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THE JURISPRUDENCE OF NON-CONVICTION BASED ASSET FORFEITURE (CIVIL FORFEITURE) IN NIGERIA: CONSTITUTIONALITY OF THE NEW KNIGHT-ERRANT INNOVATED UNDER THE UNCAC

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INTRODUCTION

SResearch shows that between 1980 and 2018, African countries received close to $2 trillion in foreign direct investments and development assistance but recorded over half of that sum, about $1.3 trillion, in illicit financial flows (outflow). Nigeria, South Africa, Democratic Republic of Congo and Ethiopia collectively accounted for more than 50% of illicit outflows from the continent within the same period. According to a report by the Global Financial Integrity (GFI), between the years 2000 to 2008 Nigeria recorded a loss of about $130 billion to illicit outflows. The country suffers a serious case of entrenched institutionalized corruption which has enabled illegal acquisition of assets by politically exposed persons and bureaucrats in a large scale.

Typically, when assets are acquired by illegal means, perpetrators go to great lengths to hide the proceeds of their crime by elaborate money laundering schemes. The experience in Nigeria is that stolen funds are in many instances hidden in offshore financial centers and tax havens. It is evident that criminal acquisition of wealth is a transboundary enterprise. Therefore, an effective solution must involve a multilateral collaboration of states. It is against this background that the United Nations Convention Against Corruption was adopted in 2003, and came into force in December 2005. Nigeria ratified the convention on 24th October 2004. The convention set the global standards on anticorruption laws and made ground breaking provisions on asset recovery, including the innovative Non-Conviction Based Asset Forfeiture (civil) procedure.

UNITED NATIONS CONVENTION AGAINST CORRUPTION (UNCAC)

The UNCAC is divided into 8 Chapters with 71 Articles. The purpose of the convention is; to strengthen measures to fight corruption more efficiently, facilitate international cooperation and technical assistance in the fight against corruption and promote accountability in the management of public affairs and public property. In this regard, state parties are obligated to develop and implement effective anti-corruption policies and practices. Article 14 mandates state parties to take measures to prevent money laundering. Accordingly, states are to institute a comprehensive regulatory regime for financial institutions and other persons or bodies susceptible to money laundering. The convention binds state parties to criminalize bribery of national and foreign public officials. Embezzlement, misappropriation and diversion of public property , trading in influence , abuse of functions, amongst others are also criminalized by the convention.

Significantly, the convention establishes the offence of illicit enrichment by Article 20. Illicit enrichment is defined as...a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income. According to a report on the offence of illicit enrichment by the Stolen Asset Recovery Initiative (STAR), there are five elements to the offence -

The offender must be a public official
The increase in asset must have occurred during the period the offender held public office
There must have been a significant increase in the offender's asset
Intent to corruptly acquire assets must be established
The increase must be unjustified or unexplainable.

It has been argued that the offence of illicit enrichment may be contrary to constitutional standards because it places the burden of proof on the accused rather than on the prosecution, against the constitutional doctrine of presumption of innocence. That the burden of showing legitimacy of assets acquired while holding public office lies on the public officer, the prosecution need only establish the first four elements of the offence while the burden shifts to the defendant on the element of justification.

The adaption of the offence of illicit enrichment in Nigeria has been held not to offend the country's constitutional provisions. Illicit enrichment is reflected by the code of conduct provisions of the Constitution and the Code of Conduct Bureau and Tribunal Act, 1991. The 5th Schedule to the Constitution makes provision for the Code of Conduct for Public Officers in Nigeria. Paragraph 11 of Schedule 5 obligates every public officer to submit to the Code of Conduct Bureau a written declaration of all his properties, assets, and liabilities within three months after he takes office.
A false declaration is considered a breach of
the Code of

Conduct. Paragraph 11(3) renders it a breach of the code if the public officer acquires asset after the declaration not attributable to legitimate income earned;

Any property or assets acquired by a public officer after any declaration required under this Constitution and which is not fairly attributable to income, gift, or loan approved by this Code shall be deemed to have been acquired in breach of this Code unless the contrary is proved.

The provisions of Paragraph 11 of the 5th Schedule to the Constitution and the Code of Conduct Bureau and Tribunal Act represents Nigeria's adaption and codification of the offence of illicit enrichment. Under the Constitution and the Act, the prohibition on illicit enrichment extends to spouse of the public official, unmarried children under the age of eighteen (18) and his nominees, trustees or other agents . Public officers to which the code apply must make a full declaration of all assets owned on assumption of public office. In FEDERAL REPUBLIC OF NIGERIA v. DR. OLUBUKOLA ABUBAKAR SARAKI (2017) LPELR-43392(CA) the Code of Conduct tribunal upheld the No Case Submission of the Respondent. On appeal, the appellant argued that the tribunal failed to consider the provision of Paragraph 11(3) Schedule 5 to the Constitution which puts a burden on the Respondent to show that he had not violated the code of conduct where investigations by the CCB and EFCC show that he had submitted a false declaration.

