

**THE STATE'S POWER TO SEIZE PROPERTY IN CRIMINAL MATTERS v THE
PROPERTY RIGHTS OF AN ACCUSED: FINDING THE BALANCE**

By

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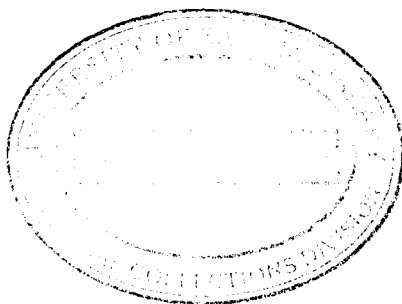
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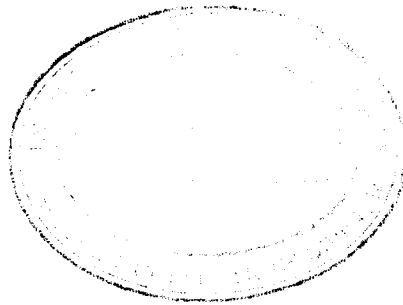


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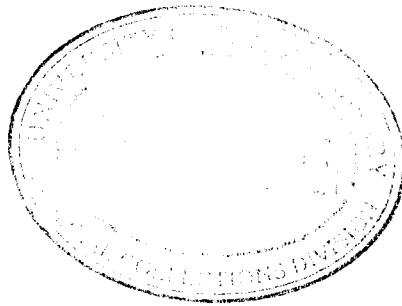
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ABSTRACT

This dissertation considers the right to property and the power of the State to seize property in criminal matters. It further attempts to address the issue of balancing the two competing interests. In approaching the concept, the research starts by explaining the notion of the right to property and the instruments that guarantee its protection at international, regional and national levels. It further looks at whether the state in exercising the power to derogate from an individual's right to property does so within the parameters of that power or in an arbitrary way. In addition it considers whether the State has the power to utilise seized property before a forfeiture order is granted by the court as reflected in cited cases.

The outcome of the research and interviews indicated that when the State seizes property alleged to be an instrumentality of a crime, it does so without any reasonable grounds upon which to suspect that the alleged owner committed a criminal offence. Through interviews conducted it was observed that the burden the State bears in proving that property is an instrumentality of a crime is too high to discharge in most instances. From the cases cited, it was found that government investigation officers in most instances misuse seized goods before investigations are even concluded or a forfeiture order is granted forfeiting the interest in the said property to the state.

The study therefore recommends that civil forfeiture should be introduced in the Zambian legal system and should co-exist with the already existing criminal forfeiture system. It is also recommended that the courts should make an order that prohibits anyone from interfering with seized property in the custody of the State before a forfeiture order is granted.

DEDICATION

This research is dedicated to my father, Oliver Mhango and my mother, Renny Mhango for all the love and support that they have given me. Thank you for teaching me that I can and will always achieve all that I want in life through hard work.

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I firstly, acknowledge the Lord God Almighty for helping and giving me direction in all my life's endeavors including the completion of this research. No matter the storm, you have always helped me face it and from this I can safely say that you really care for me.

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A lot of thanks also go to my supervisor, Dr Iris Mwanza for her guidance, patience and efficiency in the way she guided me through the research. It's an honour to have been supervised by you.

Lastly, my special thanks to the following people: Lily Brown, Melanie Palicha, Harriet Biemba, Precious Tembo, Likando Makala, Kaumbi Ndulo, Angelica Mwanza, Helen Mwansa, Chellah Nachilima, Ndonga Chiwaya, John Siame, Arnold Kaluba, Robert S Kelly, Joshua Kabwe, Joshua Mwamulima and Emmanuel .J. Simukali. Thank you for being great friends and helping me out in a number of ways though different.

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1.0 CHAPTER ONE

1.1 INTRODUCTION

This chapter defines the nature of the problem and the significance of the research topic. It explains the background, the objectives, the proposed research questions and the methodology used in conducting the study.

1.2 BACKGROUND

Property refers to any physical or intangible entity that is owned by a person, a group of people or a legal entity.¹ Depending on the nature of property, an owner has the right to consume, sell, rent, transfer, destroy it, or exclude others from doing the said things. A title or a right of ownership establishes the relation between the property and other persons, assuring the owner of his right to dispose of the property as he sees fit.² The types of property include: real property which refers to land and any improvements to or on the land, personalty refers to the physical possession belonging to a person while intellectual property refers to the creations of the human intellect.³ Everyone has a right to own property alone as well as in association with others. Some philosophers assert that property rights arise from social convention while others find its origins from morality or natural law.⁴

The Universal Declaration of Human Rights (UDHR) in Article 17 prescribes the protection of the right to property by stipulating that “No one should be arbitrary deprived of his property.” The African Charter on Human and People’s Rights which Zambia is a party to also guarantees

¹Business Dictionary.com, <http://www.businessdictionary.com/definition/property.html>

² Business Dictionary

³G M Kanga, *Intellectual Property Law* (Lusaka: UNZA Press, 2006), 10.

⁴R Dworkin, *Laws Empire* (Oxford: Hart Publishing 1998), 115.

the right to property under Article 21. The right to own property is a fundamental human right thus most modern States have laws which protect one's right to property, this right is usually found in their Constitutions or in the Bill of Rights. The Constitution, Chapter 1 of the laws of Zambia in the Bill of Rights (Part III) has provisions which guarantee ones rights to property under Article 16.

In as much as everyone has a right to own property, the said right is not absolute as an individual can be deprived of his right to property lawfully in a number of circumstances.⁵ Since the right to property is not absolute, States have been given a wide degree of discretion to limit this right. In Zambia for example the Constitution provides for instances when the said right can be derogated in Article 16. Through this Article, the State possesses the power of eminent domain which gives it right to seize the private property of an individual. Zambia has various statutes which grant State the power to the state to seize an individual's private property among which are the following: The Lands Acquisition Act, Town and Country Planning Act, The Housing (Statutory and Improvement Areas) Act, The Prohibition and Prevention of Money Laundering Act, The Penal Code, The Narcotic Drugs and Psychotropic Substances Act and The Forfeiture of Crime Proceeds Act. These laws are consistent with the Constitution and as such are lawful.

This research is focused on Acts which deal with seizure of property belonging to an accused person in criminal matters. In this regard, there is need for such laws to be used reasonably because they infringe on one's inherent right to own property. Therefore it follows necessarily that the court has to make a determination on whether from the facts that where available to the government investigation officers, it was reasonable to warrant the seizure of an accused person's property. It is evidenced from this that they should be a balance between the two

⁵ Jacob Mchangama, *"The Right to Property in Global Human Rights Law"*, Cato Policy Report , 2011.

competing interests which are the property rights of an accused and the States obligation to protect the public by deterring criminal activities. Such a balance is necessary as it would prevent the government from abusing its powers in the disguise of deterring criminal activities.

1.3 STATEMENT OF THE PROBLEM

There are many laws in Zambia which derogate from the right to own property. On this basis it becomes relevant to control any form of abuse of power by the State in order for an individual's property rights to be protected. The State should therefore only seize an accused person's property in instances where there are reasonable grounds upon which to suspect one of having committed a criminal offence. However, the law does not provide for how seized property should be managed prior to obtaining a forfeiture order from the courts. In practice what obtains is that public officers tend to misuse seized property before the investigations are even concluded; the following cases illustrate this proposition: *Mifiboshe Walulya v The Attorney General & Hon. F.M Chomba*, the plaintiff was arrested and detained on charges of being found in possession of stolen motor vehicles. The Police misused the plaintiff's seized motor vehicles before investigations were concluded and a court order finding him guilty was made. In *Roy Chilumanda & Namwali Lodge and Car hire v The Attorney General*,⁶ the police returned the plaintiff's vehicles to him in deplorable state, implying that they were misused while in their custody.

