A Commentary on the Confiscation Regime in Zambia By Way of Review of the Forfeiture of Proceeds of Crime Act of 2010

BY

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A dissertation submitted to the University of Zambia in partial fulfilment of the requirements for the degree Bachelor of Laws (LLB) of the University of Zambia.

May 2012
DECLARATION

I, MUSA BAH, computer number – 28026900 do hereby declare that I am the author of this Directed Research entitled: A Commentary on the Confiscation Regime in Zambia By Way of Review of the Forfeiture of Proceeds of Crime Act of 2010, and confirm that it is my own work. I further declare that due acknowledgement has been given where work of other scholars has been used. I verily believe that this research has not been previously presented for a degree at the University of Zambia or any other University.

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ABSTRACT

This research endeavours to give provide a commentary on the confiscation regime in Zambia by reviewing the Forfeiture of Proceeds of Crime Act of 2010. In order to do this the essay has highlighted the challenges faced by authorities around the world when implementing forfeiture laws and has also looked at the justification and rationale for such laws. The essay looked at the origins of forfeiture laws from middle age England and proceeded to look at the previous legislation that governed forfeiture and confiscation of illegally obtained wealth in Zambia. The essay analyses in detail the important sections of the Act, these include section 4, sections 10-12, sections 24, 29 and sections 71, 72 and 78. The research analyses how they are meant to work, the possible pitfalls and the possible areas of reform. Finally the essay analyses the judicial decisions that have been made around the world regarding forfeiture and confiscation laws and how these decisions may be applied to the Zambian legislation.

The research concluded that there are obstacles and challenges to the application and the very existence of forfeiture and confiscation laws. Despite these obstacles an increasing number of jurisdictions across the world have implemented such laws. The judiciary in all these countries have upheld these laws simply because of the perceived important and pivotal role the laws play in the fight against graft and abuse of power. The Forfeiture of Proceeds of Crime Act of 2010 will probably face many challenges in its application. However this will not detract its importance or its perceived necessity because the judiciary just like in other jurisdictions around the world will protect these laws.

The objectives of this research have been achieved by analysing the applicable laws and judicial decisions, scholarly articles, magazine articles as well as the internet. There are obstacles and
serious challenges that plague any law that aims to deprive private citizens of their property regardless of how that property may have been obtained. However the perceived importance of such laws has in most instances allowed the judiciary to find ways to look past such obstacles or challenges.
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Chapter 1

1.0 INTRODUCTION

The corrupt money associated with bribes received by public officials from developing and transition countries is estimated to be $20 billion to $40 billion per year—a figure equivalent to 20–40 percent of flows of official development assistance. The amount of stolen assets is of such a staggering magnitude that it has a devastating impact on development. The theft of public assets is a development problem of the greatest magnitude. The exact value of state assets that have been stolen from developing countries is impossible to determine with any precision. Between $1 trillion and $1.6 trillion is lost each year to various illegal activities. Corrupt public officials in developing and transition countries loot as much as $40 billion each year, concealing these funds overseas where they are extremely difficult to recover. This figure is equivalent to the annual GDP of the world’s 12 poorest countries, where 240 million people live.¹

The true cost of corruption far exceeds the value of assets stolen by the leaders of countries. It leads to the degradation and distrust of public institutions, especially those involved in public financial management and financial sector governance; the weakening if not destruction of the private investment climate; and the corruption of social service delivery mechanisms, such as those for basic health and education programs, with a particularly adverse impact on the poor.²

In this regard laws that both deter and strip possible corrupt officials of the property and money that is looted are crucial in the development of developing nations. The Forfeiture of Proceeds

² ibid, p. 10
of Crime Act of 2010 was therefore a crucial Act in the development of the Zambian legal system and the fight against corrupt practices by public officials. However confiscation laws by their very nature are not easy to administer and have significant groups of vocal opposition. The importance and necessity of these laws however make it imperative that they are implemented with the minimum detraction and maximum adherence to the standards that have been internationally established and the standards of constitutional democracy. Therefore this paper makes case for the importance of confiscation laws; it looks at the difficulties inherent in administering these laws and looks at the standards established in different jurisdictions and how these standards can be applied to the Zambian Act.

1.1 STATEMENT OF PROBLEM

Confiscation laws wherever they are introduced in the world always have groups of vocal opposition because as many detractors have argued in the past they are at odds with the with constitutional guarantees of property rights and are usually at odds with the established standards of criminal and civil standards of trial. Because of the importance of such laws in a developing country like Zambia it was necessary to look at these lingering doubts and suspicions towards these laws and look at how the law works, the obstacles in implementing them and to come up with suggestions and recommendations regarding the better application of the law.

The law pertaining to the confiscation of illegally obtained wealth in Zambia is the Forfeiture of Proceeds of Crime Act.\textsuperscript{3} The Act is largely the same as the English Proceeds of Crime Act of

\textsuperscript{3} Act no 19 of 2010
2002. According to the Bill that proposed the enactment of the Act, the objectives of the Act are to:

a) provide for the confiscation of the proceeds of crime; b) for the deprivation of any person of any proceed, benefit or property derived from the commission of any serious offence; c) facilitate the tracing of any proceed, benefit and property derived from the commission of any serious offence; and, d) the provide for the domestication of the United Nations Convention against Corruption.

A key element in this Act is that the forfeiture proceedings are treated as civil proceedings and not criminal proceedings, and therefore the burden of proof is somewhat lower. One of the criticisms of the previous legislation on corruption relates to the burden of proof for convicting criminals. Under the Forfeiture of proceeds of Crime Act the state are only required to prove their case on a ‘balance of probabilities’ as opposed to ‘proof beyond reasonable doubt’ which is required in criminal proceedings. Another key element is that the Government is able to recover obtained property without waiting for the conclusion of criminal proceedings. Therefore it is possible for the government to take parallel routes with civil proceedings taking place at the same time as the criminal proceedings.
1.2 OBJECTIVES

GENERAL OBJECTIVE

This paper shows the difficulties inherent in the application of confiscation laws and shows the importance of the decisions made in other jurisdictions around the world and their importance to the Zambian Act.

SPECIFIC OBJECTIVES

1. To clearly illustrate the pitfalls inherent in the application of forfeiture laws

2. To review the Forfeiture of Proceeds of Crime Act and illustrate the way the important sections in the Act work

3. To show how different jurisdictions have construed the pertinent provisions of the Act and show how these may be applied to the Zambian Act

1.3 RATIONALE AND JUSTIFICATION

Zambia as a poor African country struggles with the problem of corruption and abuse of office which tends to delay the development process and is a chief cause of poverty. It is a fact that most corruption scandals come to the fore after a change of government. Due to the excitement and the smugness on the part of the new people in power there is a lack of observance of due process and a general disregard of the law in the rush to punish “offenders” and to settle political scores.

