africa and Kenya, where the courts have concluded that the right to criminal fair trial does not apply to the non-conviction based assets recovery, the right cannot be of any help in checking against the unconstitutionality of the non-conviction based mechanism. Alternative rights that can be used to check against state abuse and unfair effects of the non-conviction based mechanism should therefore be sought. In this regard, given that assets recovery is primarily concerned with the deprivation of property, the right to property presents a viable alternative to the right to fair trial for such a protection. The next chapter examines the viability of the right to property in protecting individuals against the unfair effects that may arise from the use of the non-conviction based assets recovery mechanism. It analyses the scope of the right to property with a view to determining its applicability in the non-conviction based assets recovery mechanism and by extension its usefulness in checking against the unconstitutional infraction of the non-conviction based mechanism on individual rights.

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intention [of classifying the proceedings as civil] could also be to isolate these proceedings against the protection that applies to criminal proceedings in terms of the Constitution").

CHAPTER FIVE

NON-CONVICTION BASED ASSETS RECOVERY MECHANISM AND THE RIGHT TO PROPERTY

"We never get far from wealth and all of its masks when we deal with [state] power."[961]

5.1. Introduction

The previous chapter examined the constitutionality of the non-conviction based assets recovery in light of the requirements of the right to fair trial. It concluded that despite assets recovery's punitive character and effect the criminal fair trial guarantees are considered inapplicable in the non-conviction based assets recovery procedure in Kenya and South Africa. The effect of such finding is that the protection of the right to fair trial does not extend to individuals whose properties are the subject of non-conviction based recoveries. This means that the right cannot be of any help in checking against the unconstitutionality of the non-conviction based mechanism. This inapplicability of the criminal law fair trial guarantees in the non-conviction based assets recovery poses a number of risks to property owners. For example, it could lead to the arbitrary deprivation of private property, which could in turn lead to the disruption of family life, infraction into the privacy of the affected individuals, and in some cases to the loss of the individuals' source of livelihood.[962] These dangers to innocent property owners are heightened by the potential of assets recovery mechanism to be used as a source of wealth for the state, a potential which if unchecked could engender a profit oriented approach to criminal justice in which assets recovery becomes the mainstay of law enforcement agencies.[963]

To overcome these dangers, one way would be to insist that states maintain the traditional criminal-civil law divide whereby all punitive state actions are made amenable to the

[961] F Herbert *Children of Dune: The Third Dune Novel* (2010) quoted at http://www.notable-quotes.com/p/power_quotes_iii.html (accessed 1/3/2012).

[962] See, for example, the South African case of *Prophet v NDPP* [2006] ZACC 17 (on right against arbitrary deprivation of property); *Van der Burg and Another v NDPP (Centre for Child Law as Amicus Curiae)* 2012 (8) BCLR 881 (CC) (right to property, housing, and right of children).

[963] Indeed studies have documented instances of the misuse of non-conviction based confiscation in a number of jurisdictions with appalling outcomes for innocent owners. See, for example, JM Miller & LH Selva Drug Enforcement's Double-Edged Sword: An Assessment of Asset Forfeiture Programs (1994) 11(2) *Justice Quarterly* 313 at 313-335 (documenting cases of "asset hunting" by law enforcement officers in the US in search of revenue regardless of the confiscation's enforcement value).

criminal law procedure with its attendant fair trial guarantees.[964] However, while such an approach would bring clarity in the distinction between criminal and civil law and prevent states from circumventing the criminal process by labelling procedures for criminal punishments as civil,[965] the approach would have little immediate impact in those jurisdiction where the inapplicability of the criminal fair trial guarantees in non-conviction based assets recovery procedures has been upheld by the bodies (courts) constitutionally empowered to finally adjudicate on the issue.[966] This of course is not to say that the case for the return to the traditional criminal-civil law divide is without merit or that it should be abandoned altogether,[967] but rather it is to acknowledge that the process of reversal might not be achieved now or in the near future given the position taken by courts in these jurisdiction. A better approach, therefore, would be to allow for the possibility that the non-conviction based assets recovery procedure might be there to stay and that until they are repealed the criminal fair trial guarantee is not going to assist in checking governments from abusing the use of these procedures in those jurisdiction where it has been held inapplicable. Such a practical approach allows one to then seek alternative ways of ensuring that states do not abuse the non-conviction based procedure to arbitrarily deprive innocent property owners of their property.

In this regard, given that assets recovery is concerned with the confiscation of property (proceeds of crime), the most immediate and direct right that can be used to check against unconstitutional non-conviction based mechanisms would be the right to property. It is true that other substantive rights such as the right to privacy, peaceful family life, housing, and children rights are sometimes also affected by deprivation of property and could therefore be

[964] For support of this position, see, for example, CS Steiker "Foreword, Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide" (1997) 85 *Georgetown Law Journal* 775.

[965] CS Steiker "Foreword, Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide" (1997) 85 *Georgetown Law Journal* 775 at 784, 810 & 814 (noting that the approach helps: (1) to "restore some clarity to the distinction" between the two areas of law; and (2) to check on states "from circumventing the criminal process by 'rechristen[ing]' crimes as 'administrative violations' of some sort").

[966] Indeed as demonstrated in the previous chapter, in cases brought to challenge the legal and constitutional basis of non-conviction based recovery procedures, courts in many jurisdictions, including Kenya and South Africa, have upheld the legality and constitutionality of these procedures. See chapter four, particularly section 4.7. The international legal framework also endorses the use of the non-conviction based assets recovery as a strategy in the fight against acquisitive crimes such as corruption and calls on states to adopt it in their laws. See, for example, UNCAC, art 54(1)(c).

[967] But see SR Klein "Redrawing the Criminal-Civil Boundary" (1999) 2 *Buffalo Criminal Law Review* 679 at 720 (contending that the sun has set on the day when statutes possessed all of the attributes of a criminal or civil action). For a similar position, see K Mann "Punitive Civil Sanctions: The Middleground between Criminal and Civil Law" (1992) 101(8) *The Yale Law Journal* 1795 (pointing out that it is simply impossible, at present, to separate all proceedings into criminal and civil actions, as so many now have a combination of features from both and advocating for a middleground jurisprudence to deal with these new proceedings).

used to check against the unfair effects of non-conviction based assets recoveries.[968] However, given that the effects on these rights are secondary[969] and that they only occur in certain circumstances,[970] the usefulness of these rights is fairly limited. On the other hand, because property is the primary target of the non-conviction based assets recovery mechanism, it seems unlikely that the tension between the protection of private property and the public interest in the recovery of corruptly acquired assets, which is represented in the right to property, can be avoided. The right to property, therefore, presents a guaranteed framework, in the absence of the right to fair trial, of checking against unconstitutional confiscations.

However, to say that the right to property can be used to check against the unfair effects of the non-conviction based assets recovery is to presuppose: first, that the right to property does in fact apply to the recovery process and; second, that if it applies it can be used to guarantee procedural fairness and proportionality in the non-conviction based assets recovery mechanism.[971] Since the right to property can only have meaningful use in checking against unconstitutional confiscations if these assumptions are correct, it is imperative that the correctness of the assumptions be confirmed. This chapter specifically seeks to do that. It examines the nature and scope of protection accorded by the right to property, with specific reference to Kenya and South Africa, with a view to ascertaining whether the state action of assets recovery falls among the state interferences with private property that the right to property protects individual against and by extension to determine the kind of protection that the right to property accords to individuals in the non-conviction based assets recovery process.

5.2. The scope of protection accorded by the right to property

Modern constitution invariably embodies a formulation protecting one, two or three broad categories of property claims: a claim of eligibility to hold property; a claim to immunity against unlawful state interference in the enjoyment of private property; and a claim to hold

[968] See AJ van der Walt *Constitutional Property Law* 3ed (2011) 311 ft 411 (citing cases where some of these rights have been used in South Africa to challenge the constitutionality of the non-conviction base assets recovery mechanism).
[969] They arise only as an indirect consequence of confiscation of property.
[970] For example, effect on right to housing would arise only where the targeted property is a residential house while that on family or children right would occur only where the owner of targeted property has family and children respectively.
[971] Since the main concern against the non-conviction based assets recovery mechanism is in its use of a non-conviction based means to address criminal law prohibitions, the right to property can only be useful against state abuse if it can ensure procedural fairness and proportionality in the non-conviction based assets recovery.

property.[972] The first claim, the claim of eligibility to hold property, is an assertion that one has a right to acquire and hold property without discrimination. It is not, unlike the third claim, an assertion that one is entitled to hold property even if one cannot afford property but rather that one should not be excluded from holding any class of property when they are in a position to acquire it. The second claim, the claim against unlawful state interference with private property, is an assertion that one is immune from uncompensated compulsory acquisition or arbitrary deprivation of property by the state. It means that private property may not be interfered with without affording an owner a fair procedural opportunity to contest the interference and that in those instances where the interference amounts to the taking away of property such interference should be accompanied by payment of adequate compensation to the owner. The third claim, the claim to hold property, is an assertion that an individual has a right to own at least enough property that would enable him or her to subsist or lead a life of dignity. It envisages that where a person does not have property or cannot afford property, then it should be provided to him or her by the state. Such a claim makes property right a second generation right (socio-economic right), thus putting an obligation on the state to progressively provide for property to those citizens who cannot afford enough property necessary for survival or for leading a dignified life.

The property clause of the South Africa's 1996 Constitution expressly protects the second of these claims. Section 25 provides that no one may be arbitrarily deprived of property and that where the deprivation amounts to expropriation (compulsory acquisition) then adequate compensation must be paid to the affected owner(s).[973] The clause does not expressly protect the first claim (claim of eligibility to hold property). This is unlike the 1993 Interim Constitution which accorded everyone the right to acquire, hold and dispose of property.[974] This omission of the positive claim to property in the 1996 property clause was deliberate. It

[972] See C Heyns (ed) *Human Rights Law in Africa* (2004) for a collection of the primary material dealing with human rights law in Africa, on the United Nations, regional, sub-regional, and domestic levels of all the countries of Africa. See also J Waldron *The right to private property* (1988) 16-24 (including an additional category of claims, that is, a claim that rights to property are natural rights). However, as Currie & de Waal correctly points out "this category should account as a justification for the constitutional protection of property than to account as content of such protection"). I Currie & J de Waal *The bill of rights handbook* 5ed (2005) 534.

[973] Constitution of the Republic of South Africa 1996, s 25(1) & (2):

> "(1) No one may be deprived of property except in terms of law of general application and no law may permit arbitrary deprivation of property. (2) Property may be expropriated only in terms of law of general application (a) for a public purpose or in the public interest; and (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court."

[974] Constitution of the Republic of South Africa 1993 (Interim Constitution), s 28(1) (according everyone the right "to acquire and hold rights in property and, to the extent that the nature of the rights permits, to dispose of such rights".

was intended to address the concern of those who argued that its inclusion would entrench the existing white property privileges and stymie efforts to correct the injustices of the apartheid era by post-apartheid governments.[975] However, though the property clause does not expressly guarantee the right to acquire, hold and dispose of property, the Constitutional Court has nevertheless held that the "[p]rotection for the holding of property is implicit" in the clause.[976] It can therefore be safely argued that a right not to be arbitrarily or unfairly excluded from the class of property holders is effectively guaranteed in the Constitution especially also taking into account the Constitution's express prohibition against unfair discrimination under section 9 equality clause.[977] In addition to the two claims, the property clause has also attempted to give recognition to the third claim - the claim by the propertyless to be provided with property by the state. Section 25(5), for example, requires the state to promote access to land on an equitable basis.[978] The Bill of Rights also contains a number of socio-economic rights such as the right of access to adequate housing,[979] which have a bearing on the third property claim.[980]

In Kenya, unlike South Africa, the property clause in the 2010 Constitution expressly guarantees the first claim, the claim of eligibility to hold property, in addition to the second claim, the claim against unlawful state interference with private property.[981] Section 40(1) guarantees everybody the right to "acquire and own property of any description and in any part of Kenya"[982] while Section 40(2) and (3) provides protection to owners of property against arbitrary deprivation and uncompensated compulsory acquisition respectively.[983] The

[975] See K Savage "An Overview of the Key Players" in P Andrews & S Ellmann (eds) *The post-apartheid constitution: Perspectives on South Africa's Basic Law* (2001) 164 at 176-81 (pointing out that the ANC did not wish the clause to contain a constitutional "guarantee" or "restatement" of existing property rights). See also M Chaskalson "Stumbling Towards Section 28: Negotiations over Property Rights at the Multiparty Talks" (1995) 11 *South African Journal of Human Rights* 222

[976] *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) para 72.

[977] Constitution of the Republic of South Africa 1996, s 9.

[978] Constitution of the Republic of South Africa 1996, s 25(5) provides: "The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis".

[979] Constitution of the Republic of South Africa 1996, s 26.

[980] See I Currie & J de Waal *The Bill of Rights Handbook* 5ed (2005) 535 (arguing that these socio-economic rights could be used to demand state intervention in the provision of property). See also the Constitutional Court's decision in *Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC) and President of the Republic of South Africa and Another v Modderklip Boerdert (Pty) Ltd and Others* 2005 (5) SA 3 (CC) (discussing the relationship between the right to property and the right of access to adequate housing).

[981] Constitution of the Republic of Kenya 2010 at s 40.

[982] Constitution of the Republic of Kenya 2010, s 40(1). Everybody in this case include citizens and non-citizens. However, in the case of non-citizens, the holding of land is restricted to leasehold tenure only. Constitution of the Republic of Kenya 2010 at s 65.

[983] Constitution of the Republic of Kenya 2010, s 40(2) & (3) provides:

Kenyan property clause does not however, unlike that of South Africa, give express instructions to the state to promote access to property on an equitable basis (in other words, it does not expressly protect the third claim, the claim of propertyless individuals to hold property). Instead the clause has a proviso excluding from its protection all property found to have been unlawfully acquired.[984] However, just like its South African counterpart, the Kenyan Bill of Rights also contains other clauses outside the property clause that recognise socio-economic rights such as right of access to adequate housing, which have a bearing on the third property claim.[985] In addition, the Constitution has a chapter "outside"[986] the property clause and Bill of Rights that is dedicated to land in which the state is called upon to develop a land policy based on a number of principles including the principle of "equitable access to land".[987]

These differences in the formulation and emphasis of the two property clauses can be attributed to the different historical context that preceded the enactment of the property clauses of the two countries. Unlike South Africa's 1996 Constitution whose enactment was preceded by an apartheid era characterized by "injustices of forced removals from land and evictions from homes (by the government)",[988] Kenya's immediate past preceding the

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> "(2) Parliament shall not enact a law that permits the State or any person (a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or (b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).
> (3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation (a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or (b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that (i) requires prompt payment in full, of just compensation to the person; and (ii) allows any person who has an interest in, or right over, that property a right of access to a court of law."

[984] Constitution of the Republic of Kenya 2010, s 40(6): "The rights under this Article do not extend to any property that has been found to have been unlawfully acquired".

[985] Constitution of the Republic of Kenya 2010, s 43. For a discussion of the relation between the right of access to adequate housing to the right to property in the Kenyan context, see L Juma "Nothing but a mass of debris: urban evictions and the right of access to adequate housing in Kenya" (2012) 12 *African Human Rights Law Journal* 470.

[986] But see *KAPI Ltd & Another v Pyrethrum Board of Kenya* [2013] eKLR, para 14 (holding that section 65 of Chapter Five on Land and Environment guarantees the right to property). However since the chapter is physically located outside Chapter Two, Bill of Rights, the correct position should be that provisions in chapter five are merely complimentary to the bill of rights especially the right to property and environment. They provide flesh to the rights provided for in Chapter Two, Bill of Rights but do not grant the said rights. They are what are popularly called directive principles of state policy (DPSP). DPSP can only be converted to justiciable guarantees through judicial activism and not by the express provisions in the Constitution. For illustration of how the DPSP can be (and have been) converted to justiciable guarantees, see, for example, the Indian case of *Kesavananda Bharati v State of Kerela* (1973) 4 SCC 225 (where the Indian Supreme Court held that fundamental rights and DPSP are complementary because "what was fundamental in the governance of the country could be no less significant than that which was fundamental in the life of an individual").

[987] Constitution of the Republic of Kenya 2010, chap 5, s 60(1)(a).

[988] *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC); 2005 (1) BCLR 78 (CC) para 25.

enactment of the 2010 Constitution was characterized by injustices of powerful individuals grabbing public or communal (not so much of private) property and converting the same to private use.[989] Thus, to ensure that the injustices caused by government interference with private property in the past do not recur, the South Africa's property clause is framed as a negative protection of private property against arbitrary government deprivation.[990] This negative protection is, however, considerably qualified in the case of land that is the subject of land reform measures, indicating that those who had been dispossessed or deprived of property under apartheid also have some form of constitutional redress.[991] Towards this end, the Constitutional Court has held in, for example, *Port Elizabeth Municipality v Various Occupiers*[992] and *President of the Republic of South Africa and Another v Modderklip Boerdert (Pty) Ltd and Others*,[993] that the occupational interest of unlawful occupiers of land is property interest capable of protection under the Constitution's property clause.[994]

Kenya's colonial period just like South Africa's apartheid era was also characterised by forced eviction under the land alienation programme instituted by the British colonial administration.[995] However, unlike the case of South Africa where racial disparity in ownership of property under the apartheid was still fresh in the minds of negotiators of the 1996 Constitution, by the time Kenya was writing its 2010 Constitution (almost 50 years after independence) some semblance of racial parity had been established in property ownership. Furthermore, unlike South Africa, Kenya's property problem in the immediate period preceding the negotiation of the 2010 Constitution was characterised less by state

[989]See Government of Kenya *Report on Illegal and Irregular Allocation of Public Land* (2004) GoK, Nairobi 6 observing that:

> "Since colonial times, land has been used as an instrument of political patronage in Kenya. At the height of political dissent during the KANU era, the ruling elite continually and illegally allocated public land to influential individuals and corporations in return for political support."

[990] *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) para 72.

[991] Constitution of the Republic of South Africa 1996, s 25(4)-(8) makes it clear that land reform initiatives are not only legitimate but that the state is obliged to establish and implement them. See Van der Walt *Constitutional property law* (2011) 92 (noting that "Apartheid systematically eroded black land rights by depriving owners and occupiers of security and denying them the normal protection of laws of the land"). See also I Currie & J de Waal *The bill of rights handbook* 5ed (2005) 381 (noting that the property protection "is considerably qualified in the case of land that is the subject of land reform measures").

[992] *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC).

[993] *President of the Republic of South Africa and Another v Modderklip Boerdert (Pty) Ltd and Others* 2005 (5) SA 3 (CC).

[994] *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC), paras 8-23; *President of the Republic of South Africa and Another v Modderklip Boerdert (Pty) Ltd and Others* 2005 (5) SA 3 (CC), para 48.

[995] For land alienation under the British colonial administration in Kenya, see generally MPK Sorrensen *Origins of European Settlement in Kenya* (1968); W Morgan "The White Highlands of Kenya" (1963) 129 *Geographical Journal* 140; NC Jones "The Decolonization of the White Highlands of Kenya" (1965) 131 *Geographical Journal* 186; S Wanjala *Essays on Land Law: The Reform Debate in Kenya* (2000).

interference with *legitimate* private property but more by individuals' illegal conversion of public or communal property for private use.[996] Thus, Kenya's property clause while guaranteeing the right to acquire, hold and dispose of property and the right against arbitrary deprivation and uncompensated compulsory acquisition, also makes it clear that: "The rights under this Article do not extend to any property that has been found to have been *unlawfully acquired*".[997] This provision was included in order to address the past illegal acquisitions and to introduce integrity in the acquisition of new property. It does this by requiring a party wishing to enjoy or enforce the right to property to demonstrate that he or she is entitled to the property in issue and that the proprietary interest sought to be protected is defined by existing laws. The reason and ambit of the provision was explained in *Adan Abdirahani Hassan v the Registrar of Titles, Ministry of Lands*[998] in the following words:

> "This requirement recognises the fact that the Constitution protects certain values such as human rights, social justice and integrity amongst others. These national values require that before one can be protected by the Constitution, he must show that he has followed the due process in acquiring that which he wants to be protected."[999]

However, despite these differences in formulation and emphasis, both Kenya's and South Africa's property clauses do recognize that the purpose of the right to property is not to guarantee existing property holding absolute protection against any interference, but rather to establish and maintain a balance between the individual's vested rights and the public interest in the regulation of the property regime. Thus, the two property clauses while protecting private holding of property also allow the state to interfere with the enjoyment of private property where the interference serves a public purpose or is in the public interest. This approach mirrors the approach in property guarantees under international and regional human rights instruments. For example, under Article 17 of the United Nations Universal Declaration of Human Rights (UDHR) the right to acquire, hold and dispose of property is

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[996] See Government of Kenya *Report on Illegal and Irregular Allocation of Public Land* (2004) GoK, Nairobi 6 (noting that the property problem in independence Kenya has been characterised by "the ruling elite continually and illegally allocate[ing] public land to influential individuals and corporations in return for political support"); See also R Southall "The Ndungu Report: Land and Graft in Kenya" (2005) 103 *Review of African Political Economy* 142. But See L Juma "Nothing but a mass of debris: urban evictions and the right of access to adequate housing in Kenya" (2012) 12 *African Human Rights Law Journal* 470 at 486-487 (arguing that in spite of almost 50 years of independence, the phenomenon of forced evictions that was rampant in the colonial period has remained a government approach to land problem in Kenya); O Oculi "The Role of Economic Aspirations in Elections in Kenya" (2011) 35 *Africa Development* 13 at 19 (noting that forced eviction were used during the Moi era as a political tool). However, while it is true that forced evictions has continued to occur in Kenya, the reasons given for most of these evictions have been that the targeted property are public property that were illegally acquired by the affected owners. In any case, the rampant cases of alienation of public property seem to have been foremost in the mind of the drafters of the Constitution if the express inclusion of section 40(6) (on unlawful acquisition) is to go by.

[997] Constitution of the Republic of Kenya, s 40(6) (emphasis added).

[998] *Adan Abdirahani Hassan & 2 Others v the Registrar of Titles, Ministry of Lands & 2 Others* [2013] eKLR.

[999] *Adan Abdirahani Hassan & 2 Others v the Registrar of Titles, Ministry of Lands & 2 Others* [2013] eKLR, para 19.

guaranteed to everyone while the state is also permitted to deprive individuals of their property provided that the deprivation is not arbitrary.[1000] Similarly, Article 14 of the African Charter on Human and Peoples Rights (ACHPR) guarantees everyone the right to property but also allows for state encroachment in public interest.[1001] A comparable trend is also observable under Article 21 of the Inter-American Convention on Human Rights[1002] and Article 1 of the First Protocol to the European Convention on Human Rights and Fundamental Freedoms.[1003]

The human right (constitutional) property protection thus differs with the private-law protection of property. In private law, the purpose of the property protection is largely to regulate the acquisition, transfer and protection of private property rights among private individuals,[1004] but in the constitutional sphere the protection of vested property rights is not the only priority. In addition to protecting vested property rights, the constitutional property right also recognizes the legitimacy of restrictive state powers, which is exercised in the public interest and that may conflict with the protection of private property. In other words, unlike private property law which is concerned with guaranteeing and insulating existing private property holding from private interference, the aim of protection of property as a constitutional right is not to imbed existing rights absolutely nor to threaten them unreasonably and unfairly, but rather to maintain a just and equitable balance between the protection of existing property rights and the protection of the public interest in the use of property.[1005]

[1000] UDHR, art 17 provides that: "(1) Everyone has the right to own property alone as well as in association with others" and that "(2) No one shall be arbitrarily deprived of his property". For further discussion, see C Krause & G Alfredsson "Article 17" in G Alfredsson & A Eide (eds*) The Universal Declaration of Human Rights: A common standard of achievement* (1999) 359, 360.

[1001] AfCHPR, art 14 ("The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws").

[1002] Inter-American Convention, art 21 ("(1) Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society").

[1003] First Protocol to the European Convention on Human Rights and Fundamental Freedoms 213 UNTS 222, ETS 5, Art 1:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

[1004] See G Wille & D Hutchinson *Wille's Principles of South African Law* (1991) 38 (noting that a legal right in private law is an interest conferred and protected by the law to the benefit of right-holder).

[1005] This point has been made expressly clear by the South African and Kenyan Courts. See, for example, the South African case of *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) 49 ("under the

Both Kenya's and South Africa's property clauses give effect to this balance by expressly (in the case of Kenya) or implicitly (in the case of South Africa) guaranteeing the right to hold property while at the same time validating legitimate deprivations of private property by the state. In both jurisdictions, the state is allowed to expropriate (the term used in South Africa's property clause), or compulsorily acquire (the term preferred in the Kenyan clause) private property for public purpose or in public interest and to subject the use of private property to controls and regulations (deprivation).[1006] These state interferences with private property are, however, required to meet certain minimum standards aimed at ensuring fairness and reasonableness.

With regard to expropriation, which results in compulsory acquisition of private property by the state,[1007] the requirement is that it must be authorised by law and must serve a public purpose or be in public interest. And because it forces one or a small number of affected owner(s) to bear the burden of the public, there is a further requirement of prompt and adequate compensation that must be paid to the affected owner(s).[1008] On the other hand, deprivation, which does not lead to the taking away of private property but nevertheless imposes restrictions on the use of private property, is required to be carried out in terms of

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1996 Constitution the protection of property as an individual right is not absolute but subject to societal considerations").

[1006] It is interesting to note that different constitutions use different terms to refer to the compulsory acquisition of private property by the state. Some constitution refer to "expropriation"; some to "compulsory acquisition" or "taking" of property; others refer to "deprivation" as an all-encompassing term, without distinguishing it from expropriation. Some use "deprivation" to refer to what is otherwise known as expropriation. Yet others use "requisitioning" and "compulsory dispossession". For illustrations, see AJ van der Walt *Constitutional property clauses: a comparative analysis* (1999).

[1007] See South African case of *Harsken v Lane NO* 1998 (1) SA 300 (CC) para 32 (noting that compulsory means compelled by law, as opposed to voluntary alienation of property).

[1008] Constitution of the Republic of South Africa 1996, s 25 (2) & (3); Constitution of the Republic of Kenya 2010, s 40(3). It is interesting to note, however, that in the case of compulsory acquisition of land, the Kenyan property clause is silent on whether the acquisition should serve a public purpose or be accompanied by adequate compensation. Such requirements are only expressly demanded of compulsory acquisition of properties other than land. With regard to land, the Constitution merely states that a compulsory acquisition of land must be carried out in accordance with Chapter Five of the Constitution. But an examination of Chapter Five reveals no requirement for adequate compensation or public purpose in the compulsory acquisition of land. The approach by the courts, however, has been to assume that the requirements of public purpose and compensation apply to all acquisitions of property including land. See *Adan Abdirahani Hassan & 2 others v The Registrar of titles, Ministry of Lands & 2 others*, para 17, 18 & 20; *Philma Farm Produce & Supplies & 4 Others v Attorney General & 6 Others* [2012]eKLR para 47 & 63. Though the assumption by the courts in these cases is not supported by the express provision of section 40(3), it is submitted that the conclusion reached is nevertheless sound given that there is no justifiable reason for excluding land owners from the protection of the public purpose test or from monetary compensation and also given the precedence in Kenya where these requirements have been applied consistently in past compulsory land acquisitions. Furthermore, if it were the intention of the drafters to exclude land owners from compensation then it would not have been necessary to include section 40(4), which calls on the government to pay compensation in good faith to occupiers without title of land compulsorily acquired. The omission of public purpose and compensation with respect to land in section 40(3)(a) should, therefore, be viewed as a case of oversight or poor craftsmanship and not as a deliberate attempt to treat land acquisition differently.

law[1009] and to be non-arbitrary, that is, it must serve a legitimate public purpose and the means adopted to realise it must be procedurally fair and proportionate in its effect.[1010] However, since the state does not take the property away from the owner and because the burdens it imposes are supposed to generally spread over the population more or less equally,[1011] there is no requirement of compensation in cases of deprivation, even where the deprivation results in economic loss for a property owner.[1012]

These distinctive requirements for expropriation and deprivation are expressly provided for in both the Kenyan and South African property clauses. However, in the South Africa's context, the Constitutional Court has held in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service*[1013] that all state interference with private property will be tested against the requirement of non-arbitrariness.[1014] According to the Court, all state interferences, including those amounting to expropriation, are to be treated as deprivation of property and, therefore, tested against the requirements for deprivation under section 25(1). It is only when they pass the requirements for deprivation that the court is then supposed to determine if the interference amounts to expropriation, in which case it should then be subjected to the requirements for expropriation under section 25(2). The effect of

[1009] The South African property clause (s 25(1)) uses the term "law of general application", while that of Kenya (s 40(2)) uses the term "law" but nevertheless requires that that law must be non-discriminatory. Since "law of general application" in the context of the South African property clause has been interpreted as a law that (1) is properly enacted and promulgate and (2) does not discriminate, the import of the two clauses is the same. On South African "law of general application", see S Woolman & H Botha "Limitations" in S Woolman *et al* (eds) *Constitutional law of South Afric*a (2006) 34 at 48-49.

[1010] While a claim that a statute applies arbitrarily is usually associated with the absence of procedural fairness (See JA Crane "Property, Proportionality and Instruments of Crime (2011) 29 *National Journal of Constitutional Law* 159 at 175), the courts in Kenya and South Africa have indicated that arbitrariness for purposes of the right against arbitrary deprivation of property under section 25(1) relates to both procedural and substantive elements of the claim. See South African case of *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC), para 100; and Kenyan case of *Crywan enterprises limited v Kenya revenue* [2013] eKLR para 29.

[1011] T Allen *The right to property in commonwealth constitutions* (2000) 180 (pointing out that deprivation even if it imposes heavy burden (upto and including loss of the property) does not transform into an expropriation that require compensation). But see GS Alexander *The Global debate over constitutional property: Lessons for American taking jurisprudence* (2006) 225 (discussing the distinction in US law between regulatory action that destroys property without compensation and instances that mutate into expropriation and require compensation – what is loosely called the inverse condemnation).

[1012] See T Allen *The right to property in commonwealth constitutions* (2000) 180 (pointing out that deprivation even if it imposes heavy burden (upto and including loss of the property) does not transform into an expropriation that require compensation). But see GS Alexander *The Global debate over constitutional property: Lessons for American taking jurisprudence* (2006) 225 (discussing the distinction in US law between regulatory action that destroys property without compensation and instances that mutate into expropriation and require compensation – what is loosely called the inverse condemnation).

[1013] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC).

[1014] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service* 2002 (4) SA 768 (CC) paras 46, 57 & 58.

this logic is that all state interferences with property have to undergo the non-arbitrary analysis under section 25(1) in addition to the more specific section 25(2) requirements - meaning that the only requirement that distinguishes deprivation from expropriation is compensation, which is required for the latter and not for the former.[1015] This approach of the Court in *First National Bank* amended an earlier decision by the same Court in *Harsken v Lane NO*[1016] where expropriation and deprivation were treated as separate entities with non-overlapping requirements.[1017]

Though a later decision, the approach in the *First National Bank* is, however, problematic. Firstly, it does not reflect the express provisions of section 25(1) and (2) of the property clause, which specifically assigns separate requirements to deprivation and expropriation respectively.[1018] Secondly, it introduces a lengthened analysis to property protection not contemplated by the property clause itself by requiring that in all constitutional property disputes the deprivation issue should be investigated first, regardless of whether it was raised by the applicant or not and that where a deprivation passes the section 25(1) enquiry, the expropriation question must be answered whether it was raised by the applicant or not.[1019] Thirdly, if followed to its logical conclusion, the approach would have the undesired effect whereby an expropriation that does not pass the non-arbitrary test of section 25(1) either because it is not for public purpose or because it does not provide for adequate compensation would not reach the stage where it can be adjudged as expropriation – meaning that these expropriations would end up being treated as deprivation. Lastly, since expropriation is by nature built to forcefully and disproportionately burden one or a few property owners on behalf of the public, insisting that the non-arbitrariness requirement (in both its procedural and substantive sense) should apply to state expropriation would be meaningless as it cannot

[1015] Section 25(1) and (2) requires that deprivation and expropriation respectively should take place in accordance with law of general application. In addition, s 25(1) requires that deprivation should not be arbitrary but according to the *First National Bank* reading this also applies to expropriation (a subset of deprivation). Furthermore, s 25(2) requires that expropriation should be for a public purpose or in the public interest; a requirement that is not explicitly stated for non-expropriatiory deprivation, although one could assume an implicit public purpose requirement in that deprivation that does not serve a public purpose or the public interest would probably be arbitrary (see AJ van der Walt *Constitutional property law* 3ed (2011) chap 4 at 4.4). Effectively therefore the only requirement that distinguishes deprivation from expropriation is compensation, which is required for the latter and not for the former.

[1016] *Harsken v Lane NO* 1998 (1) SA 300 (CC).

[1017] *Harsken v Lane NO* 1998 (1) SA 300 (CC) para 33-40.

[1018] Compare s 25(1) on regulatory deprivation ("No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property") and s 25(2) on expropriation:

> "Property may be expropriated *only* in terms of law of general application: (a) for a public purpose or in the public interest; and (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court" (emphasis added).

[1019] For further discussion, see Walt *Constitutional property law* (2011), chap 5 s 5.1

change the defining arbitrary character of expropriation.[1020] Indeed it is because of this unavoidability in the unfair character of expropriation that the right to property includes the mandatory requirement for compensation in all expropriations, as a way of ameliorating the inevitable whimsical procedure and disproportionate effect of expropriation on property owners.[1021]

Fortunately, and perhaps as indication of its discomfit with the *First National Bank's* problematic logic, the Constitutional Court has avoided the approach in subsequent cases dealing with expropriation of private property. For example, in *Du Toit v Minister of Transport*[1022] and *Haffejee NO and Others* v *eThekwini Municipality and Others*,[1023] the Constitutional Court while professing to follow its holding in the *First National Bank* did in fact depart from it and deliberately avoided to test the challenged expropriations against the requirement of non-arbitrariness under section 25(1). Meaning that even if the approach in *First National Bank* is to be accepted as the correct position, given the subsequent tendency of the Constitutional Court to avoid the tenuous process in cases involving expropriation, it cannot be stated with certainty that the non-arbitrary requirement under section 25(1) will always feature as a test against state expropriation.[1024] Thus, the only guaranteed requirements for expropriation of property under the South African property clause are the requirements expressly provided for under section 25(2), which are that it must be authorised by law of general application, must serve a public purpose or be in public interest, and must be accompanied by prompt and adequate compensation.

[1020] See *Harsken v Lane NO* 1998 (1) SA 300 (CC) para 32 (holding that expropriation for purposes of s 28(3) of the 1993 Interim Constitution (the equivalent of s 25(2) of the 1996 Constitution) refers to "*compulsory acquisition"* of rights in property by the state. According to the Court, compulsory mean compelled by law, as opposed to a voluntary alienation of rights).

[1021] The requirement for compensation is found in s 25(2)(b). The purpose of the compensatory element of the right to property was explained by the US Supreme Court in *Armstrong v United States* (1949) 364 US 40 as barring "Government from forcing some people to bear public burdens which, in all fairness and justice, should be borne by the public as a whole".

[1022] *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC).

[1023] *Haffejee NO and Others* v *eThekwini Municipality and Others* (2011) ZACC 28.

[1024] It seems that the Constitutional Court is only willing to follow the approach in the *First National Bank* in cases that do not involve expropriation. See *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others*; *Transfer Rights Action Campaign and Others v Member of the Executive Council for Local Government and Housing, Gauteng and Others* 2005 (1) SA 530 (CC); *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another* 2009 (6) SA 391 (CC). See also *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others* 2011 (1) SA 293 (CC), which involved a mix of deprivation and expropriation claims.

5.3. The placement of assets recovery within the different categories of protection accorded by the right to property

From the foregoing discussion it is evident that the right to property in Kenya and South Africa protects property owners from two kinds of state interference, that is, expropriation, which result in compulsory acquisition of private property by the state; and deprivation, which does not lead to the taking away of private property but nevertheless imposes restrictions on the use of private property.[1025] If it is deprivation then the requirement is that it must be authorised by law and must not be arbitrary but if it is expropriation then, apart from being authorised by law, it must be carried out for public purpose and must be accompanied by adequate compensation.[1026] Because the treatment accorded to state interference with private property depends on whether it amounts to deprivation or expropriation,[1027] to determine whether a state action is covered by the right to property and which requirements of the right to property is applicable to the state action, it has to first be established whether the action falls in the category of deprivation or expropriation. Such a task by implication requires an understanding of the distinguishing features of deprivation and expropriation. This section examines these distinguishing characteristics of deprivation and expropriation with a view to locating the state action of assets recovery within its correct grid, if any, in the web of protection accorded by the right to property.

