

The Scope of “in Rem” Forfeiture under Nigerian Law: Issues Arising

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Abstract

Some criminals might be content to serve time in prison, if they know their assets will be available upon release, or that their families may continue to enjoy the proceeds of crime and this is why in rem forfeiture of assets is an important mechanism that can be used to prevent this from happening. Indeed it has, generally, been used as an effective tool to counter organized crime, drug trafficking and certain other crimes in Italy since 1956 and in the USA since 1970. In rem forfeiture removes the tools of the crime from circulation thereby depriving the wrongdoer, his associates or family from benefiting from the proceeds of crime. Even though for now Nigeria does not have a comprehensive framework for in rem forfeiture, it is however recognized under various Nigerian Laws. This paper discusses in detail the legal framework of in rem forfeiture under Nigerian laws, the gaps as well as management of seized or forfeited assets pending final forfeiture order. The paper posits that for any meaningful progress in the fight against corruption and the recovery of proceeds of crime to be made, anti-corruption and law enforcement agencies must continue to apply in rem forfeiture mechanism. The paper however emphasizes that civil forfeiture should never be seen as an alternative or substitute for the institution of criminal proceedings when there is sufficient evidence to support such proceedings and where such proceedings would otherwise be justified.

Keywords: Nigeria, corruption, in rem, civil forfeiture, criminal forfeiture, seizure, assets, crime

1. Introduction

Corruption in Nigeria as elsewhere is a difficult and multifaceted problem that cannot be solved in isolation. The reality of the effects of corruption is the socio economic threats it poses to Nigeria as a nation. It suppresses economic growth and undermines the sustainable management of natural resources. It breaches fundamental human rights, undermines national security, exacerbates poverty and promotes instability by diverting funds from health care, education and other basic services. It does not matter how much revenue a country makes or how transformative its plans are, corruption will ensure that the majority of the people do not benefit from it.

Many countries now have provisions governing the forfeiture or confiscation of proceeds of crime. Such legislation permits a forfeiture order to be made following a conviction, as part of the sentencing process as well as forfeiture of proceed of crime where conviction cannot be secured and this is commonly referred to as civil forfeiture, in rem forfeiture and Non Conviction Based Forfeiture, in contrast to the more typical criminal forfeiture. Forfeiture laws supplement traditional criminal remedies by attacking the economic foundation of criminal activity-confiscating illicit profits and assets (Goldsmith & Linderman, 1989).

Whilst recognizing that civil forfeiture is still prevalent in the US and has been entrenched for more than fifty years in Italy, more and more jurisdictions have introduced civil forfeiture legislation. Those states include: Australia and its individual States, Antigua and Barbuda and other Caribbean jurisdictions, Canadian Provinces of Ontario, Alberta, Manitoba, Saskatchewan and British Columbia, Columbia, Fiji, Ireland, Malaysia, Netherlands, New Zealand, The Philippines, South Africa, United Kingdom (Council of Europe, 2013)

In order to achieve that much needed traction in the fight against corruption and the recovery of assets, a multi prong approach need to be adopted to attain a coordinated level of success. The mid 1990s witnessed a shift in the criminal

justice policy. The new policy strives to curb crime by taking away the profits of crime, rather than just punishing the individuals who have allegedly committed the crimes (Stessens, 2002). The first step in this direction was to introduce rules of confiscation following a criminal conviction.

The criminal justice sector across the world came to recognize that, if the aim of sentencing policy was to be effective deterrence, then it needed to hit the true aim of such criminality, which is making a profit. International instruments such as the 1988 Vienna Convention on Drug Trafficking, as the pioneering instrument, introduced the mechanism of confiscation for drug trafficking and this paved the way for extending confiscation to all other acquisitive crimes, including for bribery and corruption first in a limited way in the UN Convention on Transnational and Organized Crime (UNTOC) and then, in 2003, more comprehensively in the UN Convention Against Corruption (UNCAC) (Council of Europe, 2013).

In Recognizing the problem of corruption and the need for improved mechanisms to combat it, UNCAC introduced an innovative framework dedicated to asset recovery in its Article 54 which states that each State Party shall, in accordance with its domestic law: ... (c) consider taking such measures as may be necessary to allow confiscation of such property without a criminal conviction in cases where the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases. UNCAC was the first global convention to acknowledge the importance of in rem to the recovery of criminal proceeds. Also, the 2005 Commonwealth Expert Group on Asset Recovery & Repatriation urges countries to consider taking measures that will allow confiscation of property without a criminal conviction and to also promptly put in place, comprehensive legislations and procedures for non-conviction based asset forfeiture.

As shall be discussed in details in this paper, Nigerian laws have always provided for in rem forfeitures but these provisions had sparsely been implemented until recently. Though the laws are not explicit and comprehensive enough, they nevertheless recognize forfeiture in rem of properties illicitly acquired including where the defendant could not be convicted of any crime as is typical in many high profile corruption cases in Nigeria.

