

COMPARATIVE EVALUATION OF NIGERIAN AND INTERNATIONAL LEGAL REGIMES
ON FORFEITURE OF PROCEEDS OF CRIME*

Abstract

The Constitution of the Federal Republic of Nigeria declares itself Supreme and makes its provisions binding on all authorities and persons throughout Nigeria. It further asserts that any other law inconsistent with its provisions shall, to the extent of the inconsistency. We have witnessed of late a plethora of legislations enacted by the National Assembly to regulate Economic Crimes in Nigeria. Such statutes include the Independent Corrupt Practices Commission Act 2003; The Money Laundering (Prohibition) Act 2004; The Economic and Financial Crimes Commission (Establishment) Act 2004; The Advanced Fee Fraud and other Fraud Related Offences Act 2006. These statutes are all intended to assist the government in the fight against corruption and to build a healthy society with a growth-based economy. However, some of the provisions of these Acts have been found to contradict the Constitution of Nigeria in the areas of protection and preservation of the rights of the citizens. This work focuses on the desirability of re-aligning these enactments with provisions of the Constitution and allied international legislations so as to close up the gaps that have exposed the citizens to the rough deals from the implementation of these laws as they now exist.

Keywords: Forfeiture, Confiscation, Proceeds of Crime, Proprietary Rights.

1. Introduction

Globalization and its accompanying technological innovations of the late 20th century into 21st century marked a wake of significant improvements in the financial market. However, while the global community was (and is still) basking in the euphoria of positive changes, the criminal elements in the society saw in these innovations an avenue to exploit a booming financial market. A major negative innovation of globalization is money laundering which can be defined as the act of concealing the transformation of profits from illegal activities into ostensibly legitimate assets. It appears that while the global community hurriedly embraced the positives of globalization, the regulatory apparatuses of the local and international communities respectively were inadequate to curb its negatives, especially the laundering of ill-acquired wealth. Traditional penal statutes were designed as criminal trial tools for the conviction and incarceration of offenders. Over time, the conviction-based system became inadequate deterrence especially for financial crime offenders. The average high-profile offender prefers to ride with the state through the rigours of excruciating criminal trials even at the risk of conviction. The offender's resolve (and reasonably so) is that a man who retains the proceeds of his criminal activity, though convicted, remains undefeated. It therefore appeared that the pre-21st century penal statutes were inadequate deterrence tools for curbing the menace of advanced stealing, criminal breach of trust and money laundering. Therefore, there was a need for the state to introduce both proactive and reactive measures to sufficiently shackle the growing wrists of financial crimes through criminal conviction and/or restitution (through forfeiture of proceeds of crime). Briefly defined, forfeiture can be seen as the temporal or permanent loss of a legal right especially a right to property as a consequence of the property owner's breach of law.

In the wake of the 2nd millennial celebrations, several states enacted anti-graft laws which birthed multiple anti-graft agencies. In Nigeria, the Obasanjo led civilian administration between 1999 and 2007 introduced the Corrupt Practices and other Related Offences Act 2000.¹ establishing the Independent Corrupt Practices Commission; the Economic and Financial Crimes Commission (Establishment) Act 2004 establishing the Economic and Financial Crimes Commission (EFCC); the Money Laundering (Prohibition) Act 2004.² It is arguable (and strongly so) that the establishment of the EFCC in the year 2004 birthed a new regime in the anti-graft crusade in Nigeria. This is because the EFCC (Establishment) Act further conferred on the commission the powers to coordinate the enforcement of existing anti-graft laws.³ The aforesaid existing laws though extant were largely ignored before the establishment of the EFCC. Suffice to say that the introduction of the EFCC ignited life into the anti-graft apparatus of the Nigerian government, thereby attracting controversies from stakeholders and the society at large. Over the years, the aforesaid anti-graft legislations have been amended and others repealed and

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¹ The Act is now defunct having been repealed and replaced in 2003.

² Now repealed and replaced with the Money Laundering (Prohibition) Act 2011.

³ Including the Advance Fee Fraud and Other Fraud Related Offences Act, 1995 (now repealed); the Banks and Other Financial Institutions Act, 1991, (as amended), the Miscellaneous Offences Act; and any other law or regulations relating to Economic and Financial Crimes.

replaced by new legislations designed to address constitutional and implementation challenges.⁴ The aforesaid improvements notwithstanding, the anti-graft apparatus of Nigeria is still confronted by constitutional challenges over seeming inconsistencies with guaranteed rights to property.⁵ Hence, there is a need to strike a balance between protecting the guaranteed rights of citizens and implementation of statutory provisions designed to limit an abuse of the aforesaid constitutional rights. The elements of a desirable balance can be unearthed upon a critical review of extant Nigerian laws on right to acquire and own moveable and immoveable properties and limitations thereof.

2. Relevant Literature on Ownership of Property in Nigeria

In Nigeria, acquisition and ownership of property is a right guaranteed under the Constitution⁶ and concurrently regulated by various laws and administrative rules.⁷ There is however a caveat that such other statutes and subsidiaries must not be inconsistent with the ultimate provisions of the Constitution.⁸ Therefore, the task of this enterprise involves the following:

- (a) identifying proprietary rights under the Constitution;
- (b) identifying constitutional exceptions to proprietary rights;
- (c) identifying legislations made pursuant to constitutional exceptions to ownership of property in particular statutes relating to forfeiture of proceeds of crime; and
- (d) evaluating the consistency or otherwise of any such legislation(s) limiting proprietary rights vis-à-vis provisions of the Constitution.