The starting point of such an endeavour to distinguish between deprivation and expropriation would be to examine the description given to the two types of state interference in the

[1025] The right has no horizontal application as it is only the state that is capable of depriving people of property in the special manner that the term is used and expropriation as compulsory taking over of property can also only be by the state. See J de Waal *et al The bill of rights handbook* (2000) 382 (noting that "there can be no point in saying that an individual has a duty not to deprive another individual of property arbitrarily or not to expropriate their property without compensation).

[1026] This trend is actually applicable in most modern constitutions For a comparative exposition of constitutional property clause, see AJ van der Walt *Constitutional property clauses: a comparative analysis* (1999). For constitutional property clauses in commonwealth countries, see T Allen "Commonwealth Constitutions and the Right not to be Deprived of Property" (1993) 42 *International & Comparative Law Quarterly* 523.

[1027] This is the position in Kenya and South Africa. However in the South African context, as already discussed, in the case of *First National Bank of SA Ltd t/a Wesbank v Commissioner* 2002 (4) SA 768 (CC) at para 57, the Constitutional Court noted that deprivation encompasses all types of state interference with property including expropriation, so that expropriations is considered as a subset of deprivation. Meaning that all expropriations are deprivations, but just some deprivations are expropriation. This approach is problematic and has been avoided in subsequent cases involving expropriation such as *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) and *Haffejee NO and Others* v *eThekwini Municipality and Others* (2011) ZACC 28. But even if it were to be accepted as the true position, it still exclude the possibility of an overlapping "grey area" where the one category can shade into the other, since only expropriations can be compensated. The approach merely postpones the stage of differentiating expropriation from deprivation to the point when the court has to decide whether a state interference should be accompanied by compensation.

relevant property clause, which for the purpose of this thesis is the Kenyan and South African property clauses. Under the two clauses, a distinction is made between regulatory restrictions on the use of property (deprivation) and compulsory state acquisition of property (expropriation).[1028] In this context, deprivation is distinguished from expropriation on the basis that it does not involve the taking away or dispossession of property. In other words, unlike expropriation that involves the acquisition of private property by the state for public purposes, deprivation is seen as merely restricting the use, enjoyment and exploitation of property without taking away the property from the owner. Based on this differentiation, any restriction on the owner's use of property which does not result into the acquisition of property by the state would be considered deprivation, while a restriction that results into the acquisition of property interest by the state would be considered expropriation (compulsory acquisition) for purposes of compensation.[1029] This distinction has been confirmed by the South African Constitutional Court in *Mkontwana v Nelson Mandela Metropolitan Municipality and Another*[1030] where it held that the taking away of property is not a requirement for deprivation.[1031] A similar position was taken in the Kenyan case of *Isaac Gathungu Wanjohi & another v Attorney General & 6 others*,[1032] where the Court noted that compensation would only arise where the deprivation results in compulsory acquisition of property under section 40(3) of the Kenyan Constitution.[1033]

This preliminary distinction, though helpful, is, however, too simplistic in so far as it places too much emphasis on the acquisitive effect of the state's interference. This is because there are always borderline cases where the state interferes with private property in a way that cannot easily be described as either purely regulatory deprivation or acquisitive expropriation of property. A classic example would be taxation which involves the compulsory acquisition of private property by the state for purposes of facilitating the

[1028] See Constitution of the Republic of Kenya 2010, s 40(2) and (3); Constitution of the Republic of South Africa 1996, s 25(1) and (2)-(3).
[1029] For illustration of deprivation leading to destruction of property see, for example, *Miller v Schoene* 276 US 272 (1928) (where one landowner's trees were destroyed to save others from a virulent pest). For further discussion, see T Allen *The right to property in commonwealth constitutions* (2000) 180.
[1030] *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffallo City Municipality and Others; Transfer Rights Action Campaign and Others v Member of the Executive Council for Local Government and Housing, Gauteng and Others* 2005 (1) SA 530 (CC).
[1031] *Mkontwana v Nelson Mandela Metropolitan Municipality and Another* 2005 (1) SA 530 (CC) at para 32, citing *First National Bank of SA Ltd t/a Wesbank v Commissioner* 2002 (4) SA 768 (CC) para 57. See also *Harsken v Lane NO* 1998 (1) SA 300 (CC) para 32 where Goldstone J stated that expropriation is characterised by the "acquisition of rights in property by a public authority for a public purpose", while deprivation falls short of such acquisition, citing *Beckenstrater v Sand River Irrigation Board* 1964 (4) SA 510 (T) 515A-C, *Hewlett v Minister of Finance and Another* 1982 (1) SA 490 (ZCS) and *Davies and Others v Minister of Lands, Agriculture and Water Development* 1997 (1) SA 228 (ZSC).
[1032] *Isaac Gathungu Wanjohi & another v Attorney General & 6 others* [2012] eKLR.
[1033] *Isaac Gathungu Wanjohi & another v Attorney General & 6 others* [2012] eKLR para 38.

regulatory functions of the state. On the one hand it looks like expropriation in that it involves the involuntary loss of property by affected owners and acquisition of property by the state, but on the other hand it also resembles deprivation in that it is general (affecting everyone in the same way) and is aimed at facilitating the regulatory function of the state. The fact, however, is that taxation is rarely treated as expropriation as it does not invite compensation for the affected owners; rather it is considered as an uncompensated deprivation.[1034] And yet if the acquisitive-based differentiation were to be used taxation would not easily fit the mould of deprivation, mainly because it results in involuntary loss of property rather than mere regulation of use and because the state acquires property of the affected persons. This fact illustrates why acquisitive based distinction cannot be fully relied on to identify the two types of state interference.

A second illustrative example of the inadequacy of the acquisitive criterion would be the case of "regulatory taking", where expropriation takes place without the state acquiring the affected property, that is, situations in which the loss of the affected property by its former holder rather than acquisition by the state is the functional element of expropriation.[1035] In these cases, a state action usually starts out as a limitation of property for regulatory purposes but ends up having what can be described as "acquisitive" effects even though the state does not actually take away the affected property from its owners. An example would be where a state builds a nuclear plant and declares the surrounding area a nuclear zone ostensibly to safeguard the health of its citizens but with the result that the surrounding land is made inhabitable and frozen from development.[1036] In this example, though the state does not acquire the title to the surrounding property, its regulatory action does effectively eliminate all reasonable uses to which the surrounding parcel of land can be put.[1037] Some

[1034] See AJ van der Walt *Constitutional property law: a comparative analysis* (1999) 109 (noting that the fact that taxation is not rectified by way of compensation militates against it being seen as expropriation).
[1035] On regulatory taking, see M Milke *Stealth Confiscation: How Governments Regulate, Freeze And Devalue Private Property without Compensation* (2012) (giving various examples of regulatory taking). See also AJ van der Walt *Constitutional property law* 3ed (2011) 338.
[1036] For further examples, see M Milke *Stealth Confiscation: How Governments Regulate, Freeze And Devalue Private Property without Compensation* (2012) (giving various examples of regulatory taking).
[1037] This example should be distinguished from those cases where a stick in the bundle of rights that make up the plenary ownership is extinguished without extinguishing the whole bundle such as the case of zoning laws preventing a homeowner from running a business from home, urban planning legislation preventing a land owner from erecting a multi-story building in a suburban area, or environmental legislation which prevents a farmer from ploughing near a river. These cases would ordinarily not amount to an expropriation. See *Colonial Development (Pty) Ltd v Outer West Local Council* 2002 (2) SA 589 (N) 610ff (the restrictions on rights of use of land imposed by town planning restrictions do not involve expropriation of property); *Government of Malaysia v Selangor Pilot Association* 1975] 2 MLJ (where legislation prohibiting private companies or individuals from operating pilotage services in state-owned harbours, which had the effect of wiping out the goodwill accumulated over many years by a private association was held not amount to a compulsory acquisition of property without payment of compensation). But see the South African case of *Diepsloot*

jurisdictions treat these excessive regulatory deprivations as expropriation that requires compensation because of their unfair or excessive effects on individual property holders.[1038] In the case of South Africa and Kenya it is unclear whether such a situation would be considered as amounting to expropriation requiring compensation or whether it would be treated as a case of disproportionate deprivation requiring invalidation;[1039] however, the example does demonstrate that relying exclusively on the acquisitive or non-acquisitive effect of a state action to differentiate between deprivation and expropriation will not always give a clear answer.

Apart from the acquisitive criterion, another effect-based distinction that is usually fronted to distinguish deprivation from expropriation is the consideration that expropriation divests private property from their owners and vests it in the expropriating authority permanently while deprivation does not. This distinction was used by the South African Constitutional Court in *Harsken v Lane NO* to reject the applicant's argument that section 21 of the Insolvency Act 24 of 1936, which provided for the transfer of ownership of the rights in the property of the solvent spouse to the Master and, on appointment, to the trustee upon the sequestration of the estate of an insolvent spouse,[1040] should be held to be in violation of the applicant's right to property on the ground that it resulted in the expropriation of a solvent spouse's property without compensation.[1041] In rejecting this argument the Court noted that the main characteristic of expropriation that distinguishes it from deprivation is that its effect is to divest the former owner of the property and to vest it in the expropriating authority permanently; in other words, where these characteristics are present the action is expropriation, and where they are lacking it is deprivation.[1042] In the court's view the effect of Section 21 of the Insolvency Act was merely to vest temporary control over the property to the Master or Trustee for purposes of ensuring that the insolvent estate was not deprived of property to which it was entitled, and not to permanently divest the solvent spouse of their

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Residents & Landowners Association v Administrator, Transvaal 1993 (3) SA 49 (T) (where increase in pollution and crime due to the settlement of a large population of squatters near an established suburb were taken to constitute an interference with the right to property).

[1038] The case of constructive expropriation has been recognized in, for example, the United States and Canada. See AJ van der Walt *Constitutional property law* 3ed (2011) 338

[1039] But See AJ van der Walt *Constitutional property law* 3ed (2011) chap 4 s 4.6.4 and 5.3 (arguing that constructive expropriation should not be recognized in South African law and that regulatory deprivation that have disproportionate effects should held arbitrary and therefore invalid). The thesis agrees with van der Walt position especially considering that both jurisdiction treat deprivation and expropriation as two distinct categories with no possibility of overlap. However, in the case illustrated where invalidating the excessive regulation would only endanger owners who attempt to use the surrounding land, it would seem fair that the state should be forced to take over the affected land and compensate the affected owners.

[1040] Insolvency Act 24 of 1936 s 21(1).

[1041] *Harsken v Lane NO* 1998 (1) SA 300 (CC) para 30.

[1042] *Harsken v Lane NO* 1998 (1) SA 300 (CC) paras 32-35.

property, and could therefore not amount to compensatory expropriation.[1043] Thus, the fact that the effect of section 21 was regarded as vesting of temporary (rather than of permanent) control over the property made it to be classified as deprivation and not expropriation. However, while it is true that expropriation mostly lead to permanent acquisition by the state, permanence on its own is not a conclusive basis for distinguishing between deprivation and expropriation either. This is because it is possible to have permanent deprivation[1044] just as it is also possible to have temporary expropriation.[1045]

For a similar reason, a distinction that emphasizes on the generality or specificity of the effect on property owners to distinguish between deprivation and expropriation cannot be fully relied upon. Under this distinction, emphasis is usually placed on the non-arbitrary requirement that obliges states to ensure that regulatory deprivation is general in its effect but which is lacking when it comes to expropriation. Thus, deprivation is distinguished from expropriation on the basis that it affects all property of a certain category generally, whereas expropriation affects only a specific property or owner. This yardstick is, however, also not definitive as there are some, albeit exceptional, regulatory deprivations that may have limited, specific focus on one or a small group of property owners,[1046] and some expropriatory state actions that may affect a large class of properties.[1047]

Given the inconclusiveness of these effect-based characteristics in distinguishing between deprivation and expropriation, an alternative way would be to resort to the source of the power that allows the state to interfere with private property. In this regard, deprivation would be distinguished from expropriation on the basis that it results from the exercises of a state's regulatory police power while expropriation results from the exercises of a state's

[1043] The Court held that "[t]he purpose is to ensure that the insolvent estate is not deprived of property to which it is entitled". *Harsken v Lane* NO 1998 (1) SA 300 (CC) para 35 quoting *Van Schalkwyk v Die Meester* 1975 (2) SA 508 (N) 510E-F, where it was held that the vesting provision was designed to protect property which rightfully belonged to the insolvent estate from alienation, malicious damage or destruction, accidental damage or destruction, fraudulent abandonment, and theft by the solvent spouse or third parties.

[1044] In fact most regulatory restrictions on the use of property aimed at protecting public health and safety are most often permanent in their limiting effect on the use of property.

[1045] For illustration of temporary expropriation, see, for example, *Attorney General v De Keyser's Royal Hotel Limited* (1920) AC 508 (HL) (wartime requisitioning of a hotel for military use) and *First English Evangelical Lutheran Church of Glendale v County of Los Angeles* 482 US 304 (1987) 318 (temporary taking of all use of a certain piece of land). In both instances the landowner was allowed to claim compensation for the temporary but total loss of the use of the property. See also *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) (the first expropriation case to reach the South African Constitutional Court and which involved a temporary expropriation of the use of private land).

[1046] For an illustration, see, for example, *Miller v Schoene* 276 US 272 (1928) (One landowner's trees were destroyed to save others from virulent disease).

[1047] For an illustration, see, for example, *James v United Kingdom* (1986) 8 EHRR 123 (expropriation of a whole class of land rights for redistribution).

power of eminent domain.[1048] The key difference between the two sources of power lies in their purpose and by extension effect; while the purpose of power of eminent domain (and thus expropriation) is to take ownership of privately held property regardless of the owner's wish for public purposes or in the public interest,[1049] the purpose of police power (and thus deprivation) is to merely regulate the use of private property (without acquiring the same) in order to protect the defence, safety, health, order, morality and general welfare of the public.[1050] Since the purpose of power of eminent domain is to acquire private property while that of police power is to regulate the use of property without acquiring the same, compensation is usually required for exercise of the power of eminent domain but not for exercise of the police power. In this respect, within the source of the two powers there is also the effect or impact of the interferences that further differentiate between them. The effect of the exercise of power of eminent domain (thus expropriation) is generally the acquisition of private property by the state for public purpose; whereas the effect of exercise of police power (thus deprivation) is generally to spread widely and fairly throughout society the burden of protecting public health, defence, order, morality, safety, or general welfare by way of general restriction on the use of private property.

Because it also encompasses a differentiation based on both the purpose and effect of the two state interferences, a source of power distinction can be said to be more comprehensive as it allows one to refer to a number of considerations in contrasting between deprivation and expropriation (source of power, purpose and effect). Based on these considerations, one can construct distinguishing features that would help in identifying the category to which a state action should fall. In this regard, a state action would amount to expropriation if: firstly, it is brought about as a result of the exercise of the state's power of eminent domain, that is, by the unilateral action of the state without the cooperation (and often against the will) of the affected owner; secondly, it result in the compulsory loss of property for the affected owners

[1048] For a discussion of the two powers, see, for example, CJ Jacobus *Real Estate Principles* (2009) 35.

[1049] A state's power of eminent domain is the right of the government to take ownership of privately held property regardless of the owner's wish. See Constitution of the Republic of South Africa 1996, s 25(2) and Constitution of the Republic of Kenya 2010, s 40(3) (Both providing that a legitimate public purpose for acquisition of the property is required for expropriation).

[1050] A state's police power is the right of government to enact laws and enforce them for the order, safety, health, morals and general welfare of the public. The Constitution of the Republic of Kenya 2010 at s 66(1), for example, provides that: "The State may regulate the use of any land, or any interest in or right over any land, in the interest of defence, public safety, public order, public morality, public health, or land use planning". See also AJ van der Walt *Constitutional property law* 3ed (2011) chap 4 at 4 (noting that though the public purpose requirement is not explicitly stated for non-expropriatiory deprivation under the South African Constitution, one could assume an implicit public purpose requirement in that deprivation that does not serve a public purpose or the public interest would probably be arbitrary).

and the acquisition or destruction of the same by or on behalf of the state;[1051] and thirdly, the involuntary loss of private property through compulsory acquisition or destruction by the state is for a public purpose or in the public interest and is accompanied by compensation. On the other hand, an action would be considered as regulatory deprivation if it manifest the following attributes: firstly, it is brought about as a result of the exercise of the state's regulatory police power, that is, through the enactment and enforcement of a law that regulate or restrict the use of private property for the order, safety, health, morals and general welfare of the public; secondly, its purpose and effect is not to compulsorily acquire property of one or few private owners for the benefit of the whole public but is to restrict (without acquiring) the use of *all* private property of a certain category for the protection of the health, safety, order, morals or general welfare of the public; thirdly, since the state does not take the property away from the owner and because the burdens it imposes are supposed to generally spread over the population more or less equally, it is not accompanied by compensation.

However, where there are conflicting attributes of a state action that makes it difficult to place the action in one category or the other, then the source of power should be the determining factor. The basis of this assertion lies in the fact that in modern democratic societies (such as Kenya and South Africa) governed by the constitution and its enabling values of rule of law and accountability, an exercise of power by government can only be legitimate if it is founded on a legally recognised source of power.[1052] The source of power not only legitimizes government action but it also provides the basis upon which any state action is to be undertaken. Meaning that a state action that goes beyond what is envisaged by the enabling authority would be considered *ultra vires* (beyond the powers) and therefore invalid.[1053] Thus, the source of the power with which the state justifies its interference with private property should play a preponderant role in determining the category within which

[1051] But see M Chaskalson & C Lewis "Property" in M Chaskalson *et al* (eds) *Constitutional Law of South Africa* (1996) 31 (arguing that destruction of property will not constitute expropriation). This also reflects the position taken by the Constitutional Court in *Harsken v Lane NO* 1998 (1) SA 300 (CC) where it was said the state has to acquire property.

[1052] See Constitution of the Republic of South Africa 1996, s 1 (setting out the founding values of the Republic of South Africa to include, among others, "supremacy of the constitution and the rule of law' and democratic governance 'to ensure accountability, responsiveness and openness"). See also the Constitution of the Republic of Kenya 2010, s 10 (for similar foundation).

[1053] See, for example, the South African case of *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) para 90 (holding that: "Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary" and therefore invalid).

the interference should fall.[1054] This source of power with regard to state's interference with private property is either the state's power of eminent domain or its regulatory police power.

It follows, therefore, that if the effect of state interference with private property is compulsory acquisition of property but the source of authority is the regulatory police power then the state action should be categorised as deprivation and not as expropriation. The state action is deprivation because, though its effect is acquisitive, its authority derives from the state's regulatory police power. For the same reason, it is not expropriation because, though the effect corresponds with the effect of expropriation's source of power (power of eminent domain), the source of power is in fact not power of eminent domain. In this regard, in identifying the source of power, emphasis should be placed on the purpose (real not declared) and not on the effect of the action. This approach of relying on the purpose of source of power as opposed to its effect in determining where an action should lie has support in judicial jurisprudence. For example, in its illuminating discussion in *First National Bank*[1055] of the Australian High Court jurisprudence dealing with the property clause (section 51(xxxi)) of the Australian Constitution, the South African Constitutional Court quotes with approval a passage from the judgment of Brennan J in *Mutual Pools & Staff Pty Ltd v Commonwealth of Australia*[1056] to the effect that a state action must have an expropriatory purpose (as opposed to a merely incidental expropriatory effect) for it to amount to expropriation.[1057] This fact, according to the Constitutional Court, explains why laws with a purpose other than the acquisition of a public benefit at private expense (such as tax laws and criminal forfeitures laws) are not expropriations, even though they have acquisitive effect.[1058] The logic of this approach rests in the fact that the fundamental injustice that the right to property seeks to prevent is the acquisition of a public benefit at the

[1054] See also AJ van der Walt *Constitutional property law* 3ed (2011) 57-58 (holding that a principled distinction between deprivation and expropriation should be based on the enabling authority).

[1055] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) paras 80-83.

[1056] Passage from the judgment of Brennan J in *Mutual Pools & Staff Pty Ltd v Commonwealth of Australia* (1994) 179 CLR 155, 177-178.

[1057] According to Brennan J in *Mutual Pools & Staff Pty Ltd v Commonwealth of Australia* (1994) 179 CLR 155, 177-178:

> "In my view, a law may contain a valid provision for the acquisition of property without just terms where such an acquisition is a necessary or characteristic feature of the means which the law selects to achieve its objectives and the means selected are appropriate and adapted to achieving an objective within power, not being solely or chiefly the acquisition of property. But where the sole or dominant character of a provision is that of a law for the acquisition of property, it must be supported by s 51(xxxi) and its validity is then dependent on the provision of just terms."

[1058] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 83.

expense of private individual.[1059] Laws with this purpose in mind are thus considered as expropriation requiring compensation to the affected individual from public fund while laws with another purpose but that have the incidental effect of taking property without this purpose in mind are not.[1060]

Based on the discussed distinguishing principles, it becomes apparent that, although assets recovery manifests conflicting characteristics,[1061] on closer examination assets recovery does in fact amount to regulatory deprivation. Granted that the state eventually acquires the confiscated property and even benefit from it financially but, clearly, the confiscation is not expropriation and the intention is definitely not to compensate the affected individuals. The confiscation is aimed at regulating the legal acquisition of property by ensuring that individuals do not possess illegal properties or benefit from proceeds of their criminal activities and is therefore more an exercise of state's regulatory police power of protecting public safety rather than an exercise of its power of eminent domain.[1062] Because its main purpose is not to acquire private property for public purpose but to control acquisitive crimes such as corruption, it does not qualify as expropriation, although it results in the acquisition of property. Instead it is a regulatory deprivation for which the affected property owner does not deserve to be compensated.[1063]

[1059] The purpose of compensation element in expropriation was explained by the US Supreme Court in *Armstrong v United States* (1949) 364 US 40 as barring "Government from forcing some people to bear public burdens which, in all fairness and justice, should be borne by the public as a whole".

[1060] Another example of such is the recovery of debts through execution processes. See *Geyser v Msunduzi Municipality* 2003 5 SA 18 (N) 250-251 (where debt recovery from a debtor was distinguished from s 118 of the Local Government: Municipal Systems Act 32 of 2000 which allows debt recovery form a third party).

[1061] Identifying the type of state interference represented by assets recovery would be difficult without clear distinguishing criteria between deprivation and expropriation. This difficulty arises from the conflicting characteristics that assets recovery manifests. For example, while its purpose is crime control (a defining characteristic of police power), its effect is acquisitive (a defining consequence of power of eminent domain). See, for example, AJ van der Walt *Constitutional property law* 3ed (2011) chap 4 s 4.7.4 (concluding that confiscation of proceeds is "an exercise of police power"). Compare with RE Edwards "Forfeitures – civil or criminal?" (1970) 43 *Temple Law Quarterly* 191 at 191 (defining confiscation as "is a state action whereby the state seizes and claims property rights in private property without compensation to the owner").

[1062] See, for example, AJ van der Walt *Constitutional property law* 3ed (2011) 311-312 (concluding that "exercise of state powers of search and seizure, confiscation and forfeiture of property should be treated as deprivation of property that has to conform to the requirements in section 25(1) (of South African Constitution)

[1063] See, for example, the South African case of *Mohunram and Another v NDPP and Others* 2007 (6) BCLR 575 (CC) para 120 (treating it as deprivation of property); Kenyan case of *KACC v Lands Limited & 8 others* [2008] eKLR, para 28 (terming it "deprivation").

5.4. The nature of property targeted by assets recovery and its impact on the applicability of the right to property

Because assets recovery amounts to deprivation, it forms part of the state interferences with private property against which the right to property protects property owners. However, since the purpose of assets recovery is to recover illegally acquired property, and also given that the targeted proceeds from corruption can be held in many forms (such as shares, money, land, housing, commercial related interests, intellectual property, goodwill, unit trust, life insurance, salaries, pension schemes, medical aid schemes, state jobs and state contracts), the next question that arises is whether the kind of property targeted by assets recovery falls within the type of property protected by the right to property against unlawful state deprivation. This section examines the kind of property that is protected by the right to property with a view to determining how the form of proprietary interest and illegality in acquisition of property impacts on the applicability of right to property to the state action of assets recovery.

To begin, it is to be noted that property is a word that is usually used to connote a variety of meaning that makes it difficult to define with precision. However, there are at least three possible meanings that it could denote.[1064] First, it could narrowly refer to physically tangible objects such as land, houses and cars. Understood in this sense, the right to property would then be protecting people from having their physical property unlawfully interfered with. Second, it could refer to the rules that govern the relationship between individuals and their physical property – what is commonly referred to as property rights. In this sense, the right to property would then be protecting the plenary right of ownership and its component rights such as the right to alienate, to use, to dispose, or to exclude others from using the physical object. Third, property could broadly refer to any relationship or interest that has an economic value. This would include the market value of land calculated in accordance with the current market value for land in the area. Thus, if the state acts in such a way as to reduce the market value of physical property (for example, by turning the surrounding land into a waste disposal area) then it would be required to compensate the affected owners for taking away the market value, which is considered property in this third sense.

[1064] For further discussion, see in general AJ van der Walt *Constitutional property clauses: a comparative analysis* (1999); T Allen *The right to property in commonwealth constitutions* (2000).

An examination of the Kenyan and South African property clauses reveals that they envisage an all-encompassing conception of property for purposes of the right's protection. For example, the South African property clause has broadly indicated that property for purposes of section 25 is not to be "limited to land".[1065] In this regard, the South African Constitutional Court has held in the *First National Bank* that the meaning of property for purposes of section 25 is to be left open ended as it is impossible to define it comprehensively.[1066] This statement has, however, not stopped commentators from attempting to come up with a list of possible "properties" covered by the property clause. Most South African commentators agree that the concept of property under the constitutional property clause is wider than its conception in private law.[1067] The main difference in constitutional property is that the objects of constitutional property right are not restricted to physically tangible objects nor are the "bundle of rights" dominated by ownership in the technical sense.[1068] Instead, and as confirmed by South African courts, the object encompasses both tangible objects such as land and intangible objects such as intellectual property (copyright, patents and trademarks) and a range of other rights and interests such as commercial interests (debts, shares, and the goodwill of a company).[1069] This broad conception of property is also evident in the Kenyan property clause which applies to property "of *any* description" and to "*any* interest in, or right over, any property of any description".[1070] In its adjudication on the property clause, the Kenyan courts have found that

[1065] Constitution of the Republic of South Africa 1996 s 25(4).

[1066] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 51.

[1067] South Africa ascribe to the Roman-Dutch legal tradition that views property as a legal relationship between persons and corporeal (physical tangible) things. See in general AJ van der Walt *Constitutional property clauses: a comparative analysis* (1999) 351-353; T Roux & D Davis "Property" in MH Cheadle, DM Davis & NRL Haysom *South African Constitutional law: the bill of rights* (2010) 17-18; I Currie & J de Waal *The Bill of Rights Handbook* 5ed (2005) chap 25.

[1068] In Roman-Dutch law from which South Africa private property law is inspired, ownership is regarded as an abstract that is more than the sum of its constituent entitlements. See CG van der Merwe *Sakareg* 2ed (1989) 175-176.

[1069] See *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) (confirming that ownership of land and of movable tangibles (such as motor vehicle involved in that case) is property for purposes of section 25). See also *Laugh it off promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and Another* 2006 (1) SA 144 (CC) para 1 & 40 (where intellectual property was held to be property for purposes of section 25 protection); *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) and *President of the Republic of South Africa and Another v Modderklip Boerdert (Pty) Ltd and Others* 2005 (5) SA 3 (CC) (where occupation interest of unlawful occupiers of land were recognised as property interests for purposes of the Constitution). See also *Ex Parte Optimal Property Solutions* CC 2003 (2) SA 136 (c) (where the Western Cape High Court interpreted property purposively and decided that it "should be read to include any right to, or in property" and concluded that restrictive conditions, like registered praedial servitudes, are real right and thus property for purposes of section 25).

[1070] Constitution of the Republic of Kenya 2010, s 40(1), (2) & (3) (emphasis added).

it applies not only to tangible objects such as land but also to intangible objects such as intellectual property.[1071]

Property for purposes of the right to property protection in Kenya and South Africa can thus be said to encompass a range of tangible and intangible objects such as land and intellectual property respectively. It also encompasses a range of real rights (rights with respect to things) such as ownership, mortgage, lease, servitude, and liens; and personal rights (rights of performance or legal claim) such as shares, claims to payment from a pension fund or from other contractual obligations, rights arising out of court judgments and statutory obligations, and rights deriving from the acquisition and exploitation of commercial licenses, permits and quotas.[1072]

The reason why the definition of property should be interpreted to capture intangible objects and personal rights lies in the fact that in modern economic life, a person's wealth is no longer primarily defined by ownership of physically tangible objects such as land. An inordinate number of personal wealth is today represented in personal rights such as shares, goodwill, unit trust, life insurance, salaries, pension schemes, and other welfare benefits.[1073] Equally important are intellectual property such as ideas, trademarks and inventions; commercial related rights such as those arising out of licenses, permits and quotas; and "interest in government largesse" such as state pensions, medical aid schemes, state jobs and state contracts; which because of their lack of physical existence are not encompassed in the traditional real rights.[1074] Thus, to restrict the definition of property to tangible property or to

[1071] See *Isaac Gathungu Wanjohi & Another v Attorney General & 6 Others* (2012) eKLR (on land); *East Africa Breweries Ltd v Attorney General & 2 Others* [2013] eKLR, para 28 (on intellectual property).

[1072] The difference between a real right and a personal right is that with real rights one has a right to "that which is mine", and with personal rights one has a right to "that which is due to me." See Du Plessis, *An Introduction to Law* (1999) 147. See also *Cooper v Boyes NO* 1994 (4) SA 521 (C) (holding that a share is an interest in the company which consists of a complex of personal rights which may, as an incorporeal entity, be negotiated or otherwise disposed of); the South African case of *Diepsloot Residents & Landowners Association v Administrator, Transvaal* 1993 (3) SA 49 (T) (where increase in pollution and crime due to the settlement of a large population of squatters near an established suburb were taken to constitute an interference with the right to property).

[1073] On dephysicalisation of property see generally KJ Vandevelde "Developing property concepts" (1980) 29 *Buffalo Law Review* 333; AJ van der Walt "Unity and pluralism in property theory: a review of property theories and debates in recent literature: part I" (1995) *The Journal of South African Law* 15; TC Grey "The disintegration of property" in JR Pennock & JW Chapman *Property (Nomos XXII)* (1980) 69; C Reich "The new property" (1964) 73 *Yale Law Journal* 733.

[1074] See CA Reich "The New Property" (1964) 73 *Yale Law Journal* 733 (noting that "new property" is a right to income, including from social welfare programmes); AJ van der Walt *The Constitutional Property Clause: A Comparative Analysis of Section 25 of the South African Constitution of 1996* (1997) 40-41. A South African case recognising that "new property" is protected by the property clause is *Transkei Public Servants Association v Government of the Republic of South Africa* 1995 (9) BCLR 1235 (Tk) (where employment

real right would mean that economically significant intangible property and personal interests, which form a big chunk of the source of modern personal wealth, would be left unprotected from state deprivation.[1075] For a similar reason, the definition of property should also encompass the sticks in the "bundle of rights" that constitute plenary ownership such as the rights to use a thing, to exclude others from it, to receive income from it and to transfer it to others on mutually agreeable terms. Otherwise, the state could interfere at will with the component rights of ownership provided it left a shell of bare ownership in the hands of an owner.[1076]

Indeed, the need to protect the broadest range of property interest has seen the South African Constitutional Court amending its position from that in the 1995 case of *Ferreira v Levin NO*[1077] where it held that the United States jurisprudence interpreting property rights so as to accord extensive constitutional protection to economic liberty was not appropriate for South Africa,[1078] to that in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service* and *Mkontwana v Nelson Mandela Metropolitan Municipality* where it indirectly endorsed the argument that component rights in the "bundle of rights" that constitute plenary ownership could constitute separate property interests capable of separate protection in appropriate cases.[1079] It is also probably for the same reason

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benefits of civil servants, in particular their housing subsidies were held to be property rights protected by s 28 of the Interim Constitution).

[1075] But see T Roux & D Davis "Property" in MH Cheadle *et al South African Constitutional Law: The Bill of Rights* (2 ed) (2010) ch 20 at 13 noting with respect to the South African property clause that:

> "An overly expansive definition of constitutional property, one that recognized virtually every interest capable of being assessed in money terms, would run counter to the courts' developing jurisprudence on the fundamental values underlying the final constitution."

See also I Currie & J de Waal *The Bill of Rights Handbook* 5ed (2005) 537 (arguing that too broad a definition of property could result in an unrestricted proliferation of intangible property interests). However, given that the dephysicalisation of property is an incontrovertible reality and that intangible property is becoming increasingly important in defining personal and social wealth, a definition of property that fails to encompass these emerging property interests within its ambit would deprive the protection accorded by the right to property of any usefulness.

[1076] See T Allen *The right to property in commonwealth constitutions* (2000) 530-37.

[1077] *Ferreira v Levin NO* 1996 (2) SA 984 (CC).

[1078] I *Ferreira v Levin NO* 1996 (2) SA 984 (CC) para 182. See also M Chaskalson "Stumbling towards section 28: Negotiations over the protection of property rights in the interim constitution" (1995) 11 *South African Journal of Human Rights* 222 at 234-236 (noting that during the drafting of the South African Constitution the restrictive potential of conceptual severance arguments caused concern in pro-reform circles who saw it as a potential bottleneck that could be used to frustrate almost any reform effort by the government by subjecting it to impossible compensation duties).

[1079] See *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC), para 100 (one of the factors to be considered when evaluating whether a deprivation of property is arbitrary is whether the deprivation affects "all the incidents of ownership" or "only some incidents of ownership and those incidents only partially"); *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 (2) BCLR 150 (CC) para 45 ("We are concerned in this case with the deprivation of a single but important incident of ownership in immovable property namely the right to pass transfer of property to complete alienation. The owner can continue to occupy the property, let it or do anything else that ownership allows"). See also see T Roux & D Davis "Property" in

that the Kenyan Constitution, which was enacted over 10 years after the South African Constitution, recognized the futility of limiting the meaning of property and instead adopted the open-ended phrase of property "of *any* description" and "of *any* interest in, or right over, any property of *any* description".[1080]

This broad conception of property for purposes of right to property protection finds favour in international and regional human rights instruments and jurisprudence. Section 27(2) of the Universal Declaration of Human Rights (UDHR), for example, gives express recognition to intellectual (intangible) property. It provides that "everyone has the right to the protection of the moral and material interest resulting from any scientific, literacy or artistic production of which he is the author".[1081] This intangible property in contrast to property in general that was left out of the subsequent International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) which gave content to the rights in the UDHR and made them binding, was made binding by the ICESCR.[1082] Under Article 15(c), the ICESCR confirms that everyone has the right "to benefit from the protection of the moral and material interest resulting from any scientific, literary or artistic production of which he is the author".[1083]

Similarly, the Inter-American Court of Human Rights in *Ivcher-Bronstein v Peru*[1084] has defined property for purposes of the right to property under Article 21 of the American Convention on Human Rights broadly as "those material things which can be possessed, as

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MH Cheadle, DM Davis & NRL Haysom (2ed) *South African Constitutional Law: The Bill of Rights* (2010) chap 46 13 (pointing out that the FNB decision and methodology could support conceptual severance arguments by emphasizing effect that deprivation has on particular entitlements of the property holder). But see Van der Walt *Constitutional property law* (2011) 100 (pointing out that conceptual severance is not possible as "the focus on entitlements during the arbitrariness test is simply to gauge the scope and impact of the deprivation as a whole and not rank single entitlement limitations as independent deprivations"). Still the fact that the Constitutional Court was willing to consider conceptual severance is a significant pointer to its disinclination against restrictive definition of property especially considering that in Roman-Dutch law under which South Africa's property clause is grounded, regards ownership as an abstract that is more than the sum of its constituent entitlements: CG van der Merwe *Sakareg* 2ed (1989) 175-176.

[1080] Constitution of the Republic of Kenya 2010, s 40(1), (2) & (3) (emphasis added). In its adjudication on the property clause, the courts have found that it applies not only to tangible objects such as land but also to intangible objects such as intellectual property. See *Isaac Gathungu Wanjohi & Another v Attorney General & 6 Others* (2012) eKLR (on land); *East Africa Breweries Ltd v Attorney General & 2 Others* [2013] eKLR, para 28 (on intellectual property).