Legislation that allows for confiscation of property in such an environment and in the wrong hands can be a dangerous tool if not properly administered. Due to the recent change in government there has been a rise in the number of cases relating to confiscation of property that has been seen as having been illegally obtained. Even though this is a just cause and the
government are well within their rights to bring such cases, such cases are always controversial either due to the lack of understanding of the law or due to plain ignorance. Therefore there was need to look at how this law would work and to look at the possible results of the application of this law.

1.4 METHODOLOGY

This research will primarily rely on desk research. Secondary data in the form of journals, scholarly articles as well as the internet were be consulted in order to attain the most recent information on the subject matter which continues to be addressed globally by scholars.
1.5 OUTLINE OF CHAPTERS

Chapter One
This chapter gives an introduction to the research and will also deal with the basic aspects of the research. It will include the statement of the problem, objectives of the research questions, significance of the study, the methodology and the chapter lay out.

Chapter two
This chapter looks at the challenges that have been faced by authorities throughout the world when implementing forfeiture laws and will also look at the justification for such laws.

Chapter three
This chapter looks at the history of the legislation on forfeiture of proceeds of crime in England and how Zambia has come to adopt its own legislation. This chapter also focuses on the similarities and differences between the English and the Zambian legislation.

Chapter four
This chapter reviews the precedent that has been set so far in construing legislation regarding forfeiture of proceeds of crime in England and other jurisdictions and how the Zambian judiciary can benefit from these decisions

Chapter Five
This chapter gives the general conclusion of the research, recommendations and possible areas of reform in confiscation of proceeds of crime in Zambia.
Chapter 2

Justification, Rationale for Forfeiture Laws and the Challenges of Implementation

2.0 Introduction

Confiscation and forfeiture of private property by the state whether it is carried out under civil or criminal proceedings always raises controversy because it goes against one of the foundations of constitutional democracy that the state will not interfere with the right of its citizens to own property. Thus whenever legislation that aims to deprive property that is deemed to have been illegally obtained is enacted in a jurisdiction, there are always obstacles and constitutional challenges to such laws. Thus this chapter will look at the literature from different jurisdictions on the challenges to such laws. The chapter will also look at the justification for these laws made by their proponents.

2.1 Justification

According to Justice Anthony Smellie Q.C[^1], “the worldwide adoption of laws which enable the confiscation of the proceeds of crime reflects the acknowledged importance of depriving the criminal of his profits. These laws recognise that organised criminals use their proceeds of crime to insulate themselves, by the use of intermediaries, from detection and arrest. They acknowledge that the more profitable the crime, the more difficult it becomes for law enforcement to link the criminal to it. The proceeds of crime become the very means by which the bastions of organised crime can be created and sustained”.

He argues that "Confiscation of assets that are gained by ill means is based upon acknowledged moral and social principles. The most fundamental of these is that no person should be allowed to become unjustly enriched at the expense of his victims or of society at large. The extreme measures adopted by the criminal to obtain and keep his proceeds of crime have come to be used as justification for the draconian measures needed for effective law enforcement."

Justice Smellie further observes that throughout the common law world, laws enacted to enable the confiscation of the proceeds of drug trafficking, and in many cases the proceeds of all serious crimes, have withstand the challenges of constitutional validity. Courts have consistently held that these laws, though draconian in nature, contain measures which are reasonable and necessary in a democratic society to combat the scourge of drug trafficking and organised crime. This was illustrated in the American case of Austin v The United States.²

After a state court sentenced petitioner Austin on his guilty plea to one count of possessing cocaine with intent to distribute in violation of South Dakota law, the United States filed an in rem action in Federal District Court against his mobile home and auto body shop under 21 U.S.C. § 881(a)(4) and (a)(7), which provide for the forfeiture of, respectively, vehicles and real property used, or intended to be used, to facilitate the commission of certain drug related crimes. In granting the Government summary judgment on the basis of an officer's affidavit that Austin had brought two ounces of cocaine from the mobile home to the body shop in order to consummate a prearranged sale there, the court rejected Austin's argument that forfeiture of his properties would violate the Eighth Amendment's Excessive Fines Clause. The Court of Appeals affirmed, agreeing with the Government that the Eighth Amendment is inapplicable to in rem civil forfeitures.

² Austin v The United States No. 92-6073. Argued April 20, 1993 -- Decided June 28, 1993
2.2 Rationale

The most common rationale for civil forfeiture laws is usually the personification theory which creates a fiction of personality that is granted to the property itself. Thus the proceedings are against the object itself and the property is held accountable for violation of the applicable laws. Because of this fiction, courts can disregard the innocence of the owner and commence proceedings against the object itself. The forfeiture action is against the thing itself and not the owner. This in American jurisprudence is what is referred to as the Taint Doctrine. The doctrine that the object itself had been tainted from its use in the illegal activity and is thus targeted by prosecutors itself. ³

The U.K. legislation is a little different from the approach taken in the US. The subject property must still be shown to be property obtained through personal unlawful conduct. Justice Smellie observes that, "This is notwithstanding the provision (in section 240 (2)) to the effect that the recovery proceedings may be brought whether or not anyone has been charged with an offence to which the property relates. What is required is proof of the unlawful predicate conduct to the civil standard of proof, and proof to the same standard that the defendant has a criminal lifestyle. Thus, civil proceedings for an order for the recovery of property in the U.K. will still be taken against a respondent who holds recoverable property, rather than directly against the property itself." ⁴

2.3 Difficulties if Implementation

One of the most contentious issues when it comes to implementation of forfeiture laws is the standard of proof and the rules of evidence to be used during confiscation or forfeiture

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⁴ Justice Smellie, page 8
proceedings. An example can be made of the differences between the legal regimes in South Africa and Australia. The South African Prevention of Organised Crimes Act of 1998 provides in section 13 that:

(1) For the purposes of this Chapter proceedings on application for a confiscation order or a restraint order are civil proceedings, and are not criminal proceedings.

(2) The rules of evidence applicable in civil proceedings apply to proceedings on application for a confiscation order or a restraint order.

(3) No rule of evidence applicable only in criminal proceedings shall apply to proceedings on application for a confiscation order or restraint order.

(4) No rule of construction applicable only in criminal proceedings shall apply to proceedings on application for a confiscation order or restraint order.

(5) Any question of fact to be decided by a court in any proceedings in respect of an application contemplated in this Chapter shall be decided on a balance of probabilities.

Thus the South African Act clearly state that proceedings under the Act are civil proceedings and are to be treated as such. The standard of proof is on a balance of probabilities. This provision is in line with a number of jurisdictions but some have argued that it may be unconstitutional. This provision of POCA seems to be in direct contravention of the constitutional principle of presumption of innocence which requires that an accused should only be convicted when there is proof beyond a reasonable doubt.  