3. Proprietary Rights under the Nigerian Constitution

The right to acquire and own properties in Nigeria is guaranteed as follows: 'Subject to the provision of this Constitution every citizen⁹ of Nigeria shall have the right to acquire and own immovable property anywhere in Nigeria'.¹⁰ Furthermore, S.44 CFRN provides as follows:

- (1) No moveable property or any interest in an immoveable property shall be taken possession of compulsorily and no right over or interest in any such property shall be acquired compulsorily in any part of Nigeria except in the manner and for the purposes prescribed by a law among other things-
 - (a) requires the prompt payment of compensation therefor; and
 - (b) gives to any person claiming such compensation a right of access for the determination of his interest in the property and the amount of compensation to a court of law or tribunal or body having jurisdiction in any part of Nigeria.
- (2) Nothing in subsection (1) of this section shall be construed as affecting any general law-
 - (a) for the imposition of enforcement of any tax, rate or duty;
 - (b) for the imposition of penalties or forfeitures for the breach of any law, whether under civil process or after conviction for an offence;
 - (c) relating to leases, tenancies, mortgages, charges, bills of sale or any other rights or obligations arising out of contracts;
 - (d) relating to the vesting and administration of the property of persons adjudged or otherwise declared bankrupt or insolvent, of persons of unsound mind or deceased persons, and of corporate or unincorporated bodies in the course of being wound-up;
 - (e) relating to the execution of judgments or orders of court;
 - (f) providing for the taking of possession of property that is in a dangerous state or is injurious to the health of human beings, plants or animals;
 - (g) relating to enemy property
 - (h) relating to trusts and trustees
 - (i) relating to limitation of actions

⁴ The Advance Fee Fraud and Other Fraud Related Offences Act 1995 (as amended 2005) was repealed by the Advance Fee Fraud and Other Fraud Related Offences Act, 2006.

⁵ The right to acquire personal property both moveable and immoveable is guaranteed under S.43 and S.44 CFRN 1999 (as amended).

⁶ S. 43 and S.44 CFRN 1999 (as amended).

⁷ Land Use Act 1978 and other Use of Property laws and rules made pursuant thereto.

⁸ S.1 (3)-Laws found to be inconsistent with the provisions of the Constitution shall to the extent of such inconsistency be void.

⁹ Ownership of immovable property under S.43 CFRN 1999 is a citizen's right.

¹⁰ S. 43 CFRN 1999.

- (j) relating to property vested in bodied corporate directly established by any law in force in Nigeria;
- (k) relating to the temporary taking of possession of property for the purpose of any examination, investigation or enquiry.
- (l) providing for the carrying out of work on land for the purpose of soil-conservation;
- (m) subject to prompt payment of compensation for damage to buildings, economic trees or crops, providing for any authority or person to enter, survey or dig any land, or do lay, install or erect poles, cables, wires, pipes, or other conductors or structures on any land, in order to provide or maintain the supply or distribution of energy, fuel, water, sewage, telecommunication services or other public facilities or public utilities.

4. Constitutional Exceptions to Proprietary Rights in Nigeria

The constitutional exceptions to proprietary rights are enshrined in S. 44(1) and (2) (a)-(m) above including abrogation of property rights on grounds of public safety,¹¹ overriding public interest,¹² compensation for civil liabilities,¹³ conviction for an offence,¹⁴ guardianship¹⁵ and other forms of property management/ administration,¹⁶ temporal investigation or inquiry,¹⁷ and insolvency.¹⁸ Based on the foregoing, the foundation of the constitutional abrogation of proprietary rights by way of penalty or forfeiture as a consequence of criminal act or alleged criminal act of such property owner is enshrined in S. 44 (2) (b) and (k) of the CFRN 1999. Therefore, the aforesaid constitutional provisions suffice as enabling law for legislature to enact forfeiture laws which must complement and not contradict the provisions of the Constitution.

5. Constitutionality of Nigerian Laws On Interim and Final Forfeiture of Proceeds (or Alleged Proceeds) of Crime

It is important to note straight away that no person or authority has the power to take over the temporal or absolute control of the personal properties belonging to any person¹⁹ without a positive order of a court of competent jurisdiction authorizing any such person or authority to deal with or dispose of such property in a manner defined by the Court. Therefore, any law which empowers or purports to empower the arbitral seizure, detention, confiscation, forfeiture or in any like manner of properties of defendants is *ab initio* unconstitutional for reason of its inconsistency with S. 6 of the CFRN.²⁰ Accordingly, under the EFCC Act,²¹ the Corrupt Practices and Other Related Offences Act;²² (hereinafter ICPC Act) the Advance Fee Fraud and Other Fraud Related Offences Act²³ (hereinafter AFFA 2006) and other extant laws, orders for the forfeiture or seizure of assets found or reasonably suspected to be proceeds of crime can only be made by a court of competent jurisdiction. In furtherance to the provisions of S.44 (2)-(b) of the 1999 CFRN, a final order of forfeiture can only be made under the EFCC Act and ICPC Act respectively after conviction for an offence under the said Acts.²⁴ However, same cannot be said about the Advance Fee Fraud and Other Fraud Related Offences Act wherein the legislature took a seeming controversial approach when it enacted as follows;

- (1) Where any property has come into the possession of any officer of the Commission unclaimed property or any property is found by any officer of the Commission to be in the possession of any other person, body corporate or financial institution or any property in the possession of any person body corporate or financial institution is reasonably suspected to be proceeds of some unlawful activity under this Act, the Money Laundering Act, 2004, the Economic and Financial Crimes Commission Act, 2004 or any other law enforceable under

¹¹ S. 44 (2) (f) & (g)

¹² S. 4 (1) & (2) (i) & (m)

¹³ S. 44 (2) (a) (b) (c) (e)

¹⁴ S. 44 (2) (b)

¹⁵ S. 44 (2) (d)

¹⁶ S. 44 (2) (d) (h) (i) & (j)

¹⁷ S. 44 (2) (k)

¹⁸ S. 44 (2) (d)

¹⁹ 'Any Person' includes persons accused of having committed a criminal offence or having been convicted of offence.