[1081] UDHR, art 27(2).

[1082] Intellectual property is an exception category of property that has received recognition in ICESCR, art 15(c). For further discussion see generally PK Yu "International rights approaches to intellectual property: Reconceptualising intellectual property interests in a human rights framework" (2007) 40 *University of California Davis Law Review* 1029.

[1083] ICESCR, art 15(c).

[1084] *Ivcher-Bronstein v Peru*, Judgment of 6 February 2001, Inter-American Court of Human Rights (Series C) nr 74.

well as any right which may be part of a person's patrimony".[1085] These material things, according to the Court, include "all movable and immovable property, corporal and incorporeal elements, and any other intangible object of any value".[1086] This definition was quoted with approval by the same court in a later case of *Mayangna (Sumo) Awas Tingi Community v Nicaragua* where the court found that the right to property extends to the rights of members of the indigenous communities within the framework of communal property.[1087] The Court also held in *Torres Benvenuto et al (Five Pensioners) v Peru* that pensions of former public servants constituted property for purposes of the right to property protection.[1088] Likewise, the European Court of Human Rights (ECHR) and the African Commission on Human Rights, though refraining from offering a general definition, have also adopted a broad conception of property in their case law.[1089] The ECHR, for example, has held that the "possession" arm of the right to property provision in article 1 of the First Protocol to the European Convention on Human Rights and Fundamental Freedoms is "not limited to ownership of physical goods"[1090] but includes ownership of other incorporeal and intangible objects of value such as performances,[1091] shareholding,[1092] goodwill,[1093] and rights deriving from the acquisition and exploitation of commercial licenses, permits and quotas.[1094] On its part, the African Commission on Human Rights has found the right to property to be applicable in cases involving personal belongings,[1095] land and housing,[1096] inheritance rights,[1097] personal right to performance (monetary compensation granted by

[1085] *Ivcher-Bronstein v Peru*, Judgment of 6 February 2001, Inter-American Court of Human Rights (Series C) nr 74 para 122.
[1086] Ibid.
[1087] *Mayangna (Sumo) Awas Tingi Community v Nicaragua*, Judgment of 31 August 2001, Inter-American Court of Human Rights (Series C) nr 79 para 144.
[1088] *Five Pensioners v. Peru* Judgment (IACtHR, 28 Feb. 2003).
[1089] For a discussion of the jurisprudence of the ECHR, see generally U Kriebaum & C Schreuer "The Concept of Property in Human Rights Law and International Investment Law" available at http://www.univie.ac.at/intlaw/concept_property.pdf (accessed 08/08/2013).
[1090] *Beyeler v Italy* (App no 33202/96) ECHR (GC) 2000-I para 100. See also *Matos e Silva Lda v Portugal* (App no 15777/89) ECHR 1996-IV para 75; *Former King of Greece v Greece* (App no 25701/94) ECHR 2000-XII para. 60; *Tsirikakis v Greece* (App no 46355/99) ECHR 17 January 2002, para 53.
[1091] See *Slivenko and Others v. Latvia* (App no. 48321/99) (GC) ECHR 2002-II, para 121 (noting that "[p]ossessions" can be "existing possessions" or assets …. (or at least) a "legitimate expectation" of acquiring effective enjoyment of a property right"). However, the claim or expectation must be enforceable or based on a justified expectation concerning the existence of a property right. See *Malhous v Czech Republic* (App no 33071/96) ECHR (GC) 2000-XII (Decision on Admissibility) (holding that no legitimate expectation and, therefore, no protection exist where claim is subject to a condition which has not been fulfilled).
[1092] See, *Lithgow et al v United Kingdom* (App nos 9006/80, 9261/81, 9263/81) (1986) Series A no 102.
[1093] *Iatridis v Greece* (App no 31107/96) ECHR 1999-II, para 54.
[1094] *Tre Traktörer v Sweden* (App no 10873/84) (1989) Series A no 159 (concerned the revocation of a licence to serve alcoholic beverages); *Fredin v Sweden (No. 1)* (App no 12033/86) (1991) Series A no 192 (concerned revocation of the applicant's permit to extract gravel).
[1095] *Modise v Botswana* (2000) AHRLR 30 (ACHPR 2000) para 94.
[1096] *Malawi African Association and Others v Mauritania* (2000) AHRLR 149 (ACHPR 2000) para 128.
[1097] *Rabah v Mauritania* (2004) AHRLR 78 (ACHPR 2004) para 30.

judgment),[1098] rights derived from permit and licensing laws,[1099] right to have access to property,[1100] and right to undisturbed possession, use and control of one's property.[1101]

Thus, it can be concluded that as long as a property interest (whether tangible or intangible, or whether personal or real) has constitutionally relevant value for the claimant it should form part of proprietary interest capable of protection by the right to property.[1102] However, despite this broad conception of property for purposes of constitutional property clauses, it is to be noted that not all proprietary interests are protected by the right to property. The proprietary interest must be vested for it to be protected.[1103] A vested interest is one that has accrued to the claimant according to the existing law and not one that is merely an expectation. This point was illustrated in the Kenyan case of *Philma Farm Produce & Supplies & 4 Others v Attorney General & 6 Others*[1104] where the court held that a claim grounded on two letters of allocation of the suit properties was not capable of protection under the constitutional property clause. According to the court, in order to enforce the right to property under section 40 of the Constitution, "a party must demonstrate that it is entitled to the property in issue and the proprietary interest sought to be protected is defined by existing laws".[1105] The court found that this was not demonstrated by the claimant in the case because the letters of allocation relied on could "not confer a proprietary right but only a right to receive property or to be allocated on complying with the terms and conditions stated".[1106] Because the right was contingent upon a future happening, the Court concluded that the dispute could not be determined under the property clause but "in accordance with the ordinary rules of contract".[1107]

[1098] *Bissangou v Republic of Congo* (2006) AHRLR 80 (ACHPR 2006) para 76.
[1099] *Kemai and Others v Attorney-General and Others* (2005) AHRLR 118 (KeHC 2000) para 20 (the court however found against the applicant).
[1100] *Constitutional Rights Project and Others v Nigeria* (2000) AHRLR 227 (ACHPR 1999) paras 53-54.
[1101] *Huri-Laws v Nigeria* (2000) AHRLR 273 (ACHPR 2000) paras 52-53.
[1102] As already demonstrated in paragraph one of this section (5.3.) above, the requirement of vested interest apply in the Kenyan and South African Constitutional property clause. See also AJ van der Walt *Constitutional Property Clauses: A Comparative Analysis* (1999) 153 (noting that these requirements especially the one on vested interest apply in one form or another in most, if not all, modern constitutions).
[1103] This requirement finds application, in one form or another, in most if not all jurisdictions. See AJ van der Walt *Constitutional Property Clauses: A Comparative Analysis* (1999) 153.
[1104] *Philma Farm Produce & Supplies & 4 Others v Attorney General & 6 Others* (2012) eKLR.
[1105] *Philma Farm Produce & Supplies & 4 Others v Attorney General & 6 Others* (2012) eKLR para 34.
[1106] *Philma Farm Produce & Supplies & 4 Others v Attorney General & 6 Others* (2012) eKLR para 37.
[1107] *Philma Farm Produce & Supplies & 4 Others v Attorney General & 6 Others* (2012) eKLR para 37.

A comparable position was taken in the South African case of *Lebowa Mineral Trust Beneficiaries Forum v President of the Republic of South Africa*[1108] where the High Court ruled that to be property, rights must have "demonstrably vested in the applicant in the sense that the rights have accrued according to the relevant principles of common law or statute" as opposed to "rights or interests that are no more than expectations that may or may not vest in future".[1109] Although the conclusion by the court that mineral rights (which were the concern in the case) are not protected by the constitutional property clause has been the subject of ample criticism,[1110] its holding that property rights must be vested for them to be protected remains sound and has been supported by a number of commentators.[1111]

Thus, a claimant in a constitutional property dispute in the two countries has to prove that the property interest at issue is vested in him or her as a preliminary matter before the safeguards against expropriation and deprivation can be invoked in his or her favour.[1112] In the Kenyan case, however, there is an additional requirement of lawfulness (of the vestment or of the acquisition) that must be met for a proprietary interest to be protected.[1113] This requirement arises out of the express provision of Section 40(6) of the Constitution, which, as already noted,[1114] excludes property that "has been found to have been unlawfully acquired" from the ambit of protection of the right to property.[1115] The effect of this section as held in *Isaac Gathungu Wanjohi v Attorney General*[1116] is that "protections afforded by

[1108] *Lebowa Mineral Trust Beneficiaries Forum v President of the Republic of South Africa* 2002 (1) BCLR 23 (T).
[1109] *Lebowa Mineral Trust Beneficiaries Forum v President of the Republic of South Africa* 2002 (1) BCLR 23 (T) 31.
[1110] See, for example, M Dale *South African Mineral and Petroleum Law* (2008) 131; See also *Attorney General of Lesotho v Swissbourgh Diamond Mines (Pty) Ltd* 1997 (8) BCLR 1122 (Lesotho CA) where the court (per Mahomed P) had no difficulty in considering registered mining leases to be property protected by the property right of the Lesotho Human Rights Act).
[1111] See, for example, AJ van der Walt *Constitutional Property Clauses: A Comparative Analysis* (1999) 353 (concluding that property for purposes of the South African Constitutional property clause is restricted to rights that are "demonstrably vested in the claimant, and that have some patrimonial value"). See also *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 46 (holding that a claimant in a constitutional property dispute has to prove the existence of a vested property interest as a threshold matter).
[1112] The principle has also been adopted in some form or another, in most if not all jurisdictions. For example, in the Zimbabwean case of *Chairman of the Public Service Commission v Zimbabwe Teachers Association* 1996 (9) BCLR 1189 (ZS) 1203 G-H the Supreme Court of Zimbabwe found that a bonus paid to Public Servants in December every year did not amount to property as it was conditional on whether the recipient was a public employee during November of the year in which it was paid. "This meant" according to the majority "that if and when that contingency happened then the right would be created. The right sought to be enforced must be vested and not merely contingent upon a future happening". For further examples, see AJ van der Walt *Constitutional Property Clauses: A Comparative Analysis* (1999) 153.
[1113] The ordinary meaning of the word "vests" connotes the acquisition of ownership. See *Jewish Colonial Trust Ltd v Estate Nathan* 1940 AD 163, 175.
[1114] See section 5.2 above.
[1115] Constitution of the Republic of Kenya 2010, s 40(6) (emphasis added).
[1116] *Isaac Gathungu Wanjohi & Another v Attorney General & 6 Others* [2012] eKLR.

Article 40 which protect the right to property must be read to exclude property found to be unlawfully acquired under Article 40(6)".[1117] This means that a proprietary interest must have lawfully vested in (or have been lawfully acquired by) a claimant for it to benefit from the protection accorded by the right to property.[1118]

A similar position seems to also apply in the South African context especially in light of the Constitutional Court's holding in *First National Bank case* that a claimant in a constitutional property dispute has to first prove the existence of a recognized property interest before it can be considered for protection under section 25[1119] and the decision in *Lebowa Mineral Trust Beneficiaries Forum v President of the Republic of South Africa* that a property interest can only accrue "according to the relevant principles of common law or statute", which logically cannot allow for illegal acquisition.[1120] However, when one takes into account the decision of the Constitutional Court in *Port Elizabeth Municipality v Various Occupiers*[1121] and *President of the Republic of South Africa and Another v Modderklip Boerdert (Pty) Ltd and Others,*[1122] to the effect that the occupational interest of unlawful occupiers of land is property interests for purposes of the Constitution, it becomes apparent that a general assumption on lawfulness requirement cannot be made. Still when one considers the reason given by the Court for upholding the constitutionality of the unlawful proprietary interest in these two cases, it does appear that unlawful occupation of land is meant to be an exception rather than the rule on the question whether lawfulness of acquisition is a determining factor in the application of the South Africa's property right protection.

According to the Court, the reason for protecting the interest of unlawful occupiers lies in the historical injustice under which apartheid systematically removed certain category of citizens from their land and forcefully evicted them from their homes. This historical fact, in the Court's view, necessitates an "orderly opening-up or restoration of secure property rights for those denied access to or deprived of them in the past", part of which orderliness requires

[1117] *Isaac Gathungu Wanjohi & Another v Attorney General & 6 Others* [2012] eKLR para 42.
[1118] In this regard, section 40(4) which calls on the government to compensate in good faith occupiers of land without title should not be interpreted as a recognition of unlawful occupation of land but rather as an attempt to address the perennial problem in Kenya where many lawful landowners were not issued with title deeds due to the conflicting land regime obtaining in the period preceding the enactment of the new constitution.
[1119] See *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 46.
[1120] See *Lebowa Mineral Trust Beneficiaries Forum v President of the Republic of South Africa, Lebowa Mineral Trust Beneficiaries Forum v President of the Republic of South Africa* 2002 (1) BCLR 23 (T) 31.
[1121] *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC).
[1122] *President of the Republic of South Africa and Another v Modderklip Boerdert (Pty) Ltd and Others* 2005 (5) SA 3 (CC).

securing the interest of the unlawful occupiers even as concrete and case-specific solutions are sought for the difficult problems that arise.[1123] However, because the forceful eviction and removal during the Apartheid era was mainly land based,[1124] it would be far-fetched to hold that the same protection accorded to unlawful occupiers of land equally applies to persons who, for example, unlawfully acquire a motor vehicle or who through fraudulent means acquire shares in a public listed company even if the right to hold these properties were denied certain category of the populace under the apartheid regime. Such a conclusion would be tantamount to saying that illegal transfer of title can be effected by constitutional fiat, a situation which the South African Constitution clearly frowns upon.[1125] Indeed, even in the case of land, the Constitutional Court has reiterated that the Constitution does not "sanction arbitrary seizure of land, whether by the state or by landless people".[1126] Meaning that, save for the case of "genuine" unlawful occupation of land, the lawfulness of the vestment would also be a determining factor in a decision on whether a proprietary interest should benefit from the South Africa's property clause's protection.

When the discussed principles are applied to the case of assets recovery, it can be concluded that since the right to property extends its protection to the broadest range of property interest it would therefore cover the various forms in which corruptly acquired property may be held (such as shares, money, land, housing, commercial related interests, intellectual property, goodwill, unit trust, life insurance, salaries, pension schemes, medical aid schemes, state jobs and state contracts). However, since the right to property only protects property that is lawfully acquired,[1127] assets recovery should really not raise any property right's

[1123] See *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) paras 8-23; *President of the Republic of South Africa and Another v Modderklip Boerdert (Pty) Ltd and Others* 2005 (5) SA 3 (CC) para 48.

[1124] See *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC); 2005 (1) BCLR 78 (CC) para 25 (noting that apartheid was characterised by injustices of forced removals from *land* and evictions from *homes*" (emphasis added)).

[1125] *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC), para 20; See also AJ Van der Walt "Exclusivity of Ownership, Security of Tenure and Eviction Orders: A critical evaluation of Recent Case Law" (2002) 18 *SA Journal on Human Rights* 372 at 397 (noting that the rights of the dispossessed does not change the institution of private property). Cf the Kenyan case of *Joseph Ihugo Mwaura and 82 Others v Attorney General* Nairobi Petition 498 of 2009 (Unreported), where the Court referring to section 75 of the 1963 (repealed) Constitution observed that:

> "Section 75 of the Constitution contemplates that the person whose property is the subject of compulsory acquisition has a proprietary interest as defined by law. The Constitution and more specifically section 75 does not create proprietary interests nor does it allow the court to create such rights by constitutional fiat. It protects proprietary interests acquired through the existing legal framework."

[1126] *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 20. See also *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) para 92 (where Yacoob J pointed out that "[l]and invasion is inimical to the systematic provision of adequate housing on a planned basis").

[1127] As already noted, in South Africa unlawful acquisition is generally outlawed, save for cases of genuine unlawful occupation of land mostly by the landless but definitely not by deliberate criminals.

concerns since the property that is targeted for recovery is usually that which has been illegally acquired. However, to exclude property targeted for recovery from the protection of the right to property is to presuppose that the targeted property was illegally acquired. This is, however, only possible after it is has been established before an impartial arbiter to the required standard that the property in question is indeed proceeds of corruption. Thus, until the state proves the illegal source of the property, the protection of the right to property is applicable. The import is that while the state has the right to deprive individuals of their property in exercise of its regulatory police power, it must ensure that the deprivation complies with the requirements of lawful deprivation for it to be valid. The next section examines whether assets recovery conforms to the requirements of lawful deprivation.

5.5. Assets recovery and the requirements for lawful deprivation

Being a regulatory deprivation of property, for it to be valid, assets recovery should conform to the requirements of lawful deprivation under the right to property, that is, it should be authorised and governed by law of general application and it must not be arbitrary.[1128] By law of general application is generally meant a law that (1) is properly enacted and promulgated and (2) does not discriminate.[1129] In other words, the requirement that deprivation must be authorised by law of general application will not be fulfilled where the state acts, by itself or through its representative, to deprive an individual of property without authorisation by a clear, precise, certain and publicly promulgated law.[1130] It will also not be met where the law authorising the deprivation only targets a particular individual or group of individuals.[1131]

[1128] Constitution of the Republic of South Africa 1996, s 25(1); Constitution of the Republic of Kenya 2010, s 40(2).

[1129] The South African property clause (s 25(1)) uses the term "law of general application", while that of Kenya (s 40(2)) uses the term "law" but nevertheless requires that that law must be non-discriminatory. Since "law of general application" in the context of the South African property clause has been interpreted as a law that (1) is properly enacted and promulgate and (2) does not discriminate, the import of the two clauses is the same. On South African "law of general application", see S Woolman & H Botha "Limitations" in S Woolman *et al* (eds) *Constitutional law of South Africa* (2006) Juta chapter 34 at 48-49.

[1130] See S Woolman & H Botha "Limitations" in S Woolman *et al* (eds) *Constitutional law of South Africa* (2006) chap 34 at 48-49 (noting that law of general application should have these attributes). The requirements for law of general application would usually be met by legislation, regulations, subordinate legislation other than regulations, by-laws, common law, customary law, rules of court, and international conventions. It is not clear, however, whether standards, directives, norms and guidelines issued by government agencies or statutory bodies would qualify as law of general application. For example, in the South African case *of De Lille and Another v Speaker of the National Assembly* 1998 (3) SA 430 (c) the Cape High Court held that the rule of parliamentary privilege does not qualify as law of general application because it was neither published or accessible nor precise or certain.

[1131] See, for example, *Attorney General of Lesotho v Swissbourgh Diamond Mines* 1997 (8) BCLR 1122 (where a decree purporting to revoke five specified mining leases was overturned by the Lesotho Court of Appeal on grounds that because of its discriminatory nature it was an uncompensated violation of the right to property).

With regard to the non-arbitrary requirement, the courts in Kenya and South Africa have indicated that arbitrariness for purposes of the right against arbitrary deprivation of property relates to both procedural fairness and substantive non-arbitrariness.[1132] Procedural fairness is a flexible concept and will usually depend on the circumstance of each case.[1133] However, in substance what is required for procedural fairness is predictability and sufficiency or adequacy in the criteria used to arrive at the deprivation – in other words, the government is prohibited from acting capriciously when regulating or policing private property.[1134] Substantive non-arbitrariness, on the other hand, requires that the purpose of the authorising law should not only conform to the general purpose of a state's regulatory police power[1135] but that the means adopted to realise the objective of that law must also be rationally connected to the legitimate objective and must not be disproportionate in its effect.[1136]

However, because most deprivations are usually authorised by law, the law of general application requirement is rarely given much attention by the courts See, for example, *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 61 (where only 9 words were used to dispense with the requirement: "section 114 clearly constitutes a law of general application". See also *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffallo City Municipality and Others; Transfer Rights Action Campaign and Others v Member of the Executive Council for Local Government and Housing, Gauteng and Others* 2005 (1) SA 530 (CC) para 83 ("It is quite clear that section 118(1) does constitute a law of general application and this issue need not trouble as further").

[1132] See South African case of *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100; and Kenyan case of *Crywan enterprises limited v Kenya revenue* [2013] eKLR para 29.

[1133] See, for example, *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 (1) SA 530 (CC) para 65 (noting that procedural fairness will depend on the circumstances of each case).

[1134] See, for example, the South African case of *Janse van Rensburg v Minister of Trade and Industry* 2001 (1) SA 29 (CC) (s 8(5)(a) of the Harmful Business Practices Act 71 of 1998 allowed arbitrary deprivation of property by allowing the Minister of Trade and Industry to seize assets before the completion of a proper investigation); *Metcash Trading Ltd v Commissioner for the SA Revenue Service and Another* 2000 (3) BCLR 318 (W) (s 36(1), 40(2) and 40(5) of the Value Added Tax Act 89 of 1991 do not constitute arbitrary deprivation of property) See also *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 (1) SA 530 (CC) para 65 (where the Constitutional Court noted that it is a flexible concept and will depend on the circumstance of each case).

[1135] The Kenyan Constitution, for example, provides at section 66(1) that: "The State may regulate the use of any land, or any interest in or right over any land, in the interest of defence, public safety, public order, public morality, public health, or land use planning". Constitution of the Republic of Kenya 2010, s 66(1). See also AJ Van der Walt *Constitutional property law* 3ed (2011) chap 4 s 4 (noting that though the public purpose requirement is not explicitly stated for non-expropriatiory deprivation under the South African Constitution, one could assume an implicit public purpose requirement in that deprivation that does not serve a public purpose or the public interest would probably be arbitrary).

[1136] As the South African Constitutional Court noted in the case of *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100, a deprivation of property is arbitrary within the meaning of section 25(1) of the Constitution if the law in issue "does not provide sufficient reason for the particular deprivation in question or is procedurally unfair". In determining whether there is sufficient reason for a permitted deprivation, the Court noted that one must evaluate a vortex of relationship between the purpose of the law and the means adopted to effect that law. The deprivation is arbitrary where the purpose and means bears no relation to each other or where the effect of the means adopted is disproportionate. See also *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 (1) SA 530 (CC) para 34-35. This South African approach has been endorsed by the Kenyan Courts. See, for example, *Crywan enterprises limited v Kenya revenue* [2013] eKLR para 29.

The reason for this elaborate safeguard of non-arbitrariness in the case of deprivation lies in the fact that unlike its expropriation counterpart, deprivation does not attract compensation yet its effect is also burdensome to property owners as it restricts the free use of private property and might even diminish its value or lead to the destruction or loss of the targeted property.[1137] Thus the non-arbitrary test is inserted to ensure that the deprivation is only undertaken where the protection of legitimate public purposes such as public health and safety so requires; and that where it is undertaken the criteria adopted is clear, sufficient and predictable and the effect of the means is proportionate in the sense of being spread over the population more or less equally and of not being more burdensome on property owners than is necessary to achieve the legitimate public purpose. In this regard, deprivations whose procedures are unfair or whose effect is to burden some owners and not others whose property is in same category or is to burden property owners excessively or unfairly would be considered arbitrary and therefore invalid.[1138]

When assets recovery is examined in relation to these requirements for lawful deprivation, it becomes evident that while it is generally governed by statutory law with general application,[1139] its impact does not conform to the non-arbitrary requirement of deprivatory actions. As already noted, one of the elements of the non-arbitrary requirement is that the effect of the deprivation should not be disproportionate in the sense of going beyond the general purpose for which the deprivatory power, which in this case is the regulatory police power, is created.[1140] Thus, since the generally accepted purpose of regulatory police power (the source of power for assets recovery) is to regulate the use of property without the state

[1137] See, for example, *Miller v Schoene* 276 US 272 (1928) (where one landowner's trees destroyed to save others from a virulent pest). For further discussion, see T Allen *The right to property in commonwealth constitutions* (2000) 180.

[1138] See, for example, *Janse van Rensburg NO v Minister van Handel en Nywerheid* 1999 (2) BCLR 204 (T), 221F (where it was held that s 8(5)(a) of the Harmful Business Practices Act 71 of 1998 was procedurally inadequate and therefore arbitrary for allowing the Minister of Trade and Industry to seize assets before the completion of a proper investigation); *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC), para 67, 100 (where it was found that section 114 of the Customs and Excise Act 91 of 1964 was unfair in its effect and therefore arbitrary for allowing the state to attach the property of innocent third parties in execution of a custom debt of unrelated tax defaulter); *Director of Public Prosecution: Cape of Good Hope v Bathgate* 2000 (2) SA 535 (C) para 82 (seizure of possessions under the Proceeds of Crime Act 76 of 1996 "may…constitute arbitrary deprivation of property in terms of s 25(1)"); This approach is different from that adopted in jurisdictions where the notion of regulatory taking (the US) or material expropriation (Switzerland) is recognized. In these jurisdictions, unfair or excessive regulatory deprivation could be salvaged by being treated as an expropriation that requires compensation. For further discussion, see AJ van der Walt *Constitutional property clauses: A comparative analysis* (1999).

[1139] In Kenya and South Africa, as exposed in chapter 3 above, assets recovery is authorised by statutory provisions.

[1140] Which means that it must serve a public purpose and the burden it imposes must not exceed what the public purpose requires.

acquiring the same, the fact that property is acquired by the state under assets recovery makes it go beyond what is ordinarily allowed by the enabling police power. Indeed, although the exercise of state police power might in some cases diminish the value or profitability of private property, its ordinary purpose is not to take property away but to merely place controls on the use of the property.[1141]

5.6. Impact of the acquisitive effect of assets recovery on its constitutionality

In some jurisdictions, the excessive or acquisitive deprivation is usually treated as expropriation requiring compensation, even though the source of power is regulatory police power. This phenomenon is popularly referred to as "constructive expropriation" and is mostly applied in the United States.[1142] In other jurisdictions such as Germany, the result would be that the action is declared invalid for exceeding its constitutional or statutory authority or purpose.[1143] In Kenya and South Africa, because deprivation and expropriation are treated as distinct categories with no possibility of overlap, it can be said that the impact or effect of the deprivation would help determine the level of scrutiny and it might render the deprivation arbitrary and therefore invalid but it does not change the character of the interference from deprivation to expropriation.[1144] Thus, while the source of power does play a deciding role in identifying the category of interference, the effect of the interference would have an impact on its validity.[1145]

[1141] But see *Miller v Schoene* 276 US 272 (1928) (where one landowner's trees destroyed to save others from a virulent pest). But even in these cases where the regulation result in total destruction of property, the state does not acquire the property for public purposes and therefore it is not expropriation. For further discussion, see T Allen *The right to property in commonwealth constitutions* (2000) 180.

[1142] See, for example, *Pennsylvania Coal Co v Mahon* 260 US 393 (1922) 413. For further discussion see T Allen *The right to property in Commonwealth constitutions* (2000) 168.

[1143] See AJ van der Walt *Constitutional Property Clauses: A Comparative analysis* (1999) 132-145 (discussing cases from Germany on this point).

[1144] This approach is symptomatic of jurisdictions which treat deprivation and expropriation as two distinct categories with no overlap. This is the position in Kenya and South Africa. In South Africa, the case of *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service* 2002 (4) SA 768 (CC) somehow amended the position by describing deprivation and expropriation as two distinct categories, of which the smaller (expropriation) is wholly included in the larger (deprivation). But even if this should be taken as the case, which is not definite given the subsequent approach by the Constitutional Court in *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) and *Haffejee NO and Others* v *eThekwini Municipality and Others* (2011) ZACC 28 in which expropriation was treated on its own, it still exclude the possibility of an overlapping "grey area" where the one category can shade into the other. For further discussion, see generally see AJ van der Walt *Constitutional property clauses: a comparative analysis* (1999); T Allen "Commonwealth Constitutions and the Right not to be Deprived of Property" (1993) 42 *International & Comparative Law Quarterly* 523.

[1145] For illustration see the South African case of *City of Cape Town v Helderberg Park Development (Pty) Ltd* 2008 (6) SA 12 (SCA) (where the Supreme Court of Appeal refused to treat an acquisitive deprivation as compensatory expropriation). See also the Kenyan case of *Rodgers Mwema Nzioka v The Attorney General & 9 Others* (2007) eKLR para 5 (holding that compulsory acquisition can only take place as per the enabling provision in the constitution and statutory law) and *Crywan enterprises limited v Kenya revenue* [2013] eKLR

However, despite its acquisitive effect, assets recovery is recognized in most jurisdictions including Kenya and South Africa as a valid exercise of a state's regulatory police power.[1146] The validity of assets recovery is usually justified on the ground that it targets illegally acquired assets and thereby helps control acquisitive crimes such as corruption.[1147] However, while these reasons may be convincing, they only go to show that the acquisitive effect of assets recovery does not sit well with the non-arbitrary requirement for regulatory deprivations. In other words, once it becomes necessary to justify regulatory state actions by reference to some overriding public purpose such as crime control, it seems reasonable to conclude that such actions are arbitrary interference with the right to property of affected owners (in the sense of going beyond the normal bounds of its source of power) but that because of the overriding public purpose they serve they are nevertheless considered justified interferences.[1148] Indeed, the justifications with regard to assets recovery are usually raised to explain why even though the acquisitive effect of assets recovery does not fit within the normal mold of lawful deprivation, asset recovery should nevertheless be considered a valid exercise of state's regulatory police power.[1149]

When an excessive or extraordinary state action, such as assets recovery, is justified with reference to pragmatic or public interest-based concerns, it seems natural that the unfair effect of the action should also be taken into consideration. This is the inevitable outcome in contemporary human rights framework, where the public-purpose justification of a state action usually places the whole action within a context where judicial review of the rationality and proportionality of the action becomes unavoidable. Such a judicial scrutiny is aimed at determining whether the means adopted is rationally connected to the purpose served, and whether the effect is proportional to the purpose.

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para 29 (quoting with approval the South African Constitutional Court's interpretation of the "non-arbitrary" test to the effect that the impact of the deprivation must be proportionate to its purpose).

[1146] For instance, its use in the fight against corruption has been recognized and lauded in international, regional, and many national laws as a necessary government objective in open and democratic societies. See, for example UNCAC, arts 31 & 51 to 59; Kenya's ACECA, s 55;South Africa's POCA, chap 6.

[1147] The argument usually fronted is that gains from unlawful activity ought not to accrue and accumulate in the hands of those who commit unlawful activity and that those individual who acquire property illegally ought not to be accorded the rights and privileges normally attendant to civil property law. See chap 3 section 3.2 above. For justification of the non-conviction based assets recovery, see for example, the South African case of *Prophet v NDPP* 2007 (6) SA 169 (CC) para 66 (quoting with approval the reasoning of the court *a quo)*; and the Kenyan case of *KACC v Lands Limited* & 8 others [2008] eKLR para 19.

[1148] See, for example, South African case of *Director of Public Prosecution: Cape of Good Hope v Bathgate* 2000 (2) SA 535 (C) para 82 (holding that seizure of possessions under the Proceeds of Crime Act 76 of 1996 "may…constitute arbitrary deprivation of property in terms of s 25(1)").

[1149] See, for example, the South African case of *NDPP and Another v Mohamed NO and Others* 2002 (4) SA 843 para 16 (where the Constitutional Court noted that assets recovery mechanism is one of the "mechanisms to ensure that property derived from crime or used in the commission of crime is forfeited to the state"). See also the Kenyan case of *Kenyan case of KACC v Lands Limited & 8 others [*2008] eKLR para 13.

Ordinarily such an inquiry into the proportionality of state action should follow a finding that the action is in breach of a protected right. In other words, the proportionality inquiry is usually carried out at the second stage of a bill of rights inquiry when an action that has been found to be in breach of the tenets of a right is brought up for justification (justification stage), especially in cases where the right is subject to general limitation as is the case with right to property in Kenya and South Africa.[1150] However, when it comes to the right to property the position is a little bit clouded. This is because: firstly, deprivation and expropriation of property by the state by their very nature are usually considered at the outset as a limitation to the enjoyment of the right to property as they restricts the use and enjoyment of the affected property; and secondly, though in principle a finding that a deprivation or expropriation does not meet the requirement of the right to property in the first stage inquiry should move the inquiry into the next stage of determining whether the action is nevertheless a justified limitation, in practice once a state interference with property fails at the first stage of inquiry it is almost always guaranteed that it would also fail the second stage inquiry (the justification stage).[1151] As Ian Currie and Johan de Waal have rightly observed with regard to the relationship between the general limitation clause and property clause in the South African Bill of Rights:

> "It seems that s 36 (on general limitation) can have no meaningful application to s 25 (property clause). The rights in s 25 have been qualified to such an extent that it is unlikely that any violation of those rights can be justified. Put another way, if an applicant is able to discharge the difficult burden of showing that the rights in s 25(1)-(3) have been violated, the state will be unable to justify the violation in terms of s 36."[1152]

It seems logical, therefore, given the fact that the first stage analysis almost always produces a similar result as the second stage analysis, that the inquiry into the proportionality of the non-conviction based assets recovery should be conducted at the first stage when the court is determining its non-arbitrariness. Such an approach would save time and bring about some

[1150] As noted in Chapter Four section 4.4 the interpretation of human rights clauses generally involves two stage enquiries. At the first stage the meaning or scope of the right in question is exposed and then it is determined whether the challenged law or conduct conflicts with the right. Where a challenged law is found to be in breach then the inquiry proceeds to the second stage to determine whether, in spite of violating the human right, the law or conduct is nevertheless justified under the limitation clause.

[1151] For example, given that both the general limitation clause and the property clause in Kenya's and South Africa's Bill of Rights both require that a state action must be authorized by law of general application, a deprivation that failed the first stage inquiry because it was not authorized by law of general application cannot surely be justified at the second stage. Similarly it would be difficult to justify at the second stage a deprivation that is found at the first stage to be procedurally unfair or to have a purpose and means that do not bear any relation to each other as is required by the non-arbitrary requirement; or an expropriation that is found to have no public purpose or to have failed to provide adequate compensation.

[1152] I Currie & J de Waal *The Bill of Rights Handbook* 5ed (2005) 110. But see *Nhlabati and Others v Fick* 2003 (7) BCLR 806 (LCC) (where Land Claims Court in obiter held that even if section 6(2) (dA) of the Extension of Security of Tenure Act 62 of 1997 (ESTA) amounted to an expropriation of land without compensation, the statutory obligation of a landowner to allow an occupier to appropriate a graveside on his or her land without compensation would be reasonable and justifiable under section 36 general limitation clause).

form of substantive review of state action at the first stage of the property clause analysis. More importantly, since the proportionality inquiry is more elaborate than the non-arbitrary enquiry, including the proportionality inquiry in the first stage would ensure that a state action that is not proportional does not pass the non-arbitrary inquiry to the detriment of individual property owners as it would not get a chance to be tested at the justification stage. On the other hand, however, including the proportionality requirement as part of the non-arbitrary test would have the effect of over-extending the scope of the non-arbitrary test thereby making it difficult for state interferences to pass the first stage analysis as it would mean that any deprivation of property would have to be justifiable in accordance with the test for an acceptable limitation of rights for it to be regarded lawful.[1153]

In its approach to the non-arbitrary question, the South African Constitutional Court has held in the *First National Bank* that substantive arbitrariness of a deprivation will be assessed by means of a test that oscillates between a "mere rationality" enquiry and the "proportionality" enquiry used to assess the legitimacy of limitations of rights.[1154] According to the court, the more restrictive a deprivation is the more the inquiry will move towards the proportionality test but always bearing in mind that the inquiry should never quite reach the proportionality methodology. In the Court's own words:

> "In its context "arbitrary", as used in section 25, is not limited to non-rational deprivations, in the sense of there being no rational connection between means and ends. It refers to a wider concept and a broader controlling principle that is more demanding than an enquiry into mere rationality. At the same time it is a narrower and less intrusive concept than that of the proportionality evaluation required by the limitation provisions of section 36. This is so because the standard set in section 36 is "reasonableness" and "justifiability", whilst the standard set in section 25 is "arbitrariness". This distinction must be kept in mind when interpreting and applying the two sections."[1155]

By opting for this calibrated and context sensitive approach, the *First National Bank* decision seems to accommodate both those who oppose undue restriction on the powers of government and those who are for a substantive review during the first stage analysis of the

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[1153] On the requirement of proportionality test see chapter 6 below.

[1154] Mere rationality inquiry usually tests the connection between the purpose of an action and the results it achieves. It is neutral on the choice of means. As long as the means achieves the intended end it will be considered rational even if there are other less restrictive means. For further discussion, see J Elster *Nuts and Bolts for the Social Sciences* (1989) 22. For illustration, see *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) para 36. On the other hand, the principle of proportionality is a legal rule, which requires that all state law and actions, for them to be constitutionally justifiable, must have a permissible end and must not be excessive in the means they employ to achieve the desired ends. As aptly explained by Ralph Steinhardt:

> "In simplest terms, the proportionality principle requires some articulable relationship between means and ends, specifically that the means chosen by an administration be suitable or appropriate, and no more restrictive than necessary to achieve a lawful end."