Regarding the Australian legal regime, Justice Smeelie has noted that “... the different states have taken different routes to forfeiture and confiscation of proceeds of crime. Building on the

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6 Justice Smeelie, page 9
earlier Drug Trafficking (Civil Proceedings) Act 1990, the Criminal Assets Recovery Act of New South Wales ("C.A.R.A") provides that a person can be made to account for and explain assets and profits in a civil proceeding whether or not that person has been convicted and even if the person has been acquitted in a criminal court. The critical thing that must be proved is that it is more probable than not that the person is engaged in serious crime."

He further states, "where a restraint order prior to confiscation is sought on the basis that the property is suspected to have been derived from crime, the court must make the order if it is satisfied that there are reasonable grounds for suspicion that it was so derived. Undertakings in damages are required from the prosecution to indemnify an innocent respondent or third party who might be affected by the restraint. The court must make a forfeiture order if it is satisfied on a balance of probabilities that the respondent engaged in some form of serious criminal activity during the previous six years, without the need to prove a particular offence. In addition or alternatively, the court may make an order for the assessment of the proceeds if it finds it more probable than not that the defendant engaged in serious criminal activity in the previous six years. If so satisfied, the court must assess the gross value of the proceeds derived from any illegal activity undertaken during that six-year period and order repayment to the state of that amount."\(^7\)

In some Jurisdictions, it is a common occurrence for the burden of proof to shift during confiscation or forfeiture proceedings.\(^8\) This in the case of McIntosh v Lord Advocate\(^9\), Lord Hope on behalf of the judicial committee of the Privy Council stated:

\(^{7}\) Justice Smellie, page 10
\(^{8}\) ibid
\(^{9}\) McIntosh v Lord Advocate [2001] Cr. App R. 490 at 509-510
"The essence of drug trafficking is dealing or trading in drugs. People engage in this activity to make money, and it is notorious that they hide what they are doing. Direct proof of the proceeds is often difficult, if not impossible. The nature of the activity and the harm it does to the community provide a sufficient basis for the making of these assumptions. They serve the legitimate aim in the public interest, of combating that activity. They do so in a way that is proportionate. They relate to matters that ought to be within the accused’s knowledge, and they are rebuttable by him at a hearing before a judge on the balance of probabilities. In my opinion a fair balance is struck between the legitimate aim and the rights of the accused”.

Justice Smeelie has stated that, “there is no basis for distinguishing between the proceeds of drug trafficking and other serious crimes for these purposes. Moreover, the arguments against the reversal of the onus in forfeiture cases on grounds of violation of human rights or other unconstitutionality have been unreservedly rejected by the courts.” In the case of Attorney General of Hong Kong -v- Lee Kwong-Kut\(^{10}\) Lord Woolf stated:

“In order to maintain the balance between the individual and the society as a whole, rigid and inflexible standards should not be imposed on the legislature’s attempts to resolve the difficult and intransigent problems with which society is faced when seeking to deal with serious crime. It must be remembered that questions of policy remain primarily the responsibility of the legislature. It would not assist the individuals who are charged with offences if, because of the approach adopted to ‘statutory defences’ by the courts, the legislature, in order to avoid the risk of legislation being successfully challenged, did not include in the legislation a statutory defence to a charge.

\(^{10}\text{Attorney General of Hong Kong -v- Lee Kwong-Kut} \ [1993] \text{AC 951}\)
Lord Woolf set down a test for when a reverse of the burden of proof would be acceptable: "Whether they are justifiable will in the end depend upon whether it remains primarily the responsibility of the prosecution to prove the guilt of the accused to the required standard and whether the exception is reasonably imposed, notwithstanding the importance of maintaining the principle [of the presumption of innocence]. . . If the exception requires certain matters to be presumed until the contrary is shown, then it will be difficult to justify that presumption unless, as was pointed out by the United States Supreme Court in Leary v United States [1969] 23 L Ed 2d 57, 82, "it can be at least said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend."

Justice Smellie\(^{11}\) has observed that one of the main obstacles to confiscation and forfeiture of proceeds of crime is conviction based forfeiture. He notes that "most common prosecutorial obstacle is the need to obtain a conviction for the predicate offence from which the proceeds must be shown to be derived. This requirement is still the state of the law in most countries. It remains the general state of the law, notwithstanding the introduction in many countries of legislation which enables the confiscation of the proceeds of all serious crimes, not just drug trafficking."

The prerequisite of a conviction hinders the usefulness of the restraint or freezing provisions of laws because they, also, typically require a prima facie showing of a criminal case against a defendant in person, or of reasonable cause for belief that such a case exists.

\(2.4\) Forfeiture Laws and the Right to Property

\(^{11}\) Justice Smellie, page 19
2.4.1 Protection of the Right to Property

Micheline notes that "the notion of the right to property can be traced back to Europe; it emerged during the Renaissance a period in which international trade by merchants made use of mercantilist ideas. In 16th Century Europe, Lutheranism and Protestant Reformation advanced private property rights using biblical terminology. The 17th Century Revolutionary Europe unlike what obtained in the 16th Century advanced private property rights as a result of the radical demand for human rights vis-à-vis the state. In the 18th and 19th Century the right to private property as a human right became a subject of intense controversy. Now in modern times, private property rights are respected and protected in human rights instruments.\textsuperscript{12}

This Right may be described as the principle that adult human beings may not be prohibited or prevented by anyone from acquiring, holding and trading valued items not already owned by others. Such a right is thus unalienable and if in fact justified, it is supposed to enjoy respect and legal protection in a just human society. The right to property is further seen as human right and it is understood to establish an entitlement to private property.\textsuperscript{13}

Many reasons have been advanced as to why the right to private property has been supported in the history of the political economy. The most prominent has been the claim that there should be legal protection of this right because it affects productivity; protecting the said right it is argued helps a society to become rich.\textsuperscript{14} Adam Smith and John Stuart Mill also argued along these lines by stating that it is a good thing to have these rights because if we act in terms of them we will have greater prosperity. This it is said is one of the reasons why the governments

\textsuperscript{12} Ishay Micheline, \textit{The History of Human Rights: from Ancient Times to the Global Era}. (University of California Press, 2008), 92.
\textsuperscript{13} Tom Bethell, \textit{The Nobelest Triumph: Property and Prosperity through Ages}. (New York: St Martins Press 1998)
\textsuperscript{14} Randy Barnett, \textit{The Structure of Liberty}. (London: Oxford University Press 1998)
of the day engage in privatization. The other argument which is in support of the proposition that the right to protection of one’s property is very vital is that; this right secures for human individuals a sphere of personal jurisdiction, the right to acquire and hold the property. When individual’s rights to property are guaranteed and protected, it is easy for them acquire and hold property as their interests are secured.\textsuperscript{15}

In Zambia the right to own property is protected in the constitution under Article 16. The relevant part of Article 16 of the constitution provides:

(1) Except as provided in this Article, property of any description shall not be compulsorily taken possession of, and interest in or right over property of any description shall not be compulsorily acquired, unless by or under the authority of an Act of Parliament which provides for payment of adequate compensation for the property or interest or right to be taken possession of or acquired.