²⁰ S. 6 (1-6) CFRN 1999 vests the judicial powers of the federation in the courts including powers to determine questions relating to all matters between persons, or between the government or authority in Nigeria on any question as to the civil rights and obligations of that person.

²¹ SS. 20, 21, 23, 24, 29, 30 and 34 EFCC (Establishment) Act

²² S. 41

²³ SS. 16 & 17

²⁴ S. 30 EFCC Act, S. 41 ICPC Act.

the Court shall upon application made by the Commission, the High Court, or any other person authorized by it and upon being reasonably satisfied that such property is an unclaimed property or proceeds of unlawful activity under the Acts stated in this subsection make an order that the property or the proceeds from the sale of such property be forfeited to the Federal Government of Nigeria.

- (2) Notwithstanding the provisions of subsection (1) of this section, the High Court shall not make an order of forfeiture of the property or the proceeds from the sale of such property to the Federal Government of Nigeria until such notice of publication as the High Court may direct has been given or made for any person, body corporate or financial institution in whose possession the property is found or who may have interest in the property or claim ownership of the property to show cause why the property should not be forfeited to the Federal Government of Nigeria.
- (3) Application under subsection (1) above shall first be made by a motion ex parte for interim forfeiture order of the property concerned and the giving of the requisite notice or publication as required in subsection (2) of this section.
- (4) At the expiration of fourteen days or such other period as the High Court may reasonably stipulate from the date of the giving of the notice or making of the publication stated in subsections (2) and (3) of this section, an application shall be made by a motion on notice for the final forfeiture of the property concerned to the Federal Government of Nigeria.
- (5) In this Section...
- (6) An order of forfeiture under this section shall not be based on a conviction for an offence under this Act or any other law.²⁵

6. Evaluating the Constitutionality or Otherwise of Section 17 of the Advance Fee Fraud and Other Fraud Related Offences Act, 2006

It is expected that stakeholders within and outside the legal community especially the Courts (when the opportunity presents itself) would review the provisions of S. 17 AFFA 2006 critically and with exceeding concerns for its apparent encroachment on the constitutional right against double jeopardy and the presumption of innocence. The question which begs answer is: *whether considering the provisions of S. 35 (5) and (9); and S. 44 (2)(b) of the CFRN 1999, a non-conviction based forfeiture is not unlawful?* By virtue of S. 44 (2) (b) CFRN, a law is not unconstitutional if it imposes penalties or forfeitures as a consequence of the breach of any law whether (a) under civil process or (b) after conviction for an offence. Having established that S. 17 of the AFFA 2006 is a self-confessed non-conviction based law, the outstanding question is: *whether it qualifies as a civil process under which an action for civil forfeiture can be sustained?* Although it is expressly provided under the AFFA that forfeiture under the Act does not require a conviction, the AFFA 2006 is silent on the nature of proceedings to be commenced thereof. It is, however instructive that the non-requirement of a conviction does not mean the non-requirement of a criminal charge. Therefore, the first evidence of untidiness in S.17 AFFA 2006 is with respect the failure of the lawmakers to reconcile a non-conviction based forfeiture and a concurrent or subsequent criminal charge on an offence with similar ingredients.

A practical application of S. 17 (1) of the AFFA 2006 suggests that in a proceeding for forfeiture, a court has to be reasonably satisfied that such property is an unclaimed property or proceed of unlawful activity. The further question therefore is: *whether under the Nigerian jurisprudence, the finding of liability for an unlawful activity to wit the breach of a penal law can be determined within the civil process of the court?* Without a doubt, criminal allegations against persons can only be brought before the court upon a charge stating the offence and relevant particulars thereto.²⁶ Hence, in order to reasonably satisfy the court that property sought to be forfeited constitute proceeds of unlawful activities, the applicant must first state the act which it alleges to be unlawful, and prove all the ingredients of the offence beyond reasonable doubt.²⁷ The requirement of proof beyond reasonable doubt for allegations of crime is a cardinal distinction between civil and criminal processes. Note further that where an allegation of crime is made within a civil process, the standard of proof tilts upward from proof on a balance of probabilities to proof beyond reasonable doubt.²⁸ Helpfully, the definition of the word *crime* is not as large as Court of Appeal in Nigeria

²⁵ S. 17, Advance fee fraud and Other Fraud Related Offences at

²⁶ *Aig-Imoukhuede v Ubah* [2015]8 NWLR (pt. 1462) Pg. 399 at 454-455

²⁷ *Jua v State* [2010]4 NWLR (Pt. 1184) Pg. 217 at 253

²⁸ *Amgbare v Sylva* [2009]1 NWLR (Pt. 1121) Pg. 1 at 81-82; note however that in proceedings for forfeiture under S. 17 AFFA, the cause of action is punishment for criminal liability. Therefore, an action commenced under S.17 AFFA does not qualify as a civil suit containing allegations of crime.

has defined crime as ‘a positive or negative act in violation of penal law.’²⁹ Consequently, the next test is to query the status of the AFFA 2006 to ascertain whether it is a civil or penal law. The status of the AFFA 2006 can be gleaned from the preamble to the Act, which though riots a part of the enactment; can *be* resorted to as an aid to its construction considering the ambiguity in S. 17 of the Act.³⁰ The preamble to the AFFA 2006 reads as follows: ‘An Act to prohibit and punish certain offences pertaining to advance fee fraud and other fraud related offences and to repeal other Acts related therewith’.