RG Steinhardt "Book Review, European Administrative Law*"* (1994) 28 *George Washington Journal of International law and Economics* 225 at 231-232.

[1155] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 65.

property clause. However, while the Constitutional Court did deliberately resist importing a proportionality analysis at the non-arbitrary stage, in its application of the non-arbitrary requirement to the facts at hand the Court did employ an analysis that is akin to a proportionality test.[1156] In that case, the issue for consideration was whether section 114 of the Customs and Excise Act 91 of 1964, which allowed for the attachment of property of innocent third parties in payment of custom debts of another person, was arbitrary. In the Court's view, the section was arbitrary because it cast "the net far too wide", that is, it unnecessarily and drastically infringed the property rights of a third party to achieve goals that could have been achieved by a far less restrictive means such as the attachment of the property of the tax-debtor alone.[1157] Though some commentators have tried to argue that this reasoning should be viewed in the context of the calibrated list provided by the Constitutional Court,[1158] this kind of analysis that tries to see if the means employed is the least restrictive means available is exactly the same analysis that makes up a proportionality inquiry.[1159] In this regard, it is interesting to note that the section was declared unconstitutional on the least restrictive means consideration employed at the non-arbitrary stage. Though the court held that the finding of arbitrariness should still take the inquiry to the second stage inquiry for justification, in the Court's view, the justification inquiry could still not save the section given that it allowed the Commissioner to execute customs debt on the property of uninvolved party.[1160] Meaning that, the factors taken into account in the non-arbitrary stage inquiry were similar to the ones that the court took into account in the second stage inquiry.[1161] Thus, while in principle the court frowns against the application of proportionality test in the first stage inquiry, in practice, and in suitable cases, the non-arbitrary analysis sometimes mesh with that of proportionality.

[1156] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100 (listing down a number of considerations that a court needs to take into account when evaluating the non-arbitrariness of a deprivation).

[1157] See *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 108:

> "The means it uses sanctions the total deprivation of a person's property under circumstances where (a) such person has no connection with the transaction giving rise to the customs debt; (b) where such property also has no connection with the customs debt; and (c) where such person has not transacted with or placed the customs debtor in possession of the property under circumstances that have induced the Commissioner to act to her detriment in relation to the incurring of the customs debt."

[1158] See, for example, I Currie & J de Waal *The Bill of Rights Handbook* 5ed (2005) 547.

[1159] A proportionality inquiry is about finding out if the means adopted is suitable and appropriate, and no more restrictive on the rights of individuals than is necessary to achieve the permissible common end. Thus, if there are two means, A and B, that can be used to achieve C, then Means A should be preferred if it is less restrictive than mean B. For further discussion, see generally AS Sweet & J Mathews "Proportionality Balancing and Global Constitutionalism" (2008) 47 *Columbia Journal of Transnational Law* 73.

[1160] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 111

[1161] But see I Currie & J de Waal *The Bill of Rights Handbook* 5ed (2005) 547 (for a contrary view).

This meshing is particularly evident in non-conviction based assets recovery cases where the Constitutional Court has preferred an analysis that is similar to that of the proportionality test at the non-arbitrary stage. For example, in *Mohunram and Another v NDPP and Others,*[1162] the Court noted that a finding that non-conviction based assets recovery is a necessary tool in the fight against crime could still "result in situations of clearly disproportionate (and hence constitutionally unacceptable) forfeiture, and courts must always be sensitive to and on their guard against this".[1163] Whilst acknowledging that the standard for establishing arbitrariness is different to the standard of proportionality,[1164] the Court however went ahead to note that a guard against the disproportionality of assets recovery, requires a further weighing of "the forfeiture and, in particular, its effect on the rights of the owner concerned, on the one hand, against the purposes the forfeiture serves, on the other", a weighing which the Court called a "proportionality enquiry".[1165] Though this christening should not be given much weight considering the qualification given by the court, the means-effect analysis, which the Court referred to, is usually associated with a proportionality methodology which aims to ensure that the means adopted is "no more restrictive than necessary to achieve a lawful end".[1166] Indeed the Constitutional Court did hold that a finding that the assets recovery is disproportionate at the non-arbitrary stage would render the recovery unconstitutional.[1167] Such a conclusion can only make sense if the proportionality inquiry at the non-arbitrary stage is of a similar weight as that normally carried out at the justification stage, otherwise a finding that the assets recovery is disproportionate at the non-arbitrary stage should ordinarily move the enquiry into the second stage of inquiry.[1168]

In Kenya, the Courts have mostly followed an approach similar to that of the South African Constitutional Court enunciated in the *First National Bank*. For example in *Crywan*

[1162] *Mohunram and Another v NDPP and Others* 2007 (6) BCLR 575 (CC).
[1163] *Mohunram and Another v NDPP and Others* 2007 (6) BCLR 575 (CC) para 56.
[1164] *Mohunram and Another v NDPP and Others* 2007 (6) BCLR 575 (CC) para 54.
[1165] *Mohunram and Another v NDPP and Others* 2007 (6) BCLR 575 (CC) paras 57 & 56.
[1166] RG Steinhardt "Book Review, European Administrative Law*"* (1994) 28 *George Washington Journal of International law and Economics* 225 at 231-232.
[1167] *Mohunram and Another v NDPP and Others* 2007 (6) BCLR 575 (CC) at para 56. See also *Prophet v NDPP* 2007 (2) BCLR 140 (CC) paras 58-61. This point was also succinctly made by the Supreme Court of Appeal in *Prophet v NDPP* 2005 (2) SACR 670 (SCA) at para 37 in the following words:

> "To ensure that the purpose of the law is not undermined, a standard of 'significant disproportionality' ought to be applied for a court to hold that a deprivation of *property is 'arbitrary' and thus unconstitutional, and consequently refuse to grant a forfeiture order*. And it is for the owner to place the necessary material for a proportionality analysis before the court." (Emphasis added).

[1168] For a similar position see also *NDPP v Geyser and another* [2008] 2 All SA 616 (SCA) at para 19; *NDPP v Van Staden* 2007 (1) SACR 338 (SCA) paras 5 & 8; *NDPP v Mohunram* 2006 (1) SACR 544 paras 56-63, 122-123 and 142-143; *NDPP v RO Cook Properties (Pty) LTD; NDPP v 37 Gillespie Street Durban (Pty) Ltd and another; NDPP v Seevnarayan* 2004 (2) SACR 208(SCA) para 74.

Enterprises Limited v Kenya Revenue Authority,[1169] the Court quoted with approval the approach of the *First National Bank* and applied the same in analysing whether the East African Community Customs Management Act of 2004 (EACCM) was arbitrary for donating to a custom officer the power to seize a person's vessel or goods on "reasonable grounds".[1170] In the case, the applicant contended that the provision was arbitrary because it provided for an overbroad discretion which the custom official could use to seize a person's property even when there was a pending investigation of payment of taxes or otherwise "before ascertainment of wrong doing", as had happened in the applicant's case. The Court, however, found that the Act was not arbitrary because it had an inbuilt mechanism of ensuring fairness including a procedure that allows a discontented property owner the opportunity to challenge the manner in which the discretion by a custom official is exercised.[1171] This case was, however, a clear-cut case where the less contentious arm of the non-arbitrary test – the procedural fairness – sufficed to decide the case.[1172] It does not therefore help in showing how the courts apply the substantive arbitrary test, though it confirms that the courts consider the approach of the South African Constitutional Court favourably. However, in *Kenya Anti-Corruption Commission v Stanley Mombo Amuti*[1173] the Court did indicate that though the non-conviction based assets recovery is a necessary tool in the fight against corruption, its provision under the ACECA must still be interpreted in such a way as to ensure that there is "proportionality or justified balance between the effects of the impugned measures on the protected right and attainment of the objective".[1174] Meaning that a right to property challenge on the non-conviction based assets recovery mechanism under ACECA would most probably be considered under the light of a proportionality-type analysis.

5.7. Conclusion

It is concluded, that the right to property protection is applicable to the property targeted in the assets recovery process, and since non-conviction based mechanism is one of the means of assets recovery, it implies that the right is also applicable in the non-conviction based assets recovery. It is further concluded that given that the purpose of the regulatory source of

[1169] *Crywan Enterprises Limited v Kenya Revenue Authority* [2013] eKLR.
[1170] *Crywan Enterprises Limited v Kenya Revenue Authority* [2013] eKLR para 29.
[1171] *Crywan Enterprises Limited v Kenya Revenue Authority* para 39.
[1172] *Crywan Enterprises Limited v Kenya Revenue Authority* para 38 (concluding that the procedure of the EACCM Act was "consistent with the tenents (sic) of procedural fairness").
[1173] *KACC v Stanley Mombo Amuti* (2011) eKLR.
[1174] *KACC v Stanley Mombo Amuti* (2011) eKLR 19.

power for deprivation is to place control on the use of property without acquiring the same, the acquisitive effect of assets recovery makes it go beyond the requirement for lawful deprivation. This acquisitive effect would normally make assets recovery unconstitutional, especially in countries such as Kenya and South Africa where deprivation and expropriation are treated as distinct categories with no possibility of overlap. However, because the acquisition in assets recovery is said to target only illegally obtained property, which is not protected by the right to property, assets recovery has been accepted as a justified exercise of state's police power.

This recognition of assets recovery as a justified limitation of the right to property obviously means that the unfair effects of the mechanism should also be taken into account to ensure that it does not disproportionally affect innocent proprietary interests. This is in tandem with contemporary human rights discourse, which requires that a pragmatic or public purpose justification of a state action should place the whole process within a context where the rationality and proportionality of the action becomes amenable to judicial scrutiny. Such an enquiry ordinarily takes place at the second stage analysis when the general limitation comes into play. However, jurisprudence from Kenya and South Africa shows that the courts are willing to apply the enquiry at the first (non-arbitrary) stage of inquiry.

This anomaly in procedure could be attributed to the fact that under the right to property, it is usually the law and not the action that proceeds from the law that is usually subject to constitutional challenge. In other words, the constitutional validity of a deprivation depends on the law that authorises the action and not the action itself. This point derives from the requirement of the right to property that state interference with property must be authorised by law and which by implication requires that litigants who aver that a right protected by the Constitution had been infringed must rely on legislation enacted to limit that right. Private or administrative action can only be challenged with regard to the law that authorises it and not directly under the constitutional property clause.[1175] This means that once a law has been found to be a justified limitation of rights, in subsequent cases the court need not decided on the same issue again or go through a two a stage analysis of the same law. This reasoning is not evident from the judgments of the Courts in the assets recovery cases, but it probably explains why the proportionality enquiry with regard to non-conviction based assets recovery challenges is carried out at the non-arbitrary analysis stage.

[1175] For further discussion see generally AJ van der Walt "Normative pluralism and anarchy: reflections on the 2007 term" (2008) 1 *Centre for Conflict Resolution 7*7-128 (discussing a number of case laws on the point).

Be it as it may, the courts have recognised that a guard against disproportional effects of assets recovery requires a proportional enquiry to determine whether the means chosen in the assets recovery is no more restrictive than necessary to achieve its designated purpose. The import of this proportionality enquiry is that the absolute worrying effects that would usually follow from a strict application of the assets recovery mechanism is required to give way to a more comprehensive process in which each instance of assets recovery becomes amenable to judicial scrutiny where a range of contextual factors such as the position of innocent owners and third parties are taken into consideration. In this way it becomes possible to use the right to property to ensure that the non-conviction based means of assets recovery is suitable and appropriate, and no more restrictive on the rights of individuals than is necessary to achieve the identified objectives. The next chapter examines how Kenya and South Africa have attempted to ensure that their non-conviction based assets recovery mechanism is no more restrictive on the rights of property owners than necessary to achieve the assets recovery purpose.

CHAPTER SIX

ENSURING PROPORTIONALITY IN THE NON-CONVICTION BASED ASSETS RECOVERY MECHANISM

"They don't have to convict you. They don't even have to charge you with a crime. But they have your property."[1176]

6.1. Introduction

The previous chapter examined the applicability of the right to property to the state action of assets recovery and concluded that the right to property does apply. The chapter also concluded that the acquisitive effect of assets recovery makes it go beyond the ordinary requirements for lawful exercise of assets recovery's source of power - the regulatory police power. This is because, under the right to property, the interference with private property that emanates from the exercise of a state's police power (deprivation) is ordinarily limited to the regulation of the use of private property without acquisition of the same. The acquisitive effect of assets recovery thus makes it an extraordinary interference with the enjoyment of private property, which, under the property clauses, such as that of Kenya and South Africa, that treats deprivation and expropriation as distinct categories with no possibility of overlap, can only remain valid as a justified limitation to the enjoyment of the right to property.[1177] In this regard, assets recovery has been accepted as a justified exercise of state regulatory power on the ground that it serves crime control objectives.[1178]

However, the fact that assets recovery requires justification for its validity implies that it is an extra-ordinary infringement of the right to property that is sanctioned with reference to some overriding public purpose. This means, under the human rights framework, that assets recovery is required to undergo a proportionality analysis to ensure that the means adopted is proportional to the intended purpose of the action. Because the proportionality analysis

[1176] Henry Hyde, as quoted in an article by the Legal Information Institute, available at www.law.cornell.edu/background/forfeiture (accessed 1 May 2013).

[1177] In other countries, such as the United States, that allows for constructive expropriation, a deprivation that has expropriatory effect could be "converted" into expropriation for purposes of compensation. See, for example, *Pennsylvania Coal Co v Mahon* 260 US 393 (1922) 413. For further discussion see T Allen *The right to property in Commonwealth constitutions* (2000) 168.

[1178] See, for example, A Kennedy "Justifying the civil recovery of criminal proceeds" (2004) 12 *Journal of Financial Crime* 1 at 2 (pointing out that the impact of the criminal confiscation "has been limited by the necessity to obtain sufficient evidence to obtain a criminal conviction as a prerequisite for confiscatory action"). For case law, see for example, the South African case of *Prophet v NDPP* 2007 (6) SA 169 (CC) para 66; and the Kenyan case of *KACC v Lands Limited* & 8 others [2008] eKLR para 19.

examines the effect and purpose to ensure that the means adopted does not unduly infringe the rights of affected individuals, the analysis, therefore, serves as a useful tool that can be used to tighten the non-conviction based means so as to check against unconstitutional use of the means by the state. This chapter examines how the proportionality principle has been applied by Kenya and South Africa to ensure that the non-conviction based means used to recover assets in their jurisdiction is suitable and appropriate, and no more restrictive on the rights of property owners than necessary to achieve assets recovery end. But before engaging in the analysis, an explanation and background of the proportionality principle is first given.

6.2. The principle of proportionality

The principle of proportionality is a legal rule, which requires that all state law and actions, for them to be constitutionally justifiable, must have a permissible end and must not be excessive in the means they employ to achieve the desired ends.[1179] It thus acts as a restraint tool on the use of the extensive state power and aims to ensure that all government actions are in tandem with the interest of its citizens.[1180] It does this by requiring that all state laws and actions are aimed at achieving a rational common end and that, in cases where these aims conflict with the interest of individual citizens; the means adopted is suitable and appropriate, and no more restrictive on the rights of individuals than is necessary to achieve the permissible common end. As aptly explained by Ralph Steinhardt:

> "In simplest terms, the proportionality principle requires some articulable relationship between means and ends, specifically that the means chosen by an administration be suitable or appropriate, and no more restrictive than necessary to achieve a lawful end."[1181]

6.2.1. Background to the proportionality principle

The proportionality principle, which has become the modern day human rights tool for "managing disputes involving an alleged conflict between two rights claims, or between a

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[1179] See AS Sweet & J Mathews "Proportionality Balancing and Global Constitutionalism" (2008) 47 *Columbia Journal of Transnational Law* 73 at 75 (noting that proportionality principle is a doctrinal principle that emerged and diffused "an unwritten, general principle of law through judicial recognition and choice").

[1180] As Fitzgerald has aptly observed in BF Fitzgerald "Proportionality and Australian Constitutionalism" (1993) 12 (2) *University of Tasmania Law Review* 263 at 268-269, proportionality is:

> "ingrained with the notion of governing in the interests of the people ... (it is) an ethic generated from the touchstone of the interests of the people. It is an ethic which says that good government is government which is to the point, clear, precise and necessary ... (it will) instil an ethic of efficiency, responsibility and accountability."

[1181] RG Steinhardt "Book Review, European Administrative Law*"* (1994) 28 *George Washington Journal of International law and Economics* 225 at 231-232.

rights provision and a legitimate state or public interest",[1182] is usually traced to Aristotle's idea of justice as proportionality.[1183] In Book V of the *Nicomachean Ethic,* Aristotle begins by differentiating between universal and particular justice and then proceeds to analyze the latter.[1184] This particular justice he also divides into two types: distributive and corrective. According to him, distributive justice comes into being when community possessions are to be distributed. In these cases, distribution can only be just if it is done proportionate to the value of the individual persons involved. In other words, the distribution of equal shares among unequal persons, or of unequal shares among equal persons, would be unjust.[1185] While Aristotle concedes that the standard of value of persons might not be unanimously agreed upon ("For democrats it is the status of freedom, for some oligarchs wealth, for others good birth, for aristocrats it is excellence"), he however, contends that such a standard of value, which according to him should be "merit", is necessary in order to ensure that the distribution is just.[1186]

In corrective justice, however, the concern is not with the distribution of communal possession, but rather with the "straightening out" of relationships, to rectify an injustice by removing the (unjust) gain and restoring the loss. In this case, the relative value of the persons is irrelevant, "for it makes no difference whether a good man has defrauded a bad man or a bad one a good one, nor whether it is a good or bad man that has committed adultery".[1187] Here "the law looks only at the nature of the damage, treating the parties as equal ...."[1188] But even in this case, the resolution of the dispute is done "on the basis of proportion, not on the basis of equality".[1189] In other words, the object of corrective justice is

[1182] AS Sweet & J Mathews "Proportionality Balancing And Global Constitutionalism" (2008) 47 *Columbian Journal of Transnational Law* 72 at 73.

[1183] For the tracing of the proportionality principle to Aristotle, see, for example, E Engle "The history of the general principle of proportionality: an overview" (2009) 10 *Dartmouth Law Journal* 1 (arguing that the idea first clearly appeared in Aristotle's book *Nicomachean Ethics, Book V.* Compare with T Poole "Proportionality in perspective" (2010) *LSE Law, Society and Economy Working Papers 16* available at http://www.lse.ac.uk/collections/law/wps/WPS2010-16_Poole.pdf (accessed 20/7/2013) tracing the concept to Plato and Cicero).

[1184] Aristotle defines universal justice as that which makes people desire to act justly and that which is manifested when they enact these desires. See S Aristotle *Nicomachean Ethics* (1999) Book V, 111 (1129a7-11). But see M Lutz-Bachmann "The Discovery of a Normative Theory of Justice in Medieval Philosophy: On the Reception and Further Development of Aristotle's Theory of Justice by St. Thomas Aquinas" (2000) 9(1) *Medieval Philosophy and Theology* 1 at 2 (noting that Aristotle does not distinguish between a universal and a particular justice but merely asserts that justice should be considered on the one hand as "virtue in the fullest sense" or as "complete virtue," and on the other hand as merely a part of virtue).

[1185] S Aristotle *Nicomachean Ethics* (1999) Book V, 1131a24-29.

[1186] S Aristotle *Nicomachean Ethics* (1999) Book V, 1131a24-29. Aristotle uses the criterion of merit and contends that the more one has of merit, the more one deserves of whatever treatment Y is relevant to it.

[1187] Aristotle *Nicomachean Ethics* (1999) Book V, II3Ib32-32a6.

[1188] Aristotle *Nicomachean Ethics* (1999) Book V, II3Ib32-32a6.

[1189] Aristotle *Nicomachean Ethics* (1999) Book V, II32b21-33b29.

not to ensure equality among the different parties but rather to ensure that the right relationship affected by the injustice is restored by "giving to each their due".[1190] In Aristotle's own word: "[w]hat is just in this sense, then, is what is proportional, and what is unjust is what violates the proportion".[1191]

This Aristotle's abstract idea of proportionality as the right ratio in the relationship between the state and the citizen and between the citizens themselves,[1192] which was shared by Plato,[1193] was later transformed into a specific rule of law as espoused in Cicero.[1194] Cicero concretized the Aristotle's abstract principle in positive law by describing law as the *recta ratio naturae congruens* - meaning the right ratio, the proper proportion.[1195] To Cicero, the equilibrium that maintains an acceptable human justice between the state and the citizen and between the citizens themselves was guaranteed only via and by law.[1196] This legal concretization by Cicero was further refined by St. Augustine and St. Thomas Aquinas in the law of self-defence of states.[1197] St Augustine, while not explicitly using the term proportionality (between force and threat), argued in the *City of God* that the use of force needed to be just for it to be justified.[1198] To Augustine, force could only be just if it was motivated by "just causes", which he defined in terms of wrongs committed by the other side.[1199] But even where these "just causes" existed, to Augustine, force was to be resorted to

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[1190] Aristotle claimed that "to do injustice is to have more than one ought, and to suffer it is to have less than one ought". Aristotle *Nicomachean Ethics* (1923) Book V, chap 9 at 145.

[1191] Aristotle *Nicomachean Ethics* (1999) Book V, 113.

[1192] Aristotle *Nicomachean Ethics* (1999) Book V, 113 ("We do not allow a man to rule, but rational principle, because a man behaves thus in his own interests and becomes a tyrant").

[1193] Justice, for Plato, was ultimately a question of proportional equality. In the *Laws*, he identified two concepts of equality: arithmetic equality and proportionate equality. Arithmetic equality he equated to the simple distribution of equal awards (by lot). But it was proportionate equality that he considered "genuine equality". He defined it in *Laws* (2004) 757b-c as:

> "The general method I mean is to grant much to the great and less to the less great, adjusting what you give to take account of the real nature of each – specifically, to confer high recognition on great virtue, but when you come to the poorly educated in this respect, to treat them as they deserve. We maintain, in fact, that statesmanship too consists of essentially this – strict justice."

[1194] MT Cicero "Treatise on the Commonwealth" in F Barham *The Political Works of Marcus Tullius Cicero: Comprising his Treatise on the Commonwealth; and his Treatise on the Laws* (1841-42) Vol 1.

[1195] For further discussion, see HF Jolowicz *A Historical Introduction to the Study of Roman Law* 3ed (1972) 104-105; AA Schiller *Roman Law: Mechanisms of Development* (1978) 374-375.

[1196] MT Cicero "Treatise on the Commonwealth" in F Barham *The Political Works of Marcus Tullius Cicero: Comprising his Treatise on the Commonwealth; and his Treatise on the Laws* (1841-42) Vol 1.

[1197] T Aquinas *Summa Theologica* (1947) Question 40.

[1198] See Augustine, *The City of God* (1950) chap 7.

[1199] "Augustine *The City of God* (1950) 683 ("For it is the wrongdoing of the opposing party which compels the wise man to wage just wars"). Augustine's views here are connected with his notable thesis on what constitutes the evil of war. He asks:

> "What is the evil in War? Is it the death of some who will soon die in any case, that others may live in peaceful subjection? This is mere cowardly dislike, not any religious feeling. The real evils in war are love of violence (*nocendi cupiditas*), revengeful cruelty (*ulciscendi crudelitas*), fierce and implacable enmity, wild resistance, and the lust of power {*libido dominandi*) and such like."

as a last recourse and only if it was "necessitated"[1200] by the need to restore the "right" relationship destabilized by the wrongs.[1201] This right relationship to be restored, in his view, was an order of justice which assigns to each thing or person its due.[1202] Thus, to Augustine, use of force is just only if its aim is to stabilize relationships between antagonistic parties by doing justice that is solicitous for the right of both sides.

However, while Augustine's idea of just force helps to explain the need for rationality in the use of force, it was St Thomas Aquinas who provided the first breakdown of Aristotle's concept into the now accepted multi-step proportionality analysis.[1203] To Aquinas, in the law of self-defence, there are conditions that must exist for the use of force to be just, that is, force must first be necessary;[1204] and secondly, force, when used, must not be excessive - it must be proportional.[1205] This proportionality inquiry, according to Aquinas, requires an assessment as to whether the evil that the means used would cause is balanced by the overall good that the use of force aims to achieve.[1206] The use of force would only be justified if the evil of its means does not outweigh the overall good of its end.[1207] Proportionality, therefore, according to Aquinas, prohibits using force greater than necessary to accomplish legitimate objectives.

To Augustine punishing these evils of war is what amounts to just war: "It is generally to punish these things, when force is required to inflict the punishment, that, in obedience to God or some lawful authority, good men undertake wars". See Augustine, "Contra Faustum Manichaeum" in Philip Schaff *The Nicene and Post-Nicene Fathers*, Vol IV (1887) 151 at 301. See also Augustine *Letters* Vol III (1953) 4 ("We often have to act with a sort of kindly harshness, when we are trying to make unwilling souls yield, because we have to consider their welfare rather than their inclination").

[1200] In his letter to Boniface, Augustine reminds Boniface that war is "the result of necessity", and therefore "let it be necessity, not choice, that kills your warring enemy". Augustine *Letters* Vol IV (1955) 26.

[1201] See J Langan "The elements of St. Augustine's just war theory" (1984) 12(1) *The journal of religious ethics* 19 at 25 (arguing that Augustine's approach to just war is to advocate for the preservation of the moral order in which "the various goods are properly estimated and in which human passions are restrained"). Indeed as Augustine himself remarked in *Letters*, "wars should be waged by the good, in order to curb licentious passions by destroying those vices which should have been rooted out and suppressed by the rightful government". Augustine *Letters* Vol IV (1955) 4.

[1202] See Augustine *The City of God* (1950) Book IV. See also Augustine's Letters clxxxix To Boniface in Augustine *Letters* Vol IV (1955) (noting that: "We do not seek peace in order to be at war, but we go to war that we may have peace. Be peaceful, therefore, in warring, so that you may vanquish those whom you war against, and bring them to the prosperity of peace").

[1203] T Aquinas *Summa Theologica* (1947) Questions 90-97. For a comparison of Aristotle's justice and Aquinas', see generally M Lutz-Bachmann "The Discovery of a Normative Theory of Justice in Medieval Philosophy" (2000) 9(1) *Medieval Philosophy and Theology* 1.

[1204] On the necessity of war he agreed fully with Augustine. As he explained summarily in T Aquinas *Summa Theologica* (1947) Question 40 art 1, "those who are attacked, should be attacked because they deserve it on account of some fault".

[1205] T Aquinas *Summa Theologica* (1947) Question 40.

[1206] On proportionality in the just war theory of St. Thomas Aquinas, see P Ramsey *War and the Christian Conscience: How shall Modern War be Conducted Justly?* (1961) 34-36.

[1207] P Ramsey *War and the Christian Conscience: How shall Modern War be Conducted Justly?* (1961) 34-36. See also T Aquinas *The Summa Theologica* (1947) Question 40 (holding that "True religion looks upon as peaceful those wars that are waged not for motives of aggrandizement, or cruelty, but with the object of securing peace, of punishing evil-doers, and of uplifting the good").

This Aquinas's theory on proportional self-defence was in turn picked up by Grotius and used as a general principle of law.[1208] Adopting a consequentialist model of proportionality, Grotius argued that balancing the good of the end with the evil of the means was imperative in determining the justness of use of force: "in all deliberations, the ends should be compared with one another, and also the effective power of the means to bring about the ends".[1209] In this balancing act, Grotius argued, rulers should take into account not only the interest of persons entrusted to their care; but also the interests of the whole human race including those on the offending side.[1210] Grotius contended that, in the balancing exercise, the views on penal proportionality, which requires the limiting of the range of punishment's amount or severity as a matter of proportion, equally applied to the constraints to war.[1211] Grotius thus evolves the principle of proportionality into modernity and links Aristotle's idea of proportionality as the right ratio in relationships to the concept of interest, and establishes balancing as a tool for resolving conflicting interests. [1212] As one author has noted, "with Grotius, we see the union of the ancient concept of justice as ratio, the medieval concept of proportional self-defence, and the modern concept of balancing interests".[1213] This proportionality principle, to Grotius, is applicable not only at the states' relational level but also at the individuals' relational level.[1214]

Contemporary proportionality can thus be said to have emerged as a general principle of law. This principle, which was first enunciated in international law as legal principle of proportional self-defence between states later extended to cases of self-defence of the person, then to criminal law and administrative law. In a nutshell, the principle requires that self-defence must be exercised in proportion to the threat; punishment in proportion to the crime; and administration action in proportion to a legitimate government objective.

[1208] H Grotius, *The Rights of War and Peace, including the Law of Nature and of Nations* (1901) 62 (noting that "The Law of Nations does not consist, therefore, of a mere body of deductions derived from general principles of justice, for there is also a body of doctrine based upon consent").

[1209] See H Grotius *The Law of War and Peace* (1625) Book II, chap xxiv, part V at 257. Grotius illustrates the proportionality by posing the dilemma between the forceful pursuit of freedom, which may result in the slaughter of one's own people, and peace without freedom. The evil of the former, in his view, outweighs the good of the latter and thus does not warrant resort to war. H Grotius *The Law of War and Peace* (1625) Book II, chapter xxiv, part V-VI. For Grotius, a war was just if: (1) the danger faced by the state was immediate; (2) the force used was necessary to adequately defend the nation's interests; and (3) the use of force was proportionate to the threatened danger. Ibid.

[1210] H Grotius *The Law of War and Peace* (1625) Book II, chapter xxiv, part V-VI.

[1211] H Grotius *The Law of War and Peace* (1625) Book II, chapter xxiv, part I-II, 255 & part 38 at 225.

[1212] H Grotius *The Law of War and Peace* (1625) *Chapter XXIV*.

[1213] E Engle "The history of the general principle of proportionality" (2009) 10 *Dartmouth Law Journal* 1 at 5.

[1214] He argues, for example, that when it comes to individual action, the demands of one's conscience should take precedence over legal commands. If ordered to go to war, for example, one must not serve if the cause is clearly unjust as disobedience in such cases is a lesser evil than slaughter of the innocent. H Grotius *The Law of War and Peace* (1625) Book I, Chapter IV, part I-III; Also book II, chapter XXVI, part III.

6.2.2. Proportionality principle within the human rights framework

Since human rights is about controlling the excessive use of state power, the proportionality principle has also been embraced within the human rights framework in many jurisdictions as a mechanism of judicial review to prevent undue legislative encroachment on individual rights and other abuses of state power.[1215] For example, at the international level, the European Union has reiterated the principle in a number of cases challenging state infringement of individual rights including the often quoted cases of *Vikings*[1216] and *Laval*.[1217] Similarly, at the municipal level, the South Africa Constitutional Court, though initially reluctant to adopt the principle as demonstrated in the *S v Zuma* case,[1218] eventually overcame its reluctance and endorsed the principle in the *S v Makwanyane* case.[1219] Since then the principle has been elevated to the status of a constitutional principle[1220] and has become a cornerstone of the Bill of Rights interpretation of South Africa's Courts.[1221] In Kenya too the Courts have read the principle in the Bill of Right clauses of the 2010

[1215] See generally M Poto "The principle of proportionality in comparative perspective" (2007) 8 *German Law Journal* 835.

[1216] Case C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union v. Viking Line ABP and OÜ Viking Line Eesti*, 2007 E.C.R. I-10779 para 75.

[1217] Case C-341/05, *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet and Others*, 2007 E.C.R. I-11767 para101. The principle has also been applied by the European Court on Human Rights. For a discussion, see, for example, EA Alkema "The European Convention as a Constitution and its Court as a Constitutional Court" in P Mahoney *et al Protecting human rights: the European perspective* (2000) 41; S Greer *The European Convention on human rights: Achievements, Problems and Prospects* (2007) (discussing the "balancing" justice dispensed by the European Court on Human Rights).

[1218] *S v Zuma & Others* 1995 (2) SA 642 (CC) para 35. The Court while acknowledging that the proportionality "criteria may well be of assistance to our courts in cases where a delicate balancing of individual rights against social interests is required", insisted that "section 33(1) (of the interim constitution) itself sets out the criteria which we are to apply, and [we] see no reason, in this case at least, to attempt to fit our analysis into the Canadian pattern".

[1219] *S v Makwanyane & Another* 1995 (3) SA 391 (CC) para 104 (holding that proportionality was "implicit in the provisions of section 33(1) (of the interim constitution)").

[1220] See section 36 of the Constitution of the Republic of South Africa 1996 (revising the Interim Constitution's limitation clause and incorporating the factors named in *Makwanyane* as elements of Proportionality analysis). These factors according to *Makwanyane* include:

> "the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy and, particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question."

S v Makwanyane & Another 1995 (3) SA 391 para 104.

[1221] See, for example, AL Sachs "The Challenges of Post-Apartheid South Africa" (2003) 7 *Green bag* 63 at 67 (noting that "[p]roportionality and balancing are at the heart of constitutional litigation in our country", and estimating that as many as three quarters of the Court's cases require the justices to engage in a balancing analysis). Some of the cases where the principle has been applied include: *S v Williams & Others* 1995 (3) SA 632 (CC) (on corporal punishment of juveniles); *National Coalition for Gay and Lesbian Equality & Another v Minister of Justice* 1999 (1) SA 6 (CC) (anti-sodomy statutes); *Minister of Home Affairs v National Institute for Crime Prevention & the Re-integration of Offenders (NICRO) & Others* 2005 (3) SA 280 (CC) (felon disenfranchisement); *Prince v The President of the Law Society of the Cape of Good Hope* 2001 (2) SA 388 (CC) (prohibition on cannabis as applied to Rastafarians who use it for religious purposes); *S v Mello & Another* 1998 (3) SA 712 (CC) (right to fair trial). For further discussion, see Z Motala & C Ramaphosa *Constitutional Law: Analysis and cases* (2002).

Constitution[1222] and applied it in a number of cases challenging government intrusion on a number of individual rights.[1223]

The use of proportionality principle within the human rights context springs from the recognition that conflicts do arise between individual rights and other competing collective concerns such as public order, security, safety, health and democratic values, and that when this happen the right or consideration with lesser weight in the circumstance should give way to the weightier right or consideration.[1224] As such, not all state laws or conducts that infringe human rights are unconstitutional or invalid.[1225] However, because human rights are considered a priority category of moral or legal considerations,[1226] where they are in conflict

[1222] See *Randu Nzai Ruwa & 2 Others v Internal Security Minister & another* [2012] eKLR para 48 & 52 (holding that s 24 of the Constitution (limitation clause) requires the courts in Kenya to carry out a proportionality analysis where a state action infringes the human right(s) of an individual). However, the application of the proportionality analysis did not begin with the enactment of the 2010 Constitution. Earlier on the Courts had applied the principle with regard to the Bill of Rights in the Independence Constitution. See, for example, *Kenya Bus Service Limited & 2 Others v. attorney General & 2 others* (2005) eKLR; *Martha Karua v Radio Africa Ltd t/a Kiss FM Station & 2 Others* (2006) eKLR; *Rose Moraa & Another v Attorney General* (2006) eKLR.

[1223] See, for example, *Randu Nzai Ruwa & 2 Others* (on freedom of association); *East Africa Breweries Ltd v Attorney General & 2 others* [2013] eKLR (on right to property, consumer rights and freedom of expression); *Dennis Mogambi Mang'are v Attorney General & 3 Others* [2012] eKLR; *Johnson Muthama v Minister for Justice and Constitutional Affairs* & another [2012] eKLR (on the right against discrimination); *Beatrice Wanjiku & another v Attorney Genera & another* [2012] eKLR (right to security of the person, right to freedom of movement, and right to dignity).

[1224] For a discussion on the relationship of human rights and other collective considerations, see A McHarg "Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights" (1999) 62 *Modern Law Review* 671. See also DM Beatty *The ultimate rule of law* (2004) (concluding that balancing is not only the proper way of resolving human rights issues but the only way); See also R Alexy *A theory of constitutional right*s (2002). But see H Black "Bill of rights" (1960) 35 *New York University Law Review* 865 (contending that holding that human rights are not absolute negates the whole purpose of human rights, which is to limit the exercise of state power).

[1225] See AS Sweet & J Mathews "Proportionality Balancing and Global Constitutionalism" (2008) 47 *Columbia Journal of Transnational Law* 73 at 89-92 (discussing the reasons for the proportionality test and listing them as the indeterminacy of rights; the non-absoluteness of rights; and the conflicting constitutional role of government of protecting both the individual and collective interests).