This paper addresses the role in rem forfeiture plays in the recovery of assets. Part one introduces the thesis statement. This part highlights the introduction of an innovative framework dedicated to asset recovery. Part two describes in detail how the study was conducted. Part three discusses the different forfeiture models and their applicability. Part four identifies the legal framework of seizure and forfeiture under Nigerian law and the nature and constitutionality of in rem forfeiture. Part five discusses the importance of having adequate measures in place to secure assets under forfeiture and the present state of management of recovered assets in Nigeria. Part six is prescriptive, positing that it is imperative for the application of in rem forfeiture to maintain its traction for any meaningful progress in the fight against corruption and the recovery of proceeds of crime to be recorded.

2. Methodology

The research methodology for this paper involved library research, cases and statutes which provides insightful perspectives on Nigerian laws that prescribe conviction based forfeiture and in rem forfeiture. In order to develop the analysis, the author analyzed the legal framework of seizure and confiscation in Nigeria, which included all relevant laws and statutes governing the different kind of forfeiture models in Nigeria in accordance to the framework introduced by Article 54 of the UNCAC, which provides for in rem forfeiture. The 2019 Supreme Court judgment in the case of *Patience Jonathan Goodluck v Federal Republic of Nigeria* provide the basis of the applicability of in rem forfeiture in Nigeria.

3. An Overview of Forfeiture Models

Forfeiture is the surrender or loss of property or rights without compensation. It is defined as a comprehensive term, which means a divestiture of specific property without compensation (Oxford Dictionary, 1997), and it imposes a loss by taking away some pre-existing valid right, without compensation (Black's Law Dictionary, 1990).

The reasoning behind the concept of forfeiture is that in addition to being able to arrest wrongdoers and put them in jail for some period of time, laws should also have the ability to remove the tools of the crime from circulation thereby depriving the wrongdoer, his associates or family from benefiting from the proceeds of crime. Secondly, in any case where the crime involves innocent victims, such as property offence and fraud, asset forfeiture turns out to be the most effective means of recovering property that may be used to compensate the victims. Thirdly, asset forfeiture takes the profit out of crime. The incentive to engage in economic crime is diminished if people

contemplating such activity understand that there is a high likelihood that they will not be allowed to retain any profits that might flow from their temporary success. Taking these items away from a criminal not only ensures that the criminal enterprise is deprived of its economic resources, by making funds available for restitution to the victims, it also sends a signal to the community that the benefits of a life of crime are illusory and temporary at best. (Stefan, 2006).

According to a UK Cabinet Office report which was endorsed by former Prime Minister Blair, it is quoted as stating “...most crime is motivated by profit. Pursuing and recovering the proceeds of crime would send out a message that crime does not pay; prevent criminals from finding further criminality; remove negative role models in communities; and, decrease the risk of instability in financial markets” (Jeremy, 2009). The law and practice of forfeiture depend on the kind of crime and the statute being enforced to prosecute the crime and pending the passage of the Proceed of Crime Bill into law, there is an absence of a distinct forfeiture legal framework in Nigeria rather what is available are snippets of forfeiture provisions in the enabling laws of various Federal agencies.

3.1 Conviction Based Forfeiture or Criminal Forfeiture

Conviction based forfeiture or criminal forfeiture is an action against a person (*in personam*), which connotes a legal process that facilitates the recovery of property linked to criminal activity. This requires a criminal trial and conviction, and is often part of the sentencing process. The process is triggered by a criminal conviction for a predicate offence. (Note 1) The public policy edict of confiscation law, that individuals not retain the profits of unlawful enterprise, derives legitimacy from the age-old adage that crime should not pay, which in turn is based on the ancient rule that no person profits from crime. In the late nineteenth century, Lord Justice Fry, in *Cleaver vs Mutual Reserve Fund Life Association*, explained: “*It appears to me that no system of jurisprudence can with reason include amongst the rights which it enforces, rights directly resulting to the person asserting them from the crime of that person*” (*Cleaver v Mutual Reserve Fund Life Association*, 1892)

3.2 In Rem Forfeiture or Non - Conviction Based Forfeiture

In rem forfeiture or Non - Conviction Based Forfeiture is a legal mechanism that provides for the restraint, seizure, and forfeiture of stolen assets without the need for a criminal conviction. It can be used when the accused is dead, fled the jurisdiction, is immune from investigation or prosecution like in the case of serving Presidents, Vice – Presidents, Governors and Deputy Governors in Nigeria, or is a Political Exposed Persons (Nigeria Const. sec. 308. Amend, 1999) who can subvert the criminal justice system for as long as possible. In rem Forfeiture is an action against the asset itself. It is not contingent upon criminal conviction because the action is not against an individual but against the property, the owner of the property is a third party having the right to defend the property. Compared to criminal forfeiture, civil forfeiture offers fewer procedural requirements.