The Right to acquire and own property is also protected under different human rights instruments and documents. The right to property is enshrined in Article 17 of the Universal Declaration of Human Rights. Article 17 provides that:

17(1) everyone has the right to own property alone as well as in association with others.

(2) No one shall be arbitrary deprived of his property.

The wording of Article 17 of the UDHR clearly provides or guarantees an individual the right not only to own property but also the right of an individual not to be arbitrary deprived of his property.

\textit{2.4.2 Derogations from the Right to Property}

\textsuperscript{15}Adam Smith, \textit{An Inquiry into the Nature and causes of the Wealth of Nations}. (Cooke & Hale 1818)
Sub article 2 of Article 16 provides for situations when the right to own property may be abrogated. Sub article 2 (aa) provides:

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of clause (1) to the extent that it is shown that such law provides for the taking possession or acquisition of any property or interest therein or right there over-

(aa) in terms of any law relating to-

(i) the forfeiture or confiscation of the property of a person who has left Zambia for the purpose or apparent purpose, of defeating the ends of justice;

(ii) the imposition of a fine on, and the forfeiture or confiscation of the property of, a person who admits a contravention of any law relating to the imposition or collection of any duty or tax or to the prohibition or control of dealing or transactions in gold, currencies or securities.

Article 16 therefore protects a citizen’s right to own property without being arbitrarily deprived of it. However the Act further provides for circumstances under which this right may be abrogated. One of the ways in which this can be done is through an Act that provides for lawful confiscation or forfeiture. The Forfeiture of Proceeds of Crime Act falls firmly within this proviso to Article 16.

Laws that provide for the derogation of the right to property that are in line with Article 16 (2) of the constitution have previously been held to be constitutional by the Zambian courts. In the case of Zambia National Holdings Limited and United National Independence Party (UNIP) v The Attorney-General¹⁶, the appellants brought a petition in the High Court to challenge the decision of the respondent to acquire compulsorily under the Lands Acquisition Act the appellants' land being Stand number 10934 Lusaka which is also known as the New UNIP

¹⁶ (1993/94) ZR 115 (SC).
Headquarters. The President resolved that it was desirable or expedient in the interests of the Republic to acquire this property whereupon the appropriate Minister gave notice to the appellants of the Government's intention in that behalf and the steps and formalities under the Act for such acquisition were commenced. The appellants wrote to the respondent suggesting a sum of money to be paid as compensation but as it turned out, and as the parties specifically informed the learned trial judge, they wished the question of compensation to be postponed until the court had disposed of the challenge to the legality and constitutionality of the compulsory acquisition. The case proceeded on that basis both in the High Court and the Supreme Court. The petition was unsuccessful and so was appeal the Supreme Court.\footnote{(1993/94) ZR 115 (SC).}

Justice Ngulube when dismissing the Appellant’s constitutional challenge stated “One of the appellants' arguments at the trial which has not been repeated with any enthusiasm here had been that any compulsory acquisition under sub-article (i) had to fit into one of the pigeon holes" sub-article (2). Sub-article (2) reads:

"(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of clause (i) to the extent that it is shown that such law provides for the taking possesssion or acquisition of any property or interest there in or right there over."

and goes on to list numerous situations such as satisfaction of any tax, execution of judgments or orders of the court, and so on. Article 16(1) clearly states the general rule, that is, the acquisition must be under a law which must provide for adequate compensation. Sub article (2) on the other hand goes on to give exceptions to, and not categories of, the general rule. It deals
with situations where an involuntary loss of property could take place even without adequate or any compensation. We see no need for a strained and exotic construction of this straightforward Article in the manner attempted, and properly rejected, at the trial."\(^\text{18}\)

In the case of Patel v Attorney General,\(^\text{19}\) the High Court found that the specific limitations placed upon the protection of the fundamental rights and freedoms of the individual imposed by the various provisions of Chapter III of the Constitution must be read together with section 13 (now Article 11) of the Constitution, which provides that such specific limitations are "designed to ensure that the enjoyment of the rights and freedoms (set forth in Chapter III) by any individual does not prejudice the rights and freedoms of others or the public interest."

Article 11 of the Constitution provides that:

11. It is recognised and declared that every person in Zambia has been and shall continue to be entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed, sex or marital status, but subject to the limitations contained in this Part, to each and all of the following, namely:

(a) life, liberty, security of the person and the protection of the law;
(b) freedom of conscience, expression, assembly, movement and association;
(c) protection of young persons from exploitation;
(d) protection for the privacy of his home and other property and from deprivation of property without compensation;

and the provisions of this Part shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in this Part,

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\(^{18}\) (1993/94) ZR 115 (SC).

\(^{19}\) (1968) ZR 99 (HC)
being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.\textsuperscript{20}

Referring to this Article during the course of his judgement, Magnus J. stated “I have said that this section is definitive because it makes the provisions of the chapter effective for the purpose stated, that is, "for the purpose of affording protection to those rights and freedoms" and subjects them to limitations which are designed for a specific purpose, namely the purpose set out in the section and which I have stressed above. There are thus two purposes of these limitations: (1) to preserve the rights and freedoms of others; and (2) to preserve the public interest. It is necessary, therefore, in considering the specific limitations imposed by the other provisions of Chapter III, to read them together with section 13 (Article 11).”\textsuperscript{21}

\textbf{2.4 Conclusion}

Therefore this chapter has highlighted the difficulties and intricacies that exist when dealing with forfeiture and confiscation of proceeds of crime. Different jurisdictions have dealt with the challenges in their own distinct ways. Zambian Law allows the deprivation of property as long as the process is provided for under a specific law and the law is essentially in the public interest. In the next chapter this essay will look at the history of the legislation on forfeiture of proceeds of crime in England and how Zambia has come to adopt its own legislation. The chapter will also focuses on the similarities and differences between the English and the Zambian legislation.