[1226] Within rights theory itself, there are competing versions of the protection which rights confer upon individuals and hence competing accounts of the proper relationship between conflicting rights and public interests. For the strongest version, see J Waldron "Introduction" in J Waldron *Theories of Rights* (1984) 15 (contending that a right constitutes a strict constraining requirement on action, such that if someone has a right it is morally wrong even to contemplate breaching it); For the stronger version, see R Dworkin *Taking Rights Seriously* (1977) 193 (contending that rights are trumps over other interests and as such are to be protected and promoted to the greatest extent possible before other interests are even taken into consideration). For similar view, see also J Rawls, *A Theory of Justice* (1972) 3; R. Plant, *Modern Political Thought* (1991) 258-259; R. Nozick, *Anarchy, State and Utopia* (1974) ix; H. Steiner, *An Essay on Rights* (1994) 199. The weaker version is expressed by Raz who argues that rights signify particularly important interests but that this does not give them any greater weight and, therefore, in principle can be outweighed by other important considerations such as the collective good. J Raz *The Morality of Freedom* (1986) 186-192; J Raz "Rights and Individual Well-Being" in J Raz *Ethics in the Public Domain* (1994) 254-255. The approach mostly favoured in the human rights discourse and by the Kenyan and South African Courts seems to be the stronger version. See the Kenyan case of *Beatrice Wanjiku & another v Attorney General & another* [2012] eKLR para 31 (where the court noted that though the limitation clause in the Constitution "involves the weighing of competing values", the process should not be done in a mechanical manner and should always bear in mind that "the purpose of the

with collective demands, for state laws or conducts to triumph over a right, there must exist "compellingly good" reasons for limiting the right[1227] and equally good reasons for thinking that the restrictive means adopted is the "least restrictive" way in which the rational purpose can be achieved.[1228] The inquiry into the fulfillment of these basic requirements (the legitimacy of the objectives, and the suitability and necessity of the means), which usually begins once a *prima facie* case of infringement has been made,[1229] forms the bulk of the proportionality analysis, though in some cases courts have engaged in a cost-benefit analysis where a means is found to be suitable and necessary as a further check on disproportionate restriction of human rights.[1230]

Thus, for a state action or law to pass the proportionality test it must not only serve a rational

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Constitution and particularly the Bill of Rights is to preserve the dignity of individual and to promote social justice and the realization of the potential of all human beings". See also the South African case of *S v Makwanyane and Another* [1995] ZACC 3 para 104. For further discussion, see generally A McHarg "Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights" (1999) 62 *Modern Law Review* 671.

[1227] I Currie & J de Waal *The Bill of Rights Handbook* 5ed (2005) 164 (noting that this means that the limitation must serve a purpose that "most people would regard as compellingly important", otherwise "if rights are to be overridden simply on the basis that the general welfare will be served by the restriction then there is little purpose in the constitutional entrenchment of rights"). See also CG Svarez *Vortrlage Ober Recht Und Staat* (1960) at 40, quoted in AS Sweet & J Mathews "Proportionality Balancing and Global Constitutionalism" (2008) 47 *Columbia Journal of Transnational Law* 73 at 99 noting that:

> "Only the achievement of a weightier good for the whole can justify the state in demanding from an individual the sacrifice of a less substantial good. So long as the difference in weights is not obvious, the natural freedom must prevail .... The [social] hardship, which is to be averted through the restriction of the freedom of the individual, has to be more substantial by a wide margin than the disadvantage to the individual or the whole that results from the infringement."

[1228] See D Meyerson *Rights limited: Freedom of Expression, Religion and the South African* (1997) 36-43.

[1229] But see the South African case of *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) (where the Court declined to decide whether a law prohibiting corporal punishment in school was a violation of the right of freedom of religion and the right to practice a religion in community with others and went directly to the limitation clause). This approach has, however, been correctly criticised as "an extremely artificial way of deciding a case" as it renders the proceeding proportionality analysis a "hypothetical exercise without precedential value". See I Currie & J de Waal *The Bill of Rights Handbook* 5ed (2005) 166 fn 11.

[1230] The "legitimacy" inquiry is devoted to confirming that the government is constitutionally authorized to take the challenged measure. The "suitability" inquiry, on the other hand, is aimed at verifying that, with respect to the act in question; the means adopted by the government are rationally connected to stated policy objectives. The "necessity" examination (or the "least restrictive means" (LRM) test) is aimed at ensuring that the measure does not curtail the right any more than is necessary for the government to achieve its stated goals. If the impugned measure fails on suitability or necessity, the act is *per se disproportionate*; it is outweighed by the pleaded right and therefore unconstitutional. However, in its fully developed form, the analysis involves four steps. If the measure under review passes the first three tests, the judge proceeds to fourth stage (commonly known as "balancing in the strict sense" or "proportionality in the narrow sense") in which the judge weighs the benefits of the measure, which has already been determined to be the "least restrictive means" against the costs incurred by infringement of the right, in order to determine which "constitutional value" shall prevail, in light of the respective importance of the values in tension and the facts of the case. For further discussion, see R Alexis "Constitutional Rights, Balancing, and Rationality" (2003) 16 *Ratio Juris* 135 (noting that the principle of proportionality consists of three sub-principles: the principle of suitability, of necessity, and of proportionality in the narrow sense). See also M Poto "The principle of proportionality in comparative perspective" (2007) 8 *German Law Journal* 835; AS Sweet & J Mathews "Proportionality Balancing and Global Constitutionalism" (2008) 47 *Columbia Journal of Transnational Law* 73; I Currie & J de Waal *The Bill of Rights Handbook* 5ed (2005) chap 7.

purpose (legitimacy test) but the means adopted must also be rationally connected to the stated purpose (suitability test) and must not curtail any right any more than is necessary to achieve its stated goals (necessity test).[1231] Where these requirements are met, there is a further cost-benefit analysis stage where the judge weighs the benefits of the measure, which has already been determined to be the "least restrictive means" against the costs incurred by infringement of the right, in order to determine whether the means should still prevail, in light of the tension between the benefit and cost and the facts of the case. This latter stage, commonly known as "balancing in the strict sense" or "proportionality in the narrow sense" is a further check on disproportionate restriction of human rights and aims to ensure that the cost of the means chosen does not outweigh the benefit it seeks to achieve.

6.3. Proportionality principle and the non-conviction based means of assets recovery

Assets recovery is used as a tool against acquisitive crimes such as corruption. Its main aim is to ensure that individuals do not possess illegal properties or benefit from proceeds of their criminal activities and that the victims of the illegal acquisition of property are compensated or restored to their original position.[1232] This objective has been accepted as a legitimate aim of government in many countries including South Africa and Kenya. For example, in the case of *S v Shaik & Others*,[1233] the South African Constitutional Court, after observing that "corruption is often closely associated with organized crime", concluded that the recovery of corruptly acquired assets formed part of the crime control objectives expressed under the POCA, which objectives "are entirely legitimate in [South Africa's] constitutional order".[1234] Similarly, in the Kenyan case of *Kenya Anti-Corruption Commission v Lands Limited & 8 others*,[1235] the Court noted that the assets recovery strategy under the ACECA was a legitimate government objective as it was inspired by the assets recovery provisions under

[1231] For further discussion, see S Tsakyrakis "Proportionality: An assault on human rights?" (2009) 7 *International Journal of Constitutional Law* 468.

[1232] With regard to recovery of corruptly acquired assets, the non-conviction based mechanism allow stolen wealth to be retrieved from corrupt individual and restored to the use of the wider society. See "Travaux Preparatoires of the Negotiations for the Elaboration of the United Nations Convention against Corruption" http://www.unodc.org/documents/treaties/UNCAC/Publications/Travaux/UNCAC_Travaux_Preparatoires_-_English.pdf (accessed 10/3/2011) (This intention is apparent from the initial title of the chapter on Asset Recovery in UNCAC. It read "Preventing and combating the transfer of funds of illicit origin derived from acts of corruption, including the laundering of funds, and returning such funds").

[1233] *S v Shaik and Others* 2008 (5) SA 354 (CC).

[1234] *S v Shaik and Others* 2008 (5) SA 354 (CC) para 73-75. See also para 81 ("there can be no doubt that corruption is a crime that is closely related to the purposes of the Act"). According to the Court, the key objective of assets recovery under POCA is "to ensure that no person can benefit from his or her wrongdoing". From this main objective flows, in the Court's view, two other specific objectives, that is, general deterrence (preventing criminals "from enjoying the proceeds of the crimes they may commit") and crime prevention (removing "from the hands of criminals the financial wherewithal to commit further crimes") - at para 52.

[1235] *KACC v Lands Limited & 8 others* (2008) eKLR.

the United Nations Convention Against Corruption (UNCAC) to which Kenya is a member and since "other countries of comparable jurisdictions have enacted almost similar provisions modelled on the Convention".[1236]

It is therefore not in doubt that the objective that assets recovery serves is a legitimate government objective. It is equally less in doubt that assets recovery is rationally connected to the stated purpose as is required by the "suitability" test. Indeed justifying the suitability of a measure is usually less problematic because it is always possible to argue that the means chosen by the legislature serve the legitimate purpose it is designed to serve.[1237] Thus, with regard to assets recovery it is possible to argue that its use does contribute to the recovery of corruptly acquired assets and with it the control of corruption. In this respect, both the South African and Kenyan Courts have easily concluded that the assets recovery is rationally connected to crime control.[1238]

To achieve its end, assets recovery uses two different means: the conviction based mechanism and the non-conviction based mechanism. In the conviction based assets recovery, the confiscation is usually restricted to the property of the person who has already been convicted of a criminal offence. The confiscation operates *in personam* or as against a specific person, meaning that confiscation is dependent on a conviction having been obtained against that person and is generally restricted to the property that is owned by the convicted person. Because it targets only the property of a person whose criminal guilt has been proven and whose link to the proven crime has been established, conviction based assets recovery mechanism raises little conflict with the right to property,[1239] though it can

[1236] *KACC v Lands Limited & 8 others* (2008) eKLR para 13. The Court went further to state that the need for the assets recovery strategy in the fight against corruption arose from the potential of corruption "to ruin the societies by siphoning off resources for economic development of the countries and their people". Thus, in the court's view, the recovery of corruptly acquired assets was a legitimate objective as it allowed the government to get back stolen public resources for use in the economic development of the country and its people. *KACC v Lands Limited & 8 others* (2008) eKLR para 14.

[1237] See S Tsakyrakis "Proportionality: An assault on human rights?" (2009) 7 *International Journal of Constitutional Law* 468 at 474. But see *S v Makwanyane and Another* [1995] ZACC 3 para 86 (where the South African Constitutional Court found that the state had not shown, nor could they show a connection between the death penalty and a reduction in the incidence of violent crime).

[1238] See, for example, the South African case of *NDPP and Another v Mohamed NO and Others* (CCT13/02) 2002 (4) SA 843 para 16 (where the Constitutional Court held that non-conviction based assets recovery mechanism is one of the "mechanisms to ensure that property derived from crime or used in the commission of crime is forfeited to the state"). See also the Kenyan case of *KACC v Lands Limited & 8 others* (2008) eKLR para 13.

[1239] Because the right to property only protects property that is lawfully vested in an individual, conviction based assets recovery does not really raise right to property issue as it targets property that is linked to the crime in which the owner's involvement has been proven beyond reasonable doubt. However, if unchecked, a generous interpretation of the procedure (such as applying to other properties that are not connected to the proven crime but that belong to the owner) could have excessive or unfair results, especially as regards the

raise criminal justice issues such as disproportionate punishment.[1240]

Unlike conviction based assets recovery procedure which requires proof of criminal guilt and restricts the confiscation to the property of a person whose criminal guilt has been proven, non-conviction based assets recovery does not require proof of criminal guilt and targets property, which has been proven at a lower standard of proof to have been acquired through crime,[1241] wherever found and without regard to the holder's involvement in or knowledge of the crime. This difference is explained by the fact that the non-conviction based assets recovery is aimed at the property itself (*in rem*) and not at any person. Because it targets the property itself, the non-conviction based mechanisms is tainted by the relation-back doctrine in that it relates back to the date of illegal acquisition of property, regardless of whether the property is still owned or possessed by the criminal.[1242] In this way, non-conviction based mechanism poses great problem for innocent third parties when the property that is alleged to be the proceeds of crime has been transferred for value to an innocent person or presented as security for a debt or charged for a mortgage, under circumstances where the concerned person was unaware and could not have been expected to be aware of the illegal origin of the property. This problem is exacerbated by the fact that, given the *in rem* nature of the non-conviction based assets recovery, an innocent owner could find that his property is permanently lost to the state even after the criminal case against a suspected criminal has been abandoned or dismissed.

Clearly, therefore, from the characteristics of the two different types of assets recovery, the non-conviction based assets recovery procedure is evidently more intrusive on the right of innocent property owners than the conviction based assets recovery procedure. The

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interest of third parties such as creditors, lessees, co-owners and mortgagors. For further discussion, see, for example, DJ Fried "Rationalizing Criminal Forfeiture" (1988) 79 *Journal of Criminal Law & Criminology* 328 at 424-434.

[1240] One of the main concerns with conviction based assets recovery is that since in some circumstances it is considered as a separate remedy it might push the aggregate amount of punishment that is meted on the convicted individual to a disproportionate level. For a discussion, see, for example, CW Palm 'RICO Forfeiture and the Eighth Amendment: When is Everything too Much?' (1991) 53 *University of Pittsburg Law Review* I (discussing this effect with regard to the conviction based confiscation under the US RICO and suggesting that the problem could be remedied by limiting the discretion of the court in awarding the confiscation order).

[1241] Normally, it suffices in non-conviction based assets recovery proceedings to establish a reasonable suspicion that the property was derived from illegal activity.

[1242] Under that theory, the confiscation relates back to the time of the offence and defeats or knocks out any intervening property interests. The theory was developed to defeat the felons in the traditional common law attainder proceeding, who in order to defeat the system and prevent their estate from being confiscated, passed their estate to their heirs prior to being caught. This feature was retained in the *in rem* attribute of civil confiscation. For further discussion of the relation-back doctrine, see MA Jankowski "Tempering the Relation-Back Doctrine: A More Reasonable Approach to Civil Forfeiture in Drug Cases" (1990) 76 *Virginia Law Review* 165.

implication of this fact under the proportionality principle is that the conviction based procedure should be preferred over the non-conviction based procedure as it is the least restrictive means of achieving the assets recovery objectives between the two. In other words, though both mechanisms serve a rational purpose of assets recovery (the legitimacy test) and are rationally connected to the stated purpose (the suitability test), non-conviction based assets recovery mechanism, because of its potential to restrict the right of property owners more than the conviction based assets recovery mechanism, does obviously fail the "least restrictive means" or "necessity" test, which requires that where two means can achieve the desired objective then the one that does less harm to the rights of individuals should be preferred.[1243]

However, despite not being the least restrictive means, most jurisdictions also provide for the non-conviction based mechanism in their laws.[1244] This raises an interesting question under the proportionality principle: when is it reasonable and justifiable to allow for a more restrictive means to be used to achieve a public purpose of crime fighting at the expense of individual's right to property, even in those cases where a property owner may evidently be innocent and unaware of the criminal activity?

6.4. Non-conviction based assets recovery mechanism and the "least restrictive means" test

The "least restrictive means" test requires that for a measure that limits rights to be proportionate, there shouldn't be any other equally effective means that could be employed to achieve the same ends without restricting rights at all or without restricting them to the same extent. In other words, if there exists a non-restrictive or less restrictive (but equally effective) means that can be used to achieve the legitimate purpose, then that non-restrictive or less restrictive alternative should be preferred.[1245] In assessing the effectiveness of alternative means a margin of discretion is usually given to the state. As the South African Constitutional Court noted in *S v Makwanyane*, "the role of the Court is not to second-guess

[1243] For further discussion, see S Tsakyrakis "Proportionality: An assault on human rights?" (2009) 7 *International Journal of Constitutional Law* 468.
[1244] For an exposition, see TS Greenberg *et al Stolen Asset Recovery: A Good Practices Guide for Non-Conviction Based Asset Forfeiture* (2009) 109-191 (Discussing the forfeiture regimes in representative countries from both the common law tradition and the civil law tradition).
[1245] I Currie & J de Waal (5ed) *The Bill of Rights Handbook* (2005) Juta law at 149 ("If a less restrictive (but equally effective) alternative method exists to achieve the purpose of the limitation, then the least restrictive method must be preferred").

the wisdom of policy choices made by legislators".[1246] However, this doesn't mean that Courts will not examine the specific policy choice to see if it's restriction on rights is the least restrictive. As the Kenyan Constitutional Court stated in *Randu Nzai Ruwa & 2 others v Internal Security Minister & another:*[1247]

> "It is appreciated that the executive arm of the Government is charged with the responsibility of ensuring national security (Chapter 14 of the Constitution). That arm of Government is therefore the best suited to make decisions in respect of matters of national security. What it says about national security must ordinarily be believed. And in these matters it must be given some margin of appreciation. Where, however, there is a complaint raised as in this petition, that national security has been wrongfully invoked to take away a fundamental right *the court needs to be judicially satisfied that the action of the State is reasonable and justifiable*. If these were not so, then the State could make any decision or take any action in the name of national security with the comfort that it will never be required to account for that action. The State could be tempted to use the blank cheque to overdraw!"[1248]

In the context of assets recovery, since assets recovery is a remedy for criminal conduct, a measure that would not lead to the breach of the right to property of innocent property owners would be one that provides for the proof of the criminal involvement of an individual in the acquisition of the targeted property before his or her alleged proceeds of corruption is confiscated. Such a measure would be the conviction-based assets recovery mechanism. Under this mechanism, the confiscation of proceeds of crime can only take place after the state has proven the criminal guilt of the defendant to the criminal standard of beyond reasonable doubt. Since the state would have proven not only that the owner is criminally guilty but also that the property was acquired as a result of the criminal activity for which the owner is convicted, the conviction based confiscation poses little threat, if any, to the enjoyment of legitimate property interest.

This procedure would therefore, under the "least restrictive test" or necessity test, be a preferable alternative to the non-conviction based assets recovery mechanism. This is because under the non-conviction based assets recovery mechanism there is no requirement of proof of guilt. This means that the property rights of those involved in crime and those not

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[1246] *S v Makwanyane and Another* [1995] ZACC 3

[1247] *Randu Nzai Ruwa & 2 others v Internal Security Minister & another* [2012] eKLR

[1248] *Randu Nzai Ruwa & 2 others v Internal Security Minister & another* [2012] eKLR, para 57 (emphasis added). See also the South African case of *Minister of Health and Others v Treatment Action Campaign and Others* (2002) 5 LRC 216 at 248 para 99, where the Constitutional Court defined the constitutional duty of the Court in the following terms:

> "The primary duty of Courts is to the Constitution and the Law, which they must apply impartially and without fear, favour or prejudice. The Constitution requires the State to respect, protect, promote, and fulfil the rights in the Bill of Rights. Where State policy is challenged as inconsistent with the Constitution, Courts have to consider whether in formulating and implementing such policy the State has given effect to its constitutional obligations. If it should hold in any given case that the State has failed to do so, it is obliged by the Constitution to say so. In so far as that constitutes an intrusion into the domain of the executive that is an intrusion mandated by the Constitution itself."

involved can be equally affected. Whereas in the case of those involved in crime, the loss of property right is by and large not necessary unfair or unreasonable since they acquired the property with full knowledge of its illegal source; in the case of innocent third parties, who either purchased the property for value without notice of its original illegality or who innocently acquired interest in the property as lenders, mortgagors or co-owner, the unfairness is clearly evident.

However, despite not being the least restrictive means, most jurisdictions also provide for the non-conviction based mechanism in their laws. The reason usually fronted for the inclusion of the non-conviction based mechanism in the assets recovery laws in spite of its potential to harm more than the conviction based mechanism, is that the conviction based assets recovery mechanism is not always effective, or is less effective than the non-conviction based mechanism (and is therefore not considered a comparable alternative or substitute). As Kennedy notes:

> "The peaceful enjoyment of the proceeds of crime damages public confidence in the rule of law and provides harmful role models, which has led to *a recognition that the traditional criminal confiscation may be unacceptably inadequate and ineffective*."[1249]

The inadequacy of the conviction based procedure is mainly attributed to the difficulty it places on states to prove a connection between the property to be recovered and a specific offence of corruption.[1250] This requirement to establish a link is a pre-condition to lawful confiscation of criminally acquired assets in the conviction based type of confiscation in many jurisdictions, including Kenya and South Africa.[1251] A criminal conviction usually has to be won by the prosecution before it can seek an order confiscating the property derived from that offence.[1252] But even if a conviction is obtained, the prosecution still needs to prove the link between the criminal offence for which the defendant has been convicted and the property to be confiscated before the court can sanction the confiscation of the property.[1253]

[1249] A Kennedy "Justifying the civil recovery of criminal proceeds" (2004) 12 *Journal of Financial Crime* 1 at 3 (emphasis added).

[1250] See S Young (ed) *Civil Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime* (2009) part II (illustrating that because of the difficulty in using criminal forfeiture systems to disrupt criminal organizations, state countries such as Australia, Canada, China, Ireland, South Africa, the United Kingdom and the United States are turning to civil forfeiture systems).

[1251] For an exposition, see TS Greenberg *et al Stolen Asset Recovery: A Good Practices Guide for Non-Conviction Based Asset Forfeiture* (2009) 109-191 (Discussing the forfeiture regimes in representative countries from both the common law tradition and the civil law tradition).

[1252] See A Kennedy "Justifying the civil recovery of criminal proceeds" (2004) 12 *Journal of Financial Crime* 1 at 2 (pointing out that the impact of the criminal confiscation "has been limited by the necessity to obtain sufficient evidence to obtain a criminal conviction as a prerequisite for confiscatory action").

[1253] See section 3.6 above.

With regard to corruption, because it is a criminal behaviour, criminal prosecution followed by confiscation of assets may well be the least restrictive approach. However, because of the secretive, inter-boundary and sophisticated nature of corruption, conviction based confiscation is perceived to swing the justice pendulum in favour of criminals who take advantage of legal safeguards provided under the criminal law to retain their ill-gotten gains.[1254] The secret nature of corruption and the lack of individual victims that would report an act of corruption make it difficult to not only prove the commission of corruption offence to the criminal law standard of beyond reasonable doubt but also to prove the link between the targeted property and a specific act of corruption.[1255] The fact that perpetrators invariably ensure that they are far removed from the overt corrupt activity does not make the task any easier.[1256] Particular difficulties occur when a case involves prominent politicians and wealthy business persons who fund and support corruption but seldom carry out the physical elements of the crime or who use their powerful positions to impede investigations and destroy or conceal evidence.[1257]

For these reasons, non-conviction based assets recovery procedure is seen as a necessary means for realizing the objectives of assets recovery as it enables the state to recover proceeds of corruption in instances where the shackles of conviction based procedure makes it burdensome or expensive.[1258] For one, the fact that it is not preconditioned on proof of criminal guilt of the owner makes it useful in instances where the state lacks enough evidence for criminal conviction but has enough evidence to show that a property was

[1254] See, for example, The Australian Law Reform Commission *Project 87: Report on Confiscation that Counts: A Review of Proceeds of Crime Act 1987* 54 (pointing out that the requirement that a conviction or finding of guilt be made before forfeiture of assets may be ordered is considered to be the reason why much crime used or derived assets have not been the subject of forfeiture orders in Australia).

[1255] See I Carr "Fighting Corruption through the United Nations Convention on Corruption 2003: A Global Solution to a Global Problem? 11(1) *International Trade Law Review* (2005) 24 at 26 (pointing out that "corruption is a hidden crime and investigation can prove a costly exercise").

[1256] Peter Hennings in analysing the offence of influence peddling points out that "the chance of proving this type of corruption may be lower because the influence-peddler is removed from the actual decision, so it will be difficult to link an improper payment to a particular government action". P Henning "Public Corruption: A Comparative Analysis of International Corruption Conventions and United States Law" (2001) 18 *Arizona Journal of International & Comparative Law* 793 at 825. See also S Al-Jurf "Good Governance and Transparency: Their Impact on Development" (1999) 9 *Transnational Law & Contemporary Problems* 193 at 202 ("The nature of corrupt activities propagates a system which is hard for outsiders to penetrate. Participants in corruption do everything within their power to keep their transactions secret").

[1257] For an illustrative study, see J Maton and T Daniel "Recovering the Proceeds of Corruption by Public Officials: A Case-Study" (2009) 10(3) *Era Forum* 453 (discussing international efforts to recover the assets of a former Nigerian State Governor).

[1258] J Wade "Legislation to Establish New Assets Confiscation Scheme" (1997) 103 *Victorian Bar News* 11 Remembering that one of the features of organised crime is that it is highly sophisticated and depends on numerous criminal activities rather than an isolated criminal activity.

corruptly acquired.[1259] Secondly, while the confiscation models have varied among the jurisdictions that have adopted them, non-conviction based confiscations generally make the work of the state easier as it lowers the state's standard of proof to that of civil law standard of proof and allocates evidentiary burden to the owner of the property, who has to prove that the targeted property was legally acquired.[1260] And since the owner of the property is most suited to know the source of his or her wealth, the procedure is seen as saving the state the time and money needed to prove the link between the targeted property and a specific corrupt act.[1261] This lowering of state's standard of proof and shifting of some of the burden of proof to the defendant is especially considered useful in cases where the targeted property may have been acquired with the proceeds of numerous corrupt acts as it would be almost impossible in these cases to link the property to a particular corruption offence if the whole onus lay with the prosecution.[1262]

It is to be noted, however, that the "difficulty" argument raised by states to justify measures that shifts the burden to individuals in crime-based cases is usually frowned upon by courts. This is because the state is usually considered to have all the machinery necessary to investigate crimes and those it suspects of having committed those crimes. As Katsala J quotably noted in the Malawian case of *Hon. Friday Anderson Jumbe & Another v Attorney General,*[1263] "[w]hen I think of the resources at the disposal of the state that can be used to fight crime", there is no reason why it should "be said with open eyes that there is no other way the crime of corruption can be dealt with firmly other than by infringing on the rights of the accused".[1264]

[1259] This has been the experience in Kenya, where the KACC (now EACC) has been successful in recovering public property corruptly alienated by individuals but has found it difficult to secure the conviction of individuals involved because of the high standard of proof required for criminal conviction. See the various Annual Reports of the Commission available at *www.eacc.go.ke.*

[1260] See the discussion on the difference between conviction based and non-conviction based assets recovery and the example of Kenya and South Africa in chapter 3. See also A Kennedy "Designing a Civil Forfeiture System: An Issues List for Policymakers and Legislators" (2006) 13 *Journal of Financial Crime* 132 (examining the provisions of legislations from a number of countries and setting out the common issues which have arisen and the range of options which have been attempted as potential solutions).

[1261] See S Casella "The Case for Civil Forfeiture: Why *in rem* Proceedings are an Essential Tool for Recovering the Proceeds of Crime." (2008) 11 *Journal of Money Laundering Control* 8 (concluding that criminal forfeiture statutes, which authorize forfeiture after a defendant has been convicted are not enough, by themselves, for successful recovery of criminal proceeds, and that civil forfeiture provisions must be included for the recovery efforts to succeed).

[1262] See J Wade "Legislation to Establish New Assets Confiscation Scheme" (1997) 103 *Victorian Bar News* 11 (Remembering that one of the features of organised crime is that it is highly sophisticated and depends on numerous criminal activities rather than an isolated criminal activity).

[1263] *Friday Anderson Jumbe & Another v Attorney General* Constitutional cases Nos. 1 and 2 of 2005

[1264] *Friday Anderson Jumbe & Another v Attorney General* Constitutional cases Nos. 1 and 2 of 2005 at 49. See also *S v Bhulwana; S v Gwadiso* 1996 (1) SA 388 (CC), where the South African Constitutional Court declared unconstitutional section 21(1)(a)(i) of the Drugs and Drug Trafficking Act 140 of 1992, which provided that a

Nevertheless, when it comes to the non-conviction based assets recovery mechanism, courts have been willing to excuse the difficulty argument and with it the sharing of burden of proof between the state and defendant, ostensibly because the guilt of the property owner is not at issue. As Judge Nkabinde of the South African Constitutional Court noted in *Prophet v NDPP*,[1265] non-conviction based assets recovery mechanism "rests on the legal fiction that the property and not the owner has contravened the law".[1266] This guilty-property fiction is, however, in the thesis view, not a convincing explanation for excusing the difficulty argument in the case of non-conviction based recovery of proceeds of corruption. This is because unlike the traditional types of confiscation (confiscation of instrumentalities or of subjects of crime) where the property was guilty for either being used in the commission of a crime (instrumentalities) or for being an illegalized contraband (subjects of crime), it is impossible to regard property corruptly alienated from the public or other victims as being guilty of anything.[1267] As aptly noted by Van der Walt:

> "Civil forfeiture is in fact nowadays more often justified on pragmatic grounds, such as the importance of preventing crime or the difficulty of identifying the owner of the property or the person who should be prosecuted for the crime, and the guilty-property fiction is not generally regarded as a good justification for the legitimacy of civil forfeiture in modern law."[1268]

This reservation on the guilty-property fiction does not, however, detract from the fact that non-conviction based assets recovery is not *directly* concerned with the guilt of the owner of property in the sense of requiring a finding on the criminal guilt of the owner. As the Kenyan Constitutional Court noted in *Kenya Anti-Corruption Commission v Davy Kiprotich Koech*,[1269] a non-conviction based assets recovery case "is not a criminal case, where the accused person is entitled to keep silence". Such a case, according to the Court, is "a civil matter [in which] the Court expects the explanations and justifiable defence from the Defendant".[1270] What this means, therefore, is that, though the guilty-property fiction should not hold in the case of recovery of proceeds of corruption, the fact that the criminal guilt of the owner is not *directly* involved does help to assuage the frown that is usually placed on difficulty arguments by the courts. Also because "it will be far easier for a Defendant in the

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person in possession of an amount of dagga exceeding 115 grams would be considered a dealer unless he could prove otherwise.

[1265] *Prophet v NDPP* (CCT56/05) 2007 (6) SA 169 (CC).

[1266] *Prophet v NDPP* (CCT56/05) 2007 (6) SA 169 (CC) para 58. See also Judge Ackermann in the South African case of *NDPP v Mohamed NO & Another* [2003] ZACC 4 para 17, noting that the non-conviction based mechanism is "focussed, not on wrongdoers, but on property that has been used to commit an offence or which constitutes the proceeds of crime".

[1267] See chapter 3 for an explanation of the different types of confiscation.

[1268] AJ Van der Walt "Civil forfeiture of instrumentalities and proceeds of crime and the constitutional property clause" (2000) 16 *South African Journal on Human Rights* 1 at 8-9.

[1269] *KACC v Davy Kiprotich Koech* [2011] eKLR.

[1270] *KACC v Davy Kiprotich Koech* [2011] eKLR para 23.

majority of circumstances to establish, on the balance of probabilities, that the assets in dispute have an innocent source",[1271] the relaxing of the burden of proof in the non-conviction based assets recovery is usually viewed as not entirely unreasonable.[1272] In this respect, the Kenyan Constitutional Court has found that corruption is a complex, secretive and organized crime in which "much information lies within the suspect's knowledge and that of his associates" and that, therefore, requiring a defendant in a non-conviction based assets recovery proceeding to prove the legal source of his income does not amount to an unreasonable burden.[1273] The South African Constitutional Court has similarly concluded in the case of *Prophet v NDPP* that:

> "[T*]he acquittal of the appellant on a technicality indicates the difficulties the State has to contend with in its endeavours to combat* [organized crimes] … Counsel accepted that organised crime (such as corruption) has become a growing international problem and that societies in transition (like South Africa) are susceptible to organised crime groups, and that *ordinary criminal law measures are ineffective in targeting these criminal organisations, thus necessitating extraordinary measures such as civil forfeiture in terms of ch 6 of the Act*."[1274]

Thus, the difficulty in securing a conviction in corruption cases does justify the use of the non-conviction based mechanism to recover corruptly acquired assets. However, in addition to the difficulty justification, non-conviction based procedure is also considered a necessary tool as it offers the only means of recovering proceeds of corruption in certain circumstances. This is the case, for example, where the suspect flees from the jurisdiction, or dies, or when assets are held through offshore trusts or companies or associates not amenable to prosecution;[1275] or where a conviction cannot be obtained for technical reasons (such as,

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[1271] *R v Benfield* [2000] All ER (D) 2456.

[1272] Furthermore, since most of the corruption recovery cases usually involve public officials who have breached the public entrusted authority for their own private gain, a requirement for them to explain the legal source of their property would ordinarily be viewed as part of a reasonable duty owed to the beneficiaries of the public trust – the public. On assets declaration and the fight against corruption, see R Mukherjee & O Gokcekus "Officials' Asset Declaration Laws: Do They Prevent Corruption?" available at http://works.bepress.com/omer_gokcekus/36 (accessed 20/9/2013).

[1273] See *Christopher Ndarathi Murungaru v KACC & Another (No 2)* (2006) eKLR at 47 (noting that with corruption "much information lies within the suspect's knowledge and that of his associates").

[1274] *Prophet v NDPP* (CCT56/05) 2007 (6) SA 169 (CC) para 66, quoting with approval the Supreme Court of Appeal's holding in *Prophet v NDPP* 2006 (1) SA 38 (SCA) para 32 (emphasis added). See also *NDPP v Mohamed* (2002), 4 SA 843 (CC) 853 noting that: "it is often impossible to bring the leaders of organised crime to book, in view of the fact that they invariably ensure that they are far removed from the overt criminal activity involved".

[1275] See CM Welu "The International Compliance Clamp-Down" (2007/2008) 74 *Euro Law* 51 at 52 (Pointing out that anti-corruption cases tend to be highly political and impinge on the diplomatic sensitivities of the nations involved); see J Carver "The Hunt for Looted State Assets: The Case of Benazir Bhutto" in R Hodess *et al* (eds) *The Global Corruption Report* (2004) 102 (for a case study on the difficulties of trans boundary recovery). In these instances non-conviction based procedure allows states to target the criminal proceeds even in the absence of the offender thereby removing the difficulty posed to conviction based procedure by absentee criminals. See AR Valukas & TP Walsh "Forfeitures: when Uncle Sam says you can't take it with you" (1988) 14 *Litigation* 31-37.

the rule against retroactive application of statute);[1276] or where evidentiary rules prevent necessary evidence from being admissible in criminal proceedings, but available for civil claims.

In some jurisdictions such as South Africa, the non-conviction procedure also provides the only means of recovering specific objects illegally acquired such as public utilities. This is because the type of assets recovery under their conviction based mechanism is that of "value" not "object".[1277] As the Constitutional Court noted in *S v Shaik and Others*,[1278] the order that a court may make in terms of chapter 5 (conviction based mechanism) "is not for the confiscation of a specific object, but an order for the payment of an amount of money to the state".[1279] Thus, the only alternative means available to the South African government in cases where specific public properties are corruptly acquired is the non-conviction based mechanism under chapter 6 of POCA, which allows for object confiscation.[1280]

However, while this latter scenario may be cited as a justification for the use of the non-conviction based assets recovery mechanism, it is the view of this thesis that the deliberate exclusion of object recovery in the conviction based mechanism does not amount to a reasonable justification for the use of the non-conviction based mechanism. This is because there is really no reason why confiscation of specific objects acquired through crime cannot also be included under the conviction based regime. Indeed countries like Kenya have empowered their courts to provide for both the value and object confiscation in their conviction based regimes without posing any discernible difficulty to the realisation of the objects of assets recovery.[1281]

Still, apart from these instances of legislative "mis-enactments", the non-conviction based

[1276] Indeed non-conviction based assets recovery is the only retroactive assets recovery instrument the thesis could come up with and can therefore be used to recover proceeds from crimes preceding the enactment of its legislation. See, for example, the South African case of *Prophet v NDPP* (CCT56/05) 2007 (6) SA 169 (CC) para (holding that the assets recovery provisions of POCA are retrospective). Compare with the Kenyan case of *Samuel Kamau Macharia and Another v Kenya Commercial Bank Ltd and 2 Others* SCK Application No. 2 of 2011 [2012] eKLR para 61 where the Supreme Court that:

> "As for non-criminal legislation, the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are prima facie prospective, and retrospective is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature. (Halsbury's Laws of England, 4th Edition Vol. 44 at p.570). A retroactive law is not unconstitutional unless it: (i) is in the nature of a bill of attainder;(ii) impairs the obligation under contracts;(iii) divests vested rights; or (iv) is constitutionally forbidden."

[1277] For the difference between value and object confiscation, see chapter 3, section 3.7.2.