1.4 PURPOSE OF THE STUDY

The main objective of this research is to critically analyze whether the State complies with the law dealing with the seizure of property belonging to an individual suspected of committing a

⁶ (2006) Hp 0797

criminal offence. In this regard, it is relevant to determine whether the State in exercising its power has reasonable grounds upon which it suspects that the accused person has committed a crime or has exercised its power in an arbitrary way. This research will also attempt to address how seized property should be managed when in the custody of the State; that is before investigations are concluded and the court finds the accused person guilty of a criminal offence. Seized property should not be misused until a forfeiture order is granted by the courts forfeiting the interest therein to the State.

1.5 SIGNIFICANCE OF THE STUDY

The significance of the study is that it will highlight how the courts can help in limiting the parameters of the powers vested in the State as regards the deprivation of the right to property. In addition it will also provide for alternatives on improving the law pertaining to this aspect. Through the cases cited, it can be deduced that the State in exercising its power to seize property in criminal matters has acted maliciously by depriving individuals of the right to own property in the disguise of combating crime. It is also evidenced from the cases cited that the State has not only been in the habit of seizing property, it has gone further to misuse the said property even before investigations are concluded.

1.6 METHODOLOGY

This research will primarily be conducted using desk research and field research which shall be conducted through interviewing advocates and scholars who are experienced in the subject matter of the research. Secondary data such as books, journals, scholarly articles as well as the internet will be used in order to obtain the most recent information on the subject matter of the research being undertaken.

1.7 RESEARCH QUESTIONS

- Whether the State abuses its power to search and seize private property?
- Is the State entitled to use the seized property when investigations and a court hearing are still pending?
- Should we adopt civil forfeiture proceedings?

1.8 LAYOUT OF THE CHAPTERS

CHAPTER 1:

This Chapter discusses the fundamental aspects of the research topic. It considers the background of the research, the problem statement, the objectives and the relevance of the research. It further considers the methodology used to carry out the research.

CHAPTER 2:

This Chapter discusses the concept of property and the notion of the right to property. It also further illustrates that the right to property is not only recognized but also protected in various international, regional and national laws or instruments.

CHAPTER 3:

The Chapter discusses the derogations that are placed on the fundamental right to own property. It highlights the requirement for the valid exercise of the power of eminent domain which is inherent in every sovereign State. It further discusses the power of the State to seize property in criminal matters.

CHAPTER 4:

This Chapter discusses the procedures of asset forfeiture used in international law. It also discusses the mode of asset forfeiture used in other jurisdictions these being the United States of America and South Arica. It further discusses the position of the law on asset forfeiture in the Zambian legal system.

CHAPTER 5:

This Chapter looks at the conclusion and the proposed recommendations of the research.

2.0 CHAPTER TWO:

THE RIGHT TO PROPERTY: INSTRUMENTS WHICH GUARANTEE ITS PROTECTION

2.1 INTRODUCTION

This chapter discusses the concept of property; it considers the notion of the right to property and the various instruments which guarantee its protection at international, regional and national levels.

2.2 THE CONCEPT OF PROPERTY

The concept of property has been defined by various scholarly disciplines such as law, economics and sociology. These disciplines have varying definition of what property entails for instance scholars of social sciences frequently conceive property as a bundle of rights, stressing that property is not a relationship between people and things but is a relationship between people with regard to things.¹

For instance Oliver Wendell Holmes² describes property as having two fundamental aspects: possession, and title. Possession, as an aspect of property was defined by Holmes as control over a resource based on the practical inability of another to contradict the ends of the possessor; and title defined as the expectation that others will recognize the right to control the resource even when it is not in possession.

¹John Schrems, *Understanding Principles of Politics and the State* (Newyork: Penguin, 2004), 55.

²Oliver Wendall Homes, *The Common Law* (Oxford: Hart Press, 1997), 22.

On the other hand, John Locke in his book *Second Treatise on Civil Government*³ when writing about the concept of property and its importance stated that “Everyman has a property in his own person. This nobody has a right to but himself.” He further stated that “The reason why men enter society is the preservation of their property.” A proposition similar to John Locke’s was advanced by Frederic Bastiat who stressed that “life, liberty and property do not exist because men have made laws, on the contrary it was the fact that life, liberty and property existed before hand that caused men to make laws in the first place.”⁴ From what was advanced by Locke and Bastiat, it can be rightly argued that property is very vital as it is one of the sole reasons why man enters society.

In medieval and renaissance Europe, the term property essentially referred to land. However, much rethinking has come to regard land as only a special class of the property genus. The basis of this rethinking is attributed to at least three broad features of early modern Europe these being: the surge of commerce, the breakdown of efforts to prohibit interest, and the development of centralized national monarchies.⁵ In modern times there are two categories of what can be regarded as property these being: real property (land and anything attached to it) and personal property.

From the above definitions of property given by various scholars, it can be said that there is no precise definition of the term property. The term property is too general and as such it encompasses a lot of things ranging from land (real property) to intellectual property (creations of the human intellect).

³John Locke, *Second Treatise on Civil Government* (London: Pearson Education , 1689), 33.

⁴Fredric Bastiat, *Economic Harmonies* (New York: Mc Grew, 1850), 275-277.

⁵Dean Russel, *The Law* (Princeton: Princeton University Press, 1850), 213.

An individual who is regarded as an owner of property is traditionally entitled to certain rights these include: the right to control the use of the property, the right to any benefit from the property for example mining rights and the right to sell or transfer the property. In as much as an owner of property is legally entitled to exercise certain rights, there are some limitations that are placed on this right. The limitations attached to the ownership of property are: one has no right to use his property unreasonably so as to interfere with the property rights of another private party and a property owner is prevented from using his property in such a way that it is likely to interfere with public property rights. Uses of property that often injure public health, safety and convenience are prohibited.⁶

From the foregoing, the author is of the view that an owner of what can be termed as property from the various definitions given above, has by virtue of that ownership certain rights which they are entitled to legally.

2.3 THE RIGHT TO PRIVATE PROPERTY

The historical 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

⁶Dean Russel, 250.

right became a subject of intense controversy.⁷ In modern times, private property rights are recognized and protected in human rights instruments.

The right to property is said to be a social-political 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.⁸

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.⁹ 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 of the day engage in privatization.¹⁰ 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.

⁷Ishay Micheline, *The History of Human Rights: from Ancient Times to the Global Era* (University of California Press, 2008), 9.

⁸Tom Bethell, *The Noblest Triumph: Property and Prosperity through Ages* (New York: St Martin's Press, 1998), 90.

⁹Randy Barnett, *The Structure of Liberty* (London: Oxford University Press, 1998), 213-224.

¹⁰Adam Smith, *An Inquiry into the Nature and causes of the Wealth of Nations* (Cooke & Hale, 1818), 380-383.

2.4 INTERNATIONAL INSTRUMENTS WHICH GUARANTEE THE RIGHT TO PROPERTY

The right to property is enshrined in a number of international instruments which Zambia is a signatory to. The following are some of the international instruments which guarantee the protection of an individual's right to property:

The Universal Declaration of Human Rights (UDHR) enshrines the right to property. The UDHR was adopted by the General Assembly of the United Nations (UN) on 10th December 1948 as a common standard of achievement to promote respect for human rights and freedoms. Although it was not intended to have any legal force, the principles it proclaims have acquired the status of international customary law and as such the said principles are binding on states.¹¹

The right to property is enshrined in Article 17 of the UDHR. The said Article provides as follows:

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.

The Convention on the Elimination of All Forms of Racial Discrimination is another international instrument which enshrines the right to property in Article 5 by stipulating as follows:

¹¹ N Rodley, *Treatment of Prisoners under International Law* (London: At Caledon Press, 1987), 17.

“Everyone has the right to equality before the law without distinction as to race, colour and national or ethnic origin, including the right to own property alone as well as in association with others and the right to inherit. ”

Article 5 of the convention makes reference to the right property by providing that individual’s rights to property should be guaranteed in a non-discriminatory manner.