\textsuperscript{20} Chapter I of the Laws of Zambia
\textsuperscript{21} (1968) ZR 99 (HC)
Chapter 3

History of Forfeiture and the Current Mechanisms

3.0 Introduction

The forfeiture of proceeds of crime Act is a unique Act in many ways, it needs to be in order to deal with the problems of corruption abuse that plague any developing country. However the need to deprive criminals of their benefits must be balanced with the need to observe constitutional standards of prosecution. Therefore this chapter will focus on the Act itself and the significant sections within the Act. The chapter will begin by giving a background to the forfeiture laws in both Zambia and England. The chapter will then look at the similarities and the important differences between the two country’s legislation. Finally the chapter will focus on the Zambian Act and will highlight the important sections of the Act the possible sources of controversy.

3.1 History of Forfeiture Laws

The origin of modern forfeiture laws in common law countries is generally accepted to be the English law of deodand (from deo dandum “to give to God”). These laws can be traced back to pre-Norman times. ¹ Talbot observes that “Some commentators (eg Finkelstein; (1973) 46 Temple Law Review 169) suggest that asset forfeiture laws can be traced back further – to Biblical times. The Old Testament focused on the culpability of the thing which caused offence and its destruction rather than the punishment of the man in Exodus Ch. 21 v 28:-

“If an ox gore a man or a woman that they die, then the ox shall surely be stoned and his flesh not be eaten. But the owner of the ox shall be quit.”

¹ Talbot, K, “Civil Forfeiture – a jurisprudence eating monster” (lecture, chancery lane, April 2011), page 2
He further notes that, "Deodand was heavily used in England and France throughout medieval times. It seems to have begun before the Norman conquests as banes, whereby articles causing damage or death were given to the victim. It then became deodand in about 1200 and was primarily the forfeiture to the state of things which caused death, the forfeited article being redistributed in some way in the community. The growth of the railways in the early 19th century brought about the abolition of deodand in the UK. Coroner’s juries had power to award deodand and did so against railway companies who, on the whole and in a manner prescient of the same country nearly 200 years later built and operated their train lines without much regard to risk to life. Deodand was abolished in the UK in 1846 when Parliament introduced the Fatal Accidents Act which allowed compensation to be awarded by a court to a deceased family."

Before the passage of the Proceeds of Crime Act 2002 (POCA) in England, the Drug Trafficking Act 1994 (DTA) and Part VI of the Criminal Justice Act 1988 (CJA) as amended by the Proceeds of Crime Act 1995 gave the Crown Court power to make confiscation orders and also gave the Magistrates' Court a limited power of confiscation. The prosecutor could apply to the High Court to preserve the defendant's assets where proceedings had been instituted or the defendant was to be charged, or an application in respect of further confiscation proceedings had been made or was to be. If the defendant did not pay the confiscation order voluntarily, then either the Magistrates' Court enforced the order as if it were a fine or the prosecutor could apply to the High Court to appoint a receiver. This regime continues for proceedings in which an offence was committed before the 24 March 2003 commencement date in respect of which an application for confiscation is to be made.²

3.2 Previous Legislation in Zambia

In Zambia the principle Acts dealing with forfeiture and confiscation before The Forfeiture of Proceeds of Crime Act of 2010 was The Narcotic Drugs and Psychotropic Substances Act, Cap 96\(^3\) of the Laws of Zambia and The Prohibition and Prevention of Money Laundering Act of 2001.\(^4\) Part v of The Narcotic Drugs and Psychotropic Substances Act dealt with seizure and forfeiture of property. Section 31 of the Act provided as follows:

Any property which a drug enforcement officer or police officer reasonably suspects to be the subject-matter of an offence under this Act, or which has been used for the commission of that offence or is illegal property shall be liable to seizure.

Section 33\(^5\) further provided that: (1) Where any property has been seized under this Act and-

(a) no prosecution for any offence under any written law is instituted with regard to the property;

(b) no claim in writing is made by any person that he is lawfully entitled to the property or that it is not liable to forfeiture under this Act;

(c) no proceedings are commenced by the Commission, within six months from seizure, for the forfeiture of the property, property shall become forfeited immediately upon the expiration of the period of six months.

(2) Where within six months from the date of the seizure of any property under this Act a claim in writing is made by any person in terms of paragraph (b) of subsection (1)-

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\(^3\) Chapter 96 of the Laws of Zambia
\(^4\) Act No. 14 of 2001
\(^5\) Chapter 96 of the Laws of Zambia
(a) the Commissioner may order the release of the property to the claimant if he is satisfied that there is no dispute as to the ownership of the property and that it is not liable to forfeiture; or

(b) if the Commissioner is satisfied that there is a dispute as to the ownership of the property or is doubtful as to the person who owns it, or whether it is liable to forfeiture, he shall, within fourteen days after the expiry of the period of six months, refer the claim to the High Court for its decision.

(3) This section shall be without prejudice to the power of a drug enforcement officer or police officer to release from seizure any property under section thirty-two.

Section 34\(^6\) of the Act further provided forfeiture of property upon conviction. The section provided that:

(1) A court which convicts for an offence under this Act shall, in addition to any penalty, order the narcotic drug or psychotropic substance, and any movable or immovable property used to commit the offence to be forfeited to the State.

Section 35 of the Act provides for application by the DPP to the High Court for a forfeiture order. The section states:

(1) The Director of Public Prosecutions may apply to the High Court for an order of forfeiture of any property he believes to be illegal property.

Part vi of The Prohibition and Prevention of Money Laundering Act provides for seizure and forfeiture of assets in relation to money laundering. Section 15\(^7\) of the Act provides:

\(^6\) Chapter 96 of the Laws of Zambia

\(^7\) Act No. 14 of 2001
An authorised officer shall seize property which that officer has reasonable grounds to believe that the property is derived or acquired from money laundering. Section 17 further provides that:

(1) Any property - (a) Which has been seized under subsection (1) of section fifteen; and (b) which is in the possession or under the control of a person convicted of a money laundering offence and which property is derived or acquired from proceeds of the crime shall be liable to forfeiture by the Court.

(2) Where the person whose property has been forfeited dies before or after the order under the subsection (1) is made, the order shall have effect against the estate of the deceased.

Section 18\(^8\) of the Act further provides that:

(1) Where any property has been seized under this Act and – (a) no prosecution for any offence under any written law is instituted with regard to the property; (b) no claim in writing is made by any person; and (c) no proceedings are commenced within six months from the date of seizure, for the forfeiture of property; the Commissioner shall apply to the Court upon the expiration of the period of six months for an order of forfeiture of that property.