In construing the above preamble, the phrase *prohibit and punish* is instructive. It is therefore without a doubt that the AFFA 2006 is a penal statute designed to prohibit and punish offences. In addition, S. 17 of the Act is a procedural law for the process of determining alleged unlawful activities and imposing punishment to wit; forfeiture. In *Nwigwe v FRN*³¹ the Court of Appeal per Mukhtar, JCA, pronounced the punitive nature of forfeiture as follows:

There is no doubt that forfeiture and sale of property, be it temporary or permanent is punitive in nature. The word ‘forfeiture’ has been defined in the *Black’s Law Dictionary 6th Edition at p. 650* as follows:

‘A divestment of specific property without compensation: it imposes a loss by the taking away of some pre-existing valid right without compensation. A deprivation or destruction of a right in consequence of the non-performance of some obligation or condition, loss of some right or property as a penalty for some illegal act. loss of property or money because of breach of a legal obligation. Forfeiture and sale of property (including money, securities and real estate) is one of the penalties provided for under certain Federal and State criminal statutes. Such forfeiture and sale provisions apply to property used in the commission of a crime under the particular statutes, as well as property acquired from the proceeds of the crime.’³²

7. The Position of the Nigeria Supreme Court on Pre-Conviction Forfeiture of Proceeds of Crime

In the case of Dame Patience Ibifaka Jonathan V. FRN³³, the Supreme Court came to the rescue in resolving the vexed issues relating to the nature and constitutionality of pre-conviction and non-conviction based interim forfeiture of proceeds of crime prior to the judgment of the Supreme Court, the position of the Nigerian Court of Appeal in *Nwigwe* where the Court tested the Constitutionality of S. 29 of the EFCC Act was as follows:

Forfeiture of property cannot be anything other than punishment and as provided by the above provision. It is quite natural and appropriate when it is inflicted on the appellants after due trial and convictions. Section 29 of the EFCC Act clearly imposes punishment on the appellants by way of forfeiture of property on the basis of mere suspicion. It constitutes an infraction on the rights of the appellants under section 35(5) of the Constitution and is in wild riot or conflict with the constitutional provision. I have no hesitation in finding the provision of section 29 of the EFCC Act as unconstitutional. I therefore invoke the provision of section 1(3) of the Constitution to declare the provision of section 29 of the EFCC Act as null and void. That dictatorship like provision was an unfortunate misplacement in our laws under democratic governance.³⁴

However, in *Jonathan’s case* the Supreme Court held that the position of the Court of Appeal in *Nwigwe* does not represent the correct position of the law.³⁵ The apex court however held that while S. 29 of the EFCC Act remains valid to the extent that it is enforced temporally during the pendency of a criminal charge, the said section would be unconstitutional when enforced permanently. For ease of reference, the holding of the court is reproduced as follows

the intention of sections 25 and 29 of the EFCC Act is merely to get a preservative order on the property suspected to be proceeds of crimes so as to prevent the accused person

²⁹ *Ibid* 81.

³⁰ *Aig-Imoukhuede v Ubah* [2015] 8 NWLR (pt. 1462) Pg. 399 at 453

³¹ [2009]16 NWLR pt. 1166 Pg. 169 at 200

³² *Ibid*.

³³[2019] 10 NWLR (Pt 1681)533

³⁴ ‘Where- (a) The assets or properties of any person arrested for an offence under this Act has been seized, or (b) Any assets or property has been seized by the Commission under this Act, the Commission shall cause an *ex-parte* application to be made to be made to the court for an interim order forfeiting the property concerned to the Federal Government and the Court shall, if satisfied that there is prima facie evidence that the property concerned is liable to forfeiture, make an interim order forfeiting the property to the Federal Government.

³⁵ *Supra* note 31 @ 201 per Mukhtar, JCA.

or suspect from dissipating the asserts so the final judgment of the court will not be rendered nugatory in the event of a conviction or where the interested person fails to show cause. I therefore disagree with the decision in *Federal Republic of Nigeria v. Nwaigwe* (2003) 16 NWLR (Pt. 116) where section 29 of the EFCC Act was struck down as unconstitutional. If it was a final forfeiture order that was made on mere suspicion without proof, I would endorse the view that section 29 of the EFCC Act is unconstitutional. The Commission can confiscate a person's property only when he is found guilty of an offence and the property is linked to the offence committed e.g. the laundering of money from the proceeds of drugs.³⁶

The foregoing decision of the Supreme Court therefore upholds the view that pre-conviction interim preservation of proceeds of crime is recognized under the Nigeria legal system.