The other international instrument which guarantees an individual the right to own property is the Convention on the Elimination of All forms of Discrimination against Women. Article 16 of the said convention protects the right to property; it stipulates that State parties ought to accord equal opportunities to both spouses with regard to the ownership of property.

2.5 REGIONAL INSTRUMENTS WHICH GUARANTEE THE RIGHT TO PROPERTY

Regional instruments such as the American Declaration of the Rights and Duties of Man, the European Convention on Human Rights (ECHR) and the African Charter on Human and Peoples’ Rights (ACHPR) have provisions which guarantee individuals the right to own property. The ACHPR is the only regional instrument which will be discussed as it is of relevance to this research because Zambia is a party to the charter.

The ACHPR protects the right to property most explicitly in Article 14, the said Article provides as follows:

“The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.”

The ACHPR has other provisions which make reference to the right to property these are Articles 13 and 21. Article 13 provides that:

“Every citizen has the right to participate freely in the government of his country, the right to equal access to public services and the right to access to public property and services in strict equality of all persons before the law.”

Article 21 of the ACHPR on the other hand stipulates that:

1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.

2. In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.

From what has been stipulated above, it is clear that the ACHRP as a regional human rights instrument guarantees the protection of the right to property. The charter only permits the deprivation of the said right in limited circumstances such as if the deprivation is done for public interest. The charter also provides that individuals have rights to access public property (State owned property).

2.6_NATIONAL LAWS WHICH GUARANTEE THE RIGHT TO PROPERTY

The law Zambia recognizes and guarantees the right to property, the said right is also protected in the country's Constitution. The Constitution has provisions in Part III (the Bill of Rights) which protect an individual's rights to property. Article 11 of the Constitution in particular guarantees an individual the right to property, the said Article provides that:

11. It is recognized 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:

(d) Protection for the privacy of his home and other property and from deprivation of property without compensation.

Article 11 of the Constitution recognizes the right to property; Article 16 on the other hand protects individual's property rights by preventing any form of deprivation of property without adequate compensation. Article 16 provides as follows:

(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.

From wording of Articles 11 and 16, it is clear that the Constitution guarantees the protection of the right to property. Article 11 in particular stipulates that one has the right to the protection of his property regardless of his race, political opinion, creed and the other instances listed in Article 11(1). Article 16 of the Constitution has a general proposition which prevents compulsory acquisition of private property however; the said Article permits compulsory acquisition of property provided that it is done under the authority of an Act which provides for adequate compensation.

2.7 CONCLUSION

From what has been discussed, it is clear that despite the varying definitions of what property entails, a property owner is regarded as individual who has an interest or a right to a thing. This relationship between an individual and his property is one which has since time immemorial

been recognized and evidence of this recognition is reflected in the various legal instruments cited. By virtue of this legal recognition, an individual's right to private property is guaranteed and the Constitution of Zambia being the supreme law of the land is no exception.

3.0 CHAPTER THREE:

DEROGATIONS ON THE RIGHT TO PROPERTY

3.1 INTRODUCTION

Chapter three of this research discusses the legal instruments which empower States to derogate from an individual's right to own property. States have been granted the powers under international law and their respective national laws to seize private property of individuals. This chapter will firstly, discuss the principle of eminent domain under international law. It will further look at national laws which derogate from the right to property; it will also highlight the statutes which give the State the power to seize property in criminal matters.

3.2 THE POWER OF EMINENT DOMAIN

The right to property just like many other fundamental human rights is not absolute as number of derogations is placed on it. These derogations exist to in order to limit the exercise of this right.¹

A State has the power to seize private property in order for it to strike a balance between individual interests and the interests of the public as a whole; this power is referred to as the power of eminent domain.² The term "eminent domain" was first defined by Hugo Grotius, who used the term *dominium eminens* which is a Latin term for supreme lordship; he described this power as:

The property of subjects is under the eminent domain of the State, so that the State or he who acts for it may use and even alienate and destroy such property, not only in the case of extreme necessity, in which even private persons have a right over the

¹ Carlson Anyangwe, *Introduction to Human Rights and International Humanitarian Law* (Lusaka: UNZA Press, 2004), 5.

² Fredrick S Mudenda, *Land Law in Zambia: Cases and Materials* (Lusaka: UNZA Press, 2007), 321.

property of others, but for ends of public utility, to which ends those who founded civil society must be supposed to have intended that private ends should give way. But it is to be added that when this is done the State is bound to make good the loss to those who lose their property.³

The power of eminent domain therefore, refers to the power of a nation or a sovereign State to take or to authorize the taking of private property for a public use without the owner's consent conditioned upon payment of just compensation.⁴ In the case of *United States of America v Frank L. Jones, Adam of George J. Pumpelly & deceased others*,⁵ the US Supreme court restated the principle of eminent domain as thus; the power of taking private property for public uses generally termed as the right of eminent domain belongs to every independent government. It is an incident of sovereignty and requires no constitutional recognition. It is acknowledged as an inherent political right founded on a common necessity and interest of appropriating the property of individual members as the community to the great necessities of the whole community. It is recognized principle under customary international law that when a State is exercising the power of eminent domain it ought to do so for public purposes and a just or fair amount of compensation should be paid.

From the definition of the power of eminent domain, it is clear that before a State exercises this power it should identify the existence of a public need because taking of property by the state through the use of eminent domain can only be done for public use. Public use usually identified with public purpose, public interest and public convenience. Since there is no precise definition of the term public use, generally it is used in connection with; public advantage, convenience, or benefit, and that anything which tends to enlarge the resources, increase the industrial energies

³ John E Nowak & Ronald D Rotunda, *Constitutional Law* (Cambridge: University Press, 2004), 263.

⁴ John E Nowak & Ronald D Rotunda, 270.

⁵ Law ED US 106-109 p 1015

and promote the productive power of any considerable number of the inhabitants of a section of the State, or which leads to the growth of towns and the creation of new resources for the employment of capital and labour which contributes to the general welfare and the prosperity of the whole community.⁶

The case of *Kelo v City of New London*⁷ is illustrative on what would amount public purpose in relation to the exercise of the power of eminent domain. In this case, United States Supreme Court held that the governmental taking of property from one private owner to give to another in furtherance of economic development constitutes a permissible “public use.” The brief facts of the case were that the US government exercised its powers of eminent domain to permit the transfer of land from one private owner to another. The land was acquired so that it could be part of the redevelopment plan which would create more new jobs and increase the tax revenues.

When a resolve is made by the State to exercise its power of eminent domain for benefit of the public, a fair or just amount of compensation ought to be paid to the individual who owns the property in question. Just compensation refers to the full and fair amount equivalent to the property taken from its owner by the State. The payment of compensation can only be considered just or fair if it satisfies the following conditions: it must be real, substantial, full and ample; made within a reasonable period of time.⁸

When exercising of the power of eminent domain, a State is at liberty depending on public need to use any of the following mode of acquiring private property: *complete taking* which refers to acquiring all property in issue, *partial taking* on the other hand implies that the taking should be

⁶ Samatha J Hepburn, *Principles of Property Law* (Newport: Cavendish, 2001), 45.

⁷ (2005) US Supreme Court

⁸ Osborne M.Reynolds, *Local Governments Law*, Second Edition (West Group, Min, 2001), 505.

done in relation to part of the property for instance the taking of a portion of a piece of land, *temporal taking* is regarded as the taking of part or all the property appropriated for limited period of time after which the property is reverts to its owner. Private property can in certain circumstances be acquired for the purpose of creating *an easement or a right of way* in this case the owner of the property has an obligation not to hinder anyone from enjoying the right granted by the easement an example would be the exercise of a right of way.⁹

The international and regional instruments discussed in Chapter Two of this research which guarantee individuals the right to property also recognize that the said right is not absolute as they permit certain derogations to it. For instance Article 14 of the ACHPR which guarantees the right to property recognizes that there are limitations on the exercise of this right. The said Article provides that: “the right to property can be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.”