In rejecting the argument, the court considered the provisions of the said Paragraph 11 and Section 36(5) of the constitution. The court held that in a case of false asset declaration, the burden of proving all elements of the offence still rests on the prosecution in conformity with the accusatorial criminal justice system the country operates. Where the prosecution has laid out a prima facie case, the defendant may then raise a defense and this does not amount to a shift in burden of proof.

Nigeria operates the adversarial system of criminal procedure, and the procedure of the Code of Conduct Tribunal by virtue of the Code of Conduct Bureau and Tribunal Act (CCBT Act) does not depart from that. The Third Schedule to the CCBT Act provides for the Code of Conduct Tribunal Rules of Procedure. Paragraph 4 of the 3rd Schedule, provides that the plea of the accused is to be taken, after which the Prosecution presents its case in the event of a "not guilty" plea. After the prosecution closes its case, the Accused may then open its defence. This procedure conforms with the adversarial system of criminal prosecution and is not contrary to Section 36(5) of the Constitution which places the burden of proof on the prosecution.

NON-CONVICTION BASED ASSET FORFEITURE (CIVIL FORFEITURE)

Chapter V of the UNCAC incorporates asset forfeiture as a fundamental principle. The rationale behind forfeiture of assets is that those who commit unlawful activity should not be allowed to profit from their crimes rather, the proceeds should be forfeited and applied to compensate the victim. Also, removing the economic gain from crime makes it less attractive and promotes deterrence.

There are two types of forfeiture recognized and incorporated by the UNCAC; Criminal Forfeiture and Non-Conviction Based Forfeiture (Civil Forfeiture). As the name implies, Criminal Forfeiture is forfeiture made further to a criminal trial and conviction, while Civil forfeiture, is forfeiture made pursuant to a civil process, it is an innovation of the UNCAC. Article 54(c) of the UNCAC mandates state parties to;

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 absence or in other appropriate cases.

The civil forfeiture procedure is an action in rem against the property as against a person. The burden on the State is to show that the property is proceeds of crime on a balance of probabilities, which is a lesser standard than proof beyond reasonable doubt required under a criminal procedure. From an analysis of Article 54(c) it is evident that the civil forfeiture procedure is especially useful where it is impossible to prosecute the offender either in cases of death, flight, absence etc.

Civil forfeiture has been fully incorporated into the South African legal system through its Prevention of Organized Crimes Act, 1998 (POCA). Section 38 of the POCA permits the High Court upon an exparte application to make an order prohibiting anybody from dealing with a property where there are reasonable grounds to believe that that the property is an instrumentality of an offence or is the proceeds of an illegal activity. Section 37 provides expressly that only the rules of evidence applicable in civil proceedings shall apply to Chapter 6 of the POCA which contains detailed provisions on civil forfeiture. Under United States Law, the civil forfeiture provisions are also made applicable to properties acquired in violation of law. In line with the requirement on countries by the UNCAC to provide assistance to foreign states, civil forfeiture procedure under US law also applies to;

Any property, real or personal, within the jurisdiction of the United States, constituting, derived from, or traceable to, any proceeds obtained directly or indirectly from an offense against a foreign nation, or any property used to facilitate such an offense, if the offense— would be punishable within the jurisdiction of the foreign nation by death or imprisonment for a term exceeding 1 year Nigeria has benefitted from non-conviction based asset forfeiture provisions in other jurisdictions in the course of its efforts to recover funds looted from the country. In May 2006, about €1.5 million looted by Diepreye Alamieyeseigha, former governor of Nigeria's Bayelsa State were confiscated and returned to Nigeria after the completion of a civil process pursuant to the Proceeds of Crime Act of Britain. Mr. Alamieyeseigha who was arrested in England on suspicion of money laundering had jumped bail and fled to Nigeria. Large tranches of the Abacha loot have also been confiscated and returned to Nigeria on completion of civil proceedings in various jurisdictions.