Therefore before the passage of The Forfeiture of Proceeds of Crime Act, there was provision for forfeiture and confiscation of property that has been tainted by criminal activity. However this forfeiture or confiscation was restricted to the areas provided by the Act, illegal drugs under The Narcotic Drugs and Psychotropic Substances Act and money laundering under The Prohibition and Prevention of Money Laundering Act. None of these Acts provided for confiscation or forfeiture when it comes to crimes like abuse of office by public officials or corruption in general. The Forfeiture of Proceeds of Crime Act is therefore an attempt to

\(^8\)Act No. 14 of 2001
provide for confiscation and forfeiture for crimes that were not provided for under the previous legislation. Thus the preamble of the Act reads: An Act to provide for the confiscation of the proceeds of crime; provide for the deprivation of any person of any proceed, benefit or property derived from the commission of any serious offence; facilitate the tracing of any proceed, benefit and property derived from the commission of any serious offence; provide for the domestication of the United Nations Convention against Corruption; and provide for matters connected with, or incidental to, the foregoing.\(^9\)

3.3 The Forfeiture of Proceeds of Crime Act of 2010

The preamble makes it clear that the Act is meant for the confiscation and Forfeiture for any benefit or property that is derived from the commission of any serious offence. A serious offence is defined under the Act as “an offence for which the maximum penalty prescribed by law is death, or imprisonment for not less than twelve months;

The Act has many similarities with the Proceeds of Crime Act of 2002 of England but there are also significant differences between the two. Probably the most obvious difference is how much longer the English Act is compared to the Zambian Act. The Zambian Act is made up of 84 sections while the English Act is made up of 462 sections. This difference seems to be attributable to the fact that while the Zambian Act is solely an Act meant for the provision of a way to deprive suspected criminals of tainted property, the English Act not only does what the Zambian Act is supposed to do but also creates a handful of new offences. The Zambian Act does not create these offences because they are provided for under other laws. For instance Section 333 of the English Act provides for the offence of tipping off. This offence is not provided for under the Zambian Act. It was instead added to Section 12 of The Prohibition and

\(^9\) Act No. 19 of 2010

Both these Acts unlike the American and to some extent the South African legislation do not provide for in rem procedures against tainted property. The Zambian Act like the English Act provides for application for forfeiture and confiscation orders only when the owner has been convicted of an offence. Section 4\(^{10}\) of the Zambian Act states:

1. Subject to subsection (2), where a person is convicted of a serious offence committed after the coming into force of this Act, a public prosecutor may apply to the court for one or both of the following orders: (a) a forfeiture order against property that is tainted property in respect of the offence; (b) a confiscation order against the person in respect of benefits derived by the person from the commission of the offence.

2. A public prosecutor shall not make an application after the end of the relevant application period in relation to the conviction unless the public prosecutor has reasonable grounds for doing so.

3. An application under this section may be made in respect of one or more than one serious offence.

The Act further goes on to give a guideline for what constitutes tainted property. Section 10\(^{11}\) (2) of the Act provides as follows:

(2) In determining whether property is tainted property the court may infer—

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\(^{10}\) Act No. 19 of 2010

\(^{11}\) Act No. 19 of 2010
(a) where the evidence establishes that the property was in the person's possession at the time of, or immediately after, the commission of the offence of which the person was convicted, that the property was used in, or in connection with, the commission of the offence;

(b) where the evidence establishes that the property, and in particular money, was found in the person's possession or under the person's control in a building, vehicle, receptacle or place during the course of investigations conducted by the police before or after the arrest and charge of the person for the offence of which the person was convicted, that the property was derived, obtained or realised as a result of the commission by the person of the offence of which the person was convicted;

(c) where the evidence establishes that the value, after the commission of the offence, of all ascertainable property of a person convicted of the offence exceeds the value of all ascertainable property of that person prior to the commission of that offence, and the court is satisfied that the income of that person from sources unrelated to criminal activity of that person cannot reasonably account for the increase in value, that the value of the increase represents property which was derived, obtained or realised by the person directly or indirectly from the commission of the offence of which the person was convicted; and

(d) where the evidence establishes that the property was under the effective control of the person at the time of, or immediately after, the commission of the offence of which the person was convicted, that the property was derived, obtained or realised as a result of the commission by the person of the offence of which the person was convicted, and for purposes of this paragraph effective control has the same meaning as in section twenty-four of this Act.12

Section 2413 of the Act reads:

12 Act No. 19 of 2010
(1) In assessing the value of benefits derived by a person from the commission of an offence or offences, the court may treat as property of the person any property that, in the opinion of the court, is subject to the effective control of the person whether or not the person has—
(a) any legal or equitable interest in the property; or
(b) any right, power or privilege in connection with the property.

(2) Without limiting the generality of subsection (1), the court may have regard to—
(a) shareholdings in, debentures over or directorships of a company that has an interest, whether direct or indirect, in the property, and for this purpose the court may order the investigation and inspection of the books of a named company;
(b) a trust that has a relationship to the property; and
(c) any relationship whatsoever between persons having an interest in the property, or in companies referred to in paragraph (a) or trusts referred to in paragraph (b), and other persons.

Thus section 2414 (2) provides for the court to lift the corporate veil when necessary to establish what properties are owned by a convicted person.

One of the most important provisions of the Zambian Act is the protection afforded to third parties under section 10 of the Act. Section 10(4) of the Act provides as follows:

In considering whether a forfeiture order should be made under subsection (1), the court may have regard to—
(a) the rights or interests, if any, of third parties in the property;
(b) the gravity of the offence concerned;

13 Act No. 19 of 2010
14 Act No. 19 of 2010
(c) any hardship that may reasonably be expected to be caused to any person by the operation of the order; and

(d) the use that is ordinarily made of the property, or the use to which the property was intended to be put.

The Act is not explicit in this regard but it seems to provide that a forfeiture order may only be granted if it will not adversely affect other persons that are not connected to the criminal activity.

Section 12\textsuperscript{15} further provides that:

(1) Where an application is made for a forfeiture order against any property, a person who claims an interest in the property may apply to the court, before the forfeiture order is made, for an order under subsection (2).

(2) Where a person applies to the court for an order under this subsection in respect of the person's interest in any property and the court is satisfied that—

(a) the applicant has an interest in the property;

(b) the applicant was not in any way involved in the commission of the offence in respect of which the forfeiture of the property is sought, or the forfeiture order against the property was made; and

(c) the applicant:

(i) had the interest before the serious offence occurred;

(ii) acquired the interest during or after the commission of the offence, \textit{bona fide} and for fair value, and did not know or could not reasonably have known at the time of the acquisition that the property was tainted property;

\textsuperscript{15} Act No. 19 of 2010
The court may make an order declaring the nature, extent and value, as at the time when the order is made, of the applicant's interest.

Once property is forfeited it vests solely in the state. Section 11 (1) of the Act provides that:

(1) Subject to subsection (2), where the court makes a forfeiture order against any property, the property vests absolutely in the State by virtue of the order.