Generally, the criminal conduct must be established on a balance of probabilities standard of proof. This eases the burden on the government and means that it may be possible to obtain forfeiture when there is insufficient evidence to support a criminal conviction. Because the action is not against an individual defendant, but against the property, the owner of the property is a third party having the right to defend the property (Greenberg, Samuel, Grant, & Gray, 2009). The substantial question is whether a link can be established between the property and criminal conduct. Where the owner is able to establish ownership of the property and that he acted in good faith as regards the link between the property and crime, forfeiture is not executed. Where the owner does not successfully defend the property, the property will be forfeited and handed over to the relevant authority.

According to Kennedy Talbot, the two most important potential constitutional challenges to in rem forfeiture are likely to be that civil forfeiture proceedings are, in fact, criminal proceedings and/ or amount to a penal sanction and that a forfeiture order would interfere with property rights (Kennedy, 2011). Nevertheless, most constitutions guard against interference by the state with the right to ownership of property, which is not an absolute right. The question likely to arise in a court in a given case is whether the interference with property justified.

4. Legal Framework of Seizure and Forfeiture

4.1 Criminal Forfeiture

Criminal forfeiture provisions are contained in a number of the enabling laws of anti-corruption, and law enforcement agencies. These provisions specify forfeiture of assets as part of the sentencing process, after the conviction of a defendant and do not seem to make allowance for holding of separate confiscation hearings after sentence of a convicted defendant thereby re-enforcing the point that for a conviction based forfeiture, there must be

a conviction before confiscation can take place. Criminal forfeiture provisions are contained in the following laws-

4.1.1 Advance Fee Fraud and other Fraud Related Offences Act

Section 16 (1) of the Act states that where at any stage of a trial, the High Court is satisfied that a prima facie case has been made out against a person, it may (a) by an order prohibit any disposition of property, movable or immovable, by or on behalf of that person, except to such extent as may be specified in the order; and (b) by an order addressed to the manager of the bank or the head office of the bank where the person has an account or is believed to have an account directing the bank to stop all outward payments, operations or transaction for the time being specified. It states further that the Court may vest in itself or otherwise acquire custody of any property, moveable or immovable of the person, for the preservation of the property, pending the determination of the proceedings.

These provisions deal with making of interim orders of preservation of property and/or of moneys in the bank account of a defendant facing trial. It is obvious from the provisions that for the Court to make an order of prohibition of disposition of property, certain conditions must be present – (a) the person whose property is in issue must be undergoing trial proceedings for an offence under the Act; (b) a prima facie case must have been made out against him, and this presumably must be at the close of the case of the prosecution; (c) the property, movable and immovable must have been identified by the prosecution, and it must be shown to be owned or held by the person on trial or owned or held on his behalf; (d) the Court is at liberty to exempt any portion of the property from the prohibition order, and this must be specified in the order.

4.1.2 Corrupt Practices and Other Related Offences Act

Section 37 of the Act empowers an officer of the Independent Corrupt Practices Commission (ICPC) to, in the course of investigation, seize any movable or immovable property of a suspect which he has reasonable grounds to believe is the subject matter or evidence of commission of an offence under the Act for which the suspect is being investigated. The officer of the Commission can so do without recourse to the Court. Section 38 (1) states that the seizure shall be effected by removing the movable property from the custody and control of the person from whom it is seized and placing under the custody of such person or authority and at such place as the said officer may determine. Section 47 of the Act states that where the suspect is charged with and convicted of the offence, the Court shall make an order for the forfeiture of any property shown to be the subject matter of the offence or to have been used in the commission of the offence. It goes further to say that where the said property has been disposed of, or cannot be traced, the Court shall order the defendant to pay as a penalty a sum which is equivalent to the amount of the gratification or is, in the opinion of the Court, the value of the gratification received by the defendant, and any such penalty shall be recoverable as a fine.

4.1.3 The Economic and Financial Crimes Commission (Establishment) Act

Section 26 of the Act empowers the Economic and Financial Crimes Commission (EFCC) to seize the properties of a person suspected of committing an economic and financial crime discovered upon conducting a search or in the course of arresting the person. Sections 28 and 29 empowers the EFCC to immediately trace and attach all the assets and properties of the person which were acquired as a result of such economic and financial crimes by an order of interim forfeiture of the said properties. It is important to note that it has been held by the Court that section 28 is a condition precedent to exercising the powers in section 29.

In other words, the EFCC must have traced and attached the assets and properties before applying to the Court for an order of interim forfeiture and that where this is not done, the order of interim forfeiture will be improper (*Nwaigwe v Federal Republic of Nigeria*, 2009). It has been held that once the order of interim forfeiture or freezing of account is granted pursuant to a criminal charge, pending or subsequently filed, it cannot be discharged or set aside by the same Court while the charge is still pending (*Felimon Enterprises Nig. Ltd v The Chairman, EFCC*, 2013. *EFCC v Zahara Shopping Mall Ltd*, 2016). Section 30 provides that where a person is convicted of an offence under the Act, the EFCC can confiscate the convicted person's assets and properties acquired or obtained as a result of the crime which were subject to the interim order.