[1278] *S v Shaik and Others* [2008] ZACC 7.

[1279] *S v Shaik and Others* [2008] ZACC 7 para 24.

[1280] For further discussion of the assets recovery scheme under South African POCA, see chapter 3.

[1281] See Kenya's ACECA, s 54. For further discussion of the Assets recovery regime in Kenya, see chapter 3.

assets recovery mechanism is arguably a necessary tool in the recovery of corruptly acquired assets especially in those cases where the use of conviction based mechanism would place undue burden on the state or make it impossible to recover corruptly acquired assets.[1282] Kenyan and South African Courts have in this respect found that their respective non-conviction based assets recovery mechanisms meet the necessity test as without it the purpose of assets recovery would be diminished, though, in so finding, they have not circumscribed the instances when the mechanism should be applied.[1283]

Normally a finding on the necessity of a prescribed measure would settle the question as to the proportionality of that measure.[1284] However, because non-conviction based assets recovery mechanism has the potential to unconstitutionally deprive innocent owners or innocent third parties of their lawful property because of its *in rem* focus; it is reasonable to insist that in justifying the infringement that it causes account should also be taken of the possibility of successful criminal conviction and the effect of the confiscation on innocent owners and third parties. In other words, where the means is found to be suitable and necessary, as most jurisdictions have so far found with regard to non-conviction based procedure, its effect on property owners might still be disproportionate, thereby necessitating a further inquiry into whether its restrictive effect is proportional to the purpose.

In this regard, the courts in Kenya and South Africa have, in addition to the necessity test, engaged in an effect-purpose analysis as a further check on the disproportionate effect of the non-conviction based mechanism. As noted by the South African Constitutional Court in *Mohunram and Another v NDPP and Others,*[1285] a finding that the non-conviction based mechanism is a necessary means of achieving assets recovery's objective could still "result in situations of clearly disproportionate (and hence constitutionally unacceptable) forfeiture, and courts must always be sensitive to and on their guard against this".[1286] A guard against this disproportionality, according to the Court, requires a further weighing of "the forfeiture

[1282] In this regard, the Kenyan Constitutional Court has noted in the case *Dyer & Blair Bank Ltd V Equity Bank Ltd & Another* [2012] eKLR para 9 that on limitation of rights the "the emphasis is on justification".
[1283] See, for example, the Kenyan case of *KACC v Lands Limited* & 8 others [2008] eKLR para 19; and the South African case of *NDPP v Mohamed NO & Another,* para 17; *National Director of Prosecutions v. Prophet* [2006] ZACC 17 (law upheld as constitutional further to a number of constitutional issues raised, including violation of rights to dignity, privacy, fair trial, silence, to be presumed innocent until proven guilty, and the right not to be arbitrarily deprived of property).
[1284] See, for example, I Currie & J de Waal *The bill of rights handbook* 5ed (2005) 166 (concluding in their review of the South Africa's Constitutional Court's proportionality jurisprudence that it usually ends or fall at the least restrictive means stage).
[1285] *Mohunram and Another v NDPP and Others* 2007 (6) BCLR 575 (CC).
[1286] *Mohunram and Another v NDPP and Others* 2007 (6) BCLR 575 (CC) para 56.

and, in particular, its effect on the rights of the owner concerned, on the one hand, against the purposes the forfeiture serves, on the other".[1287] Similarly in the Kenyan case of *Kenya Anti-Corruption Commission v Stanley Mombo Amuti*[1288] the Court held that, despite the constitutionality of the non-conviction based assets recovery provision under the ACECA, it must still be interpreted in such a way as to ensure that there is "proportionality or justified balance between the effects of the impugned measures on the protected right and attainment of the objective".[1289]

6.5. Balancing the effect and purpose of non-conviction based assets recovery mechanism within the right to property proportionality framework

The effect-purpose component of the proportionality analysis (also referred to as "balancing in the strict sense" or "proportionality in the narrow sense") is usually invoked where a measure under review passes the first three tests (of legitimacy, suitability and necessity) as a further check on the disproportionality of the measure. Under this test, the judge weighs the benefits of the measure - which has already been determined to be the least restrictive means of achieving the legitimate government objective – against the cost incurred by limitation of a right, in order to satisfy itself that there is proportionality between the effects of the measure and the objectives. In most jurisdictions, including Kenya and South Africa, the test is logically connected to the necessity (least restrictive means) test[1290] and is usually invoked out of the realization that the least restrictive means test on its own would be

[1287] *Mohunram and Another v NDPP and Others* 2007 (6) BCLR 575 (CC) para 57.
[1288] *KACC v Stanley Mombo Amuti* (2011) eKLR.
[1289] *KACC v Stanley Mombo Amuti* (2011) eKLR 19.
[1290] This is the approach preferred, for example, by the Canadian Supreme Court. As it noted in the *R v Oakes* [1986] 1 SCR 103 139 once a court finds that the measure"impair 'as little as possible' the right or freedom in question" it must also satisfy itself that there is "proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective". In other jurisdiction such as the United States, a challenged law would prevail once a court determines that the measure under review furthers a "compelling interest" and has been "narrowly tailored". The balancing exercise may take place at the compelling interest stage, though this is not guaranteed. See, for example, *United States v O'Brien*, 391 US 367 (1968) (where where the right being pleaded by Mr. O'Brien received no analytical attention at all). In Kenya and South Africa the courts do engage in the balancing of the cost and effect in determining whether the measure under review is the least restrictive, though the stage at which it is carried out is not always determinate. In the case of South Africa, Justice Ngcobo has observed in *Prince v The President of the Law Society of the Cape of Good Hope* 2001 (2) SA 388 (CC) as follows:

> "None of these factors [in s 36 limitation clause] is individually decisive. Nor are they exhaustive of the relevant factors to be considered. These factors together with other relevant factors *are to be considered in the overall enquiry*. The limitation analysis thus involves the weighing up of competing values and ultimately an assessment based on proportionality" (emphasis added).

In the case of Kenya see the case of *Randu Nzai Ruwa & 2 Others v International Security Minister & another* [2012] eKLR para 52 (aligning itself with the South African approach and noting that the limitation clause should not be applied mechanically). See also *Beatrice Wanjiku & another v Attorney General & another* [2012] eKLR para 31 (holding that "Article 24 (the limitation clause) is not a checklist and the weighing of these considerations is not to be approached mechanically).

ineffectual, since "any measures at all could be presented as 'necessary', if the purpose they serve is defined in wide enough terms".[1291] It is thus added to the least restrictive means test (necessity test) to ensure that the principle of necessity does not "lose all substance" - it does this by requiring that the limiting effect of a necessary measure does not outweigh its value.[1292]

In the case of non-conviction based assets recovery, however, the courts have held that the inquiry into the proportionality of the measure should take place at every instance of assets recovery.[1293] In other word, apart from the initial determination of the constitutionality of the non-conviction based mechanism that takes place when the extraordinary assets recovery law is being considered for constitutionality, the subsequent application of the non-conviction based assets recovery law is also required to undergo a proportionality analysis aimed at guarding against the disproportionate effects that may arise from the implementation of the non-conviction based assets recovery mechanism. In this subsequent proportionality enquiry, however, the general constitutionality of the mechanism is not at issue, what is at issue is the proportionality of the effect that arise from the implementation of the mechanism. Where the recovery under consideration results in disproportionate effects, the specific recovery would be declared unconstitutional without affecting the overall constitutionality of the non-conviction based mechanism in the law. Thus, for example, in *NDPP v Seevnarayan,*[1294] the South African Supreme Court of Appeal held that the definition of proceeds of crime in the POCA, which "in essence requires that the property in question be 'derived, received or retained' 'in connection with or as a result of' unlawful activities", should be interpreted with a restrictive caution on the "in connection with" to ensure that only property that can be connected to the crime is confiscated.[1295] Where a recovery leads to the confiscation of property not connected to the crime, it would then be declared unconstitutional.

The import of this proportionality enquiry is that the absolute worrying effects that would usually follow from a strict application of the non-conviction based assets recovery

[1291] P Lerche *Ubermass und verfassungsrecht: zur bindung des gesetzgebers an die grundsatze der verhaltnismassgkeit und der erforderlichkeit* (1961) 20.
[1292] See also the Canadian case of *R v Oakes* [1986] 1 SCR 103 (noting that that even important laws that satisfy the suitability and necessity criteria could still cause such harmful effects as to outweigh their value).
[1293] *Mohunram and Another v NDPP and Others* 2007 (6) BCLR 575 (CC) para 57; *KACC v Stanley Mombo Amuti* (2011) eKLR 19.
[1294] *NDPP v RO Cook Properties (Pty) LTD; NDPP v 37 Gillespie Street Durban (Pty) Ltd and another; NDPP v Seevnarayan* 2004 (2) SACR 208(SCA).
[1295] *NDPP v Seevnarayan* 2004 (2) SACR 208(SCA) para 64-67.

mechanism is required to give way to a more comprehensive process in which each instance of non-conviction based recovery becomes amenable to judicial scrutiny where a range of contextual factors such as the position of innocent owners and third parties are taken into consideration. During the judicial scrutiny the mechanism that has already been accepted as suitable and necessary and therefore constitutional is interpreted in a way that does not lead to the confiscation of legally obtained property. Since the value served by the non-conviction based mechanism in the recovery of corruptly acquired property has already been set out, it is helpful to also set out the danger posed to legally obtained property before examining how the mechanism has been framed and interpreted in Kenya to ensure proportionality between the effects and the objective.

6.5.1. The potential unfair effect of confiscation of property of innocent owners

The non-conviction based assets recovery poses specific risks to the enjoyment of the right to property by innocent property owners. These risks are many and varied. For example, since proof of guilt of the owner of the property is not a requirement, and since the targeted property is presumed guilty upon lower standard of proof, the non-conviction based procedure can result in an innocent owner who was uninvolved in or unaware of the criminal activity losing their legitimate property. On the simple showing of probable cause or balance of probability, the government can confiscate any property thought to be proceeds of a crime. An owner can only save his or her property from confiscation if he or she can prove that the property was obtained through lawful means. To do this he or she must adduce evidence of lawful purchase by showing, among other things, that the money used to buy the property was legally acquired or that the property itself was not acquired through illegal means. This shifting of burden of proof to the property owner presupposes that individuals keep track record of purchase documents of properties under their possession, which is sometimes not the case. Innocent owners may, thus, end up losing their legitimate property simply because they lack the evidence to show that it was lawfully acquired.[1296] The fact that the procedure can be invoked long after the alleged offence was committed or even after the alleged offender has died due to the relation-back doctrine, does not help matters either.[1297]

[1296] For a discussion of some of the potential injustices that may occur, see PC Roberts and LM Stratton *The Tyranny of Good Intentions: How Prosecutors and Law Enforcement are Trampling the Constitution in the Name of* Justice (2008).

[1297] See UNCAC, art 54 (providing that non-conviction based confiscation should be adopted in case the perpetrator is dead).

Compounding the problem for the owners is the fact that, since they are not entitled to legal representation in a civil suit, to prove that the property is not a proceed of crime, they not only must pay the costs and expenses associated with a civil proceeding, they usually must do without their property in the meanwhile even as the case drags on. The problem becomes acute if the targeted property is the source of income for the owner as he or she then becomes unable to meet the cost of quality defence. And since the defendant is fighting against the state with its entire attendant powers (financial and otherwise), not having enough resources to pay for legal representation might affect a defendant's ability to save his or her innocent property. In some cases, the cost of defending one's property may actually exceed the value of the targeted asset, making it of little sense to fight for the property in the first place. [1298]

Moreover, most civil confiscation provisions also provide for the preservation of targeted property pending the conclusion of a recovery suit.[1299] While the aim for such preservation is usually to prevent the property from being wasted, lost or improperly disposed of,[1300] the fact that the owner of property cannot access his or her property during the period of the civil proceeding can have debilitating effect on the defendants' ability to maintain themselves and support their dependents, or on their ability to defend their innocent property from confiscation. As Freiburg and Fox correctly points out:

> "The disruptive effect of forfeiture proceedings on property holders and their families prior to conviction or acquittal raises longstanding questions about the accused's right to access assets for the purpose of maintaining a livelihood, supporting a family, and challenging the proceedings."[1301]

In addition to the owners, non-conviction based confiscation is also potentially harmful to the rights of *bona fide* third parties. The fact that it targets the property and not the owner means that it follows the object model of confiscation. This has potential devastating effect on third parties holding interest in the targeted property. As already shown,[1302] under the object model of confiscation, what matters is proof of the direct relationship between the property and a predicate offence. Once the relationship is proved the property becomes amenable to confiscation notwithstanding any possible property rights established in relation

[1298] See TR Piety "Comment, Scorched Earth: How the Expansion of Civil Forfeiture Doctrine Has Laid Waste to Due Process" (1991) 45 *University of Miami Law Review* 911
[1299] See, for example, chapter 6 of South Africa's POCA.
[1300] For purposes of these preservatory provisions, see M Dalton *Country Justice* (1973) 267 (pointing out that one of the aim of these provisions is to prevent the defendant's from disorderly selling or wasting the targeted property).
[1301] See A Freiberg & R Fox "Fighting crime with forfeiture: lessons from history" (2000) 6 *Australian Journal of Legal History* 1 at 49.
[1302] See difference between object and value confiscation in Chapter 3 part 3.6 above.

to the property. In the same way, under the non-conviction based confiscation, the authorities only need to prove that the targeted property is tainted as proceeds of crime for it to be confiscated.[1303] In this regard, it does not require a conviction or even a criminal charge against the owner, nor does it consider any innocent interest that may be attaching to the property.[1304] Once the guilt of the property (connection to predicate offence) is established on the civil standard of proof, the property becomes amenable to confiscation. It matters not who is the actual possessor of the property at the time of confiscation or whether or not they are in lawful possession of the same. This fact makes non-conviction based confiscations not only to breach the traditional common law principle that holds that individual criminal liability is personal not vicarious but also makes it potentially harmful to the rights of *innocent* third parties. Creditors, family members and *bona fide* purchasers for value without notice of illegality may find themselves losing their investments without being afforded an opportunity to claim their interest in the property.[1305]

These risks to the owner and *bona fide* third parties are heightened by the capacity of the confiscation procedure to generate revenue. Indeed in some jurisdictions, including South Africa, confiscation is considered a source of funding for the costs of the law enforcement.[1306] This view of confiscation of proceeds as a source of income can engender a "profit oriented approach of criminal justice" among law enforcement authorities.[1307] Such an approach could make law enforcement dependent on the "income" from confiscated proceeds.[1308] The danger is that law enforcement authorities could then begin to consider confiscation of proceeds as a first priority, resulting in a prejudiced enforcement of law.[1309] Indeed studies have documented instances of the misuse of non-conviction based confiscation in a number of jurisdictions with appalling outcomes for innocent owners.[1310]

[1303] See MP Loui *Glossary of Forfeiture Term* (1988).

[1304] This is unlike the conviction based confiscation which affects only the defendant's interest in the property, not the property itself.

[1305] See, for example, M Goldsmith & MJ Linderman "Asset Forfeiture and Third Party Rights: The Need for Further Law Reform" (1989) *Duke Law Journal* 1253.

[1306] AJ Van der Walt has, for example, noted that the confiscated proceeds of crime is considered a source of funding for the law enforcement in South Africa. AJ van der Walt *Constitutional property law* (2011) 312-314. See also JM Miller & LH Selva Drug Enforcement's Double-Edged Sword: An Assessment of Asset Forfeiture Programs" (1994) 11(2) *Justice Quarterly* 313-335 (for illustration from the US); C Meyer "Zero Tolerance for Forfeiture: A Call for Reform of Civil Forfeiture Law" (1990) 5 *Notre Dame Journal of Law, Ethics and Public Policy* 853-887.

[1307] G Stessens *Money laundering: A New International Law Enforcement Model* (2000) t 56.

[1308] G Stessens *Money laundering: A New International Law Enforcement Model* (2000) 58.

[1309] G Stessens *Money laundering: A New International Law Enforcement Model* (2000) 420-425.

[1310] Miller and Selva, for example, have documented cases of "asset hunting" by law enforcement officers in the US in search of revenue regardless of the confiscation's enforcement value. See JM Miller & LH Selva "Drug Enforcement's Double-Edged Sword: An Assessment of Asset Forfeiture Programs (1994) 11(2) *Justice Quarterly* 313.

These studies also show how the procedure has frequently been used by some authorities to penalize people when the state cannot sustain a criminal conviction.[1311]

6.5.2. South Africa's response to the danger of confiscation of property of innocent owners

To ensure that its non-conviction based assets recovery does not disproportionately infringe on the right to property, the South African POCA provide for a raft of procedural safeguards which have been liberally interpreted by the Courts. For example to address the need for legal representation in confiscation proceedings and to prevent inflicting suffering on the property owner in cases where the targeted property is the only source of livelihood, section 44 of the POCA allows a High Court to permit payment of reasonable living and legal expenses from the property that is subject to a preservation order.[1312] The Constitutional Court has held in *National Director of Public Prosecution v Elran* that without this provision on living and legal expenses, the non-conviction chapter of POCA "would be unconstitutional".[1313] With specific regard to the provision for legal expenses, the Constitutional Court has noted that it is "necessary" because proceedings involving POCA are "complex" and "difficult to interpret" and thus without legal representation lay individuals would not be able to adequately defend their interests.[1314]

The provision on living and legal expenses is available not only to a person from whom the property in question was seized but to all persons "holding an interest in the property subject to a preservation order and his or her family or household".[1315] However, these expenses which "must be reasonable" are not given merely upon request. The section provides that the applicant must (1) make full disclosure of interest in the preserved property, (2) satisfy the court that he cannot meet the expenses out of his or her property not subject to the preservation order, and (3) submit a sworn and full statement of all his assets and liabilities.[1316] However, in interpreting this section the Constitutional Court has held in the *Elran* case that these requirements are not to be interpreted as preconditions to the granting of an order for the expenses and that the only threshold is that a court should be satisfied that

[1311] JM Miller & LH Selva "Drug Enforcement's Double-Edged Sword: An Assessment of Asset Forfeiture Programs (1994) 11(2) *Justice Quarterly* 313.
[1312] POCA, s 44.
[1313] *NDPP v Elran* 2013 (1) SACR 429 (CC) para 35.
[1314] *NDPP v Elran* 2013 (1) SACR 429 (CC) para 52.
[1315] POCA at s 44(1); See also *NDPP v Elran* 2013 (1) SACR 429 (CC) para 29.
[1316] POCA, s 44(2).

the applicant cannot meet the expenses from unpreserved property and that he or she has an interest in the property subject to the preservation order.[1317] In this regard, the Court found in the *Elran* context that it was not fatal for an applicant to rely on a three year old sworn statement of assets and liabilities to prove that he was not capable of meeting legal expenses.[1318]

In addition to the provision on living and legal expenses, the POCA also gives a property owner an opportunity to apply for rescission of the preservation order if it causes him or her hardship. This opportunity was confirmed by the Constitutional Court in *Mohamed (2)*[1319] when it read into the power of the High Court to grant a conservatory order under section 38 of the POCA, a requirement for an opportunity to be given to individuals affected by an *ex parte* preservation order to have the preservation order set aside or varied.[1320] The contention in the case was that section 38 did not expressly provide for the issuance of rules *nisi*[1321] thereby violating the right to be heard (*audi* rule) under section 34 of the Constitution. In the Applicant's argument, the fact that rule *nisi* was not expressly mentioned in section 38 of the non-conviction based procedure, as was the case with a similar provision (section 26) of the conviction based procedure, meant that it was excluded and that an *ex parte* order issued thereunder would be final contrary to the right to be heard under section 34 of the Constitution. The court, however, found that the silence of section 38 on the rules *nisi* did not mean that it was excluded. After looking at the purpose of the Act and the other provisions (such as section 44 and 47) that required the court to investigate the effect of the order on the livelihood of affected parties, the court concluded that:

> "[T]here is only one proper construction of section 38, namely, that the *audi* rule has not been excluded and that the principles relating to the issuing of rules *nisi* and the making of interim preservation orders by the High Courts, as discussed in this judgment, are applicable to the section 38 procedures when the National Director applies *ex parte*, as he is entitled to do in all cases, for relief under section 38."[1322]

The preservation order would be set aside if, in the case of immovable property, the affected party can show that it is "in the interest of justice" to do so and, in the case of movable property, if the court can be satisfied that the order would deprive the applicant of "reasonable living expenses" or that it would cause "undue hardship to the applicant" and

[1317] *NDPP v Elran* 2013 (1) SACR 429 (CC) para 38.
[1318] *NDPP v Elran* 2013 (1) SACR 429 (CC) para 45.
[1319] *NDPP v Mohamed NO and Others* 2003 (4) SA 1 (CC).
[1320] *NDPP v Mohamed NO and Others* 2003 (4) SA 1 (CC) para 44.
[1321] Rule *nisi* is an order by a court issued at the instance of the applicant and calling upon another party to show cause before the court on a particular day why the relief applied for should not be granted.
[1322] *NDPP v Mohamed NO and Others* 2003 (4) SA 1 (CC) para 51.

that the hardship "outweighs the risk that the property concerned may be destroyed, lost, damaged, concealed or transferred".[1323] The lifespan of a preservation order is also restricted to a non-renewable period of 90 days - the state must apply for an order of forfeiture within this period, failure of which the preservation of property order will automatically lapse at the end of the period.[1324]

Furthermore, aggrieved parties are provided an "innocent owner" defence at the confiscation stage, which they can use to avoid a confiscation order by showing that they obtained an interest in the property legally and for value, and that they neither knew nor had reasonable grounds to suspect that the property constituted proceeds of crime.[1325] As noted by the Constitutional Court in *Mohamed (1)*[1326] to avoid his or her property from being confiscated an owner can "claim that he or she obtained the property legally and for value, and that he or she neither knew nor had reasonable grounds to suspect that the property constituted the proceeds of crime".[1327] This defence according to the Court is "the innocent owner" defence and is available to the owner at the stage when forfeiture is being sought by the state.[1328] This defence of "innocent owner" can also be used by creditors and *bona fide* purchasers for value to protect their interest in the targeted property and is raised by way of an application for an order excluding the affected party's interest from the effect of a forfeiture order to which the NDPP has proven an entitlement.[1329]

However, it is to be noted that the provision of the "innocent owner" defence does not shift the burden of proof to the property owner but only comes to effect once the state has discharged its onus of proving on balance of probability that they are entitled to a confiscation order. As the Supreme Court of Appeal noted in *NDPP v Van der Merwe &*

[1323] POCA, s 47(1) & (3).
[1324] POCA, s 40. See the judgment of Goldstein J in *Levy v NDPP* 2002 (1) SACR 162 (W) para 9 (holding that the 90 day period should be strictly interpreted and that where the state doesn't serve affected parties with the 90 days it lapses. According to the judge: "Where a statute makes serious inroads on the rights of an individual the court ought to lean in favour of a construction which will result in such inroads being as limited as possible"). Compare with *NDPP v Van der Berg* (unreported case 5597/06) (finding that "section 40 of POCA merely requires that an application for a forfeiture order must be 'pending' within ninety days after the date on which notice of a preservation order is published in the Government Gazette" and that "[t]hat does not presuppose the service of the application but merely the issuing thereof").
[1325] POCA, s 48(4).
[1326] *NDPP and Another v Mohamed NO and Others* 2002 (4) SA 843.
[1327] *NDPP and Another v Mohamed NO and Others* 2002 (4) SA 843 para 18.
[1328] *NDPP and Another v Mohamed NO and Others* 2002 (4) SA 843 para 18. But see *NDPP v R O Cook Properties (Pty) Ltd* [2004] ZASCA 36 para 24 (Where the Supreme Court of Appeal concluded that the defence was an "ignorant owner" defence, interpreting it to require a property owner to prove "absence of knowledge or absence of reasonable grounds for suspicion" otherwise the property stands to be forfeited "even if he or she was unable to do anything about the scheduled offence or its continuation").
[1329] POCA, s 52.

another:[1330]

> "The NDPP is burdened with the onus of proving an entitlement to a forfeiture order pursuant to an application by that functionary in terms of section 48(1) of the Act. As is generally the position in regard to a true onus, the incidence of which is fixed by law, nothing in the character of a particular case can shift that onus to the other party.…The case of the respondent who applies for exclusionary relief in terms of section 48(4)(b) read with section 52 of the Act falls to be considered only if it is found that the NDPP has discharged the onus in the application in terms of section 48(1). That much follows from the wording in section 52(1) to the effect that a court may exercise the power to make an exclusion order 'on application . . . and when it makes a forfeiture order'."[1331]

With regard to the risk of the non-conviction based assets recovery mechanism being used to engender a "profit oriented approach of criminal justice", the Constitutional Court has warned in *S v Shaik & Others* that "[t]he primary object of a confiscation order is not to enrich the State but rather to deprive the convicted person of ill-gotten gains".[1332] The Supreme Court of Appeal has also noted in *Prophet v National Director of Prosecution*[1333] that "Courts should be vigilant to ensure that the statutory provisions in question are not used in *terrorem* and that there has been no overreaching and abuse".[1334] In light of this warning, the Supreme Court of Appeal advised in *NDPP v Van Staden*[1335] that the assets recovery mechanism should not be used to fight crime "which does not ordinarily result from organised illicit activity, and [which] presents no special difficulties to detect and prosecute".[1336] According to the Court, assets recovery mechanism exists to "supplement criminal remedies in appropriate cases" and is not to be used "merely as a more convenient substitute".[1337] Thus, where the ordinary criminal law is sufficient to deal with a crime, it ought to be the first port of call, otherwise using assets recovery might amount to arbitrary use of discretion.[1338] In the Court's own words:

> "To avoid an order for forfeiture in such cases being arbitrary, and thus unconstitutional, a court must be satisfied that the deprivation is not disproportionate to the ends that the deprivation seeks to achieve. In making that determination the extent to which the deprivation is likely to afford a remedy for the ill sought to be countered, rather than merely being penal, will necessarily come to the fore, bearing in mind that the ordinary criminal sanctions are capable of serving the latter function."[1339]

This liberal interpretive approach in favour of individual's property protection adopted by the South African Courts is informed by the importance attached to the right to property in the South African constitutional dispensation. The importance attached to right to property is

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[1330] *NDPP v Van der Merwe & another* [2011] JOL 26963 (WCC).
[1331] *NDPP v Van der Merwe & another* [2011] JOL 26963 (WCC) para 15.
[1332] *S v Shaik & Others* [2008] ZACC 7 at para 52, quoting with approval the words of the Supreme Court of Appeal in *NDPP v Rebuzzi* 2002 (2) SA 1 (SCA) para 19.
[1333] *Prophet v National Director of Prosecution* 2006 (1) SA 38 (SCA).
[1334] *Prophet v National Director of Prosecution* 2006 (1) SA 38 (SCA) para 45.
[1335] *NDPP v Van Staden* [2006] SCA 135 (RSA).
[1336] *NDPP v Van Staden* [2006] SCA 135 (RSA) para 7.
[1337] *NDPP v Van Staden* [2006] SCA 135 (RSA) para 7.
[1338] *NDPP v Van Staden* [2006] SCA 135 (RSA) para 7.
[1339] *NDPP v Van Staden* [2006] SCA 135 (RSA) para 8.

in turn informed by the historical context in which the right to property came to be included in the Constitution. The right to property was the subject of heated debate during the negotiation for the 1996 Constitution. On the one hand were the ANC negotiators who were opposed to the inclusion of the right to property in the Bill of Rights, arguing that it would entrench white privilege and stymie efforts to correct past injustices by future governments. On the other hand were the negotiators of the National Party who felt that without the property clause their property would be subjected to nationalization or confiscation or devaluation in the name of economic reforms.[1340] The proponents of the inclusion eventually carried the day but in framing the property clause an attempt was made to strike a balance between the contending arguments. The property clause strikes this balance by protecting existing property rights while permitting legislative programmes aimed at correcting historical imbalances.[1341] However, given the injustices caused by government interference with private property in the past, the property clause is framed as a negative protection of property against arbitrary government deprivation and does not expressly guarantee the right to acquire, hold and dispose of property, though "[p]rotection for the holding of property is implicit".[1342]

Because of this history and the subsequent framing of the property clause, the courts have been strict when dealing with confiscations by states except in the case of land that is the subject of land reform measures.[1343] In this regard, following the leading decisions from the South African Constitutional Court, such as *Grootboom,*[1344] *Port Elizabeth Municipality v Various Occupiers*[1345] and *President of the Republic of South Africa and Another v Modderklip Boerdert (Pty) Ltd and Others,*[1346] to the effect that forced evictions should not be enforced where it would render the targeted persons homeless, it can safely be concluded that where the corruptly acquired property is occupied by indigent persons the enforcement

[1340] For further discussion see, for example, M Chaskalson "Stumbling Towards Section 28: Negotiations over Property Rights at the Multiparty Talks" (1995) 11 *South African Journal of Human Rights* 222.

[1341] As noted by the Constitutional Court in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another* 2002 (4) SA 768 (CC) para 50:

> "The purpose of section 25 has to be seen both as protecting existing private property rights as well as serving the public interest, mainly in the sphere of land reform but not limited thereto, and also as striking a proportionate balance between these two functions."

[1342] *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) para 72.

[1343] See J de Waal & I Currie *The Bill of Rights Handbook* 5ed (2005) 381 (noting that the property protection "is considerably qualified in the case of land that is the subject of land reform measures"). See also AJ Van der Walt "Dancing with Codes – Protecting, Developing and Deconstructing Property Rights in a Constitutional State" (2001) 118 *South Africa Law Journal* 258.

[1344] *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC)

[1345] *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC).

[1346] *President of the Republic of South Africa and Another v Modderklip Boerdert (Pty) Ltd and Others* 2005 (5) SA 3 (CC).

of a confiscation order would most likely be made subject to the finding of alternative land or accommodation for the affected individuals. Indeed in cases involving the confiscation of instrumentalities of crime, the Courts have been willing to take into account the right to housing of affected individuals.[1347]

6.5.3. Kenya's response to the danger of confiscation of property of innocent owners

Unlike South Africa whose confiscation jurisprudence within the right to property framework is mostly informed by the need to avoid the repeat of the "injustices of forced removals from land and evictions from homes (by the government)" of the apartheid era,[1348] Kenya's confiscation jurisprudence has mostly been informed by the need to avoid the past injustices of powerful individuals grabbing public property and converting the same to private use. It is true that just like South Africa, Kenya's colonial period was characterised by forced eviction under the land alienation programme instituted by the British colonial administration.[1349] However, unlike the "young" South Africa, Kenya has managed, after over 50 years of independence, to establish some semblance of racial parity in property ownership and to somehow contain state evictions of "*legitimate"* property owners.[1350] The major property problem that has persisted is that of powerful individuals in and outside government (mis)using their position to corruptly influence the conversion of public or communal property to their private use. As the Ndung'u Commission of Inquiry into the Irregular and Illegal Allocation of Public Land in Kenya observed with respect to public land:

> "Since colonial times, land has been used as an instrument of political patronage in Kenya. At the height of political dissent during the KANU era, the ruling elite continually and illegally allocated public land to influential individuals and corporations in return for political support."[1351]

[1347] See, for example, *Van der Burg and Another v NDPP (Centre for Child Law as Amicus Curiae)* 2012 (8) BCLR 881 (CC) (right to property, housing, and right of children).

[1348] *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC) para 25.

[1349] For land alienation under the British colonial administration in Kenya, see generally MPK Sorrensen *Origins of European Settlement in Kenya* (1968); W Morgan "The White Highlands of Kenya" (1963) 129 *Geographical Journal* 140; NC Jones "The Decolonization of the White Highlands of Kenya" (1965) 131 *Geographical Journal* 186; S Wanjala *Essays on Land Law: The Reform Debate in Kenya* (2000).

[1350] But See L Juma "Nothing but a mass of debris: urban evictions and the right of access to adequate housing in Kenya" (2012) 12 *African Human Rights Law Journal* 470 at 486-487 (arguing that in spite of over 50 years of independence, the phenomenon of forced evictions that was rampant in the colonial period has remained a government approach to land problem in Kenya); O Oculi "The Role of Economic Aspirations in Elections in Kenya" (2011) 35 *Africa Development* 13 at 19 (noting that forced eviction were used during the Moi era as a political tool). However, while it is true that forced evictions has continued to occur in Kenya, the reasons given for most of these evictions have been that the targeted property are public property that were illegally acquired by the affected owners. Still, there is danger of these evictions being used to target legitimate private property and for this reason the courts have held that permission must be sought from the Courts before the government can evict owners of illegally acquired property.

[1351] Government of Kenya: *Report on Illegal and Irregular Allocation of Public Land* (2004) 6.

This illegal acquisitions context informed the drafting of the property clause in the 2010 Constitution, which while guaranteeing the right to acquire, hold and dispose of property and the right against arbitrary deprivation and uncompensated expropriation also makes it clear that: "The rights under this Article do not extend to any property that has been found to have been *unlawfully acquired*".[1352] This provision was included in order to address the past illegal acquisitions and to introduce integrity in the acquisition of new property. As explained in *Adan Abdirahani Hassan v the Registrar of Titles, Ministry of Lands*:[1353]

> "This requirement recognises the fact that the Constitution protects certain values such as human rights, social justice and integrity amongst others. These national values require that before one can be protected by the Constitution, he must show that he has followed the due process in acquiring that which he wants to be protected."[1354]

The history of rampant illegal acquisitions of public property was also influential in the introduction of the provision in ACECA for the confiscation of unexplained assets. As noted by the Constitutional Court in *Christopher Ndarathi Murungaru v Kenya Anti-Corruption Commission*, the requirement for disclosure of source of wealth by persons suspected of corruption is a recognition of "the values and aspirations…of the people or citizenry that there shall be zero tolerance to corruption…."[1355] The provision, which requires public officials to explain the source of their wealth where there is suspicion that their net worth is not commensurate to their known source of income, and which provides that where no satisfactory explanation is forthcoming then the value of the unexplained part of the assets should be confiscated for public use, is a more intrusive version of non-conviction based assets recovery as it places the burden of explaining the legality of acquisition on the individual.[1356] In this regard, the Courts have held, for example, in *Kenya Anti-Corruption Commission v Davy Kiprotich Koech,*[1357] that in a proceeding for the recovery of unexplained assets "the Court expects the explanations and justifiable defence from the Defendant" and where this is not forthcoming or is not satisfactory a negative inference may be made.[1358] This need to burden public officials with the onus to prove the lawful source of their wealth, apart from serving the purpose of attenuating the difficulty states face in proving facts that are exclusively within the knowledge of the public official, was also meant to introduce transparency in the running of public offices and managing of public resources.

[1352] Constitution of the Republic of Kenya 2010, s 40(6) (emphasis added).
[1353] *Adan Abdirahani Hassan & 2 Others v the Registrar of Titles, Ministry of Lands & 2 Others* [2013] eKLR.
[1354] *Adan Abdirahani Hassan & 2 Others v the Registrar of Titles, Ministry of Lands & 2 Others* [2013] eKLR para 19.
[1355] *Christopher Ndarathi Murungaru V KACC & Attorney- General* (2006) eKLR.
[1356] ACECA, s 55.
[1357] *KACC v Davy Kiprotich Koech at* [2011] eKLR.
[1358] *KACC v Davy Kiprotich Koech* (2011) eKLR para 23.

The illegal acquisition context further explains why, unlike the case in South Africa, the Kenyan non-conviction based assets recovery mechanism has been reluctant to protect the interests of *bona fide* purchasers for value or for creditors in the order for confiscation of corruptly acquired public property. Under the Kenyan law once it is established on a balance of probability that the targeted public property was unlawfully acquired all purported interests in the property, *bona fide* or otherwise, become extinguished.[1359] For example, in *Kenya Anti-Corruption Commission v Ahmed Karama Said*[1360] the Court noted, with regard to *bona fide* purchaser for value, that:

> "Generally, as already noted, the innocent purchaser for value without notice of defect of title, will be treated as the darling of equity, and will be allowed to retain ownership. But this is *subject to the qualification that the creation of the title itself is not in flagrant breach of statute law, so that it amounts to a nullity ab initio*."[1361]

In the *Ahmed Karama Said* case, the suit property was land excised from a public road reserve and alienated (by the Municipal Council of Mombasa entrusted with the duty of managing the road reserve) to the defendant in alleged contravention of the applicable statutory provisions. The defendant took the position that it was an "innocent purchaser for value without notice of irregularity". The Court, however, held that the principle was incapable of protecting the land acquisition in the case. In the Court's view, the Municipal Council, which is a public authority, ought to have complied with the governing law, and because it did not the subsequent property title created by its action was void *ab initio.* In the Court's own words: "the Municipal Council could not breathe life into that title by purporting to pass it on to 2nd defendant".[1362] This rule in the Court's holding was:

> to be strictly applied where property title has passed from the hands of a public authority holding a trust for the benefit of members of the public; and even more strictly must this rule apply … where the property in question is for the planning and installation of fixed structures serving as amenities of civilized life in a space-starved urban area.[1363]

This means that when it comes to land or property that initially belonged to the public, an individual who wishes to acquire property interest in the said property must confirm that the conversion of public property to private use was done in accordance with the applicable laws. In other words, it is not enough that a person did not participate in the irregularity or

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[1359] As was held in *Joseph Ihugo Mwaura v Attorney General*, the Constitution and more specifically the property clause "does not create proprietary interests *nor does it allow the court to create such rights* by constitutional fiat. It protects proprietary interests *acquired through the existing legal framework*". *Joseph Ihugo Mwaura and 82 Others v Attorney General* Nairobi Petition 498 of 2009 (Unreported) (emphasis added), quoted with approval in *Philma Farm Produce & Supplies & 4 Others v Attorney General and 6 others* (2012) eKLR para 35.