CIVIL FORFEITURE UNDER NIGERIAN LAW

Section 17 of the Advance Fee Fraud and other Related Offences Act (AFFA) 2006 contains Nigeria's adaptation of the civil forfeiture procedure. Along with the Economic and Financial Crimes Commission Act and the Money Laundering Prohibition Act, the AFFA is in compliance with the anti-corruption standards required of member states under the UNCAC. Section 17(1) of the AFFA provides;

Where any property has come into the possession of any officer of the Commission as unclaimed property or any unclaimed 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 of 2004, the Economic and Financial Crimes Commission Act of 2004 or any other law enforceable under the Economic and Financial Crime Commission Act of 2004, the High Court shall upon application made by the Commission, its officers, 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

Subsection 2 prohibits the High Court from making any order of forfeiture unless notice has been given to every person who may have interest in the property. The application for interim forfeiture is to be made by exparte motion, and on the expiration of 14 days or such other period stipulated by the Court, an application may be made by motion on notice for the final forfeiture of the property.

The provision of Section 17 is clearly applicable in the absence of a conviction. It is complementary to Section 7 of the EFCC Act which empowers the Commission to cause investigations to be conducted into the properties of any person where it appears to be illegitimate. By Section 17 of the AFFA, the EFCC is given the power to proceed against properties in the absence of a court conviction. The provision has eliminated the necessity of going through the rigors of a criminal trial which in Nigeria are usually long and protracted, before going against the property. The criticism however is that the provision is a violation of the constitutional right of presumption of innocence guaranteed by Section 36(5) of the Constitution of the Federal Republic of Nigeria (CFRN) and the right to own property guaranteed under Section 44 of the CFRN. The arguments are analysed in subsequent paragraphs.

CONSTITUTIONALITY OF SECTION 17 AFFA

The constitutionality of the non-conviction based asset forfeiture procedure under Section 17 of the AFFA was an issue before the Court of Appeal in MR. OLUKOYA OGUNGBEJE ESQ v. ECONOMIC AND FINANCIAL CRIMES COMMISSION (2018) LPELR-45317(CA). After discovering large sums of money in an abandoned flat on Osborne road Ikoyi, the EFCC applied to the Federal High Court for an order of interim forfeiture of the funds under Section 17 of the Act. Further to the application, the FHC granted an interim forfeiture order and directed that the interim order be published in a national newspaper as notice to everyone with interest in the funds. In response, the Appellant (a legal practitioner with no interest in the funds) filed an application seeking a stay of proceedings pending the outcome of the investigation and Report of the Presidential Panel of Investigative Inquiry and for an order directing and compelling the EFCC, the ICPC and the Nigerian Police Force to carry out a thorough investigation into the source of the monies and furnish the Court with same. The FHC dismissed the Appellant's application and granted the final forfeiture order.

The issue before the Court of Appeal was whether the learned trial Judge had jurisdiction when he granted final forfeiture order of properties/monies to the Federal Government of Nigeria in the absence of an investigation, prosecution, trial and conviction. The Appellant argued that on the authority of Section 36 and 44 of the CFRN, a Court can make a pronouncement that a property is the proceeds of an illegal activity only after a conviction has been secured. He argued that when Section 17 of the AFFA is read with Section 28 and 29 of the EFCC Act, the position of the law is that a court may only give an interim order to preserve a property pending the outcome of a criminal trial. According to the Appellant, no final forfeiture order can lie where there is no conviction. In response, Counsel to the Respondent argued that the EFCC has fully complied with the provisions of Section 17 AFFA. He distinguished the procedure under Section 28 and 29 of the EFCC Act as procedure further to a criminal trial while the procedure under Section 17 AFFA contemplates a civil procedure. He argued that the procedure under Section 17 is a civil action in rem, against the property, hence criminal standards of proof and procedure are not required. He submitted that the provisions of Section 17 AFFA is Nigeria's codification of Article 54 of the UNCAC to which Nigeria is a party.

In resolving the issues, the court considered Section 17 of the AFFA. Upon analysis, the court held that the law recognizes the power of the trial Court to make an Order of Forfeiture without conviction for an offence; that is the very essence of the provisions of Section 17 of the Act which was emphasized in Subsection (6), by clearly and emphatically providing that forfeiture under the provisions shall not be based on conviction. The court affirmed that Section 17 incorporates the non-conviction based asset forfeiture, it is a misconception of law to insist on a conviction before forfeiture in this instance. Tijjani Abubakar, J.C.A stated

I think at this stage, it is necessary to mention that Nigeria is a State party to the Convention and non-conviction based forfeiture of proceeds of crimes is not strange, it is now the order of the day, it is part of international best practice. Enactment of the Advance Fee Fraud and other related Offences Act 2006 is part of the obligations of State parties under the Convention, every State party to the Convention must criminalize certain offences and introduce measures that will promote recovery of proceeds of crimes and their eventual return to the State, this is exactly the purpose of Section 17 of the Advance Fee Fraud and Other Related offence Act 2006

In Dame Patience Ibifaka Jonathan V. Federal Republic of Nigeria (2019) LPELR-46944(SC) the Supreme Court upheld the constitutionality of the non-conviction based asset forfeiture procedure under Section 17 of the AFFA. After giving a historical background, the Apex Court considered non-conviction based asset recovery as an action in remrather than in personam, accordingly civil standards rather than criminal are applicable.