8. The Non-Conviction Civil Forfeiture Procedures

In *Jonathan's* case the Appellant challenged an Order of interim forfeiture of funds exceeding N2000,000.00 (Two Billion Naira) in the name of the Appellant and domiciled in various Nigerian banks. The order of the FHC was made pursuant to S.17 of the AFFA which section was argued by the Appellant as unconstitutional on the following grounds:

- (1) That the proceedings for forfeiture under S.17 AFFA qualifies as a criminal process *in personam* as composed to a civil process in rem, therefore, Appellant was denied her right to fair hearing when the Federal High Court made its order of interim forfeiture ex-parte.
- (2) That forfeiture whether interim or final under S17 AFFA is punitive and therefore in conflict with S.44 of the CFRN.

In the resolving the above issues, the Supreme Court held that Forfeiture under S.17 AFFA is a civil process in rem which neither requires the criminal conviction of the property owner nor his innocence. In the words of His Lordship Akaahs JSC

Civil forfeiture which is an action in rem as opposed to the confiscation of asserts which have been foreseen is embarked upon when the interest of the State is merely to recover the proceeds of unlawful activity. ...The modern explosion of civil forfeiture laws as a method of crime control is certainly due to organized crime... the UK and Federal Government of Australia passed the Proceeds of Crime Act 2002 and New Zealand enacted the Criminal Proceeds (Recovery) Act 2003. All these laws make provision for forfeiture of asserts that are connected to crime without any requirement for a conviction, all of them apply the standard of proof in civil law rather than proof beyond reasonable doubt required in criminal prosecution ...Nigeria is a member State and signatory to the United Nations Convention Against Corruption (UNCAC) which came into force in 2005. Article S.4 enjoined each state party to consider taking such measure as may be necessary to allow confiscation of property suspected to be proceeds of unlawful act without a criminal conviction in cases which the offender cannot be prosecuted. In 2006, the Advance Fee Fraud and Other Fraud Related Offences Act was enacted in line with the convention wherein non-conviction based forfeiture was legalized through section 17 of the said Act... In *United States v. Ursery* (95-345) 518 US 267 (1996) the Supreme Court of the United States of America after reviewing a list of similar precedents found that in contrast to the *in personam* nature of criminal actions in rem forfeiture are neither 'punishment' nor for criminal purposes. Similarly, In *Bennis V. Michigan* (94-8729) S.17 US 1163 (1996) forfeiture was found constitutionally permissible even in the case of a joint owners of property as the court found that historically, consideration was not given to the innocence of an owner because the property subject to forfeiture was the evil sought to be remedied. The Supreme Court of Ireland in *Gilligan v. Criminal Asserts Bureau* (2011) 1ESC 82 held that the authorities lend considerable weight to the view that in rem proceedings for the forfeiture of property, even when accompanied by parallel procedures for the prosecution of criminal offences arising out of the same events are civil in nature... Nigeria does not live in isolation and developments in other parts of the world impact either positively or negatively on this Country... proceedings in rem its own procedure. As I have already explained the Advance Fee Fraud and Other Fraud Related Offences Act was enacted in line with convention wherein non conviction based forfeiture has

³⁶ *Jonathan v. FRN* (supra note 33) Per Akaaks, JSC pg. 55.

been legalized by section 17 of the Act and is not limited to Nigeria alone as it follows the same pattern with Part 5 the Proceeds of Crime Act 2002 (POCA) of the UK which was used in *Butler v. The United Kingdom* (supra). It is not the procedure that matters but the substance of the application and what it is intended to achieve. Not only that, the proviso to section 36(5) of 1999 Constitution recognizes the validity of any law which imposes the burden of proving particular facts on the person charged with an offence who is presumed innocent until proven guilty... The standard of proof required to invoke section 17(1) of the Act and section 19(3) of the Money Laundering Act read along with section 36(1) and (5) of Constitution is not proof beyond reasonable doubt but proof on a balance of probability... So an ex-parte application for interim forfeiture of property that is not predicated on conviction of the owner of the property would necessarily be an action in rem because it is the recovery of the property that that law aims at³⁷

By the foregoing decision of the Supreme Court in *Jonathan*, it is without a doubt that:

- (a) There are two applicable proceedings for forfeiture of proceeds of crime in Nigeria, to wit: (i) Forfeiture under criminal process made interim during the pendency of a charge and absolute by confiscation after conviction; and (ii) Forfeiture under civil process.
- (b) Forfeiture of proceeds of crime under civil process is *sui generis*.
- (c) Forfeiture of proceeds of crime under civil process is targeted at recovering the property and not in the determination of the guilt/innocence of the property owner.
- (d) The standard of proof in civil process forfeiture is proof on the balance of probabilities.
- (e) When an interim order of forfeiture is made under the civil process, publication and notice must be issued on interested parties and the property owner to show causes why a final order of forfeiture should not be made by the court.
- (f) The property owner or any interested party/inter-pleader MUST be notified and heard.³⁸
- (g) Upon the making of the interim order of forfeiture, the burden of proof shifts to the party interested pursuant to the proviso to S. 36(5) CFRN.³⁹