4.1.4 National Drug Law Enforcement Agency Act

Section 33 -36 of the Act empowers the National Drug Law Enforcement Agency (NDLEA) to seize the properties of a person suspected of committing an offence under the Act and immediately trace and attach all the assets and properties of the person through interim forfeiture. Section 42 further provides that where the property in question is moneys or money instruments in an account in possession of a bank, financial institution or designated non-financial institution, the Chairman of NDLEA may, if he is satisfied that the money in the account of the arrested person is made through illegal dealing in trafficking in narcotic drugs or psychotropic substances, issue, or instruct a bank

examiner to issue, an order addressed to the manager of the bank where the account is or is believed by him to be or the head office of the bank. Where a person is convicted of an offence, the NDLEA shall apply to the Court for an order of confiscation and forfeiture of the convicted person's assets and properties acquired or obtained as a result of the crime, which were subject to the interim order (National Drug Law Enforcement Agency Act, s. 37).

4.1.5 Failed Banks (Recovery of Debts) and Financial Malpractices in Banks (Amendment) Act

Section 19 of the Act creates offences in respect of directors, managers, officers and employees of Banks who knowingly, recklessly, negligently, willfully or otherwise grants or approves a loan, an advance, guarantee or credit facility in certain situations and also in respect of debtors of Banks who negligently, willfully or recklessly make false statements or give fake information. Section 7 of the Act empowers the Court to control the property of an accused defendant and it states that where at any stage of a trial, the Court is satisfied that a *prima facie* case has been made out against a person, it may (a) by an order prohibit any disposition of property, movable or immovable, by or on behalf of that person, except to such extent as may be specified in the order; and (b) by an order addressed to the manager of the Bank or the head office of the Bank where the person has an account or is believed to have an account directing the Bank to stop all outward payments, operations or transaction for the time being specified.

It states further that the Court may vest in itself or otherwise acquire custody of any property, moveable or immovable of the person, for the preservation of the property, pending the determination of the proceedings. These provisions deal with making of interim orders of preservation of property and/or of moneys in the Bank account of a defendant facing trial. They are similar to the provisions of the Advance Fee Fraud and Other Fraud Related Offences Act previously discussed and thus similar considerations apply.

4.1.6 Trafficking in Persons (Prohibition) Enforcement and Administration Act

The Act covers forfeiture of any property or instrumentality used in any manner to commit or to facilitate the commission of an offence. This power extends to the forfeiture of any property or instrumentality used in any manner to commit or to facilitate the commission of such offence even if not already disclosed in the Declaration of Assets Form. After conviction, assets shall forfeit to the Victims of Trafficking Trust Fund (Trafficking in Persons (Prohibition) Enforcement and Administration Act, s. 49 & 51). In addition, where a person is arrested or is under investigation for an offence under the Act, the Agency shall immediately trace and attach all the assets and properties of the person, acquired as a result of the offence. What this means is that the Agency shall first seize the property and then apply to the Court for an interim attachment order, which the Court will only grant if satisfied that there is a *prima facie* evidence that the property concerned is liable to forfeiture ((Trafficking in Persons (Prohibition) Enforcement and Administration Act, s. 55). Section 56 of the Act further states that where an arrested person is convicted of an offence, the agency or any authorized officer shall apply to the Court for a final order of forfeiture of the convicted person's assets and properties.

4.1.7 Custom & Excise Management Act

Section 167 of the Act empowers any officer or police officer, or any other person authorized in that behalf by the Board, to at any time seize or detain anything liable to forfeiture under the customs and excise laws or which such officer, police officer or other person has reasonable grounds to believe is liable to forfeiture. Section 168 provides for forfeiture by reason of some offence committed by an excise trader, but such goods are not available for forfeiture, the Board may seize from the stock of that trader goods of that kind to such quantity as would attract the same amount of duty as the amount of duty on the goods liable to forfeiture.

One common thread that runs through all the aforementioned provisions is that they specify forfeiture of assets as part of the sentencing process, after the conviction of a defendant. It does not make allowance for holding of separate confiscation hearings after sentence of a convicted defendant. Thus, it is advisable that confiscation proceedings or the consideration of an application for confiscation should be done as part of the sentencing hearing after conviction. This is because under conviction based forfeiture, there must be a conviction before confiscation can take place.

The Court of Appeal in a recent decision delivered by its Yola Division seemed to suggest that confiscation hearing can be held subsequent to the passing of sentence on a defendant and that same does not have to be part of the sentencing hearing (Dantsoho Alhassan v Federal Republic of Nigeria, 2016). In that case, the prosecution applied for and obtained an order of interim forfeiture in the course of trial. The defendant was found guilty, convicted and sentenced to a prison term. The prosecution failed to apply for the final order of forfeiture. The defendant served his prison term and thereafter applied for the release of his detained vehicles and his contention was that since there was no final order of forfeiture made, he was entitled to the vehicles, having served his sentence. It was at this point that the prosecution filed an application for the final order of forfeiture, giving reasons for the delay. The Federal High

Court dismissed the application of the defendant and subsequently granted the order of final forfeiture. On appeal, the Court of Appeal affirmed the decision of the Federal High Court.