3.3 NATIONAL RECOGNITION OF THE POWER OF EMINENT DOMAIN

The Constitution Chapter 1 of the laws of Zambia incorporates the principle of eminent domain in Article 16 as it allows for the enactment of laws which derogate on the right to property for the benefit of the Republic. Article 16(1) lays down a general proposition that no property of any description or interest in property can be compulsorily acquired. An exception to the proposition is provided for; the exception being that the acquisition can only be done under the authority of an Act of Parliament which provides for the payment of adequate compensation. Article 16(1) stipulates that:

⁹ Osborne M.Reynolds, 506-507.

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 adequate compensation for the property or interest or right to be taken possession of or acquired.

Article 16(1) is in line with international standards as regard the fact that compensation has to be paid when private property has been compulsorily acquired by the State.

However, Article 16(2) of the Constitution makes reference to instances when an individual's property can be taken away without the payment of adequate compensation as provided for in Article 16(1). Article 16(2) provides that:

“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”

Article 16(2) goes further to stipulate the grounds upon which property of any description can be compulsorily acquired without the payment of adequate compensation. The grounds laid down in this Article which are of relevance to this research are:

(b) By way of penalty for the breach of any law whether under civil process or after conviction of an offence.

(t) for as long as may be necessary for the purpose of any examination, investigation, trial or inquiry or in the case of land, the carrying out there on-

From what has been discussed above, under the Zambian legal regime, the basis of the power of eminent domain is Article 16 of the Constitution. It is this Article which grants the law makers the power to enact laws which provide for the compulsory acquisition of property on condition that the said laws provide for the payment of adequate compensation. On the other hand, if the

law enacted by Parliament falls within the instances stipulated in Article 16(2) the payment of compensation can either be provided or not.

3.3.1 STATUTES WHICH DEROGATE FROM THE RIGHT TO PROPERTY IN NON CRIMINAL MATTERS

Pursuant to Article 16(1) of the Constitution a number of statutes have been enacted which grant the State the power to seize or compulsorily acquire private property of individuals.¹⁰ The Lands Acquisition Act Chapter 189 of the laws of Zambia is one such Act; this Act was enacted to address the mischief created by absentee landlords who left huge tracts of land unoccupied the Act was therefore enacted to compulsorily acquire abandoned tracks of land. As per preamble of the Act, it is not only intended to address the compulsory acquisition of land but also other properties. Section 3 of the Lands Acquisition Act provides that:

“Subject to the provisions of this Act, the president may, whenever he is of the opinion that it is desirable or expedient in the interests of the Republic so to do, compulsorily acquire any property of any description.”

Section 3 of the Act gives the president the powers to acquire property of any description provided that he is of the opinion that it is expedient or desirable in the interest of the Republic to acquire such property. Section 3 of this Act as interpreted by the court in the case of *Wise v The Attorney General*¹¹ is in line with the international law principle, which is that the taking of private property should be done in the interest of the public. In this case, the court held that the purpose of compulsory acquisition must be a public one. The silence of the Act on the question of the purpose or purposes upon which the State may compulsorily acquire property upon

¹⁰ Fredrick S Mudenda, 230.

¹¹ (1990-92)ZR 124

payment of adequate compensation does not per se give the State a blanket right to compulsorily acquire property without any cause or purpose.

If the compulsory acquisition of property is not done in furtherance of public interests, then the acquisition can be challenged in court. In the case of *Zambia National Holding & United Independence National Party v The Attorney General*,¹² the court laid down a number of instances which one would use to challenge the decision of the State as regards the validity of the compulsory acquisition. The court stated that the presidents resolve can be challenged in the courts both as to legality and arbitrariness. The court went further to state that there was no dispute on the law that the exercise of statutory powers could be challenged if based on bad faith or some such other arbitrary capricious or ulterior ground not supportable within the enabling power.

Sections 5, 6 and 7 of the Act lay down the procedure which the president is mandated to follow in order for him to make known his intention to compulsorily acquire property. A notice of the intention to acquire property must be given to all interested parties and the mode of service should be in accordance with section 7. The Act also provides for the payment of compensation for the property acquired in section 10.

There are other Acts which grant power to the State to acquire private property; these Acts make reference to the Lands Acquisition Act with regard to the payment of compensation. The Town and Country Planning Act¹³ is one such Act; this is an Act whose purpose is to provide for building in accordance with laid down structure plans. Section 40 of the said Act which deals with compulsory acquisition provides as follows:

¹² (1993-94) ZR 115

¹³ Chapter 283 of the Laws of Zambia

“Where any land is required to be included in a structure plan or local plan or approved structure plan or approved local plan the Minister may recommend to the president that the land may be acquired by the president in accordance with the Lands Acquisition Act. ”

Section 40 of the Town and Country Planning Act as mode of exercising the power of eminent domain can only be evoked when land privately owned is part of a structure or a local plan. The owner of the said land is entitled to compensation as per se 10 of Lands Acquisition.

The other Act which has a provision that enables the State to compulsorily acquire property is the Zambia Development Agency Act (ZDA).¹⁴ The main purpose of this Act is to foster economic growth and development by promoting trade and investment. Section 19 of the Act provides for compulsory acquisition of investor’s property, it provides that:

19(1) An investor’s property shall not be compulsorily acquired nor shall any interest in or right over such property be compulsorily acquired except for public purposes under an Act of Parliament relating to the compulsory acquisition of property which provides for payment of compensation for such acquisition.

The ZDA Act only permits the acquisition of an investor’s property provided that such acquisition is done for public purposes. The Act stipulates that an Act of Parliament which provides for the payment of adequate compensation should be used, in this instance the appropriate Act is the Lands Acquisition Act.

3.3.2 ASSET FORFEITURE LAWS (SEIZURE OF PROPERTY IN CRIMINAL MATTERS)

Asset forfeiture is the confiscation by the State of assets which are either the alleged proceeds of a crime or the alleged instrumentalities of crime. Instrumentalities of a crime are defined as the

¹⁴ Act No 11 of 2006

property that was allegedly used to facilitate the commission of a crime. Proponents of seizure laws advocate that it is an essential tool which can be used to put a stop to crime.¹⁵ Property can be subjected to seizure laws on any one of the following instances:

Property for which ownership by itself constitutes a crime for instance smuggled goods or narcotics. Under these circumstances, the government has an obligation to protect the public and it does so by seizing such goods. The other instance is when the property in question is a proceed of an illegal activity; once the crime has been identified, the state may seize any property flowing from the activity. States can also seizure property which was used as a tool or instrument in the commission of a crime. It is argued that by virtue of the property being associated with the crime, it is 'guilty' of the offence and as such it is also subject to seizure.¹⁶

There is no requirement in law that an alleged owner of property which is seized by the State has to be compensated provided that it is proved that it is connected to illegal activities. This proposition is in line with Article 16(2) of the Constitution which lays down instances in when a statute can provide for the compulsory acquisition of private property without the payment of adequate or any form of compensation. When the State seizes property on the grounds that the owner has committed a criminal offence there is no need to make reference to the Lands Acquisition Act which provides for the payment of compensation. A property owner, who obtains his property through illegal means or uses his property in order to facilitate the commission of a crime, is not entitled to any form of compensation because compensating such an individual would mean that he or she is benefiting from their illegal act.¹⁷ It is for this reason

¹⁵ Brain J Heachey, "LII Backgrounder on Forfeiture." Edited by Evan Williford. Legal Information Institute, 60.

¹⁶ Brain J Heachey, 75.

¹⁷ E Blumensen & E Nilsen, "*Policing for Profit: the Drug Wars Hidden Economic Agenda*,65" (University of Chicago Law Review 35, 1998)

that the author begs to differ with the application of the Lands Acquisition Act in the case of *Zambia National Holding & United Independence National Party v The Attorney General*.¹⁸ In that case, the State when compulsory acquiring UNIP's headquarters stated that the said property was to be acquired because UNIP had used State funds to purchase the property. The government of the day would have used another law which deals with abuse of State funds by government officers for their own private gain. Even though compensation was not given to UNIP by virtue of the statutory instrument, it was not even supposed to be of concern because as a matter of fact UNIP officials ought to have been punished for misusing State funds.