The above resolutions notwithstanding, it is uncertain from the decision of the Supreme Court whether a civil proceeding for forfeiture could be accompanied by parallel procedures for criminal offences arising out of the same events⁴⁰. Though the court held that civil forfeiture 'is embarked upon when the interest of the State is merely to recover the proceeds of the unlawful activity'⁴¹ the court did not go further to give directions on the proper approach to be adopted by the lower courts where such process is adopted simultaneously with a criminal process where there may exist real danger of the civil proceedings causing injustice in the criminal proceedings. Expectedly, stakeholders especially legal practitioners would argue that, the civil process ought to be stayed pending the determination of the criminal process.⁴² Arguably, there is a danger of injustice on a respondent on who lays the burden of proof in the 'sister' civil proceedings. Hence, though the likelihood of subject-matter estoppel may not be established, the similarity of issues and evidence in both actions would require an examination of a likelihood of an abuse⁴³. A further challenge posed by S.17 AFFA is that it empowers the State/Applicant to subject a defendant to more than one trial for the same offence with similar ingredients thereby giving the State a second bite at the cherry. For instance, if A is charged with an offence of conversion of an instrument of crime under the EFCC Act and is found guilty, the State can commence forfeiture proceedings against A over the proceeds of the same crime on the ground that failure to secure conviction is immaterial as conviction is not a precondition for proceedings under S.17 AFFA. A further illustration which has become the practice of the EFCC is as follows: If A is charged with an offence under any law in Court B, the EFCC can concurrently commence S.17 AFFA proceedings in Court C. Hence, though A may be discharged and acquitted by Court B, his properties may be forfeited in Court C on the same facts. Therefore, the process of subjecting a defendant to a multiplicity of proceedings on the same subject matter creates room

³⁷ Ibid 41-42

³⁸ Per Akaahs, JSC, 42-55

³⁹ Per M.D. Mohammad, JSC 18

⁴⁰ The question that however arises is whether it does not amount to a contradiction that S.36 (5) itself is held inapplicable whereas the proviso thereto is held to bind the Respondent.

⁴¹ *Jonathan v. FRN* (supra) Per Akaahs, JSC, 49

⁴² Ibid 42

⁴³ *Akilu v. Fawehinmi* (No2) (1989) 2 NWLR (pt.102) pg. 122 at 177

for an abuse of court process and offends S.36 (9) CFRN which forbids double jeopardy. Hence, there is likelihood of prejudice.

Ordinarily, it would be expected that when the State initiates a criminal proceeding against a defendant, the neater option would be for the state to commence interim forfeiture proceedings under S.29 of the EFCC Act, thereby preserving the property subject-matter of the trial. Thereafter, confiscation can follow after conviction. In *Gilligan* and *Butler* both referred to by Supreme Court in *Jonathan* there were peculiar facts on the absence of legal framework and substantial evidence to secure criminal conviction. Therefore, as held by the Supreme Court in *Jonathan*, non-conviction forfeiture of proceeds of crime is an intervening remedy designed to beat the technicalities of organized crime where proof beyond reasonable doubt is a near impossibility. In Nigeria, the practice is that the EFCC files concurrent/cross-actions against defendants.

Furthermore, another issue which requires resolution by the Supreme Court is the proper position of a property-owner in civil forfeiture proceedings. Though it has been resolved that such actions are *in rem* as against the property and not *in personam* as against the property owner, the question remains whether the property owner is a Respondent *ab initio* reserving all rights to personal notice of action or a part of the whole world on whom notice is given through public notice there appears to be a misconception among prosecutors that the property subject matter of forfeiture is the defendant in forfeiture proceedings. Hence, by EFCC practice, oftentimes, there are no parties named on the face of court processes before the trial courts. However, a careful study of S.17 AFFA reveals that there are two categories of property that can be subjected to the civil process of forfeiture thus: (a) unclaimed properties in the possession of the State; and (b) properties reasonably suspected to be proceeds of crime found by the EFCC to be in the possession of any person⁴⁴. Therefore, whereas respondents in unclaimed property suits may be referred to as Persons Unknown, persons in whose custody suspected proceeds of crime are recovered should be properly identified and notified of the forfeiture proceedings to ensure compliance with the requirements of fair hearing. This position is best explained by the Supreme Court decision in *Rhein Mass Und See GMBH v. Rivway Lines Ltd*⁴⁵ where the Supreme Court per Ogwuegbu, JSC, held thus:

This brings me to the definition of action *in rem* and action *in personam*. An action *in rem* is a piece of legal machinery directed against a ship alleged to have been the instrument of wrongdoing in cases where it is sought to enforce a maritime or statutory lien or in a possessory action against the ship whose possession is claimed. A judgment *in rem* is a judgment good against the whole world. This does not mean that the vessels is the wrong doer but that it is the means by which the wrongdoer is brought before the court as a defendant. It is an accepted legal theory that an action *in rem* is procedural. The purpose is to secure the defendant owner's personal appearance.

Therefore, it is imperative that as a matter of first instance, interested persons receive personal notice of forfeiture proceedings. This is because there have been instances where persons whose properties formed the subject matter of forfeiture proceedings had no notice of such proceedings until after final forfeiture orders were made as notice was issued on the whole world through publication. It does not seem to be the intention of the law that property is divested to the State from persons who may have reasonable explanation for its ownership but who are not afforded reasonable opportunity to be heard. Therefore, the phrase *notice of publication* under S. 17(2) AFFA should be construed in such a manner that the former means personal notice to persons known while the latter means general notice to persons unknown/interested. There is also a need to provide a guideline for taking witness evidence in forfeiture proceedings. Though the requirement of S.17(1) of the AFFA is that an application for forfeiture be made to the court without more, the European Courts in *Gilligan* and *Butler* held that witness examination through oral evidence is the proper procedure that guarantees fair hearing in forfeiture proceedings.