However, it is important to note that the Court did not do that as a general principle, but on the peculiar facts of the case and based on the specific provisions of National Drug Law Enforcement Agency Act. It must always be borne in mind that either in the consideration of the application for interim forfeiture or in the consideration of the application for confiscation after conviction, the onus of proof on the prosecution in connecting the assets and properties to be forfeited to the defendant and the offence is the civil burden of proof, balance of probabilities, and not the criminal burden of proof, beyond reasonable doubt (Dantsoho Alhassan v Federal Republic of Nigeria, 2016).##

4.2 *In Rem* Forfeiture

Nigeria has in rem forfeiture provisions in some legislation. Though not a satisfactory position, the laws nevertheless recognize forfeiture in rem of properties illicitly acquired in diverse situations, including where the defendant could not be convicted of any crime. It is important to note that, In rem forfeiture does not undermine the outcome of the criminal process, particularly because it is preventative and/or compensatory rather than punitive in nature

4.2.1 Advanced Fee Fraud and Other Fraud Related Offences Act

The Advanced Fee Fraud and Other Fraud Related Offences Act clearly states that the order of forfeiture under the Act shall not be based on conviction for any offence, thereby legalizing in rem forfeiture. Section 17 requires the following matters to be taken into consideration before an in rem forfeiture is granted; an ex parte interim forfeiture order must have been granted; notice must have been given or publication made; the High Court must be reasonably satisfied that property is unclaimed property or proceeds of unlawful activity under the Advanced Fee Fraud and Other Fraud Related Offences Act, the Money Laundering Act of 2004, the Economic and Financial Crimes Commission Act of 2004 or any other law enforceable. At the expiration of 14 days or such other period as the High Court may reasonably stipulate from the date of the notice or making of the publication, an application shall be made by a motion on notice for the final forfeiture of the property concerned to the Federal Government of Nigeria.

In the case of Federal Government of Nigeria & Others v Central Bank of Nigeria & Anor, the court held as follows: *“In the light of the staunch denial of Chief James Ibori as the owner of the controversial \$15million being sum the 3rd Applicant's officials recovered in the course of investigating Chief James Ibori sometime in April 2007, the said \$15million qualifies by these events within the provisions of the Act cited as an “unclaimed property”, and having regard to the controversy that surrounds its origin and or its ownership, its also in my view, raises a presumption as to make it to be “suspected to be proceeds of some unlawful activity” and makes it prima facie, susceptible to an order to have it forfeited to the Federal Government of Nigeria..... In the final analysis, the Applicants' application to make a final forfeiture order succeeds and the said sum of \$15million is hereby forfeited to the 1st Applicant who shall take steps to capture it in the earnings of the Federal Government of Nigeria for the fiscal year 2012/2013 and shall administer the funds to address specific needs that will be beneficial to greater number of the citizenry. The Respondent shall on the authority of this judgment take necessary steps to ensure that the said sum of \$15million is immediately paid to the coffers or account of the appropriate authority of the Federal Government of Nigeria where earnings such as this are kept in the ordinary course of official business”*

On 8 March 2019, the case of Patience Jonathan Goodluck Vs Federal Republic of Nigeria, decided the position of the Supreme Court on the nature and constitutionality of in rem forfeiture. Prior to the judgment of the Supreme Court, the Court of Appeal in *Nwigwe v FRN*, in testing the Constitutionality of S. 29 of the EFCC Act (note 2) stated that *“Forfeiture of property cannot be anything other than punishment and as provided by the above provision. It is quite natural and appropriate when it is inflicted on the appellants after due trial and conviction. Section 29 of the EFCC Act clearly imposes punishment on the appellants by way of forfeiture of property on the basis of mere suspicion. It constitutes an infraction on the rights of the appellants under section 36 (5) of the Constitution and is in wild riot or conflict with the constitutional provision. I have no hesitation in finding the provision of section 29 of the EFCC Act as unconstitutional. I therefore invoke the provision of section 1 (3) of the Constitution to declare the provision of section 29 of the EFCC Act as null and void. That dictatorship like provision was an unfortunate misplacement in our laws under democratic governance”*. (note 3)

A position recently advanced by the Supreme Court in the case of *Mrs Jonathan*, states that the position of the Court of Appeal in *Nwigwe* does not represent the correct stance of the law. (note 4) The Supreme Court however held that while section 29 of the EFCC Act remains valid to the extent that it is enforced temporarily during the pendency of a criminal charge, the said section would be unconstitutional when enforced permanently. The Court stated that ‘the intention of sections 28 and 29 of the EFCC Act is merely to get a preservative order on the property

suspected to be proceeds of crime so as to prevent the accused person or suspect from dissipating the assets so the final judgment of the court will not be rendered nugatory in the event of a conviction or where the interested person fails to show cause.