The author also disagrees with the application of the Lands Acquisition Act in the *LAP Green case* which is before the court. This is a case which the Zambian government, has reversed the sale of Zamtel to sub-Saharan mobile operator Lap Green Networks of Libya, following allegations that the company was fraudulently and irregularly sold by the previous government. Lap Green is a majority shareholder in Zamtel with 75% of the company's shares. It had before the acquisition made investments amounting to US\$ 170 million.¹⁹ From these facts, it is right to argue that the Lands Acquisition Act should not be used because the ground upon which the government acquired Lap Green's shares which is fraud is a crime. If the government proceeds to use the Lands Acquisition Act, then it ought to pay compensation as per section 10 of the Act. If compensation is paid in these circumstances then, the government will be paying compensation to an entity which is guilty of committing a criminal offence. The government should instead prove that the shares were acquired fraudulently and then proceed to declare the

¹⁸ (1993-94) ZR 115

¹⁹ Michael Malakata, *Zambian Government Reverses Sale of Zamtel to Libya's Lap Green*, 12th January 2012. Computer World Zambia

contract of sale to be void. This will enable the government to refrain from paying huge amounts of compensation to the Libyan government.

The following pieces of legislation grant the State the power to seize private property without paying compensation:

The Narcotic Drugs and Psychotropic Substances Act Chapter 96 of the laws of Zambia, is an Act which deals with the control of importation, exportation, production, sale and use of narcotic drugs and psychotropic substances. The Act also provides for the seizure and forfeiture of property relating to, or connected with unlawful activities involving narcotic drugs and psychotropic substances. The provisions of this Act which grant powers to the state to seize property which is connected to the sale or distribution of narcotics are: section 24 which empowers the commissioner to search and seize property which is liable to forfeiture, section 31 which allows for the seizure of property that has been used in the commission of a crime under the Act and sections 34 and 39 which provide that the State is allowed to forfeit property which has been used in the commission of a crime upon a successful conviction.

The Prohibition and Prevention of Money Laundering Act²⁰ is an Act which prohibits money laundering as stipulated in section 3 of the same Act. Section 15 of the Act empowers the State to seize property provided that there are reasonable grounds to believe that the property was derived from money laundering. Sections 17 and 20 of the Act provide that property which has been seized may be liable to forfeiture by the court and it shall vest in the State.

²⁰ Act No 14 of 2001

Section 29 of the Penal Code²¹ deals with forfeiture of goods used in the commission of a crime. This section provides that: When any person is convicted of an offence under any of the following sections, namely, sections ninety four, ninety-five, ninety-six, one hundred and thirty, one hundred and fourteen, three hundred and eighty-five and three hundred and eighty-six, the court shall, in addition to or in lieu of any penalty which may be imposed, order the forfeiture of any property which has passed in connection with the commission of the offence, or, if such property cannot be forfeited or cannot be found, of such sum as the court shall assess as the value of the property. Payment of any sum so ordered to be forfeited may be enforced in the same manner and subject to the same provisions as in the case of the payment of a fine.

3.4 CONCLUSION

To conclude, the right to property as a fundamental human right is not absolute as there are permissible derogations to the said right. These derogations are recognized under international law and our national laws also give powers to the State to seize property for the benefit of the public and also for the purposes of preventing the commission of a crime. The justification for taking away of private property is that public interests in that particular instance outweigh individual interests.

²¹ Chapter 87 of the Laws of Zambia

4.0 CHAPTER FOUR:

THE LAW ON ASSET FORFEITURE IN ZAMBIA: A COMPARATIVE ANALYSIS OF WHAT OBTAINS IN JURISDICTIONS SUCH AS THE UNITED STATES OF AMERICA AND SOUTH AFRICA.

4.1 INTRODUCTION

Chapter four of this research paper discusses the law on asset forfeiture in Zambia. It will firstly, give a brief background of the types of asset forfeiture used at international level. Secondly, it will highlight the mode of asset forfeiture used in jurisdictions such as the United States of America and South Africa. Thirdly, the paper will outline the mode of asset forfeiture used in Zambia; it will further discuss whether the mode adopted in the Zambian legal system is appropriate or is used arbitrary by the state; this will be demonstrated with the aid of case law. Lastly, a conclusion shall be drawn on the basis of the findings.

4.2 THE TYPES OF ASSET FORFEITURE

There are two types of asset forfeiture used at international level to recover the proceeds or instrumentalities of crime these being: non-criminal based forfeiture (civil) and criminal forfeiture. The said types of forfeiture have the same objective which is to enable the state to forfeit the proceeds or instrumentalities of crime. The rationale for the existence of asset forfeiture stems from the fact that those who commit unlawful activities should not be allowed to profit from such activities. The proceeds of crime should instead be forfeited and used to compensate the victims, be it the state or an individual. The other rationale for forfeiture is that it helps in deterring unlawful activities. Forfeiture of instrumentalities also ensures that the

forfeited assets will not be used to further criminal purposes. The difference between civil and criminal forfeiture is as regards the procedure used to forfeit assets.¹

The difference between the two types of forfeiture is that criminal forfeiture requires a criminal trial and conviction, whereas civil forfeiture does not require a criminal trial. Criminal forfeiture is an *in personam* order that is action against the person; it is for this reason that a criminal trial and conviction are required, as it is often part of the sentencing process. The requirement that there must be a criminal trial before a forfeiture order is granted entails that the government must firstly, establish guilt beyond reasonable doubt or such that the judge is intimately convinced. Criminal forfeiture systems are object-based, that is the prosecuting authority must prove that the assets in question are proceeds or instrumentalities of the crime. In criminal forfeiture what is forfeited is the defendant's interest in the property.²

Civil forfeiture on the other hand is an action against the asset itself and not against an individual. It is a separate action from any criminal proceedings and as such requires proof that the property is a proceed or instrumentality of a crime. Generally, the standard of proof for criminal conduct must be established on a balance of probabilities. Civil forfeiture eases the burden of proof on the government as it makes it possible to obtain forfeiture when there is insufficient evidence to support a criminal conviction. This is possible because the action is not against the individual defendant but against the property, in this instance the owner of the property is a third party with the right to defend his interest.³

¹ "The Asset Forfeiture Manual, Version 1.0", Edited by Fredrick Mann and TLH Staff, 2005.

² "The Asset Forfeiture Manual," 76.

³ Lieske Roberts, "Civil Forfeiture Law: Replacing the Common Law with a Common Sense Application of the Excessive Fines Clause of the Eighth Amendment." William Mitchell Law Review 21, 1995.

From what has been discussed, it can be stated that civil forfeiture is useful in instances when criminal forfeiture is not possible, examples of such instances include: a situation where the violator is dead or were he dies before conviction because death brings an to end criminal proceedings, the other situation is where the violator is immune from criminal prosecution or where he is so powerful that a criminal investigation or prosecution is unrealistic or impossible, where the violator has been acquitted of the underlying criminal offence as a result of lack of admissible evidence or a failure of meeting the burden of proof. This is relevant in jurisdictions in which civil forfeiture is established on a standard of proof that is lower than the criminal conviction standard. Therefore, when there is insufficient evidence for a criminal conviction beyond a reasonable doubt, there could still be sufficient evidence to show that the assets were derived from illegal activity on a balance of probabilities.⁴

At international law, a number of multilateral treaties have been concluded that provide obligations for states to cooperate with one another on forfeiture asset sharing, legal assistance and compensation of victims.⁵ The United Nations Convention against Corruption (UNCAC) is one such treaty; it contains a specific provision on non-conviction based forfeiture. Article 54 (1)(C) of the Convention provides that countries should consider taking such measures as may be necessary to allow confiscation of such property without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight or in other appropriate cases. Asset forfeiture does not predetermine nor does it preclude any specific disposal or use of

⁴Lieske Roberts, 15.