9. Need For Amendment S.17 AFFA 2006

Historically, S.17 AFFA is not the first of its kind, the legislature having enacted a similar provision in S.49 of the now defunct Corrupt Practices and Other Related Offences Act 2000. The same legislature in its wisdom abandoned the said enactment when the defunct law was replaced by the Corrupt Practices and Other Related Offences Act 2003 following a barrage of legal actions against the old law. Between 2006 when the AFFA was passed into law and 2015, stakeholders paid little or no attention to S.17 of the Act. However, the emergence of the present administration and its anti-corruption crusade exposed both the advantages and dangers of equipping state authorities especially in Africa with extensive discretionary powers. It is therefore recommended that the National Assembly should amend S.17 AFFA 2006 by setting a procedure of hearing which does not encroach on a property-owner's right to fair hearing and right against double-jeopardy. Also, the 14-day period required or a party interested to show cause why property subject to order of interim forfeiture should not be forfeited to the State should be extended, while notice to the property owner must to direct (at first

⁴⁴ A defendant to a charge may be forced to technically 'open his defence' in a civil suit whereas the prosecution is yet to open his case, thereby arming the prosecution with materials to amend its case.

⁴⁵ (2005) 6NWLJR (Pt.109) p.59

instance). Otherwise, it is hoped that when opportunity presents, our Courts will issue practice directions for civil proceedings for forfeiture including directions on receivership, maintenance and restitution. It is no longer news that there is a Bill to Establish Proceeds of Crime Recovery and Management Agency pending before the National Assembly presently. The 'Agency' sought to be established shall have the power to co-ordinate and enforce all other laws on the investigation, identification, tracing and recovery of the proceeds of unlawful activities. While there is a seeming sense of excitement amongst stakeholders about the proposed law, one may argue that the said bill if passed into law will amount to the furtherance of a multiplicity of anti-graft legislations and agencies. The duty to co-ordinate and enforce anti-graft laws is already legislated under the EFCC Act. The issue of asset management can also be assigned and executed by already existing federal government agencies thereby saving the cost of governance. It is therefore recommended with respect that the legislature abandon the aforesaid bill, same being a waste of legislative time and resources.

10. Should the Supreme Court Revisit Its Decision in *Jonathan's case*⁴⁶

It is humbly argued, that, while the infallibility and finality of the Supreme Court remains undisputed, the decision of the apex Court in *Jonathan* while resolving topical issues in forfeiture proceedings seemingly left flood gates open for likelihood of abuse of individual constitutional rights. Historically, policy judgments anchored on the desire to assist the State achieve State Policies and Directive Principles raise concern on the weakening of conflicting rights. The Supreme Court acknowledged this probability when it held that:

it is not the procedure that matters but the substance of the application and what it is intended to achieve. Not only that, the proviso to section 36(5) of 1999 Constitution recognizes the validity of any law which imposes the burden of proving particular facts on the person charged with an offence who is presumed innocent until proven guilty....⁴⁷

Respectfully, while it is in the overall interest of well-meaning Nigerians that offenders do not enjoy their illicit wealth, procedural justice must not, with respect, be sacrificed on the altar of anti-corruption. Nigeria's adoption of international treaties/conventions notwithstanding, the State ought to ensure that nothing done in furtherance of international relations contravenes even in the least manner, any provision of the CFRN. This is because the Nigeria Constitution is the *grundnorm* made to promote our unique course in our peculiar society. Fair hearing is a fundamental procedural safeguard that guarantees equal opportunities to parties before the court. There is therefore room to revisit the ratio that though the State is not bound by the provision of S. 36(5) of the CFRN (requiring proof beyond reasonable doubt), the Respondent is bound by the proviso to the same provision that is held to be inapplicable for his protection. In *Butler*, the State called evidence and presented forensic evidence before the court to establish its claims. Therefore, the European Court of Human Right (ECHR) did not waive the burden on the State but rather held that it should be kept within the burden limits, such guideline(s) is absent in *Jonathan*. In addition, there is no similar proviso to S. 36(5) CFRN in the ECHR. The European Court therefore rightly held that the applicable case law in Europe permits that allegation of crime could be found on presumptions of facts. Respectfully, it therefore begs reconciliation Nigeria's solidarity with a world of conflicting constitutional principles especially as Nigeria's statutory and case law have remained consistent on the standard of proof for criminal allegations in civil proceedings. Suffice to state that in civil proceedings wherein the standard of proof for crime is beyond reasonable doubt, the guilt of the alleged offender does not have to be in issue. S. 135(1) (2) Evidence Act provides.

If the commission of a crime by a party to any proceeding is directly in issue in any proceeding civil or criminal, it must be proved beyond reasonable doubt. The burden of providing that any person has been guilty of a crime or wrongful act is, subject to section 139 of this Act, which is on the person who asserts it, whether the commission of such act is or is not directly in issue in the action.⁴⁸

Furthermore, in *Gilligan* the court held that proceedings which are defined as civil in domestic law may in certain limited circumstances nevertheless qualify as criminal proceedings, the court, therefore reserved the powers to determine the nature of its proceedings as opposed to the holding of the Nigerian Supreme Court that statute determines the nature of our proceedings. It is also important to note that provisions relating to property rights under the European Convention is not *in pari materia* with S. 44(b) of the CFRN. For the avoidance of doubt, the first Article of the first Protocol as follows: -

⁴⁶ The view of the Author hereunder does not in any manner suggest that the decision of the Supreme Court in *Jonathan* (supra) is perverse, the author rather argues (for purpose of future development of the law) that perhaps the attention of the Court was not drawn to certain discrepancies between the Nigerian Law and international conventions relied upon by the Court in arriving at its conclusions.