In Jonathan's case, the appellant challenged an Order of interim forfeiture of funds exceeding two billion naira in the name of the Appellant and domiciled in various Nigerian banks. The Order of the Federal High Court was made pursuant to section 17 of the Advanced Fee Fraud and Other Fraud Related Offences Act, which the Appellant argued was unconstitutional on the grounds that the proceedings for forfeiture under section 17 qualifies as a criminal process in personam as opposed to a civil process in rem and therefore denying the Appellant her right to fair hearing when the Federal High Court made its order of interim forfeiture ex-parte and that forfeiture whether interim or final under section 17 is punitive and therefore in conflict with section 44 of the 1999 Nigerian Constitution.

In resolving the issues, the Supreme Court held that forfeiture under section 17 is a civil process in rem which neither requires the criminal conviction of the property owner nor his innocence. His Lordship Akaahs JSC stated that civil forfeiture is an action in rem that is embarked upon when the interest of the State is merely to recover the proceeds of unlawful activity. He added that the modern explosion of civil forfeiture laws as a method of crime control is certainly due to organised crime and laws now make provision for forfeiture of assets that are connected to crime without any requirement for a conviction, thereby applying the standard of proof in civil law rather than proof beyond reasonable doubt required in criminal prosecution

He further stated that it is not the procedure that matters but the substance of the application and what it is intended to achieve. Not only that, the proviso to section 36(5) of 1999 Constitution recognizes the validity of any law which imposes the burden of proving particular facts on the person charged with an offence who is presumed innocent until proven guilty.... The standard of proof required to invoke section 17 (1) of the Act and section 19(3) of the Money Laundering Act read along with section 36 (1) and (5) of Constitution is not proof beyond reasonable doubt but proof on a balance of probability. As such, an ex-parte application for interim forfeiture of property that is not predicated on conviction of the owner of the property would necessarily be an action in rem because it is the recovery of the property that the law aims at.

This argument is supported by the record of in rem forfeitures made under section 17 and existing scholarship. Giving the framework, it is clear that the decision in *Patience Jonathan v FRN* connotes two applicable proceedings for forfeiture of proceeds of crime in Nigeria that is forfeiture under criminal process made interim during the pendency of a charge and absolute by confiscation after conviction; and forfeiture under civil process.

4.2.2 Corrupt Practices and Other Related Offences Act

Section 48(1) of the Corrupt Practices and Other Related Offences Act provides that where there is no prosecution or conviction for an offence under the Act, the Chairman of the Commission may, before the expiration of twelve months from the date of the seizure, apply to a judge of the High Court for an order of forfeiture of that property if he is satisfied that such property had been obtained as a result of or in connection with an offence under sections 8 to 19 (Corrupt Practices and Other Related Offences Act). (note 5)

4.2.3 Administration of Criminal Justice Act

Part 34 of the ACJA implements specific provisions on the seizure, forfeiture, confiscation and destruction of instrumentalities of crime and some of those provisions are not dependent upon a conviction. For instance section 333 of the Act implies that once there is reason to believe that anything would be used to commit an offence such item should be seized and forfeited to government or returned to the rightful owner. This section focuses on the property and not the defendant. Furthermore, section 337(2) states that where the owner of a property is unknown, the Court may detain property, issue public notice and where nobody shows up to claim the property within six months, the court may order property to be sold and proceeds forfeited to the Federal Government of Nigeria (Administration of Criminal Justice Act, s 338(1)).

5. Management of Seized or Forfeited Assets

Asset seized is of little value if, at the end of the day, there is nothing left to be forfeited, as such it is critical that adequate measures are taken to secure the assets that may eventually be forfeited to the Federal Government. Once assets have been secured through provisional measures, agencies will need to ensure the safety and value of the assets up until the assets are eventually confiscated or released. Sometimes these control mechanisms are capable of

working effectively over assets without any need for ongoing supervision and management. For instance once an order to freeze a bank account has been served on the bank, the bank can usually be relied upon to ensure that the account is effectively blocked. Other assets may require more targeted approaches to ongoing maintenance, control and management, such as vessels, exotic vehicles, and luxury real estate. It is essential for any asset confiscation system to have the flexibility to control and manage such assets pending confiscation, and the ability to realize them and pay the proceeds to government or other authorized recipients after confiscation (United Nations Convention Against Corruption, art. 31(3); G8 Best Practices for the Administration of Seized Assets, 2005; Organization of American States Model Regulations, Article 7).