However sections 71, 72 and 78 are probably the most significant parts of the Act. These three sections are remarkable for reasons that are threefold. Firstly section 78 provides that any question of fact under the Act will be decided on the balance of probabilities. Therefore this section effectively provides that the standard to be used when adjudicating any matter under the Act is the standard that is used when adjudicating a civil matter. What makes this significant is the fact that section 71 of the Act provides for an offence where any person receives, conceals, disposes of or brings into Zambia any money or property that may reasonably be suspected of being proceeds of crime, and that person is liable upon conviction to:

(a) if the offender is a natural person, imprisonment for a period not exceeding five years; or (b) if the offender is a body corporate, a fine not exceeding seven hundred thousand penalty units.

Therefore this section criminalizes the possession of tainted property but the state only has to prove its case on a balance of probabilities. Thus under the Act the state does not have to prove beyond a reasonable the defendant is in possession of property that is proceeds of crime. This might allow for lawsuits challenging the constitutionality of this section as it seems to be in contravention of the Bill of Rights by depriving a citizen of their rights without proving the case beyond a reasonable doubt.\textsuperscript{16}

\textsuperscript{16} Act No. 19 of 2010
Section 72 goes further by imputing liability to corporations by inferring the state of mind of the servants or directors of the company. What makes this section interesting is that for a corporate body to be liable under this section the servant need not have been acting under express authority from the corporation, mere apparent authority is enough for the company to be liable. Thus if the state proves on a balance of probabilities that a servant was acting under apparent authority from the corporation, the company will be liable under section 71. This section seems unduly harsh to corporate bodies that might suffer through the actions of their servants.

Finally one of the defining sections of this Act is section 29. This section provides for application for forfeiture orders without conviction. Section 29 reads:

A public prosecutor may apply to a court for an order forfeiting to the State all or any property that is tainted property.\(^{17}\)

Section 30 provides for notice where an application is made under section 29. The section reads:

Where a public prosecutor applies under section twentynine for a forfeiture order— (a) the public prosecutor shall give not less than thirty days written notice of the application to any person who is known to have an interest in the tainted property in respect of which the application is being made; (b) any person who claims an interest in the property in respect of which the application is made may appear and produce evidence at the hearing of the application; and (c) the court may, at any time before the final determination of the application, direct the public prosecutor to give notice of the application to any person who, in the opinion of the court, appears to have an interest in the property; and publish in the Gazette or a daily newspaper of general circulation in Zambia, a notice of the application.\(^{18}\)

\(^{17}\) Act No. 19 of 2010

\(^{18}\) Act No. 19 of 2010
Section 31 further provides that:

(1) Subject to subsection (2), where a public prosecutor applies to the court for an order under this section and the court is satisfied on a balance of probabilities that the property is tainted property, the court may order that the property, or such of the property as is specified by the court in the order, be forfeited to the State.

Thus section 29 introduces one of the most important tools in the arsenal of the prosecutor in the pursuit of illegally obtained wealth. Non-conviction based forfeiture is crucial because it allows the prosecution to use a lower burden of proof to confiscate illegally obtained wealth even though the cannot prove criminal activity which has a higher burden of proof.

3.4 Conclusion

The Forfeiture of Proceeds of Crime Act is similar to the corresponding English Act but there are some significant differences. The Zambian Act does not contain some provisions that are found in the English Act because some of these provisions are provided for under other laws. The Act does have some controversial sections that may be a source of increased litigation. However because it is a new Act there is no Zambian case law to provide a guidance as to how difficulties arising under the Act may be resolved. Therefore in the following chapter the essay will focus on the case law from different jurisdictions to illustrate how the courts in these countries have dealt with the problematic sections of the Act.
Chapter 4

The Judicial Decisions

4.0 Introduction

Though Forfeiture laws vary from country to country, there are similarities in the laws of most countries. The problems that have been faced in those jurisdictions will ultimately be faced when effecting the Forfeiture of Proceeds of Crime Act. Therefore it is imperative to review the case law from those countries in order to learn lessons on the problems that may arise.

4.1 How Forfeiture Affects Third Parties

The problem of how forfeiture affects third parties has been tackled by courts in other jurisdictions. Davis¹ writing about the Canadian system notes that “The breadth of the court’s discretion in respect of forfeiture of property in which third parties have an interest is illustrated by the Ontario Court of Appeal’s decision in R. v. Canadian Imperial Bank of Commerce. That case arose in connection with the sentencing of one Mr. Obront, who was charged and convicted of fraud in relation to a gemstone telemarketing scheme. The trial judge made a forfeiture order in respect of various assets, including funds in the account of a company named Royal International Collectibles ("RIC"). The funds were ostensibly subject to a security interest held by the bank at which the account was located, the Canadian Imperial Bank of Commerce ("CIBC").

Prior to the making of the forfeiture order, CIBC argued that the funds should be returned to it, apparently relying upon subsection 462.41(3) of the Criminal Code. The trial judge rejected CIBC’s claim, however, on the basis that RIC could not have transferred an interest in the funds in the account to CIBC because those funds were proceeds of crime." On appeal, the Crown

¹ Davis, k “The Effects of Forfeiture on Third Parties”, MCGILL LAW JOURNAL vol. 48, page 199
noted that according to the *Personal Property Security Act* a debtor must have rights in property before a security interest can attach to that property and a security interest must attach to property before it can be effective as against third parties. The thrust of the Crown's argument was that because RIC obtained the funds in the account through fraud, it never had an interest in those funds and so CIBC could not have obtained a valid security interest in the property. Of course, without a valid interest in the property, CIBC was not entitled to relief from forfeiture."

The Ontario Court of Appeal rejected the Crown's argument and held that the trial judge erred in concluding that RIC never had an interest in the funds. According to the appellate court, RIC's title was voidable rather than void *ab initio*. As a result, the bank's security interest attached to the funds in the account. Nevertheless, the members of the Court of Appeal unanimously dismissed the appeal on the grounds that they were entitled to exercise the discretion that the trial judge was authorized to exercise under section 462.41 of the *Criminal Code*. The court declined to exercise that discretion in favour of the bank, stating:

"Although we are satisfied that the bank has a security interest in all the moneys in the account pursuant to its security agreement, we would not exercise the court's discretion in favour of the bank in these circumstances in respect of any of the [proceeds of crime]. Those moneys are identifiable proceeds of crime which should be returned to the victims," No further explanation was provided. As a result, this case illustrates both the breadth of the discretion enjoyed by courts in deciding whether to grant third parties relief from forfeiture and the reluctance of appellate courts to provide guidance on how that discretion ought to be exercised.²

This case is directly applicable to section 12 of the Forfeiture of Proceeds of Crime Act. The section also seems to grant discretion to the court to decide whether the third party deserves to

² Davis, k, page 200
be protected or not. Therefore this case may be instructive when if a case that has to do with section 12 is before the courts.