⁴⁷ *Jonathan v. FRN* (supra)

⁴⁸ Every judgment is conclusive proof, as against parties and privies of facts directly in issue in the case, actually decided by the Court, and appearing from the judgment itself to be the ground on which it was based; unless evidence was admitted in the action in which that judgment is intended to be proved. See also S. 173 Evidence Act conclusiveness of facts forming ground of judgment.

Every natural or legal person is entitled to the peaceful enjoyment of his possession. 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, however, not 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 and penalties⁴⁹.

Therefore, while the Convention is silent on the words ‘forfeiture’ and ‘Conviction’ the Nigeria Constitution expressly defines over 7 instances for the deprivation of property rights including forfeiture after conviction. Therefore, while *Gilligan* and *Butler* may represent a correct interpretation of the applicable laws in Europe where the general interest of the State is a ground for the confiscation of personal property, the ratios therein seem unworkable within the context and framework of the CFRN wherein the general interest of the state is not a ground for the deprivation of property rights. In addition, under s.44 (2)(b) CFRN, conviction of a property owner is contemplated as condition precedent to forfeiture. Note also that both the Butler and the Gilligan family member had criminal records. There are also other significant provisions of the civil forfeiture laws in England absent in Nigerian laws. S.241 Civil Recovery of the Proceeds ETC of Unlawful Conduct defines unlawful conduct as follows:-

- (1) Conduct occurring in any part of the United Kingdom is unlawful conduct if it is unlawful under the criminal law of that part.
- (2) Conduct which-
- (3) Occurs in a country outside the United Kingdom and is unlawful under the criminal law of that country, and.
- (4) If it occurred in a part of the United Kingdom, would be unlawful under the criminal law of that part.
- (5) The court or sheriff must decide on the balance of probabilities whether it is proved-
 - (a) That any matters alleged to constitute unlawful conduct have occurred. Or
 - (b) That any person intended to use any cash in unlawful conduct.

There must be a fixed sum subject of forfeiture under POCA; The proceedings in the High Court is upon a claim, the respondent is entitled to damages, the respondent is made a party *ab initio* in the High Court and must be given notice.⁵⁰ There is a process of severance of property; Trustees can be appointed; when order of Magistrate is appealed, an appeal is in the form of a re-hearing.⁵¹ Hence, the burden of proof does not shift. There are two procedures, one in the High Court relating to properties generally, and the other in the Magistrate Court relating to cash S. 240-316 including 4 chapters. There is also a mandatory requirement on the Secretary of State to make a code of practice for enforcement officers.

11. Conclusion

The discussions above lead to the single direction that both on the municipal and international arenas, the anti-corruption campaign are concerted and global in nature. The difficulty in securing criminal convictions does not seem to meet state actors well across the globe. The reaction therefore is to weaken the constitutional safeguards of the defendant by permanently depriving him of proceeds of his alleged criminal conduct either before or without a conviction. To the state actors, restitution or forfeiture is the goal of financial crime proceedings and if same can be secure without the hassles of criminal trial then the prosecution will embrace such option. However, the proponents of the rule of law and due process believe that justice must not be sacrificed on the altar of results. This is especially as our criminal law has evolved to accommodate plea bargain to ease the stress of criminal trials⁵². However, state actors seem more interested in non-conviction recovery of alleged proceeds of crime which has received the nod of the Nigerian Supreme Court. As indicated by the Supreme Court in *Jonathan*, the British Parliament enacted the Civil Recovery of the Proceeds ETC of Unlawful Conduct and incorporated same into the Proceeds of Crime Act, 2002. The aim of the legislation is to complement the criminal regime under the Proceeds of Crime Act, 2002. It is noteworthy that unlike S.17 AFFA the civil forfeiture law in the UK is properly detailed and ensures safeguards for a defendant against loss at the instance of a receiving/recovery/forfeiture order⁵³. The law also expressly forbids orders incompatible with any of the convention rights within the meaning of the Human

⁴⁹ Nielsen, Nikolaj (25 February 2014) ‘EU donate criminal assets to charity’ EU observer; European Parliament Passes New EU Rules to Crack Down on Crime Profits’ rttnews.com.25 February 2014 (last accessed 14th April 2020)

⁵⁰ s. 234, Proceed of Crime Act 2002, UK.

⁵¹s. 299(3) Proceed of Crime Act 2002, UK.

⁵²ss. 270-277, Administration of Criminal Justices Act, 2015.

⁵³ Chapter 5, ss. 256, 257,266(3), 298, 302 Proceed of Crime Act, 2002, UK.

Rights Act, 1998. Indeed, the problem with our system is less about the inadequacy of the law but the lack of professionalism and good faith in its application. Hence, the average Nigerian Respondent feels safer challenging the competence of a judicial process other than its merit. The State therefore reserves the duty to be transparent. It must be noted that an attempt at transparency seems hopeful within the Proceeds of Crime Bill. The bill, which is yet to be passed into law, appears doomed already as it provides, inter-alia, for simultaneous civil and criminal forfeiture proceedings. While we reserve comments on the effect of the aforementioned Bill, the conversation on extant laws must continue.