As I have already explained, the Advance Fee Fraud and Other Fraud Related Offences Act was enacted in line with the convention wherein non conviction based forfeiture has been legalised by Section 17 of the Act and is not limited to Nigeria alone as it follows the same pattern with Part 5 of 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... 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.

See: Daudu v. FRN (2018) 10 NWLR (Pt. 1626) 169.

ADDRESSING THE INHERENT DANGERS IN NON-CONVICTION BASED ASSET FORFEITURE

Civil forfeiture is an innovation birthed by necessity, the motivations behind the procedure are clear and appreciated. However, when the concept of forfeiture of proprietary rights over assets is analyzed, it may be argued that it is a penal sanction which can only be legitimately imposed after a criminal process. Proponents of this concept are of the view that civil procedure does not recognize forfeiture of assets, rather what happens in a civil process is a contest of rights by parties, after which the court makes a declaration of rights on a balance of probabilities after weighing evidence. Forfeiture in this sense is restricted to forfeiture of proprietary rights over assets and does not extend to a claim for forfeiture of tenancy rights subsequent to a breach of covenants in a tenancy agreement. Civil procedure in its undiluted form does not recognize forfeiture of assets, as asset forfeiture is in substance and effect a penal sanction.

This point is better appreciated on analysis of Section 17 AFFA. The section is made applicable where an asset that qualifies as "unclaimed property" is the "proceeds of an unlawful activity". In the context of the AFFA which is a criminal legislation, "unlawful activity" implicates criminal activity. As prescribed by Section 135 of the Evidence Act, 2011, crime may only be established when the burden of proof beyond reasonable doubt is discharged, and the constitutional safeguard of presumption of innocence is afforded a defendant. Anything contrary is an abuse of due process of law and constitutionally guaranteed rights.

It is admitted that by its nature, Section 17 AFFA and civil forfeiture in general, empowers the courts to impose a penal sanction through a civil process. The provision affords the EFCC an unfair short cut to confiscate assets of suspected offenders, in total disregard for the constitutional safeguards afforded an accused person to prevent abuse of his rights. "Unlawful activity" cannot truly be established by simple affidavit evidence as contemplated under Section 17 AFFA, it would require a criminal trial in the real sense. In fact, civil procedure and standards were never designed to establish criminal activity as Section 17 AFFA now permits.

It is for this reason that there is a friction; the section effectively empowers the courts sitting in their civil jurisdiction to determine guilt and impose penal sanctions.

The above contention appears quite illuminating and persuasive. This, perhaps, played on the mind of the court in Nwaigwe v. FRN (2009) 16 NWLR (Pt. 1166) 169 where Mukhtar JCA (as she then was) held thus;

"Forfeiture of property cannot be anything other than punishment... It is quite natural and appropriate when it is inflicted on the appellant after due trial and conviction. Section 29 of the EFCC Act clearly imposes punishment on the appellants by way of forfeiture of property on the basis of mere suspicion..."

In Nwaigwe's case, the court of appeal considered the constitutionality of Sections 28 and 29 of the EFCC Act which provides;

28. Where a person is arrested for an offence under this Act, the Commission shall immediately trace and attach all the assets and properties of the person acquired as a result of such economic and financial crime and shall thereafter cause to be obtained an interim attachment order from the Court. 29. 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 application to be made to the Court for an interim order forfeiting the property concerned to the Federal Government and the Court shall, if satisfied that there is Prima Facie evidence that the property concerned is liable to forfeiture, make an interim order forfeiting the property to the Federal Government.

The lower court had granted an interim order attaching various properties belonging to the Appellant pending the conclusion of the Respondent's investigations into his affairs. The Appellant challenged the constitutionality of Sections 28 and 29 EFCC Act. Mukhtar JCA considered the issue; whether the provision of Section 29 of the EFCC Act which provides for forfeiture of properties before conviction is constitutional. The Court held that Section 29 which empowers the court to order forfeiture of a person's property without trial is in violation of the right to be presumed innocent and therefore contrary to Section 36(5) of the Constitution.