[1360] *KACC v Ahmed Karama Said & 2 Others* [2011] eKLR.

[1361] *KACC v Ahmed Karama Said & 2 Others* [2011] eKLR para 34.

[1362] *KACC v Ahmed Karama Said & 2 Others* [2011] eKLR para 34.

[1363] *KACC v Ahmed Karama Said & 2 Others* [2011] eKLR para 35.

that he or she was not aware of the irregularity; as long as the lawful requirement for private alienation was not followed any title arising out of that alienation is void *ab initio*.[1364]

However, though not willing to recognize proprietary interest arising from unlawful alienations, in *Republic v The Registrar of Titles, Mombasa Ex Parte EMFIL Limited*[1365] the Court did hold that since "the Government has custody and right to allocate all public land" a person "would have a legitimate expectation that any land allocated to them by the Government is done with lawful authority" and that therefore any title acquired therefrom should only be extinguished subject to compensation to the innocent purchaser for value without notice of irregularity.[1366] In that case, the Government offered parcels of land which was registered to a private individual and which had been adjudged by a court of law to belong to the said individual for sale to squatters at subsidised prices. The court held that though the Government had no right to sell the parcels of land, the squatters who bought the land on the basis of the Government offer acquired good titles, which could not be extinguished without adequate compensation.[1367] The import of this ruling is that in cases of property offered for sale by the government, where the unlawfulness arises out of failure to follow the law on the part of the Government or its agents, then the confiscation of the said property should be made subject to compensation to the *bona fide* purchaser for value without notice of the irregularity.

This qualification by the *Ex Parte EMFIL Limited* case on the general rule against the recognition of proprietary interest arising from unlawful alienations of public property, is by no means of little significance considering the array of cases where the government has

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[1364] This approach varies the long standing approach to "indefeasibility of title" principle under Kenyan property law, which viewed registered title to property as absolute and indefeasible unless it could be shown that the holder of title procured the registration of title through fraud or misrepresentation or that he or she otherwise participated in the irregular registration of title. See *Milankumarn Shah & Two Others v City Council of Nairobi & Another*, Nairobi HCCC No. 1024 of 2005:

> "We hold that the registration of title to land is absolute and indefeasible to the extent, firstly, that the creation of such title was in accord with the applicable law and, secondly, where it is demonstrated to a degree higher than the balance of probability that such registration was not procured through fraud and misrepresentation to which the person or body which claims and relies on that principle has not himself or itself been part of a cartel which schemed to disregard the applicable law, and the public interest."

[1365] *Republic v The Registrar of Titles, Mombasa & 2 Others Ex Parte EMFIL Limited* [2012] eKLR.

[1366] *Republic v The Registrar of Titles, Mombasa & 2 Others Ex Parte EMFIL Limited* [2012] eKLR para 16.

[1367] The Court's solution to the conflicting interest of the private owner and that of the squatters was to find in favour of the squatters continuing to occupy the said land while the private owner be compensated by the government should allegations levelled against him by the government that he acquired the land illegally be found baseless. The Government had contended that the transfer of the land to the private owner by the first owner was irregular and fraudulent because it was done without referral to the government's reversionary rights under the original lease-hold and in contravention of the original purpose of the allocation which was agricultural purposes to grow sugar cane by changing user to residential purposes.

issued title deeds for land only to turn around and extinguish title on the claim that the process followed was irregular. This was made possible by the provisions under the Registration of Titles Act (cap 281) and the Registered Land Act (cap 300), which allowed the Registrar to correct mistakes in titles where it came to its notice that the land in question was reserved for public purpose and had been mistakenly assigned to the private person.[1368] This scenario played itself out, for example, in the case of *Ephantus Kimotho Kimani & 6 others v Attorney General & another*[1369] where the petitioners bought parcels of lands from the original allottee and were subsequently issued with title deeds bearing their names and necessary approvals to begin development by the government only for the government to turn around and cancel the titles after development had been carried out on the land on the ground that it had come to their notice that the said parcels of land were reserved for public purpose. Unfortunately the government failed to adduce evidence of unlawful acquisition prompting the Court to find in favour of the petitioners without deciding on the issue of compensation. However the case does illustrate the injustice that would be wrought on property owners if there were to be an unqualified non-recognition of proprietary interest arising from unlawful alienations of public property.[1370] Thus, though the qualification in *Ex Parte EMFIL Limited* does not prevent the government from recovering public property unlawfully alienated, it does provide some protection to innocent purchasers for value without notice of the irregularity in cases where the government is culpable and puts pressure on government officials as trustees of public property to adhere to the requisite regulations when alienating public land for private use.

Furthermore, though not willing to recognize proprietary interest arising from unlawful alienations, the Courts have held that before any property unlawfully alienated can be confiscated by the state, a finding to that effect must first be made by a court of law. For example, in *Republic v Commission of Lands ex-parte Carolizanne Gathoni Kuria,*[1371] the Court held that the crucial words in Article 40(6) of the property clause in the Constitution (excluding unlawfully acquired property from protection) were "found to have been unlawfully acquired" and that therefore "there must be a finding that the property in question was unlawfully acquired" by the courts.[1372] This insistence by the courts that any

[1368] See Registration of Titles Act (cap 281) (now repealed), s 65; Registered Land Act (cap 300) (now repealed), s 142(c)
[1369] *Ephantus Kimotho Kimani & 6 others v Attorney General & another* [2013] eKLR.
[1370] For further illustrations of these injustices, see L Juma "Nothing but a mass of debris: urban evictions and the right of access to adequate housing in Kenya" (2012) 12 *African Human Rights Law Journal* 470.
[1371] *Republic v Commission of Lands & Another ex-parte Carolizanne Gathoni Kuria* [2013] eKLR.
[1372] *Republic v Commission of Lands & Another ex-parte Carolizanne Gathoni Kuria* [2013] eKLR para 55.

confiscation of unlawfully acquired property must be preceded by a court order, though grounded in the law, has also to a large extent been informed by the rampant cases of government acting on its own motion to confiscate or extinguish titles of persons perceived to be illegally occupying public property. As the Court noted in *Kieran Holdings Limited v Attorney General,*[1373] "The petitioner's apprehension, *in view of the country's history of forced evictions and demolitions, is not without justification*".[1374] In that case the petitioner had rushed to court for an injunctive order on receiving a notice from the government of a pending demolition of his property on allegation that it jutted on land reserved for road construction. Because of "the country's history of forced eviction and demolitions" the court found "a threat to the petitioner's property real and entitling the petitioner to move the court".[1375] As a check against arbitrary confiscation or extinction of title of property owners, the courts have thus insisted that the confiscation of property or revocation of titles must be preceded by a finding by the courts that the targeted property was unlawfully acquired. This position was summarized by Musinga J in *Kuria Greens Limited vs Registrar of Titles*[1376] in the following words:

> "Whereas unlawful acquisition of public property by citizens must be lawfully resisted, the Court will be failing in its constitutional duties if it failed to protect citizens from unlawful acquisition of their property by the State through unlawful decisions taken by public officers. If the respondents were satisfied that the suit land had been unlawfully alienated and that it was in the interest of the public that the land reverts to the State or to the Kenya Agricultural Research Institute, appropriate notice ought to have been given to the petitioner and thereafter the respondents ought to have exercised any of the following options: (a) Initiate the process of compulsory acquisition of the suit land and thus pay full and prompt compensation to the petitioner or (b) File a suit in the High Court challenging the petitioner's title and await its determination, one way or the other. Short of that, the respondents' purported action of revoking the petitioner's title is an affront to private proprietary rights which are guaranteed by our Constitution and such an action must be frowned upon by the law."[1377]

For purposes of finding unlawfulness in the acquisition, the Courts have held that due process must be followed.[1378] Such due process in the context of unexplained assets under ACECA require that before any confiscation can be ordered the court must satisfy itself that (1) a defendant was given a "reasonable opportunity" at the investigation stage to explain the source of the suspected "unexplained wealth"[1379] and (2) the explanation given to the

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[1373] *Kieran Holdings Limited v Attorney General & 2 Others* [2012] eKLR.
[1374] *Kieran Holdings Limited v Attorney General & 2 Others* [2012] eKLR para 6 (emphasis added). These cases of evictions have been adequately discussed by Laurence Juma in his article "Nothing but a mass of debris: urban evictions and the right of access to adequate housing in Kenya" (2012) 12 *African Human Rights Law Journal* 470.
[1375] *Kieran Holdings Limited v Attorney General & 2 Others* [2012] eKLR para 6-7.
[1376] *Kuria Greens Limited vs Registrar of Titles & Anor* [2011] eKLR.
[1377] *Kuria Greens Limited vs Registrar of Titles & Anor* [2011] eKLR.
[1378] See *Evelyn College of Design Ltd v Director of Children's Department & another* [2013] eKLR para 16. See also *Crywan Enterprises Limited v Kenya Revenue Authority* [2013] eKLR paras 28-30.
[1379] The courts have held that what amounts to "reasonable opportunity' would depend on the circumstances of each case. See, for example, *Kenya Anti–Corruption Commission v Stanley Mombo Amuti* [2008] eKLR 5.

investigator was not satisfactory or was inadequate.[1380] Where these conditions are met, the court is still required at the confiscation proceeding to (1) give the defendant an opportunity to challenge any evidence adduced by the state to prove that the targeted assets are "unexplained" and (2) give the defendant another opportunity, where it is satisfied that the state's evidence has established on balance of probability that the assets are "unexplained", to satisfy the court by testimony or other evidence it deems sufficient that the assets were acquired otherwise than by corrupt means. It is only after these opportunities have been given to a defendant that the court may order (if it is not satisfied that the assets were acquired otherwise than by corrupt means) the person concerned to pay to the Government an amount equal to the value of the unexplained assets.[1381] The standard of proof that the affected party needs to meet in order to satisfy the court at the confiscation proceedings, though not stated, has been interpreted in *Kenya Anti-Corruption Commission v Stanley Mombo Amuti* to be that of balance of probability.[1382]

It is to be noted, however, that the opportunities described are only express requirement for cases where the targeted property is "unexplained assets", which the Act defines as assets whose value is disproportionate to a person's known source of income at or around the time the person was allegedly guilty of corruption or economic crime and for which there is no satisfactory explanation.[1383] The Act is, however, silent on whether the same opportunities would apply where the targeted property is not an "unexplained asset" but is nevertheless a corruptly acquired asset such as the case of grabbed public land. In these latter cases whether the owner also has a right to be given a "reasonable opportunity" at the investigation stage to explain how he acquired the public property remains unsettled, though the practice is that suspected owners are usually called in for questioning and hopefully given opportunity to explain.[1384] However at the confiscation stage the same civil procedure opportunities applicable in the case of unexplained assets will apply. In other words, the state would have to prove on balance of probability that the property is public property that was corruptly acquired by the defendant and if the court is satisfied, after giving the defendant an

[1380] *KACC v LZ Engineering Construction Limited & 5 others* [2004] eKLR 7 & 12.
[1381] ACECA, s 55. See also *KACC v LZ Engineering Construction Limited & 5 others* [2004] eKLR and the discussion in chapter three at section 3.7.2.3.
[1382] *KACC v Stanley Mombo Amuti* [2011] eKLR 4 (noting that a higher standard would make section 55 unconstitutional).
[1383] ACECA at s 2 defining "unexplained assets" as assets:
> "(a) acquired at or around the time the person was allegedly guilty of corruption or economic crime; and (b) whose value is disproportionate to his known sources of income at or around that time and for which there is no satisfactory explanation."

[1384] See, for example, "EACC seeks DC over military recruitment bribery claims" *Daily Nation* August 16, 2012.

opportunity to cross-examine the state evidence, that the state has discharged its burden; the defendant would then be called upon to show on balance of probability that the property was acquired otherwise than by corrupt means. This is the procedure that the court adopted in *KACC v Davy Kiprotich Koech* where the then KACC made an application to recover money that was allegedly embezzled by the Defendant from a government parastatal, the Kenya Medical Research Institute.[1385]

In addition to the opportunities at the investigation and confiscation stage, the Kenyan ACECA also gives a property owner opportunity at the preservation stage to apply to court within 15 days of receiving an *ex parte* preservation order for the court to discharge or vary the order.[1386] The court can discharge or vary the order if it is satisfied on a balance of probability that the property with respect to which the order was made was not acquired through corruption.[1387] The preservation order is to be issued for a period of 6 months as provided for in ACECA and any renewal must be convincingly justified[1388] To ensure that the preservation order does not remain in force indefinitely through repeated extensions, it has been held in *Dakane Abdullahi Ali v Kenya Anti-Corruption Commission* that a preservation order should be sought only after the filing of the recovery suit.[1389]

However, unlike the case in South Africa, there is no express provision under the ACECA requiring courts to provide for living and legal expenses of affected parties out of the preserved property. Also the courts have held (for example, in *Jack J. Khanjira v Safaricom Limited*[1390]) that Kenyan Constitution only donates the right to legal representation to an accused persons in the criminal justice system but "does not donate a similar right to a litigant in civil matters to have an advocate".[1391] This does not, however, mean that the courts would turn a blind eye if a case were to be made by an affected party that they can't meet the living and legal expenses out of their unrestrained properties. However, so far no such case was found to have been made.

Besides the procedural safeguards, it is also to be noted that ACECA requires the EACC to

[1385] *KACC v Davy Kiprotich Koech* [2011] eKLR.
[1386] ACECA, s 56.
[1387] ACECA, s 56(5).
[1388] See *Dakane Abdullahi Ali v KACC & 2 Others* [2008] eKLR.
[1389] *Dakane Abdullahi Ali v KACC & 2 Others* [2008] eKLR.
[1390] *Jack J. Khanjira & Another v Safaricom Limited* [2012] eKLR.
[1391] *Jack J. Khanjira & Another v Safaricom Limited* [2012] eKLR para 13 (interpreting Article 50 (2) (g) of the Constitution).

recover the proceeds of corruption on behalf of the public office that suffered the loss.[1392] This means that the proceeds from assets recovery are not to be used by the EACC but are to be channelled back to the relevant public office. However, where there is no discernible victim of the alleged corrupt conduct, the practice has been that the proceeds are returned back to the Treasury for use in re-budgeting and redistribution to the deserving government projects. In this way the ACECA provides for an inbuilt mechanism which ensures that the assets recovery mechanism doesn't engender a profit oriented approach of criminal justice as the profits are not ploughed back directly to the EACC's budget.

It is also noteworthy that, though the Kenyan property clause, unlike South Africa's, does not recognise the title of unlawful occupiers of land,[1393] Kenyan courts, just like their South African counterparts, have been reluctant to order the removal of squatters or indigent persons from unlawful property, especially in instances where no alternative land or accommodation has been provided to them by the relevant authority. For example, in the case of *Susan Waithera Kariuki v The Town Clerk, Nairobi City Council*[1394] where the Nairobi City Council demolished the houses of the applicants who were squatters in the Kitisuru area of Nairobi on the ground that the area in which they were living was a public road reserve and that they had not obtained permission to settle there; the Court held that the forced evictions in circumstances that rendered the applicants homeless was a violation of their right to housing. In reaching this decision the Court relied on the leading South African cases on right to housing such as *Grootboom,*[1395] and *President of the Republic of South Africa and Another v Modderklip Boerdert (Pty) Ltd and Others*[1396] where similar sentiments have been expressed.[1397] Though the eviction was not pursuant to a confiscation order, the holding that forceful removal of indigent persons from their homes without providing them with alternative land or accommodation is unconstitutional is, arguably, also relevant to cases where the targeted property for confiscation is occupied by squatters. In other words, where the unlawfully acquired property is occupied by indigent persons the enforcement of a confiscation order would most likely also be made subject to the finding of alternative land

[1392] ACECA, s 55 & s 56.
[1393] The South African Constitutional Court has held in *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) and *President of the Republic of South Africa and Another v Modderklip Boerdert (Pty) Ltd and Others* 2005 (5) SA 3 (CC) that the occupation interest of unlawful occupiers of land is property interests capable of protection under the Constitutional property clause.
[1394] High Court of Kenya, Nairobi, Petition 66 of 2010 (2011) KLR 1.
[1395] *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC).
[1396] *President of the Republic of South Africa and Another v Modderklip Boerdert (Pty) Ltd and Others* 2005 (5) SA 3 (CC).
[1397] For a similar position, see also *Ibrahim Osman v The Minister of State for Provincial Administration and Others* High Court of Kenya, Embu, Constitutional Petition 2 of 2011 (unreported).

or accommodation for the affected individuals.[1398]

6.6. Conclusion

The non-conviction based assets recovery mechanism is considered a suitable and necessary means to achieving the legitimate aim of the assets recovery strategy in the fight against corruption. The mechanism is accepted in most jurisdictions, including Kenya and South Africa, because its alternative, the conviction based mechanism which is less restrictive in comparison, is usually burdensome and in some cases impossible to use. The non-conviction based mechanism is thus adopted to ease the work of the state and to recover assets in those instances where the conviction based mechanism is made inapplicable either by the death or absence of property owner or by operation of the law.

However, because it does not require proof of criminal guilt and operates *in rem*, the non-conviction based assets recovery mechanism also has the potential of resulting in the confiscation of legally obtained property or property of *bona fide* purchasers for value without notice. As a check against these effects, courts in Kenya and South African have engaged in a proportionality analysis so as to ensure that its limiting effects are proportionate to the legitimate ends it seeks to serve. Such analysis has involved the interpretation of relevant provisions with the aim of restricting their potential infringement of the right against arbitrary deprivation of property. In this regard, the approach in South Africa has tended to be more deferential to the individual's right to property while that in Kenya has leaned more towards the public interest in the fight against corruption. This difference in approach is mainly attributable to the different historical context of the two countries. While South Africa's context is characterized by a need to avoid the "injustices of forced removals from land and evictions from homes" of the apartheid era, Kenya's context has been characterized by injustices of powerful individuals grabbing public land and converting the same to private use. These pasts seems to influence the approach taken by the legislature and courts in framing and interpreting the non-conviction based provisions in the two countries. However, an analysis of the different approaches shows that, in spite of a few discernible differences, the courts in both jurisdictions are in agreement that the non-conviction based mechanism should be clothed with procedural and substantive guarantees to ensure that only illegally

[1398] But see "Illegal structures along railway line in Nairobi demolished" East African Standard Tuesday, November 5th 2013 available at http://standardmedia.co.ke/?articleID=2000096950&story_title=illegal-structures-along-railway-line-demolished (indicating that Kenya has still a long way to go in respecting this principle).

obtained property is confiscated without compensation to the owner and that vulnerable members of the society are also protected in the process. The next chapter makes some concluding observations on the lessons learnt from the two countries.

CHAPTER SEVEN

SUMMARY AND CONCLUSION

"Men have learned to shoot without missing their mark and I have learned to fly without perching on a twig."[1399]

7.1. Summary

The objective of this thesis was to study how the non-conviction based assets recovery mechanism could be crafted in a way that allows it to meet its assets recovery objective without disproportionately affecting the rights of property owners. Focus was put on studying how the requirements of the right to fair trial and the right to property could be used to reign in the unfair effects that might arise in the use of the non-conviction based mechanism. The main guiding assumption was that human rights offer a desired balance between the society's need to recover stolen public property and the corresponding need to protect individuals' against the unfair effects of the non-conviction based assets recovery process. The assumption was based on the understanding that while corruption is detrimental to the wellbeing of the society and must therefore be eradicated, the means chosen for its eradication should be fair and proportionate otherwise the war against corruption could be turned into a tool for terrorising innocent individuals. In this regard, the human rights paradigm was seen as offering a medium for ensuring the fairness and proportionality of anti-corruption means given its concern with limitation of state power. This assumption was tested and proven in the analysis that followed in the various chapters.

7.2. Findings

7.2.1. Non-conviction based mechanism is a necessary means in the recovery of corruptly acquired assets

An analysis of the meaning and nature of corruption in chapter two found that corruption is an acquisitive crime that is characterised by abuse of entrusted authority for private gain. Because of this acquisitive nature of corruption, the thesis concluded that assets recovery is indeed an important objective in the fight against corruption as it not only guarantees that

[1399] Eneke the bird explaining why he was always on the wing in C Achebe *Things fall apart* (1959) 148

public property corruptly diverted to private use is recovered for the use of the public but also because it removes private gain from corruption thereby making it unattractive. This conclusion was confirmed in chapter three where an examination of the relevant international and national anti-corruption instruments showed that the assets recovery objective is included in these instruments as part of the strategy in the fight against corruption.

The study also revealed in chapter three that the recovery of corruptly acquired assets can be undertaken either through the conviction based or the non-conviction based mechanism. An analysis of the two mechanisms showed that none of the two can be used as a substitute of the other since they both operate under different dynamics. Conviction based mechanism, because it requires a conviction for the underlying offence, is useful in circumstances where the defendant has been convicted of an underlying offence. Also, because it allows for value confiscation, it is useful in circumstances where the defendant has dissipated the specific assets as it can be enforced against substitute assets. However, because it requires criminal conviction, it cannot be used where the defendant is absent by reason of death, elopement or immunity. Also, because it is an *in personam* action against a convicted defendant, it cannot be used to recover unlawfully acquired assets which have been transferred to *bona fide* third parties for value or which are held in the names of foreign companies and trusts. Furthermore, because the criminal conviction requires the highest standard of proof of beyond reasonable doubt, the mechanism is unavailable where the state cannot obtain enough evidence to convict the defendant.

In these cases where the conviction based mechanism is ineffective, the non-conviction based mechanism becomes the only means available for states to get back stolen public property. For example, because it does not require conviction for the underlying offence, the non-conviction mechanism is useful where the defendant is absent by reason of death, elopement or immunity. Also, because it is an in *rem* action against the property and not the individual, it can be used to recover property held by foreign companies and trusts or by third parties who have not been charged with a criminal offence but are aware or wilfully blind to the fact that the property stems from an act of corruption. Furthermore, since the standard of proof is the civil law standard of balance of probabilities or preponderance of the evidence, it can be used to recover assets in those cases where the state does not have enough evidence to secure a conviction. Moreover, since proceedings are civil, the law can be made retrospective to recover unlawful assets acquired prior to its enactment. However, because it

is mostly restricted to object confiscation, the non-conviction based mechanism is unhelpful in circumstances where the defendant has dissipated the specific assets as it cannot be enforced against substitute assets. In this latter case, the conviction based mechanism would come in handy as it allows for value confiscation. However, the conviction based mechanism even in this latter case would still require that the owner not only be present but also that there be enough evidence to secure a conviction. To overcome the possibility of absence of the owner or the difficulty in securing a conviction, some jurisdictions such as Kenya have provided for both object and value confiscation in their non-conviction based mechanism. Meaning that even where the specific assets derived from corruption have been dissipated the non-conviction based mechanism can still be used to recover substitute assets in these jurisdictions.

Because it allows the state to recover proceeds of crime in circumstances where the conviction based assets recovery is unavailable either because of the absence of the defendant or because of the difficulty in obtaining enough evidence to secure a prosecution, and given the rate at which corruption is perpetrated and the increasing sophistication of means used by criminals to conceal corruptly acquired assets and frustrate attempts at criminal proceedings, the non-conviction based mechanism has been accepted as an essential option in the recovery of corruptly acquired assets.

7.2.2. Though useful, if unchecked, non-conviction based assets recovery mechanism can unduly infringe on the rights of property owners

Non-conviction based assets recovery mechanism, though useful, also exposes property owners to unfair consequences. This exposure arises from its attribute of allowing the state to bypass the criminal process and use the civil procedure in addressing a crime-based problem. The criminal fair trial guarantees that it bypasses are usually aimed at protecting individuals against arbitrary use of the immense police power that society places on the state and the attendant unfair consequences that may follow from such abuse. Thus, since assets recovery is an exercise of state's police power against crime, the use of a non-conviction based mechanism that does not require proof of criminal guilt of a property owner and that allows the state to confiscate criminally derived property using a civil process does pose serious threat to the rights of the property owner, especially the right to presumption of innocence and the right to property. For example, because it does not require the state to prove its case beyond reasonable doubt, a person may end up losing legitimately acquired

property simply because he or she lacks the evidence to show that it was lawfully acquired. Also, because it is not preceded by a determination of the guilt or innocence of the holder of targeted property, a property owner may end up suffering a criminal label for the underlying corruption crime of which he is innocent. Furthermore, since it targets the property itself without being concerned about the criminal involvement of its current holder, the non-conviction based mechanism can result in innocent third parties, who acquired interest in the targeted property for value without notice of its illegal origin, losing their innocent investment without compensation. This problem is exacerbated by the fact that, given the *in rem* nature of the non-conviction based assets recovery, an innocent owner could find that his property is permanently lost to the state even after the criminal case against a suspected criminal has been abandoned or dismissed.

Thus, the use of the non-conviction based mechanism if unregulated could have debilitating effect not only on the security of property and reputation of innocent individuals but also on the confidence of the public in the fairness of the fight against corruption. To check against these dangers, the thesis examined how the requirements of the right to fair trial and the right to property could be used to reign in the unfair effects that might arise in the use of the non-conviction based mechanism. The choice of the two rights was informed by the fact that the mechanism is concerned with addressing criminal prohibition through confiscation of property, which makes the two human rights directly involved.

7.2.3. Despite the penal attributes of assets recovery, the protection of the right to fair trial is considered inapplicable in the non-conviction based assets recovery process in Kenya and South Africa

In the context of the right to fair trial, the ordinary expectation is that since assets recovery is an exercise of a state's police power intended to remedy a criminal offense (corruption), any mechanism that is adopted should provide for the traditional fair trial guarantees of criminal law. This expectation flows from the traditional distinction between criminal and civil law, which sees criminal law as essentially punishing crimes (wrongs by individuals against the society) and civil law as remedying private injuries (wrongs occasioned by one private individual or entity against another).[1400] In this regard, since assets recovery is a state

[1400] See W Holdsworth A history of English law (1977) at 276 (pointing out that civil and criminal law are both sanctioning processes). See also HL Packer *The limits of criminal sanctions* (1968) at 1 (decrying the absence of a theory of sanctions and developing a set of principles for limiting the scope of the criminal sanction).

response to corruption crime (wrongs committed by individuals against the society) should it not, therefore, be amenable to the fair trial guarantees under the criminal law, or does the labelling of recovery process as "civil" effectively removes it from the reach of these fair trial guarantees? The question is necessitated by the failure of international human rights treaties and national constitutions to prescribe procedural and substantive norms applicable in non-conviction based recoveries. As noted by Young:

> "these instruments bifurcate the world of adjudication into criminal and non-criminal proceedings with the former given superior rights protections and the latter only minimal ones. In this bifurcated world, civil forfeiture sits well in neither of the two realms".[1401]

Because of this failure to prescribe procedural and substantive norms for non-conviction based recoveries, courts have been left grappling with the question as to whether the criminal law fair trial guarantees that are meant to protect individuals from state excesses should equally apply in the non-conviction based mechanism. This recurring question has been fuelled by the mixed heritage of the non-conviction based assets recovery mechanism. While the arena in which it is practiced is private law (civil law), the assets recovery objective of the non-conviction based mechanism does have characteristics similar to those of criminal law actions. These characteristics include the fact that it is a vertical state action aimed at remedying a criminal offence and the fact that its remedial underpinning is equally shared by punitive sanctions.

However, despite these criminal law characteristics of assets recovery, an analysis of jurisprudence from Kenya and South Africa showed that the courts in these jurisdictions are unwilling to apply the criminal law procedural guarantees to the non-conviction based mechanism. In reaching this position, the Kenyan and South African courts have taken the route of seeking out the legislature's intent in providing for the non-conviction based mechanism. In South Africa, the courts have examined the purpose for the creation of the non-conviction based assets recovery mechanism and found that the aim is to remedy crime not punish criminals, a finding that has made them conclude that criminal law procedural guarantees are not meant to apply. According to the courts the criminal fair trial guarantees in the Constitution only apply in proceeding where a person is called upon to answer to a punitive charge. Thus, since the assets recovery objective of the non-conviction based assets recovery proceedings is remedial and not punitive, in that it only aims to take away that which does not belong to the defendant and not more, the criminal fair trial guarantees

[1401] SNM Young (ed) *Civil Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime* (2009) 4.

cannot apply as the defendant in the case is only called upon to answer to a civil not a punitive charge. In Kenya, on the other hand, the courts have resorted to the label given to non-conviction based procedure by the legislature and found that since the non-conviction based mechanism is labelled civil in the law, the intention is that the criminal law procedural guarantees are not to apply. According to the courts the criminal fair trial guarantees only apply in proceedings labelled criminal in law and since the non-conviction based assets recovery is not so labelled, the criminal fair trial guarantees are inapplicable.

This approach of seeking the legislature's intent to determine whether the criminal procedural guarantees should apply to a state action is at odds with jurisprudence from international human rights bodies, which have invariably warned against over-reliance on the legislature's intent and called for a substantive approach that goes beyond legislative intent. Such a substantive approach, apart from making courts less deferential to the legislative branch, helps courts to appreciate not just the label and purpose but also the true characteristics and effects of the action in question. In this regard, the European Court of Human Rights, unlike the courts in Kenya and South Africa, have applied the substantive approach to find that confiscation of proceeds of crime is indeed penal in character and that certain aspects of the right to fair trial should be made applicable. In fact, this penal attributes of assets recovery have also been acknowledged by the Kenyan and South African courts, though the courts have not been swayed enough by these attributes to change their position on the applicability of the right to fair trial protection in the non-conviction based recoveries, only cautioning that in light of the penal consequences the provisions of non-conviction based laws should be interpreted strictly to ensure that they do not result in unfair effects on property owners.

Given the position taken by the courts in Kenya and South Africa, it was concluded that the right to fair trial cannot be of any help in checking against the unconstitutionality of the non-conviction based mechanism. The viable option that remained was to seek alternative rights that could be used to check against state abuse and unfair effects of the non-conviction based mechanism. In this regard, given that assets recovery is primarily concerned with the deprivation of property, the right to property presented a viable alternative for such a protection. Chapter five was therefore dedicated to examining the viability of the right to property in protecting individuals against the unfair effects that may arise from the use of the non-conviction based assets recovery mechanism.

7.2.4. The right to property is applicable in the non-conviction based assets recovery process in Kenya and South Africa and offers protection against confiscation of legally obtained property without compensation

The constitutionality of the non-conviction based assets recovery within the right to property framework is tied to two related requirements. Firstly, the right to property, though extending its protection to the broadest range of property interests, requires that for individuals to enjoy its protection the property in question must have been lawfully acquired. This is a constitutional requirement in Kenya and to some extent South Africa. In South Africa unlawful acquisition is generally outlawed, save for cases of genuine unlawful occupation of land mostly by the landless but definitely not by deliberate criminals. This means that once it is established that the property in question is illegally acquired then the protection of the right to property is extinguished. In the context of assets recovery, what this means is that assets recovery should really not raise any property right's concerns since the property that is targeted for recovery is usually that which has been illegally acquired. However, to exclude property targeted for recovery from the protection of the right to property is to conclude that the targeted property was actually illegally acquired. This conclusion is, however, only possible after it is has been established before an impartial arbiter to the required standard that the property in question is proceeds of corruption. Until then, the protection of the right to property is applicable even to holders of the alleged illegally obtained property.

Secondly, the right to property in Kenya and South Africa protects private property from two distinct categories of state interferences: expropriation, which result in compulsory acquisition of private property by the state; and deprivation, which does not lead to the taking away of private property but nevertheless imposes restrictions on the use of private property.[1402] If it is deprivation then the requirement is that it must be authorised by law and must not be arbitrary but if it is expropriation then, apart from being authorised by law, it

[1402] This is the position in Kenya and South Africa. However in the South African context, in the case of *First National Bank of SA Ltd t/a Wesbank v Commissioner* 2002 (4) SA 768 (CC) para 57, the Constitutional Court noted that deprivation encompasses all types of state interference with property including expropriation, so that expropriations is considered as a subset of deprivation. Meaning that all expropriations are deprivations, but just some deprivations are expropriation. This approach is problematic and has been avoided in subsequent cases involving expropriation such as *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) and *Haffejee NO and Others* v *eThekwini Municipality and Others* (2011) ZACC 28. But even if it were to be accepted as the true position, it still exclude the possibility of an overlapping "grey area" where the one category can shade into the other, since only expropriations can be compensated. The approach merely postpones the stage of differentiating expropriation from deprivation to the point when the court has to decide whether a state interference should be accompanied by compensation.

must be carried out for public purpose and must be accompanied by adequate compensation.[1403] Analysed against the attributes of the two types of state interference, the thesis found that assets recovery falls in the deprivation category of state interferences. This is because, even though the state eventually acquires the confiscated property and even benefit from it financially, assets recovery's purpose is definitely not to acquire private property for public purpose but is to control acquisitive crimes such as corruption and is therefore more an exercise of state's regulatory police power of protecting public safety rather than an exercise of its power of eminent domain. However, because the purpose of regulatory police power is to place control on the use of property without acquiring the same, the acquisitive effect of assets recovery makes it go beyond the requirement for lawful deprivation. Under the property clauses, such as that of Kenya and South Africa, which treats deprivation and expropriation as distinct categories with no possibility of overlap, such acquisitive deprivation can only remain valid as a justified limitation to the enjoyment of the right to property.[1404] In this regard, the validity of assets recovery is usually justified on the ground that it targets illegally acquired property, which does not fall within the category of properties requiring compensation.

However, because assets recovery requires justification for its validity, the import is that it is an extraordinary exercise of state regulatory power (in the sense of going beyond the normal bounds of its source of power) and would, therefore, ordinarily be declared unconstitutional but that because of the overriding public purpose that it serves it is nevertheless considered a justified exercise of state's regulatory power. The inevitable outcome of such justification in contemporary human rights framework is that it puts the whole action within a context where judicial review of the rationality and proportionality of the action becomes unavoidable. Such a judicial scrutiny is aimed at determining whether the means adopted is rationally connected to the purpose served, and whether the effect is proportional to the purpose. In this regard, chapter six examined how Kenya and South Africa have used the proportionality analysis to ensure that the non-conviction based mechanism is framed in a way that ensures its constitutionality.

The chapter noted that because there is an alternative means (the conviction based assets recovery mechanism) which can be used to achieve the assets recovery objective with less restriction on the rights of property owners, the non-conviction based mechanism would

[1403] Ibid
[1404] Ibid

ordinarily be declared unconstitutional. This is in tandem with the least restrictive means aspect of the proportionality analysis, which requires that where two means can both achieve the same objective then the one that does less harm to the rights of individuals should be preferred. Because it targets only the property of a person whose criminal guilt has been proven and whose link to the proven crime has been established, conviction based assets recovery mechanism raises little conflict with the right to property compared to the non-conviction based mechanism which does not require proof of criminal guilt and which targets property wherever found and without regard to the holder's involvement in or knowledge of the crime. However, the non-conviction based mechanism is usually saved from unconstitutionality on the ground that its conviction based counterpart is not always effective, or is less effective (and is therefore not considered a comparable alternative or substitute). In other words, the use of the non-conviction based mechanism is not viewed as contravening the least restrictive means requirement because that requirement only becomes applicable where the alternative means is not only less restrictive but also equally effective. In this regard, because non-conviction based mechanism allows the state to recover assets in cases where the conviction based mechanism is ineffective or inapplicable, the means are seen as incomparable. It is for this reason that the two means are usually allowed to exist side by side, at least in the assets recovery laws of Kenya and South Africa, despite the least restrictive means requirement under the human rights framework.