⁵"The Asset Forfeiture Manual," 35.

confiscated assets. Forfeited assets are disposed of by the forfeiting jurisdictions as determined by their national legislation.⁶

4.3 ASSET FORFEITURE IN THE UNITED STATES OF AMERICA

The fourth Amendment of the Constitution of the United States of America is the primary basis upon which investigative activities are guided.⁷ The said Amendment provides that:

The right of the people to be secure in their persons, houses, papers, and effect, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The US Constitution prohibits unreasonable search and seizure, unreasonableness in this instance generally refers to that which is extreme, arbitrary, and capricious and is not justified by the apparent facts and circumstances.⁸ Pursuant to the fifth Amendment of the American Constitution which provides that: “No person shall be deprived of life, liberty or property without due process of the law; nor shall private property be taken without due process of law; nor shall private property be taken without just compensation,” Congress has enacted statutes that allow law enforcers to seize property on suspicion of criminal activity; this property is forfeited to the government upon conviction.

The concept of forfeiture in the US can generally be traced back to the English common law. Under the English common law the courts recognized three kinds of forfeiture these being: *escheat upon attainder*, *deodand*, and statutory forfeiture.⁹ Under the doctrine of *escheat upon*

⁶ “The Asset Forfeiture Manual,” 37.

⁷ James A Inciardi, *Criminal Justice* (Mc Grew Hill Companies, 2004-05), 200.

⁸ James A Inciardi, 226.

⁹ “The Asset Forfeiture Manual,” 40.

attainder, a person's property reverted to the government upon that person's conviction for a felony; the basis of this doctrine was the theory that the sovereign government possessed the superior property interest. On the other hand the *doctrine of deodand* or guilty property allowed the courts to strip a person of property if the property was involved in an offence. This doctrine allowed the court to seize property regardless of the owner's culpability. The only kind of English forfeiture recognized in the American colonies was *Statutory Forfeiture* or forfeiture based on written laws.¹⁰

In 1970 Congress enacted the Comprehensive Drug Abuse Prevention and Control Act which is also known as the Forfeiture Act. This Act authorized federal prosecutors to bring civil forfeiture actions against certain properties that were owned by persons who had been convicted in federal court of dealing in drugs. This Act was seldom used as it limited forfeiture to the property of persons who had been convicted of participating in continuing criminal enterprise.¹¹ In 1978, Congress amended the 1970 Act to allow for the forfeiture of anything of value used or that was intended to be used by a person to purchase illegal drugs. This change expanded the Act to allow the forfeiture of all proceeds and property that were traceable to the purchase of illegal drugs. Under the amendment, the federal government was authorized to proceed *in rem* against property; in such proceedings, the guilt or innocence of the property owner regarding any criminal activity is irrelevant. In 1984, the Comprehensive Crime Control Act amended the Forfeiture Act; this Act authorized the *in rem* forfeiture of real property.¹²

¹⁰ "The Asset Forfeiture Manual," 42.

¹¹ Henry Hyde, *Forfeiting Our Property Rights: is your Property Safe from Seizure?* (Washington DC: Cato Institute, 1995), 20.

¹² Robert Lieske, "Civil Forfeiture Law: Replacing the Common Law with a Common Sense Application of the Excessive Fine Clause of the Eighth Amendment." *William Mitchell Law Review* 21, 1995.

Under the US law, forfeiture under the Forfeiture Act begins with either the constructive or actual seizure of property after the court has issued a warrant; the warrant must be based on a reasonable belief that the property was used in a crime subject to forfeiture. After the property is seized, the court holds it until the case is resolved.¹³ Forfeiture proceedings in the US can either be criminal or civil. If the government seeks forfeiture pursuant to criminal charges, it must establish the defendant's guilt beyond reasonable doubt and if acquitted, the defendant is entitled to retrieve the seized property. Criminal forfeiture provisions relate to any property, real or personal which is involved in the commission of a crime or any property traceable to such property. The accused in this instance has a much lower burden than that of the State which is proof based on the preponderance of evidence.¹⁴

The procedure under civil forfeiture is that the government need only show reasonable grounds to believe that the property was used in or derived from certain prohibited activities. If the owner of the property fails to rebut, showing of probable cause with sufficient evidence, the government may keep the property. During trial, the government's standard of proof in civil forfeiture is by a preponderance of evidence which is a lesser burden than that required in criminal matters which is proof beyond reasonable doubt. In civil forfeiture, the State commences proceedings against the property and its owner is treated like a third party in the proceedings; if it is established that the owner ought to have known about the property's illegal use, then the property has to be forfeited to the State without compensation.¹⁵ In the case of *United States of America v Ruben Desantiago-Flores*,¹⁶ the appellant's cheque was seized after

¹³ "The Asset Forfeiture Manual", 55.

¹⁴ Pilen R, "Oversight of Federal Asset Forfeiture: Its Rights in Fighting Crime." Statement before Senate Committee, 1999.

¹⁵ Pilen R, 97.

¹⁶ No.98-1459 [D.C. 94-CR-414-M Colorado]

investigations on a drug conspiracy. An order was made to forfeit the cheque to the state by the district court. On appeal, it was alleged that the State had failed to prove the nexus between the seized property and the illegal drug conduct. The court held that the appellant failed to contest the seizure hence he waived his right to be heard.

From the case cited above, one can be rightly argue that the US government used civil forfeiture to seize the appellant's cheque as the he (the appellant) was a third party who had a burden of challenging the forfeiture which he did not discharge. From the cited case, it is also right to argue that the State discharged its burden and as such it was entitled to forfeit the cheque because the appellant did not contest to the seizure so as to rebut the evidence given by the State. The case further demonstrates that in the US, once the State proves its case on a balance of probabilities, the alleged owner (third party) is not entitled to any form of compensation.

Another case which illustrates the use of civil forfeiture under the US laws is the case of *James Burton of Bowling, Green, Kentukey*,¹⁷ the brief facts of the case were that the police raided Burton's farm and found marijuana plants, he admitted to growing the marijuana but it was for his personal use as he suffered from a rare hereditary disease whose only medicine was marijuana. The court ordered that his farm should be purchased and its value should be forfeited to the state. Judge Ronald Meredith stated that "When owners of property live at a site while marijuana is growing in their presence, there is no defense to forfeiture."

The Racketeer Influenced and Corrupt Organizations Act (RICO) is another vehicle for forfeiture used in the federal court. It allows federal authorities to seize property of persons engaged in a pattern of racketeering. It includes persons who commit murder, kidnapping, perjury, arson and

¹⁷ 200 U. S. 321, 337

other offences twice or more times within a period of ten years; thus it allows for the forfeiture of all property which is traceable to the crime. Obscenity laws are also part of the racketeering offences the case of *Alexander v United States*¹⁸ demonstrates this proposition. In this case, the appellant an owner of more than a dozen stores and theaters offering sexually explicit materials was charged with operating a racketeering enterprise in violation of RICO. He was convicted and after his conviction, the federal authorities sought to forfeit all assets related to his business. It was held that the assets should be forfeited to the State. His appeal to the Supreme Court was dismissed.

In summation, the US Constitution as explained guarantees individuals the right to property and the right not to be subjected to unreasonable search and seizure. Congress, is however given the power to enact laws which derogate from this constitutional right; it has enacted laws which grant the State the power to seize properties which are obtained illegally and this is done either through the use of criminal forfeiture which is an *in personam* action or by way of civil forfeiture which is an *in rem* action.

4.4 ASSET FORFEITURE IN SOUTH AFRICA

In South Africa, forfeiture of assets is mainly governed by the Prevention of Organized Crime Act (POCA) which has provisions dealing with both civil and criminal asset forfeiture. For civil forfeiture, the Act requires proof to be established on a balance of probabilities, that the property is an instrumentality of an offence or a proceed of unlawful activities for it to be forfeited. Under civil forfeiture proceedings, there is no need to find an individual guilty of a criminal

¹⁸ 509 US 544, 133 S. Ct. 2766, 125L. Ed. 2d 441 (1993)

offence.¹⁹The POCA provides that for civil forfeiture, there is need for a preservation order which precedes a forfeiture order; it is brought against any person and not against the property, to prevent him from dealing with the property in any manner. What is required by the preservation order is the showing of reasonable grounds to believe that the property is either a proceed of or an instrumentality of a crime.