In Nigeria, the existing practice of decentralized assets management regime by various anti-corruption agencies and law enforcement agencies has proved ineffective and wasteful. Under Nigeria law, the Corrupt Practices and Other Related Offences Act is about the only law that contain some basic, though not adequate, provisions on the handling of properties seized or forfeited property. This lacuna in the laws of agencies task with the mandate to recover assets, can be appreciated when viewed from the angle that court cases in Nigeria often last for several years before they are concluded. Hence, properties recovered remain in control of the Government agencies and attention must be given to the management and maintenance of the assets while the case is pending in court. Quite a number of vehicles including vessels under interim forfeiture lay wasting at various holding sites across the country. This is not an appropriate asset management strategy because being depreciating assets; vehicles lose their economic value if they continue to be subjected to the elements, which substantially reduce the recovery of any sales proceeds when they are eventually sold after obtaining a final order of forfeiture.

Section 38 of the Corrupt Practices and Other Related Offences Act provides guidance on the management of seized or forfeited property. It states that where any movable property is seized and requires to be moved from the custody or control of the person from whom it is seized and to be placed under the custody the Commission, the Court may determine. Where it is not practicable, such property may be left at the premises in which it is seized under the custody of such persons as may entail for the purpose. The section further states that where any movable property seized is liable to decay or deterioration, or is property which cannot be maintained without difficulty, or not practicable to maintain, the Commission may sell or cause such property to be sold at the prevailing market value and shall hold the proceeds of the sale, after deducting the costs and expenses of the maintenance and of the sale of the property.

Obviously, an effective property management framework is necessary for the integrity of an asset recovery framework and there are a number of different ways in which a country might approach their property management responsibility for proceeds or instruments of crime. The structure for a property management framework will depend in part on the legislation, guidelines and procedures in place for asset freezing, seizure and forfeiture. At the moment, Nigeria does not have a holistic legislation that provides for the recovery and management of proceeds of crime.

5.1 Recommended Framework for the Recovery and Management of Recovered Assets

In July 2016, the Presidential Advisory Committee against Corruption (PACAC) in collaboration with the Commonwealth Secretariat organized a three day National Stakeholders Meeting on the “Recovery and Management of Recovered Assets for Nigeria”. Heads and representatives from thirty government agencies and other International Organizations attended the meeting. (note 6) At the end of the meeting a recommended framework for the management of recovered assets was produced and adopted for the benefit of law enforcement and anti corruption agencies dealing with asset forfeiture cases. The following steps are required to be taken to ensure that recovered property is properly managed:

5.1.1 Creation of a Management Team

The management team will be multi-disciplinary, and includes professionals such as valuers, accountants, asset managers etc and will provide for third party management where the seized property requires complex managerial skills through a public tender. This process will ensure transparency in conformity with best practices in procurement procedures.

5.1.2 Pre-Seizure Planning Before the Freezing Order

There should be a pre-seizure planning before the freezing order is issued as this is essential to the overarching policy objectives of assets management. This must include but is not limited to the legal basis of seizure, the location and nature of the property, the security required to secure it, the appropriate management model, the type of managers and legal requirements relevant to the management model. This must also include a risk assessment for the security of the personnel conducting the search and seizure.

5.1.3 The Freezing Order

This requires the determination of the conditions to be contained in the order (restraint/preservation) from the court. The determination of this question will invariably include the consideration of all issues at the pre-seizure stage. The preservation of the property in a good state once it comes into the hands of the relevant agency pending the final outcome of the forfeiture case. Some types of property, like cash or a vehicle, may need to be physically removed or have some special arrangement.

5.1.4 The On-going Management of Property, After Restraint

The type of property will define the technique needed. A bank account might be effectively frozen by an order binding on the financial institution in an interest bearing account; a vehicle may need to be securely stored, bonded or sold; complex properties, like an on-going business, will require complex management (paying employees and suppliers, meeting existing contractual obligations, collecting revenues etc.). The final disposition of property where final forfeiture has been ordered, property will have to be sold or disposed of. In the event that the court does not make a forfeiture order, the property must be returned to the rightful owner.

5.1.5 Record Keeping/Assets Register

The record of all the restrained properties must be kept and maintained in a database. It is important that accurate and updated records are kept at all times of the assets should be recorded either by way of photograph or video with a detailed inventory indicating the state and condition of the property at the time of seizure. This inventory should be confirmed and signed by both the authorized government representative and the owner of the property. If a going concern is seized, then a regular set of business accounts should be produced so that chattels and other business assets can be identified. It is also important to get the cooperation of the owner and to make that possible, it is recommended to make this request in the application to the Court during the interim order proceedings in case the owner may not be willing to cooperate.

5.1.6 Securing Seized Assets after the Order

In securing seized assets, the following actions should always be considered: Insurance of the property by a government agency; registration of legal interests for instance any third party or mortgagee; the physical safety of the property needs to be considered and items such as motor vehicles will need to be put in secure storage.