4.2 Criminal or Civil

There has been quite a lot of litigation regarding whether forfeiture proceedings are actually criminal and not civil. Talbot\(^1\) has observed that In respect of proceeds civil forfeiture no jurisdiction has found that the proceedings are in reality criminal. In the UK in Charrington [2005] EWCA Civ 335 explained that where there is no charge, arrest or appeal the procedure cannot be regarded as criminal but will instead be civil.

In Ireland in Gilligan v CAB [2001] IESC\(^2\), the Supreme Court explained that the civil forfeiture law:- “concerns the right of the State to take, or the right of a citizen to resist the State in taking, property which is proved on the balance of probabilities to represent the proceeds of crime. In general such forfeiture is not a punishment and its operation does not require criminal procedures. Application of such legislation must be sensitive to the actual property and other rights of citizens but in principle and subject, no doubt, to special problems which may arise in particular cases, a person in possession of the proceeds of crime can have no constitutional grievance if deprived of their use.”

The Canadian Supreme Court also dealt with a similar issue in the case of Chatterjee v Ontatario 2009 SCC 19.\(^3\) The issue arose in the context of whether Ontario had the power to make laws which interfered with sentences which were regulated as part of federal law. If the Ontarian civil forfeiture laws were in reality criminal and imposed a sentence they would be

\(^1\) Talbot, K, page 8
\(^2\) ibid
\(^3\) Ibid
ultra vires. The Supreme Court made it clear that civil forfeiture laws were indeed civil and imposed no penalty.

Talbot further notes that “The jurisprudence of the European Court of Human Rights results in the same conclusion but for slightly different reasons. The ECHR approaches the issue applying a 3 fold test. First, the classification under domestic law (which is not decisive, indeed rarely relevant). Second, the nature of the offence. Third, the character of the penalty. Applying these criteria the Court has consistently held civil forfeitures to be civil. This is principally on the basis that such forfeitures do not involve penalties but are preventative measures which remove from circulation the proceeds of crime or property caught up in the commission of crime. The forfeiture of articles in this category is not a punishment. The ECHR came to this conclusion in relation to proceeds civil forfeiture in Butler v UK (app 41661/98) 27th June 2002, Raimondo v Italy [1994] 18 EHRR 237 and Walsh v UK (app 43384/05) 21st November 20016.”

Therefore these cases are indicative of how section 78 of the Forfeiture of Proceeds of Crime Act is to be approached. All the cases from all the jurisdictions seem to agree that forfeiture proceedings are civil proceedings and not criminal. However this does not put to rest the question of whether criminal prosecution under an Act that provides for forfeiture of proceeds of crime is constitutional or not. It is clear that section 71 of the Zambian Act does not provide for civil proceedings because it provides for imprisonment for anyone found guilty under the section.

4.3 Constitutionality of Forfeiture Laws

Different jurisdictions have had to deal with the issue of constitutionality of Forfeiture laws. Human Rights instruments and constitutions are a major challenge to the successful application of

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6 Talbot, K, page 9
forfeiture laws Talbot⁷ gives an example of the Article 1 of Protocol 1 of the European Convention on Human Rights which states:

“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.”

According to Talbot “The ECHR approach to all qualified rights, including article 1 of Protocol 1, is to apply a 3 fold test to constitutional compliance. Is the measure lawful (ie provided for by domestic law, ii) is it directed towards a legitimate aim and iii) is the measure proportionate to that aim? Plainly civil forfeiture laws by statute, are provided for by law. The jurisprudence of the ECHR is that forfeiture of proceeds or instrumentalities is legitimately directed towards the legitimate aim of crime prevention by controlling the use of property. The issue therefore is one of proportionality. The Court has applied this test consistently holding asset forfeiture laws in general to be compliant with article 1 of protocol 1 (eg Raimondo, Air Canada supra)). This does not mean that the Court in such cases has decided that the law cannot be non-compliant with article 1 of protocol 1, merely that on the facts before the Court forfeiture struck a fair balance between the interests of the community and the interests of the person suffering the forfeiture.”

Talbot⁸ further observes that “Proportionality is also the test under the domestic constitutions of many countries. It is far more likely to arise in instrumentalities cases. For example in South

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⁷ Talbot, K., page 10
Africa in *Mohunram v NDPP* [2007] 2 ACC 4, the Constitutional Court quashed a forfeiture order in respect of a factory which housed 57 unlicensed gaming machines. The factory owners ran a legitimate business, but the gaming machines were not licensed contrary to the criminal law. The Supreme Court explained that the purposes of the forfeiture order were properly directed towards removing incentives for the commission of crime, deterring persons from allowing their premises to be used for crime, and preventing the commission of crime. However, forfeiture of the factory was out of proportion to those aims. The criminal law had ample powers to deal with the criminality and forfeiture was not appropriate. The Court issued an important reminder to its own asset forfeiture agency, which others around the world might do well to absorb:

“[The Agency’s] manifest function as defined by statute is to serve as a strongly-empowered law enforcement agency going after powerful crooks and their multitude of covert or overt subalterns. The danger exists that if the AFU spreads its net too widely so as to catch the small fry, it will make it easier for the big fish and their surrounding shoal of predators to elude the law. This would frustrate rather than further the objectives of POCA.”

The courts in the UK, have also consistently held that, properly applied, the civil forfeiture laws do not arbitrarily interfere with property rights (eg *He and Chen* [2004] EWHC 3021 Admin).9 Talbot observes that “the UK laws like most other laws contain numerous statutory exceptions to forfeiture, principally where the property is traceable to crime but the owner acquired the property in good faith, for full value without notice of the crime. Indeed the scope of the exceptions and the ability of the Court to protect innocent person’s interests mean that in practice it is almost impossible for a forfeiture order to operate in a disproportionate way. Even

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9 Talbot, K. page11
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if such an order could do so, the UK specifically provides that an order cannot be made if it is incompatible with ECHR rights. Therefore, the proportionality test remains as a long stop protection.”

Therefore any constitutional challenge to the legitimacy of the Forfeiture of Proceeds of crime Act would probably be unsuccessful if the jurisprudence from different jurisdictions and the available Zambian cases are followed. Courts around the world have held that these laws are legal as long as they are used for the purpose they are intended; to deprive perpetrators of serious crimes of the fruits of their crimes when these laws are used to punish those who have not benefitted from any crime the courts have intervened accordingly.

4.4 Conclusion

Therefore a significant amount litigation regarding forfeiture laws in different jurisdictions around the world. Perhaps the most significant decisions are those that have attempted to deal with the question of whether these laws are compatible with the principles of a constitutional democracy or not. Courts around the world have held time and again that that these laws are constitutional and have refused to entertain petitions that have tried to challenge the constitutionality of such laws. In the next chapter the essay will summarize the research, it will give recommendations on possible areas of reform and will give the final conclusion of the research.


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