We hold the view that Section 29 of the EFCC Act is easily distinguishable from Section 17 AFFA on the ground that Section 29 clearly envisages an application for interim forfeiture of property as a precursor to a criminal trial, the idea of which is to preserve the res pending the conclusion of trial. Section 17 AFFA envisages a civil application against the property, and final forfeiture is not conditional to a conviction unlike Section 29. However, a common denominator in both provisions is that they sanction the forfeiture of assets in the absence of a conviction. Nonetheless, application under Section 17 AFFA is sui generis and is intended to claw back proceed of unlawful activity simpliciter, regardless of where and how the proceed is localized and/or warehoused.

It is in recognition of this fact that the Supreme Court in Dame Ibikafa Jonathan's case set aside the decision of the Court of Appeal in Nwaigwe's case when it held that;

The intention of the legislature in enacting the Advance Fee Fraud Act is clearly brought out in Section 17 (6) of the Act which provides that - "An order of forfeiture under this section shall not be based on a conviction for an offence under this Act or any other law." 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 the law aims at. In this regard the decisions in such cases as Nwaigwe v. FRN (2009) 16 NWLR (Pt. 1166) 169 wherein the lower Court struck down Section 29 of the Economic and Financial Crimes Commission Act as unconstitutional; Chidolue v. EFCC (2012) 5 NWLR (Pt. 1292) 160 and FRN v. Ikedinwa (2013) LPELR - 21120 (CA) do not represent the correct position of the law. Per AKA'AHS, J.S.C. (Pp. 17-42, Paras. F-E)

EXPLORING THE JUSTIFICATION FOR CIVIL FORFEITURE

The Courts have upheld the constitutionality of Section 17 in recent decisions. The opposition to Section 17 has been that the forfeiture of an asset on the ground that it is the proceed of an illegal activity without obtaining a conviction after a criminal trial is a violation of a person's right to be presumed innocent until proven guilty, that it amounts to a determination of guilt without trial. In response, it has been established that the non-conviction based asset forfeiture procedure is an action in rem rather than in personam. It is a civil procedure, accordingly, the doctrine of presumption of innocence is inapplicable as the court is not out to determine the guilt of anyone, rather the court is invited on application to determine a question whether the property subject of the proceeding is a product of illegality. Accordingly, the consideration should be whether persons with interest in the property are afforded fair hearing. As the cases analyzed above show, Section 17 provides mandatorily that notice of the order of interim forfeiture should be made public, to give persons with interest in the property the opportunity to join the proceedings to show cause why a final forfeiture order should not be made. In Mr. Olukoya Ogungbeje ESQ V. Economic and Financial Crimes Commission the court held that publication of the interim order in a national newspaper satisfies that constitutional requirement to afford fair hearing.

The burden of proof on the Applicant is on a balance of convenience which is a lower standard than proof beyond reasonable doubt as is the case under a criminal procedure. It is conceded that the procedure could be abused by overzealous EFCC officials to unjustly deprive persons of their legitimate assets. There is therefore a duty on the Courts to ensure that when an application is brought pursuant to Section 17 AFFA, all persons with legitimate interest in the asset are served with the interim order. The court must ensure that significant opportunity is given to all parties to contest the application.

In 2019, the Attorney General of the Federation and Minster for Justice, Abubakar Malami made the Asset Tracing, Recovery and Management Regulations, 2019. The purpose of which is to regulate and coordinate the activities of law enforcement agencies and anti-corruption agencies in investigating, tracing and attachment, seizure and disposal and recovery of illegally acquired assets. The Attorney General is vested with the duty to coordinate inter agency investigations in recovery matters both within and outside the country amongst others. Significantly, Section 5 of the regulations provide;

1. All Non-Conviction Based Forfeiture shall be conducted by the office of the Attorney-General of the Federation.

2. Where a non-conviction based asset forfeiture procedure arises, the Law Enforcement Agency or the Anti-Corruption Agency shall transfer the file to the Office of the Attorney General of the Federation.

Perhaps this provision became necessary in recognition of the sensitivity of non-conviction based asset forfeiture and the need to ensure that the procedure is not abused by law enforcement and anticorruption agencies. While anti-corruption agencies are well versed in criminal prosecution, they have very little experience pursuing civil claims. It is therefore a welcome development; the hope is that the direct involvement of the office of the Attorney General implies better professionalism in handling such cases and more accountability.

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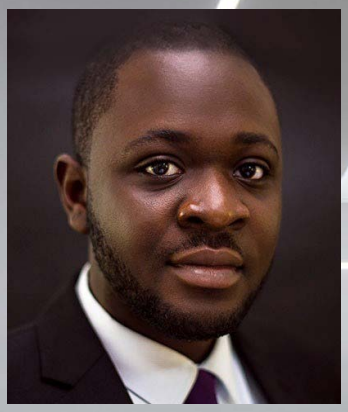

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