5.2 Management of Assets

In 2017 a Presidential Committee on Audit of Recovered Assets was set up to audit all accounts in which the recovered assets were lodged to ensure its accuracy (AIT Online). The Committee recommended amongst others; a clear separation of responsibilities for the custody, management and realization of funds from disposal of assets, investigating and prosecution of alleged offenders; a creation of a lean, efficient and centralized asset management body; a recovered assets trust and; a centralized cash & non-cash assets register. The interim measures in place for the management of recovered assets is as follows-

5.2.1 Presidential Committee on Asset Recovery

In 2016 the President set up the Presidential Committee on Asset Recovery (PCAR). PCAR is vested with administrative powers and chaired by the Vice President of Nigeria. The committee has oversight powers and is responsible for coordinating the recovery, and disposal of assets and proceeds of crime in a centralized manner. (note 7) PCAR only coordinates recoveries; it does not manage or dispose assets.

5.2.2 Inter Agency Assets Tracing Team

The team provides technical support to the Committee and ensures transparency in tracking, identifying and facilitating the recovery of assets. It also ensures accountability, transparency and public confidence in the assets' recovery process.

5.2.3 Technical Sub-Committee on Asset Recovery and Management, Ministry of Finance

The sub-committee is chaired by the Permanent Secretary, Special Duties, Office of the Secretary to the Government or the Federation and provides support to the Federal Ministry of Finance in its custody and management of recovered assets and this includes accounting, logistics and legal support. The membership include representatives from the Federal Ministry and Finance and Office of the Accountant General of the Federation. The functions of the sub-committee is to serve as a think tank for the Federal Ministry of Finance; provide logistics support to the Inter-Agency Task Team; provide legal advice on issues that may arise as well as provide guidance concerning accounting procedures.

6. Conclusion

In consolidating the efforts in the fight against corruption, Nigeria has witnessed the increased use of in rem forfeiture mechanism as a means of fighting corruption as well as recovering assets. Clearly, the Supreme Court judgment in the case of Patience Jonathan v FRN has resolved the issues relating to the nature and constitutionality of in rem forfeiture of proceeds of crime by reiterating that forfeiture under section 17 of the Advance Fee Fraud and Other Fraud Related Offence Act is a civil process “in rem” which neither requires the criminal conviction of the property owner nor his innocence. The emergence of this present government’s anti-corruption drive has exposed the advantages of in rem forfeiture mechanism in the recovery of assets. So far, anticorruption agencies have fully taken advantage of this provision and Courts have successfully granted in rem forfeiture orders on a number of assets. In rem forfeiture sends a very strong message to corrupt persons that even if they manipulate the system and avoid going to jail, they would nevertheless not procure pecuniary advantage either for themselves or for their families. Finally, it should be emphasized that in rem forfeiture should not be seen as an alternative or substitute for the institution of criminal proceedings when there is sufficient evidence to support such proceedings and where such proceedings would otherwise be justified.

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Notes

Note 1. A predicate offence is a crime that is a component of a more serious criminal offence like a financial crime e.g. money laundering, fraud, bribery.

Note 2. Where: the assets or properties of any person arrested for an offence under this Act has been seized; or any assets or property has been seized by the Commission under this Act, the Commission shall cause an application to be made to the Court for an interim order forfeiting the property concerned to the Federal Government and the Court shall, if satisfied that there is *Prima Facie* evidence that the property concerned is liable to forfeiture, make an interim order forfeiting the property to the Federal Government.

Note 3. Per Mukhtar JCA

Note 4. Per Akaahs JSC Pg. 41, 55.

Note 5. These sections deals with Gratification by an official; Corrupt offer to Public Officers; Corrupt demand by persons; Counseling offences relating to corruption; Fraudulent acquisition of property; Fraudulent receipt of property; Penalty for offences committed through postal system; Deliberate frustration of investigation of investigation by the Commission; Gratification by and through agents, and definition of agents; Offence of using office or position for gratification.

Note 6. Ministry of Foreign Affairs, Ministry of Finance, Ministry of Justice, Department of State Services, Office of the National Security Adviser, Nigeria Police Force, Nigeria Customs Service, Federal Inland Revenue Service, Federal High Court, High Court of the Federal Capital Territory, Nigerian Security Civil Defense Corps, National Agency for the Prohibition of Traffic In Persons, National Drug Law Enforcement Agency, Federal Capital Territory Authority, Economic and Financial Crimes Commission, Independent Corrupt Practices Commission, Office of the Federal Accountant General, Office of the Honourable Attorney General of the Federation, Chattered Institute of Bankers of Nigeria, Chattered Institute of Estate Surveyors and Valuers Management of Nigeria, Institute of Chattered Accountants of Nigeria, Nigerian Institute of Advanced Legal Studies, World Economic Forum's Abuja Global Shapers, TransparencIT-NG, ESFAJ & Partners and select media outfits. Expert and Technical Support provided by Commonwealth Secretariat, UNODC/World Bank and Asset Recovery Inter-Agency Network of Southern Africa.

Note 7. PCAR's membership include the Attorney General of the Federation and Minister of Justice, Minister of Finance, Chairman of the Economic and Financial Crimes Commission, Chairman of the Independent Corrupt Practices Commission, Director General of the Department of State Security, National Security Adviser Inspector General of Police and Minister of Information and Culture.