The Act provides that the State is required to give notice that the order has been made to all persons who may have an interest in the property. An individual intending to oppose forfeiture or to apply for his or her interest in the property to be excluded must give notice to the court. The circumstance under which property is seized is that there has to be reasonable grounds to believe that such property will be removed. Once the preservation order is in force, the court may apply for a forfeiture order. The Act further provides that anyone opposing the application or applying for exclusion may bring evidence at the hearing of the application. During the hearing the State bears the burden of proof, it has to show on a balance of probabilities that the property is a proceed of or an instrumentality in crime. When the State discharges this burden, anyone applying for an exclusion of his or her interest in the property may show on a balance of probabilities that he acquired the interest legally and neither knew nor had reasonable grounds to suspect that the property was the proceed or instrumentality of a crime. The Act provides for appeals and enables innocent owners to defend their interest and gives them the right to appeal.

Chapter five of the POCA, provides for the procedure used in criminal forfeiture; it provides for post-conviction confiscation of proceeds of all offences. It provides for the confiscation of any benefit derived from any criminal offence for which the accused is convicted. Proceeds received,

¹⁹ Jean Redpath (2000) Forfeiture Rights? Assessing South Africa's Asset Forfeiture Laws. Vol 9 No 5/6 Published in African Security Review

derived or retained as a result of a conviction for an offence or related to criminal activity form the basis of the calculation of the benefit received. A confiscation order is a money judgment and any realizable property including legitimately obtained and untainted property of the accused may be realized, upon an order of court to satisfy the confiscation order. To determine the property that is subject to confiscation, the gross value of the defendants' benefit is calculated by adding together the value of all property, services or other benefits received as a result of an offence (section 19).

Once the value of the defendants benefit has been calculated, the court must determine the value of the realizable property which the defendant has available to pay a confiscation order. The realizable property is the sum of the value of all property which the defendant's holds (whether obtained from legitimate or illegitimate courses) and the value of all gifts the defendant made in a period of seven years before the restraint of the defendant's property, less any obligations to secured creditors. The value of the realisable property may therefore be more than the value of the property which the defendant actually holds and may include the value of property held by third parties. When the court has determined the value of the realisable property, it must make the confiscation order in the form of a money judgment against the defendant to the value of the benefit, unless the value of the benefit exceeds the value of the realisable property. In the latter case, the court must make the confiscation order to the value of the realisable property.²⁰

From what has been discussed above, the procedure that the South African government uses as regard the forfeiture of assets used in the commission or connected to crime, can either be civil or criminal forfeiture. The author is of the view that the procedure adopted in civil forfeiture in

²⁰ "Anti Money Laundering and Combating the Financing of Terrorism." Mutual Evaluation Report South Africa. 26th Feb, 2009.

South Africa which provides that notice of the seizure should be given to all interested persons is essential because in certain circumstances, the State may seize property which belongs not only to the alleged owner (one who has committed criminal offence) but also other innocent individuals. As such these individuals ought to be given an opportunity to be heard in order for them to protect their interest.

4.5 THE PROCEDURE OF FORFEITURE UNDER THE LAWS OF ZAMBIA

The type of asset forfeiture used in the Zambian legal system is criminal forfeiture that is, the action is *in personam* as there is a requirement for a criminal conviction. The laws which grant powers to the state to seize property in criminal matters discussed in Chapter three of this research paper require that proceeds of a crime should be forfeited to the state upon the conviction of the accused. For instance the Prohibition and Prevention of Money Laundering Act provides in section 15 that property may be seized if there are reasonable grounds to believe that it is derived from money laundering. Sections 17 and 20 of the Act provide that property which has been seized may be liable to forfeiture by the court and it shall vest in the state.

The Narcotic Drugs and Psychotropic Substances Act Chapter 96, empowers the commissioner to enter, search and seize property which is liable to forfeiture (section 24). The Act further provides in section 31 that all property that has been used in the commission of a crime under the Act should be seized. Sections 34 and 39 of the Act provide that forfeiture of property to the state is allowed upon a successful conviction.

From the provisions of the two Acts of Parliament highlighted above, it is clear that the procedure of forfeiture used in the Zambian legal system is criminal or conviction based forfeiture. The government is empowered to first seize property which it suspects that it was

involved in the commission of a crime. Thereafter, when the said property is seized, the accused has to be convicted and after which the property has to be forfeited to the State. The government has the burden to prove that the property was acquired illegally beyond reasonable doubt.

The following cases illustrate the use by the government of the powers to seize property of individuals who are suspected of having obtained the property through illegal means:

The case of *Mifiboshe Walulya v The Attorney General and HON. F. M. Chomba*,²¹ the plaintiff was arrested and detained on charges of being in possession of motor vehicles believed to be stolen which he used to operate his business. He was charged with various offences of being in possession of motor vehicles believed to be stolen or unlawfully obtained before six Subordinate Courts. He was acquitted on all the charges except on one count of being in possession of a motor vehicle on which he was convicted and sentenced. He appealed to the High Court against conviction and sentence; before his appeal was determined, armed police officers seized his property. The police took several of the motor vehicles. The plaintiff stated in his affidavit that most of the property seized had been stolen by public officers. He tried to seek legal redress against wrongful seizure of his property by the State.

In *Seong San Co Ltd v The Attorney General and the Drug Enforcement Commission*,²² the plaintiff company had contacted Duncan Malie and signed a Memorandum of Understanding on the importation of copper from Zambia based on payments by way of Bank Guarantee. The plaintiff duly remitted the sum to Duncan's account who never sent the shipping documents of the copper as agreed. The plaintiff reported the matter to the police who later effected a notice of seizure on Duncan's account number. Criminal proceedings were brought against him and during

²¹ [1980] Z.R 327

²² [2008]/HPC/0396 (unreported)

those proceedings he died. The Drug Enforcement Commission released the funds to the deceased's estate. The plaintiff brought an action; the defendant argued that the seized money was not held in trust for the plaintiff but was as an exhibit in the criminal proceedings. The court held that the defendant had notice of the transfer of funds into the deceased's account, a portion of which they had seized. The court went on to state that the seized funds which were suspected to be the product of money laundering were in actual fact the property of the plaintiff.

Roy Chilumanda & Namwali Lodge and Car Hire v the Attorney General,²³ the plaintiff brought an action against the state for damages for wrongful interference with property. Officers of the Drug Enforcement Commission searched and seized his motor vehicles. The officers said that they were looking for drugs and pornographic materials. It was alleged against the plaintiff that he was receiving stolen items from RAMCOZ, ZESCO and that he was involved in money laundering. The ground upon which the plaintiff's vehicles were seized was that he was related to Mrs Regina Chiluba and on the basis he used state funds to purchase the vehicles. The seizure of the motor vehicles was done without a search warrant and the vehicles were returned to the plaintiff after about one year without explanation and some of the vehicles were in a deplorable state of repair.

It was held that there were no reasonable grounds which existed in order for the State to seize the plaintiff's vehicles and as such, the State was held to be liable for the damage caused to the plaintiff by public servants.

From the aforementioned cases, it is clear that the procedure used to forfeit instrumentalities of a crime is that the State has to, upon reasonable suspicion that the accused obtained the property

²³ [2006] HP/O797 (unreported)

illegally obtain a search warrant to search and seize his property. However, in certain instances a search can be commenced without obtaining a search warrant. When the property is seized and there exist reasonable grounds to believe that the property was obtained illegally, the accused (owner of the property) is convicted and the property is forfeited to the State upon conviction. From the cases cited above, it can be unequivocally stated that in practice government officers usually seize private property without any reasonable suspicion that the owner committed a criminal offence. For instance the ground upon which property was seized in the case of Roy Chilumanda which is that he was related to Regina Chiluba is unreasonable because no reasonable investigation officer can rely on such a ground in order for him to search and seize private property. Furthermore, the cases also demonstrate that seized property is usually misused by government officers before a court order forfeiting the property to the State is made; for example what obtained in the case of Mifiboshe Walulya and Attorney General and HON. F. M. Chomba.