However, though the non-conviction based means is considered constitutional, because it targets the property itself and relates back to the date of illegal acquisition of property, regardless of whether the property is still owned or possessed by the criminal, the courts have recognized that it could also net in property interest of innocent owners or innocent third parties legally acquired under circumstances where the concerned person was unaware and could not have been expected to be aware of the illegal origin of the property. The courts have thus held that each instance of non-conviction based assets recovery should also undergo a proportionality analysis within the right to property framework so as to ensure that its effect is proportional to the objective. Because the legitimate objective of assets recovery is to confiscate illegally acquired property, the proportionality analysis is mainly aimed at ensuring that the mechanism is framed in such a way that it minimizes potential abuse of the procedure by the state and checks against the confiscation of legally obtained property. In this regard chapter six also examined how this has been done in the context of Kenya and South Africa.

7.2.5. South Africa's POCA has provided for more rigorous safeguards against the unfair effects of the non-conviction based mechanism than Kenya's ACECA

In the context of safeguards against unfair effects of the non-conviction based assets recovery, the study revealed that South Africa's POCA has more rigorous safeguards than its Kenyan counterpart. These safeguards include the requirement that all assets recoveries must be authorized by a court of law. It also places the burden of proving the illegality in the acquisition of targeted property on the state. The state has to prove that the targeted property is derived from corruption crime to the high civil standard of balance of probability. If the state fails to discharge it burden, the property will revert back to the owner. Where the state manages to discharge its burden, the affected individuals who have interest in the property are also given a chance to show that the property was acquired through legal means (by showing that they obtained an interest in the property legally and for value, and that they neither knew nor had reasonable grounds to suspect that the property constituted proceeds of crime). This defence is called the innocent owner defence and if discharged to the standard of balance of probability then the property is spared from confiscation or confiscated subject to adequate and prompt compensation. In addition, at the preservation of property stage, a property owner has an opportunity to apply for rescission of a preservation order if it causes him or her hardship. Where an owner proves that (s)he cannot survive or cannot afford the legal expenses out of his or her property not subject to the preservation order, then the court is mandated to provide for the living and legal expenses of a defendant in its preservation of property order. Also, to ensure that the preservation order does not remain in operation indefinitely, the lifespan of a preservation order is restricted to a non-renewable period of 90 days - the state must apply for an order of forfeiture within this period, failure of which the preservation of property order will automatically lapse at the end of the period.

Similar requirements as concerns court authorization of all assets recoveries, burden of proof, standard of proof and opportunity for the defendant to show legality in the property's acquisition as provided in the South African assets recovery regime are also applicable in Kenya. In addition to the opportunities at the confiscation stage, the Kenyan ACECA also gives a property owner opportunity at the preservation stage to apply to court within 15 days of receiving an *ex parte* preservation order for the court to discharge or vary the order. However, unlike South Africa, Kenya has not expressly provided for reasonable legal and living expenses to be catered for in the preservation order. In addition, the fixed 90 days life span for the preservation order is lacking in Kenya. Instead Kenya has provided for a

lifespan of 180 renewable days for its preservation order. Besides, unlike South Africa, Kenya provides for the seizure and forfeiture of "unexplained assets", which puts a legal presumption of guilt on the officer who is unable to explain the source of their wealth. Furthermore, unlike South Africa that only provides for object confiscation in its non-conviction based mechanism, Kenya has provided for both value and object confiscation in its non-conviction based assets recovery mechanism thereby enabling the state to recover alternative assets where the original property has been dissipated.

These differences in legislative provision can be attributed to the historical context of the two countries. While South Africa's context is characterized by a need to avoid the "injustices of forced removals from land and evictions from homes" of the apartheid era, Kenya's context has been characterized by the need to avoid injustices of powerful individuals grabbing public land and converting the same to private use. These pasts seems to influence the approach taken by the legislature in framing the non-conviction based provisions in the two countries. One legacy of South Africa's apartheid past has been that the South African legislature is barred by the post-apartheid Constitution (in the absence of constitutional amendment) from pursuing more sweeping non-conviction based assets recovery laws. Kenya's legislature is not so precluded, and as illustrated has provided for far-reaching powers to its anti-corruption agency in its version of the non-conviction based assets recovery regime.

However, despite the difference in legislation, chapter six noted that when it comes to adjudication of non-conviction based assets recoveries, Kenya's courts have increasingly adopted a rights-based approach similar to that of the South African jurisprudence. Thus, for example, in *Kenya Anti-Corruption Commission v Stanley Mombo Amuti* the Court held that the non-conviction based provision in the ACECA was unconstitutional to the extent that it provided for a legal presumption against the individual in the confiscation of unexplained assets. According to the Court, the presumption should be an evidentiary one and only after the state had proved that the assets were unexplained to the civil law standard of balance of probability. Though this decision is the subject of appeal, it is a pointer to the direction that courts are taking in addressing the conflict between individual rights and public purpose of assets recovery in the non-conviction based recoveries. Similarly, to ensure that the preservation order does not remain in force indefinitely through repeated extensions to the detriment of property owner's interest, it has been held in *Dakane Abdullahi Ali v Kenya Anti-Corruption Commission* that a preservation order should be sought within a civil

recovery suit and that any application for extension must reveal good reason. Furthermore, though the Kenya's context has been characterized by the need to avoid injustices of powerful individuals grabbing public land and converting the same to private use leading to the courts holding that *bona fide* purchasers for value without notice are not protected in the case of unlawful conversion of public property, given the spate of government misuse of the situation to cancel land titles that it had initially issued to private individuals, the courts have had to turn around and hold that where the government is complicit in the illegal conversion of public property to private use then the innocent purchaser for value without notice should be compensated.

7.3. Lessons learned

In summary, it can be concluded that non-conviction based mechanism is a necessary tool in the fight against corruption that however needs to be regulated to ensure that it achieves its rational objective of assets recovery without unduly affecting the rights of the individuals concerned. The correct balance in the non-conviction based assets recovery is achieved when the measure is crafted in a way that allows the state to recover illegally acquired property while giving an opportunity to innocent owners who have an interest in the targeted property to prove legal acquisition of the said interest. Such an opportunity ensures that innocent owners, innocent purchasers for value without notice of illegality, and third parties such as creditors and mortgagors who acquired interest in the targeted property, under circumstances where they were unaware and could not have been expected to be aware of the illegal origin of the property, are able to vindicate their rights. Such persons deserve the protection of the law, as they are also victims of the wily criminals that the state is trying defeat. Where they are able to prove their innocent acquisition then the confiscation of their innocent property and the incidental effect of presumption of guilt for the underlying corruption offence that usually arise from assets recovery should be avoided. The corollary is that a person who is not able to show that they obtained the property legally would not be said to unfairly suffer the consequence of the confiscation.

It can also be concluded that since the balancing in the non-conviction based mechanism involve two competing imperatives, the human rights agenda would lose out in the competition if it were to lack constitutional backing. The entrenchment of the relevant rights such as the right to fair trial and the right to property in the constitution therefore helps a great deal in the vindication of individuals' rights in the non-conviction based mechanism.

However, the absence of specific rights in the constitution or the declaration of their inapplicability in the non-conviction based mechanism should not stifle efforts aimed at making the mechanism fair and effective. Alternative rights that are also involved in the assets recovery process should be sought and invoked to provide the necessary framework for balancing the benefit and cost of the mechanism. In this regard, the fact that the criminal procedural guarantees are deemed inapplicable in the non-conviction based mechanism has not stopped courts in Kenya and South Africa from using the right to property to provide the necessary framework for a proportionality analysis of the non-conviction based assets recovery mechanism.

It can further be concluded that, though the balancing between the imperatives of assets recovery and the guarantee of individual rights should ideally be carried out at the drafting stage of the relevant legislation, more often than not the context of application would raise unforeseen circumstances that render the initial provision unfair. In this regard, while attempt must be made at the drafting stage to address the potential negative effects of the measure in question, provision should also be made for a contextualized analysis of the fairness of the provision during application. The body best suited for this contextualised analysis is the courts.

7.4. Recommendations

Based on the study, the following recommendations are, therefore, offered on how best to vindicate the individuals' rights while allowing the non-conviction based mechanism to meet its assets recovery objective.

7.4.1. Legislative interventions

7.4.1.1. Provide for the innocent owner defence and reasonable legal expenses to enable innocent owners defend their property

One way of protecting innocent property from confiscation and reputation of innocent owners from being tarnished, is to provide the property owner with opportunities to prove, after the state has met its civil burden of proof, the legal source of their interest in the targeted property and thereby avoid the disproportionate consequences of the confiscation. In this regard, Kenya and South Africa both give affected parties an opportunity to show that

the targeted property was lawfully acquired, after the state has discharged its burden of proving that the property is proceeds of corruption. It is contended that providing such opportunities for the property owner to prove the legal source of their property and to show that "he or she obtained the property legally and for value, and that he or she neither knew nor had reasonable grounds to suspect that the property constituted the proceeds of crime" is a proportionate requirement that balances between the need to confiscate property where criminal prosecution is unavailable and the right of individuals to presumption of innocence and to security of property. Though the procedure does not match the criminal law requirement which puts the whole burden of proving a case on the state, given that no penal consequence on the person of the owner follows from a confiscation order, such a requirement is a proportionate compromise. Also because "it will be far easier for a Defendant in the majority of circumstances to establish, on the balance of probabilities, that the assets in dispute have an innocent source",[1405] the relaxing of the burden of proof in the non-conviction based assets recovery is not entirely unreasonable. Where an individual is able to demonstrate that the property was legally obtained, then his or her interest in the targeted property should be excluded from confiscation or confiscated subject to adequate compensation. The corollary is that an owner who is unable to establish the innocent owner defence would not unjustifiably suffer the impact of the forfeiture order, serious though it might be, especially in a context where the reasons for granting the confiscation order are compelling.

However, given that proceedings involving assets recoveries are usually "complex" and "difficult to interpret" it is recommended that provision for reasonable legal expenses should be made in the laws for those defendants who cannot afford legal representation. The legal representation would enable lay individuals to adequately defend their interests and by extension their reputation. In this regard, the South African POCA requires that where the affected party cannot meet legal expenses out of their unrestrained property, then provision should be made for reasonable legal expenses out of the preserved property to which they have an interest. Such express provision is lacking in Kenya. It is argued that the provision is a proportionate requirement given the power imbalance between the state and the individual in the non-conviction based process and should, therefore, be expressly provided for. However, where it later turns out that the targeted property was legally acquired by the defendant, then the state should be made to refund the legal expenses incurred by the defendant (whether the expense was deducted from the preserved property or met by the

[1405] *R v Benfield* [2000] All ER (D) 2456.

defendant out of his or her unpreserved property). This would take care of the disproportionate effect that non-conviction based mechanism puts on innocent owners by forcing them to defend property that is legally theirs. The proposition is not novel, as it is being applied in civil proceedings in many countries where the losing party is expected to compensate the expenses of the winning party.[1406] However, where the state wins, a similar provision on compensation should not be enforced in favour of the state. This is partly because the proceeding is instituted by the state and not the defendant, but mainly because assets recovery forms part of the state's police responsibility that the public (including the affected property owners) pays for in the form of tax.

7.4.1.2. Limit the period for the preservation order and provide for reasonable living expenses where the preserved property is the only source of income

Given the unfair effects that might follow from prolonged preservation of property orders, it is suggested that the preservation order should be limited to a fixed period of say 90 days or alternatively should only be applied for after the state has filed a civil recovery suit. The limited fixed period is a feature of the South Africa POCA while the requirement that preservation order should be sought after the government has filed a main recovery suit is a feature that the courts have read into the Kenyan ACECA. Either of these requirements would check against the capricious use of the preservation order provision by states and the disproportionate effects on individuals that results from prolonged preservation orders.

One may argue that limiting application for preservation orders to after a civil suit has been filed, might shackle the effectiveness of the order especially in instances where investigations reveal that there are proceeds of corruption that are about to be dissipated by the defendant and yet the evidence is not yet enough to sustain a recovery suit. However, the Kenyan courts have held that in these instances the state can still use the more rigorous restraining order available in the criminal process to preserve the property.[1407] One may further argue that limiting the period for preservation order to fixed periods might introduce inflexibility in the time needed for investigation of corruption offences. Such an argument is,

[1406] For discussion, see WK Davis "International View of Attorney Fees in Civil Suits: Why Is the United States the Odd Man Out in How It Pays Its Lawyers" (1999) 16 *Arizona Journal of International & Comparative Law* 361; GT Mclaughlin "Recovery of Attorney's Fees: A New Method of Financing Legal Services" (1972) 40 *Fordham Law Review* 761; AA Ehrenzweig "Reimbursement of Counsel Fees and the Great Society" (1966) 54 *California Law Review* 792.

[1407] See the Kenyan case of *Beryl Akinyi Muganda v Ethics and Anti-Corruption Commission* (2012) eKLR para 50-59 (for a discussion of the difference between the two options).

however, countered by the risk of delays in investigations being engineered by wily law enforcers when they know that they can always renew preservation orders. Furthermore, given that preservation orders are issued only when the state can prove a prima facie case with probability of success as in the case of Kenya or "if there are reasonable grounds to believe" that the property is proceeds of crime as in the case of South Africa, the assumption would be that at the point of seeking the preservation order the state would have collected enough evidence to sustain a prima facie case or to show reasonable grounds for belief that the property is proceeds of crime and therefore a further period of 90 days would be a proportionate period to allow it firm up its evidence.

In addition to limiting the period for the preservation order, property owners should also be given an opportunity within a reasonable period after the grant of the *ex parte* preservation order to apply for rescission or variation of a preservation order if it causes him or her hardship. Where a defendant proves that (s)he cannot survive out of his or her property not subject to the preservation order and has fully disclosed under oath his interest in the property and his assets and liabilities, then the court should be mandated to provide for reasonable living expenses out of the property that is subject to the preservation order. Both Kenya and South Africa give a property owner opportunity at the preservation stage to apply to court for a discharge or variation of the preservation order. However, unlike the case in South Africa, there is no express provision under the Kenyan ACECA requiring courts to provide for living expenses of affected parties out of the preserved property. This requirement, it is recommended, should be expressly provided for as it would then direct the courts' mind on the need to alleviate the suffering that might arise to the defendant and his or her family or dependents out of losing the only source of their income.

One may argue that providing such living expenses out of the targeted property may defeat the whole purpose of preservation order which is to preserve the property "so that any confiscation order which may be granted can be effective".[1408] However, the point to note is that at the stage of preservation order it is not yet established that the property was illegally acquired and therefore the right to property is still applicable. Furthermore, since states generally and particularly in Kenya and South Africa have a duty (under international human rights and national bill of rights) to fulfil the socio-economic and cultural rights of its citizens (subject to availability of resources), where a citizen has proven that they would become destitute without the provision of living expenses from the available resource (which

[1408] *NDPP v Mcasa* 2000 (1) SACR 263 (Tk) para 8.

is not yet proven to have been illegally acquired), requiring that living expenses should be deducted from the property, it is contended, is not an unreasonable balance between the need to preserve property for confiscation and the need to protect the rights of innocent property owners. However, to ensure that the defendant does not then use the opportunity to dissipate the property, a court must examine the situation and determine whether such a risk exist and whether the risk outweighs the hardship that the owner will suffer. In this regard, the South Africa's POCA provides that before rescinding or varying a preservation order, the court must, in addition to being satisfied that the preservation order would deny the defendant of the means to provide for reasonable living expenses, also satisfy itself that the hardship that the applicant will suffer as a result of the order outweighs the risk that the property concerned may be destroyed, lost, damaged, concealed or transferred. Such a caution it is contended is necessary to ensure that each application for living expenses is not used as an excuse for dissipating the targeted property. However, where the court is unsure of the weight of the two risks, it is recommended that it should err on the side of the applicant given the innocence of property owners at the stage of preservation, the imperative of the right to property and the positive duty that the state owes to its destitute citizens.

7.4.1.3. The use of non-conviction based mechanism should be limited to cases where prosecution is unavailable

As discussed in chapter three and six, the non-conviction based mechanism is a more intrusive method of fighting corruption than its conviction based counterpart. Under the proportionality analysis, the non-conviction based mechanism would ordinarily, therefore, be declared unconstitutional for failing the "least restrictive means" or "necessity" test, which requires that where two means can achieve the desired objective then the one that does less harm to the rights of individuals should be preferred. However, the non-conviction based mechanism is usually saved from unconstitutionality on the ground that it helps serve the objective of assets recovery in instances where the conviction based mechanism would be impossible or unduly difficult to use. Because this is the ground for its justification, it is suggested that the law should make it clear that the use of non-conviction based mechanism should be reserved only to cases where criminal prosecution is unavailable. The law in Kenya and South Africa lack such provision, though the courts in South Africa have variously opined that where the ordinary criminal law is sufficient to deal with a crime, it

ought to be the first port of call, otherwise using assets recovery might amount to arbitrary use of discretion.[1409]

In determining unavailability of criminal prosecution or conviction based mechanism, less emphasis should be placed on the difficulty to obtain evidence. While it is true that corruption is a complicated crime to investigate due to its secretive and organized nature, given the immense resources and power at the disposal of the state, any excuse on the basis of difficulty to obtain evidence should be treated with the contempt that it deserves. Just like Eneke the bird in *Things fall apart* learned to evade the non-missing hunters, the state must also improve its hunting skills to match that of its quarry.[1410] Otherwise, difficulty would become a pretence under which every form of laziness is attempted to be justified. In this regard, it is suggested that justification for use of non-conviction should be limited in the law to instances where the use of the criminal process is made unavailable due to circumstances beyond the control of the state such as (1) where the suspect flees from the jurisdiction, or dies, or enjoys immunity from prosecution, or when assets are held through offshore trusts or companies or associates not amenable to prosecution; or (2) where a conviction cannot be obtained for technical reasons (such as, the rule against retroactive application of statute); or (3) where evidentiary rules prevent necessary evidence from being admissible in criminal proceedings, but available for civil claims. In all the other instances, the use of the conviction based mechanism should be the first port of call.

In some jurisdictions such as South Africa, the non-conviction procedure also provides the only means of recovering specific objects illegally acquired such as public utilities. This is because the type of assets recovery under their conviction based mechanism is that of "value" not "object". Such limited ambit of the conviction based mechanism would mean that where specific public properties is involved, the state's hand would be tied to using the non-conviction based mechanism under chapter 6 of POCA, which allows for object confiscation. It is recommended that to avoid such a scenario the confiscation of specific objects acquired through crime should also be included within the ambit of conviction based regime. Indeed Kenya has empowered its courts to provide for both the value and object confiscation in its conviction based regimes without posing any discernible difficulty to the realisation of the objects of assets recovery.

[1409] See *NDPP v Van Staden* [2006] SCA 135 (RSA) para 7

[1410] C Achebe *Things Fall Apart* (1959) 148 (Eneke the bird explaining why he is always on wings in the following words: "Men have learned to shoot without missing their mark and I have learned to fly without perching on a twig").

This requirement of restricting the use of non-conviction based mechanism to only instances where prosecution is unavailable would not only limit the disproportionate effects that may follow from the application of the mechanism but also ensure that civil actions in crime based recoveries do not undermine the effectiveness of criminal law or result in a loss of confidence in law enforcement. Acts of corruption, be it embezzlement, bribery or trading in influence, all constitute criminal offences and as such should be attacked by the traditional criminal law mechanism of prosecution. The retributive and deterrent effects of criminal prosecution on the control of these crimes cannot be overstated. Thus, criminal prosecution and conviction based assets recovery should remain the standard legal response in corruption cases. It is only when they are unavailable, due to the above mentioned circumstances that the non-conviction based mechanism should then be resorted to.

The requirement would also help to address the unfair effect that concurrent proceedings (of criminal prosecution and non-conviction based assets recovery) may impose on defendants. Because non-conviction based assets recovery arises from criminal conduct, there are situations in which criminal proceedings may coincide with non-conviction based assets recovery proceedings. In this scenario, a jurisdiction may choose to invoke non-conviction based mechanism when criminal prosecution is unavailable or allow for both proceedings to run concurrently. While the latter approach allows for concurrent imposition of criminal penalties and civil remedy, it also disproportionately affects the right of the defendant not only against self-incrimination but also reduces the defendant's ability to lodge an effective defence in both cases. The defendant may be discouraged from vigorously defending the civil assets recovery proceeding to avoid incriminating himself in the criminal case. Kenya and South Africa have not addressed this scenario in their laws thus leaving the discretion on the state to decide which route to take. It is argued that where the requirement of justification is included in the law, then the second scenario would not arise as the non-conviction based mechanism would only be resorted to where criminal prosecution is unavailable.

However, there is a possibility that after the non-conviction based mechanism has been invoked, evidence might come to light that necessitates criminal prosecution being preferred against the defendant. In this scenario, it is recommended that a stay of proceedings in the non-conviction based assets recovery should be granted to enable the defendant concentrate his or her effort in defending the more penal criminal proceedings. However, where the defendant chooses to allow both the criminal prosecution and civil assets recovery action to run concurrently, a *caveat* should be imposed in the law to the effect that evidence or

information obtained from the defendant in the civil proceedings cannot be used against him or her in the criminal prosecution.

7.4.1.4. To allow for the effective recovery of proceeds from corruption, the non-conviction based mechanism's scope should cover all corruption offenses

This thesis aim was not restricted to studying how human rights of individuals can be vindicated but on how the assets recovery objective of law enforcement can be undertaken successfully while respecting human rights. Thus, weaknesses in the law that prevents a successful recovery of corruptly acquired assets are also addressed. In this regard, an analysis of the crime of corruption revealed that the acts that constitute corruption are many and varied. However, under South Africa's PCCAA the definition of corruption is limited to bribery. This means that the definition leaves out the other important aspects of corruption such as embezzlement or misappropriation of public funds, abuse of office, breach of trust, breach of financial or procurement procedures and engaging in unplanned public projects, which does not involve bribery. These aspects of corruption are huge avenues for conversion of public property to private use, which if left out would leave the fight against corruption bereft of any meaningful impact. It is thus recommended that the definition of corruption in the law should be amended to reflect the reality of the diversified manifestation of corruption and to cover the various types of abuse as discussed in chapter three.

Related to the scope is also the question whether all the acts of corruption should be subjected to the non-conviction based assets recovery given their different levels of sophistication. For example, the conversion of physical public property such as land might be easier to investigate than say bribery. In the given example, should the recovery of the physical public property be excluded from the non-conviction based mechanism due to the ease in collection of evidence for criminal prosecution, or should it be allowed since it raises little fair trial issues and saves the state time of having to go through the lengthy criminal process? Because all the acts of corruption somehow lead to the illegal conversion of public benefit to private use, it is suggested that the law should not discriminate on the corruption crimes amenable to the non-conviction based assets recovery. This will help avoid circumscribing or putting in hierarchy the different acts of corruption, which may give rise to loopholes in recovery actions. The only determining condition that should apply in excluding a case from the non-conviction based type of assets recovery is, as already suggested, unavailability of criminal prosecution.

Furthermore, to enable the state to recover alternative assets where the original property has been dissipated it is recommended that the law should provide for both value and object confiscation in its non-conviction based assets recovery mechanism. In this regard, unlike Kenya, the South African law only provides for object confiscation, meaning that where assets are dissipated and the criminal process is unavailable for one reason or another the proceeds of corruption cannot be recovered. This is undesired situation given the increasing tendency of criminals to money launder their illegal proceeds in order to hide their illegal source.

7.4.1.5. All recoveries should be authorised by the courts

In the assets recovery process, some jurisdictions usually permit administrative freezing or internal freezing of property by financial institutions.[1411] To ensure that the mechanism is not abused by the overzealous state officials, the law should not allow any confiscation or preservation of property to be carried out without a court order. The scenario where government official use their discretion to extinguish titles to property should not be allowed as the government is more often actuated in the exercise of its discretion by factors beyond the dictates of justice. Indeed as the Kenyan cases cited in chapter six illustrate, allowing the government to act on its own motion to extinguish titles of persons perceived to be illegally occupying public property, can bring untold injustice on property owners. Since the government is the one that issues the titles in the first place, allowing it the discretion to unilaterally extinguish these titles without a court order can lead to arbitrary exercise of discretion in an effort to correct mistakes of its own making. In this regard, the Kenyan courts have rightly held that the confiscation of property or revocation of titles must be preceded by a finding by the courts that the targeted property was unlawfully acquired. The ultimate vindication of individual rights in the non-conviction assets recovery mechanism would therefore be a *mandatory provision in the laws that each instance of non-conviction based recovery be authorised by a court of law*. In this way, the absolute worrying effects that would usually follow from a strict application of the non-conviction based assets recovery mechanism would then give way to a more comprehensive process in which each instance of non-conviction based recovery becomes amenable to judicial scrutiny where a

[1411] For instance, France allows administrative freezing by the Financial Intelligence Unit upon receiving a report of a suspicious transaction. In Switzerland, financial institutions may be mandated to freeze automatically reported transactions for 5 days, pending the review of the reasonableness of the measure by a magistrate. See U4 Anti-corruption Resource Centre "Mutual Legal Assistance treaties and money laundering" available at http://www.u4.no/helpdesk/helpdesk/query.cfm?id=173 (accessed on 3 August 2013).

range of contextual factors such as the possibility of successful criminal conviction and the position of innocent owners and third parties are taken into consideration.

7.4.1.6. Where illegal alienation of public property to private individuals takes place with the blessing of government officials, the officials should be made to account

Since public property is usually placed in the custody of the government, it will more often be the case that the transfer of public property to private hands is done with the complicity of government mandarins. In Kenya, as illustrated in chapter six, most of the titles to property that the government usually claim to have been illegally acquired often turn out to have been issued by the same government. This as demonstrated has resulted in untold sufferings to individuals who on the strength of the title begin to develop the property only to be told later that their title has been cancelled because of the property is ostensibly public property. While it is the duty of individuals to carry out due diligence to ensure that the property they are purchasing is legal, in instances where a *bona fide* individual acquires property interest in government property for value under circumstances where the concerned person was unaware and could not have been expected to be aware of the illegal origin of the property, where it is later discovered that the public property was converted to private use and offered for sale as a result of failure to follow the law on the part of the government or its agents, then the confiscation of the said property should be made subject to adequate compensation to the *bona fide* purchaser for value without notice of the irregularity. The amount of compensation should then be recovered from the public officials involved in the irregularities. This would put pressure on government officials as trustees of public property to adhere to the requisite regulations when alienating public property for private use or registering titles to property. It would also protect the public and innocent owners from answering to mistakes that are not of their making or bearing burdening costs of governance that are not legitimately incurred.

7.4.1.7. Proceeds from assets recovery should not directly be used in funding law enforcement imperatives

As discussed in chapter six, there is always the danger of non-conviction based assets recovery being viewed as a source of income for the cost of law enforcement. This is because of the capacity of the confiscation procedure to generate revenue. Indeed in some

jurisdictions, including South Africa, confiscation is considered a source of funding for the costs of the law enforcement.[1412] This view of confiscation of proceeds as a source of income can engender a "profit oriented approach of criminal justice" among law enforcement authorities, with the effect that the non-conviction based mechanism then becomes the priority area of law enforcement. This would increase the chances of the procedure being abused to the detriment of property owners. As a check against this, it is recommended that apart from circumscribing the instances when the mechanism should be used to cases where prosecution is unavailable, there should also be a requirement in the law that any recovery made should be reverted back to the public institution from which the property was illegally alienated or where there is no identifiable institution, then the proceeds should be returned to the treasury for use in re-budgeting and redistribution to the deserving government projects. This is the approach that Kenya has taken and is recommended as a way of reducing a profit oriented approach to law enforcement that would have a piggyback effect on the disproportionate use of the non-conviction based assets recovery mechanism.

7.4.2. Judicial intervention

Recommendations involving judicial interventions are usually met by the challenge that they are dependent on the parties instigating the court process. However, because assets recovery laws invariably require that each case of assets recovery be authorized by the courts, the role of the courts in the process is therefore inescapable. It follows that in the confiscation proceeding, where the court finds that the property is proceeds of unlawful activity, it should order for its confiscation. It is recommended, however, that the confiscation order should be excepted where it would clearly not be in the interests of justice to do so. Such an instance include where the targeted property is occupied by indigent persons. In these instances it is recommended that the enforcement of a confiscation order should be made subject to the finding of alternative land or accommodation for the affected individuals. This would reduce untold suffering to this group of people and would accord with the government's positive obligation under the right to property and to access to housing as discussed in chapter five. The approach would secure the interest of the unlawful occupiers even as concrete and case-specific solutions are sought for the difficult problems that arise. This recommendation, should however not be seen as an excuse for unlawful invasion of public property by

[1412] AJ Van der Walt has, for example, notes that the confiscated proceeds of crime is considered a source of funding for the law enforcement in South Africa. AJ van der Walt *Constitutional Property Law* (2011) 312-314. See also JM Miller & LH Selva Drug Enforcement's Double-Edged Sword: An Assessment of Asset Forfeiture Programs" (1994) 11(2) *Justice Quarterly* 313 (for illustration from the US).

indigent persons. Such a conclusion would be tantamount to saying that illegal transfer of title can be effected by constitutional fiat, a position that should be totally resisted considering the chaotic consequences that might follow. Thus, save for the case of "genuine" unlawful occupation of land by squatters and indigent persons, the lawfulness of the vestment of the targeted property should still be the determining factor in a decision on whether a proprietary interest should benefit from constitutional protection. In determining who a "genuine" unlawful occupier is, it is suggested that the circumstances leading to the unlawful occupation and the current condition of the occupiers should be taken into account. Where the unlawful occupation was forced on the individuals by circumstances beyond their control such as poverty and landlessness and where their current situation does not allow them to afford alternative land or housing, then the government should be required to intervene.

7.4.3. Other complimentary measures

7.4.3.1. Prevention (systems audit and anti-corruption sensitization)

As indicated in the beginning of chapter three, the assets recovery strategy falls in the law enforcement category of strategies in the fight against corruption. The other category is prevention. The preventive strategy proceeds from the premise that corruption is a function of inclination and opportunity and that it occurs whenever an individual inclined to corruption meets a corruption opportunity presented by loopholes in the institutional systems. As such the preventive strategy proposes measures, such as systems audit, that are aimed at sealing institutional loopholes and those, such as public education, that are aimed at disinclining people from corruption. The aim of these measures is to prevent corruption from taking place. It is argued that these measures should continue being vigorously pursued to prevent corruption and thereby reduce chances of the non-conviction based assets recovery being used against the innocent owners or innocent third parties such as lenders and mortgagors who without knowledge of or involvement in the initial criminality subsequently acquire for value some interest in proceeds of corruption. Though idealistic, it is contended that only when corruption ends will the dangers posed by the non-conviction based mechanism on innocent property owners also end. The preventive strategy contributes towards this end.

7.4.3.2. Specialized training

However, it has to be conceded that there are people who cannot be disinclined by public education or who cannot resist taking advantage of weaknesses and loopholes in the systems however much they are tightened and that the only way to deal with these people is to confront them with the full wrath of the law. Because this is the likely scenario, the second way of ensuring that the danger of non-conviction based mechanism is minimized is by taking the anti-corruption enforcers through an intensive training on investigative and detection techniques that would help them outsmart the increasingly organised and sophisticated criminals. Where the chances of criminal prosecution are increased, the use, and therefore danger, of the non-conviction based assets recovery would become minimal, especially if the recommendation that the mechanism be used only where prosecution is unavailable is taken seriously. It is therefore recommended that law enforcers should undergo constant training on anti-corruption investigation and prosecution techniques aimed at increasing their knowledge and sharpening their skills.

Besides the law enforcement officers, it also recommended that judges and advocates should be taken through training on the human rights issues surrounding the non-conviction based mechanism and how to deal with them. As noted by the South African Constitutional Court in *NDPP v Elran* proceedings involving the recovery of assets are "complex" and "difficult to interpret" and thus without adequate training of judges and lawyers the interest of innocent individuals would not be adequately canvassed. The balancing and vindication of human rights would mostly depend on the level of commitment and competency of these important actors. Thus, training on the non-conviction based assets recovery process should form part of the continuing legal education of both lawyers and judges.

7.5. Concluding remarks

The issue of whether the fight against corruption can be carried out without violating individual rights is usually prone to two contending views. One side of the debate sees human rights violation as inevitable. In support of this position, the complexity of corruption and the need to adopt drastic measures to effectively fight it is usually cited.[1413] According to

[1413] Prosecution of corruption is a particularly difficult endeavour and successes in this field are still too rare. The detection rate is often low because of the lack of verifiable information that is received from public servants or other citizens. See BG Crutchfield & KA Lacey "A Coalition of Industrialized Nations, Developing Nations, Multilateral Development Banks, and Non-Governmental Organizations: A Pivotal Complement to

this school, the nature of corruption is such that it's a mutual crime perpetuated in most cases by willing participants making it necessary to put in place special mechanisms to deal with it. This, it is argued, would sometimes need to be done at the expense of human rights because in any case international human rights law recognizes that there are situations where a state must be allowed to decide what is in the best interest of its citizens.[1414] On the other side of the divide, is the argument that human rights represent ideals worth striving for. According to this school, to ignore human rights in the fight against corruption is not only tactically unwise, but is also ethically wrong, since it weakens the very basis of the anti-corruption agenda.

These two positions present legitimate fears. There is a genuine concern on one side that concentration on the ideals of human rights could render the fight against corruption ineffective.[1415] In Kenya, for example, human rights have been used by influential personalities to override the full implementation of the anti-corruption agenda in the country[1416] while in South Africa the public has resorted to mob justice in some cases because of the perception that the criminal justice system is tilted towards protection of the perpetrators of crime.[1417] On the other side, there is the real fear that if the war against corruption is left to a state's whimsical opinion of what is in the best interest of its people, then the important strides made in the human rights movement so far would be back-pedalled. Governments have been known, for example, to settle political scores in the name of fighting crime and maintaining law and order.[1418]

However, while these concerns are valid and need to be borne in mind by both anti-corruption and human rights crusaders, there is no reason why good anti-corruption practice should not be consistent with human rights. Indeed, contrary to the argument that observance

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Current Anti-Corruption Initiatives" (2000) 33 *Cornell International L.aw Journal* 547 at 551 ("Bribery assumes many forms and, due to its characteristically clandestine nature, it is often difficult to detect").

[1414] For some of these arguments, see *Hon. Friday Anderson Jumbe & Others v AG,* (Constitutional Cases Nos 1 and 2 of 2005) in the High Court of Malawi Unreported. But generally on the fight against corruption, see BI Spector *Fighting corruption in developing countries: strategies and analysis* (2005).

[1415] See M Schlos "Fighting International Corruption & Bribery in the 21st Century" 33 *Cornell International Law Journal* (2000) 469 (arguing that in many developing and transition economies, "the judiciary, legal enforcement institutions, police, and other legal bodies are unreliable because the rule of law is often fragile and therefore can be captured by corrupt interests").

[1416] On an exposition of how influential personalities in Kenya have used human rights to frustrate anti-corruption cases against them, See J Gathii "Defining the Relationship Between Corruption and Human Rights" (2009) *University of Pennsylvania Journal of International Law* 125.

[1417] See N Kollapen and M Sekhonyane Combating Crime and Respecting Human Rights: An illusive Balance or the Search for a Durable Solution" (2002) International Council on Human Rights available at Policy http://www.ichrp.org/en/projects/1312 (accessed 20/2/2011).

[1418] As shown by cases from Kenya the Courts have had to come strongly on the government use of self-help mechanisms to forcefully evict persons from alleged public property. .

of human rights impedes the fight against corruption, the fact of the matter is that it actually strengthens the fight. As revealed in this study, non-observance of human rights in the anti-corruption laws and practice often leads to the fight against corruption being bogged down by cases challenging the constitutionality of the impugned actions. These challenges often take away the attention from the fight against corruption to the justification of the impugned law. Thus, if perpetrators of corruption are to face justice, anti-corruption laws should be framed and their enforcement conducted in such a way that no legal loopholes that can be exploited by the suspects are left unaddressed.

Inclusion of human rights principles in these measures assures that this is done as it caters for the interests of the individuals thereby denying perpetrators of corruption legal excuses that can be exploited to delay or frustrate corruption cases in the courts of law. In the context of non-conviction based assets recovery, respecting individuals' rights in the non-conviction based mechanism also assures the security of legally obtained property, which is necessary for confident investments and by extension a thriving economy. It further ensures that civil actions in crime based recoveries do not undermine the effectiveness of criminal law or result in a loss of confidence in law enforcement, conditions that are necessary for public participation in the eradication of corruption. Thus, governments should not view human rights as an enemy but rather as an important ally that can be used to improve their chances of success and enlist the confidence of the citizenry in the anti-corruption agenda.

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