From the forgoing discussion it can be stated that the mode of asset forfeiture used in Zambia and the way in which it is exercised by government officers raises serious questions. These questions are: whether criminal forfeiture is the best mode to adopt in Zambia having regard to the current practice by government officers?, Is there a likely hood that if Zambia adopted civil forfeiture procedure, there will be less cases in which government officers will be misusing seized before a court order is granted?. To address these questions, the author's opinion is rendered together with the views collected interviews.

The authors view as regard the question of whether criminal forfeiture is the best method of asset forfeiture for Zambia, is that criminal forfeiture as a mode of asset forfeiture is useful. The problem is not the law but the way in which government officers exercise the powers to search

and seize private property. As already discussed, criminal forfeiture requires that the State has to prove beyond reasonable doubt that the property is an instrumentality of a crime. This is a huge burden to discharge and, as demonstrated in the cases cited above, the government fails to discharge this burden; for example in the case of Roy Chilumanda, the State failed to prove its case beyond reasonable doubt and as such it could not legally confiscate the plaintiff's property. It is the author's opinion that our legal system should introduce civil forfeiture proceedings; this proposition is based on the fact that civil forfeiture, it will help lessen the burden the State has to discharge as proof is established on a balance of probabilities. If the State has insufficient evidence upon which to establish proof beyond reasonable doubt, it can proceed by way of civil forfeiture. The rationale for the existence of both modes of asset forfeiture is that when the State cannot use criminal forfeiture due to its limitations, it can proceed by way of civil forfeiture this is useful as it will enable the State to deter criminal activities by making sure that individuals who obtained property illegally are dealt with whether or not the State has sufficient evidence to proceed with criminal trial provided that it can prove its case on a balance of probabilities.

In an interview conducted on the same question, Mrs. Fatima Mandhu,²⁴ agreed with the proposition that civil forfeiture should be introduced as it will help in easing the burden the state discharges in criminal forfeiture. She stated that the two types of forfeiture should both co-exist in our legal system. She further stated that in certain instances, some individuals actually obtain property illegally but it cannot be forfeited to the state because the State has insufficient evidence to convict the accused. Therefore, when civil forfeiture is introduced this will be remedied.

The second question of whether misuse of property by government officers is likely to reduce when civil forfeiture is introduced, the authors view is that there is a higher chance of it

²⁴ Fatima Manduh, interview conducted by the author, 14th April 2012.

reducing. The author is of the view that Zambia should like the US when forfeiting property before a court order is made place the property in the custody of the court. When the property is in the courts custody, there are lesser chances of it being misused before the court determines whether the property should be forfeited to the state. If the position used in the US cannot be plausible, a position similar to obtains in South Africa should be adopted which is that the property still remain with the accused but his not allowed to deal with or dispose of the property. The position in South Africa is very practical when the property in question is real property (land).

In another interview Mr. John Sangwa,²⁵ was of the opinion that whether or not civil forfeiture is introduced, government officers do not have the right to use seized property because there is not yet a court order to determine who will own the property be it the State or the accused. Government officers cannot use such property as the interest in that property has not yet passed to the state. He stated that government officers who misuse seized property should be personally liable as they are not acting under the authority of any law.

Mrs. Manduh gave a similar position to that of Mr. Sangwa, she stated that whether the State uses criminal forfeiture, its officers are not supposed to interfere with the seized property until a court order is granted. She suggested that in order for situations such as what obtained in the case of Roy Chilumanda (misuse of his goods), the court has to issue order to prevent any transactions or dealings in the said property.

²⁵ John Sangwa, interview conducted by the author, 12th April 2012.

4.6 CONCLUSION

This chapter highlighted the types of asset forfeiture it also outlined the types of asset forfeit used in jurisdictions such as the US and South Africa. The position of the law in Zambia was discussed, from what has been discussed it can be said that Zambia like other jurisdictions should have both types of asset forfeiture this will help in striking a balance between the interest of the State to prevent criminal activities and the property rights of accused persons.

5. O CHAPTER FIVE:

RECOMMENDATIONS AND CONCLUSION

5.1 INTRODUCTION

Chapter of this research outlines the recommendations which the author proposes concerning the legal issues which arise from the outcome of the research paper. A conclusion shall be drawn on the basis of the research finding.

5.2 CONCLUSION

This research paper has demonstrated that the right to property is a fundamental human right which has been recognized since time immemorial. The said right has been enshrined in a number of international instruments and regional instruments which are discussed in Chapter Two of this research. Chapter Two of this research has also shown that the right to property is protected and recognized in the Constitution of Zambia. The right to property is however not absolute because certain limitations are placed on it, for instance an owner of property cannot use it in such a way that the said use would interfere with other person’s rights. The State is empowered to derogate from individuals right to own property, through the use of the power of eminent domain; the State can acquire an individual’s property for the benefit of the public. The power of eminent domain has been discussed in Chapter Three of this research paper as it being inherent in all mature legal systems. The State is also empowered by the Constitution to enact laws which derogate from the right to property in situations where its owner is suspected of having committed a criminal offence; the said laws are discussed in Chapter Three of this research. With reference to these laws, the State is as discussed under no legal obligation to pay compensation. The paper has in Chapter Four, highlighted the type of asset forfeiture used in the

Zambian legal system, it has identified with the aid of case law that government officers have in a number of instances misused their power to search and seize property. Chapter Four of this research has also outlined the mode of asset forfeiture used in other jurisdictions.

5.3 RECOMMENDATIONS

The author of this research proposes the following recommendations concerning the research topic:

1. That the State when exercising its power of eminent domain pursuant to the Lands Acquisition Act should do so only in instances where there exists public need. It is abuse of the power of eminent domain for the state to compulsorily acquire private property using the Lands Acquisition Act when the reason for doing so is that the owner of the property obtained it illegally. The power of eminent domain should not be abused as the said power derogates from the fundamental right to own property. It therefore should only be exercised when there is a pressing public need.
2. The introduction of civil forfeiture; the said type of forfeiture should co-exist with criminal forfeiture. The rationale for this is that there is need for the state to prevent individuals from obtaining or using property in furtherance of criminal activities. Civil forfeiture will be useful in situations where the State has insufficient evidence to prove beyond reasonable doubt that the accused obtained the property illegally or that the said property was used in the commission of a crime. When civil forfeiture proceedings are introduced, the State has to sue the property and the alleged owner has to defend his interest in the property. If the State proves its case on a balance of probabilities the burden should then shift to the alleged owner of the property who has to show on a

balance of probability that he acquired the property legally. The use of civil forfeiture will thus help in balancing the conflicting the two conflicting interests which are the States interest in deterring criminal activities and the property rights of accused persons.

3. Even if civil forfeiture is not introduced in our legal system, when using criminal forfeiture and government officers suspect that property was obtained illegally or that it was used in the commission of a crime and they effect a seizure. The court should make an order which should prevent them and any other person from interfering with the property before a forfeiture order is made by the courts. It is legally wrong for the State to misuse seized property because no proprietary interest can be passed on to the State before a court order is made. This will help in preventing the current practice by government officers where they use seized property before a forfeiture order is made by the State and it will also preserve the property rights of accused persons.
4. If civil forfeiture is introduced a position similar to what obtains in South Africa should be introduced. The said position is that in South Africa, POCA provides that for civil forfeiture, there is need for a preservation order which precedes a forfeiture order; it is brought against any person and not against the property, to prevent him from dealing with the property in any manner. This will be of relevance in Zambia because it will prevent government officers from misusing property before a forfeiture order is made.

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